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# LAW, LEGALISM, AND COMMUNITY BEFORE THE AMERICAN REVOLUTION

Bruce H. Mann\*

Community is an elusive concept, all the more so for being an evocative one. It conjures images of a simpler time when relations were close and familial, when people mattered more than things, when neighbors truly did love one another as they loved themselves. This veil of romanticism lends special peril to the historical study of community. After all, as Randall Jarrell once wrote, the problem with golden ages is that the people who live in them complain that everything looks yellow.<sup>1</sup> Idealized notions of community can lead historians to dismiss such complaints as churlish caviling in the face of obvious good fortune, or to pay them too much heed in irritated reaction against aggressive naïveté and good cheer. Both responses are extreme, but they proceed naturally from typological theories of social change that posit polar dichotomies of status and contract, *Gemeinschaft* and *Gesellschaft*, traditional and modern, Puritan and Yankee — to name but a few of the paired opposites that incautious acolytes interpret as mutually exclusive and probably successive.<sup>2</sup> The reality, of course, is more complex, as reality often is. The intricate webs of human interactions that underlie politics, economy, and society do not lend themselves to easy categorization.

Historians, of all people, should be sensitive to such nuances. Themes of community have dominated the historiography of early America for the last twenty years, more particularly since 1970 — the 1848 of social history, when four path-breaking books changed the way colonial historians framed the questions they asked of the past.<sup>3</sup>

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1. Jarrell, *The Appalling Taste of the Age*, SAT. EVENING POST, July 26, 1958, at 18.

2. See T. BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 15-25 (1978).

3. J. DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (1970); P. GREVEN, FOUR GENERATIONS: POPULATION, LAND, AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS (1970); K. LOCKRIDGE, A NEW ENGLAND TOWN, THE FIRST HUNDRED YEARS: DEDHAM, MASSACHUSETTS, 1636-1736 (1970) (2d ed. 1985); M. ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY (1970). These four were not the first community studies. Earlier works include C. GRANT, DEMOCRACY IN THE CONNECTICUT FRONTIER TOWN OF KENT (1961); S. POWELL, PURITAN

Since then, detailed studies of individual towns have proliferated as the vehicle of choice for recovering the texture of daily life.<sup>4</sup> Declension had already become the leitmotif of Puritan studies under the forceful pen of Perry Miller, so it was perhaps inevitable that community studies would also find, and sometimes lament, the decline of community.<sup>5</sup> They differed, however, on when the breakdown of community occurred. Candidates ranged from the antinomian controversy in the 1630s to the Second Great Awakening in the early 1800s, with occasional votes for the later nineteenth or early twentieth centuries.<sup>6</sup> The variety is understandable, since, as one historian recently remarked, "[n]o historian labors in the eye-straining, frustratingly incomplete, and sometimes nearly intractable sources of local records in order to prove the changelessness of the society he or she is studying."<sup>7</sup> Moreover, the closer historians looked, the more they discovered such apparent anomalies as Stephen Innes' proto-capitalistic Springfield, settled in the same year as Kenneth Lockridge's Christian, utopian, closed, corporate Dedham, or, heresy of heresies, Christine Heyrman's Gloucester and Marblehead, where the traditional indicia of community intensified rather than crumbled under the pressure of commercial development.<sup>8</sup>

Such discoveries are anomalous only if one ignores the essential pluralism of historical experience and instead assumes the universality and inexorability that are implicit in dichotomous typologies. Community need not necessarily "break down," nor need it always exist or consist of the same qualities. The best of the recent community studies caution against such assumptions. Legal historians, however, have not been as careful. There are, of course, exceptions. David Konig's study of Essex county, Massachusetts, and A.G. Roeber's work on Virginia, for example, display enormous sensitivity to the interactions

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VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN (1963); D. RUTMAN, WINTHROP'S BOSTON: PORTRAIT OF A PURITAN TOWN, 1630-1649 (1965). But the methodologies of the 1970 studies were the freshest and most distinctive, and the synergistic effect of their simultaneous appearance, particularly among young historians, was electrifying. See generally Murrin, *Review Essay*, 11 *HIST. & THEORY* 226 (1972).

4. For the most recent attempt to evaluate the enterprise, see Rutman, *Assessing the Little Communities of Early America*, 43 *WM. & MARY Q.* (3d ser.) 163 (1986).

5. Miller articulated the theme of declension most clearly in P. MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* (1953).

6. See T. BENDER, *supra* note 2, at 45-53; Nash, *Social Development*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 233, 236 (J. Greene & J. Pole eds. 1984).

7. Nash, *supra* note 6, at 237.

8. C. HEYRMAN, *COMMERCE AND CULTURE: THE MARITIME COMMUNITIES OF COLONIAL MASSACHUSETTS, 1690-1750* (1984); S. INNES, *LABOR IN A NEW LAND: ECONOMY AND SOCIETY IN SEVENTEENTH-CENTURY SPRINGFIELD* (1983); K. LOCKRIDGE, *supra* note 3.

between law and society.<sup>9</sup> And the tradition of historical still lifes, which capture and freeze slices of a social and legal past but which do not attempt to deal with change, has continued since George Haskins made the genre respectable twenty-five years ago.<sup>10</sup> More often, though, the dominant view has been that of William Nelson and Morton Horwitz, whose works, for all their abundant merit, posit or assume idealized, homogenized pictures of the colonial period that differ little from the casual dismissals by Roscoe Pound and Grant Gilmore.<sup>11</sup>

The connections between law and community are difficult to identify, let alone explain. It may be best to begin by seeing how law and the ways people used it changed, and then attempt to relate those changes to the surrounding economy and society. One must, of course, be wary of finding what one looks for. Nonetheless, as with objects against a dark background, it is sometimes easier to see things when they move than when they remain still. To illustrate the interactive nature of legal change and community, I will draw on examples from Connecticut before the Revolution — not because I think Connecticut was representative or typical, but because I know something about it. As it happens, there were significant changes in the legal system from the end of the seventeenth century to the eve of the Revolution, both in the ways people used the legal system and in its internal characteristics. There were also perceptible changes in the economy and society of the colony during the same period. The juxtaposition may have been coincidental, but I think not. The changes were linked, however loosely, by the growth of a legalist paradigm, in which the formal legal system supplanted ways of dealing that were rooted in communities and became the standards for all forms of disputing.

## I

The principal changes in the legal system during the eighteenth century were not changes in substantive law. Instead, they were changes in how people structured their legal relations, such as a shift in the way they evidenced debt obligations, and changes in how they

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9. D. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692* (1979); A. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* (1981).

