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Book Review of Silencing the Opposition: Government Strategies of Suppression of Freedom of Expression, by Craig R. Smith

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PARTISAN JUSTICE. By Marvin E. Frankel, New York, New York: Hill and Wang, 1980. Pp. IX,134.

*Reviewed by Jethro K. Lieberman**

In our adversary culture, it is only to be expected that one target of attack will be the very fact of adversariness. Critics are many; some have fashioned scathing, venomous assaults on the adversary practice and even its theoretical principle.¹ Almost invariably, these critics suggest as remedy a wholesale reformation and reorientation of the justice system, motivated by an Eastern vision of social harmony and self-criticism — “China chic.” They seem to conclude that all will be well if we could, as a society, sit down and, as Lyndon Johnson was fond of quoting, “reason together.” They do not dwell on the price. Indeed, the singular strength of the adversary system is measured by a central fact that is usually deplored: The overwhelming majority of those accused in American courts are guilty. Why is this strength? Because its opposite, visible in many totalitarian nations within the Chinese and Russian orbits, is this: Without an adversary system, a considerable number of defendants are prosecuted, though palpably innocent. And no one would claim, I daresay, that a system is fairer or better that manages to do that. In short, the strength of the adversary system is not so much that it permits the innocent to defend themselves meaningfully, but that in the main it prevents them from having to do so.

This strength is, however, also a weakness. Only because defense lawyers are independent of the state and the ruling political parties and are permitted, even encouraged, to defend fiercely and partisanly do we ensure that the state will be loath to indict those whom it knows to be innocent. This result, the good and proper result, is largely invisible. We rarely see who is not indicted, we never see those whom a prosecutor, or even a governor or president might like to prosecute but cannot. By contrast, the visible result is usually ugly: We see the class of criminal defendants, largely guilty, in whose behalf defense lawyers will exert every stratagem to defeat the state’s case. These stratagems are always irritating, frequently unseemly and seedy, and sometimes downright dangerous to the public at large.

The issue is, then, whether attempts to reform the adversary system as practiced — the browbeating and humiliation of witnesses, the suppression of facts, and, on the civil side, the interminable delays and

*Legal Affairs Editor, *Business Week*. B.A. 1964, Yale University; J.D. 1967, Harvard Law School.

1. See, e.g., A. STRICK, *INJUSTICE FOR ALL* (1977).

abuse of discovery —will dilute and ultimately destroy it. In other words, is it impossible to be “a little bit less adversary,” as it is to be “a little less pregnant”?

This is the question that Marvin E. Frankel, former United States District Judge, Columbia Law School professor, and now practicing attorney, addresses in his admirably succinct and elegantly written essay, *Partisan Justice*.² After thirteen years, some of them evidently exasperating, on the bench in the Southern District of New York, Frankel wonders whether we can as a society tolerate a system in which practitioners frequently make a mockery of the ideal embodied in the word “justice.” This is, however, no simple-minded analysis, as anyone familiar with the literature will know.³ He does not condemn the adversary system as an abstraction, does not propose its abolition, does not recommend excluding anyone from its protective mantle. He does suggest that “the finer forms of dirty tricks have not over the centuries served on balance to further the worthy ends of the masses of people”⁴

Some half the book is an adroit summary of the deficiencies of the adversary system as practiced. In Frankel’s view, the system pits not only the parties and the lawyers against each other, but also the judge against all. The author proposes to cure the distortions the system engenders by changing some of the rules of professional conduct. He cites some that he helped develop as a member of the American Bar Association’s Commission on Evaluation of Professional Standards (the Kutak Commission).⁵ One rule, for example, would require the lawyer to refrain from participating in the introduction of evidence known to be false or substantially misleading. So seemingly simple and straightforward a rule has prompted howls of alarm from the bar since the book was published, however, and the Kutak Commission has a dogged fight on its hands to sell even a watered-down version to the ABA House of Delegates in February, 1983.

In the criminal arena, Frankel suggests a new social contract: Abandon the “fiction” of *Miranda v. Arizona*⁶ that suspects can “intelligently” waive their rights to be questioned without counsel and provide lawyers to all people taken into custody; let them, furthermore, be questioned “before,” or possibly “by,” an impartial magistrate.⁷ At the

2. M. FRANKEL, *PARTISAN JUSTICE* (1980).

3. The book is largely drawn from articles previously published and widely noted, usefully edited into a cohesive whole. *Id.* See Frankel, *The Adversary Judge*, 54 *TEX. L. REV.* 465 (1976); Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031 (1975).

4. *Id.* at 7.

5. *Id.* at 80.

6. 384 U.S. 436 (1966).

7. M. FRANKEL, *PARTISAN JUSTICE* 98 (1980)..

same time, permit the prosecution later to comment on a defendant's refusal to answer questions and "to argue (for example) that a story given by the defendant at that subsequent time should be found to be fabricated."⁸ Frankel also suggests re-examining our, theoretically, highly punitive sentences, which add considerable pressure to defense lawyers to get their client off by any means fair or foul.

In the civil arena, Frankel tackles the jury trial in complex cases, the cumbersome rules of evidence that make it sometimes impossible for a jury to follow the logic of testimony, the fetish of the "continuous live trial,"⁹ and also briefly argues for a host of alternatives to the courts themselves. He concludes by recommending a greatly-enlarged Legal Services Corporation (LSC), which he would rename the National Legal Service to supply "to anyone who applies the assistance of counsel paid (or paid for) by the community."¹⁰ These words were published in 1980. Two years later, the LSC, a vehicle now open only to the indigent, is fighting for its life.

Partisan Justice is eloquent and crisp; as a summary of the issue it is an exceedingly useful guide. But it provides no blueprint, no battle plan. Ultimately it is a precis or preface. It does not analyze the pressures that would beset the practitioner in an altered system, the force of the tremors that changes in the codes governing practice would set in motion, or the imbalances that would be struck. For example, would a requirement that lawyers not mislead a court in ways now allowed be observed or enforceable; reassure the public or defendants; force more plea bargains or fewer? Would such a change lead some attorneys to retire from practice and others to enter; or would it increase or decrease the number of fair-minded and honorable law school graduates who become assistant prosecutors? Questions such as these Frankel fails to analyze adequately. None of this is to say that Frankel is wrong; only that what he has most usefully provided is assertion, not proof.

8. *Id.* at 98-99.

9. Frankel believes courts ought to experiment with videotape, as some have begun to do. *Id.* at 109.

10. *Id.* at 124.