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Odds are high that the call for judicial deliberation in the sunshine will not be well received in the legal profession generally. Even so, it deserves serious attention. Some may put it down as naive or lacking in depth, but it is daring and innovative, down to the guts of the crucial issue of judicial credibility. It points to a fruitful frontier for both political and scientific inquiry and debate. Of course, the political goals and the scientific worth which have been intertwined in the proposal are of different looms.

If courts are government, and the Supreme Court merely another basically political body, then open deliberation and full disclosure of influences follow from the public's right to know and participate. Naturally, the judicial animal can be expected to resist. The sun can burn, especially naked power. More subtle would be the impact on the internal dynamics of a court. In the terms of small group theory, a public dyad is not really just a dyad. In any event, lifting the veil involves the taking and redistribution of power.

Of a different piece is the justification in the name of science: the advancement of knowledge. Even with optimum conditions, science is hard put to assess decisional dynamics. Presently we can only see the black box and what comes out of it, with a limited view of input. Judicial opinions do not suffice as a source for significant data for the making of valid correlations. No doubt opening of the black box would help, yet one remembers the bugging of the jury room and the great outcry. There seem to be other values at stake than the right or need to know.

As unapparent as it is, there is a way that the political question relates to the scientific. Maybe rhetorical ploy—or worse, jurisprudential metaphysics—is involved in saying a court is political rather than legal. Ideological reflections lack scientific credibility, be they those of an author or a researcher, unless given as admitted bias rather than fact description. (A fictional Nixonian sociologist might have trouble

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with the sunlight proposal.) Yet we can be objective in observing someone else's ideology or values, or an apparent conflict in values between persons or groups. There could be an objective basis for saying that a court is not behaving "legally" if it is in some way violating cultural expectations. Behind this conclusion are dynamics which have been subjected to a scientific sort of scrutiny which calls for inquiry preliminary to the grand opening of the judicial chamber doors. *Prevailing* images of law—some measurement of beliefs, expectations, and attitudes about law and the function or appropriate behavior of the court (s) to be observed—should somehow appear in the picture.

According to some expectations, there is no need for public deliberation. If the law is in the Constitution, for instance, then the measure of judicial propriety is in that recipe. It is currently popular for some sophisticated critics to postulate the Constitution as the funnel for social principles which are to be made legal by distinctive but knowable rational techniques, again with no need for lifting the veil of secrecy. In short, whatever is expected of a court has much to do with whether it is acting or appearing to act legally; and that in turn has everything to do with what seems likely at the moment to be a lack of any felt need for public deliberations.

Political realists and scientists alike see "myth" operating in such views, but myth cannot be ignored if it is a real social phenomenon. Naturally there is frustration because of the manipulators hiding behind the myth, whether judges or others using legalistic arguments to promote unarticulated values. If cultural myths *eventually* fade to legend, they still resist debunking. As to law, there may be risk to the debunking, risk that one is aiming his shot at social acceptance, the heart of law. Of course, science has taken that risk many times, perhaps on the pragmatic assumption that even socially necessary myths eventually evolve to assimilate the discoveries of science which slowly but eventually filter into public consciousness.

Then too, it is not as if this call for an end to judicial secrecy is completely radical. An earlier call has had a significant impact on legal education, lawyer practices, and even the rhetoric of judicial opinions. But even before the advent of our most recent presidential jurisprudence, it had not significantly affected the general public lore of law. The reference is to that complex of scholarship known as sociological jurisprudence and legal realism, but mainly the latter. Not that the call to public judicial deliberations was dominant or even existent,

but the call to full disclosure was. It came in the form of an attack on the rhetoric of judicial opinions.

The legal realists proved for once and for always that opinions written in what Llewellyn called the formal style—as opposed to the grand style—were not logically or scientifically credible: many were incredible. They may have proved that such credibility in judicial opinions was not even possible. It may indeed be that the most credible form of presentation would be spontaneous expression *seriatim* by each participating judge. Conceivably that form could serve the influence-stating function, while something like the present form of opinions would serve the law-stating function—the expression of rules, principles, and policies and their legislative implication.

Unfortunately, there is no guarantee at all that public deliberation alone would serve the goals suggested and implied in the Miller-Sastri proposal, simply because there is no assurance that the total deliberation would be purely public or that the public ponderance would be sincerely deliberative. A judge can easily be publicly legalistic. The pathological legalist cannot help himself. The insincere dialectician will fall back on legalistic pretense primarily because one significant power function of legalistic rhetoric is to camouflage and mislead, to steer the audience away from the true or proper grounds of decision.

Legalistic rhetoric is propagandistic in its public displays, inhibiting and self-deceptive in its use in private explorations and introspections. That is why Jerome Frank recommended that all judges undergo psychoanalysis. He had confronted himself in that way, but not even he came consistently close to candor in his opinions. Conceivably he would have if his colleagues had shared his views on decision making. How far we would have to go in our thinking about law to write or to submit opinions displaying the candor which the facts of life but not the law justify! Certainly the majority of the judges which populate our highest court or the other high courts are not going to accept such suggestions. Many of them simply cannot be reached because of the barriers which legalistic attitudes about law allow or encourage them to maintain. Given the trends in legal education, some future generation of high court judges will be more amenable to such suggestions. Of course, there is no guarantee that those trends will continue.

In the meantime, if the Supreme Court is just another policy-

making body, and perhaps the "least dangerous" and most tender one at that, there seems to be no good reason to pick open its gut before the real decisional dynamics of other policymaking bodies are exposed. The call must rest on another base: the potential for abuse of the kind of power that lies in trust, "the fidelity of law." The crucial issue becomes: is there some way to bring the special brand of policy making and implementation which is judicial to the fore without destroying its *public* credibility. The Warren Court was testing the limits, the Burger-Nixon Court *threatens* to drop behind a mask which is discredited only in some sophisticated and maybe in all alienated pockets of society.

The call to public deliberation could serve a desirable base for public education if it were poured into mass media channels. At the same time, interested scholars and researchers could pursue some presently untapped questions vital to the crucial issue. Just what are the expectations concerning courts in this society? How is law in general viewed in its ideal image? What is the assumed function of courts? Is the function of the Supreme Court viewed distinctively? What part does the mass media play in affecting these image-expectations? We might even discover that the public is ready after all. Imagine the possibilities of a judicial initiation of restoration of full public faith in government.

At another level of inquiry, experiments can be devised to help assess the difference it might make if judicial deliberations were public. Law schools provide most useful laboratories for new kinds of "moot courts." There are further possibilities. My impression is that there would be intermediate appellate courts that *might* be willing to join in the experiments; not to allow bugging, but perhaps a trusted observer, maybe even to try public deliberations. Maybe experiment in judicial conference could be motivated. Certainly there is more hope at that level for starters.

Public judicial deliberations cannot be forced, but unnecessary secrecy can be undermined. The proposal is necessary and well timed at least as a challenge. If neutrality is possible in response, the traditions of science obviously are better fitted to the task than either jurisprudential or political theory alone. Not just any science will do; but science duly sensitized to the significance of linguistic and communicative dynamics is of prime importance in understanding judicial behavior and public response.