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A Sitting Justice Speaks to Troubled Times: An Interview With Hon. Rolando T. Acosta

Judges infrequently speak publicly to troubling societal issues du jour. Consistent with his ethical obligation of restraint, lest he inadvertently prejudge issues that may conceivably come before him, Justice Acosta has agreed to weigh in on some matters with which society, particularly in New York, is currently grappling involving the administration of criminal justice.

By **Joel Cohen** | March 09, 2022



Justice Rolando Acosta, Photo: Rick Kopstein

Rolando T. Acosta is the Presiding Justice of the Appellate Division, First Department, one of the most important courts in the nation. The Justice leads the court with a welcoming, but firm, touch.

Justice Acosta embodies the great hope of the American immigration dream. Born and raised in the Dominican Republic, where his late father was often a political prisoner of the fascist Trujillo regime, he came to New York at the age of 14. He later attended Columbia University (where he was a star pitcher) and then Columbia Law School. Justice Acosta eschewed “Big Law” and chose to give back, working first for the Legal Aid Society and then for the Commission of Human Rights. He then entered the judiciary, first in Civil Court, then to Supreme Court, and ultimately to the Appellate Division and his current position.

I co-teach a class on “How Judges Decide” at both Cardozo and Fordham Law Schools, which hosts a guest judge weekly to be interviewed by the class about the general processes of judicial decision-making in difficult-to-decide cases. The class is on the honor system, meaning what is said in the class stays there, thus promoting maximum candor by the judges asked directly about influences in their decision-making. Justice Acosta is a regular. Put aside his position as PJ, anyone who has ever spoken with him knows his gentle, gregarious and uncommonly friendly spirit.

Recently at Cardozo, the discussion with Justice Acosta inevitably turned to the currently brewing issues about criminal justice in New York. As a throwaway, this gifted public servant was asked when was the last time he was “hassled” by the police. We expected he would say in his teens, or even twenties. Instead, “three weeks ago.” He was driving in the neighborhood where he lives (largely minority families but like everywhere these days, gentrifying). He was dressed casually—it was the weekend. Driving his new Lexus, he was pulled over for a supposedly bad right turn.

The Presiding Justice of the Appellate Division, a man in his sixties, sadly knows the drill too well from his experience as a person of color: hands on the wheel; windows wide open; no sudden movements; reach for your driver’s license only with the officer’s permission. The police ultimately allowed the Justice to go on his way. Another day in paradise.

I, myself, later asked the judge about his conversation with his wife after the incident. Many would have been punching walls; not necessarily over the sheer humiliation, but because of the potential physical danger inherent in such a stop. He said that she—the principal of a charter school and a significant public servant in her own right—was actually in the car: “*Her presence definitely had a de-escalating effect.*” I expect the Justice has understated the concern that was going through his mind.

Hard to forget how he phrased it. After all, two police detectives were tragically murdered on duty last month, and those who stopped the Justice might resultantly have been anxious on a dark night (maybe afraid, particularly when stopping a large, athletic looking, somewhat dark skinned, individual as the Justice is). I foolishly assumed in my question that the police officers who stopped him were white. But no; one was Latino and the other Black. We live in complicated times! As mentioned above, the class employs the rule of omerta, but the Justice has allowed me to share this story for this interview.

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JC: You know, Justice Acosta, that I have written frequently that judges, who know more about criminal justice than virtually anyone, should—maybe have a duty to—inform and educate the public about their perspectives especially when criminal justice, particularly in New York, is awash in such controversy. You yourself have been reticent (except in a classroom).

Given your recent police encounter and others you've had over the years, one might think that your mindset as a sitting judge would almost reflexively favor progressive measures designed to prevent over-policing that could take a bad turn like could have happened that night in your car. Is that, indeed, your mindset?

RTA: I wouldn't necessarily characterize my views that way. First, my view is that policy should never be driven by anecdotal experiences. And I don't think it's progressive or non-progressive to think that police should be there to aid in protecting people and solving crimes. That is their primary function. I also don't think it's progressive or non-progressive to say that police should also not overstep and violate citizens' rights. I would hope that everyone believes that. I really don't think it is even debatable. But yes, I do think we need to have a robust discussion about this topic in our country, because we need adequate policing in all communities, not over- or under-policing in some.

Overall, to answer your question, I try not to allow the feelings that I experience during what may be a discriminatory traffic stop to motivate me toward extreme positions. These issues are very complicated and require a nuanced and balanced analysis.

JC: The current lenient bail law was enacted largely due to the belief that men in the minority community have too often been victimized by a system that says "arrest now, we'll figure it out later" while the arrestee is jailed awaiting his day in court. Accordingly, bail reform limited, sometimes removed, a judge's discretion to set bail. You're not a legislator, you're a judge. Has the legislation gone too far?

RTA: I don't think so, but again this is a complicated and nuanced issue. The purpose of setting bail is primarily to ensure that a defendant returns to court. That has always been the law, even before bail reform. Bail should not be punitive because the defendant has not been convicted. Innocent until proven guilty is a great hallmark of our criminal justice system, and it's what separates us from some countries that have little to no due process. Unfortunately, under the old system, poor defendants were serving "sentences" for minor crimes in places like Rikers pending their day in court.

Bail reform, and the subsequent reform of the bail reform law, was really about re-defining what minor crimes should be eligible for bail. Reasonable minds may disagree about that. For those crimes which were not bail eligible—and even some crimes that were bail eligible—bail reform effectively expanded supervised release, which has been extremely effective in ensuring that defendants return to court, which again is the very purpose of bail.

It bears mentioning that the bail reform measures have not ended all cash bail. Most felonies are still subject to cash bail, and virtually all violent felonies are still subject to cash bail, depending on the judge's discretion. I think it is generally a terrible idea to take away all discretion from judges.

