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Judge Frankel and the Adversary System

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BY
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Over the last several years a number of people familiar with the American trial system have voiced a concern that trials in America — despite being surrounded by extensive procedural protections — too often produce results that are inaccurate and unjust. The focus of most of these concerns about our trial system has been the competency of trial attorneys. Chief Justice Burger has claimed that he has observed "many miscarriages of justice" as a result of inadequacy of counsel.[1] And Judge Irving Kaufman has similarly warned that the quality of justice being achieved by our trial courts is suffering due to the poor quality of many advocates appearing in those courts.[2] But I think we should feel relieved if the heart of the problem with our trial system is the competency of our trial attorneys because that is a problem that can be attacked on several fronts with required trial skills courses, examinations in trial subjects (and even periodic reexaminations), apprenticeships with experienced trial attorneys, performance review systems, etc. Indeed the warnings of Justice Burger and Judge Kaufman have led to some modest steps of questionable merit aimed at assuring minimum competency of lawyers in federal trial courts.[3]

Much more troubling is the contention that we are missing the heart of the problem in focusing on the lawyers because it is not

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1. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 238 (1973).

2. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974). For a sample of the debate and controversy engendered by these criticisms see McGowan, *The University Law School and Practical Education*, 65 A.B.A.J. 374 (1979); *Lawscope, Just How Good (or Bad) are Federal Trial Lawyers?*, 63 A.B.A.J. 1525 (1977); Frankel, *Curing Lawyers' Incompetence: Premium Non Nocere*, 10 CREIGHTON L. REV. 613 (1977). *See also* Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980).

3. *See* The Judicial Conference of the United States, *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, reprinted in* 83 F.R.D. 215 (1979) (usually referred to as the Devitt Committee report, after its chairman District Judge Edward J. Devitt); Advisory Committee on Proposed Rules for Admission to Practice, *Qualifications for Practice Before the United States Courts in the Second Circuit, reprinted in* 67 F.R.D. 159 (1975) (usually referred to as the Clare Committee after the chairman of the advisory committee, Robert L. Clare, Jr.).

simply the lack of trial skills that produces injustice but the American trial system itself that leads to results that are wrong. The most articulate and powerful critic of the American trial system is Judge Marvin Frankel who began his assault on our adversary system in a 1974 lecture in which he expressed his belief, after nine years on the federal bench in the Southern District of New York, that the "search for truth" in the courtroom "fails too much of the time."[4] He maintained that "our adversary system rates truth too low among the values that institutions of justice are meant to serve."[5]

Last year Judge Frankel published a short book entitled *Partisan Justice*[6] in which he expanded some of his earlier criticisms of our trial system. In contrast to those who urge more training in trial skills, Judge Frankel believes that it is the trial skills themselves that are partially responsible for the inaccuracy of the verdicts and judgments. He paints a picture of a trial controlled completely by lawyers who "are playing out a species of farce, employing their skills to fool a jury and, if possible, the judge as well."[7] Using his experience the skillful cross-examiner "will employ ancient and modern tricks to make a truthful witness look like a liar."[8] And the schooled cross examiner will have learned the "classic wisdom" of avoiding the "one question too many," thus leaving the badgered witness dangling with no chance to explain his or her answer.[9]

According to Judge Frankel the texts on advocacy will also have taught the skilled attorney "how to make it seem by not cross examining that the witness should be deemed a liar, beneath scorn, or how to employ histrionic stunts of one sort or another to create illusions that the jury may be mesmerized into accepting as facts."[10] For Judge Frankel we should be thankful, not disappointed, that lawyers "are rarely accomplished thespians, and that the stunting is not regularly successful."[11]

Judge Frankel describes an adversary system which carries everything to extremes. Even procedural protections specifically

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4. Frankel, *The Search for Truth: An Umpireal Point of View*, 123 U PA. L. REV. 1031, 1034 (1975) (the 31st Annual Benjamin N. Cardozo Lecture, delivered before the Association of the Bar of the City of New York, December 16, 1974).

