Mass Toxic Torts May Be Hazardous to Your Courts

Agent Orange On Trial: *Mass Toxic Disasters in the Courts* By Peter H. Schuck. Cambridge: Harvard University Press, 1986. Pp. 347 $25.00

*Reviewed by Jeffrey D. Steinhardt**

By all accounts, the *Agent Orange* litigation was a stunning event. The tremendous initial demand for damages, ranging from $4 to $40 billion, eventually resulted in a $180 million settlement. At the time, it was the largest settlement sum in the history of tort law. A staggering quarter of a million plaintiffs filed settlement claims. The legal issues were as complex as the lawsuit was large.

The clash of humanitarian, economic, technological, and political interests underlying the Vietnam-related *Agent Orange* lawsuit is the subject of a burgeoning literature. Legal and medical aspects of the mass exposure to dioxin-contaminated defoliants have been examined in professional journals; the news media have covered more general aspects. Yale Law School Professor Peter Schuck's new book, *Agent Orange on Trial: Mass Toxic Disasters in the Courts*,[1] is the most comprehensive and detailed study yet.

Exactly nine years after United States troops pulled out of Saigon, Chief Judge Weinstein of the Eastern District of New York announced legal settlement of the *Agent Orange* dispute. Schuck uses the *Agent Orange* litigation as a framework to evaluate the ability of our legal system and society to deal with mass toxic exposures. Presenting a necessarily lengthy history of the mammoth class action, Schuck hopes to spark consideration of new solutions for compensation, control, and de-

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[1] P. SCHUCK, AGENT ORANGE ON TRIAL: *Mass Toxic Disasters in the Courts* (1986) [hereafter cited by page number only]. Schuck presents his study in three major parts, entitled simply *The Context*, *The Case*, and *The Future*.

terrence of mass exposure accidents.

I. History: Human Forces, Technology, and Legal Doctrine

Schuck begins his ambitious commentary by describing "two urgent social problems and . . . the extraordinary lawsuit they spawned."[2] First, American soldiers, whose futures would be filled with bitterness, controversy, and debilitating illness, were returning home from the "charnel house."[3] Meanwhile, the country faced a deluge of new toxic synthetic chemicals that presented unusual problems, including long health-effects latency periods, complex production and distribution processes, and serious disposal questions.

The controversial background of Agent Orange, the chemical herbicide (or defoliant) that was central to the United States' Vietnam war effort, spanned several decades. The phenoxy herbicides in Agent Orange were initially developed in the thirties and forties. Alarming signs of possible exposure hazards from the herbicides' dioxin contaminants appeared prior to 1952. Through discovery, the *Agent Orange* plaintiffs found a 1965 memorandum documenting industry concern over serious health risks. During the mid to late sixties, a significant sector of the scientific community opposed the United States' massive aerial spraying of defoliants in Vietnam.[4] International protests culminated in a December 1969 resolution of the United Nations General Assembly declaring the Agent Orange defoliation program violative of the 1925 Geneva Protocol limiting the use of chemical and biological weapons. Finally, the United States ended its Agent Orange program in 1971.

The book also sketches, in lay terms, the development of modern tort and products liability principles. New litigation and new solutions to mass toxic exposures are evolving from

> a growing consensus, already ripening into what can only be called a conventional wisdom, that the traditional moral foundations of tort law, as symbolized in the negligence standard and its individualized case-by-case determination of fault, should be replaced by a more functional system . . . .[to be] evaluated according to how well it achieves a variety of social policy goals.[5]

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[2] P. 3.

[3] *Id.*

[4] For an example of opposition to both the international and domestic use of defoliants, see T. Whiteside, Defoliation (1970); *see also* South Okanagan Environmental Coalition, The Other Face of 2, 4-D; A Citizen's Report (1976).

[5] P. 32.

In their lawsuit, the veterans contended that Agent Orange exposure caused their children's birth defects, spouses' miscarriages, and their own soft tissue cancers and skin and liver diseases. Only after the legal innovations of the late 1970's were the Agent Orange veterans able to launch a serious legal attack on the chemical industry.[6] Thus, the *Agent Orange* case demonstrates the trend to force nontraditional disasters — mass toxic exposures involving indeterminate *plaintiffs*[7] as well as defendants[8] — into the conventional tort law mold.

