

Book Review

Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*. New Haven: Yale University Press, 2017, pp. 449, \$84.00

Reviewed by Renée Lettow Lerner

Amalia Kessler highlights fundamental problems with the adversarial system as it operates in the United States, problems which are crushing parties. Lawyers and judges—and even legal academics—are reluctant to acknowledge the depth of the problem. From time to time legal academics, commissions, and rules committees suggest tweaking this or that procedure. But the difficulty is far beyond fixing by tweaks.

Here's an example: Why are depositions so long, so costly, and so pointless? Partisan lawyer control of depositions has ruined them as an efficient tool of fact investigation. Without strong judicial control, the deposition degenerates into partisan procedural bickering. American legal professionals are now so inured to this inefficiency and expense that they hardly notice. Lawyers paid by the hour have a financial incentive not to notice. A presiding judge on the continent of Europe examining a witness can cut straight to the heart of the matter in a few minutes. It would be salutary for every American lawyer, judge, legal academic, and civil party to see this judicial examination, to remind us of what we're giving up with our obsession with adversarialism.

Another example: The American legal system almost never fully adjudicates cases on the merits. Trials are vanishing. In federal courts, less than two percent of civil cases are decided following a trial, and in state courts less than four percent.¹ Less than five percent of criminal cases are decided after a

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1. Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND CIVIL JUSTICE INSTITUTE 3 (2011), <http://poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf>. (In 2010 in civil cases in U.S. district courts, bench trials as a percentage of total dispositions were 0.34%, and jury trials were 0.73%.); Paula Hannaford-Agor, Scott Graves, & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, CIVIL JUSTICE INITIATIVE 25 (2015) (Of non-domestic civil cases reaching disposition in a sample of state courts between July 1, 2012 and June 30, 2013, bench trials were 3.4% of dispositions, and jury trials were 0.1%. 16% of the sample were small claims.); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

trial.² Instead, we have in civil cases some dismissals or summary judgments, but primarily settlement. In criminal cases, we have plea bargaining. What's wrong with settlement and plea bargaining? Settlement negotiations turn in part on the merits of the case. But often, more importantly, results of negotiations depend on the parties' tolerance of risk and delay, and the huge expected costs of litigation.³ Even in this era of settlement, the administrative costs of the tort system are high. For the decade 2000-2010, the total cost of the tort system averaged \$241.4 billion per year, of which 24.3% was administrative expense—including legal expenses—for an average of \$58.7 billion per year.⁴ Plea bargaining is inherently coercive. The government, with its monopoly of charging power, can offer a defendant such a discount on a sentence in exchange for a guilty plea that it's hard to refuse, no matter what the facts. Again, what's driving prosecutors to offer such deals is the huge cost of litigation.⁵

And often ignored are the millions of pro se parties flooding lower courts. These parties don't want to or can't hire lawyers, because of the expense. Pro se parties' suits concern matters such as debt, landlord-tenant disputes, immigration, domestic violence, divorce, and child custody. Without legal guidance, these parties flounder. They don't know how to present key evidence, or even what evidence is relevant.⁶ Many judges and clerks provide little assistance, either because guiding parties takes too much time and effort, or because court personnel are afraid to contravene adversarial norms.⁷

2. For fiscal year 2016 in the U.S. district courts, of 77,318 total criminal defendants whose cases reached disposition, 226 received a disposition by bench trial, or 0.3%, and 1,627 received a disposition by jury trial, or 2.1%. 68,459, or 88.5%, pled guilty. Charges were dismissed for 7,006 defendants, or 9%. *Statistics and Reports*, Table 5.4, UNITED STATES COURTS, <http://www.uscourts.gov/statistics/table/54/judicial-facts-and-figures/2016/09/30>. In a study of state felony defendants in the 75 largest counties in the United States in 2009, 2% were convicted in a trial, and 1% were acquitted. *State Court Processing Statistics, Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, 24, Table 21, BUREAU OF JUSTICE STATISTICS (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.
3. J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 NYU. L. REV. 59, 68-80 (2016); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-51 (1994); Hannaford-Agor, Graves, & Miller, *supra* note 1, at iv ("Litigation costs that routinely exceed the case value explain the low rate of dispositions involving any form of formal adjudication.").
4. 2011 UPDATE ON U.S. TORT COST TRENDS, TOWERS WATSON, 6, 8, 12 (2012), <http://www.casact.org/library/studynotes/Towers-Watson-Tort-Cost-Trends.pdf>.
5. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8-11 (1978); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470-86 (2004).
6. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743-44, 754-60 (2015).
7. BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 49-53 (2017).