Currently, judges have the discretion to release defendants pre-trial and impose conditions such as electronic monitoring and supervised release, which may result in defendants being referred to mental health treatment services or drug treatment services. And in certain cases where defendants are charged with violent felonies, judges can even order them to be detained pending trial, especially where a defendant has been rearrested for a felony or violent felony after having been released upon bail or on supervised release or on his or her own recognizance. I see the bail reform legislation as attempting to strike a critical balance between ensuring defendants' lives are not ruined by being detained before trial and permitting judges to exercise discretion to utilize cash bail where it is warranted.

JC: Do you believe judges should affirmatively be positioned to set bail to ensure that the defendant doesn't commit another crime that may endanger the public? And do you believe that too often judges were making bail decisions based on race?

RTA: Well, I will let the other branches of government opine on that first question. Right now, that's not our system. But given what we now know about implicit bias, it certainly stands to reason that some judges have made bail decisions based at least partially on race, even if unintentionally.

Of course, some have raised the valid concern that judges' implicit bias will inevitably affect their decisions regarding bail if they are permitted to consider a defendant's potential dangerousness. I have little doubt that such biases were present in judges' decisions in the past, even if they were unconscious. But we are learning about implicit bias and ways to combat it, and we have an increasingly diverse bench in New York City, composed of judges from all walks of life. In my Court, for example, we now have many judges of color, myself included, who grew up poor and still live in the communities where we were raised, the same communities where many Black and Brown defendants are from. And that is also true of the judges who decide bail issues every day, the Judges of the Criminal Court whose bench is increasingly diverse and who live in our great City. So, I am confident that our diverse bench today can properly and fairly consider a defendant's likelihood to return to court, as well as dangerousness to the community, without allowing racial bias to factor into the equation. Of course, a diverse bench is not an antidote to bias. However, being well-grounded and experienced in the consequences of bias will hopefully create understanding and empathy with the reality litigants bring to the courtroom. In bail determinations, as in sentencing, ignorance isn't bliss, and I don't think it makes sense to limit judges' discretion to such a severe degree, at least where the makeup of the bench continues to reflect the diversity of the community.

Still, I am well aware that there aren't clear answers here, and I don't have a panacea to resolve these issues, as much as I wish I did. Of course, in the United States we have the highest incarceration rate in the world, and that has not resulted in a clear reduction in crime, so I understand why some would argue that we shouldn't be detaining people pending trial at all. We need to marshal all of our creativity and resources to reduce crime and incarceration, so alternatives to incarceration deserve serious consideration. New York City has one of the lowest pretrial detention rates among major U.S. cities, and I think that may be due, at least in part, to the bail reform legislation. I also understand the argument that dangerousness can never be fairly considered when making bail determinations, but I'm just not sure I agree with it given how diversity in the judiciary is changing, at least in New York.

JC: It intrigues me that “Defund the Police” and similar movements originate in the minority communities. From your unique perspective as a sitting judge who actually lives in a minority community, what do *you* think about that?

RTA: I think the first thing about this is to clarify what people mean by Defund the Police. My understanding is that this movement is not seeking to abolish the police entirely but to restructure police departments and reallocate resources to other endeavors (some of which would work in tandem with police), such as mental health services, youth initiatives, and reducing homelessness. As I often say, the truth is complicated, and most folks these days seem to be on the extreme sides of the arguments, where they aren’t really hearing each other. So, in my opinion, “defund the police” is a poor and inadequate catch phrase, because it requires clarification and it alienates some people from the debate. Perhaps a better catch phrase would be “Reimagine the Police.”

In all honesty, I don’t think minority communities really want to do away with police departments. They are simply fed up with the current system. It’s not surprising that minority communities are advocating for these reforms, since we are often simultaneously over-policed and under-policed. Over-policed in the sense that we are unjustifiably stopped and questioned more often (as was the case in the “bad right turn” story I shared), and under-policed insofar as the police may take too long to respond to reports of crime in our neighborhoods, or they don’t thoroughly investigate crimes that are committed in minority communities. The truth is, we need police to aid in stopping and solving crimes, particularly violent crimes, but there are folks who understandably fear or distrust police in places like upper Manhattan due to past negative experiences with government and police. Nonetheless, people of color in my neighborhood are overwhelmingly the victims of crime (which too often goes unsolved), so it’s not as easy as saying eliminate the police or limit their resources so that they are not able to execute on their most basic function to protect.

In my view, isolating police is not the answer. They should be the guardians to keep us from devolving into a Hobbesian state of nature. In other words, they are needed to protect and serve. The question is how do we, the people, ensure that police power is properly limited and exercised? We need accountability and transparency. There are ways to reach our goals. For example, I liked the community policing model that my former boss, Mayor David Dinkins, negotiated with the New York State legislature. I personally believe that it was partially responsible for the drop of crime in New York. Some argue that police officers should live in the communities they police; I think that makes sense as well. But remember that even when police live in the communities they serve, they themselves can be victimized or even killed, as in the tragic shootings of Officers Wilbert Mora and Jason Rivera. One of them lived in my neighborhood and jogged around my block often. It’s tragic. Again, it’s complicated.

At bottom, this is a critically important conversation, and I think we could make progress if everyone concerned seeks reasonable solutions and really listens to one another.

JC: I expect that we couldn’t end on a better note.

Joel Cohen practices law as senior counsel at *Stroock & Stroock & Lavan*. He is the author of *‘Blindfolds Off: Judges on How They Decide’* (ABA Publishing, 2014), and co-teaches at class based on the book at both *Cardozo* and *Fordham Law Schools*.