Despite useful, but unnecessarily abstract discussions of legal theory, Schuck's study is strongest in exposing the human forces that shaped the epic *Agent Orange* lawsuit. At the drama's onset, Veterans Administration (VA) benefits counselor Maude deVictor suspected that Agent Orange might be responsible for illnesses. DeVictor, the so-called "Mother of Agent Orange," gathered and publicized statistics about Vietnam defoliant exposures and veterans' physical symptoms. Her work led to press coverage and triggered an army of veterans to visit the VA with what they contended were Agent Orange related health problems.[9] Other players included:

> Dedicated but deeply divided veterans; flamboyant trial lawyers; class-action financial entrepreneurs; skillful, Machiavellian special masters; a Naderesque litigation organizer; a brilliant, crafty judge — these forceful personalities continually collided in a kind of Brownian [molecular] motion of strategic choice, high idealism, seat-of-the-pants innovation, and human folly. Seldom has the law and its technical, formal reality been

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[6] Two major legal developments were the shifting of the burden of proof in cases involving indeterminate defendants, *see infra* note 8, and the growing popularity of strict liability in tort for the manufacture and distribution of dangerous products. *See generally* pp. 28-29.

[7] In this context, the indeterminate plaintiff problem is the question of whether a particular plaintiff actually was harmed by a particular toxic substance. Another case attempting to deal with the problem of increased incidence of illness among indeterminate plaintiffs is Allen v. United States, 588 F. Supp. 247, 415 (D. Utah 1984) (suit stemming from exposure to ionizing radiation), *rev'd*, 816 F.2d 1417 (10th Cir. 1987).

[8] The indeterminate defendant problem arises when harm results from the activities of only one of multiple defendants engaged in a similar activity in a manner that makes it impossible to determine which defendant actually harmed the plaintiff. *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (in DES products liability litigation involving indeterminate defendants, court adopted "market share" liability concept), *cert. denied*, 449 U.S. 912 (1980); *see also* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (shifting burden to defendants to show which one did *not* cause injury).

[9] DeVictor's story was recently dramatized in a television movie that premiered on the eve of Veterans Day, 1986. *Unnatural Causes* (NBC television broadcast Nov. 11, 1986).

more vividly revealed.[10]

The author's anecdotes about Judge Jack B. Weinstein's elaborate maneuvers are particularly worthwhile.[11]

Tension existed between the veterans and their attorneys throughout the litigation. More important to the veterans than a legal victory was the opportunity to settle accounts and to produce a "searing [courtroom] morality play projected onto a national stage."[12] The book portrays the veterans' patriotism and disillusionment, noting that the chemical companies, not the veteran plaintiffs, brought the government into the case as a defendant.[13] Settlement kept the veterans from vindication before the courts and the nation. Summary judgment against the plaintiffs who had opted out of the class action blocked the final attempt, however improbable, of showing that Agent Orange caused the veterans' injuries. In unprecedented national class-action settlement fairness hearings, Judge Weinstein was "deeply touched" by the bitterness of many veterans.[14] The outcome of the litigation was even more disillusioning to them than the dishonor of the War and their evacuation from Vietnam.

The plaintiffs' attorneys staked both their professional reputations and financial welfare on the outcome of the case. Schuck's study describes their strife, their ever-present funding problems, and the strategic decisions affecting both legal and media postures. The story of their struggle to keep pace with well-heeled defendants' attorneys and Judge Weinstein's grueling litigation schedule is fascinating and foreboding.

The book fails to present substantial coverage of the *Agent Orange* defense camp. Unfortunately, that missing element is important to a balanced exposition of legal and tactical problems growing from toxic disaster litigation. Beyond interviews with Leonard Rivkin, the chemical companies' prominent lead attorney, Schuck appears to have few sources on defense strategies.

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[10] P. 15.

[11] At one point, Weinstein apparently remarked that litigating *Agent Orange* without the federal government as a party was like "playing Hamlet without the Prince of Denmark." P. 58.

[12] P. 11.

[13] Thorough exploration of the veterans' concerns is beyond the scope of Schuck's study.