Other judges help pro se litigants in a way that's completely discretionary and inconsistent.⁸

It's no wonder that in the World Justice Project's most recent Rule of Law Index, the United States' civil justice system received an abysmal score for "accessibility and affordability."⁹

Our system of adjudication, in short, is a failure. How did it get this way? Why is the American legal profession so complacent? Why are legal academics so silent? And what can be done?

Kessler's book answers these questions. She puts the blame where it belongs, on Americans' unthinking adoration of adversarialism. American lawyers have worked hard to foster this blind reverence. A few persons have dared to challenge it.¹⁰ Kessler has the historical and comparative knowledge to do so effectively. Her book demonstrates, from the early nineteenth century, the harmful effects of lawyer championing of adversarial procedure. And Kessler shows that there are practical alternatives. These alternatives are found not just in other legal systems, but in our own history.

The main difference between adversarial and inquisitorial proceedings is who controls presentation of evidence: the parties, meaning the lawyers, or judges. On the continent of Europe in civil cases, the parties nominate—suggest to the judge—evidence such as witnesses and documents. The judge questions parties and lawyers, reviews documents, calls witnesses, and examines them personally. In modern practice, counsel for the parties are present at examinations of witnesses, but they are not the primary questioners. Proceedings are discontinuous, going forward in discrete, logical stages. In contrast, a lay jury requires proceedings that are continuous, with all evidence heard at once in a concentrated trial. On the continent, if a defendant is found

8. Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899, 938-47.
9. 0.42 out of a possible 1.0. The United States' overall score was 0.73. It was ranked 19th out of the 113 countries. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017-2018, at 148, https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_o.pdf.
10. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 404-05 (1906) (arguing that "contentious procedure" "disfigures our judicial administration at every point"); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80-102 (1949); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 87-99 (1980); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); THEODORE L. KUBICEK, ADVERSARIAL JUSTICE: AMERICA'S COURT SYSTEM ON TRIAL (2006); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009); BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011); JAMES R. MAXEINER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011); Steinberg, *Adversary Breakdown*, *supra* note 8; BARTON & BIBAS, *supra* note 7, at 150-54.

not liable, there is no need to hear evidence about damages. Appeals are thorough, on questions of fact as well as law, and on the merits (3).¹¹

Lawyers and judges tend to identify the American legal tradition exclusively with common-law, adversarial procedure.¹² Many American legal professionals are not aware that our entire system of pretrial discovery—depositions, interrogatories, document discovery, and the rest—is drawn from equity, a nonadversarial tradition.¹³ This ignorance is understandable, because lawyers took control of these practices and transformed them to their liking. In this book, Kessler shows that the assumption of an exclusively adversarial tradition in America is mistaken. She reveals the rich vein of American procedure that is nonadversarial, or, as she puts it, quasi-inquisitorial. Courts that eschewed adversarial proceedings included courts of equity, conciliation courts, and Freedmen’s Bureau courts.

Lawyers Transform Equity from Inquisitorial to Adversarial

Kessler’s story of the fate of New York’s court of equity is especially fascinating, and instructive. Few members of the legal profession today understand the significance of equity in the Anglo-American legal tradition. In part, that’s because of the way we teach civil procedure. We often discuss jury trial—or at least its former importance—without spending much time explaining that it was necessary for the legal system as a whole, from its earliest days, to have an alternative. We rarely explain to students the differences between the systems of “common law” (or “law”) and equity—and the reasons for these differences.

