THE AUDIENCES OF THE JUDGE

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This paper is inspired by Professor Perelman's insistence on the importance, for understanding reasoning, of determining the nature of the audience the speaker is addressing (1). Its general thesis is that it is a necessary condition of the soundness of judicial reasoning that it take into account the legitimate interests of the audience to which it is directed. Its special thesis is that in criminal courts of first instance, these interests typically conflict when it comes to sentencing; and that this conflict in the interests of the audience gives rise to mistaken analyses of judicial reasoning.

I

We must first say a word about the role of the "judge".

It is conceivable that there should be an institution in which the judge was not expected to justify his decision, nor even to deliberate. This could easily be understood if the cases which came before him were those in which a decision is needed, but in which it is not crucial *which* decision the judge arrives at. These would be cases in which it was agreed on all hands that the considerations on both sides balance out, so that there is no reason for choosing one course in preference to another, even though there *is* a reason for choosing one course *or* the other. Arbitrary decisions need not be irrational ones, as someone should have told Buridan's ass. In such an institution, the judge could be replaced by a pair of dice or a roulette wheel (2).

We will speak of an institution in which the judge does not operate in this way, but is expected always to deliberate and sometimes to offer justification for his decision. He is expected to deliberate or justify because there are conflicting considerations which must be reconciled as well as possible. If he deliberates but offers no justification, then his reasoning can

be criticized only by criticizing his procedure: the question will be whether he "took into account" everything that he should. No question can be raised whether, in deliberating, he gave proper weight to the considerations in question, since by hypothesis we have no way of knowing how he weighted what he took into account.

To simplify, therefore, we will speak of judges who not only deliberate but also offer justification for their decisions. Where this is so, we will contend that a sound justification must take into account the legitimate interests of the audience to which it is addressed. This will no doubt have an uncomfortably relativistic sound, as if the judge, like a sophist, must speak in such a way as to have a certain effect, which he desires, upon his hearers. This is true, and my position is relativist — but not in the sense that the judge's discourse must be assessed merely by its psychological effect on a particular audience of his choice.

I have spoken of the legitimate interests of an audience. How is this to be made intelligible ? Perhaps by offering paradigms of what an "audience" is and what "legitimate interests" are. The audiences and interests to which I refer are, as will be seen, institutionally defined. The audiences are of particular kinds of role-players within an institution, and the interests are those which a role-player may be presumed, as the player of that role, to have.

II

In what follows, I shall hold that there are three different audiences to which every judge must address his justification of his decision, and that each of these audiences may be defined by reference to the interest which characterizes it. There is (1) the audience of those concerned with the development of the law as an effective set of rules: this I shall call the *legal* audience. It includes especially the courts to which the decision in the court of first instance may be appealed, but it also includes legislators and other courts of first instance whose decisions can be compared with those of the court in question.

There is (2) the audience of *litigants,* including defendants in criminal and civil proceedings, as well as prosecutors where there is an adversary system. This is the audience of those immediately concerned, the audience which will or will not find satisfaction in a trial, the audience which must bear the burdens or which will enjoy the privileges awarded by the judge. Finally, there is (3) the audience of those who, while not necessarily litigants in the case, will indirectly stand to gain or lose by the impact of the decision on the well-being of the community, in part or as a whole. This I will call the *general* audience. It is obvious that a member of the legal or the litigant audience can also be a member of the general audience, but that a member of the general audience need not be a member of either of these audiences.

The legitimate interest of the legal audience is both in what might be called judicial legislation and judicial administration. That is to say, it is interested in the consistent development of a viable code, and in the proper application of that code in particular cases. For simplicity, I shall here ignore the latter interest, that of application, and concentrate on the former, which we shall refer to simply as *consistency.*

The legitimate interest of the litigants is in *fairness*: in a fair apportionment of losses, in a fair assessment of liability, or in a fair judgment of guilt. The legitimate interest of the general audience is in the *benefits* or *losses* which accrue to the general community as a result of the decision. From the standpoint of this audience, the judge is an administrative official whose business, like that of mayors, sheriffs, dog-catchers, and councilmen is to quell nuisances, maintain order, and improve the quality of life.

