Book Reviews

The Ages of Classical Contract Law

The Rise and Fall of Freedom of Contract. By P. S. Atiyah. *Oxford: Clarendon Press,* 1979. Pp. 779. $49.50.

Reviewed by Charles M. Gray†

The most general of this book's many distinctions is that it places an important chapter of the technical legal history of the last three centuries in a rich setting of intellectual, economic, and political history. If the strict legal history were much reduced, the book would remain outstanding both as a synthesis of specialized work by historians and as a commentary on English institutional history and its intellectual counterpoint from the eighteenth century to the present.[1] By combining that larger picture with private law, Professor Atiyah has achieved much more. Lawyer's law is not deprived of its autonomy, but neither is it separated from the forces that have impinged on it during this period of incomparable change. In an account characterized by complexity and sensitivity to cross-currents, the book shuns a pat theory of the relationship between law and general history. Rather, it shows both consonances and dissonances between legal history and wider movements in thought and material life. Indeed, one of the book's important substantive arguments is that the law of contracts in the nineteenth century was in fundamental harmony with prevailing ideology and social needs; by contrast, in the altered moral and institutional environment of England since 1870, contract law has lacked a policy drawn from outside itself and has only edged toward conformity with new values.

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1. Although Professor Atiyah acknowledges that much of his account is relevant to concurrent developments in both the United States and Scotland, the book is largely confined to the English experience. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT viii (1979) [hereinafter cited by page number only]. Nonetheless, the book occasionally brings in American law and makes use of the more developed American historical scholarship, such as Professor Grant Gilmore's THE DEATH OF CONTRACT (1974).

Professor Atiyah divides his book into three sections with parallel structures. In each, the intellectual, economic, and political-institutional background to legal history is discussed, and then the legal history itself. The first section is mostly about the eighteenth century, but it subsumes, as *terminus a quo,* the earlier history of contracts and of England, from which the eighteenth century broke cleanly away only in its final decades. The second section covers the heyday of freedom of contract and classical doctrine, 1770 to 1870—a time of unexampled economic development and social dislocation under a competitive regime of numerous small businesses. Political economy and utilitarianism provided for this era—in a way no other ideology in history has quite matched—both a consciousness of what was happening and a set of prescriptions for what ought to happen. Ironically, the market in this period, which often worked as it was supposed to, was given its head partly by default, while an earnest society struggled to gain the science and the administrative organization to confront its problems by deliberate collective action. The book's final section deals with the decline of freedom of contract in the fractionated environment of 1870 to the present. In these times, the law has been neither disengaged from its nineteenth-century past nor unswayed by the changed values, the collectivistic legislation, and the reorganization of the private sector that have rendered that past unreal. Intellectuals have not shared a vision of the "is" in hopeful conjunction with the "ought," and the law has scarcely listened to their diverse voices.

I

Freedom of contract suggests primarily the rights to make almost any contract, to depend on its enforcement in some sense, and not to have the plain terms of the contract scrutinized for fairness. Directly antithetical to this freedom are the notion of a just price and a panoply of legal limitations on what one can effectively contract to do. Although one of the book's central themes is the rise and fall of freedom in this sense, it is also about the life and moribundity of classical contract law as that is understood by the modern lawyer—the law that was systematized, in its years of diminished vigor, by such treatise writers as Sir William Anson[2] and Sir Frederick Pollock.[3]

The classical law has several familiar principal features. Its moral

2. W. Anson, Principles of the English Law of Contract and of Agency in its Relation to Contract (1879).

3. F. Pollock, Principles of Contract (1875).

root is the proposition that promises ought to be kept, almost no matter what—a proposition that is encumbered with problems of meaning, and neither as obvious in ethics as it is sometimes assumed to be, nor supportable by a single set of reasons common to all moralists.[4] Although the proposition can hardly be denied some sort of axiomatic status in most ages and value systems, it can be taken more or less seriously in competition with other values and can be accommodated by the law in various ways. To the essentialistic question "what is a contract?", the classical law replies that a bilateral contract, to adhere to the paradigm case, exists when the wills or intentions of the parties are in accord. The end of contract law is to see that states of affairs to which people looking into the future have committed their wills come about in reality—or rather, that a party worse off for their failure to come about is put in the monetary position he would occupy if the project had succeeded. This contrasts with saying, for example, that contract law exists for remedying palpable losses induced by reasonable reliance on indications of intention or incurred by bestowing a benefit in circumstances in which payment for it should ensue.

In classical doctrine, the bargain, or expectation, interest in contracts is recognized as real, and it predominates over the reliance and benefit, or restitution, interests, which are also woven into the historic texture of contract law. The latter interests tend not to be recognized by the classical theory when no proper contract stands behind an act of reliance or the receipt of a benefit. When there is a contract these interests are subsumed under the more general idea that the parties are entitled to the equivalent of fulfillment from the magic moment when minds meet. Under classical law, the model contract is the pure executory contract, and the model breach is non-performance of one of a pair of mutual promises, when the party who figures as plaintiff in litigation has neither performed his side nor acted in reliance to his detriment. The plaintiff in that situation is entitled to damages measured as the difference between his monetary position if the promise had been fulfilled and his present position, and he is discharged from performance on his part. The contract is not revocable unilaterally, even though the party on the other side has not relied to his detriment before revocation is proposed.

If the law were to impose few restrictions on the content of agreements, and if courts were to refuse to look behind agreed prices, contracting could be quite free; but the other features of classical doc-

4. *See* pp. 1-7, 652-59 (several competing ideas support promissory liability).

trine make for a still broader meaning of freedom. They subserve a market society, in which the disposition of resources is left largely to private planning by means of contract. Although a society with an inactive state and few oppressive customary restraints on individual choice—a fair enough description of England, in practice if not in aspiration, for centuries before the nineteenth—can get on with different versions of contract law, the classical version promotes the efficiency of a private-market system by insuring that people can plan confidently. If people calculate their interests wisely, they can count on receiving the monetary benefit they have anticipated. They are liberated from the danger that a co-planner, having changed his mind or perceived his unwisdom, will plead that his reneging is harmless, save to someone's incorporeal interest in being as sure as possible about the future. They are also relieved of the danger that communal mercy will intrude on certainty by coming to the aid of the miscalculating or hard-pressed.

With these freedoms, contracting becomes a means of voluntary risk-allocation. People come under pressure to calculate carefully, both because the distributional rewards go to those who can and do, and because people are stuck with the private plans in which they collaborate. Individuals are both constrained and enabled to rely on their own judgments: they are permitted to make their own decisions as to what things are worth and compelled to take responsibility for decisions looking to the future. Collective judgment can thus be minimized, as the ideal of a market society holds it should be. According to that ideal, individuals interacting in the free pursuit of whatever they value should for the most part determine the character of the society they live in, and those least enamoured of the dominant pattern should be free from political coercion by the numbers or the wealth of those whose preferences create it.

II

The main burden of the first section of the book is to show that the contract law of the nineteenth century was not in existence through most of the eighteenth, that there is a true contrast between the old law and the new. This requires taking on the commonplace that, in consequence of the development of assumpsit, the informal executory contract was in being around 1600, and the supposition that classical contract law therefore did not have to be created later, but only put to fuller use. For this purpose, Professor Atiyah has the resource of another major recent book, Professor A. W. B. Simpson's *A History of*

the Common Law of Contract,[5] which deals with the later middle ages and the sixteenth and seventeenth centuries. The case for a true contrast, which has a conceptual level and an applied level, is convincing.

It is true that a promise was good consideration for a promise by the early seventeenth century, and in that sense the executory contract existed before it assumed its paradigmatic role. But there is little sign through most of the eighteenth century that its existence prompted courts to think that the will of the parties was a contract's essence, that risk-allocation was a function of contracts, or that the moral truism that promises should be kept was imperative for the law's treatment of broken promises. It was not thought a good or a right that projections embodied in contracts should be actualized; rather, the assumption prevailed that good and right are embodied in the law itself. The law was concerned with fulfilling, not private intentions, but its own prescriptions, as well as moral duties not clearly differentiated from legal ones by a pre-positivistic mentality.