[14] *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

II. Legal Novelties In Choice-of-Law, Causation, and Judicial Power

Schuck writes for a broad audience. For readers without knowledge of legal principles, he simplifies descriptions of procedure and the law. The *Agent Orange* case posed novel issues involving mass tort class actions, choice-of-law, sovereign immunity, discovery (complicated by national security and trade secrecy claims), causation, the government contract defense, and punitive damages. These issues, combined with the case's visibility and importance, challenged the court to develop innovative and often debatable solutions. Schuck's view of the litigation is bound to intrigue lawyers, judges, and students.[15] In particular, he concentrates on the problem of *Agent Orange*'s convoluted class-action settlement, exploring the ethics of managerial judging and use of special masters.[16]

The author has high regard for the creative and dynamic Judge Weinstein, who was largely responsible for settlement of the case. To many, Schuck's candid descriptions of the renowned judge's leaps of logic and heavy handed, practical manipulations alone make reading the book worthwhile. Weinstein virtually seized control of the litigation when Judge Pratt of the Eastern District of New York, formerly presiding, was appointed to the Second Circuit. Chief Judge Weinstein wanted early settlement. On first meeting with the attorneys in the five-year old lawsuit, he stated, "This case will be promptly disposed of."[17]

Although some of Judge Weinstein's decisions were legally vulnerable, commentators, including Schuck, are restrained in their criticisms. For example, in a recent editorial the *New York Times* remarked, "The courts do not usually do well in handling mass tort cases like this one. It's the tort system that needs changing, not Judge Weinstein's innovative and careful solution."[18] Even the attorneys apparently trusted Weinstein's sense of fairness, despite his "pyrotechnics."[19] After the judge disallowed seventy-five percent of the requested attorneys' fees,

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[15] Schuck was present in the courtroom to observe many later developments in the case.

[16] Judge Weinstein relied on as many as five special masters at one time. Schuck, *The Role of Judges in Settling Complex Cases: The* Agent Orange *Example*, 53 U. Chi. L. Rev. 337, 342 (1986).

Schuck's University of Chicago Law Review article is limited to analysis of the settlement process itself.

[17] P. 113.

[18] *Agent Orange — Let It Lie*, N.Y. Times, Sept. 4, 1986, § 1, at 26, col. 2.

[19] P. 137.

however, the attorneys appealed the settlement distribution scheme.[20]

Agent Orange On Trial attacks a handful of Weinstein's decisions, but later draws on his problems and innovative solutions to recommend policy reforms. Three areas that the author criticizes are discussed below.

First, Schuck reviews Weinstein's choice-of-law decision. Shortly after taking charge of *Agent Orange*, Judge Weinstein faced a case in which the laws of dozens of jurisdictions might apply. The Second Circuit had foreclosed the use of federal common law in an earlier decision, when it found that *Agent Orange* did not implicate sufficient federal interests.[21] Analyzing the choice-of-law approaches each jurisdiction would use, Weinstein nonetheless concluded that a uniform or "national consensus" law would apply to issues of products liability, the government contract defense, and punitive damages.[22] The judge declined, however, to describe the substance of the national consensus law. The book criticizes the grounds for the choice-of-law decision, yet describes it as a "strikingly bold and inventive . . . masterpiece of judicial navigation" which the judge "practically immunized" from appellate review by forcing settlement.[23]

The key to Weinstein's decision was his conclusion that the law applicable to these claims was essentially the same nationwide. On this point, Schuck disagrees. Without citing authority, Schuck first observes

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[20] *In re* "Agent Orange" Prod. Liab. Litig., 804 F.2d 19 (2d Cir. 1986) (denying motion to vacate stay of settlement distribution). The attorneys contended that the distribution scheme authorized compensation to victims who did not prove causation. That aspect of the distribution scheme was affirmed by the Second Circuit. *See In re* "Agent Orange" Prod. Liab. Litig., No. 86-3039, slip op. at 2523 (2d Cir. April 21, 1987).

[21] *See In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 993 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). Chief Judge Feinberg dissented strongly from this decision. Several commentators also conclude that the Second Circuit's decision was ill-founded. *E.g.*, 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4514, at 233-34 (1982 & Supp. 1985); Note, *The Agent Orange Litigation: Should Federal Common Law Have Been Applied?*, 10 ECOLOGY L.Q. 611 (1983); Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601 (1980); *see also* Note, Agent Orange & *National Consensus Law: Trespass on* Erie *or Free Ride for Federal Common Law?*, 19 U.C. DAVIS L. REV. 201, 225-27 (1985) [hereafter Note, *National Consensus Law*]. Schuck clearly shares this view, terming the Second Circuit's conclusion that no federal interest existed in the case "perverse." *See* pp. 129-30.