III

We shall pause here to raise the question how we know that consistency, fairness, and utility are standards by which the judge's decision should be assessed. This question sounds far more difficult in the abstract than it does when these standards are thought of as the measures which would natural-

ly be applied by the members of the different audiences to whom the judge should speak. How, then, can we say that the judge should speak to these audiences in terms of their interests ? Our answer must be a hypothetical one. If we believe that there is value in an institution in which the judge serves not just to make decisions, but to make them as a result of deliberation, and if we believe that this institution is worthy of preservation, then we must believe that the judge should speak to the legitimate interests of audiences which the institution "creates". That is, it is a part of our understanding of what the institution in question is that it includes roles in terms of which one can raise certain questions. There are not only judges, but judges of judges (appeals judges), litigants, and members of the community affected by the decision. If we approve of such an institution, and consequently of its defining the roles with the legitimate interests specified, then we must approve of the judge duly speaking to those interests in the justification of his decision.

IV

Let us now turn to a more careful examination of the different demands the judge faces. To do so, it will be useful to have before us a particular sort of decision which the judge may be called upon in some constituencies to justify. Consider, then, the justification the judge may offer of the sentence he awards in a criminal court (3).

The first sort of *consistency* in question is that with the body of law which applies to the case. The consistency required of the judge here is simply that his awards of sentence lie within the legally permitted minimum and maximum limits. Secondly, where the law allows discretion the judge must nevertheless observe certain bounds. His sentence must not inflict "cruel and unusual" punishment. It must not be completely out of line with sentences awarded for the same crime in other courts. For example, if — though the law still permits its award — the death penalty has not been assessed for 20 years, a judge should award it, he would find a heavy burden

of proof to be shouldered. Other practices in sentencing must, *ceteris paribus,* be honored. For example, first offenders may expect to receive a lighter sentence, provocation must be taken into account, and a long period of detention before trial may be expected to count toward mitigation.

The watchword for the judge in these matters is that he must seek out the law and apply it to the case in hand. His legal critics, especially the courts of appeal, will not be satisfied if he does otherwise — if, for example, he gives free rein to his sense of justice without regard for precedent. He must make his sentence as consistent as possible with what has gone before.

But why does the judge have to take into account what his legal audience demands of him ? Suppose he is bemused by the counterdemands of another audience: that which is concerned with utility. In the Penal Code of the U.S.S.R., for example, it is stated that "The aim of penal legislation is ... to protect the ... state ... against socially dangerous acts ...". If this is the criterion, need the judge observe precedent or may he be an opportunist, taking advantage of the presence of the defendant to take whatever measures seem to him likely in the circumstances to protect the state ?

The answer inevitably turns on the advantage to the individual citizen of a system of law in which he can predict the consequences of acts he proposes to himself. Consistency in enforcement and in the awarding of sentences allows him to calculate what the price of an act is likely to be. If he has no idea what sentence a judge is likely to award, he is to that extent unfree. He cannot predict how the law is likely to react to *any* violation of the law, so that he is likely to be either excessively careless about violating the law or excessively timid. Careless if he feels that anything he does may result in a severe sentence, so that there is no use being scrupulous; timid if he feels that he may avoid punishment only by being very careful indeed not to transgress any law however trivial or antiquated. To sum up, without consistency in the law there can be no planning of means to ends, and without this possibility the individual is stripped of dignity.

The audience of *litigants,* of those who stand before the bar of justice, demands *fairness* of the judge. Wherever penal justice is meted out, defendants will make invidious comparisons between themselves — between the way they are treated for the same crime in different courts, or even in the same court. Ideally, the judge will sentence in such a way that no one will be able to claim that he has been treated unfairly. The audience of litigants shares an interest with the legal audience in consistency of sentencing. But (1) consistency is not enough to insure fairness, and (2) the legal audience and the litigants have a different interest in consistency. (1) A judge who awards heavy sentences for minor crimes and light sentences for major ones may be consistent but unfair — consistently unfair. (2) It is not the *unfairness* which so much disturbs the legal audience as the inconsistency of an inconsistent judge.

Finally, the *general* audience will, recognizing that the sentence itself requires the knowing infliction of evil, demand to be shown that the *benefits* to be derived from the policy reflected in the sentence outweigh the obvious *loss* (4). The first loss is to the person sentenced; then come losses to others concerned: family, friends, employers, partners, associates; finally, there are losses to every citizen in the social cost of the sentence: e.g., the tendency it will have to embolden prospective criminals because it is too light, or the divisive tendency of sentences influenced by the race, appearance, or politics of the defendant. Here the motto should be "minimum pain for maximum gain". The judge must attempt to show that although there may be bad consequences of his sentencing in the way he does, the good consequences outweigh the bad ones. Here the judge will appeal typically to the deterrence of the criminal and others, to the possibility of reform, and to the utilitarian importance of upholding the majesty of the law.