The same point can be expressed by saying that the consideration —at the time understood as the good reason for a promise, the reason why it is intelligible and worthy of enforcement[6]—outweighed the promise itself. Although a pre-existing legal or moral obligation to do something is not the only good reason for promising to do it, that is at least the best reason. If one is looking for dominant paradigms by which lawyers conceive what contract law is about—with allowance for the significant fact that it was not consciously conceived as a distinct area of the law before the late eighteenth century—then the old paradigm was the person who undertakes because in some way he already owes.

Cases that do not fit can still be affected by a model case. When a contract with a prior obligation behind it is broken, why and how a court should act seem quite reasonably determined by the existence and the nature of the prior obligation. The promise figures as something like evidence—an analogy Professor Atiyah emphasizes[7]—a straight way to see that the prior obligation exists and to put a value on it. Even when an executory promise is broken, the absence of a prior obligation to examine need not mean that the law will turn its focus away from its own categories of rights and wrongs towards

5. A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (1975).

6. *See* pp. 139-40 (recent observation that consideration meant good reason due to Professor Simpson).

7. *See* pp. 143-46, 154-67, 216 (promise often played evidentiary role in law prior to nineteenth century).

what the parties seem to intend by promissory language, or that it will attach social importance to the accomplishment of their project, or to the fulfillment of expectations. It will be apt to think of remedying recognizable wrongs grounded in the law that prevailed before parol executory contracts became actionable or in morality more homespun than that of fidelity to promises. It will ask whether someone has been hurt by trusting reasonably and being deceived, and whether someone has got something of value without paying. Here, too, the promise may seem to be, not the thing violated, but a pointer to the fact and to the precise character of a violation of a legal-moral right.

On the level of the courts' practice, there is strong, though complicated, evidence that the mere existence of executory contracts did not entail classical doctrine.[8] Suits on contracts that were unperformed on either side and unrelied on were rare. Discharge of the plaintiff's duty to perform after a breach by the defendant was not standard law. The right of a party to countermand a promise when the other party had not performed on his side or relied on the promise was controverted and ambiguously resolved, although by the end of the seventeenth century the better opinion was that there was no such right. Here, as elsewhere, steps toward the classical law were taken over a long period before its triumph.

There is some evidence of judicial disapproval of bargain damages. More significantly, damages were a jury question. Although we are therefore substantially ignorant of how damages were measured, it is a good presumption that the recognized and approved power of juries to mitigate damages usually operated against awarding the value of bargains, in favor of sparing the contractor who was perceived as outwitted, overcharged, or in a weak bargaining position. As the old period faded into the new, increased judicial control over juries laid the foundation for judicial formulation of the classical law. Of technical dilemmas making for the new order, the most important was that arising in the case of a party obligated to perform first who has attempted performance and been refused; in those circumstances, the party almost has to be discharged from further duty and awarded the difference between what he would have had if the contract had gone through and what he has after performance is refused. The judicial award of damages in that case furnished a model for those executory-contract cases where the defendant's breach is not coordinated with any performance, attempted performance, or reliance by the plaintiff.

In its wider aspects, Professor Atiyah's discussion of the eighteenth

8. *See* pp. 194-216.

century brings out the interplay of contradictory phenomena, some undermining the old law, others revealing its persistence. While an inheritance of regulatory law directly limiting freedom of contract was losing its hold, the Chancery occupied a central place in contractual litigation and brought various equitable doctrines to bear on it. Partly because wealth was still heavily in land, many important transactions came under equity's powers to relieve against penalties and otherwise to mitigate hardships arising from bad bargains. By this means, the notion of just price effectively lived on, even as those who reflected on the abstract features of the common law—especially on its refusal to examine the adequacy of consideration—had ceased to believe in it.

Classical theory was both articulated and criticized by intellectuals before it was embraced by the law. Hobbes has perhaps the strictest claim to paternity: he asserted that a contract is definitionally a determination of the parties' wills, whose obligatory force does not derive from the law but is intrinsic to the contract. He advocated a subjective theory of value, and had the rigor to deny that duress is a valid contract defense—unless the state by the grace of its positive laws chooses to make it one.[9] From a different quarter of seventeenth-century moral thought, Grotius argued for taking promises as such seriously, and imparted that position to others in the modern natural law tradition.[10]

Before these views of the inherent force of promises influenced the law significantly, they came under criticism by Hume. His conclusion —that promise-keeping is only a useful convention, elevated to a duty by the bad but benign human habit of rulemaking—anticipates the substance, though not the mood, of the rule-utilitarianism that became the principal philosophical support of classical contract law and of its ethical postulates in the nineteenth century.[11] Hume's criticism of contractarian political theory was more successful in the intellectual marketplace than his critique of a natural-law duty to keep promises. Still, that school of political thought, chiefly represented in England by Locke, contributed to an accretion of contract-mindedness, even though the age was preoccupied, like Lockean theory itself, with property. As Professor Atiyah argues,[12] the period's obsession with property

9. *See* pp. 41-44.

10. *See* pp. 140-41.

11. *See* pp. 52-57 (Hume had little direct influence on legal thought but anticipated many of the ideas and arguments of nineteenth-century thought).

12. *See* pp. 85-90, 102-12 (recognition of property rights in many respects necessary precursor to freedom of contract).

rights actually helped prepare for the next period's way of conceiving and valuing contractual rights; for protecting expectations and facilitating plans far into the future are what property law does, the more so as it prunes qualifications from the right of dominion. In the law, the influence of Lord Mansfield also worked on the whole toward the future—by way, for example, of his respect in various contexts for individual's intentions, an attitude at odds with the old tendency to say so much the worse for intentions if they are not fitted to the forms provided by the law.[13]

The balance of countervailing forces at the end of the first era bears a strong resemblance, Professor Atiyah points out,[14] to the state of the same era's criminal law, which was draconian but tempered by mercy. The elements of classical doctrine were so close to synthesis that the public was threatened with strict responsibility for promises. Thereby it was motivated to be more enlightened in the pursuit of self-interest than traditional habits encouraged, to make and keep promises with greater care, and to contribute to order in a minimally governed society. But corresponding to the pardons and commutations of criminal law, procedures to evade a bad bargain, subject to some risk and expense, remained available.

III

Although it is in the background parts of the central section, which covers the period from 1770 to 1870, that the book is most outstanding as a portrait of an age, I shall slight the details of this section in order to concentrate on the shaping theme of rise and fall. Transitional between the background and the law is the important argument that classical contract doctrine was a purer distillation of the ideal of a self-regulating society than can be found in reality. In making this argument, Professor Atiyah takes to task A. V. Dicey's influential *Law and Public Opinion in England during the 19th Century*[15] for representing the high-Victorian years as more a time of laissez-faire, in dogma and in practice, than they were, and for the further error of seeing laissez-faire as the lengthened shadow of Bentham. Utilitarianism was, if anything, more significant as the source of faith in legis-

13. *See* pp. 120-25, 162-64, 190-91 (primacy of intentions in contract law largely due to Mansfield).

14. Pp. 189-93 (enforcement of contractual duties shared many characteristics with criminal law).

15. A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905); *see* pp. 231-37.

lation and in the management of society for aggregate ends than it was for the individualistic, non-interventionist conclusions it shared with the political economists, who were themselves only qualified proponents of laissez-faire. While classical contract law was being worked out, the modern state was in the process of creation. Before the process was complete, a great deal of legislation infringed freedom of contract and enlarged the role of public authority. In collaboration with such instincts and strains of ideology as humanitarian revulsion from the costs of industrial growth and from the kind of people who thrive on ruthless individualism, and with habits of social thought formed in an earlier age—all of which found easy expression in the still old-fashioned, aristocratic political system—utilitarianism contributed to a strong counter-current to the ideas that increasingly informed the law.