[22] *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984).

[23] Pp. 128, 131. Judge Weinstein presented his decision as "preliminary," "provisional," and "subject to refinement and change." The Second Circuit affirmed settlement on April 21, 1987. *See In re* "Agent Orange" Prod. Liab. Litig., No. 84-6273, slip op. at 7163 (2d Cir. Apr. 21, 1987).

that tort law varies substantially between states, and second, concludes that Weinstein committed "rank insubordination."[24]

While this may be a case of oversimplification for Schuck's intended audience, his first criticism misapprehends the basis for the judge's decision. Weinstein's main point was not that each state's law was uniform,[25] but that the choice-of-law approaches of each state compelled *applying* the same bodies of substantive law to the veterans' claims. Schuck's second criticism, that Weinstein disobeyed the Second Circuit, is also misleading. Schuck states that "[w]hen the Second Circuit ruled in 1980 that federal common law did not govern the Agent Orange case, it necessarily decided that *state* substantive law did."[26] However, Weinstein analyzed choice-of-law and the question of federal interest from the perspective of state courts. His conclusion was therefore consistent with the Second Circuit's rejection of federal common law. If, as Schuck's criticisms incorrectly imply, Weinstein reached his result by examining the tort law of each different state, his decision would have been reversible on grounds wholly apart from disobeying the Second Circuit — disregard of the Supreme Court's *Klaxon Co. v. Stentor Electric Manufacturing Co.*[27] and *Van Dusen v. Barrack*[28] decisions.

It is true that Weinstein essentially created a new, flexible choice-of-law doctrine. But his "national consensus law" doctrine is defensible on legal[29] as well as policy grounds.[30] Ironically, Schuck overlooks the po-

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[24] P. 130. Weinstein's theory was not directly appealed. It received mixed reviews, however, in the Second Circuit's consideration of related issues. *See In re* "Agent Orange" Prod. Liab. Litig., No. 84-6273, slip op. at 7208, 7226; *In re* "Agent Orange" Prod. Liab. Litig., No. 86-3039, slip op. at 2529-2530.

[25] However, Schuck fails to refute even this mischaracterization of Weinstein's decision. Whether substantial uniformity exists among the states' judge-made law in many fields is open to debate. *See, e.g.*, Note, *National Consensus Law*, *supra* note 21, at 235-37 (citing authority).

[26] P. 128 (emphasis in original).

[27] 313 U.S. 487 (1941).

[28] 376 U.S. 612 (1964).

Schuck also claims that Weinstein "shored up" his choice-of-law opinion by later finding that the federal law applicable to the government contract defense preempted state law. P. 130 (citing *Agent Orange*, 597 F. Supp. at 845-47). However, he fails to note the judge's alternate holding that federal law would also apply under *Erie* and the national consensus law analysis. *See* Agent Orange, 597 F. Supp. at 847. The Second Circuit later confirmed that the federal military contractor defense controlled the outcome of all opt-out claims remaining after settlement. *See In re* "Agent Orange" Prod. Liab. Litig., No. 85-6163, slip op. at 7248 *passim* (2d Cir. Apr. 21, 1987).

[29] Note, *National Consensus Law*, *supra* note 21; *cf. In re* Diamond Shamrock Chems. Co., 725 F.2d 858, 861 (2d Cir.) (Second Circuit, displaying "considerable skepticism as to the existence of a 'national substantive rule,' " nevertheless noted

tential importance that Weinstein's choice-of-law theory has for complex litigation. When federal common law itself is unavailable, the national consensus law approach may enable federal judges to follow nationwide legal trends with a flexibility similar to that enjoyed by state judges.[31]

Schuck explores a second difficulty in *Agent Orange* that often arises in toxic exposures. The problem results from the mismatch between conventional tort law's causation requirement and available scientific tools used for studying health effects.[32] Risk assessment for toxic chemical regulation in the environment and workplace has depended largely on laboratory and animal studies. To assess the probable outcomes of toxic exposures, scientific and medical experts analyze results of both epidemiological and laboratory studies together. Researchers have conducted dozens of studies on Agent Orange and dioxin.

