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AM I A DEVIANT IN THE JUDICIAL COMMUNITY?

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In the election of 1974, I was elected for a ten-year term as a County Court Judge in Rockland County, and I became a member of the Judicial Community. For 23 years prior I was a trial attorney in criminal, negligence and people-oriented matters. The bulk of my clients were of middle and working class background. Since I came from parents of the working class and my father had been a factory worker, I was able to relate and communicate with the "community" of working people.

'No man was ever attached by a sense of pride, partiality, or real affection to a description of square measurement. . . . We begin our public affections in our families. . . . We pass on to our neighborhoods, and our habitual provincial connections.'

The sense of place, of locality, is a profound one, as we shall see, in the philosophy of the plural community. Most alienation, it is thought, by whatever name it is called -- estrangement, rootlessness, anomie -- is the consequence of human beings' having been uprooted from place, from accustomed habitat, separated from what Burke called the 'inns and resting-places' of the human spirit.¹

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This continued even when my practice became successful and I and my family moved into an upper-middle class community.

The judicial community that I am referring to are those judges who are full time and elected to either a ten-year term in the County Court, or a 14-year term in Supreme Court. Geographically, these judges encompass the five counties of Rockland, Dutchess, Westchester, Putnam and Orange, a total population of approximately 2 million people. Politically, these geographical limits encompass a majority of registered Republicans, numbering approximately 450,000, and Democrats approximately 300,000. The individual counties may have different officials elected from both parties. In the Supreme Court there are approximately 22 judges, but only one Democrat elected in 1964 in the Johnson landslide. In my county, there are two judges who are Democrats and one who is Republican in the County Court. While some theorists claim that judges merely apply existing rules, others claim,

This is an error, the realists argued, because judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization. The realists asked for a 'scientific' approach that would fix on what judges do, rather than what they say, and the actual impact their decisions have on the larger community.²

The majority of judges elected in this community come from backgrounds of upper-middle class.

Mens' judgments are a parcel of their fortunes. . . .³

They practiced law in banking, real estate, and in the district attorney's office, and of course, they were politically well-situated.

Do judges from particular economic or social backgrounds, or from particular sorts of legal practice, or with particular political affiliations, or particular value schemes, tend to decide in favor of corporate defendants?

. . . These empirical questions seemed relevant, because if social background or prior allegiance determines a judge's decision, this suggests that he is not following rules.⁴

There are only a few of us out of a total of more than forty judges who were plaintiffs' attorneys in negligence cases and defendants' attorneys in criminal cases.

A judge's character and personality are vital variables in every decision he makes. His own experience is the frame of reference he brings to the judgment of his peers.⁵

My own trial experience was extensive for the last fifteen years before my election to the Bench.

Considering the background of most of the judges in this community, certain traditional values have been built in to the judicial system. Any recommendations to change the community values as they relate to the criminal justice system are not only difficult, but are resisted. Most of the resistance manifests itself in non-action. This has resulted in an independent attitude of the individual judges as well as the entire judicial community.

And finally they are insulated, caressed, and protected by the brotherhood of the robe, the dusty deference that walls them off and chokes their humanness. Measured against what we expect of them, they fall pathetically short.⁶

The communication between the rest of the members of the criminal justice system is minimal.

Police officers, probation officers, District Attorneys and medical and psychological members of the criminal justice system have limited access and contact with other members of the judicial system. Marvin E. Wolfgang recently suggested a change in criminological concern,

'We have focused long enough on the offender and his weaknesses. It is time we look to ourselves -- to this chaotic, decaying, degrading system and indict it for its failures.' By calling for us to demystify the police department, district attorney's office, courts, probation, parole, and prison and make them accountable to various publics, he presents a potential powder keg to the student of crime. Such emphasis is necessary in order to revolutionize the criminal justice system.⁷

A police officer who risks his life to apprehend a dangerous criminal will have difficulty in finding out why the defendant is back on the street in a short period of time. He receives no explanation. Recently, in our judicial community, a police officer stopped someone for a routine check. After the individual was taken into custody,

an inventory of the car revealed a loaded submachine with a silencer and a loaded 45 under the seat. The District Attorney personally appeared before me and stated that he was offering the defendant a plea to a misdemeanor gun charge and that he recommended an unconditional discharge because of an improper search. However, the police officer who might have been killed never was advised of what happened. Naturally, when he found out he was upset.

