Secrets and Lies in the History of US Adjudication

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Amalia Kessler, The Invention of American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877 (2017).

Amalia Kessler's book, *The Invention of American Exceptionalism*, is a rich history of American procedural development. The book, which is meticulously researched, sets procedural developments in their political context, and is an excellent example of a social history of law. She describes the relationship between 19th-century procedural developments and struggles over both capitalism and race. She traces English influences on our history, such as the development of equity practice, and French influences, such as the Freedmen Bureau Courts, which were inspired by French conciliation courts. Among other things, Kessler unearths the American equity tradition and with it fights over judicial power versus lawyer (and jury) power, as well as the development of lawyering as we know it today. There is too much in the book for me to adequately summarize it, so instead I will offer two vignettes from the book, the first conceptual and the second a narrative, both focused on the antebellum history of equity.

The first, conceptual, vignette describes the requirements of historic equity procedure and helps us understand our own practices by making them strange to us. Indeed, one of the best things about reading a historical study such as this is learning to understand our world in new ways by comparing it with a past understood on its own terms. So it is with the story of equity and the judicial search for truth. The modern cliché is that there was never a better test of truth than the cross examination. This idea, Kessler shows, was invented in the first decades of the nineteenth century by lawyers seeking to show their value to clients and to society. In equity practice at that time, a very different view of how to get to the truth prevailed: the truth would be best obtained in secret, without the pressures of the parties bearing down on witnesses to alter their stories.

In its ideal form, equity practice required that the judicial officer (the chancellor or an appointed magistrate) question witnesses in secret. The officer would take notes on the testimony of the witness without the lawyers or parties present. This was the equivalent of what is known today as a deposition. Because it was in secret, the lawyers could not cross examine the witnesses. Indeed, they did not know what the witness told the judicial officer so they could not use that witness's testimony to prepare other witnesses or their own clients for their deposition. When all the witness testimony was taken and every piece of evidence admitted, the testimony would be published to the lawyers – that is, it would be made public – and no more evidence could be introduced. At that point, lawyers could use the testimony to argue their case. Secrecy was the path to truth-telling.

This is a very different conception of human psychology than that found in the "crucible of trial" formulation so popular today. Instead of getting at the truth under the pressure of that Perry Mason moment when the witness is confronted by her own lies, the truth is obtained by relieving the pressure and allowing the witness room to be honest without attorney intervention or prompting. If the witness could not be influenced during the proceeding by the lawyer, she was more likely to be truthful. If the attorney could question her and prepare her to conform her testimony to that of other witnesses, she was more likely to misrepresent the truth to favor one or the other of the parties. This is similar to the principle that governs the German system today, as I understand it, in which the judge questions the

witnesses and preparing a witness for testimony is an ethical violation. Not so in our system, where lawyers conduct depositions outside the judges' presence and *not* preparing a witness is malpractice.

What happened to the idea that truth is best obtained in secret, without lawyer involvement? In his masterful history of procedure, How Equity Conquered the Common Law, Steve Subrin argued that the Federal Rules of Civil Procedure largely represent equitable practices rather than those of common law courts. Yet our rules and trial procedures depend on lawyer-led interrogation with no judge present; we cannot even imagine judges questioning witnesses in secret unless the matter concerned national security. How can this be? The answer is partly structural. The equity courts during the period Kessler covers were understaffed and therefore appointed magistrates, rather than permanent commissioners, to interview witnesses. Because the magistrates were not familiar with the case and were sometimes in the pockets of the lawyers, they became increasingly dependent on the questions lawyers submitted in advance of depositions. In fact, they became something more like stenographers than investigators. Ultimately, driven by the fiscal and structural constraints and by the constant pressure of the bar, equity courts in New York abandoned secrecy and permitted lawyers to attend depositions. The problems and complaints about equity meant that for many years—and especially as his tenure neared its end—Chancellor Kent may have been one of the most hated men in New York. (Kent was one of the most famous jurists of his day and is often praised in procedural histories as the father of equity practice in the United States).

Lawyers, argues Kessler, wanted the opportunity to show off to justify their fees, and the way to do that was to transform litigation into a kind of spectacle, which in turn required lawyers to erode the secrecy that characterized equity practice. Secrecy limited their ability to perform for their client. Lawyers styled themselves as great orators, comparing their role favorably to Cicero, and attempted to reposition themselves as servants of the public good so that they might stave off accusations that they were manipulating legal process to increase their fees. The accusation that "doing well by doing good" is self-serving clap-trap should sound familiar to the modern ear.

One could not reasonably disagree with Kessler's assessment that manipulation was part of the story of professionalization of the bar that in the mid-1800s. But there is something incomplete about this description of lawyers (then and now). The example that comes to mind is Richard Henry Dana, a Boston lawyer who in the 1840s and 50s represented fugitive slaves and persons tried for attempting to forcibly free them, as well as commercial clients. Dana wrote in his diary that his representation of fugitives brought him support from the Boston community and thus more clients, helping him to build his commercial legal practice. But Dana took a risk standing up to the slave power, which was strong in Boston (where the local mercantile elite benefitted greatly from slavery), and was attacked and severely beaten by a ruffian on the streets of Boston for doing so.

The issue of controlling lawyer behavior is a theme that runs through the book, one that is crucial to the policy questions (past and present) about lawyer-versus-judicial control over proceedings. This is one core aspect of the adversarialism to which Kessler's title refers. And it brings me to the second vignette, a wonderful story from the courts of equity in late-seventeenth-century England that provides great insight.

A lawyer managed to get his case into the chancery court and this gave him an advantage over his adversary, who was only familiar with common law practices. How so? The lawyer knew the commissioner who had taken the testimony of his witness in the case and obtained (wrongfully) the transcript of that witness's testimony. Recall that once all the evidence was taken in a case at equity, the judge closed the case by "publishing" the deposition transcripts. This lawyer took it upon himself to publicize the transcript after the first witness (*his* witness) had testified. He did this by coming to his rival's office and reading the statement to him out loud. The common-law lawyer took his client

immediately to the equity court and asked to provide his client's side of the story. Unfamiliar with equity practices, he revealed to the commissioner that his opponent had read him the testimony. This was a disaster for his client. The commissioner told him that he would now close the case to further evidence, as the testimony had been publicized.

What does this story teach us? That some gamesmanship is unavoidable in any procedural system, and always has been – at least since the late 1600s. No matter what rules are adopted or protections created, unscrupulous actors will abuse their power, cheat their adversary, and distort the system of which they are a part. Within the judicial system, this is true not only of lawyers, but also of judges and magistrates. A court system, in the end, depends on the people who use it and the people who staff it. The problem, in other words, is not only the system but the participants. Out of the crooked timber of humanity, no straight thing was ever made.

The procedural system plays a crucial role in what people can and cannot get away with, and the norms within that system play a role in what people will and will not do. However well-designed the system, abuses are inevitable. The philosopher Stewart Hampshire argued that moral conflict is eternal and that one must focus on procedures that allow contestation of moral norms. The court system offers one such set of procedures, but they are always eroding, in need of shoring up, and in danger of being distorted. The procedures themselves are a site of moral conflict. Kessler's book is important because it reminds us both that these battles have been going on forever and that understanding past fights helps open possibilities for reform in the inevitable future conflicts.

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