



BOOK REVIEW

The Lawyer/Judge as Republican Hero

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Introduction

Inventing American Exceptionalism tells a two-sided story. On one side is the replacement of the distinctive inquisitorial processes of equity courts with the adversarial ones of common-law courts. The equity courts relied heavily on taking testimony in writing and in secret, freezing the record so that parties could not shape their evidence in light of their opponents'; in the common-law courts, testimony was presented in open court and was subject to oral cross-examination. Kessler tells this story through an examination of the merger of law and equity in New York's Field Code of 1848.¹

On the other side is the persistence of interest in nonadversarial processes, especially mediation. These nonadversarial processes were not inquisitorial in the same way as the equity model, though. Rather, they were "equitable" in that they relied on the application of ethical standards only loosely connected to "law," and therefore only loosely called for lawyers' participation. Kessler tells this story in chapters dealing with arbitration and with the courts convened by the Freedmen's Bureau during Reconstruction. Arbitration was linked genealogically to practices in civil law nations, but was less inquisitorial, and also, importantly, less legalistic than civil law processes. The Freedmen's Bureau courts were paternalistic ones whose aim was to educate or socialize both the newly free population and the former master class into the norms of a full market society. Importantly, both chapters show lawyers being pushed to the processes' margins.

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1. Roughly half the book is devoted to New York. Kessler concludes the book with a brief discussion of the connection between her story and the description of contemporary U.S. legal culture as one of "adversarial legalism," a concept described by Robert Kagan. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001). The connection is, I believe, loosely analogical rather than genealogical, with contemporary alternatives to adversarial litigation such as mediation in its current forms being similar to arbitration and like institutions in the past. Just as a caution to potential readers, I would suggest that those whose primary interest is in adversarial legalism and its alternatives will probably find little useful to them in Kessler's book—which is not to say that there is little useful in the book.

The two sides of the story are connected by the ways in which lawyers saw themselves as active participants in a republic of civic virtue—what I will call lawyers’ *self-understandings*. By that phrase I refer to the ways in which lawyers saw their role in society—a psychological state rather than a reflection of reality. To oversimplify for purposes of introduction, the merger of law and equity occurred, according to Kessler, because equity proceedings did not provide a venue in which lawyers could display their republican skills at oratory and cross-examination.² The secrecy of those proceedings prevented public displays of oratorical skills, and their commitment to the presentation of evidence only in writing blocked cross-examination.³ Merging law and equity, though, fortified lawyers’ place in the public sphere. Lawyers’ self-understandings similarly explain why arbitration never took a strong hold in dealing with commercial or other disputes: lawyers wanted to see themselves as public performers of civic virtue. Those self-understandings also play some part, though almost certainly not the largest one, in the disappearance of paternalistic mechanisms of socialization through legal processes in the Reconstruction South: the lawyers’ civic virtues were republican, dealing with equal citizens, rather than paternalistic ones aimed at bringing some people “up” to some prescribed level.

As Kessler puts it, “internalists insist that legal change is primarily a product of developments internal to law and legal institutions as such,” while “externalists believe that law and society are inextricably linked, such that there is no way to understand developments in law without relating them to socioeconomic, political, and cultural change more generally.”⁴ I suggest that Kessler’s argument is at its heart an externalist one, once we understand that externalist accounts do not require that legal developments reflect the immediate material interests of lawyers and their clients. The lawyers’ self-understandings, I argue, are best understood as externalist in spirit. It seems to me, though, that those self-understandings were probably constant throughout the antebellum period. To account for merger, we must identify something that changed, and the best candidate, I believe, is the accumulation of small modifications of equity procedure, in the service of rationalizing the legal system. I conclude that despite Kessler’s evident intention, she may not have put the internalist account entirely to rest.

2. AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 190-99 (2017).

3. Presentations before the highest equity court—the Chancellor—were public, but because they were centralized (there being only one chancellor per jurisdiction) only residents of the capital city could easily observe them. *See id.* at 193.

4. *Id.* at 8.

I. Between Internalist and Externalist Accounts

I think it important to use the language of lawyers' *self-understandings* rather than that of lawyers' *interests* because Kessler frames her argument as offering a middle way between traditional interpretations, often called "internalist," of the merger of law and equity, and revisionist ones, often called "externalist."⁵ The distinction between internalist and externalist accounts of procedural reform should perhaps be refined by distinguishing among several possible versions of externalism. On Kessler's own account, though, lawyers' self-understandings—a dimension of culture, I would think—were the driving force behind merger.

