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A History of the Present: A Comment on Amalia Kessler, Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication

A Comment on: "Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication" by Amalia D. Kessler.

Issachar Rosen-Zvi*

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A History of the Present: A Comment on Amalia Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*

Issachar Rosen-Zvi[*]

Amalia Kessler's article *Deciding Against Conciliation*[1] is both rich and insightful. It shows that, contrary to the conventional view that associates conciliation with inegalitarian societies characterized by rigid hierarchical social forms, "in the mid-nineteenth century, the United States embarked on an extensive debate regarding whether to adopt institutions termed 'conciliation courts,' whose primary function was to promote the amicable, extralegal settlement of disputes."[2] The article closely follows the debate between the supporters and detractors of conciliation courts, demonstrating how this debate helped galvanize the perception of formal adversarial adjudication as a unique American feature, which is linked to the nation's commitment to promoting freedom and free enterprise.

Despite its focus on conciliation courts, the article should be read as part of a larger, and much more ambitious, project. The larger project sets out to uncover the inquisitorial roots of the self-proclaimed American

* Faculty of Law, Tel Aviv University.

1 Amalia Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423 (2009).

2 *Id.* at 426.

adversarial tradition. It seeks to expose the fractures and gaps in the widely held narrative describing the history of American procedure in terms of an uninterrupted linear development, from its messy and inefficient writs-based, English common-law origin to the modern adversarial procedure we have today. Kessler's argument is that this narrative is nothing but a myth, and one with serious repercussions. In fact, inquisitorial procedures are an integral part of the American tradition, which was ultimately abandoned only in the early twentieth century when law and equity were merged. To prove her argument, she undertakes a meticulous "archeological" study aimed at unearthing the largely forgotten inquisitorial institutions and procedures.

While the current article recounts the history of conciliation courts, Kessler's previous article — *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*[3] — engaged in a similar exercise with regard to a different procedural device — the Master. In that article, she skillfully demonstrated that what is mistakenly considered a novel managerial procedural device, which came into being to deal with the challenges posed by complex litigation, is in fact nothing more than a reemergence of the old Chancery master, which was part and parcel of equity's quasi-inquisitorial model.

But why engage in such a project? What is the purpose of exposing the hidden inquisitorial roots of the Anglo-American adversarial procedural tradition? One could, of course, answer this question by simply pointing to the desire to expand human knowledge. Kessler, however, is much more ambitious. But whereas *Deciding Against Conciliation* provides no explicit explanation for pursuing this project, luckily *Our Inquisitorial Tradition* does. It opens with the following statement of purpose: "understanding our history will permit us to diagnose our ailments and thus recognize that . . . our system is the product of a botched marriage between inquisitorial and adversarial traditions. In addition, rediscovering our past will enable us to see the virtues of inquisitorial procedure."[4] Moreover, the article continues:

> Our ability to deploy inquisitorial procedures as a remedy for the excesses of the adversarial has been stymied by an unnecessary, adversarial ideology, based on false reading of our own history . . . By recovering our forgotten, quasi-inquisitorial equity tradition, this

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3 Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

4 *Id.* at 1184.

> article seeks to challenge our adversarial self-conception — our assumption that inquisitorial procedure is entirely alien to our legal tradition and incompatible with our commitment to due process — and thereby to facilitate our ability to undertake meaningful, inquisitorial procedural reform.[5]

This explanation is, however, unconvincing; at the very least it requires some proof, which neither the current article nor the previous one provides. Exposing the existence in the past of various procedural devices, which many understand to be primitive and flawed, has rarely served as a convincing tool for reform. On the contrary, these procedures are usually cast aside as relics of the past that our society has managed to overcome. To the recovery of inquisitorial procedures in American history one might, therefore, reply along the following line: we have all sorts of flawed procedural mechanisms in our past, such as the ordeal. Is that a valid reason to reinstitute the ordeal today?! Thus, if Kessler is interested in convincing her readers of the need to adopt an inquisitorial reform, she should provide *normative* rather than historical reasons. There are many good normative arguments for both sides which have been discussed extensively in the literature: Lon Fuller as the champion of adversarial procedures is one example,[6] John Langbein as his opponent is another,[7] and, of course, there are many others.

Despite the apparent similarities between the two articles, *Deciding Against Conciliation* implicitly provides a better rationale for engaging in such a project. The rationale has to do with the *type* of history that is being produced — a history of the present. History of the present, a term coined by Michel Foucault, is different from traditional history. Traditional history is always searching for an origin of some phenomenon; it seeks the "kernel of the present at some distant point in the past and then shows the finalized necessity of the development from that point to the present."[8] It attempts to "capture the exact essence of things, their purest possibilities, and their carefully protected identities, because this search assumes the existence of immobile forms that precede the external world of accident and succession."[9]

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5 *Id.* at 1185.