5. *Id.* at 1032.

6. M. FRANKEL, PARTISAN JUSTICE (1980) [hereinafter cited as FRANKEL.]

7. *Id.* at 57.

8. *Id.* at 16.

9. *Id.*

10. *Id.* at 16-17.

11. *Id.* at 17.

designed to make trials fairer and more accurate are turned into adversary weapons. Discovery, for example, has become a potent adversary weapon as lawyers "react characteristically by demanding as much as possible and giving as little as possible."[12] Discovery can result in expensive pretrial battles and at times the expense of complying with discovery demands, including the legal fees for these pretrial skirmishes, has been used by the side with the deep pocket to force the opposition to yield from the battlefield even before the trial itself has begun.[13]

The selection of a jury, according to Judge Frankel, has become an endeavor aimed not at finding neutral or impartial jurors but at attempting to populate the jury with jurors partial to one's side. Thus lawyers do not look for jurors with detachment or understanding but "worry instead about the right and wrong prejudices, often resolving to prefer or reject, as the case may be, such justice defined categories as social workers, Italians, employers, women, bearded men, crewcut men, artists, whites, blacks, old people, college graduates, etc."[14]

The picture Judge Frankel paints of trial lawyers is one of amoral individuals shielded behind the duty of loyalty to their clients from an obligation to see that justice or the truth will prevail. In zealous pursuit of their client's interest lawyers try to frustrate the search for truth by engaging in such practices as "horseshedding" their witnesses to the extent of sometimes even suggesting a story that will win, planting errors for appellate reversal if they should lose at trial, and cross-examining the truthful witness to make it appear that the witness is incorrect or even lying. Throughout all this, the conscientious trial judge is "mandated . . . to sit by helplessly"[15] and in the end, because of what goes on in the courtroom, the judge experiences "a quality of failure and degradation in what should ideally be an inspirational event."[16]

The criticisms that Judge Frankel levels at our trial system cover a broad range of subjects ranging from professional ethics and trial advocacy to matters of criminal and civil procedure. And it is

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12. *Id.*

13. *Id.* at 18. There is some debate about the exact extent to which discovery is abused. Indications are that problems arise most frequently in large and complicated cases. *See* Brazil, *Civil Discovery: How Bad are the Problems?*, 67 A.B.A.J. 450 (1981); Levine, *"Abuse" of Discovery: or Hard Work Makes Good Law*, 67 A.B.A.J. 565 (1981).

14. *Id.* at 26.

15. *Id.* at 53.

16. *Id.* at 58.

doubtful that many readers would agree with all of Judge Frankel's characterizations and criticisms of the American trial system. Some of the criticisms even seem to be inconsistent. For example, Judge Frankel criticizes a prosecutor who failed to inform the defense in the course of plea negotiations that the prosecution's case had been weakened by the death of a key witness.[17] Apparently a defendant ought to know the strength of the prosecution's case before deciding whether to enter a plea to a crime. Yet elsewhere in the book Judge Frankel questions our legal mentality that insists that a defendant "know the odds [of conviction] before admitting what the defendant knows [he did] better than anyone."[18] But the book as a whole is provacative and disturbing, and it would be hard to come away from the book without being convinced that our adversary system — far from being a perfect and admirable vehicle for the discovery of truth — has serious problems.

Some years ago the philosopher Ludwig Wittgenstein in writing about a philosophical problem wrote that "[a] picture held us captive"[19] meaning in part that we were so accustomed to looking at the problem in one way that we were blocked from seeing the problem differently. To use that metaphor in a different context, American lawyers are captive of a picture of a proper trial as requiring the production of evidence and the development of evidence by the lawyers for the parties while the judge plays the role of a neutral, detached referee between the partisan advocates. Judge Kaufman has expressed the picture as follows: "Lawyers supply the fullest, most ingenious, and most committed statement of their client's case that they can. Judges supply the dispassion, disinterest, and hard pondering of how the clashing interests are to be decided."[20] While American lawyers can imagine all sorts of changes in the substantive law, this picture of a trial in which the lawyers are the only "players" and in which each side presents "its case" is considered not only the best way of resolving disputes, but the only way in which a trial could sensibly be conducted.