One may ask why the changing value system in the general community has not affected the judicial community more.

The record of the past one hundred years in America makes it crystal clear: changes will not be, and perhaps cannot be, achieved by the legal eagles -- the lawyers and the judges. They are part of the existing system -- the establishment. By training, by self-interest, by nature, they are, consciously or unconsciously, preservers of the status quo. Like it or not, they cannot see the forest for the trees!⁸

It is true that publicity in newspapers, in the media, and letter-writing, and even picketing of the Courthouse, may effect the reaction of the judicial community.

Norms can now derive from the movies or the television set, rather than from the local community. Authority no longer rests with age, because of the rapidity of change. Mothers, fathers, and children receive, through mass communication, images of moral acceptability that may be very different from the existing norms of their community.⁹

I was shocked when a Judge, in sentencing a convicted murder, stated publicly, "There should have been a death sentence for me to give this defendant." Has the judicial community's value system changed by understanding, training, and communication with other members of the criminal justice system? Or was it merely a reaction to be on the "good side" of public opinion?

When I had to sentence my first convicted defendant, I was surprised when I received the probation report, a well-written complete history of the defendant and his background that lacked any recommendation of sentence. It appeared that the judicial community did not welcome recommendations. When I requested the probation department to give me recommendations on all my cases, it opened a line of communication between myself and these other members of the criminal justice system. While I do not have to follow their recommendation,, I certainly consider it as a factor in sentencing.

'Judges vary widely in their explicit views and 'principles' affecting sentencing; they vary, too, in the accidents of birth and biography generating the guilts, the fears, and the rages that affect almost all of us at times and in ways we often cannot know.' 10

In addition, the growth of crimes in my county has been among youths between 16 - 19 years of age, (youthful offender eligibles) who committed burglaries. The traditional sentence had been youthful

offender treatment and five years probation. Those youthful offender defendants that I sentenced were given 6 - 8 weekends in the County Jail and/or six months community service and five years probation. I felt that a youngster who never spent a day in jail or did something for someone else, was an advertisement for other youthful offender eligibles to commit the same type of crime as a lark. To my surprise, the Appellate Division, Second Department, set aside a sentence of one year community service for an individual placed on probation, holding that it was not part of the Criminal Procedure Law. I have continued using community service in lieu of jail in non-violent crimes, and have found it to be effective. Within the last two weeks, Governor Carey and the legislature passed a law that permits community service in connection with persons on misdemeanor convictions. It is nice to know that my "deviant" innovation was three years ahead of the legislature.

In my years of experience of representing many people, I formed certain values concerning equal treatment and fairness for all. When I became a judge, these values have caused me to act differently than other judges on occasion. I have made recommendations for changes in sentencing; consideration for bail and release-in-your-own-recognizance innovative treatment for first offenders; and have spoken before many colleges, high schools and elementary school groups and volunteer

organizations.

Traditionally, the beliefs of the powerful majority of any community are more significant than the behavior of the minority. It is not an act itself that is deviant, but the interpretation placed on it by the conventional and conforming members of society. The social control causes the majority to label those members of the minority. This leads to negative self-image wherein one sees himself as a "deviant". Is that what I am? Should I be labelled different, delinquent, and deviant?

In its romantic sequel, the deviant --
whether nestling warmly in the tenderloin
of the city or making inarticulate but
penetrating attacks on the bourgeois order --
became a hero for the sociologist of
deviancy.¹¹

Emile Durkheim insisted that deviancy can be understood in terms of social interaction and that deviancy, being a social behavior can be analyzed in the same way as other types and forms of social behavior. He advocated sociological pluralism wherein different social, occupational, and professional communities would interact upon each other.

In his concept of anomie, an individual who did not conform and was separated from clear-cut norms or values was left with a feeling of rootlessness in moral matters.

For Durkheim then the basic demand society makes of the individual is selflessness. . . . whatever opposes norms must be nonsocial or antisocial.¹²

Sociologists have classified deviants as those who attempt to change the enormous power of the social order and create disorganization and conflict.