10. G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* (1960).

11. W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938); G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

litigated their disputes, in particular an increase in the technicality of pleadings and a decline in the use of juries in civil actions.

A shift in the legal framework of relations between debtors and creditors may seem unimportant until one notes that debt cases accounted for ninety percent of all civil actions in the eighteenth century.<sup>12</sup> In a society that had little hard currency and where income was tied to the vagaries of harvests and the sea, credit was essential. Until shortly after the turn of the century, book accounts were the preferred means of extending credit, whether the debt was that of a farmer to his hay mower, a townsman to a shopkeeper, or a merchant to his factor. By the 1730s, a scant generation later, book accounts had fallen from favor and been replaced by formal credit instruments — bonds, bills obligatory, and, primarily, promissory notes — as the debt obligation of choice.<sup>13</sup> There were no substantive or procedural changes that would explain the declining popularity of book debt and the concomitant rise of written credit instruments, yet the shift is unmistakable.

The key to explaining the change lies in the nature of the debt obligations themselves. Book accounts, as the name implies, were account books in which the creditor entered a continuous record of his transactions with his debtors. Anyone could keep a book, and it may be that most men did at one time or another in the course of trading goods or services. Book accounts had an almost organic quality, which nicely mirrored the economic relations they recorded. The debtor's account grew, one transaction at a time, perhaps reduced by occasional payments or seasonal settlements, until the creditor saw fit to request full payment. Some books were short, others long. Some spanned months, others years. There were no limits to the number or duration of transactions except those set by the parties as they continued to deal with one another, nor did book accounts contain an express promise by the debtor to pay the amount due. To sue on them, a creditor merely declared that the debtor owed him a certain sum on a book account that he had never paid, "though often requested." Both parties could testify, and each was free to offer whatever evidence he or she thought relevant to the dispute. The book itself was not conclu-

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12. The quantitative data in this paper rest on a sample of 5317 civil cases drawn from the records of the Hartford and New London county courts at five-year intervals from 1690 through 1760. An earlier version of my findings on debt litigation, based on a much smaller sample, appeared as Mann, *Rationality, Legal Change, and Community in Connecticut, 1690-1760*, 14 *LAW & SOC. REV.* 187 (1980).

13. Actions on book accounts fell from 71% of all debt litigation in the Hartford County Court in the first decade of the century to 29% in the third. In the 1730s, they reached 19%, at which level they remained until just before the Revolution. Actions on written instruments increased from 15% in the first decade of the century to 68% in the third and 80% thereafter.

sive evidence of the debt. It was, instead, merely a starting point for discussing in open court the range of dealings between debtor and creditor.

Notes and bonds, on the other hand, were a very different kind of debt obligation. They were formal instruments by which the debtor, over his own signature, expressly promised to pay a specific sum to the creditor, either on demand or on a certain date.<sup>14</sup> The debtor's liability rested primarily on whether the instrument itself met the legal requirements of form. Actions on written instruments did not admit the range of evidence that was permissible in actions on book accounts. The debtor's options in court were few. He could plead *non est factum* — that the instrument was not his deed, either because it had been altered or because his signature had been forged. He could plead performance of the condition if the bond was conditional or the note had been given to secure performance of a promise. Or he could plead payment. He could not plead that there had been a mistake or that he was entitled to a set-off from other dealings with the creditor or that he had intended something other than what he had signed or that the creditor had promised not to sue. In short, except for pleas that were limited in scope and often technical in nature, written instruments bound debtors to what they had signed. This quality made notes and bonds more definite and less controvertible than book accounts. With their precise forms and express promises, written obligations embodied the debtor's liability more completely and to a greater degree of certainty than book accounts.

The formal differences between book accounts and written credit instruments were not, of course, a function of social or economic change. The considerations that led people to use one rather than the other, however, were. Until well into the eighteenth century, the majority of the population in Connecticut were farmers who produced primarily for their own households, with only small surpluses avail-

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14. There were, of course, differences among the kinds of written instruments. Conditioned bonds, which were more common than single or simple bonds, were contracts under seal by which the obligor bound himself to pay the stipulated sum to the obligee on a certain date unless by that date he had performed a specified condition. That condition, known as the condition of defeasance, could be either the performance of some act or the payment of a sum of money. Bills obligatory and promissory notes were not under seal. They were promises signed by the debtor to pay the creditor a specified sum within a stipulated time or on demand. Bills generally acknowledged the indebtedness and recited what we would now regard as the consideration for the debtor's promise, whereas notes were simply unadorned promises to pay the named amount. In Connecticut, bills obligatory were also signed by witnesses, while promissory notes were not. For the most part, the distinctions between bills obligatory and promissory notes in Connecticut were inconsequential, and relatively few identifiable bills appear in the records. It would be misleading to impute the contemporary English or modern clarity of the categories of bonds, bills, and notes to colonial practice. As a group, they stand in sharp contrast to book debts, and the similarities among them are far more important than the differences.

able for trade. Their failure to produce for the market stemmed not from lack of interest or aversion to commercial activity, but rather from conditions of land, labor, and transportation. Poor transportation, rocky soil, and the high cost of labor relative to the price of land hindered production of a commercial surplus and kept trade within well-worn local channels. The economy was "pre-commercial" of necessity, not by choice.<sup>15</sup> Subsistence, however, is not the same as self-sufficiency. For what farmers could not grow or make themselves, such as cooking utensils and fineries, they relied on local shopkeepers, merchants, and chapmen. Payment was rarely in cash, which was chronically scarce. Instead, people used agricultural produce as money. Book accounts facilitated such transactions, as well as transactions with blacksmiths, coopers, carpenters, tanners, taverners, mowers, drivers, laborers, and anyone else with whom one traded goods or services. They were a product as well as a record of face-to-face transactions between traders and farmers, farmers and laborers, as well as of more distant transactions between traders and the merchants who supplied them.

Creditors in such circumstances knew their debtors, and knew them well. Book accounts relied on a creditor's willingness to extend credit to people who did not expressly bind themselves to repay the debt, a willingness that implies a measure of trust between creditor and debtor. Trust could rest as easily on self-interest as on altruism. It might be that of friends or neighbors, or that of traders who formed assumptions and expectations of one another's behavior through a series of exchanges, or a combination of the two. The trust necessary to support dealings on book accounts did not require the parties to share the idealized indicia of community, yet it occurred most often among neighbors. Book debts were, to a large extent, community matters. Almost ninety percent of all book debt actions filed in the Hartford County Court in 1700 were between residents of the county, and in sixty percent both debtor and creditor lived in the same town. The local nexus of book debt was an important element of the intricate webs of multilayered social relations that characterized early communities. The smallness of society in seventeenth-century Connecticut meant that debtors and creditors did not, indeed could not, limit their relations to single transactions.<sup>16</sup> The debt was only one part of their

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15. See R. BUSHMAN, FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765, at 25-32 (1967); I. MITCHELL, ROADS AND ROAD-MAKING IN COLONIAL CONNECTICUT (1933) (Connecticut Tercentenary Commission pamphlet); Daniels, *Economic Development in Colonial and Revolutionary Connecticut: An Overview*, 37 WM. & MARY Q. (3d ser.) 429 (1980).