Part of the task that Judge Frankel has set for himself is to look beyond our way of trying cases and to consider other possibilities. Throughout the book he refers to the European civil law system in which the trial judge has the main role in the production and devel-

17. *Id.* at 92-93.
18. *Id.* at 28.
19. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS at 48e (1958).
20. Kaufman, *supra* note 2 at 175-76.

opment of the evidence at trial. The judge is in charge of the "inquiry" and the bulk of the questioning at trial comes from the bench. Judge Frankel suggests that we ought not to let the label that a system is "inquisitorial" blind us to improvements that we might make in our own system.[21] While Judge Frankel is not the first person to suggest that we might learn something from the continental system (in fact there seems of late to be quite a bit of scholarly interest in the topic[22]), Judge Frankel's experience as a trial judge for thirteen years in a very prestigious federal trial court gives him a perspective on the workings of the system that most of us lack. Not suprisingly his description of what our trial system does to the theoretically neutral and detached trial judge is particularly insightful. In contrast to those who describe the judge as a dispassionate and disinterested observer, Judge Frankel maintains that the atmosphere of battle envelops the judge as well as the lawyers and that in actuality a judge is not a neutral referee but is "a combatant with a shifting but endless series of opponents."[23] A certain amount of baiting the judge is permitted and many lawyers even try to lead judges into error to lay a basis for reversal should they lose at trial. Judge Frankel concludes that in our system the judge is "fair game." "A vulnerable judge may be a better target than a powerful adversary. A victory gained by induced judicial blunders is a victory still. And winning is, as the philospher of good sportmanship said, everthing."[24]

Besides raising questions about the trial system in America, Judge Frankel devotes the second half of his book to suggesting changes to improve the system. Many of these suggestions are sketched out, in Judge Frankel's words, "illustratively and impressionistically" without detail or specifics.[25] Among the suggestions are that we simplify the cumbersome rules of evidence;[26] that we consider limiting the right to jury trials in civil cases, which would in-

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21. FRANKEL at 7.

22. *See, e.g.*, L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977); K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976). For an interesting debate over the merits of the civil law model when compared to the American system of criminal justice, see Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L. J. 240 (1977); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 *Yale L.J.* 1549 (1978); Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L. J. 1570 (1978).

23. FRANKEL at 47.

24. *Id.* at 48.

25. *Id.* at 102.

26. *Id.* at 106-09.

volve modifying the Constitution;[27] and that we make greater use of modern technological advances, such as videotapes, to make trials shorter and more efficient.[28]

Another suggestion urged by Judge Frankel is the adoption of a plan espoused by Justice Walter Schaefer[29] and later by Judge Henry Friendly[30] that would allow the questioning of suspects in the presence of counsel before a magistrate. The suspect would have the right not to answer, but a failure to respond could be introduced and commented on at trial.[31] While this is an important topic and the proposal might well be held constitutional today,[32] it responds only indirectly to the problems Judge Frankel feels exist in the trial process. It would give the prosecution greater access to the defendant as an evidentiary source, but the trial itself would retain the problems that Judge Frankel finds intolerable.

In a chapter entitled "Modifying the Lawyer's Adversary Ideal" Judge Frankel tackles some of his earlier criticisms of American trials. Unfortunately, I find it disappointing. Judge Frankel merely proposes changes in the rules of professional conduct. Judge Frankel is a member of the American Bar Association commission, chaired by Robert J. Kutak, which is charged with revising the present code of professional conduct and his suggestions are reflected in the Kutak Commission's discussion draft.[33]

For several reasons I think it is wrong to approach the problems Judge Frankel has outlined principally as matters of ethics. This approach strongly implies that lawyers are creating the problems, perhaps because lawyers in this country are on a lower moral plane than

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27. *Id.* at 103-06.

28. *Id.* at 109-14.

29. *See* W. SCHAEFER, THE SUSPECT AND SOCIETY 76-81 (1967).