The mere term “common law” often confuses law students and lawyers. They tend to associate the term with law as declared in judicial decisions as opposed to statutes. Sometimes they use it to refer to the Anglo-American system as a whole, as opposed to the civil law tradition that developed on the continent of Europe. They don’t understand that “common law” refers to a system developed in a particular set of English courts with particular jurisdiction and procedure. The common-law courts were characterized by strict limits on joinder of parties and claims; pleading down to one or few factual issues; oral and public trial; the inability of parties or other interested

11. See also ARTHUR ENGELMANN ET AL., *A HISTORY OF CONTINENTAL CIVIL PROCEDURE* 3-81 (Robert Wyness Millar trans. & ed., 1969) (1927); Langbein, *German Advantage*, *supra* note 10, at 826-35; Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 *DUKE J. COMP. & INT’L L.* 61, 63-76 (2003); PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 254-59 (2004); JAMES R. MAXEINER, *GUIDING LITIGATION: APPLYING LAW TO FACTS IN GERMANY* 9-15 (2008), <https://ssrn.com/abstract=1230453>.
12. See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (“The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on both sides of the question.’”) (citation omitted); Sklansky, *supra* note 10, at 1635-39.
13. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. PENN. L. REV.* 909, 922-25 (1987).

persons to testify; narrow remedies; lack of appeal on the merits; and—driving the rest—decision-making by lay juries.¹⁴

As is evident, common-law procedure could not adequately handle disputes that were factually complex, involved multiple parties and claims, or required complicated remedies such as injunctions. Because of the limitations of common-law procedure, it was vital to have an alternative. The main alternative was equity, as administered in the Court of Chancery. In equity, a judge decided the case, not a jury. Judicial officers were active in gathering and evaluating documents and testimony. Chancery drew inspiration for much of its practice from the inquisitorial systems on the continent of Europe.¹⁵

England passed the system of equity to the American colonies, hence to the states. One of the many strengths of the book is Kessler's illumination of English practice, and the ways in which American practice drew from it or departed from it. The transatlantic dialogue about procedure during this period was powerful, with the Americans and English borrowing ideas from each other.

Kessler lays out the English Chancery practice of examining witnesses: in private, without parties' counsel present, by a court official or court-appointed commissioners, "gravely, temperately, and leisurely," "without any menace, disturbance, or interruption," with testimony recorded in writing, and with a general prohibition on examining witnesses repeatedly (32-33). The New York court of equity borrowed these features, which were intended to prevent the parties from securing perjured, or unreliable, testimony. A salient characteristic of the adversarial system is the bias effect. Because of party gathering and presentation of proofs, witnesses and other evidence tend to be strongly biased, obfuscating the truth. Equity procedure aimed to reduce the bias effect.

In the new republic, American judges such as James Kent and Joseph Story extolled the role of the equity judge. Such a judge, they explained, needed not only legal learning but a highly developed morality. Equity played a special role in protecting the weak, including minors, women, and the mentally ill. Because equity judges were far more active in shaping litigation and investigating facts than common-law judges, they had the potential to mitigate another of the adversarial system's worst defects: the wealth effect. Adversarial procedure gives powerful advantages to the wealthy, who can afford the most persuasive lawyers and partisan experts.

In other words, an inquisitorial system treats investigation and adjudication of claims as a public good. The parties do not bear the costs themselves. So inquisitorial systems are—or at least have the potential to be—more accessible to and protective of the poor.

14. JOHN H. LANGBEIN, RENÉE LETTOW LERNER, & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 86-105, 147-52, 271-74, 702-05 (2009).

15. *Id.* at 268-80.

But equity courts in England and in New York suffered from a fatal mistake. These courts did not have enough judicial staff. Running an inquisitorial system requires more judges or court staff than does a common-law system, because judicial personnel actively investigate a case and examine witnesses. In England until the nineteenth century, a single man, the Lord Chancellor, ran the entire system of equity with little assistance. Likewise, in the early nineteenth century, New York had only one chancellor. Not surprisingly, therefore, both the English and New York courts of equity began to be plagued with delay.

