How Adversarialism Triumphed — and What It Wrought

BY REUEL E. SCHILLER*

AMALIA D. KESSLER

INVENTING AMERICAN EXCEPTIONALISM:
THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877

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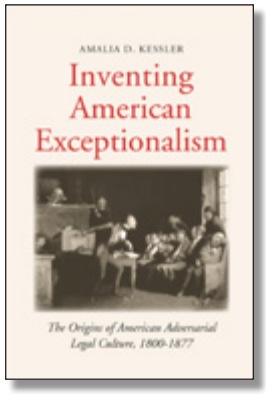

One of the first things that every would-be attorney learns in law school is that American courts resolve disputes in an "adversarial" manner. Each side in a case is responsible for generating its own evidence and its own interpretations of the law. Lawyers then present this information to passive, neutral adjudicators — judges and juries — that resolve the dispute. Much civil and criminal procedure is based on this foundation of adversarialism: responsive pleadings, party-led discovery, examination and cross-examination of witnesses, shifting burdens of proof, voir dire, impassioned opening and closing statements to juries. In the United States, judges and juries may render the final verdict, but the lawyers for the parties define the shape and structure of a case.

At some point in school, a law student may learn about an alternative approach: an "inquisitorial" system in which judges take a more active role in the litigation. In such a system the judges dictate the direction of the case. They develop the factual record themselves, perhaps with the aid of a judicially-controlled bureaucracy of masters, commissioners, and examiners. Occasionally, a student may get to debate the relative merits of the adversarial and inquisitorial systems, perhaps in a comparative law class in which American adversarialism is contrasted with the more inquisitorial systems of continental Europe. While this debate may raise questions about the wisdom of one system or another, it does not challenge one basic assumption: that adversarial adjudication is the bedrock of the American legal system. It's as American as baseball, hot dogs, apple pie, and Chevrolet.

Amalia D. Kessler's fascinating, erudite book, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877*, tells a very different story. Adjudication American-style, she persuasively argues, is not inherently adversarial. Instead, nineteenth-century America saw a battle between proponents of both adversarial and inquisitorial systems. Her detailed, well-told narrative explains why the adversarial system triumphed to such a degree that its existence now seems foreordained rather than the product of a specific, historical process.

Kessler starts *Inventing American Exceptionalism* by recapturing the lost tradition of inquisitorial adjudication in the United States. The first place she looks are the early nineteenth-century courts of equity in New York State. These courts were not simply vehicles for the pallid fragments of equity that still waft through our contemporary court systems. Instead, they had a completely different way of resolving disputes. Judges, assisted by other officials, who may or may not have been lawyers, developed a written record by presenting witnesses with interrogatories. The parties were not entitled to cross-examine witnesses, or even have lawyers. Indeed, the specifics of the proceedings were secret, in order to ensure the candor of witnesses. The orality we associate with common law trials was rare. Judges then rendered their decision based on the record that they themselves created.

Nor were courts of equity the only inquisitorial institutions that Kessler uncovers. She describes the conciliation courts of territorial Florida and California. These courts were designed to quickly and efficiently resolve disputes in an informal manner. Lawyers were not necessary, nor were specific legal causes of action. Instead, these courts empowered respected members of the community to paternalistically render decisions in disputes that would ease social tensions and enforce community norms. Although conciliation courts failed to take root in the United States, Kessler demonstrates that they were heatedly debated by mid-nineteenth-century legal reformers. Adversarialism, she shows us, was not taken for granted in the decades before the Civil War.

According to Kessler, America's last great bout of inquisitorial adjudication occurred immediately after

* Reuel Schiller is Professor of Law at UC Hastings and author, most recently, of *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism*.

the Civil War, in the form of the tribunals established by the Freedmen's Bureau to resolve disputes among recently freed slaves and between those freed people and their former masters. As with courts of conciliation, these tribunals, which frequently adjudicated disputes informally without the aid of lawyers or specific procedural requirements, were designed to promote social stability rather than to serve as forums for the enforcement of legal rights. The leaders of the Bureau saw them not as adversarial courts, but as institutions designed to teach the freed slaves and white southerners the value of racial harmony and free labor.