The simple problem of finding a "marker" to identify persons who have been harmed by or exposed to Agent Orange is more difficult than one might expect. The dioxins contaminating Agent Orange accumulate in human fatty tissues. Environmental dioxin contamination is widespread, however. In the large majority of test populations with no recorded exposures to dioxin-contaminated chemicals, scientists recently have encountered significant background levels of dioxin.[33] Furthermore, with minor exceptions, no statistically significant increase of any

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"Chief Judge Weinstein's declared intention to create subclasses as dictated by variations in state law" in denying mandamus to decertify class), *cert. denied*, 456 U.S. 1067 (1984).

[30] *E.g.*, Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 63-64 (1986) (noting that Weinstein's choice-of-law decisions were defensible to resolve unique *Agent Orange* case and suggesting that level of detail required for analyzing different states' law necessarily differs for different kinds of cases).

[31] Note, *National Consensus Law*, *supra* note 21, at 238-41.

[32] For a brief exploration of the tension between the legal system's reliance on scientific causation and society's need for a system that will provide deterrence and the spreading of liability, see, *e.g.*, *Conference on Causation and Financial Compensation*, 73 GEO. L.J. 1355 (1985).

[33] *See, e.g.*, PUBLIC HEALTH RISKS OF THE DIOXINS 63-73 (W. Lowrance ed. 1984) (summarizing analyses of dioxins in human adipose tissue in veteran and nonveteran populations and noting need for further study to enable VA to determine whether tissue dioxin levels can be used to document Vietnam veterans' Agent Orange exposures). Initial results of a New Jersey research project more recently show that Vietnam veterans who handled Agent Orange presently have blood dioxin levels around ten times greater than general population background levels. *Researchers Report Finding Telltale Sign of Agent Orange*, N.Y. Times, Sept. 18, 1986, § A, at 28, col. 3 (city late final ed.).

disease correlates specifically with exposure to Agent Orange.[34]

In causation-related rulings in the *Agent Orange* cases, Judge Weinstein treated two groups of plaintiffs inconsistently. Despite the lack of evidence on specific causation, he certified settlement of the class action.[35] Yet in stark contrast, he rejected the opt-out plaintiffs' use of laboratory and animal studies. At best, those studies could show only that Agent Orange was capable of causing specific diseases. By relying on epidemiological studies in isolation, the judge insisted on much stronger proof of causation than epidemiologists and toxicologists require. He also demanded that plaintiffs produce this proof in an unreasonably brief period.[36] As a result, those plaintiffs were unable to resist summary judgment.[37]

The judge's treatment of the opt-out cases was considerably harsher than his treatment of the class action, and the book justly challenges his decisions on several grounds. The flaws in Weinstein's approach to causation in the opt-out cases in fact merit criticism more direct than that offered by the book.[38]

Agent Orange On Trial speculates that Weinstein wished to discourage the flood of toxic litigation that lower causation standards would invite. Practically speaking, proving causation can be less formidable when plaintiffs contend that a toxic exposure has increased their risk of contracting cancer or disease.[39] In addition to their claims for present

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[34] Illnesses or conditions believed to be caused by exposure to Agent Orange also may result from other causes. Even chloracne, a skin condition associated with dioxin, does not specifically correlate with exposure to Agent Orange or its constituents. There is a high probability that veterans exposed to Agent Orange have also been exposed to sources of dioxin contamination elsewhere. *See, e.g.*, *Agent Orange*, 597 F. Supp. at 782; *see also id.* at 775-95 (discussing scientific causation evidence).

[35] *Agent Orange*, 597 F. Supp. at 842, *aff'd*, No. 84-6273, slip op. at 7163.

[36] Pp. 226-33.

[37] Summary judgment was also granted on the alternate grounds that no plaintiff could prove which defendant's product caused injury and that the military contractor defense barred all claims. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1267, 1284-85 (E.D.N.Y. 1985); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1260-64 (E.D.N.Y. 1985). The Second Circuit affirmed both decisions on military contractor defense grounds and refused to address the causation issue. *See In re* "Agent Orange" Prod. Liab. Litig., No. 85-6163, slip op. at 7243.

[38] Accordingly, a summary of the äuthor's commentary is here combined with my own.