These delays grew worse, and eventually intolerable, because of equity courts' rising caseload. Equity courts were vital to support the growing commercial economy of England and New York. Courts of equity handled, among other issues, matters concerning mortgages and business associations. As Kessler shows, in New York the court of chancery was centrally involved in collection of debt.

Kessler provides deep economic, political, and social context for the procedural changes she describes. In the chapters on chancery, for example, she discusses the transformation of a subsistence economy into a market economy. She is attentive to both the internal conditions of the legal system—such as the understaffing of chancery—and external influences—such as anxieties about the change to a market economy, the effects of the financial panics of 1837 and 1839, and the rise of mass democracy.

Lawyers took advantage of both the understaffing of chancery and the growing view that democracy required more public institutions to insert themselves into examinations of chancery witnesses. Well before the Field Code formally merged law and equity in New York in 1848, the parties' lawyers not only were routinely present at examination of chancery witnesses, but did all or virtually all the questioning themselves.¹⁶ Cross-examination of a single witness could last days. The result was that chancery became less inquisitorial and more adversarial. As Kessler observes, "One of the most important consequences of the new dominance of lawyers in chancery proceedings was a significant increase in cost and delay" (102).

To uncover these changes, Kessler has done extensive archival research. She has unearthed telling contrasts between the written record of witness examinations before the lawyers got involved, and after. In the era before the parties' lawyers inserted themselves, records of witness examinations were brief summaries of the witness's testimony and the conclusions the taker of testimony drew from it. After the lawyers showed up, the written record grew much longer and began to read more like a verbatim transcript, with extensive wrangling between the lawyers over the propriety of questions and answers.

The resemblance to a modern deposition is not accidental.

16. On the subsequent history of the Field Code's merger of law and equity, see Kellen Funk, *Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76*, 36 J. LEGAL HIST. 152 (2015).

The Importance of Lawyers' Interests

Why were lawyers so eager to insert themselves into witness examination? There were a variety of reasons, some immediate and others broader. On the immediate side, Kessler acknowledges that lawyers, by dominating proceedings, wanted to gain strategic advantage in litigation.

It would have been worth, too, discussing the importance of lawyers' fees. The more lawyers' skill is perceived as shaping the outcome of litigation, the more money they can charge clients. Therefore, adversarial systems favor higher lawyer incomes.¹⁷

To enjoy the higher incomes that adversarial procedure could bring, lawyers had to release themselves from regulation of their fees. During this period, American lawyers pushed hard to get free from any vestiges of restrictions imposed by courts or legislatures.¹⁸ When it came to fees, American lawyers presented themselves as businessmen who should enjoy freedom of contract just like other businessmen—including the use of contingent fees. In contrast to the regulated English bar, which was prohibited from charging contingent fees, American lawyers gained total freedom to contract for fees. As a result, the American bar was more entrepreneurial and aggressive. American lawyers' freedom respecting fees was one reason the United States never adopted the rule common to the rest of the world: The loser in litigation pays the winner's legal expenses, including lawyer fees.

Kessler reveals the broader political and social context in which lawyers operated. She especially highlights lawyers' efforts, until now understudied, to display the virtues of civic republicanism. Antebellum lawyers faced serious challenges from mass democracy. Hostility toward the legal profession was strong, because of concern that lawyers fomented disputes and were too expensive.

In response, American lawyers—not for the last time¹⁹—wrapped themselves in virtue, justice, democracy, and liberty. In portraits, lawyers wrapped themselves in a toga, the symbol of ancient civic republican virtue. The book includes, along with other vivid images, an arresting 1809-1810 portrait of Virginia lawyer William Wirt in a toga (155).

American lawyers claimed that they were virtuous truth-seekers exposing the vice that could undermine not only commercial relations and justice, but democracy and liberty. Lawyers demonized judge-empowering courts of equity, and valorized their own oratory. Echoing seventeenth-century English

17. TULLOCK, *supra* note 10, at 96-97.

18. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 10-17 (1984); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 *DEPAUL L. REV.* 231, 234-45 (1998); LANGBEIN, LERNER, & SMITH, *supra* note 14, at 1048-56.

