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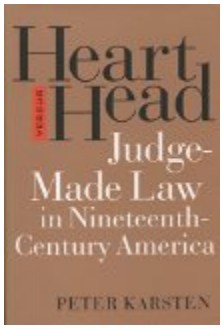
Peter Karsten. *Heart Versus Head: Judge-Made Law in Nineteenth-Century America.* Chapel Hill: University of North Carolina Press, 1997. xv + 490 pp. $55.00 (cloth), ISBN 978-0-8078-2340-8.



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Heart-Felt Equity?

In *Heart Versus Head*, Peter Karsten challenges the major premise of nineteenth-century American legal history: "American jurists did not change many of the rules of common law and equity in the nineteenth century. Continuity, not change," he underscores, "characterized their work" (p. 26). Throughout this important work, Karsten seeks nothing less than to counter and overthrow the current explanatory paradigm (that nineteenth-century jurists deliberately changed the rules of law and equity to advance and protect the emerging corporate world).

This work is both a careful and near exhaustive reread of the sources and doctrines of private law of the era and an open attack on the reigning explanation for American nineteenth-century legal development. *Heart Versus Head* will be much analyzed, parsed, debated, and weighted in the coming seminars, colloquia, conferences, and journals, and it may spawn a whole new burst of publishing in American legal history. It will not be ignored. While *Heart Versus Head* has problems (suggested below), its challenge to the reigning "economic-oriented paradigm" (to use Karsten's phrase)–that is, to the Marxist, materialist explanations of such scholars as Morton Horwitz, Lawrence Friedman, and Richard Posner–is much welcomed. Karsten's own arguments for a "kinder, gentler" understanding of nineteenth-century common law is an ironic use of Republican President George Bush's well-known phrase because Karsten's interpretation remains well within the late twentieth-century Democratic party, politically correct, stream of politics and historical writing.

His work, too, suffers from being too much a story of victims and villains; all successful wealthy persons and corporations in this work are by definition evil villains, and the margins of society, such as women, children, and workplace-injured workers, its victims. What is new here is Karsten's choice for heroes: state appellate judges, especially from the states of the Midwest and South. How those state appellate judges "softened the harsh edges of the common law" (p. 263) and employed the continuity of the rules of law to do "justice" to the community as part of their Christian duty (not to assist the capitalist in building industrial America) is the fundamental new story of *Heart Versus Head.* By his interpretation, Karsten changes the nature and focus of the arguments in the field and for that alone he is to be applauded.

Karsten performs much much heavy-lifting in this work. He presents his arguments in four parts: first, in "An Introduction to This Tale of Two Voices," he surveys the field of nineteenth-century legal history and sets out the conventional wisdom and how he proposes to explore the validity of the current paradigm. Second, in what he calls "Part One: Old Channels and Moorings: A Jurisprudence of the Head," Karsten analyzes the doctrinal traditions of the law and English precedents including tort law. Also included here is a section entitled, "Entr'acte. Eddies: A Jurisprudence of the Hand." In this section, Karsten takes on the cost-benefit analysis of law, and finds it lacking. Judges crafted equitable justifications

for decisions, he argues, not economic arguments. In the third part of this work, which he entitles, "Part Two: Strong Currents: A Jurisprudence of the Heart," Karsten lines out numerous nineteenth-century rules of law and the crafting of the exceptions of it, by midwestern and southern judges. In his last chapter, the fourth part of this work entitled, "Conclusion: What We Found, and Some Explanations of the Jurisprudence of the Heart," Karsten reviews his evidence and again (redundantly) suggests that the rules and logic of the law (the jurisprudence of the head) gave way to equitable exceptions to the black letter law to the benefit of society's weak (the jurisprudence of the heart). By the conclusion, readers will certainly have grasped Karsten's point that numerous state appellate judges ignored or explained away the rules of the "leading" case law as they actually applied those rules to real people. When the rule worked a hardship on plain people, if one is to believe Karsten, then the judges acted positively to limit the rule and to carve an exception; their hearts won out over their training and their heads.