[39] Of course, those who also manifest physical impairments are most likely to recover under this approach. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303 (W.D. Tenn. 1986) (class action). *See generally* Edwards & Ringleb, *Exposure to Hazardous Substances and the Mental Distress Tort: Trends, Applications, and a Proposed Reform*, 11 COLUM. J. ENVTL. L. 119 (1986) (discussing legal claims for

illness, the *Agent Orange* plaintiffs claimed they had a higher than average probability of contracting cancer. In similar cases, courts have accepted the use of animal studies to prove causation and to quantify increased risk in awarding damages.[40] However, in considering the *Agent Orange* opt-out plaintiffs' claims, Weinstein admitted only particularized evidence of causation bearing on individual cases. He knew that his decision to require particularized evidence would result in the plaintiffs' failure of proof.[41]

The mismatch between scientific and legal causation standards unquestionably merits major legal and policy reform. Legal causation standards simply fail to reflect scientific techniques and the state of available knowledge.[42]

In *Agent Orange*, Weinstein was aware that available scientific and medical studies were ill-suited to risk and causation analysis in the tort context. Nonetheless, he should not have discarded conventional scientific causation evidence in the opt-out cases without fashioning an appropriate replacement. Furthermore, even under his particularized causation standard, the plaintiffs might have been able to produce sufficient epidemiological evidence[43] to preclude summary judgment under a less pressing schedule.

Weinstein also committed serious mistakes in handling epidemiological evidence and expert testimony in the opt-out cases. Schuck notes that the judge misapplied evidentiary rules when he excluded many of the plaintiffs' studies and experts without allowing a jury to evaluate them.[44] Moreover, despite his substantial knowledge of toxicology and statistics, the judge was not technically qualified to evaluate the scientific evidence as he did. For example, Schuck implies that Weinstein

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fear of future illness by persons exposed to latent injury-inducing substances).

[40] *E.g., Velsicol*, 647 F. Supp. 303 *passim* (increased fear and susceptibility claims) (citing other examples).

[41] *See Agent Orange*, 597 F. Supp. at 833-39 (Weinstein's earlier discussion of same evidentiary issues and state of scientific knowledge in opinion on fairness of class action settlement).

[42] Weinstein himself recognizes this problem. He suggests sweeping changes for toxic disaster litigation. Among other measures that may diminish the impact of this dilemma, Weinstein proposes a national system of health and disability insurance and the creation of a national disaster court. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1 (1986); Weinstein, *The Role of the Court in Toxic Tort Litigation*, 73 GEO. L.J. 1389 (1985).

[43] *See In re* "Agent Orange" Prod. Liab. Litig., No. 86-3039, slip op. at 2533-34 (noting recent possible discovery of biological blood "fingerprint" left by dioxin exposure).

[44] Pp. 237-44.

relied on negative epidemiological findings to show that no correlation existed between Agent Orange exposure and illness.[45] Most epidemiologists would have interpreted those findings as inconclusive rather than negative.

Finally, Schuck questions Judge Weinstein's decision to preside over fairness hearings after being so deeply involved in fashioning the class action settlement. The settlement itself was reached in the early morning hours of May 7, 1984, following excruciating round-the-clock weekend negotiations at the courthouse. Jury selection was scheduled to begin later that morning. The defendants apparently were willing to compromise at a higher dollar settlement figure but Weinstein insisted on his own predetermined amount. In facilitating settlement, the judge often stepped beyond the judicial role.[46]

Agent Orange On Trial concludes that while the judge's failure to recuse himself from the fairness hearings was serious error,[47] the ultimate settlement and distribution plans were appropriate. "Like so many of Weinstein's decisions in the Agent Orange case, his distribution plan represented a sound (or at least defensible) exercise of policy discretion masquerading as the rule of law."[48] In Schuck's eyes, the judge's desire to promote settlement also accounted for his unconventional choice-of-law opinion. Weinstein later remarked, "Whenever I have a case that is difficult to settle, I say to the lawyers, 'Have you considered the choice-of-law problems in this case? Go out in the hallway and discuss them.' "[49]

Weinstein's determination to coerce a rapid settlement was not without costs. His singlemindedness distorted the legal process. It undermined the traditional neutrality of the court, the role of the jury as fact-finder, and it revealed shocking improprieties and inconsistencies in his actions.