16. The elements of community life in seventeenth-century New England are too numerous

dealings with one another within the community. In such circumstances, the procedural and evidentiary flexibility of book debt allowed the parties to present their dispute in ways that would place the legal issue of indebtedness in the larger context of their social relations, against which context the bench or jury would decide the case. Debtors and creditors who recorded their dealings in book accounts committed themselves to a course that permitted a broad inquiry into the nature of their mutual obligations, an inquiry that was appropriate when the relations between them were not limited to the individual transactions that created the debt.

Much of the way of doing business that underlay book debt changed with the advent of paper money, which was both a cause and a symptom of economic transformation in the early eighteenth century. The first issue of paper currency by the General Assembly in 1709 signaled growing involvement in a commercial economy.<sup>17</sup> Trade expanded rapidly in the first half of the eighteenth century. Population, which had doubled in the generation between 1670 and 1700, doubled again in the next thirty years. Population density, which had remained fairly stable for the twenty years before 1710, increased rapidly as the rate of population growth outstripped the availability of new land for settlement.<sup>18</sup> The resulting pressure on land led to more specialized cultivation to adapt to different types of soil. Specialization in turn led to commercial farming because of the need to market crops and the development of large markets in the West Indies.<sup>19</sup> With more products available for export, secondary ports along the Connecticut River and Long Island Sound and market towns on the road to Boston grew to accommodate the demand for markets and transportation. The lure of greater local trading opportunities encouraged men to enter the lists as small traders and challenge established merchants. Paper money allowed new traders to enter towns and compete with established merchants by offering farmers cash for their goods.<sup>20</sup> It also answered the demands for capital of

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to discuss here. For descriptions, see the works cited in notes 3 & 8 *supra*, and the brief, picturesque description in J. DEMOS, ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND 311-12 (1982).

17. 5 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 111-12 (C. Hoadly ed. 1870) [hereinafter cited as CONN. REC.]; J. HENRETTA, THE EVOLUTION OF AMERICAN SOCIETY, 1700-1815: AN INTERDISCIPLINARY ANALYSIS 7 (1973); see also J. PRICE, CAPITAL AND CREDIT IN BRITISH OVERSEAS TRADE: THE VIEW FROM THE CHESAPEAKE, 1700-1776 (1980).

18. B. DANIELS, THE CONNECTICUT TOWN: GROWTH AND DEVELOPMENT, 1635-1790, at 47, 50 (1979).

19. Daniels, *supra* note 15, at 433-34.

20. R. BUSHMAN, *supra* note 15, at 107-21; J. HENRETTA, *supra* note 17, at 36-37, 78-81; MARTIN, MERCHANTS AND TRADE OF THE CONNECTICUT RIVER VALLEY, 1750-1820, at 14 (1939) (Smith College Studies in History, XXIV).



farmers who wanted to buy or stock land and of traders who needed goods to trade. As paper currency supplanted commodity money, direct extensions of credit in return for written promises to repay became the dominant mode of contracting debt obligations. These promises were the bonds and promissory notes that pushed book debt aside in the 1720s. Even people who continued to trade on book felt the influence of signed credit instruments when creditors demanded that their debtors make their book accounts over into notes or bonds as a condition of further credit.<sup>21</sup>

The formal rationality of written instruments made them better suited than book accounts to credit transactions in an expanding economy. The certainty with which they embodied the debtor's liability made the outcome of litigation on them more predictable. Since nothing mattered other than the piece of paper with the debtor's promise and signature, no other evidence was relevant or even admissible. The formal attributes of written credit instruments limited litigation largely to the instruments themselves, homogenizing the underlying transactions and giving them a uniform, predictable character. Moreover, written instruments, unlike book accounts, were assignable, a trait that facilitated commercial transactions at the same time that it depersonalized the relationship between debtor and creditor. Notes and bonds reflected a world of rather different relations between debtors and creditors than those recorded on book. It was a world in which credit was no longer something that grew from transaction to transaction as people dealt with one another without formal promises to pay. Instead, credit had become something extended in single transactions in return for formal admissions of liability. Relations that had once been neighborly courses of dealing now focused on individual transactions.

The expansion of the economy in the eighteenth century did not mean that all commercial dealings became faceless and impersonal. However, population growth, migration, and economic development drew people beyond town and county boundaries and changed the way

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21. For example, when Simon Scripture, "a Shop keeper and Retailer of English Goods" in Coventry, insisted that James Jackson of Windsor acknowledge a book account that was larger than Jackson had anticipated and give him a note for it at a usurious rate of interest, Jackson felt he had no choice but to agree, "being then unable to pay said Debt and fearing the displeasure of" Scripture. Defendant's plea in bar (Jan. 1756), *Scripture v. Jackson*, 14 Hartford County Court Rec. 211, 237, Hartford County Court Files 150 (1755-56) (Conn. State Library, Hartford). See generally R. BUSHMAN, *supra* note 15, at 127-30; Martin, *supra* note 20, at 156-63. Herbert A. Johnson noted a similar transformation in New York from a barter economy to one based on credit, and the resulting increased importance of credit instruments. H. JOHNSON, *THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK, 1664-1730*, at 4-14 (1963).

they did business with one another. Multilayered relations and the dealings appropriate to them did not disappear. The continued use of book accounts suggests that they persisted. But they now shared the stage with single-interest, instrumental relations that were shaped by new patterns of economic behavior. When written credit instruments first appeared in significant numbers in the second decade of the eighteenth century, nearly two-thirds of them linked debtors and creditors from different towns.<sup>22</sup> Distance made the development of traditional multilayered relations unlikely. If book accounts implied a measure of trust between debtor and creditor, it was a trust made possible by the smallness of an economic universe in which people knew one another well and dealt with one another frequently. Notes and bonds, on the other hand, gave credit transactions an intrinsic certainty and predictability that rested on legal form rather than on trust. Connecticut at midcentury was still a small society. Its inhabitants retained a communitarian model of social life even while their commercial behavior became more impersonal.<sup>23</sup> But the nature of their relations and the legal forms that embodied them were fundamentally different from those that had prevailed a generation or two earlier.