6 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

7 John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

8 HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT BEYOND STRUCTURALISM AND HERMENEUTICS 118 (1982).

9 Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139 (D.F. Bouchard ed., 1977).

History of the present, on the other hand, is interested in existing power structures and attempts to connect the inquirer's present with the past she is examining. Such a historical pursuit is concerned with transformations in the way people perceive and interact with the world, transformations which have created the structures through which we still experience the world. In other words, it is a genealogical enterprise that attempts to contribute to freeing thought from the tyranny of the past.

Genealogy does not look to origins to capture the essence of things, or to search for some "immobile form" that has developed through history. The secret disclosed by genealogy is that there is no essence or original unity to be discovered. It shows that what we take to be rational — the bearer of truth — is rooted in domination and relationship of forces — in a word, power. When genealogy looks to beginnings (or descent), it looks for accidents, minute deviation, chance, passion, petty malice, surprises, feverish agitation, unsteady victories and, of course, power.[10] We find all that and more in *Deciding Against Conciliation* (and much less in *Our Inquisitorial Tradition*). In *Our Inquisitorial Tradition* Kessler is still concerned with the past, and writes the history of the past in terms of the present. She studies the Anglo-American procedural past, claiming to discover that a procedural institution that existed at an earlier time evolved into the institution that we know today as the Master. She argues that there is a myth that we have always been adversarial, which she would like to dispel in order to open a path for reform. But as I have already argued, this argument is unconvincing, because she does not take the "myth" seriously.

Her recent article — *Deciding Against Conciliation* — foregoes, for the most part, the futile attempt to dispel the myth. She uses history in order to clarify present-day myths, but she takes these myths very seriously. And for good reason. The myth is not just a façade that can be dispelled, because it has taken on a life of its own; it has created a reality. We cannot take away the mask and uncover the "true" reality of our procedural system because the mask is itself quite real. The genealogy of the present form of procedure is a criticism of this form, because it undermines the claims of the *ideology* of procedure to being concerned with eternal problems or truth, and because it uncovers procedure's links with practices it seemed to have left behind. Kessler shows, quite convincingly, that conciliation courts failed not (just) because of the professional guilds' petty self-interest or the fact that these institutions originated in Europe, but because of the American people's

10 *See id.* at 146.

self-conception as free subjects of a democratic society. It was, therefore, ultimately *impossible* to adopt such an institution even for those who found it appealing for various reasons.

From reading the article, it is quite clear that it is not just perceptions that we are dealing with, but an active constitution of the adversarial subject. The debate over conciliation courts (among other similar debates about the ideal American polity) did much more than sharpen existing positions and perceptions; it actively participated in the very constitution of a separated adversarial procedure as we currently know it, and of Americans as the free, industrious entrepreneurial subjectivities who are the subject of such a procedural regime. And if this is true, merely exposing the Anglo-American inquisitorial past (as was done in *Our Inquisitorial Tradition*) is far from enough.

Yet, Kessler is also concerned with showing the historical contingency of the development of adversarial formal procedure, which has since acquired the status of a situation inherent in the natural order of things. And in order to do so, she shows that "[b]eneath the great continuities of thought, beneath the solid homogenous manifestation of a solid mind or of a collective mentality . . . beneath the persistence of a particular genre, form, discipline, or theoretical activity, one [can] detect the incidence of interruptions,"[11] and contingent choices made about the kind of society in which contemporaries hoped to live and the kind of dispute resolution mechanisms that they deemed consonant with these aspirations. It is this understanding that keeps that door open for reform. Since the present does not, in fact, rest upon profound intentions and immutable necessities, but on countless lost events, there is a hope that history will change its course. And such articles are a reminder of that. If I am correct in my interpretation, the last paragraph of the article, which can be read as referring to a purposeful intention, does a disservice to the nuanced argument of the entire article.

To conclude my Comment, I would like to point out that it is unsurprising that Kessler's project was undertaken at this moment in time. In the preface to his book *The Birth of the Clinic*, Foucault speculates that it is only now possible to uncover the structures of traditional medical experience, because we are on the brink of yet another transformation in these structures. This holds true for Kessler's project as well. Procedural law is currently undergoing massive transformations — from individualist to collective, from simple to complex, and from formal procedure to procedure governed by the logic of alternative dispute resolution. Everything is changing and subject

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11 MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE 4 (1969).

to negotiation, including the very core values of procedure. The contractual logic of alternative dispute resolution is penetrating traditional procedures and altering them from within. The judge's role has shifted dramatically from a neutral umpire to a case manager.[12] That is both what enabled this project to be carried out and what makes it so valuable.

12 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).