

REVIEW

The Reform of the Adversary Process

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Partisan Justice. MARVIN E. FRANKEL. Hill and Wang, New York, 1980. Pp. x, 134. \$9.95.

Perfection, said Arnold Bennett, is a form of death. If this is so, Judge Marvin Frankel demonstrates with considerable eloquence in *Partisan Justice*¹ that a centerpiece of the American legal system, the adversary process, is a lusty infant indeed. In addition to his trenchant critique of the adversary process, the author also offers some suggestions for improvement. Judge Frankel makes only a few references to European criminal and civil procedure, however, and his arguments for the reform of the American system certainly do not rest on the teachings of comparative law. Why then was a European lawyer asked to write a review? I suspect the answer is that the editors believed it might be refreshing to have the views of a disinterested outsider whose lack of expertise with regard to American procedural practice perhaps is compensated by the absence of a direct stake in the matter.

When I first came to the United States in the early 1960s to spend a year at the University of Michigan Law School, all graduate students with a European law background were given an introductory course on American law. Procedure was an important subject of this course, and adversariness was described to us as the hallmark of the American procedural system and as the best device available in the search for truth in a court of law. The introductory course itself followed the adversary model in that our attention was drawn to critics like Roscoe Pound² and Jerome Frank.³ That

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¹ M. FRANKEL, *PARTISAN JUSTICE* (1980) [hereinafter cited without cross-reference as FRANKEL].

² See generally R. POUND, *CRIMINAL JUSTICE IN AMERICA* (1930).

³ See generally J. FRANK, *COURTS ON TRIAL* (1949).

did not have a great impact on us, however. More impressive was watching lawyer-dominated civil and criminal trials at the Washtenaw Circuit Court on closed-circuit television in a viewing room at the Law School. We also enjoyed the moot court cases with their colorful and dramatic confrontation between opposing counsel, and our lingering doubts about the attractions of adversariness were dispelled by reading Erle Stanley Gardner, Raymond Chandler, and Robert Traver's *Anatomy of a Murder*.

For those of us who remained in contact with American law, however, a process of disenchantment set in. Although it remained clear that the adversary system has its virtues, most of us realized that, here as elsewhere, all virtues have their limits. The first part of Marvin Frankel's book deals with the faults of the American system, and it does so in the true adversary spirit—with the eloquence, vigor, zeal, and partisanship required from counsel arguing a case to a jury. Judge Frankel assures the reader time and again that his book is intended not as a wholesale attack on the adversary system nor as an attempt to undermine the tested virtues of free and fair litigation.⁴ It is concerned only with excesses, distortions, and perversions, with “the tricks, stratagems, dodges, and ruses that wily advocates everywhere have learned and employed, in one form or another, to win unfairly, take unfair advantage, and achieve what detached observers would condemn, and have always condemned, as unjust results.”⁵ If the conditions described by Judge Frankel are even remotely as widespread as he suggests, they are indeed apt to make a European lawyer's untoughened skin crawl.

A familiar theme is the preparation or “coaching” of witnesses (including expert witnesses) and clients.⁶ Although it is true that memories may need to be refreshed, ordered, and stimulated, the preparing of witnesses may result (and may even be designed to result) in the concoction of false stories or in the severe editing of truthful ones. Examination and cross-examination of witnesses in the American style are, in Judge Frankel's view, likewise open to frequent abuse. He mentions the ancient and modern tricks to make a truthful witness look like a liar or a liar look like a truthful

⁴ *E.g.*, FRANKEL at ix.

⁵ *Id.* at 7.

⁶ *Id.* at 14-16.

witness.⁷ He tells us about histrionic stunts used by "paid courtroom rhapsodists"⁸ to create illusions that the jury may be mesmerized into accepting as facts.⁹ He also gives examples of acerbic sallies made by counsel in order to ridicule an expert's asserted experience, many of which I would find hard to believe were they not taken verbatim from the trial transcript of *United States v. Capra*.¹⁰ The hiring and examining of expert witnesses is indeed something particularly surprising to a European lawyer. The system of court-appointed experts used on the Continent may have its disadvantages too, but the American practice of paying experts to be partial and subjecting them to cross-examination by lawyers who have only a superficial acquaintance with the experts' specialties does not recommend itself to the European lawyer either.¹¹

Judge Frankel also sharply criticizes the uses lawyers make of the discovery device. He admits that the discovery procedure began as a laudable means to cut down on concealment and surprises at trial. "Predictably, however, it has been turned—and twisted—to adversary uses,"¹² mostly by powerful litigants imposing costly, even crushing burdens on the opponent either by excessive demands for files or pretrial testimony or by dumping "truckloads of unassorted files on the party demanding discovery, hoping . . . that the searcher will be so exhausted that the damaging items will be overlooked or never reached."¹³