19. On the trial bar's linking of adversarial procedure with liberty and anti-Communism after World War II, see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN STORIES OF AMERICAN LAW* 240-78 (2007); KAGAN, *supra* note 10, at 34-58.

rhetoric, American lawyers linked courts of equity with absolutist rule, and the common law with liberty. They eagerly imported common-law practices into equity. Lawyers emphasized their love of virtue in arguments to the jury and cross-examination. Lawyers glossed over the possibility that both of these could be misleading or promote obfuscation. Kessler has found choice examples in the unpublished diary of a small-town New York lawyer, Henry Vanderlyn. Vanderlyn especially prided himself on his cross-examination of an adverse witness in a chancery case, in which he gloated that he had revealed the wicked fraud of the “infamous villain” (186). This single cross-examination took six days.

Lawyers’ claims of civic virtue enhanced not only their standing in their communities, but also their chances of election to public office. Many lawyers of that era had political ambitions. Kessler discusses lawyers’ dominance of legislatures of the period, both state and federal. By the 1840s and 1850s, for example, 67% of the members of the U.S. House of Representatives were lawyers (152).²⁰ Lawyers especially predominated on legislative committees concerning legal procedure, and therefore were well-positioned to propose and enact legislation favoring the profession. Such legislation included requirements that chancery testimony be taken orally and in public—that is, adversarial examination and cross-examination by lawyers (96-97). The fox was guarding the henhouse.

Kessler does a great service in uncovering the self-interested motives of lawyers. She mentions the weakness of the American bench, in contrast to the powerful English bench (166, 330-31). It would be good to hear more about the American bench’s weakness. The turn to greater adversarialism required participation by not just lawyers, but also judges. Lawyers became more aggressive, but judges had to let them take control.

Kessler points out that in New York chancery, rising caseloads with not enough addition of judges was partly responsible for handing over authority to examine witnesses to lawyers. Chancellor James Kent authorized examination of witnesses by counsel, in an effort to curb delay. He soon regretted it. The law of unintended consequences operated with a vengeance; delays grew worse than ever, along with costs. Kent might have predicted that giving lawyers a greater adversarial role would never result in more efficiency.

Another important development that weakened the bench during this period was the advent of judicial elections.²¹ Judicial elections led to corruption of the bench by party machines in some areas, and also greater dependence of judges on the bar for nomination and election. The trial bench, especially, diminished in power and prestige. Judges in many states lost the power to

20. Citing MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 58 (1995).

21. JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 103-122 (2012); Renée Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed’s New York*, 15 *GEO. MASON L. REV.* 109, 114-30 (2007); LANGBEIN, LERNER, & SMITH, *supra* note 14, at 503-13.

comment on evidence to the jury.²² Judicial comment on evidence was one of the principal means that English judges used to prevent counsel from having too much emotional sway over the jury. Judicial comment was so powerful in England in civil cases—and English judges were so generally respected—that in the mid-nineteenth century many English legal professionals argued that jury trial was an unnecessary bother and expense. From the mid-nineteenth century on, England began curtailing use of civil jury trials; today they are virtually abolished.²³ Bench trials occur instead. Because they sit without juries in civil cases, English judges are active on the bench, and don't hesitate to ask questions of witnesses. English barristers presenting a case or arguing before judges are businesslike. They do not make the obvious emotional appeals that American lawyers make to lay juries.

Conciliation Courts and Freedmen's Bureau Courts

Kessler examines two other alternatives to adversarial proceedings besides equity: conciliation courts and Freedmen's Bureau courts. Conciliation courts originated in the revolutionary French *bureaux de conciliation*, established in 1790, and spread to other European countries including Spain. Kessler is well-positioned to explore this French influence, as she has studied and written extensively about French tribunals, especially merchant courts.²⁴ Through Spanish influence, Florida and California established a variant of these courts, known as *alcaldes* courts. Several other state legislatures and constitutional conventions seriously considered adopting conciliation courts, and a few authorized them. These courts, however, either were never actually established or soon sputtered and died. The Freedmen's Bureau courts were modeled on the conciliation courts. During military occupation of the South, Freedmen's Bureau courts provided some measure of justice to newly freed African-Americans. But they depended completely on military force, and ended with the withdrawal of Northern armies.