Professor Atiyah does not, however, depict the private law as a parody of contemporary social thought, unfunctional because it was unrepresentative of the historical continuum in its complexity. Much less does he depict it as the captive of special interests with a stake in laissez-faire, devoting itself to their service while the public interest struggled with some success for recognition in the forums of politics and of public opinion. On the contrary, he argues that the classical contract law was the more functional for being a somewhat puristic elaboration of certain implications of political economy.

The fundamental reason is that over the first half of the nineteenth century, the need of all classes to depend on the market was stronger than the conviction, in public opinion as a whole, that such dependence is desirable. However market organization and administrative organization compare *sub specie aeternitatis,* it took generations for the information and skills to accumulate that would permit administrative planning to become either a rival for hegemony or the major supplement to the market that it was becoming in both aspiration and experiment—at a time when substantial, if not unbounded, confidence in the market was most widespread among the educated. Besides building a law of contracts on the implicit premise that perfecting a mechanism for private planning was the courts' most constructive calling, the judges contributed to making human beings more competent members of a self-regulating society.

Innumerable people, for the most part among the poor, had no experience or education to fit them for life in the world of the industrial revolution as it unintentionally and unpreventably became, much less for life in an ideal world of individual effort harmonized for the

improvement of all lots. A slow process of education and discipline went into teaching people—not only the poor—to pay debts, to take care in their dealings, to discover the strategies of self-improvement that were within their reach, and to determine the risks they were willing to run. The stern pedagogy of contract law was among the educative influences. By 1870, the populace was much better prepared to take care of itself in a competitive environment than it was a half-century earlier, most of all because it was much wealthier, but also because it was trained for survival in the earlier kind of world, training that simultaneously prepared it to envision a world of a different kind.

The technical part of the book's second section,[16] which I can do little more than commend, begins with a discussion of the steps by which, and the emphasis and purposiveness with which, the essentials of classical doctrine came to be the law; it then describes the numerous corollaries generated from the elements by the mixture of logic and teleological compatibility that characterizes legal thinking when it is in the grip of an idea. As Professor Atiyah covers what happened in the various departments of contract law, he develops one theme that unifies many particulars. That is the propensity of nineteenth-century jurisprudence for abstraction, for principle in a sense more properly analogous to the models of science than to the axioms of geometry. Scientific models propose, not to represent factual reality, but to derive from the assumptions of the system statements that can be checked against observable fact. Law can be conceived as the analogous prescriptive pursuit, aimed at affecting reality rather than predicting what it will reveal; like science, it cannot pursue its end efficiently if it bogs down in an attempt to take account of all the facts. Because it was implicitly so conceived, classical contract law can be caught in a posture that, from one point of view that has gained ground since 1870, easily seems ridiculous—the posture of looking at a litigation situation, where some human arrangement has gone wrong and people are in dispute, and asking, not what did happen, but what should or might have happened.

The posture, however, is not folly. It should not be confused with the formalism that supposes legal ideas to have a life of their own and to lock up inevitable entailments, without reference to ethics or to judges' choices of one social goal over another. Such formalism, which is irreducible folly, figures as a symptom of the law's post-classical detachment from its milieu of values and institutions. The Victorian

16. Pp. 398-568.

lawyer's addiction to principle[17]—which reflects a cultural fascination with the "man of principle" as a moral type, a type that becomes troubling when one asks "does it matter what principles?"—was highly integrated with a commitment to certain values and social goals. The point of asking "ought" questions in a sub-moral sense was to push conduct toward what it ought to be in virtue of a prescriptive judgment, whether primarily moral or primarily practical. The disciplinary effect of contract law is again crucial. The function of civil law was thought to be, like that of criminal law, not primarily the more or less fair resolution of particular situations of breakdown and conflict, but the motivation of future behavior of both the parties and the public.

One will learn to be explicit about the risks one agrees to assume if the law on the whole construes silences and ambiguities in contractual terms in favor of a party who might have understood the promise at issue as a guarantee against frustration or mistake, whether or not insurance against misadventure or changes in information actually figured in the parties' negotiations. Effort to inform oneself about the quality of things bought will be stimulated if the law holds that a taciturn seller—or even one flirting with fraud more vocally—might have supposed that the buyer has made his own investigation, whether or not the seller really supposed any such thing. On another level, the very conditioned reflex that promises are made to be kept, that one is not free to change one's mind in exchange for mere compensation for any reliance losses incurred, is in part a matter of having learned to respect the benefits that accrue to oneself and society from classical law—even when it is immediately beneficial to escape a particular engagement. In other words, rule-utilitarianism—the prevalent support, tacit or articulated, of classical doctrine in nineteenth-century England[18]—attempts to say that certain conduct is always obligatory because of its tendency.

It is necessarily speculative whether an act whose tendency is thought to serve aggregate utility would in fact be seen to serve it if the concrete utilities of particular acts could be added up. In the end, by imputing visions to parties who never had them—all the while genuflecting to the parties' will—the courts imputed utility to the conduct they encouraged. Such imputation of unreal intentions is a necessary

17. *See* pp. 345-58 (period from 1770 to 1870 dominated by commitment to principles in ethics, politics, law, and other realms of thought).

18. *See* pp. 324-58 (rule-utilitarianism of Bentham, Mill, and others, which combined utilitarian ideas and ideas of classical economics with recognition of importance of principles, provided conceptual foundation for classical doctrine).

part of contract law. What determines which intentions to impute is judicial policy, and that policy in the nineteenth century was to promote a judicial vision of a world ruled by private decisionmaking and the price mechanism.

Professor Atiyah's detailed treatment of the classical law is of necessity partly an account of anomalies with historical and practical explanations. The new law was encumbered with the old, and with varying degrees of awkwardness it had to accommodate to its paradigms and purposes many ideas evolved in an earlier intellectual environment—among them consideration, the reliance and restitution interests, and equitable doctrines. Common sense and case law could not be perfectly classicized.

One special oddity—on the policy level, rather than on the conceptual level—is the contract in restraint of trade.[19] Nineteenth-century courts were generally indulgent toward restrictive agreements. Freedom of contract prevailed even when the object of the contract was to foreclose a class of potential dealings. Restrictive intentions were respected by courts more capable than they may have realized of preferring social utility to clear and present intentions. Professor Atiyah shows that the courts were right in their economics; he thereby adds to his case that economic teachings fed the law in a way they ceased to in the ensuing period. With the decentralized structure of nineteenth-century business, there was little danger that petty monopolistic agreements would impose monopoly prices, and this was perceived. Even after 1870, however, when trade associations and unions introduced a serious element of monopoly into the British economy, covenants in restraint of trade continued to be indulged. The inheritance from the nineteenth century was not innocuous then, but the will to resistance came slowly in an atmosphere where competition and individualism were increasingly denied value even as ideals.

IV

Professor Atiyah devotes much of the book's third section, which covers the period from 1870 to the present, to the massive record of legislation by which democratic governments since 1870 have abridged freedom of contract.[20] The prevalence of legislation with that direct effect and of redistributive legislation, as well as the state's assumption of a large immediate role in the economy, imply that majority

19. *See* pp. 408-12, 451, 528-33, 697-703.

20. Developments in English law and society that restricted freedom of contract are described throughout the book's third section. Pp. 571-779.

opinion has fallen progressively out of sympathy with the ideals of the nineteenth-century system and with conspicuous parts of its ethical constellation. Distributive equality seems to be a widely approved goal, subject to the need to sacrifice some of it to the social exploitation of private incentive—though rather less than would once have been thought a wise sacrifice in the long run. The ethic of entitlement to gains earned by trading in the market, once a strong supplement to resignation to inequality for instrumental reasons, has lost ground to the feeling that society should not tolerate the results of unequal starting points for the trading process as the lottery of nature or the price of civilization. Bargaining has ceased to feel fair when either the initial positions of the parties, or those gained through previous transactions, are unequal, and therefore various kinds of contracting have come under regulatory legislation. From arguably the best way of arriving at decisions that must be made by collectivities, majority rule seems to have become a source of positive value, lending justification to the making of more and more social determinations by political means. Yet the implications of legislation for the private law of contracts are not self-evident. The economy remains mixed, and not all life affected by contracting is commercial. Although legislation forbids some contracts, requires others, and alters the distributive results of contracting in many circumstances, it does not follow from this alone that classical doctrine no longer serves society's purposes in the area left to freedom and to the common law.