30. *See* Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

31. FRANKEL at 98-100.

32. In Griffin v. California, 380 U.S. 609 (1965) the Supreme Court ruled that the Fifth Amendment forbids comment by the prosecution on the accused's failure to testify at trial, or instructions by the Court that such silence may be evidence of guilt. The sweeping language of *Griffin* would seem to raise serious problems for the use of pretrial silence as evidence of guilt. But Justice White who dissented in *Griffin* is still on the Court. And recently in Carter v. Kentucky, 101 S. Ct. 1112 (1981), Justice Powell in his concurring opinion, 101 S. Ct. 1122, and Justice Rehnquist in his dissent, 101 S. Ct. 1123, were highly critical of *Griffin*. It seems very likely that a majority of the Court would overrule or narrow *Griffin* if the question were again presented.

33. *See* AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, January 30, 1980).

lawyers in other western countries and thus need more guidance in ethical matters. Yet Judge Frankel's descriptions of the problems within our trial system suggest that there is something about the *structure* of our trials that forces lawyers to what Judge Frankel considers adversary excesses. To try to solve these problems with ethical rules that aim only at the excesses and that leave the structure of the trials unchanged seems a doubtful undertaking.

The first half of the book demonstrates powerfully the tremendous pressure that the adversary system places on rules and the great difficulty of trying to regulate the conduct of combatants simply through rules. Consider, for example, the provision of the present code of professional ethics that specifically bars a trial attorney from giving a personal opinion on the evidence in the case.[34] This rule, Judge Frankel observes, is obeyed literally. Yet he observes that this does not stop lawyers from:

> such shows of passion as would have caused the company of travelling players in Hamlet to blush. . . . All who frequent courtrooms have watched lawyers yell, grow livid, show indignation, and recoil with horror over the merest suggestion of fault in clients who were demonstrated beyond question to be unspeakable villains.[35]

Assuming that this is an adversary excess that detracts from the pursuit of truth, should we control this problem by a subset of ethical rules that forbid feigned indignation or that insist that any temperamental outburst be sincere?

Perhaps a better example of the difficulty of curbing adversary abuses is Judge Frankel's example of our system for discovery. Designed to make trials more open and more fair, the discovery rules have been turned into some of the most potent weapons in the adversarial arsenal. But is anyone optimistic that a few more rules will at last enable discovery to achieve its proper purpose?

We could, of course, draft a discovery rule commanding that the discovery rules not be used "solely for unfair adversary advantage." But such a rule would not be easy to apply or enforce, and we could expect a wide range of interpretations of the meaning of unfair advantage. More importantly, Judge Frankel's description of the trial process convinces me of the substantial danger that this rule

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34. AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(C)(4)(1969).

35. FRANKEL at 29.

would itself become an adversary weapon with charges of purposeful unfair advantage necessitating even more hearings and expense.

Making such a rule an ethical rule rather than a rule of civil procedure seems an even more doubtful path to reform of discovery abuses. The problems of interpretation remain and there are additional problems with the enforceability of such a vague prohibition. (One wonders in this connection whether the abolition of the ethical ban against frivolous motions would add at all to the normal motion docket.) Moreover, Judge Frankel's description of what the trial process does to the combatants suggests that we should not rely heavily on the alternative of asking participants to police their own conduct in accordance with vague ethical standards.

Consider one of the major ethical changes proposed by the Kutak Commission and defended by Judge Frankel as offering an important reform in the adversary system. Rule 3.1 of the discussion draft of the Model Rules of Professional Conduct provides that, except in criminal cases, a lawyer shall not offer evidence that the lawyer "is convinced beyond a reasonable doubt is false."[36] Moreover, if the lawyer discovers that he has presented false testimony, he shall disclose that fact even if it means revealing a confidence of the client.[37] This is a controversial provision for it reverses the priorities of the present Code which places the protection of a client's confidences above the duty of disclosure to the court. The provision also creates an interesting double standard because it would apply only to civil cases.