Karsten (and the University of North Carolina Press) are to be congratulated for publishing the demonstration of his extensive research in 148 pages of expository footnotes together with three indexes: "Index of Characters" (by which he means the state judges who crafted these new exceptions and rules), an "Index of Cases ('Texts') Discussed," [Karsten can not resist post-modern jargon which hurts his overall story and will limit this work's shelf-life], and "General Index." These extensive notes might be of most interest to specialists in the field, but they will also greatly assist students and general readers in grasping the arguments and interpretations Karsten opposes and in understanding the interpretations he supports. His footnotes are, at time, more lively to read than his text, since in them he is more blunt and condemning about the flawed books and arguments he challenges. In particular, Morton Horwitz and his 1977 book, *The Transformation of American Law, 1780-1860* forms the primary target of Karsten's interpretation. After Karsten, *Transformation* no longer satisfies. Horwitz's economic determinism and conspiratorial account of legal change in the service of economic development, acceptable to American liberal academics during the Cold War, can no longer bear the weight of Karsten's contradictory evidence and sounder control of cultural context. Good riddance. The mainstream of scholars and students in American legal history adopted and embraced *Transformation* since it reflected so well their own anti-business and anti-corporate biases. Horwitz paints the law and the judges, especially state judges, as mere tools of evil capitalists (along fairly straight Marxist lines, comrades); it is not wonder that the Horwitz thesis became popular in the academy and lasted.

Yet *Transformation* had its critics from the start who argued that Horwitz's book was not only bad law but worse, bad history. Twenty years before the appearance of *Heart Versus Head*, John Phillip Reid reviewed *Transformation* for the *Texas Law Review*. His review, "A Plot Too Doctrinaire" (vol. 55, August 1977: 1307-21), warned historians and lawyers that they must be alarmed at the "conspiratorial materialism" of Horwitz. Warming to his concerns that the economic determinists were at the gate, Reid wrote: "The iconoclasts have invaded the temple of legal history. They have smashed the fetishes, blotted out the frescoes, and desecrated the tombs. If we do not force them to the evidence, they will even desacralize Clio" (p. 1321). But no one was listening. Now, finally, Karsten forces Horwitz to the evidence and Horwitz is dismantled; Reid's puissant foresight is vindicated.

Where Horwitz and his fellow travelers described a nineteenth-century legal world wherein jurists carved up the common law and its equity traditions in order to make the law serve the wealthy, the corporations, and the capitalists, Karsten describes a nineteenth-century legal world where "humane" midwestern and southern state judges (Karsten uses "humane" fourteen times between pages 231-321, and I may have under-counted) resisted. Such judges rejected the pro-business leads of their English and East Coast brethren and consciously interpreted common law rules in pro-plaintiff ways. What Karsten so ably demonstrates is the *rejection* of, or the severe limitation through numerous exceptions of the legal doctrines historians generally identify with the era– the fellow-servant doctrine, the assumption of risk, and contributory negligence as well as less well known today but important rules then such as (without naming all the rules which caught Karsten's eye) ancient-lights, broken special labor contracts, attractive nuisance doctrine in railroad turntable cases, and allowing third party beneficiaries to a contract to sue on the contract. While the conventional wisdom decrees that judges employed instrumentalism to aid businessmen before the Civil War era and gradually adopted a formalist defense of corporate property in the Gilded Age, Karsten discovers that jurists instrumentally employed the law throughout the century to ameliorate BOTH the rules of law AND the more and more industrial, mechanized, impersonal world of the nineteenth century.

Driven by these judges' training and their commit-

ment to *stare decisis* to understand and apply the law as a "moral science" and to provide equitable justice, Karsten takes these judge-made rules and exceptions seriously–not for the first time perhaps, but for the first time so persuasively and so in-depth. Judges sought principled exceptions to the rules of tort law, labor law, municipal law, and so forth in order to craft a more just and, well, equitable law. Karsten demonstrates that too often plaintiffs who should have lost on appeal (if Horwitz's economic determinists were really in charge on the American judicial scene) won. Even the Law and Economics interpretation, best represented by the constant stream of publications of Judge Richard Posner, does not explain why the evidence indicates that in an overwhelming number of cases, economic rationalizations did not exist or were discussed and abandoned as bad public policy, unneighborly, even un-Christian.