The addiction to all-out adversariness has also led, in the author's view, to the degeneration of voir dire proceedings¹⁴ and to elaborate, if self-defeating, refinements of the *Miranda*¹⁵ doctrine. It also fostered the development of arsenals of procedural swords and shields whose complexity and technicality are now so far advanced that the ordinary criminal trial, having ceased to be a workable institution, has been replaced to a large extent by what Judge Frankel calls "the tawdry spectacle of pleas and plea bar-

⁷ *Id.* at 16.

⁸ *Id.* at 29.

⁹ *Id.* at 16-17.

¹⁰ Trial Transcript at 1956-57, *United States v. Capra*, 372 F. Supp. 603 (S.D.N.Y. 1973), *aff'd in part & rev'd in part*, 501 F.2d 267 (2d Cir. 1974), *quoted in* FRANKEL at 56.

¹¹ See Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pt. 1), 71 HARV. L. REV. 1193, 1243 (1958).

¹² FRANKEL at 17.

¹³ *Id.* at 18.

¹⁴ *Id.* at 26.

¹⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966); see FRANKEL at 95-100.

gaining.”¹⁶ Needless to say, European lawyers view with wonderment bordering on disbelief the equanimity with which most Americans seem to acquiesce in a system of criminal procedure under which the important public interest in having criminal defendants tried fairly and, if found guilty, convicted according to the law is abandoned whenever the shady and questionable bargaining process demands it. Continental lawyers admittedly cannot pride themselves on the full adversary splendor of a criminal jury trial. Instead they rely on judges of comparatively paternalistic bent and on advocates of somewhat muted adversary zeal, but at least there is no plea bargaining in cases of serious crime. With full-scale trials of criminal cases conducted in America in only a small fraction of cases, there is much truth in Judge Frankel’s statement that “truly contested, fairly ‘tried’ cases are more the rule elsewhere than they are in this supposed haven of the adversary virtues.”¹⁷

So much for the diagnosis. If one looks at the therapy, however, it seems that the weaknesses of the adversary system, like the common cold, are much easier to diagnose than to cure. Thus I cannot bring myself to share Judge Frankel’s optimistic belief¹⁸ that the proposed changes in the Code of Professional Responsibility will significantly discourage lawyers from engaging in the types of reprehensible conduct described so vividly in the first part of the book.¹⁹ The idea that a revision of the rules of professional conduct will bring about a sense of duty to reveal the truth and a commitment to fairer advocacy seems to me as unrealistic and self-deluding as the belief that these virtues can be hammered into the minds of law students like the Rule in Shelley’s Case. Another reason for my skepticism is that, if I read cases like *Berger v. United States*,²⁰ *Jencks v. United States*,²¹ and *Brady v. Maryland*²² correctly, American prosecutors have long been under a duty to divulge exculpatory facts and to aid the search for the truth. Never-

¹⁶ FRANKEL at 87.

¹⁷ *Id.* at 95.

¹⁸ *See id.* at 73-86.

¹⁹ *See id.* at 14-29.

²⁰ 295 U. S. 78 (1935) (new trial granted because of prosecutorial misconduct, including misstatement of fact in closing argument).

²¹ 353 U.S. 657 (1957) (requiring production of prior written statements by Government witnesses in criminal trials).

²² 373 U. S. 83 (1963) (requiring state to produce upon request evidence favorable to accused and material relevant to guilt or punishment).

theless, according to Judge Frankel, concealing evidence or sitting quietly by as a helpful witness distorts the facts is just as rampant among prosecutors as among defense lawyers. If strict standards have remained ineffective with regard to prosecutorial conduct in litigation, why should a different result follow if the same standards are decreed for defense counsel?

Regarding the *Miranda* quagmire, Judge Frankel proposes to forbid altogether the use in evidence of any statements taken by questioning uncounseled persons in the custody of law-enforcement officers.²³ This step may be justifiable and indeed necessary under the American system. To the German lawyer, it seems a fairly drastic measure. With few exceptions, exclusionary rules of the *Miranda* type are unknown in German criminal procedure. There is no independent jury and accordingly no need for exclusionary rules designed to prevent laymen from being misled by untrustworthy evidence. Police officers are, of course, under a duty to inform the detained person of the crime of which he is suspected and of his rights to consult with counsel and to remain silent.²⁴ If a statement is taken in violation of these rules, however, we see no reason why it should be totally excluded from consideration by the court—in other words, why “[t]he criminal is to go free because the constable has blundered.”²⁵ Instead, we give the judge broad power to evaluate the credibility of evidence and, in doing so, to give due weight to the manner in which it was obtained.²⁶

Concerning civil lawsuits, Judge Frankel discusses two distinct modes of possible reform. The more modest proposals aim at improving some of the adversary techniques in civil cases. The more ambitious proposals would scrap the adversary mode altogether or offer alternatives for selected types of cases.

