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## Hired Guns

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# HIRED GUNS

*Norval Morris\**

PARTISAN JUSTICE. By *Marvin E. Frankel*. New York: Hill & Wang. 1980. Pp. x, 134. \$9.95.

*Partisan Justice* by Marvin E. Frankel will influence your thinking about litigation and the adversary system; as a bonus, you will enjoy it. A sprightly and graceful wit, a ready willingness to question the accepted, and a merciful determination to present argument clearly and concisely characterize all Frankel's writings and particularly *Partisan Justice*.

To an academic, it is a wry reflection that the leading polemicist of the procedures of litigation, criminal and civil, is a judge turned practitioner — but so it is. With *Criminal Sentences*,<sup>1</sup> Judge Marvin Frankel of the Southern District of New York staked the ground; with *The Grand Jury*,<sup>2</sup> he entrenched it; and with *Partisan Justice*, Marvin Frankel Esq. confirms the claim.

As I began to read *Partisan Justice* with this review in mind, I starred sentences which seemed to me of particular grace; my copy now resembles a firmament of stars. Some examples: "King Solomon's stunt in choosing between the two contending 'mothers' sounds brilliant because we're used to it, but lessons in psychology from Medea to Freud leave open the possibility that he was fooled after all" (p. 74); "The cash nexus may not be the warmest of bonds, but it is tough, resilient, and almost universally adored" (p. 68); "The ability to rationalize is, after all, a major factor explaining the relative prevalence of sanity" (p. 63); "The way farmers plant crops, lawyers sow dissension" (p. 63); "the object always is to beat every plowshare into a sword" (p. 18); "whatever the prospects in heaven may be, the legal prizes have gone steadily to those already well supplied with material blessings" (p. 8). And these quotations reveal also the vigor with which Frankel castigates the excessive adversariness, the hired-gun quality, of our criminal and civil procedures.

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1. M. FRANKEL, *CRIMINAL SENTENCES* (1973).

2. M. FRANKEL & G. NAFTALIS, *THE GRAND JURY* (1977).

Here is the thesis of the book in Frankel's words: "the American version of the adversary process places too low a value on truth telling" (p. 12); there should be "less combat and more truth telling in our techniques for resolving legal disputes" (p. 66). But Frankel observes:

this book is not (and rationally could not be) a wholesale attack on the Adversary System. It is common ground, at least throughout the part of the world we deem free, that fair resolution of legal disputes requires vigorous contest—adversariness—in the sense of effective advocacy, free access to the evidence, and a full hearing of both (or all) sides. The subjects of this discourse are the distortions and the excesses—the lying, the concealment, and the uses of legal procedure to harry and oppress rather than to seek right results, along with the overextension of the standard judicial battle to kinds of problems and disputes that would be better handled by simpler, less combative procedures. The curative proposals . . . are suggestions of some possible means to deal with the pathologies, not intended to undermine the tested virtues of free and fair litigation. [Pp. 68-69.]

These are the same insights into American culture first offered by de Tocqueville: excessive litigiousness and the dominant role the lawyer exercises in the resolution of private and public conflict. There is no doubt that adversariness and partisanship, expressed in legal processes, are set deep in our culture; too often negotiation starts with the issuance of the writ rather than with preliminary discussions. And it is no easy matter to change this long-established cultural pattern, which is the task Frankel sets for himself in this book.

Frankel's tone has changed from *Criminal Sentences* to *Partisan Justice*. Both are hortatory and polemical, but the former is written with controlled anger and reformist fervor, whereas in the latter the tone is that of injustices and inefficiencies seen and regretted, of hope, without self-deception, narrowly retained. And the proposals for reform offered in *Partisan Justice* are both less precise and less far-reaching than those in *Criminal Sentences*, though both areas are equally in need of reform. General suggestions of broad directions for desirable reform now substitute for the earlier detailed recommendations. I wish Frankel had risked himself further but that, I suppose, is properly his decision — and perhaps a matter of taste. Nevertheless, it is both an accurate description of *Partisan Justice* and fair criticism that the diagnosis of the disease it describes far exceeds the prescription suggested for its cure.

Frankel's discussion of criminal procedure gains from his attention to English and western European practices. He stops short of advocating any substantial move to inquisitorial practices but he rec-

ognizes that the Europeans have much to teach us — as well as much to learn from us. The Scandinavians, in particular, have been creative in blending adversarial and inquisitorial procedures in the settlement of criminal issues. Such a blend is, it seems to me, what we should be moving toward in this country.

Instrumental changes of the type Frankel recommends — ethical and professional controls of excessive partisanship, the development of alternative and less expensive methods of dispute resolution (civil and criminal), and similar step-by-step modulations of the lawyer's self-serving dominance of private disputes — will help to improve our processes of litigation and to lessen the inflationary pressures of our relentless partisanship. This book is an important contribution to that movement. It is a book to be read; it certainly deserves better than a false belief that it has been absorbed by osmosis by way of this or any other review. It is excellent treatment for the lawyer's prototypical disease, so well described by G.K. Chesterton: "the horrible thing . . . is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."<sup>3</sup>

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3. G.K. CHESTERTON, *The Twelve Men*, in TREMENDOUS TRIFLES 85-86 (1909).