On top of presenting an interesting story well told, Karsten does a better job than Horwitz of placing the law within its larger social and cultural contexts. Nineteenth-century judges did not exist in a vacuum (judge's) chamber sheltered from the maelstrom of change enveloping them. Their times, much more than positive law and English and Massachusetts precedents, influenced judicial decision-making; not the least of these influences was their religious opinions. In assessing "the power of non-economic impulses in nineteenth century America" in the "legal culture" of the era (pp. 300-301), Karsten concludes that "religious convictions [were] the prime source of the Jurisprudence of the Heart" (p. 323). By his emphasis on the non-economic forces which acted on the judges, by his understanding these state judges as men seeking to employ the law in the service of the weak, by his control of nineteenth-century values–such as his appreciation that in American history (and in the American present) religion matters–Karsten has pushed the field of legal history away from materialism and economic determinism and shoved it towards a more cultural interpretation. For this act, *Heart Versus Head* is warmly welcomed and praised.

Still, I have reservations. Why does this book appear now and where does Karsten *really* want nineteenth-century legal history to go? Peter Karsten is professor of history at the University of Pittsburgh and codirector of the Pittsburgh Center for Social History. As such, he is hardly a "neutral" scholar testing the dominate interpretation of the field. In fact, Karsten, admits he was a graduate student at the University of Wisconsin in the 1960s–one of the most radical places in the country at the time, and since. Add in his taste for social history, an approach dominated by its sacred left-wing agenda of race, class, and gender, and its implicit and often explicit dislike of America, and what the reader confronts with this author is one of the 1960s tenured radicals at odds with the very culture which supported and supports him.

Suspicion deepens: why now? Since the collapse of the Soviet Union in 1989, the final discrediting of communism and economic determinism, and the success of democratic, market capitalism, the American left has been rudderless. American left-wing academics have been searching for some place where they can preserve their fear and loathing of corporate America while defending the down-trodden, the marginal, the disreputable. So, instead of attacking capitalism and offering determinist explanations of the past, Karsten proposes a new approach with new heroes. Karsten wants historians to pursue the idea that a home-grown resistance to the extremes of capitalist development have been present all along in the state appellate judges. Karsten also believes that these state judges were never the economic creatures described by Horwitz, Posner, or Marx but were, rather, soft-hearted jurists seeking ways to ease the burdens of the weak and poor. In this fashion, then, state appellate judges from the Midwest and South became Karsten's heroes for sticking up for the little people. Carried further, these state judges would have opposed nuclear energy, saved the whales, and contributed to Greenpeace if they would have had the chance.

Karsten wants these nineteenth-century state appellate judges to possess the sensibilities that a 1960s tenured radical liberal academic possesses in the late 1990s. Just as Horwitz's interpretation found an audience in the Cold War with his economic determinism of legal development because that interpretation fit so well with the beliefs of his intended audience (other liberal academics), so, too, does Karsten's interpretation find its audience. He wants to discover that the era's judges mitigated the effects of the rule of law on the politically powerless in the society, and lo and behold he found the supporting case law. Karsten's work enriches the field; but this work should not be thought of as the one and only correct story. In John P. Reid's 1977 review of Horwitz's *Transformation of American Law*, he argued that nineteenth-century judges *might* have made economic choices as Horwitz argued but not because they favored businessmen or the corporations. Rather, and contrary to Horwitz and Karsten, Reid argued that nineteenth-century judges could just as easily have made their decisions because they genuinely believed that their decisions benefited *everyone* in the litigation and in the so-

ciety. This same warning (and criticism) can be applied to *Heart Versus Head.* In Horwitz, the businessmen and corporations benefited by activist judging; in Karsten, the injured and plain people benefit most by judge-made law. But, could it just be that both the black letter legal rules and the principled exceptions to those rules benefited all? Karsten has his politically correct interest group to preach to and who will willingly adopt his teachings. Those more skeptical and suspicious will wonder if Karsten wants to abandon one determinism for another? Just how heart-felt was judicial equity in Victorian America?

Still, Karsten succeeds in crafting an attractive and notable interpretation. He has produced an important book which must be read and considered seriously by anyone interested in American legal history, policy history, nineteenth-century cultural history, and law and society studies.

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