Professor Atiyah looks beyond the enacted law for changes that cast further doubt on the classical law's claim to be functional as the basic type of contract law. (A claim to practical usefulness as only a part of the law is something else: for example, the classical theory of how to measure damages would sometimes be convenient even if the classical theory of what damage is were abandoned; and there is a place for speculative activities, when they are clearly undertaken, that can be carried on only under the classical rules.) For one thing, the opportunity for contracting has declined. Apart from the existence of cartels, direct legislative bars to some contracts, and the government's large share of the economy as a whole, the private sector of the economy has come to be occupied by many fewer and much larger companies, proportionately, than in the 1770-to-1870 period.[21] Nonlegislated social decisions once made by contracts between independent businesses are now made by the administrative process within big

21. *See* pp. 592-601 (present period characterized by mixed economy and corporate state).

businesses and government agencies. These concerns may seek the same end of efficiency as small businesses, and may simulate internally the results that would be arrived at by contracting, but they do not make contracts with themselves. The law has done only a little with the possibility of endowing intra-organizational arrangements with some of the properties of contracts. Although the giants contract with each other, their relationships are continuing and their deals complex. When something goes wrong, they are more interested in an adjustment than in realizing a gain that one side was shrewd or fortunate enough to bargain for.

Again, the implications of change for the law are not obvious. It is arguable that even after size has reduced the scope for contract, a significant part of the economy remains. If contract under classical law ever had advantages as an ordering mechanism, it has them still. Yet one may wonder whether having admitted the advantages of the classical law, its preservation would be compelling if the impact of one or another kind of contract law on total economic performance eventually came to seem marginal. The importance accorded to a marginal effect, apart from its size, would depend on the strength of other pressures to maintain or depart from classical law.

Developments other than the reduction in the number of social decisions that can be made by contract also have a tendency to diminish demand for such a product as classical law. The public tends to want contracts that can be cancelled unilaterally. In some circumstances, contracting on any other terms is debarred by legislation. It becomes plausible to read a unilateral-cancellation term into contracts where they are less than unmistakably present and to assess only reliance damages for cancellation, or those pre-assessed by the institution of forfeitable deposits. Even if that were not the courts' propensity—explained perhaps by their guessing at parties' probable intentions—the mere incidence of contracts written to permit the application of classical doctrine would be reduced. The expectation of changed conditions, such as high but uncertain inflation, means that contracts are commonly withdrawn from the purview of traditional law by express provision for renegotiation or specification of values later on. Betting on markets is a specialized pursuit; it is no longer a feature of normal business.

From everyday impressions and intellectual sources, Professor Atiyah puts together many indications that value changes have occurred—changes directly connected with promissory behavior as well as those to which legislative and political history testify most clearly. He sees

signs that, despite the cloistered reverence of some philosophers for promise-keeping,[22] the ethics of the world have become bounded by what the law calls reliance and restitution interests. The right to change one's mind seems more obviously valuable than the power to make commitments that are binding in a future when one's self may be as different as all else. Popular moral sentiment, Professor Atiyah thinks, has in effect collapsed rule-utilitarianism according to its logical deserts.

A kind of individualism and a kind of collectivism combine in the new sensibility. To judge by remote tendency, rather than by utilities visible enough to be put on the scales, seems absurd in itself, and the right to assess an individual's act seems in the first instance his own. Neutral judgment, which is perhaps naturally likely to type the act and to consider its tendency, is at any rate postponed by a rebuttable deference to the actor's own judgment, which is apt to be formed by palpable utilities assessed by some mixture of intuition with deliberation, and whose approval of the act is evidenced by its very doing. Internalization of the neutral point of view is not the mark of a moral man; the "man of principle" in the old sense has fallen out of favor.[23] On the other hand, when doubt or disagreement requires appeal to a public standard—at which point one is only a step from the law—the appeal is to what society would think a "reasonable" valuation of the concrete act and of its near consequences. Strictly individualistic recoil from the suggestion that what something is worth to a particular person may meaningfully be addressed by anyone else is no more instinctive than attraction to rules—justified by utilitarian tendency if their justification is put on utilitarian grounds at all—as the only possible ground for an outside opinion.

Professor Atiyah's main point about lawyers' law in the recent period is that it has not developed in step with its surroundings.[24] The considerable extent to which it has finally fallen into line in practice is not reflected in a recast theory of contracts to replace the classical model. Some of the practical adaptation has been mediated through general jurisprudence. The full investigation of the facts, a distrust of rules, an indulgence for discretion, a conception of the judicial goal as a just solution of the particular case, a perception of the case that is litigated both in contract and in tort as an accident to be set right

22. *See* pp. 652-59.

23. *See* pp. 649-59 (nineteenth-century age of principles succeeded by twentieth-century age of pragmatism).

24. *See* pp. 693-715 (classical model, unlike statutes and individual court decisions, fails to recognize economic, social, and institutional realities).

rather than as an occasion to propound standards and to furnish incentives to the public—all these modern trends in adjudication militate against the felt purposes and crucial techniques of classical contract law. Though numerous other interstitial deviations are also discussed in the book, the most important direct evidence of departure from the classical law appears in the elevation of the reliance and benefit interests from their earlier subordinate position.[25]

Professor Atiyah intends to write another book on the philosophic and analytic problems of contract, a book that will address the need for a new theory. He will certainly combat in that work the form of captivity to the classical model that does not dispute results that nineteenth-century law would have disapproved—for example, the increased recognition of a duty to pay for benefits one has not solicited by an agreement to purchase—but that does dispute their classification under contract law. Over history, law that deals with promissory behavior has not always been conceived as distinct from law that concerns itself with reliance, benefits, or communal standards of fairness. If there are analytic advantages in keeping those subjects together, pre-classical law shows that it has been done. The classical period did not discover a properly contractual realm that exists by metaphysical necessity and go on to exclude intruders; rather, it developed rules of law and an exclusionary conceptual framework in a specific context and for specific purposes. This is clearly the logic of Professor Atiyah's writing history first and theory second.

In reviewing this book, one is conscious of the necessity to abstract from its detailed information and from Professor Atiyah's extraordinary mastery of literature from many fields, and to do little more than suggest the complex intelligence of his reflections. Definitiveness is not the virtue of books on such a scale and so alive with thought. Professor Atiyah has almost singlehandedly created nineteenth-century legal history in the mainstream of general history. (For earlier times, especially the middle ages, the historiographic tradition is much stronger.) The book will surely be a stimulus to further research and analysis. Because the subject bridges the Atlantic, American as well as English legal history will draw sustenance from Professor Atiyah's ideas.

25. *See* pp. 764-78.

Community and Law in Seventeenth-Century Massachusetts

Law and Society in Puritan Massachusetts. By David T. Konig. *Chapel Hill: University of North Carolina Press,* 1979. Pp. xxi, 215. $21.00.

Reviewed by Barbara A. Black†

The Puritans who founded Massachusetts Bay were faced, according to David Konig, with the cruel clash of ideal and actual.[1] Against the vision of a society based on communalism, both religiously and secularly inspired, they were forced to set the reality of community conflict stubbornly resistant to community resolution. Disputes were, ideally at least, to be settled by communal institutions. Decision by town meeting, congregational vote, brotherly suasion, neighborly persuasion, collective discipline, arbitration and the like: these, rather than the external and coercive power of the state exercised through courts, were to be the primary modes of dispute resolution. The colonists, however, recognized—if they did not embrace—reality. They had courts from the beginning, and they used them. But communalism was the "paradigm." And communalism failed.