A. Questions About the Characterization of Revisionist Accounts

Kessler's positioning herself between internalist and externalist accounts results in an unfortunate characterization of the main thrust of revisionism. She characterizes merger as part of lawyers' strategy to avoid more drastic revisions of the substantive law that would adversely affect their clients. To quote Kessler, "the revisionist suggestion that the code and its procedural reform were intended merely to forestall demands for material (redistributive) change relies on an account of lawyers' motivations that is so caricatured as to beggar belief."⁶ Kessler cites a passage in Morton Horwitz's classic *Transformation of American Law*, where Horwitz writes, "[T]he merger of Law and Equity . . . marks the final and complete emasculation of Equity as an independent source of legal standards . . . [and] represents another instance of the subjection of the already internally eroded tradition of substantive justice to an increasingly formal set of legal rules . . ."⁷ As I read those passages and the remainder of the text in which they are embedded, Horwitz focuses on the failure of proposals to modify substantive law, with the merger of law and equity being the best that reformers could achieve politically rather than a strategy by legal elites to "emasculate" the movement for reform of substantive law. I do not find in Horwitz's account an attribution of motivation, and such an attribution would be, in my view, inconsistent with the general thrust of Horwitz's book.

Kessler also cites a book review by Robert Gordon addressing the so-called "codification movement,"⁸ a social and political effort to replace the common law with statutory codes. I cannot find in Gordon's book review, however, anything like the revisionist account Kessler describes. Nor do the other discussions cited to Gordon provide such an account. As I read them, those discussions deal with "law reform" movements generally, without specific

5. *Id.* at 9-10.

6. *Id.* at 150.

7. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 265-66 (1977).

8. Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 431-32 (1983).

reference to the Field Code. The closest thing to the revisionist account I can find is a summary of what Gordon calls “an important article” by Lawrence Friedman, which, in Gordon’s summary, argues “that what lawyers call ‘law reform’—largely formal change of their internal rules and practices—is a kind of symbolic political action undertaken in response to demands by outside interests for real social change.”⁹

B. Toward a Reconstructed Revisionist Account

The traditional interpretations are Weberian in spirit. Merger was a step in the rationalization of legal proceedings, streamlining them to reduce the costs of dispute resolution, and reducing the number of dispute processing institutions from two—the equity courts and the common-law ones—to one, thereby improving the form of hierarchy associated with such institutions. The revisionist interpretations are materialist in spirit, according to Kessler. Merger occurred because lawyers’ clients benefited more from the rules being developed in the common-law courts than from the more flexible approaches taken in equity courts. The lawyers who supported merger benefited derivatively (and materially) from their clients’ interests.

Kessler focuses on lawyers’ self-understandings rather than on their material interests.¹⁰ However, I believe those self-understandings are at least as much matters of culture and ideology as they are of material self-interest. Early in the book Kessler describes the heroic images propagated of judges sitting in equity. A section on “The Idealized Image of the Equity Judge” quotes extensively from James Kent and Joseph Story, both of whom provided a “heroic conception of the equity judge.”¹¹ For them, the equity judge had a “refined moral sensibility” and “intellectual acuity and discipline”: “Enlightened man of letters and Romantic genius—enjoying acute powers of scientific reasoning but endowed at the same time with refined moral and literary sensibilities—the equity judge was, in sum, nothing short of heroic.”¹²

Kessler writes that “[f]or both [Kent and Story], it was an article of faith that the role of the judge in equity was quite distinct from that of his common-

9. *Id.* at 438 (citing Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351 (1969)).

10. Some theorizations might suggest that the difference between material self-interest and self-understanding is thinner than the difference, for example, between material interests broadly understood and Weberian concerns about rationalization. These theorizations would hold that a person has an interest in realizing her self-understandings not significantly different from her interest in advancing her material interests. I am inclined to agree with a theorization along such lines, but my discussion of Kessler’s book proceeds on the assumption that the distinction between self-understanding and material self-interest is at least thick enough to support her arguments.