Book accounts were an essentially community-based form of debt obligation. Because of their procedural and evidentiary flexibility, liability on them turned more on the facts of a dispute than on fixed conceptions of the law, as one debtor discovered when he complained — in vain — that the jury that decided a book debt action against him had considered evidence that the court had excluded.<sup>24</sup> The procedural framework of book debt litigation rested on the assumption that each dispute was unique and therefore to be decided only after the parties had aired all the evidence they thought relevant. This doubt-

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22. Of the actions on written instruments filed in the Hartford County Court between 1710 and 1715, 64% involved debtors and creditors from different towns. As a methodological matter, one must, of course, exercise caution in extrapolating from litigation patterns to the behavior of debtors and creditors generally. With respect to actions on written instruments, there are some useful connections between the worlds of litigation and nonlitigated compliance. By the 1730s, most actions on written instruments in the county courts did not represent disputes at all. Instead, they were uncontested actions in which the creditor filed suit and the debtor acknowledged the indebtedness to facilitate later collection by the creditor if the debtor defaulted. See note 26 *infra* and accompanying text. As notes and bonds spread in intratown credit relations, one would expect to find an increase in the proportion of intratown actions on written instruments and a corresponding decrease in the proportion of intertown actions on written instruments, not because notes and bonds were becoming less suitable for long-distance transactions but because local debtors could more easily appear at the county court to confess judgment against themselves. That is precisely what happened.

23. See J. CROWLEY, *THIS SHEBA, SELF: THE CONCEPTUALIZATION OF ECONOMIC LIFE IN EIGHTEENTH-CENTURY AMERICA* 6 (1974); P. TRACY, *JONATHAN EDWARDS, PASTOR: RELIGION AND SOCIETY IN EIGHTEENTH-CENTURY NORTHAMPTON* 92 (1980).

24. Petition of James Poisson (May 10, 1711) 6 Conn. Archives, *Private Controversies* (1st ser.) 222 (Conn. State Library, Hartford); 5 CONN. REC., *supra* note 17, at 210.

less explains why so many book debt litigants submitted their cases to juries for decision rather than to the judges of the bench, and why the vast majority of contested book actions, whether decided by bench or jury, turned on factual issues rather than legal ones.<sup>25</sup> Written credit instruments, on the other hand, so routinized credit relations that most actions on them were not disputes at all, but rather confessions of judgment to facilitate later collection.<sup>26</sup> Liability turned so completely on legal form that factual considerations were irrelevant. Notes and bonds treated as fungible the credit relations that book accounts presumed were unique. Their increasing dominance in intratown credit transactions in the first half of the eighteenth century suggests not only the spread of instrumental credit relations within towns, but, more significantly, that people were treating their neighbors as they did strangers, at least in terms of their credit relations.<sup>27</sup>

## II

The community significance of the shift in the way people structured their credit relations was reinforced by two related changes in the same period. Like the changes in debt litigation, the decline of the jury in civil litigation and the increasing technicality of pleadings point to a transformation from a legal system that assumed the uniqueness of individual disputes to one that subordinated individuality to comprehensiveness and predictability. Unlike the changes in debt litigation, however, the procedural changes did not proceed from economic developments. Rather, their significance for notions of community lay in the increasing constraints that a partially autonomous legal system could impose on how people litigated their disputes.

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25. Juries decided 52% of the contested book debt actions in the Hartford County Court between 1710 and 1715. Of those contested book actions, 81% turned on factual issues.

26. Beginning in the 1730s, when promissory notes first eclipsed bonds, debtors never contested more than 10% of the actions on written instruments entered against them. In fact, they rarely contested more than six percent. Instead, they appeared in court and confessed judgment against themselves, or they did not appear at all and allowed judgment to go against them by default. Either way, the debtor conceded liability to the creditor. All of the confessions of judgment and an indeterminate number of the defaults represented creditors reducing the debts to judgments before they had any intention of trying to collect from the debtor. When the notes later became due, there was no question of the debtor's liability — the judgments had already determined that. If a debtor did not pay, the creditor could procure a writ of execution on the judgment to seize the debtor's property.

27. Actions on written instruments increased from eight percent of all intratown debt actions in the first decade of the century to 14% in the second, 69% in the third, and 84% in the fourth. The mere use of formal credit instruments did not, of course, mean that the underlying credit relations were necessarily impersonal. One finds in estate inventories numerous long-overdue notes from neighbors on which the decedent had never demanded payment, which suggests that "neighborly debts" continued to occupy a special place in relations between debtors and creditors. See D. KONIG, *supra* note 9, at 82-87.

The jury has long occupied a central position in the pantheon of common law mythology. The symbol of twelve respectable "men of the neighborhood," in the traditional phrase, applying their collective judgment, understanding, and empathy to the determination of questions of right and wrong is a powerful one, so powerful that it transcends whatever the reality may be. That reality is difficult to recapture.<sup>28</sup> Juries had been used in civil actions from the beginning of settlement in Connecticut. They decided almost all civil cases from the creation of the county courts in 1665 through the end of the century. In background, experience, and outlook, jurors were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them. They applied the same standards in their deliberations that the litigants would apply in similar cases involving others. They decided cases on the basis of the evidence submitted to them, on their understanding of the law in a formal sense, and doubtless also on their sense of what the law ought to be.<sup>29</sup>

Most litigants in the seventeenth century submitted their actions to the jury under the general issue, which was a categorical denial of everything the plaintiff had alleged. Juries heard evidence on a range of issues, often a veritable morass of contradictions from which they had to determine who had done what to whom and why, and what the legal consequences would be.<sup>30</sup> How jurors determined these matters was in part conditioned by their identity as people from similar communities in a communal society. When given cases under the general issue, juries — because of the comparative weakness of formal controls, because of their discretion, and because of the secrecy of their deliberations — filtered the evidence before them through the prisms of their own knowledge, experience, and beliefs, a process that Clifford Geertz has described as "the cultural contextualization of incident."<sup>31</sup> In so doing, jurors determined legal issues against a template of community norms and served a mediating function between law and soci-

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28. Most historians have focused on the criminal jury. Two of the best studies are T. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985); and Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in *SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY* 152 (D. Hall, J. Murrin & T. Tate eds. 1984).

29. There is no indication that judges instructed juries on the law to apply. William E. Nelson, who studied Massachusetts in a later period, thinks that jury charges in civil cases were infrequent. W. NELSON, *supra* note 11, at 26.