V

If a speaker must satisfy a composite audience made up of audiences whose legitimate interests may fall into conflict,

then he will have to be adept at identifying these legitimate interests and speaking to them. The problem of diverse audiences cannot be made to go away by pretending that only one of the audiences exists. A judge who is concerned solely with the interest of the general audience would not likely sentence fairly, or with due regard to precedent. Such a judge would be regarded, and would regard himself, as a social engineer. The circumstance that the defendant is before the bar would simply provide him with an opportunity to enhance the social welfare, or to minimize misery. The audience of litigants might be satisfied by a fair decision, but such a decision might not respect the development of the law to that point, and might thus distress the legal audience. What from one standpoint is fair is from another inconsistent. Or a decision which seems sufficiently respectful of precedent may seem — from the standpoint of the general audience — to continue a hopelessly bad policy.

Retributivists tend to speak as if the judge had only an audience of litigants; utilitarians as if he spoke to the general audience alone; traditionalists as if the judge's obligation to his judicial ancestors were the sole obligation which binds him.

Judges adjudicate not only the case before them, but also the counter-claims of interests which bear on the case. If these interests can be shown to be (a) potentially conflicting, and (b) fully warranted, then it is small wonder that theories of judicial reasoning which fail to take these conflicts into account are foredoomed. Yet surely these interests are warranted. It is essential for a world in which planning, and hence some modicum of individual dignity, is possible that the judge's decisions should have careful regard to prior decisions in the same system. It is essential to a world in which any of us would want to live that judges decide fairly between litigants who come before them. It is essential, finally, that the judge, who holds a monopoly of certain powers (to commit to prison or a mental institution, to set in motion procedures for rehabilitation, e.g.) should make use of them for the public good. Yet example after example can be given in which a decision which would be fair to the litigants would not be consistent with previous decisions, nor likely to advance the public welfare — and so on.

If it be granted that the reasoning of the judge, like the reasoning of any speaker, must be assessed in the light of the legitimate interests of the audience to which it is addressed, and that the judge's composite audience may have conflicting interests, then certain theories become immediately supect: theories which hold that the judge must be guided solely by "utility" or "policy", theories according to which the judge is a disguised legislator, theories which picture the judge as a researcher of law above law, theories which reduce the judge to a social worker. Why should we believe such theories ? Why is it not more defensible to regard the judge as an adjudicator not only of the interests which are in conflict between litigants, but of all the legitimate interests which can be brought to bear on the case ? ([5]).

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NOTES

([1]) Chaim PERELMAN and Mme. OLBRECHT-TYTECA, *Traité de l'argumentation*, Paris, 1958. Following Perelman, I will speak of an audience as "the ensemble of those whom the speaker wishes to influences" (p. 19).

([2]) The *office* of judge must be distinguished from the *function*. Holders of the "same" office may be expected, in different social contexts, to function quite differently. What does the judge *do* ? Does he allow God to speak through him, does he consult an inner oracle, assess his feelings of love or hate, use calculating tables ? There are very many possibilities. Here we are concerned with judges who adjudicate interests.

([3]) Generally speaking, more is required of the judge in the way of a justification of sentence in English than in American law, since in England sentences can be appealed, but in the U. S. not. Cf. *Halsbury's Laws of England*, 3rd. edn., Vol. 10, pp. 488-89. But also cf. Commonwealth v. Williams, 402 Pa. 48, 166 A. 2d 44 (1960), and U. S. v. Ginsburg, Case # 16028 filed by the Court of Appeals for the Third Circuit on March 13, 1967.

([4]) Cf. BENTHAM, *Introduction to The Principles of Morals and Legislation*, Ch. XIII "Cases Unmeet for Punishment", and Ch. XIV, "Of the Proportion Between Punishment and Offences'.'

([5]) In a longer paper, I would consider the theses (a) that the judge addresses himself not to a composite audience, but to an imaginary impartial observer, and (b) that (as I agree) a parallel analysis, in terms of audience, could be made out for legislative justification.