11. KESSLER, *supra* note 2, at 37-48.

12. *Id.* at 38, 40, 45.

law counterpart.”¹³ I cannot quarrel with this as a description of Kent’s and Story’s views of the distinctive role of the equity judge. But I do have some question about the accuracy of the views that the equity judge differed in republican virtues from the common-law judge. The antebellum North is, as historians say, not my region or my era these days,¹⁴ but my recollection of scholarship on the common law there and then was that similar encomia to common-law judges filled the pages of those who wrote about *them*.¹⁵ If that is so, Kessler may have identified the heroic image of judges as such. On this interpretation all judges—and, as Kessler also shows, lawyers as the judges’ collaborators—were an important group supporting the larger community’s commitment to republican virtue.

On Kessler’s account, the merger of law and equity enhanced the opportunities of lawyers to display their republican virtues through public oratory and cross-examination:

Engaging in courtroom oratory, lawyers were able to display their passion for vindicating virtue and assailing injustice So too, cross-examination afforded them a powerful tool for dramatically distinguishing between virtue and vice. And the common law tradition ensured that there would be a substantial audience of citizens available to witness such lawyerly display By way of contrast, many of these mechanisms were unavailable in the quasi-inquisitorial tradition of equity.¹⁶

The “lawyers’ embrace of oral, adversarial procedure (like the concomitant rejection of equity’s distinctive, quasi-inquisitorial tradition) was . . . a product of the cultural imperative of republican self-display”¹⁷

II. Questions of Evidence

I have some questions about the evidence on which Kessler relies. First, as to public oratory. In principle, arguments made to chancellors could be displays of republican virtue not different from the displays made in arguments to juries in common-law proceedings. Kessler’s argument is that the centralization of

13. *Id.* at 37.

14. My earliest work in legal history focused on the antebellum South, and I have made some efforts to keep up with the literature on the law of slavery, but I have not read broadly in recent scholarship on law and lawyers in the antebellum North.

15. See generally PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965) (describing ante bellum praise of lawyers for combining the virtues of “the head” and “the heart”); ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES, COURTS, AND THE COMING OF CIVIL WAR* (2016) (focusing on Southern thinkers). As the subtitle of Brophy’s work indicates, it deals with the antebellum South, and its discussion of legal oratory is embedded in a broader discussion of the rhetoric of college lectures and addresses.

16. KESSLER, *supra* note 2, at 158.

17. *Id.* at 198.

equity proceedings substantially reduced the opportunities lawyers as a group had to engage in this form of display.¹⁸ The opportunities were available only to lawyers who practiced where the chancellors sat or who were able to travel there.¹⁹ Kessler shows, though, that equity proceedings in antebellum New York had developed to the point where lawyers in the periphery were able to make their arguments to audiences where they regularly practiced.²⁰ For reasons that the traditional Weberian account of merger identifies, equity procedures had been distributed away from Albany to local courthouses and even hotels, where the chancellor's delegates held hearings.²¹ That distribution has a complex relation to the traditional, Weberian account of merger. On the one hand, it reduced the costs of equity proceedings, perhaps shoring equity up. On the other, it reduced the purported benefits that those proceedings elicited: a distinctive, specialized, and highly personalized form of knowledge lodged solely in the chancellor.

The implication, I think, is not that Kessler's argument is wrong, but that it should be reframed. It was not the reality of the separation of equity and common law that mattered; rather, the lawyers' understandings of that separation mattered. And Kessler shows quite effectively that the proponents of merger *believed* that merger would enhance lawyers' opportunities to show their republican virtue.

The same is true, even more clearly, in connection with oral cross-examination. Kessler offers a close and subtle reading of a marvelous diary by an upstate New York lawyer, Henry Vanderlyn. Vanderlyn *describes* what he calls his devastating cross-examination of a witness in a will contest centering on his client's claim of fraud.²² But the diary does not show what actually happened in the cross-examination—of course it provides no transcript (hardly to be expected in a diary), but not even an example or two of lines of cross-examination. And, I think, that is entirely expectable. Cross-examination is generally plodding and not dramatic. It consists of questions about details whose answers, in the aggregate, undermine the factual claims made by one's adversary. Here is Vanderlyn's summary of the crucial cross-examination in the will case:

18. *See id.* at 190-99.