In Judge Frankel's view, little can be done about the reform of discovery devices: “The prospects are that the abusive uses of discovery as weapons of destruction will be with us for a long while.”²⁷ He says that juries should be eliminated from huge, complex civil cases, but he admits that such a step would have to overcome the “formidable obstacle that the judges are widely mis-

²³ FRANKEL at 99.

²⁴ See STRAFPROZESSORDNUNG [StPO] § 136(1) (W. Ger. Code of Crim. Pro. 1977).

²⁵ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (Cardozo, J.), cert. denied, 270 U.S. 657 (1926).

²⁶ See generally J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY 68-70* (1977).

²⁷ FRANKEL at 103.

trusted"²⁸ and, if taken with respect to the federal courts, would require the "most improbable feat" of repealing or modifying the seventh amendment.²⁹ As for the voluminous and cumbersome rules of evidence, which add greatly to the length, tedium, and expense of the American trial process, he foresees "no near prospect that the complex network will undergo basic revision."³⁰ Judge Frankel suggests that the pressures of the live, continuous trial on jurors, witnesses, lawyers, and clients might be reduced by making videotape recordings of the testimony of witnesses at different times and at convenient intervals, with parties and lawyers present; the taped accounts would be played to the assembled jurors.³¹ Although experiments conducted with the technique of the "pre-recorded videotaped trial" have been favorably received by some people, Judge Frankel concedes that understandable, if not justifiable, resistance to it remains widespread.³²

I should like to mention two other possibilities for reform, inspired by European models, that Judge Frankel does not discuss, perhaps because they may be even less likely to win general approval. Although it presumably would be heresy for an American lawyer to suggest it, witnesses, after telling their story in narrative form, should be interrogated by the court; this would be followed by interrogation in the conventional way by counsel for both sides. Furthermore, if courtroom histrionics really are as rampant as Judge Frankel tells us, an antidote might be supplied by giving the judge the power not only to sum up the evidence but to comment upon it at any stage of the proceedings if he sees fit to do so.

Of Judge Frankel's more drastic proposals, the most striking seeks to correct the unequal and unfair distribution of the services of competent lawyers so important in an adversary system in which the respective qualities of the professional champions make a decisive difference. In his view, just as with postal services, public parks, and public schools, the services of lawyers should be available free of charge not only to the indigent, but to all citizens including the affluent.³³ A National Legal Service should be created to provide any applicant with assistance of counsel, paid for

²⁸ *Id.* at 106.

²⁹ *Id.*

³⁰ *Id.* at 108.

³¹ *Id.* at 109-14.

³² *Id.* at 111-12.

³³ *Id.* at 124-25.

by the community.³⁴ Corporations, unions, and other organizations and associations would not qualify, and the service would, at least in its initial stages, embrace only the more critical needs like criminal defense, matrimonial problems, and basic contract disputes.³⁵

Clearly, this proposal would mean the nationalization of a large part of the legal services industry. To me, this is a dream, and not an edifying one. Even in countries like Sweden and Britain, which are years ahead of the United States in the socialization of services believed essential for the welfare of citizens, the creation of a National Legal Service is not a live issue. The experience in both countries with their National Health Services arguably has provided a deterrent rather than an incentive to similar plans. The parallel between the postal and the legal services is unpersuasive because the handling of mail, unlike the provision of legal services, cannot possibly be limited to people who have passed a means test. If the excesses of adversary procedure are really as common as Judge Frankel describes, why should the disgusting spectacle be billed to the government to an even larger extent than now? Would not the adversary system with all its weaknesses thereby be given an extra lease on life or even be permanently immunized against reform?

In my view, there is no need to appeal to the government for help. Admittedly, the prospects for early and thorough correction of the excesses of the adversary system seem bleak, although Judge Frankel would not share this prognosis. In any case, a promising course of action, if not the most promising one available, is the development of alternative methods of resolving disputes. Judge Frankel discusses in some detail various dispute-settlement techniques and agencies that seek to end standard commercial and other civil quarrels with fairness, efficiency, and little cost.³⁶ Such agencies are intended to work informally, with simplified procedures and at hours convenient to working people, and they attempt to reach agreements through conciliation, mediation, and settlement. Judge Frankel thus favors largely "lawyerless" courts. Yet if the role of the judge were sufficiently strengthened, the adversariness of the proceedings drastically diminished, and the contingent-fee system (which gives the lawyer a proprietary interest in

³⁴ *Id.* at 124-29.