Konig observes that historians have noted both the communal ideal and its collapse, but "existing interpretations leave the social and cultural development of Massachusetts at that point of collapse, or they view the rest of the seventeenth century as either a continued decline from orthodoxy or a drift with no direction."[2] Led astray by facile assumptions about law in general and litigation in particular, these offending historians have been kept from "asking questions of legal records as they pertain to the writing of history."[3] Noting the high rate of legal conflict, they have seen it "as merely another type of social pathology symptomatic of social divisiveness, unrestrained economic competition, or the total collapse of any coherent social ideology."[4]

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1. D. KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS (1979) [hereinafter cited by page number only].
2. P. xiii.
3. P. xi.
4. P. xii.

They have adopted, it seems, a simple-minded correlation of litigation with trouble, with a consequent view of courts as "a desperate last resort," with neither reach nor grasp higher than the containment of aggressiveness.[5] Konig dismisses this myopic perspective, and substitutes for it a complex, anthropologically validated,[6] thesis of law as a positive force. Litigation, in turn adaptive, coordinative, integrative, is—and was—in all "a useful agent of orderly and desirable social change," "helping to create a new paradigm for the establishment of stable community life."[7] Sue thy neighbor!

Konig's thesis places him squarely in the excellent company of those who would study change. He has limited his investigation to a single county of the Bay Colony, a focus reflected in heavy reliance on the records of the Essex County Court.[8] This approach is deliberately innovative; we have colony-wide[9] and town-narrow[10] monographic studies in profusion, but none that I know of for the seventeenth century concentrating on one county.[11] A new angle of vision must and does prove enlightening. There are drawbacks to this, as to all, approaches, but Konig nicely skirts the most obvious peril by limiting his conclusions, with his research, to Essex. In the event, the county is in more than one sense a happy medium.

I. The Changing Shape of Conflict: Society's Demand

Konig's concern is "not only to examine the internal development of legal doctrine and procedure, but also to discover the demands that social, economic, and political contingencies placed on legal institutions

5. *Id.*
6. P. xiii n.9.
7. P. xiii.
8. In 1636, Massachusetts established four "Inferiour Quarterly Courts," held at Salem, Ipswich, Newtowne (Cambridge), and Boston. Some time after the division of the colony into four counties, in 1643, these courts came to be held in and for the counties and re-titled county courts. In newer counties, judicial arrangements tended to be more complex. G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 32-33 (1960).
9. *See, e.g.*, P. MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (2d ed. 1954); E. MORGAN, THE PURITAN DILEMMA (1958); S. MORISON, BUILDERS OF THE BAY COLONY (rev. ed. 1964). Studies of the legal system have also tended to focus on the colony as a whole. *See, e.g.*, G. HASKINS, *supra* note 8; E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692 (1966).
10. *See, e.g.*, P. GREVEN, FOUR GENERATIONS (1970) (Andover); K. LOCKRIDGE, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS (1970) (Dedham); S. POWELL, PURITAN VILLAGE (1963) (Sudbury); D. RUTMAN, WINTHROP'S BOSTON (1965) (Boston).
11. There are, however, two excellent introductions to published records of county courts. *See* Chafee, *Introduction, Records of the Suffolk County Court, 1671-1680,* 29 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (COLLECTIONS) xvii (1933); Smith, *Legal and Historical Introduction to the Pynchon Court Record,* in COLONIAL JUSTICE IN WESTERN MASSACHUSETTS (1639-1702) 3 (J. Smith ed. 1961).

and how those institutions changed in order to become so important in society."[12] In short, the circumstances, and therefore the demands, of the 1670s were different from those of the 1630s. Konig is not, of course, saying that there were no conflicts at first, but only that there was something different about the later conflicts. The differences themselves differed,[13] but in one respect the later conflicts were identical—they led people to court. And if you are looking for an imaginative, informed, intelligent study of the roots of those conflicts which culminated in litigation, this is it.

Konig's chapter on real property litigation is a fine example.[14] At the beginning we find a society whose land-population ratio lulled the populace, permitting and even encouraging casual treatment of matters of title and boundaries. Neighborliness, deference, and trust added their portion, working a comforting assurance that there was no need either for formality or for precision. Konig makes us feel the early days and lax ways, the improvidence which left the reckoning to later generations—an angle on these folk which the reader is likely to find fascinating and surprising. With an emerging land shortage, very naturally attitudes changed, casualness giving way to care, prodigality to prudence, charity to chariness. Result, conflict.

Similarly, "as towns grew larger and commerce expanded, Essex was becoming less of a face-to-face society capable of sustaining any sort of communalism."[15] The loss of an essential similarity, if not identity, of interest brought people to court, seeking, consciously or otherwise, the coordinative function of the courts. Konig does good work here on absentee landowners, on the "Jerseymen," and on the mercantile community. And then there is a truly splendid treatment of noncommercial debt—the "neighborly loan."[16] His careful analysis of sued-for and unsued-for debt reveals that distance was the operative factor, suggesting that, in this area at least, if it could have been kept close, it could have been kept out of court.

Konig, operating on an assumption of colonial preference for the communal, naturally explores the possibilities of conflict resolution by town meeting and the like—of resolution, that is, without resort to "outside mechanisms" such as the county court. Since the people

12. P. xiv.

13. *See* p. 236 *infra*.

14. Pp. 35-63 (chapter 2). Part of this chapter originally appeared as Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137 (1974).

15. P. 65. For this topic see pp. 64-88, part of which appeared earlier as Konig, *A New Look at the Essex "French": Ethnic Frictions and Community Tensions in Seventeenth-Century Essex County, Massachusetts*, 110 ESSEX INST. HIST. COLLECTIONS 167 (1974).

16. Pp. 82-88.

involved did go to court when, by hypothesis, they preferred not to, this inquiry is in large part a search for the deficiencies of communal mechanisms and a compilation of the comparative advantages of litigation. Thus, for example, as to real property, "Essex landowners might have sought guidance from their town meetings,"[17] but they did not. Why not? The obvious answers, given, are that the town meeting had no jurisdiction over title actions, and that the sanctions of the county court were "markedly more effective."[18] But Konig looks deeper, and finds deficiencies which, unlike these deliberately imposed limitations, might be thought of as congenital, and thus irremediable:

> Scenes . . . occurred because at a town meeting every voter had to take sides publicly when the issue came to a full vote. Blame and recrimination were inevitable by-products of mandatory taking of sides in emotional cases, but settlement in court helped reduce these dangers. In the first place, only those persons who were involved in the dispute or who wanted to take sides came to court. . . . In addition, the final decision was made by a relatively impartial third-party institution, removed from the jealousies and rivalries of town politics.[19]

In later chapters Konig charts the downward course of church, arbitration, and collective discipline. He identifies, and depicts in rich detail, the societal developments which exposed the weaknesses of these institutions, weaknesses which, according to the author, explain the supersession of the desired communal by the effective legal. He points to the rise of congregational dissension and the decline of ministerial influence;[20] adding a new ingredient to this familiar mix and blending well, Konig comes up with a new role for the courts. From the beginning, he reminds us, state support of the church, and harmony between the two, were assumed. But a new interest in personal liberty took hold, and by the 1650s,

> Essex . . . was beginning to move toward the position that certain personal liberties were to be protected as zealously as the church—in fact, that they might have to be protected *from* the church. The courts were the source of that protection, for it was there that individuals could defend their personal liberties against a town meeting or congregation.[21]

17. P. 47.
18. Pp. 47-48.
19. P. 47.
20. Pp. 90-107.
21. Pp. 92-93.

Konig describes and documents a swell of resistance to arbitration, in the form of refusals, once unknown, to abide by the decisions of arbitrators.[22]

And finally, turning to "the neighborly regulation of private behavior," he reports the virtual disappearance of a sense of collective responsibility for personal conduct. He has no doubt that, at the first, "collective discipline was part of the communal paradigm," and that "[t]his view had changed by 1682,"[23] but he is sensitive both to the desirability of documenting the change by a "valid quantitative comparison between chronological periods,"[24] and to the difficulty of obtaining quantifiable evidence of neighborly watchfulness—not to mention its effectiveness—early or late. He thus turns, perforce, to "suggestive evidence of a qualitative nature";[25] his marshaling and presentation of this evidence are a model of imaginative scholarship. Finding increasing reluctance to meddle in the affairs of others, Konig detects a move to "a social ethic for a post-revolutionary Puritan society,"[26] an ethic which, by recognizing that "[s]aint and sinner now had to live in the same society," withdrew the essential legitimating support for collective discipline. Replacing the once-despised " 'civil man' . . . as an object of resentment and a source of tension was the censorious meddler who pried into the private affairs of neighbors in order to ferret out deviance."[27]

The reader may note that the economic, social, and cultural changes which produced the new demand are by no means all-of-a-piece. Population dispersal, increasing heterogeneity, commercialization, and the like are very different from attitudinal change. There is, moreover, a difference between such attitudinal change as loss of piety, or trust, and the attitudinal shift of Konig's central thesis—the shift from the communal to the legal paradigm. Further exploration of the complex relationships within this intricate network of change might be profitable,[28] but Konig's treatment of this aspect of his subject is richly textured, inventive, and rewarding.