Both the conciliation courts and the Freedmen's Bureau courts had the admirable goal of reducing the wealth effect. They were intended to provide ready access to justice for the poor, without the need to hire lawyers. Supporters of conciliation courts were particularly concerned to resolve disputes about debt (in Florida) and to quiet labor unrest (in New York). Evangelical Christians—who gave high priority to the peaceful reconciliation of differences and to justice for the poor and newly free—strongly promoted both courts.

22. Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 220-41 (2000); Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595 (1985).

23. Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 255-78 (2005).

24. AMALIA D. KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* (2007).

Neither of these courts was supposed to be staffed by legal professionals, and neither was supposed to apply formal law. The idea was that the judges would command respect because of their high position in the community, and they would encourage litigants to follow community norms. In the conciliation courts, this was really a sort of mediation. If the parties could not agree, they could proceed to an ordinary civil suit. Applying Max Weber's categories, conciliation courts and Freedmen's Bureau courts offered "kadi justice" as opposed to formal rationality and fixed legal rules. As Weber conceived it, the kadi, Islamic law judges, used their own authority and community norms to achieve personalized justice without regard to predictability (227).²⁵ Indeed, the Spanish word *alcalde* derives from al-kadi.

This informal, personal conception of law ran into many difficulties in the American context. In the relatively egalitarian American society, it was unclear who, if anyone, had sufficient extralegal authority to persuade litigants to defer and agree. Community norms were also often disputed. This problem was especially acute in the Freedmen's Bureau courts. A gulf divided the expectations of the Southern white planters, on the one hand, and on the other of African-American workers and the Northern army officers who served as judges, who espoused free labor beliefs. Predictably, Southern whites and Northern Democrats attacked the Freedmen's Bureau courts as an "oppression," and a "Star Chamber inquisition," "without any fixed rules of law (312-314)." This opposition praised adversarial procedure. But regardless of whether the system was adversarial or inquisitorial, in the American context, it was highly desirable for judges to have legal training, and to derive their authority from the formal, predictable law they applied. The Freedmen's Bureau courts were a solution that could only be temporary.

Solutions

What about a more permanent solution to the woes of our adversarial system? Kessler is under no illusions about the difficulties. Her entire book illustrates the opposition one can expect from the lawyers. I would add, many judges are not inclined to help. In our system, judges are themselves members of the bar and former lawyers, and so can be expected to share a bias toward the profession.²⁶ In contrast, judges on the continent of Europe have separate legal training specifically as judges, and few of them have been practicing lawyers first. The role of advocate and the role of truth-finder are considered to be different.²⁷ And deciding—let alone investigating—cases on the merits is

25. Citing 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 976 (Guenther Roth & Claus Wittich eds., 1978).

26. BARTON, *LAWYER-JUDGE BIAS*, *supra* note 10, at 1-3, 21-38. Gillian Hadfield has observed that, in comparison with other countries, the American bar and bench combined wield enormous power over the legal system and its costs. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 152 (2010).

27. Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the*

hard work and entails responsibility. Few judges are eager for more work and more responsibility.

Even the legal academy has been infected with proadversarial bias. The required first-year, first-semester civil procedure course “focuses almost exclusively on adversarial courtroom litigation,” (336) as opposed to alternative dispute resolution proceedings, settlement negotiations, and administrative hearings. Some academics glorify the idea of the adversarial litigator as “a warrior on behalf of the public good” (337). To make public policy through litigation—rather than legislation or regulation—is held out as the highest professional ideal. Other academics see a spiritual connection between the adversarial system and a free-market economy. The animating principle of both, according to Richard Posner (considered here as an academic), is competition (337).²⁸ But there is a vast difference between voluntary exchanges for goods and services, and a government-run system of dispute resolution that ultimately relies on force. In litigation, adversarialism leads to the wealth effect and the bias effect, with greater cost, delay, and often inaccuracy. Adversarial competition increases efficiency in a market, but decreases efficiency in litigation.

