JUDGING AS PUBLIC PERFORMANCE: WHEN LAW IS ON TRIAL

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Focused on the future of learning.
Three High Profile “Private” Civil Cases - The Issues

*Somerset v Stewart* (1772)
Is the captain of a ship docked at London (Stewart) legally justified in detaining a purported slave (Somerset) on the instructions of the alleged slave owner?

*Donoghue v Stevenson* (1932)
Does a manufacturer (Stevenson) have a legal duty to take care in production to safeguard a consumer or user of its product (Donoghue) who has not purchased it from them?

*Agent Orange* (1984)
Are manufacturers of products containing toxic dioxin (Monsanto, Dow and others) liable for injury to thousands of Vietnam veterans exposed to them while serving in the war?
Three Extraordinary Judges

**Chief Justice Mansfield** (1705-1793)
A Scot; leading barrister in London; Solicitor General; Attorney General; Cabinet Minister; Speaker of the House; Chief Justice of King’s Bench; treated a black woman (Dido Elizabeth Belle) as a member of the family; rationalized commercial law

**Lord Atkin** (1867-1944)
Australian born, Welsh upbringing; barrister in London; Judge of King’s Bench, Court of Appeal, and House of Lords; took London buses to the Lords; sat as a local magistrate on holidays in Wales

**Judge Jack Weinstein** (1921-)
Brooklyn raised WWII veteran; human rights lawyer; law professor and scholar; expert on evidence and procedure; renowned for class actions and mass tort litigation; Federal Judge 1967-1993
Three Dilemmas in Public View (1)

Chief Justice Mansfield  
(1772 - the American Revolution was looming)

| Uphold common humanity and the moral authority of the common law | Protect the legal and political stability of the British Empire with London at its center |
Mansfield CJ’s Resolution

“The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserved its force long after the reasons, occasions, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it, but positive law.”
## Three Dilemmas in Public View (2)

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<th>Lord Atkin</th>
<th>1932 - British industry was in the depths of the Great Depression</th>
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<td>Establish fundamental legal rights of consumers in advanced industrial society</td>
<td>Avert the development of a &quot;litigation culture&quot; with injurious economic effects</td>
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Lord Atkin’s Resolution

“I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test it applies to the system under which it arises. … The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; . . . . Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation … [when] directing my mind to the acts or omissions ….”
Three Dilemmas in Public View (3)

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<th>Judge Weinstein</th>
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<td>(1984 - veterans shunned because of the horrors of the Vietnam war)</td>
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| Bring closure to years of heart-rending litigation with small chance of success | Follow the "American way" of trying to resolve serious social and political problems through due process of law |
Judge Weinstein’s Resolution

“In conclusion it is well to remind ourselves of President Lincoln's admonition which is as relevant now, ... as it was six score years ago. In his Second Inaugural Address he urged us ‘to bind up the nation's wounds; to care for him who shall have borne the battle and for his widow, and his orphan to do all which may achieve and cherish a just and lasting peace among ourselves ....’ It is time for the government to join with plaintiffs and defendants in even greater efforts toward this noble goal. Whether their hurt can be traced to Agent Orange or whether they are merely "casually unfortunate," ... is beside the point in the broader context of the nation's obligations to Vietnam veterans and their families.”
When Law is on Trial

- **Actual public interest** in private litigation is essentially different from the public interest as a matter of law or the representation of public interests through participation in litigation.

- An interested public that is not represented in litigation is not satisfied with procedural propriety but expects **substantive justice**.

- An attentive public is diverse in its interests and law must be seen to be capable of doing **justice to all**.
A Judge’s Special Burden to Justify Law in the Public Eye

• Shouldering responsibility to all - both litigants and the public

• Engaging in agonistic decision making amongst plausible outcomes including settlement

• Using all available legal knowledge and techniques

• Sustaining courage due to lack of guarantees of understanding or appreciation
Requirements for Judging as Public Performance

*Legal acumen*
Mastery of legal principles and techniques and of litigation procedures; acute sensitivity to judicial powers and constraints

*Responsiveness*
Appreciation of interests of all litigants and of public needs and concerns as well as far-reaching consequences in society

*Responsibility for justice*
Recognition that the public expects actual justice to be done and not merely to appear to be done procedurally

*Rhetorical brilliance*
Ability to persuade using powerful words and striking references
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