9.1 THE ADVERSARY JUDGE: THE EXPERIENCE OF THE TRIAL JUDGE

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Much of the time, the script, cues, and setting of the courtroom drama support the judge in performing his role as impartial arbiter between the parties and faithful guide of the jury toward the truth. The prescribed role has been learned by the judge during a (usually) long course of training and observation in the lists. The professed expectations of all the other participants, which are basic determinants of the role to begin with, support the prescription. The standard doctrine, respected for its own sake and as a weapon in the hands of higher courts, is a potent force. The ceremonial business is also a congruent pressure. The two sides, in the well, are physically equal. The judge sits between them, usually on a raised bench, and is called upon to reaffirm more than once the equality of the contestants before the law. The jurors are enjoined, over and over again, to be impartial, and the judge is both their mentor and their colleague in this effort. The usual pressures to conform encourage and drive the judge to be neutral.

But there are contradictions, powerful pressures in a different direction, that constitute the focus of this essay. The pressures may be of several kinds. I mean to consider only those that may be called systematic, inherent in the trial process as we conduct it. This includes, among other things, an array of possible obstacles to impartiality that vary with cases, litigants, and judges—matters like legal or ideological preconceptions, biases touching people or groups, and things still more sinister and, it is hoped, more rare. The exclusions leave enough, I think, to warrant our concern.

The very nature of our accepted trial procedures generates forces that work against the judge's efforts to be neutral and detached. All of the several conditions and circumstances I plan to identify under this heading have in common a tendency to embroil the judge in the battle, to enlist him [or her] as an ally or to identify him as an enemy. Upon some reflection, however, I find these factors subdividing into two categories: those that cause the judge to take on combative qualities and those that serve to frustrate or impede or visibly depreciate his duty of leadership toward truth. It seems convenient at any rate to divide the topic in this way.

The Judge Embattled

The supreme concern of the parties on trial, and therefore of counsel, is to win. Of course, the battle should be fought by the rules, but the goal is victory—not the triumph of "Justice" viewed in detachment, but triumph. The high objective of the defense lawyer on trial is acquittal—not an acquittal because the client is innocent, just an acquittal. To be reminded of the clash of these views, judges, lawyers, and the jury band together to act as a tiebreaker, just as they did in the past, but now they are more likely to achieve vindication for clients who are not innocent.

The preeminence of the concern for victory is less total for the prosecutor, but it is not a subordinate matter either. Prosecutors seek convictions. Under the rules, which seem increasingly to be obeyed, they have other, broader obligations. But their goal on trial is a guilty verdict, and their behavior in court is oriented accordingly.

With partisan counsel fighting to win, and with the judge as umpire to enforce the rules of the fight, there might seem a priori no reason in the nature of the contest why the judge should himself be, or seem to be, or perceive himself as being drawn into the fray. The trial judge, likely to have moved to the bench from the ranks of advocates, may not start out wholly indisposed or unused to combat, but that progression is not unusual; all kinds of umpires are former contestants. The adversary trial, however, happens to be a game in which the role of umpire includes unorthodox features. Although it has no instant replays of particular events, its participants have a large stake in increasing the probability that the whole game be replayed. This possibility depends largely, of course, on whether the judicial umpire himself commits fouls—"errors," as we say—in the regulating of the contest. And this element is liable to cause the detachment of the trial judge to be tested, threatened, and sometimes impaired, if not entirely lost.

The "big cases," heavily populated with lawyers, heighten the tension. When the crucial question has been asked, or almost asked, the courtroom explodes as people spring up at the several tables shouting objections, usually loudly because they are in some haste and heat to cut off forbidden answers. All perhaps look somehow menacing from combined effects of tension, hostility to the questioner, and anticipated conflict. Viewed from the bench, the rising warriors sometimes have an assaultive look, which is surely a fantasy, but a palpable one to be not, I think, experienced exclusively by judicial paranoia. Whatever the individual emotional impact, the occasion is a testing time for the judge. It may be an easy chance or a hard one. If the latter, the sense of being challenged and opposed by the demand for a ruling is a recurrent experience.
Nobody doubts the range of adversary implications in our description of the judge as being "on trial." Among the more explicit references to trying the judge are the usually proper things lawyers must do or say "for the record." But propriety or no, the statement may have a cutting edge. When the lawyer says, "Just for the record, judge," depending upon the degree of the judge's self-confidence, the phrase may seem to mean simply "to preserve our rights." Or, perhaps it means "This is too much for you, judge, but it is to your undoing above." And the lawyer may in fact intend that it be heard either way. Judge-baiting, if not one of the approved techniques, is, after all, not an utter rarity, although perhaps less common than some judges perceive it to be.