Weinstein may be credited with facilitating legal settlement of a prolonged, expensive, and nationally distressing controversy. For some issues, he developed brilliant, legally defensible shortcuts. These positive contributions account in part for the reluctance of Schuck and other commentators to condemn his overbearing approach.[50] Schuck's analy-

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[45] P. 236.

[46] Other examples include the judge's recasting of major issues midway through the litigation, his extensive dictation of settlement terms, and his heavy reliance on ex parte meetings with special masters. *See generally* pp. 143-67.

[47] P. 179.

[48] P. 223.

[49] P. 55.

[50] Schuck appears more willing to challenge Weinstein in other commentary than in

sis would be stronger, however, if it asked whether such extraordinary procedural means were necessary to justify the ordinary end result of this massive litigation.[51]

Schuck suggests that Weinstein wished to preserve the integrity of the courts and discourage the flow of toxic litigation. But legal compromise has not resolved the social and policy problems that were a major concern to Weinstein in his efforts to bring a rapid settlement.[52] Weinstein was aware that the settlement fund would be wholly inadequate.[53] He might have avoided his overreaching and conflicting approaches to causation evidence by allowing the jury to perform the function of resolving colorable factual disputes. If, as the judge suggested, the evidence was weak, a defendants' jury verdict would have deterred toxic tort plaintiffs more effectively than settlement. Most importantly, regardless of outcome, the process of trying the case might sooner have ended this sad chapter of national history. Although the courts admittedly are inadequate to "lift all of the plaintiffs' burdens,"[54] allowing a jury to consider the merits of the class action or opt-out cases may well have been the preferable route.

III. Proposed Solutions

The purpose of Schuck's commentary is to illustrate the present inadequacy of the court centered scheme of toxic disaster compensation and deterrence and to entertain new solutions. His analysis of the shortcomings of tort law focuses on cases that present some or all of the following problems:

> [Indeterminate causation, because of difficulties in identifying plaintiffs and defendants;] large scale, because of the number of potential plaintiffs, defendants, and insurers; spatial dispersion, because of the large number of jurisdictions having plausible claims to provide the governing law; temporal dispersion, because of the duration of exposure and the fact that injuries might not fully manifest themselves for twenty or more years; and

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Agent Orange On Trial. E.g., Schuck, *supra* note 16, at 359-65.

[51] The judge's approach to settlement and distribution was appealed, *Agent Orange*, 804 F.2d 19, thereby further delaying distribution of the funds that Weinstein's settlement sought to expedite. Weinstein has also launched extraordinary efforts with mixed results on past occasions. *See* Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974).

[52] To Schuck's credit, this paradox does not go unobserved. *See, e.g.*, p. 167. He does not consider its larger implications for the veterans, however.

[53] He suggested the veterans should use the fund's meager settlement resources on efforts to compel the government to establish programs capable of handling their problems. P. 175.

[54] *Agent Orange*, 597 F. Supp. at 747.

enormous costs, because of all the factors listed above.[55]

Schuck tends to let events speak for themselves. *Agent Orange On Trial* is a study limited to identifying problems and summarizing legal and policy reforms suggested by other commentators. Broadly outlining a new structure for mass toxic exposures, Schuck sets forth a mixture of reform elements. He borrows from conventional tort law, from Professor Rosenberg's "public law" proposal,[56] and from other proposals aimed at increasing research and regulatory accountability.[57]

Professor Rosenberg's model emphasizes collective solutions and relies on scientific proof. Rather than require specific causation, liability is apportioned by the percentage of injuries attributable to a defendant's activity. Schuck notes that Rosenberg's judge centered "public law" model is untested, but contends that Judge Weinstein actively implemented it until settlement of the class action ended the experiment.[58]

Schuck questions the feasibility of Rosenberg's model, but seems to like many of its features. Among other advantages, the model treats mass exposure accidents as the societal problem they really are. Rosenberg's use of class actions affords compensation to individuals who otherwise cannot afford to bring suit. His proportional liability rule avoids the all-or-nothing results of applying preponderance of the evidence causation standards to individual plaintiffs.[59] However, Schuck also echoes Professor Huber's criticisms: Progressive interpretations of tort law and the "public law" approach focus on the increased risk to the victims created by a defendant's new "exotic" activity; because such approaches tend to ignore preexisting risks that the new activity may re-

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[55] P. 262.

[56] Pp. 268-75 (citing Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984)).