We commonly think of conflict as disintegrative in effect. Only a moment's thought, however, is required to remind us that it is in circumstances of conflict with external forces that almost every social group achieves its highest unity. ¹³

I confess that I have attempted, am attempting, and will continue to attempt to change what I believe to be the archaic criminal justice system.

Again it is evident that community disorganization is not necessarily a 'bad' thing. It is disruptive or disintegrative of the local community, but this disruption may serve some other aim. ¹⁴

Yet. . . , it is not infrequently the case that the nonconforming minority in a society represents the interests and ultimate values of that society more effectively than the conforming majority. This, . . . is not a moral but a functional judgment, not a statement in ethical theory but a statement in sociological theory. ¹⁵

In New York City and elsewhere, judges have recognized their responsibility to help the public understand how the criminal justice system really works. The media screams "The public has the right to

know!" but actually the media only prints that portion of the criminal justice system that is sensational and will sell papers and advertising. In forming Judge's speakers' bureaus, they are available to community groups, schools, and to the media for the purpose of providing general information concerning how the criminal justice system works.

If the judge is a man of integrity and courage, he will not shirk this responsibility. He will shed his image of isolation, will come out in the open as an advocate of judicial improvement and will adopt as his own the activist role. . . 16

In my judicial community, when I offered to be chairman of such a bureau covering the five counties, one judge told me he was too old to go out speaking and the reaction from the others was unenthusiastic. They reacted similarly to my recommendation that we establish quarterly educational seminars where the judges, police officers, probation officers, and other persons involved in the total criminal justice community would meet to exchange suggestions and criticisms.

I was on the bench 6 to 8 months when I held court for fifteen bail applications in the County Jail, in the visitor's room. Present were the District Attorney, Public Defender, Court Clerk, my court officer, and court reporter. Almost all of these defendants had been confined to the County Jail for "serious" charges ranging from theft

of services of a \$2.00 meal to petty larceny (shoplifting). Of the fifteen hearings held, thirteen defendants were released on their own recognizance to appear in Justice Court. All appeared when required and were sentenced by the lower court community, comprised of village and town justices, who were not usually products of the trial community, but also came from real estate, banking, and political clubs.

. . . The justice of the peace is thus the gatekeeper on the road to the county trial courts. These officials are almost always active members of local political organizations and thereby highly susceptible to political pressures in reaching their decisions. Thus they are sometimes hard put to dispense justice impartially, let alone with due regard for constitutional rights. 17

My judicial colleagues frowned upon the indignity of a County Court Judge holding court in the County Jail. When the number of bail applications warrant it, I hold court in the jail as is done in large cities.

At a recent meeting of all the County Judges in our five-county judicial community, I recommended bail and R.O.R. criteria be established by the Chief Judge. All members of the entire judicial community could refer to these guidelines for the proper setting of bail. The reaction from my judicial community was unenthusiastic; one judge did not want to criticize the lower court judges while another

did not want to review bail procedures of lower courts.

It is horrible to think that the world could one day be filled with nothing but those little cogs, little men clinging to little jobs and striving towards bigger ones. . . . This passion for bureaucracy. . . is enough to drive one to despair. It is as if in politics. . . we were deliberately to become men who need 'order' and nothing but order, become nervous and cowardly if for one moment this order wavers, and helpless if they are torn away from their total incorporation in it. That the world should know no men but these: it is in such an evolution that we are already caught up, and the great question is, therefore, not how we can promote and hasten it, but what can we oppose to this machinery in order to keep a portion of mankind free from this parceling-out of the soul, from this supreme mastery of the bureaucratic way of life.¹⁸

One may well-ask does a "deviant" have a place in the judicial community. Canon 5 of JUDICIAL CONDUCT authorizes a judge to contribute ". . . To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law."¹⁹

From many perspectives it has been suggested that the study of deviance is, at one and the same time, the study of respectability, rules and order. What is neglected in these accounts is that the other side of order is freedom.²⁰

In order for me to continue as a responsible "deviant" I need encouragement, "clearly to be a good friend to the deviant one must do more than give him choices and rationality 'like any other person,' in that such a person fails to recognize that often what the deviant suffers from is a lack of choice (determination)".²¹

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