30. W. NELSON, *supra* note 11, at 22-23, has a good discussion of the effect of pleading the general issue.

31. C. GEERTZ, *Local Knowledge: Fact and Law in Historical Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 181 (1983).

ety.<sup>32</sup> In theory and in ideal, such a function is the principal purpose of the jury. Yet juries can perform their traditional role as purveyors of community norms only if they get cases to decide. It is thus significant that, from early in the eighteenth century, most contested civil actions in Connecticut never reached a jury. Instead, judges disposed of them on points of law. By 1745, bench judgments concluded eighty percent of all contested civil actions in the Hartford County Court.<sup>33</sup>

The decline of the jury is striking. Within the space of half a generation, the scales of civil justice tipped from a system based on verdicts rendered by representatives of individual communities to one that rested on judgments delivered from the bench. The jury itself did not change in any fundamental way, but it became increasingly irrelevant to the resolution of private disputes. Not only did juries decide fewer cases, those they did decide often turned on limited issues or on special verdicts, neither of which involved a determination of liability by the jury.

The immediate explanation for the decline lies in the marked change in the way litigants pleaded their cases during the first half of the eighteenth century. The general direction of the change was from pleas that raised factual issues to pleas that raised legal ones. Until shortly before 1710, virtually all contested civil actions in the county courts were tried under the general issue. Around 1710, though, pleadings took on a different aspect. Factual pleas still predominated, although not overwhelmingly — twenty-four percent of the defendants pleaded the general issue and thirty-three percent pleaded in bar (that is, they made a counter-assertion of fact that, if true and if legally sufficient, would have excused them from liability in whole or in part). For the first time, however, a substantial number of defendants offered dilatory pleas — thirty-eight percent pleaded in abatement by alleging some technical defect in the writ or in its service. Most of the technical pleas failed, and the people who made them retreated to pleading the merits of their case. Yet the fact that their first line of defense had been a legalistic objection that avoided the merits of the plaintiff's allegations suggests a significant change in the way people approached litigation. Moreover, the formal appearance of pleas in bar, with their consequent narrowing of the issue to be tried, was a procedural refinement in what had hitherto largely been unrestricted argument.

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32. This quality of juries is an important part of Nelson's argument. W. NELSON, *supra* note 11, at 20-30.

33. The subset of the sample described in note 12, *supra*, that consists of contested civil actions in the Hartford County Court contains 953 actions. I counted rulings that sustained pleas in abatement as bench judgments unless the plaintiff amended his writ or appealed the ruling, because such rulings effectively represented the end of the litigation.

The proportion of technical pleas rose quickly in the second decade of the century. By 1720, pleadings on the merits had declined to a scant fifteen percent of the initial pleas in civil actions. By 1730 the patterns were clear, if somewhat variable. Defendants pleaded to the merits of the plaintiff's declaration roughly twenty to thirty percent of the time, pleading the general issue somewhat more often than they pleaded specially. The rest of the time, which is to say most of the time, they made pleas in which the legal issues were paramount and the facts were immaterial or admitted. By an increasing margin, most of those pleas were demurrers.

The shift in the structure of pleadings in civil litigation could hardly have been sharper. In a legal system that made a formal, albeit often artificial, distinction between fact and law, a change from a mode of procedure that permitted litigants to have their disputes decided on the merits, whatever they might be, to one that reduced disputes to abstract principles of law represented a fundamental transformation of the role of law in adjudicating economic and social relations. The decline of the jury, which was partly attributable to the growing predominance of technical pleas, was one symptom of that transformation. The change in pleadings was another.

The causes of the transformation were several. The first steps toward greater formality in legal practice and procedure were the extensive efforts of Sir Edmund Andros in the late 1680s to conform colonial court procedure to English practice.<sup>34</sup> Subsequent steps were a consequence of the protracted struggle between James Fitch and the Winthrop family for control of large tracts of land in eastern Connecticut.<sup>35</sup> The stakes in the dispute were largely political, but many of the skirmishes were fought in court, where Fitch's shrewdness as a legal tactician raised the level of pleadings in land actions generally. Probably the most significant factor in the transformation of legal procedure, however, was the emergence of a group of professional lawyers at the beginning of the century.<sup>36</sup> Their presence had a discernible

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34. David Konig noted a similar introduction of English practice under the Dominion in Massachusetts. D. KONIG, *supra* note 9, at 160-64.

35. See R. BUSHMAN, *supra* note 15, at 83-103.

36. The General Assembly recognized the growing practice of pleading on behalf of others and in 1708 ordered that no one should be allowed to plead for another person unless he had first been approved by the court and taken an oath that followed the form for attorneys given in the English *Book of Oaths* of 1649. The clerk of the court that administered the oath was to record the event, and the record would be proof of the taker's "admission as an attorney to the bar of the . . . court." 5 CONN. REC., *supra* note 17, at 48; see also THE SUPERIOR COURT DIARY OF WILLIAM SAMUEL JOHNSON, 1772-1773, at liii n.1 (J. Farrell ed. 1942). Within a year, eleven men had been admitted to the bar of the Court of Assistants. 5 CONN. REC., *supra* note 17, at 48 n.\*.

effect on the conduct of lawsuits as they put their developing pleading skills to work. In turn, the spread of technical pleading made lawyers essential to litigation. By the 1730s, pleadings had become duels between opposing lawyers, and statutorily prescribed attorneys' fees were a standard item in the victor's bill of costs. Pleading not only now had rules, it had rules that were best understood by lawyers, a circumstance that allowed lawyers to arrogate control of pleading to themselves. When they did, civil litigation moved away from a communal model, in which the disputants argued their grievances under the general issue, to a sparring match controlled by technical rules that made the facts of a dispute worth less than how one pleaded them.

### III

The shift in debt instruments, the decline of the civil jury, and the growing technical sophistication of pleading were marks of an increasingly formal legal system, one that was growing more rational in a Weberian sense. As cases came to turn less on the factual circumstances of each dispute and more on abstract and generalizable principles of law, local litigation became less distinctively "local." This was one element in the growth of a legalist paradigm in the eighteenth century. Another, perhaps more revealing, element lay in how the formal legal system became the procedural standard for all forms of private disputing. Two illustrations will suffice — the transformation of arbitration from "an amicable and neighbourly mode of settling personal controversies," as Zephaniah Swift described it,<sup>37</sup> into a formal process that differed little from legal adjudication, and the increasing tendency of church disciplinary proceedings to adopt the language and procedures of the common law.

Arbitration in Connecticut before 1700 was a consensual process.<sup>38</sup> No one compelled disputants to submit their differences to the judgment of arbitrators, whose only authority came from the parties themselves and whose awards were legally unenforceable. Arbitration was also a community affair. Disputants and arbitrators alike tended to come from the same town. People chose arbitration over law when they knew one another and trusted each other to treat as final an award that had no legal effect. They also chose arbitration for its rela-

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37. 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 7 (Windham, Conn. 1796).