But, putting aside the debate on the merits of the proposed change which are addressed more fully in Professor Alschuler's companion article,[38] what is surprising, given his description of the workings of the adversary system, is Judge Frankel's optimistic claim that this rule would "effect important changes if adopted."[39] This optimism seems to me unfounded. In the first place the standard requiring disclosure — that the lawyer be "convinced beyond a reasonable doubt" that the evidence or testimony is false — is so high that it seems unlikely to have much impact. But Judge Frankel takes a strong stand against any lowering of the standard, arguing that a

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36. AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(a)(3) at 59 (Discussion Draft, January 30, 1980).

37. *Id.* Rule 3.1(b) at 60.

38. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many Or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981).

39. FRANKEL at 81.

lawyer "is retained to help, not to judge, the client" and that it is "not for the advocate to effect prejudgments of this kind."[40]

A second problem with the disclosure requirement is that it requires a very difficult judgment for a lawyer to make, especially during trial. As Judge Frankel notes, it is "not for the advocate" to make such "prejudgment." The very nature of our adversary system would make it a rare case in which a lawyer could not find a reasonable doubt on behalf of the client who has retained him. And in this connection we should not underestimate the ability of lawyers to avoid being caught between loyalty to the client and disclosure to the court. As Judge Frankel observes, often lawyers take pains "to avoid really knowing the truth"[41] and if disclosure were a consequence of "knowing too much" about the case, lawyers might prefer in some cases to operate without full knowledge.

In short, it seems unlikely that this provision would greatly change the adversary system. While this provision is but one of several proposals that Judge Frankel advances for changing the rules of professional responsibility, it seems strange that Judge Frankel would prefer to modify the adversary model through changes in lawyer's ethics, rather than to urge less controversial and more direct approaches to the problems that he outlined.

For example, why should lawyers be allowed to dominate the courtroom, controlling the examination and cross-examination of witnesses with the trial judge forced to sit on his hands? The most direct response would be for judges to question witnesses, allowing counsel to fill in any gaps. This would allow the judge to set the tone of the questioning. Lawyers playing a backup role would find it harder to engage in the dramatic acting that Judge Frankel feels distracts from the pursuit of truth. And if on cross-examination the "schooled cross-examiner" leaves the witness dangling, unable to explain his answers or reply to the implications of the cross-examiner's questions, shouldn't the court interrupt and allow the witness to explain his answers by asking the "one question too many" that counsel has studiously avoided?

Such responsibility for our judges in the development of evidence is, of course, not within our tradition. A picture of a trial dominated by lawyers in front of a passive judge holds us captive. Even Judge Frankel, despite his references to trials in civil law countries, seems reluctant to tamper with this picture. But once we see that our

40. *Id.* at 82.
41. *Id.* at 77.

picture of a trial is only one way of conducting a trial, many possibilities open up. Why not have the court outline the case at the start of the trial in place of opening statements? Why should we divide witnesses into two camps — hearing first those who testify "for the plaintiff" and then those who testify "for the defendant?" Why not, for example, put opposing experts on the stand after each other? Why not allow conflicting witnesses to ask questions of each other in some circumstances?

In short, our trial system could be improved by adopting certain features of the trial procedures of civil law countries and blending them with the best of our own traditions and procedures. Naturally, some of these changes in the trial system would be easier to make than others. Some would require substantial changes in our rules of procedure. Others would require only a break with tradition. Of course, the picture of a trial as a lawyer dominated event has a powerful hold on us and any change in the role assigned to trial lawyers or judges will meet stubborn resistance. But the changes Judge Frankel proposes are by no means modest. Before we tamper with client confidentiality or change the Constitution to limit the availability of jury trials, we should consider major reforms in our trial structure. Judge Frankel has forced us to consider some difficult problems that we may wish did not exist, but trying to solve these problems through ethical rules seems very likely to leave us in a system where "the trial judge is mandated to sit by helplessly while lawyers are engaged visibly in the professional attempt to twist or foreclose the truth."[42]

42. *Id.* at 53.