[57] Pp. 289-94 (citing several government reports on data gaps and proposals for reform).

[58] P. 270.

[59] The preponderance standard typically bars recovery by toxic exposure victims because they cannot prove that a specific defendant's activity more likely than not caused a particular injury. This inability results from the inconclusiveness of causation data (in part due to long latency periods), the parties' unequal access to proof, and confounding factors such as possible alternate causes of illness and uncertainty about which of several defendants are responsible for the victim's injury. Rosenberg would allow plaintiffs to rely on epidemiological and statistical evidence even when they could not prevail under the preponderance standard. If the defendant's activity is associated with an excess incidence of illness over background risk, the defendant is liable. Rather than deny recovery to plaintiffs suffering from that illness, defendants bear the cost of compensation in proportion with their contribution to excess risk. *See generally* Rosenberg, *supra* note 56, *passim*.

duce, they fail to encourage development of safer technologies.[60] As Schuck recognizes, the test of Huber's theory awaits empirical evidence. It is presently unclear whether the public and the courts are biased in favor of plaintiffs and fail to consider the contributions of new activities toward minimizing preexisting risks. Moreover, tort plaintiffs *must* be shielded from disproportionately bearing the costs of society's progress.

Schuck notes that toxics regulation can be triggered without high standards of causation. While Schuck is on the right track, he understates the need to expand research programs and regulatory capabilities. An improved regulatory approach with enhanced environmental and health-effects data is critical to society's efforts to reduce the hazards created by largely self-regulated industries.

Schuck's support for Rosenberg's "public law" model could also be stronger. Today's tremendously imbalanced legal contests between individuals and large chemical companies poorly serve the goals of compensation and deterrence. For the large part, activities involving excessively hazardous toxic substances are challenged only sporadically and inefficiently; individualized tort litigation is usually commenced long after the hazards initially were created. As Schuck notes, because Rosenberg's model is group oriented, it may result in lower compensation to individuals with greater than average injuries from a particular activity. But Rosenberg's model is a substantial improvement over the present hit-and-miss approach. Rosenberg's is a worthwhile, creative attempt to resolve many of the difficulties faced by the victims of mass exposures.

CONCLUSION

Schuck himself supports normative analysis of complex litigation like *Agent Orange*. Unfortunately, he does not purport to create his own comprehensive model here. In contrast with its detailed history of *Agent Orange*, the book's closing analysis is abstract. At times, it lacks depth. By overall emphasis, Schuck's study seems to say that answers lie in close review of the problematic history of *Agent Orange* itself. His underlying conclusion is simple, yet indisputable: "We should not pretend that we are still operating in the moral universe of tort law when mass toxic exposure problems render it anomalous."[61]

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[60] Pp. 272-74 (citing Huber, *Safety and the Second Best: Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985)).

[61] P. 276. Congress recently has recognized the anomaly by creating a no-fault compensation scheme for vaccination injuries. National Childhood Vaccination Injury Compensation Act of 1986, PUB. L. NO. 99-660, § 311, 100 Stat. 3756 (codified at 42

It is unlikely that *Agent Orange On Trial* will satisfy hundreds of thousands of disenfranchised and confounded veterans. The lawsuit nominally prosecuted on their behalf was ultimately settled for its nuisance value to the defendants *and* the courts. Nevertheless, this fascinating recount of a great, controversial lawsuit invites a wider audience to consider the limitations of courts in dealing with mass toxic exposures. *Agent Orange On Trial* will help more people participate in developing ways to address the problems that courts have left unanswered.

U.S.C. §§ 300aa-1 to 300aa-23 (Supp. 1987)). Under the as yet unfunded compensation program (enacted Nov. 14, 1986), parents of injured children file mandatory claims in federal court. A special master determines if the claims are valid and recommends compensation according to a predetermined schedule. The compensation may then be rejected in lieu of a private lawsuit against the manufacturer of the vaccine, but the Act limits manufacturer liability. Section 311(a) (codified at 42 U.S.C. §§ 300aa-1 to 300aa-23 (Supp. 1987)). The Act also encourages increased research. Section 311(a) (codified at 42 U.S.C. §§ 300aa-2 to 300aa-5 (Supp. 1987)). These measures are bound to provide some relief for victims who cannot afford individual lawsuits, and will probably ease immunization-related causation and proof problems.