38. I have discussed arbitration in much greater detail elsewhere. See Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984).

tive speed, inexpensiveness, and informality. Arbitration was not limited by common law rules on joinder of issues, which meant that arbitrators were free to consider all questions and evidence that the parties chose to put before them. Arbitrators also had greater discretion than common law judges did to fashion remedies to suit the grievance. By submitting to arbitration, disputants expressed a willingness to compromise that was absent from litigation. They came to arbitration together, rather than as plaintiff and defendant, without the heightened sense of being adversaries that such labels imply.

These qualities made arbitration attractive in situations where the parties, for whatever reasons, had to be able to continue to deal with one another, as was the case in tightly knit communities where disputes arose within a complex web of social relations rather than in isolation. The unenforceability of arbitration awards was of little moment. The cohesiveness of communities in the seventeenth century, fostered by the necessity of living together in a physical and spiritual wilderness, gave adequate assurance that parties would abide by the awards of the arbitrators they had chosen. Parties that did not trust one another would not submit to arbitration in the first place. Once they had, however, the party that openly repudiated the award risked the disapproval of the community. As long as community sanctions sufficed, arbitration awards did not have to be legally enforceable to be effective.

Arbitration in seventeenth-century Connecticut was a uniquely community-based form of handling disputes, well suited to the needs of the communities it served. Communities, however, are not immutable. As we saw in the discussion of debt litigation, the social and economic landscape began to change near the turn of the century. Population growth and migration weakened the cohesiveness of the early towns. Settlement dispersed. A commercial economy drew people into market relations that increasingly crossed town boundaries. Towns became less insular. As the traditional bonds of community weakened, people who submitted their disputes to arbitration could not rely as readily on community support to assure voluntary compliance with awards. In fact, arbitration was increasingly likely to involve people from different towns altogether.<sup>39</sup> The legal unenforceability of arbitration awards, once of little consequence, now became troublesome. In response, disputants adopted various devices to secure compliance, which in time changed the nature of arbitration it-

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39. Whereas all arbitrations mentioned in petitions to the General Assembly before 1700 involved disputants from the same town or the same family, in the next half century only 57% did.



self. The principal such devices were conditioned bonds and, later, promissory notes, which the parties would execute in each other's favor for penal amounts and exchange, in the case of bonds, or deposit with the arbitrators, in the case of notes. Each party's note or bond secured his promise to submit to arbitration and abide by the result. Although the notes and bonds did not give arbitration awards legal effect, as enforceable debt obligations they raised the cost of ignoring awards.

The use of promissory notes had two far-reaching consequences. The first stemmed from the fact that physical custody of a note conferred on the holder power to control the obligor's unconditioned promise to pay the face amount. Before the shift to promissory notes, arbitrators had only their social authority in the community to persuade disputants to accept their awards. As custodians of the notes, however, they now had a means of legal compulsion. They could return the notes to their makers or give both notes to the person in whose favor they had awarded. They could turn the loser's note over to the winner immediately, or, if they were of a mind to give him time to perform the award, they could wait. They could endorse the loser's note down to the amount of the award before delivering it to the winner for collection, or they could deliver it unendorsed and let the victor sue for the full face amount. The power inherent in custody of the notes made arbitration a coercive process, at least in its end result.

The second consequence was a change in the nature of arbitration awards themselves. Early awards had often resembled decrees in equity, with injunctions to perform or refrain from performing various acts. After the shift to promissory notes, which was largely complete by 1730, monetary awards predominated. Arbitrators began to cast their awards so that they could be satisfied by delivery of the loser's note, which was the one part of the process that arbitrators could control. Hence the shift to monetary awards, which partook more of damages awarded at law than of remedies tailored to the social circumstances of individual disputes. The growing predominance of monetary awards also indicated the declining community basis of arbitration. The large proportion of arbitrations between people from different towns after 1700 reflected the geographic dispersal and consequent attenuation of the underlying social relations between disputants. Disputes in such circumstances tended not to be played out against the background of a complex range of relations between the parties but instead focused rather narrowly on the individual transactions in question. When the social relations of the parties had comprehended more than the dispute at hand, the omnibus awards of early

arbitration had offered compromise by their comprehensiveness and flexibility. The monetary awards of later arbitration were more appropriate for the more precisely defined disputes that arose from instrumental relations.

The longstanding effort to secure compliance with arbitration awards culminated in 1753, when the Connecticut General Assembly extended contempt and execution process to arbitration awards.<sup>40</sup> Awards were now directly enforceable by legal process. The enhanced legal status of awards accelerated the changes that were already in motion. Arbitration, which had always been adjudicatory in nature, became downright legalistic. Arbitrators, more of whom were now justices of the peace, presided over proceedings that resembled formal hearings, with sworn testimony, maneuverings that mimicked pleadings, and lawyers acting as counsel for the disputants.<sup>41</sup> The process itself was still called "arbitration," but it was no longer what that name had once implied. It had become, as Swift later observed, "a court created, constituted, and appointed by the parties."<sup>42</sup>

#### IV

The formalization of arbitration resembled similar changes in church disciplinary proceedings, which, like arbitration, offered disputants a private alternative to litigation. The side of church disciplinary proceedings most relevant here is not the one that usually attracts historical notice. Church authority in matters of morality, doctrine, and attendance, as well as instances of churches adjudicating questions of debt, contract, land title, business ethics, and other civil matters among members, are well known.<sup>43</sup> For our purposes, the most pertinent aspect of church discipline is not its subject matter but its proce-

40. 10 CONN. REC., *supra* note 17, at 201-02. The statute was modeled on the English Arbitration Act, 9 & 10 Will. 3, ch. 15 (1698).

41. Using honorifics as a rough identifier, 40% of all arbitrations mentioned in petitions to the General Assembly after 1754 included one or more justices of the peace as arbitrators. For examples of the increasing legalism of arbitration proceedings, see Deposition of Timothy Swan & William Wheeler (Oct. 10, 1767), *Minor v. Hewitt*, 19 Conn. Arch., *Private Controversies* (2d ser.) 56, 64a (1768) (Conn. State Library, Hartford); Petition of Ezekiel Pierce (Apr. 15, 1771), *Pierce v. Stuart*, 22 Conn. Arch., *Private Controversies* (2d ser.) 18, 18b (1773) (Conn. State Library, Hartford); Petition of Samuel Minor (Oct. 7, 1765), *Minor v. Minor & Minor*, 19 Conn. Arch., *Private Controversies* (2d ser.) 55, 55c-55d (1765) (Conn. State Library, Hartford) (petitioner had been "deprived of the council he had before retained whose circumstances could not admit of their then attending"); Petition of Seth Wales (May 29, 1770), *Wales v. Smith*, 29 Conn. Arch., *Private Controversies* (2d ser.) 80, 80c-80d (1771) (Conn. State Library, Hartford).