³⁵ *Id.* at 126.

³⁶ *Id.* at 114-18.

the subject matter of the litigation) prohibited, I do not see why lawyers would have to be excluded.

At this point I would like to argue the case for comparative law. Although there have been vast amounts of writing in the United States on alternative methods of dispute settlement,³⁷ little use seems to have been made of comparative research. Hindering this use has been the unfortunate labelling of the European law models of criminal and civil procedure as "inquisitorial." While there is certainly a kernel of truth in this description, it unfairly conjures up the Spanish Inquisition, Kafka's castle, and bureaucratic omnipotence. Such characterization makes the Continental system seem so alien to the common law tradition as to render detailed comparative research pointless. A recent House of Lords case provides an example of this view; Lord Simon said that "[o]ur national experience found that justice is more likely to ensue from adversary than from inquisitorial procedures—Inquisition and Star Chamber were decisive, and knowledge of recent totalitarian methods has merely rammed the lesson home."³⁸ I do not think that this does justice to continental procedure, nor was Lord Denning correct when he said in *Jones v. National Coal Board* that an English judge, unlike his brother from the Continent, is not "to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."³⁹

To be sure, German civil procedure differs in a number of important aspects from the adversary system.⁴⁰ The extent to which German judges have a direct role in, and power over, the conduct of the action will surprise the lawyer from a common law jurisdiction. The non-European lawyer may discern an element of benevolent paternalism in the way in which the German judge examines the witnesses, develops the case, and engages in independent research of the applicable law. The extent to which the judge asks questions, clarifies the issues, and encourages the parties to modify

³⁷ See, e.g., AMERICAN BAR ASSOCIATION COMMITTEE ON RESOLUTION OF MINOR DISPUTES, ALTERNATIVE METHODS OF DISPUTE SETTLEMENT—A SELECTED BIBLIOGRAPHY (1979); E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS (National Center for State Courts Pub. No. R0023, 1977).

³⁸ *D. v. National Soc'y for the Prevention of Cruelty to Children*, [1978] A.C. 171, 231 (Simon, L.J.).

³⁹ [1957] 2 Q.B. 55, 63 (C.A.) (Denning, L.J.).

⁴⁰ The best articles in English on German civil procedure are Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960), and Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1-2), 71 HARV. L. REV. 1193, 1443 (1958).

or amplify their allegations or to offer further proof, also will be a surprise. The European judge faces the difficult task of avoiding the appearance of partiality while playing an active part in the proceedings.⁴¹

It is all very well to say that “‘an over-speaking judge is no well-tuned cymbal,’”⁴² and that the judge, if he examines a witness, necessarily “descends into the arena and is liable to have his vision clouded by the dust of the conflict.”⁴³ One must ask, however, how to satisfy the need of all modern societies to provide effective justice for the “little guy” without requiring judges to pursue a more active and dominant course in the interests of the litigant. If there is a desire to reform American civil procedure, either by making changes within the adversary system or by developing alternative methods of dispute resolution, the Continental experience may be well worth studying.

⁴¹ These features are most conspicuous in civil cases tried by a single judge in the local court (Amtsgericht), where the parties may appear pro se. The judicial statistics for 1977, for example, report that in no less than 63% of all cases tried in those courts at least one party was not represented by counsel, and in 18% of the cases both parties appeared pro se. STATISTISCHES BUNDESAMT, FACHSERIE 10: RECHTSPFLEGE, REIHE 2.1: ZIVILSACHEN Table 3.2, at 21 (1977) (compilation of statistics on civil courts by W. Ger. Office of Statistics). In the same year, 71% of the local court cases involved claims worth 2,000 deutschmarks (approximately \$1,080) or less, and in one-half of the cases the amount in controversy was 1,000 deutschmarks or less. *Id.* Table 3.7, at 31.

⁴² *Jones v. National Coal Bd.*, [1957] 2 Q.B. 55, 64 (Denning, L.J.) (quoting F. BACON, *ESSAYES OR COUNSELS CIVILL AND MORALL* 319 (London 1597) (No. 56, “Of Judicature”)).

⁴³ *Yuill v. Yuill*, [1945] P. 15, 20 (Greene, L.J.).