In viewing the judge as a probable adversary, the defendant manifests an attitude, and continues a tradition, that is ancient and far from dishonorable with us. Along with the prestige often attached to the office, along with the rituals of deference, we view trial judges with a deep respect of mistrust and hostility. We remember more trial judges in history as notorious than as notable. The hardy survival of the jury with us, as distinguished from its tendency to rely elsewhere, reflects a fundamental skepticism about judges. The Constitution itself teaches the lesson, commanding in effect that the fact findings of a jury be less vulnerable than a judge's. The low pay of judges, in a society prone to estimate people in dollars, is part of the same story.

The Judge Discomforted

Apart from the threats to his detachment and neutrality, the adversary battle before the jury is frequently conducted under conditions that entail a potential sense of frustration, even stultification, for the presiding judge. Each of the contestants seeks to win. For either or both, in part or in whole, the goal of victory may be inconsistent with the quest for truth, which represents the public goal the judge is commissioned to pursue. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a cause will best promote the ultimate objective that the guilty must be convicted and the innocent go free." If premises could be vindicated by reiteration, that one would by now have overwhelmed the skepticism it tends on its face to inspire. Whatever the case, the trial judge spends a good deal of his time solemnly watching clear, deliberate, entirely proper efforts by skilled professionals to block the attainment of the ultimate objective.

When I say efforts are "clear" and "deliberate," I mean nothing less. This is not a juridical hunch; it is an open and shared professional understanding, concealed only from the jury. Often, the judge has been made explicitly aware before trial that the prosecution's assertions, though they will be contested at every step, are true. Less often, but often enough, the concession is made after trial, at sentencing or some other point when confession seems prudent or advantageous.

A whole class of examples arises in courts where plea bargaining is practiced. The bargaining, in which the judge frequently participates, starts from an understanding that the defendant has done approximately the wrong with which he is charged. In many cases, however, no deal is made. The defendant goes to trial. In the trial, the defense, by cross-examination and otherwise, fights to prevent demonstration of facts that were concealed before trial and are thus, in a sufficient and meaningful sense, known by the judge and counsel to be true.

Every trial judge could add illustrations from his own experience. I tender one here, perhaps more dramatic than routine, but apposite, I think, for our theme. A trial about two years ago involved a group of defendants charged with major dealings (multikilogram, hundreds of thousands of dollars) in heroin and cocaine. Important for both conspiracy and substantive counts was a suitcase that had been opened in a Toledo railroad baggage room and found to contain over five kilograms of heroin and a kilogram of cocaine. The motion was eventually denied, both because the quaint claim of protected title proved defective and because the Toledo search was held in any event to have been reasonable. But the points of particular interest here came later.

After other evidentiary hearings on pretrial motions adding to a total of eleven court days, we proceeded to a nineteen-day trial. While defendants did not take the stand, the considerable talents of numerous defense counsel were bent for four weeks on destroying any suggestion by any witness that would place their clients within miles at any time of any narcotics, including, of course, the Toledo shipment. Counsel for one of the erstwhile movants opened with the observation to the jury that there would "not be a shred of credible evidence," but only incredible assertions from "individuals who are the scum of the earth." A chemist who offered the opinion, novel only to the jury, that the substances in the Toledo suitcase were heroin and cocaine was raked by cross-examination for three hours, his experience tested, his veracity and motives questioned, the modesty of his academic rank (and the fact that he was a mere Ph.D., not an M.D.) being duly brought to his attention when it became apparent he had a tendency to irascibility.

Altogether, a total of forty-nine witnesses appeared. The jury heard over six hours of summation and a charge requiring (or at least lasting) nearly two hours. In deliberations extending over three days, including two nights of sequestration in a hotel, the jury called for testimony and exhibits reflecting questions, inter alia, that the movant-defendants had answered adversely to themselves, under oath, many weeks before. In the end, the defendants were convicted.

The purposes of and justifications for that four-week trial are familiar and (mostly) precious. The prosecution bears the burden of proof. Only lawful evidence is allowed. Defendants are presumed to be innocent, jurors are to search out the truth, but doubts are to be resolved in favor of the defense. Granted all that and more, our immediate subject is role strain. How does it all look and feel to the impartial judge, regulating the contest, waiting to see whether the jury arrives at findings he knows to be correct or is successfully kept from doing so? Judges vary, of course, so there is no single answer, not even for any single judge.