42. 2 Z. SWIFT, *supra* note 37, at 7.

43. W. NELSON, *DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825*, at 26-34 (1981); E. OBERHOLZER, *DELINQUENT SAINTS: DISCIPLINARY ACTION IN THE EARLY CONGREGATIONAL CHURCHES OF MASSACHUSETTS 43-163, 186-215* (1956).

ture, and in particular the increasing tendency in the eighteenth century toward a procedural framework and vocabulary that were self-consciously legalistic.

Early Puritanism was an exceptionally legalistic theology. It defined the fundamental relationship between God and the individual as a contractual one, embodied in the covenant of grace God had made with Abraham. Federal theologians of the early seventeenth century wrote of offer and acceptance, consideration, breach, performance, even of suing God for the promised salvation. For them, the language of law was a natural medium. It aided them in wrestling with the dilemma of how to make an inscrutable God scrutable, of how to render the mysterious workings of an omnipotent deity susceptible to comprehension by human reason.<sup>44</sup> The legalism of covenant theology had far-reaching consequences in seventeenth-century New England, where the religious covenant between God and individual believers was the model for the social covenants that linked individuals in communities and communities to God. There were church covenants and town covenants, each of which bound its subscribers in communities of mutual obligations, among which was the obligation of the community — however defined — to watch and correct the behavior of its members. Correction, however, could not be summary. Church disciplinary actions followed a common set of procedural rules that governed how churches should deal with delinquents.<sup>45</sup>

The procedures were particularly notable in their distinction between public offenses and private offenses. The question of what things are public and what private is a vexing one that does not admit of clear or constant answer.<sup>46</sup> In church disciplinary proceedings the distinction was double. On one level, the classification of an offense as public or private was determined by the number of witnesses to the act. On another, it was measured by the nature of the injury, which in turn rested at least in part on the substantive nature of the offense. Behavior that injured individuals rather than the community at large gave private, rather than public, offense.

The classification of offenses as public or private was a matter of more than merely taxonomic interest. Much like the common law

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44. See Miller, *The Marrow of Puritan Divinity*, 32 PUBLICATIONS COLONIAL SOC'Y. MASS. 247 (1937).

45. The best contemporary descriptions of church disciplinary procedure are T. HOOKER, *A SURVEY OF THE SUMME OF CHURCH-DISCIPLINE* (London 1648); C. MATHER, *RATIO DISCIPLINAE FRATRUM NOV-ANGLO- RUM: A FAITHFUL ACCOUNT OF THE DISCIPLINE PROFESSED AND PRACTISED IN THE CHURCHES OF NEW ENGLAND* (Boston 1726).

46. The question continues to vex. See the papers from the *University of Pennsylvania Law Review* symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

writ system, the classification of the act determined the procedure to be used in redressing it. Persons aggrieved by private offenses had to follow the procedure directed in the eighteenth chapter of Matthew.<sup>47</sup> They first had to meet privately with the offender "and seriously endeavor[ ] to bring him to Repentance."<sup>48</sup> If the offender remained obstinate, the aggrieved person was supposed to redouble his efforts with the assistance of one or two fellow church members. Only when that failed was it proper for the injured party to complain to the minister, who would then deal with the offender privately, if he relented in his obstinacy, or with the assistance of the church, if he did not. Proceedings on public offenses, on the other hand, dispensed with preliminary attempts at private correction and instead began with an examination of the offender by the minister, usually with the assistance of the elders. The examination served as a kind of probable cause hearing. If the delinquent maintained "that hardness of Heart, that bespeaks for him a publick Admonition,"<sup>49</sup> or if the nature of the offense required it, the pastor would refer the matter to the hearing and determination of the church, which would recommend admonition, censure, excommunication, or, occasionally, acquittal.<sup>50</sup>

The difference between the two procedures was not simply a matter of starting the disciplinary process at two different points. The requirement that disputants in private offenses deal with one another privately before complaining to the minister laid a conciliatory foundation for the proceedings that distinguished them from the more inquisitorial procedures for public offenses. To be sure, conciliation often fell victim to obstinacy and recrimination, but the hope that private dealing could forestall formal discipline was an article of faith in covenanted communities.<sup>51</sup>

The undercurrent of conciliation is missing from later proceedings,

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47. See *Matthew* 18:15-17.

48. C. MATHER, *supra* note 45, at 148.

49. *Id.* at 144.

50. T. HOOKER, *supra* note 45, pt. 3, at 34-38; C. MATHER, *supra* note 45, at 144-46, 148-49.

51. Churches not only inquired whether complainants had followed "the gospel rule" of *Matthew* 18:15-17, they also examined their substantive compliance with the scriptural injunction, much in the spirit of the maxim that one who seeks equity must first do equity. See, e.g., 1 Voluntown and Sterling Congregational Church Records, 1723-1914, at 29 (Apr. 14, 1725) (Conn. State Library, Hartford) [hereinafter cited as Voluntown Church Records]. When private dealing failed, churches still urged disputants to settle their differences themselves. See *id.* at 34 (Mar. 21, May 2, 1726); 1 Middletown First Congregational Church Records, 1668-1871, at 35 (Apr. 4, 1711) (Conn. State Library, Hartford). Perhaps the clearest affirmation of the value placed on conciliation through private dealing was the unanimous resolution of the Voluntown church in 1726 that a person who "does not take the scripture rule," yet who later settles his complaint after "occasioning the calling of a church meeting" and "finding he could not make his charge good," is "guilty of a scandal and that it is scandalous in the church not to censure such proceedings." 1 Voluntown Church Records, *supra*, at 27-28 (Jan. 1, 1725).