22. Pp. 108-16.
23. P. 126.
24. P. 127.
25. *Id.*
26. Pp. 131-32.
27. P. 133. The "civil man" behaved according to accepted standards but lacked inward grace. P. 130.
28. Similarly, when we find suits over title to land where at first there were no such suits, suits brought against the very community which was itself, earlier, the preferred locus of dispute resolution, and so forth, are we dealing with qualitative or quantitative change? The question of overall per capita litigation rate in Essex is not directly addressed. It appears to have increased, *see* pp. xi-xii, 27, but if it remained static, then

II. The Changing Set of Mind: Paradigms Old and New

My difficulty with Konig's thesis of a changing paradigm is not the new paradigm, but its alleged newness—or, put another way, the old paradigm. Without denying the colonists *a* communal ideal, I dissent from Konig's version of their communal ideal.

The "communal ideal" presumably refers to belief in the desirability of avoiding and resolving controversy without taking leave of mechanisms and institutions whose effectiveness rests on the immediately consensual, rather than on the remote consensuality of state coercion. That ideal[29] we may safely ascribe to the colonists. But the faintly hopeful no less than the grimly determined may be said to be possessed of an ideal. The question is, with what force? And that varies with the idealists' assessment of feasibility and degree of distaste for the alternative. Konig seems to me to overdraw both of these, coming close to a picture of the founders as innocents, and reading into colonial attitudes toward law a reluctance based on ignorance and bordering on aversion.[30] Closely, and perhaps causally, related to this is a picture of the founding of Massachusetts Bay[31] with which I disagree most emphatically.

A. *The Founding*

Konig's account of the founding of the Bay Colony rests most solidly on his belief that, in their institution of a legal system, the colonists transplanted English institutions.[32] Now it is some time since anyone has been disposed to deny that the colonists' English heritage had something to do with the lives they led and the institutions they created. But Konig overdoes the imitative and underplays the innovative.[33] On the other hand, whatever the cogency of this

the increase in certain types of lawsuits must have been offset by a decrease in other types. *Cf.* K. ERIKSON, WAYWARD PURITANS (1966) (work on constancy of deviance in colonial Massachusetts).

29. *See, e.g.*, K. LOCKRIDGE, *supra* note 10, at 6; D. RUTMAN, *supra* note 10, at 154, 233.

30. *See, e.g.*, pp. 29, 188. *But see* p. 34.

31. Pp. 3-38.

32. *See, e.g.*, pp. xiv, 3-4, 18, 22, 32-33.

33. Thus, he asserts, in a fascinating bit of revisionism, that "English corporate practices dictated the general course," p. 22, challenging the dogma that the founders set out to create a commonwealth and substituting the thesis that their model was the English borough corporation. Here Konig relies in part on the theory that the colonists, although not staying within the specific limits of their own charter, "did nothing that they could not later defend, if necessary, as being generally accepted corporate practice in England." P. 24. This is incorrect, or Pickwickian. No corporation had power over felony, which carried the death penalty, without an express grant in its charter. There is no such provision in the Massachusetts charter. Konig's piercing of the commonwealth veil is creative, not to say devastatingly plausible. Even thinking him wrong, I wonder if he is right!

criticism, it is impossible not to admire the ingenuity and skill displayed in Konig's synthesis of English and Massachusetts history. Specialists in American Revolutionary history are familiar with the theory that American political history recapitulated English political history: eighteenth-century America rings familiar to the historian of Stuart England; the Glorious Revolution, as we have been told, was fought twice, once in England, once in America. Now, in a striking adaptation of this approach, Konig's Massachusetts history recapitulates Konig's English history.

In sketching the English background, Konig harks back to a medieval communalism, to its disappearance in consequence of the weakness of communal institutions, and finally to its replacement by more effective state institutions.[34] Local courts—those of manor and village, of hundred and county—dwindled in significance in the face of society's transformation " 'from a hierarchy of communities to the agglomeration of equal competing individuals depicted in *Leviathan*.' "[35] As they declined, institutions of royal justice rose, preeminently the justice of the peace, a figure of ever-growing importance to English law and life. And what is more, Konig identifies a specifically Puritan attachment to this personage in the early seventeenth century. Despite his position as servant of a monarch given to harassing Puritans, the justice of the peace protected, and was respected and trusted by, Puritans.[36]

Gazing westward in 1629, we find an attempt to revive ancient, once-failed communalism.[37] Once again weak communal institutions fail to sustain a society whose growth and increasing complexity bring problems requiring strong, external, coercive institutions for their resolution. Here, too, experience with these legal institutions leads finally to trust, and to the awareness that law can provide the foundation for a stable and harmonious society. The parallelism is neat as well as inspired; it is also, in my view, exaggerated, and based on misplaced emphases in English history.[38] As a result, *inter alia,* the justice of the peace and the county loom far larger in Konig's Massachusetts than ever they did in John Winthrop's Massachusetts.

According to our author, the colonists, aware of the need for outside

34. Pp. 5-16.

35. P. 9 (quoting C. HILL, SOCIETY AND PURITANISM IN PRE-REVOLUTIONARY ENGLAND 487 (1964)).

36. Pp. 13-18.

37. Pp. 18, 188.

38. The attachment of English law reformers was not to the justice of the peace as such but to local, speedy, effective, and inexpensive justice. *See, e.g.,* p. 18 (quoting Hugh Peter's reform proposal); *see* note 39 *infra.*

mechanisms of support, turn to the natural model—the justice of the peace. And Konig buckles down to the task of transforming the Massachusetts magistrate into a justice of the peace, intricately and ingeniously confounding the two.[39] This picture of the Massachusetts magistrate is an error whose significance it is hard to overstate: the Massachusetts magistrate is the key to Massachusetts attitudes toward law, and misperception of the one guarantees confusion about the other.

Sensitivity to law, and a perception of the ultimate triumph of legalism, might well lead an author to the county and the justice of the peace. The county is associated with the external force of state coercion, or, in other words, with law,[40] and the English justice of the peace may be thought of as a county official.[41] But there is a paradox at work here, because the metamorphosis of magistrate into justice of the peace actually reduces the magistrate in stature, and makes possible Konig's stress, for the early years, on the externality and distance of magistrate from people. Since the magistrate is symbol as well as servant and representative of law, the effect is to minimize the role of law for those early years, which is, of course, what Konig believes the record demands for the heyday of the communal ideal.