These experiments in inquisitorial adjudication were not successful. The promotion of the Field Code in 1848 subsumed equitable forms of action into common law's adversarial procedures. Indeed, even before then, New York's equity courts were behaving in an adversarial manner, with lawyer-driven, oral examinations and cross-examinations of witnesses. Conciliation courts, while debated, were never implemented, and Freedmen's Bureau tribunals disappeared with the end of Reconstruction.

Kessler convincingly demonstrates why these various inquisitorial experiments failed. In the first place, inquisitorial equity courts required large bureaucratic staffs that were not forthcoming in relatively stateless early nineteenth-century America. Additionally, the interests of the legal profession were not furthered by inquisitorial adjudication. The fact that these courts deemphasized the use of lawyers did not please the profession in either a purely financial sense or with respect to its ability to affect the outcome of cases. Kessler also demonstrates that the oral emphasis of the adversarial system allowed lawyers to increase the status of the profession by portraying themselves in a classical mode: as virtuous leaders, instructing the people through oratory in the model of Cicero or Quintilian.

Inquisitorial tribunals faced other difficulties as well. Kessler recounts how they became enmeshed in many of the political battles in the nineteenth century. This was most obvious in respect to the Freedmen's Bureau, which quickly became a victim of the politics surrounding the end of Reconstruction. Similarly, Kessler demonstrates how early nineteenth-century equity courts managed to make enemies on both sides of the political aisle. To Jacksonian Democrats, they were elitist engines of tyranny with unelected chancellors bent on using equitable doctrines to assist corporations and the rich. To the Jacksonians' Whig opponents, they were a source of the worst sort of Jacksonian corruption as venal politicians handed out jobs as examiners, commissioners, and magistrates to their unqualified political allies.

Finally, Kessler brilliantly demonstrates how the proponents of adversarial justice linked their preferred system to emergent elements of American political culture. In particular, they portrayed access to adversarial adjudication as an element of individual freedom. Statist, paternalist, inquisitorial adjudication was a system unfit for men bred to liberty in the United States. Similarly, inquisitorial adjudication's supposed disdain for the rule of law and its preference for conciliatory outcomes undermined the legal predictability that was necessary for free men to act in the emerging market economy. The triumph of adversarial adjudication, according to its proponents, was necessary to promote individual freedom and dynamic economic growth.

Kessler has written a compelling, convincing book. It is also a master class in the use of difficult source material in an effort to see beyond how law is portrayed in statutes, case law, and learned treatises. Her deep dive into the day-to-day operations of the New York courts of equity, the conciliation courts of Florida and California, and the Freedmen's Bureau, as well as the experiences of the people who appeared before them, give the reader a true sense of how the law operated in the lives of litigants in nineteenth-century America.

Nor does Kessler's story satisfy only antiquarian concerns. She argues that we live in a world where the adversarial system is broken. Access to the system is profoundly limited by its cost. Private settlement of legal disputes has become the norm. The use of compulsory arbitration clauses in consumer and employment contracts has made a mockery of the genuine benefits of even a properly functioning adversarial system. In this context, *Inventing American Exceptionalism* can serve an important purpose beyond its superb illumination of the past. It can help us cast aside the historical and ideological blinders that suggest adversarialism is the inevitable product of America's political and legal DNA. In fact, Kessler writes, "our present-day procedural landscape is the legacy of social and ideological struggle." Adversarialism is not a foreordained inevitability. Instead, as Kessler shows us, other models of adjudication have a historical legacy in the United States, and that fact should "help to free our imaginations as to what might be possible" as we seek to reform our collapsing system of civil justice. ✯

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✯ ✯ ✯ *Email mollyselvin@gmail.com* ✯ ✯ ✯