Yet we need not despair. There are plausible ways to move the system closer to the inquisitorial model, and thus lift the burden the lawyers impose and reduce the wealth and bias effects.

A promising reform Kessler suggests for state and federal courts is to expand the role of the master and to make masters permanent, salaried judicial staff (349). This would relieve the parties of their current burden of paying the master. Kessler emphasizes the importance of finding mechanisms to ensure the masters’ competence and neutrality. Masters could be tasked with taking greater control of pretrial discovery, preventing some of the abuse and keeping the case focused on the merits.

These changes to masters would partially solve the perennial problem of a shortage of judges. Kessler’s solution seems more likely to come about than an increase in the number of ordinary judges. Calling for an increase in ordinary judges tends to trigger protests from sitting judges because their prestige would be diluted. Proposing a significant increase in ordinary judges would also provoke partisan battles over appointment and allocation. These difficulties help to explain the creation in 1968, and growth over the past fifty years in the number and role, of federal magistrate judges.²⁹ Magistrate judges, who are not Article III judges and are appointed for a term, have lower prestige than district judges, and so do not threaten district judges’ dignity or

French Cour d’Assises, 2001 U. ILL. L. REV. 791, 809-12.

28. Citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 321 (1972).

29. RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 24 (3d ed. 2005), <https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf>; Peter G. McCabe, *A Brief History of the Federal Magistrate Judges Program*, *FED. LAW.*, May/June 2014, at 44, 46-47, 50-52; Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 *HARV. J. ON LEGIS.* 343 (1979).

provoke such political battles. The federal judiciary has, in effect, increased its numbers and stratification. Greater numbers and stratification of judges, with corresponding possibilities for promotion based on performance, are important ways nonadversarial systems ensure an adequate and competent judiciary.

Kessler also makes a valuable suggestion concerning expert witnesses. Expert testimony in civil cases is today one of the worst features of the American adversarial system. Trials and hearings degenerate into laughable battles between dueling “experts,” utterly scripted by the lawyers. Judges are tasked with keeping junk science out of the courtroom, but *Daubert* hearings have themselves become lengthy partisan spectacles. Kessler proposes that instead of this apotheosis of adversarial cost, delay, and bias, American judges appoint their own experts. How would a judge choose an expert? Kessler recommends the French solution, which is also the German solution. French and German courts maintain rosters of pre-vetted experts on particular topics in particular geographic areas.³⁰ Kessler also envisions the possibility of using groups of experts to advise the judge as a sort of special jury.

These reforms point to the ultimate goal of empowering the judge. And we should have judges worthy of empowerment. To the extent that we hesitate to give judges more power over litigation because of their bias or incompetence, there are ways to check those problems. Two possibilities are the use of a panel of judges, including in the first instance, and a thorough appeal on the merits, of fact as well as law. Judges should feel personal responsibility for the substantive correctness of the outcome, and not just sit as umpires or referees enforcing procedural rules. It’s a measure of how far adversarialism has triumphed that this is a radical proposition in the United States today.

Lawyers and judges are not going to make this argument. One of the great advantages we have as academics standing outside the fray is our ability to critique the legal profession and the legal system. Lawyers and judges have criticized the legal academy as impractical or useless.³¹ We have a response. Virtually the entire American legal system is designed for the benefit of lawyers at the expense of parties and society as a whole. Legal academics are almost the only group with the knowledge and freedom to reveal this, and to argue for much-needed reform.

30. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1265-71 (2005); Lerner, *Intersection of Two Systems*, *supra* note 27, at 836-38; Langbein, *German Advantage*, *supra* note 10, at 835-41.

31. Judge Harry Edwards’ 1992 critique of the legal academy drew great attention. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). In 2011, Chief Justice John Roberts made a similar, if much more informal, critique. “Pick up a copy of any law review that you see, and the first article is likely to be the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, which I’m sure was of great interest to the academic that wrote it, but isn’t as much help to the bar.” John G. Roberts, Jr., Remarks at the Fourth Circuit Judicial Conference, C-SPAN (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>.