If the magistrate is the key to attitudes about law, then we must find the key to the magistrate, and it is neither his peripheral resemblance to the justice of the peace nor his adventitious county-ness. The key is his status as ruler of the colony, constitutionally invested with the "three-fold power of magistraticall authority,"[42] an authority pervading every level, as well as function, of government and making of the magistrate a figure both unique and towering.[43] It is wrong

39. Only some assistants, called by Konig "assistants/justices of the peace," were given the powers of the justice of the peace, *sub nomine,* in 1630, and that was short-lived. The terms "sessions," *see* pp. 93, 116 n.76, 120 n.15, and "commission of the peace," *see* p. 36, used by Konig, were not in general use in the colony during the first charter period. Konig makes much of resemblances that mean nothing, *see, e.g.,* p. 32 ("like quarter sessions, its terms were held at similar times of the year"), and little of crucial distinctions: "The civil jurisdiction of the quarterly courts was a novelty for justices of the peace (who soon came to be known simply as 'magistrates' in Massachusetts), but it also had English impulses behind it," p. 33. It embodied the "reformist desire . . . to confer such authority on the justices." *Id.; but see* note 38 *supra.*

40. The town, in contrast, is associated with communalism. It is a "subtheme" of this book that the town in Massachusetts was less important than historians have believed, and the county more so. P. xiv.

41. The justice of the peace is of course a royal official, but with county-wide jurisdiction under a commission of the peace for the county.

42. "[L]egislative, judicative, & consultative or directive of the public affairs of the country. . . ." 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 92 (N. Shurtleff ed. 1853) (converted to modern spelling).

43. Konig knows this, and discusses the related point of early centralization, *see* pp. 20-21, but this awareness seems to have little if any operative effect on the work.

to picture the magistrate as external to, however supportive of, the mission and meaning of the enterprise, and short-sighted to see the magistrate as a figure whose intervention spelled defeat for a dominant ideal.[44] In exploration of attitudes toward the magistrate, it is dangerous to view him only as a judge; if, for other and better purposes, that must nevertheless be done, it is distortive to think of him only as a county judge. The founders of Massachusetts are said to have had an "impulse toward county magistracy,"[45] and the magistrates to have identified themselves, even when acting on the town level, with the county judiciary.[46] Neither proposition seems to me supportable; certainly the support offered for them is wispy. The magistrates were the judges of the colony—constitutionally so ordained, it was believed—and they adjudicated at every level—town, county, colony. The low, the middle, and the high justice were theirs, and if we have any reason to guess—we have none to believe—that they thought of themselves more as judges of one level than another, surely it would be the colony level. Magistrates alone sat on the highest regular tribunal of justice, the colony-wide Court of Assistants.

The county court was, of course, a busy and important court, but the most important matters went either originally or on appeal to the Court of Assistants or the General Court or both. Konig sets up a kind of town-county—communal-legal—rivalry, and suggests, among other things, that the county courts were set up to keep the towns under wraps.[47] But there is no evidence of this. In 1636 the single Court of Assistants was the only regular judicial tribunal; obviously a growing and expanding, and from the first litigious, colony needed more, and more readily available, judicial tribunals. The county itself was nothing more than an obvious, convenient unit of administration. There was a relevant rivalry in the colony, from beginning to end, and it lay at the heart of the political-constitutional history of the period. It was a contest between magistrates and non-magistrates, but it was a contest over who was to administer law; the non-"magistraticall" rivals of the magistrates—the deputies—were no more "communal" —internal, local, non-coercive, extralegal—than the magistrates.

As we have seen, woven into Konig's story of an increasingly legalistic society is the thesis of growing concern for personal liberty.

44. Pp. 29, 53, 81.
45. P. 31.
46. P. 36.
47. P. 26. Konig finds a general inclination to keep towns weak; in his discussion he points out that for the colony—a corporation—to create other corporations, would have been "flagrantly illegal." P. 22; *see* note 33 *supra*.

While conceding that protection of personal liberty had been a recognized goal from earliest days, being incorporated, for example, in the Body of Liberties of 1641, Konig asserts that it was at first perceived as protection against abuse of discretion by magistrates. Judicial safeguarding of individual liberties from encroachment by church and town signaled that "magistracy was no longer an object of potential distrust but had become a source of protection."[48] Well, limits to authority were indeed a concern from the first, but no less at last than at first. Naturally concern about arbitrary government, thought to be preventable by written laws, was voiced more while the drive for written laws was on, and less when victory—and codification—had been achieved. But the distrust of magistrates did not decrease, except in the sense that they were believed shackled. Nor at any time was distrust the main ingredient. Above all, magistrates were revered, trusted, and looked to for protection.[49] In my perception of the reality of this period, there is no room for a communal ideal—beyond mild preference—so constructed as not to include these officials and the justice they administered.

B. *The Ideal*

Konig's view of the magistrate may strike sensitive chords in readers who are historians either of the law or of Puritanism. The former will ask, "What about the criminal law?", the latter, "What about covenant theory?" These, superficially dissimilar, are in this context essentially the same question; it is not accidental that the law of early Massachusetts reached its point of greatest correspondence with Scripture in the definition and punishment of crime.[50] We can hardly speak of one without the other, or of either without the magistrates. The question is whether we can speak of "paradigms" without either criminal law or covenant theory or, therefore, the magistrate.

> Every nation or people, the Puritans believed, existed by virtue of a covenant with God, an agreement whereby they promised to abide by His laws, and He in turn agreed to treat them well. To help carry out their part of the bargain, people instituted governments, and the business of government was to enforce God's

48. P. 104.

49. *See* p. 29 (Essex towns' pleas for resident magistrates). Even if the records were not overflowing with evidence of this, one could point to the reelection, year after year, of the same men to this most powerful office. *See* pp. 53-54 (Konig's treatment of this continuity in office).

50. Especially capital crime. *See* G. HASKINS, *supra* note 8, at 145-52.

> laws by punishing every detectable breach. Government in this view had a sacred task and enjoyed divine sanction in carrying it out.[51]

Man, depraved, could but be wicked, but

> God recognized degrees of evil and rewarded men's minor victories over it by minor rewards. He brought prosperity and health to nations which prevented or punished murder, adultery, theft, and other open breaches of His commands.[52]

And woe unto them who left sin unpunished.

Konig, of course, knows all this as well as anybody,[53] and is aware of the centrality of the criminal law, not merely in practice, where indeed, more leniency is to be found than popular or primer history would suggest,[54] but ideologically. It may be that Konig would say, even so, even in the criminal sphere, that communalism was the paradigm. He might indeed go to the source just quoted for support: "And punish they did, with the eager cooperation of the whole community, who knew that sin unpunished might expose them all to the wrath of God." Parents, neighbors, congregations all joined in. "With virtually the whole population for a police force Winthrop found it no problem to punish sin."[55] I would say this captures perfectly the essence of the equal partnership—ideal and actual—of communal and legal, but clearly an historian might, and Konig may, think otherwise.[56] Or, he may be offering a highly sophisticated thesis of ideological dissonance between civil and criminal spheres.[57] Such societal compartmentation is by no means impossible; it would be interesting to see further work by Konig on this point.

A thesis might posit a communal ideal and at the same time allow for recognition of the positive role of law. Blindness to the positive potential of law, and specifically, law through litigation, is not a necessary concomitant of a preference for the communal. Nor is there any reason to conclude that it accompanied that preference in this case. But Konig appears to have reached just that conclusion: "As

51. E. MORGAN, *supra* note 9, at 19.
52. *Id.* at 18-19.
53. P. 130.
54. G. HASKINS, *supra* note 8, at 151-53, 204-12.
55. E. MORGAN, *supra* note 9, at 71.
56. It is unclear to me whether Konig believes that the early primacy of the communal extends to criminal as well as civil law.
57. Statements emphasizing the colonists' early understanding of the need for law tend to be made in the context of criminal law. *See, e.g.*, pp. 3, 18. Konig does not directly address this point.

these realities came to be accepted, so too were the positive possibilities of law admitted."[58] But not, evidently, at first. The author is impressed by the fact that the leaders of the Bay Colony were wont, at first and only at first, to exhort their people not to sue their neighbors.[59] These exhortations do, certainly, evidence the founders' understanding that litigation can be destructive, but it is well to keep in mind that they were issued in "the infancy of the plantation" when none could know whether litigiousness would be carried to extremes that would threaten survival of the enterprise. And of course, recognition of the positive side of litigation can subsist happily with recognition of its destructive potential. In all, Konig, troubled by assumptions that the courts were in later decades a desperate last resort, seems to adopt the same assumptions for the first years of settlement, with no greater justification.