19. *See id.* (“[T]he *Achorn* suit, as a chancery proceeding, denied [Henry Vanderlyn] the full potential for republican self-display” because he “had to hire a local, Albany-based lawyer to undertake the oral argument before chancery once the taking of testimony was completed.”).

20. *See id.* at 190-99.

21. *See id.* at 195 (noting that Henry Vanderlyn's “account of . . . [some] suits in equity suggests that [the *Achorn* testimony] . . . was probably taken in Perkins' Hotel, the local inn and tavern”).

22. *Id.* at 185-86; *see also id.* at 195 (offering another description by Vanderlyn of this cross-examination).

Birdsall was sworn as a witness to support the deed. I was 6 days engaged in cross-examining him and completely succeeded in involving this infamous villain in a dozen or more flat and positive contradictions and perjuries.²³

Kessler's summary at this point is, "The centrality of courtroom oratory (including both speech-making and cross-examination) to Vanderlyn's *self-conception* as a lawyer stemmed from its utility as a mechanism for republican *self-display*."²⁴ "Display" surely yes as to oratory, but I doubt so as to cross-examination. Vanderlyn doesn't appear to describe anyone sitting through the six days of cross-examination. Yet, of course, "self-conception" is clearly right as to both oratory and cross-examination. Moving from equity's written evidence to the common law's oral testimony did not provide lawyers with real opportunities to display republican virtue through cross-examination; or, at least, Kessler's material does not show that it did.

What Kessler shows is that Vanderlyn *thought* that cross-examination was an occasion for displaying republican virtue. And, generalizing, merger provided an occasion for lawyers to articulate how procedure was linked to republican virtue. Cross-examination as lawyers described it was about republican virtue, and it became available through merger.

III. Combining a Cultural Account with a Weberian One

The chapter in which Kessler analyzes Vanderlyn's diary has the title, "Cultural Foundations of American Adversarialism."²⁵ Lawyers' self-understandings constituted antebellum legal culture. Yet, one thing nags: as Kessler emphasizes, the image of the equity judge and lawyer as republican hero was seemingly ever-present—meaning, present throughout the antebellum period. Yet, the merger of law and equity was a change, and it is difficult to account for change by referring to something constant throughout the period.

Perhaps what happened was that, at the outset—for Kent and Story, for example, but perhaps not for lawyers practicing in the equity courts—republican virtue was to be found *only* in the equity courts, and something else (mean-spiritedness, profit-hungriness, self-interest, whatever) would be found in the common-law courts. The cultural change would then be that the lawyers in the equity courts became frustrated that they were only imperfectly able to display their republican virtues (or, perhaps, that they could not see themselves displaying the virtues they knew they had) because of the limitations on equity procedures. Modest changes in the amount of public oratory helped some, but not enough. A full display of republican virtue required merger so that lawyers could demonstrate their oratorical skills everywhere—before judges hearing

23. *Id.* at 186.

24. *Id.* (emphasis added).

25. *See id.* at 151-99.

cases, before juries trying them, and before spectators viewing hearings in their home locations.

Two difficulties attend this reconstructed account. First, cross-examination plays no significant role in it. Yet, as I have suggested, the evidence Kessler provides suggests that it was not cross-examination as such, but instead the image lawyers had of cross-examination, that mattered. If lawyers imagined that cross-examination was an important way for them to display republican virtue, equity proceedings where they could not engage in cross-examination impaired their self-image.

Second, the reconstructed account seems in some tension with Vanderlyn's self-portrayal in his diary. From what Kessler gives us, Vanderlyn seems to have been completely satisfied with his ability to see himself displaying republican virtue in unreformed equity proceedings. There appears to have been no cultural change sufficient to account for procedural reform.

Still, I suggest that something along the lines of the reconstructed account holds out some promise, and among its virtues is that it blurs the distinction between internalist and externalist accounts.

Conclusion

Kessler writes that the adoption of the Field Code was “a fait accompli—the logical end result of developments long in the making, including . . . the rise of a procedural culture premised on lawyers’ republican self-display.”²⁶ But if the “rise” was small, what may be left are the accumulation of small changes in procedure, such as locating equity hearings away from the capital. Those changes may have catalyzed dramatic shifts in equity lawyers’ views of how they could best present themselves as bearers of republican virtue. That in turn led them to support merger, so that they could see themselves, in their own minds if not in reality, performing civic virtue before an admiring public.

26. *Id.* at 198.