Certain features of Konig's book complicate the life of the would-be fair reviewer who rejects his communal ideal. For example, Konig seems to feel less need than one might expect to prove that there was a communal ideal. He appears, first, to believe that he is only following tradition: "As is well known from many studies, *this* communal ideal soon faded in the New World environment. . . ."[60] Konig's communal ideal, as I see it, is not everybody's communal ideal; it would be interesting, however, to see the argument as it might be made in anticipation of, or in response to, challenge.[61] Secondly, Konig may have intended merely to emphasize that law was "paradigmatic" in seventeenth-century Massachusetts. Then, since he does just that for the later decades, it may be perverse, and even ungrateful, to attack him for minimizing the role of law in the early years. An author may find some irony in a reviewer's concentration of fire on that which is intended to usher in the scholarly contribution.

Also, no book entirely escapes ambiguity; the reader is unlikely to

58. P. 191. *But cf.* pp. 8, 34. The book contains inconsistent statements on this, as on the colonists' over-all attitude toward law. This review takes what appears to be the general tenor of the book as the appropriate interpretation.

59. Pp. 188-89.

60. P. xiii (emphasis added).

61. He might, for example, have dealt directly with the issue of overall litigation rates. *See* note 28 *supra*. A serious problem here is that in the earliest days of the colony, complaints of every variety were brought originally to the courts (Assistants, General Court) with colony-wide jurisdiction. With the years, legislation directed litigants to lower courts, and penalties were imposed for bringing to a higher court cases within the original jurisdiction of the lower court, usually the County Court. Thus without studying all court records, quantification is problematic. Similar problems exist for cases within the jurisdiction of the commissioners of small causes. *See* p. 86 (noting this problem in one context, but dismissing possibility that many cases went to commissioners for small causes).

feel entire certainty about the implications of Konig's communal ideal for early colonial attitudes toward law.[62] Consider, for example, the state of not being "paradigmatic." If, to Konig, something may be not-paradigmatic which merely comes in second in a photo-finish, then there is little to choose between author and reviewer on the position of law in Essex ideology.

Finally, there is the fact that community did indeed have a place in the lives of the first generation of settlers that it was never again to enjoy; *something* happened. Only in earliest days was the handshake of a neighbor all that a man needed for security in matters of real property.[63] What is demonstrated, however, by the fact that when the land-population ratio shifted, more was needed, and that it was found in the coercive power of the courts? Not, it would seem, that a communal ideal was defeated. But something.

III. Conclusion: Law, Society, and Legal History

Although Konig explores, with zest and in the greatest detail, the parentage, patternings, and particulars of *conflict,* by and large his interest in *resolution*—in litigation—stops at the courthouse door. This is not, by the way, a criticism. If the origin of litigation were—as it is not here—all that an historian had studied, done well—as it is here—it would be enough. But this approach may impose certain limits on the conclusions one can legitimately reach, particularly about the positive functions of litigation.

Konig refers to the "totality of norms" and the "rules" emerging from lawsuits.[64] He tells us that an observer in a colonial courtroom "learned what his society approved."[65] It might be protested that without more information about the decisional process we can know only that disputes were settled and those settlements abided by; that is, that aggression was contained. There is something to this: the "totality of norms" and "rules" emerging from lawsuits are of one variety if decision is regularly on the law, and another if decision is usually by general verdict. Further analysis would be interesting, but the positive role of litigation, whatever its precise contours, is not really open to doubt. It is the thesis of belated colonial awareness thereof that is vulnerable.

62. *See* note 58 *supra.*
63. Pp. 46-47, 55-57. Similarly, the contribution of the community to the extirpation of sin, *see* pp. 241-42 *supra,* decreased with time.
64. *See* pp. 69, 88.
65. Pp. 188-89.

Konig, more interested in roles than rules, does inquire extensively into the law in one area—real property.[66] The reader is thereby presented with a sample of legal response—substantive and procedural—to societal demand, and incidentally, of the erudition and skill the author can bring to the handling of technical legal material: trespass, for example, is his servant.[67] Along with the considerable legal learning apparent throughout the book, however, there is a lack of sophistication, not, finally, serious, but distracting. It surfaces on occasion as error, but more commonly as something slightly awry, as in, for example, the artless use of terms of legal art,[68] or the failure to keep sharp the distinction between accusation and guilt.[69] In summary, it may be said of Konig's handling of technical legal material that when he is good, he is very, very good, and when he is bad he—unlike the paradigm—only just misses the mark.

This recent addition to the distinguished Studies in Legal History series is a kind of legal history we need more of. Its author, however, may not be much impressed by the claims, such as they are, of "legal history" to disciplinary status. Dividing the relevant scholarly world into "legal scholars" and "scholars trained as historians," Konig appears rather to distance himself from the former. Praise for their "fine studies" is balanced by the observation that such works are written "from the perspective of their own discipline."[70] This generally held view is problematic. The fact that many "legal scholars" do not explore extensively the societal background and context of legal conflict leads some to think that their works say nothing about "law and society."[71] The tendency is to put these books in their place: excellent reference books on rules, not roles. But even the narrowest

66. Pp. 35-63. In a methodological proposition which would find unreserved acceptance only in some circles, he tells us that legal changes "can best be approached, analyzed, and measured by examining the way in which social and economic development and legal transformation were interrelated." P. 38. No attempt is made at a comprehensive or systematic review, even in one area, of law or legal change in seventeenth-century Essex. This is not a necessary consequence of an interest in "law and society," but of an institutional bias. And, as always in an institutional study, the resulting treatment—random, haphazard, depending on the fortuity of litigation—nicely echoes the origin and development of the common law itself.

67. For example, Konig spots a previously unnoticed drawback to the use of trespass, "the requirement of the plaintiff's actual possession of the land at some point in time," obviously a serious obstacle in a new land. P. 61; *cf.* 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1008 (T. Cooley ed. 1899) (nineteenth-century cases using doctrine of constructive possession for purposes of suit to deal with vacant land problem).

68. *See* note 39 *supra.*

69. Pp. 142-43, 154-55.

70. P. xi.

71. This belief reinforces the tendency to assume that books by "legal scholars" do not explore societal context and background; some do not, some do.

of these works may contribute substantially to one's understanding of the role as well as the rule.

Scholars who devote prodigious amounts of time and energy to the study of the history of law in a given society probably believe in its overwhelming importance to that society; possibly, they turn to their studies already convinced of it. Obviously it is not recommended that one accept the *a priori* hypotheses of "legal scholars" on this point; it is, however, to be hoped that all scholars will be receptive to any proof which may be found in their completed works.

If one has, by training, the social historian's sensitivity to foci of social control other than law, and/or the anthropologist's experience with societies where, for a variety of reasons, the importance of "law" does not go without saying, then that which "legal scholars" might take for granted is naturally thought to require proof. Such healthy skepticism is for the most part a boon: it keeps us all honest and prevents the hardening of bias into dogma. But my belief that the works of the "legal scholars" have established, incontrovertibly, that Massachusetts was a legalistic society from beginning to end, produces some reflection on all this. Anybody may disagree with the assertion that this *is* the message of the legal scholars, or *with* the message. The question is whether legal historians like David Konig will altogether *miss* such a message, if it is there, and accurate, because they think of their colleagues in legal history as writing "from the perspective of their own discipline."

One of the miracles of scholarship is the enormous benefit one can gain from work with which one is in profound disagreement.[72] Beyond the permissible differing of reasonable historians there lies, if one is fortunate, respect and admiration for work with the mark of excellence. That is my experience with this felicitously written, stimulating, and informative book.

72. As one among many possible examples, Konig, whose account of the establishment of a court system could hardly be less like mine, has provided a perspective on these courts which casts a totally new light on certain fundamental issues in colonial legal history. Similarly, although a world-view away from Konig's perception of colonial witchcraft as an extralegal method of social control, I find his chapter on Salem witchcraft marvelously illuminating.