private as well as public. As early as the 1720s, but particularly from the 1740s, church disciplinary proceedings began to adopt the rhetoric and procedures of secular courts. There is no indication that they did so deliberately, although there is often a self-consciousness to the language that gives one pause. For example, the records of a proceeding against a deacon of the church in Voluntown in 1725, who was accused of lying about a case that had recently been tried before a local justice of the peace, included a written complaint to the pastor, written interrogatories answered and signed by the deacon, two depositions in legal form, written pleadings by the accused attacking not the merits but the procedure of the complaint, and an issue “drawn up” for the church to determine “[a]fter hearing both parties.”<sup>52</sup> The written complaint was probably not unusual, but the other documents do not appear in recorded disciplinary proceedings before 1725. Within a few years afterward, however, disputants used them often enough to make church disciplinary proceedings resemble civil trials in virtually every important respect — except, of course, that of the available remedies. Even the citations to appear before the church were nearly identical to civil writs of summons. They differed only in that they were signed by the minister rather than a justice of the peace, they appointed a church member rather than a constable to make service and return, and they were issued not in the name of the king but on rather different authority, “in the Name of our Lord Jesus Christ.”<sup>53</sup>

By the 1750s, churches had begun to address questions of procedure explicitly rather than treating them as incidental to individual cases. The church in Kent voted in 1748 that disputants and their witnesses should withdraw “after the Publick hearing of the evidences and Pleas” while the church deliberated in private.<sup>54</sup> The first church in Plainfield and the fourth in Hartford each passed resolutions in the 1750s which declared that no process could issue to begin disciplinary proceedings without a written complaint to the minister that specified the allegations and listed the witnesses who could substantiate them.<sup>55</sup> Churches heard pleadings, including pleadings in the alternative, and entertained motions from alleged offenders that the proceedings be ad-

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52. 1 Voluntown Church Records, *supra* note 51, at 28-30 (Apr. 14, 1725).

53. See, e.g., Norwich First Congregational Church Records, 1699-1917, citations and other papers in folder marked “Norwich, Conn. 1st Cong. Church. Church Discipline, 1756, 1760-61, 1766” (microfilm reel 585, Conn. State Library, Hartford).

54. Kent Congregational Church Records, 1739-1823, at 27 (Sept. 1, 1748) (Conn. State Library, Hartford) [hereinafter cited as Kent Church Records].

55. 1 Plainfield First Congregational Church Records, 1747-1899, at 18 (July 5, 1754) (Conn. State Library, Hartford); 1 West Hartford (orig. Hartford Fourth) Congregational Church Records, 1713-1924, at 168 (June 16, 1758) (Conn. State Library, Hartford) [hereinafter cited as West Hartford Church Records].

journed to allow them time to prepare their defense or even to find legal counsel.<sup>56</sup> In church actions conducted under such rules, the procedure and rhetoric mimicked common law practice so closely that their references to "prayer" or "the church" are what seem anomalous.

The growing legalism of church proceedings was a negation of the communalism that had infused earlier disciplinary actions. Although perhaps not up to the procedural standards implicit in Grant Gilmore's description of hell as a place where "due process will be meticulously observed,"<sup>57</sup> the increasing procedural rigor of church hearings reflected a declining acceptance of the values that permitted such nonlegal hearings to function in the first place. The turn to greater procedural formality almost seems an attempt to compensate for a weakening consensus on the authority of church hearings by invoking the appearance of legal authority. It was, of course, merely the appearance. Yet the invocation of legal formality was natural. The language of law suits religion well. Both appeal to higher authority and speak through rituals that exclude the uninitiated except as supplicants. As systems of authority, law and religion were no longer coequal in the eighteenth century, as they had been in the seventeenth. The formalization of ecclesiastical proceedings along legal lines was an implicit acknowledgment of that inequality. In adopting the vocabulary and procedures of the civil law, church councils conceded the authority and hegemony of the formal legal system by paying it the compliment of borrowing from it.

## V

One cannot, of course, explain every legal development in social terms. The fit between law and society is always imperfect at best. Yet one sometimes finds convergences. The communal elements of law and disputing in the seventeenth century are unmistakable. Whether people pleaded their cases in court or submitted them to arbitration, the forms and procedures they used did not place artificial restraints on their ability to air their grievances fully. As a result, one can read court records from the seventeenth century and "see" the

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56. Kent Church Records, *supra* note 54, at 17 (Oct. 2, 1741) (pleading in the alternative); 2 Scotland (orig. Windham Third) Congregational Church Records, 1732-1915, at 49 (Oct. 21, 1756) (Conn. State Library, Hartford) (adjournment "that [the accused] might have opportunity to get such council as he desired and which he could not then obtain"); 1 West Hartford Church Records, *supra* note 55, at 169 (July 25, 1757) (adjournment to prepare defense); 1 East Haddam First Congregational Church and Ecclesiastical Society Records, 1702-1927, at 115 (Jan. 4, 1774) (Conn. State Library, Hartford) (adjournment to prepare defense).

57. G. GILMORE, *supra* note 11, at 111.

people whose disputes they recount. The breadth of relevant evidence in, for example, book debt actions or in actions submitted to the jury under the general issue allowed the parties to present their dispute in whatever context they thought necessary to a proper understanding of their differences. In insular communities, where social and economic relations were multilayered and undifferentiated, such flexible methods of disputing played an important social function in helping disputants reconcile their differences in ways that kept their disputes within the context of their communities and allowed them to resume their sometimes quarrelsome, but mutually dependent, neighborly relations.<sup>58</sup>

It does not require an idealized view of community to see the appropriateness of such ways of disputing in traditional communities. Seventeenth-century New England was a small society. The world for most people was the town in which they lived. Social and economic relations, although hardly hermetic, rarely extended across town boundaries. For much of the population, that smallness was reinforced by the intense tribalism of early Puritanism.<sup>59</sup> For everyone, it was heightened by the exigencies of life in a hostile environment. The first settlers did not attempt to transplant the common law in all its rigorous glory. Instead, they fashioned an amalgam of common law, English local custom, biblical precedent, and adaptation to local conditions, sometimes with an explicitly reforming intent.<sup>60</sup> They could have imported written credit instruments or technical pleading or arbitration bonds, all of which were common in England, but they did not. Instead, they adopted practices and procedures that treated individual disputes as unique and took into account the community dimension of disputing — whether it lay in the background of trust that permitted arbitration or dealing on book accounts or in speaking through the jury or the church. The formal legal system, which was

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58. Although not proof of conditions in colonial Connecticut, the relationship between evidentiary standards of relevance and the social context of disputing is a staple of the anthropological literature. See M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (2d ed. 1967); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC. REV.* 217 (1973); Nader, *Choices in Legal Procedure: Shia Moslem and Mexican Zapotec*, 67 *AM. ANTHROPOLOGIST* 394 (1965).

59. For discussions of the social and intellectual sides of Puritan tribalism, see E. MORGAN, *THE PURITAN FAMILY: ESSAYS ON RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* (1944); E. MORGAN, *VISIBLE SAINTS: THE HISTORY OF A PURITAN IDEA* (1963).

60. The disparate sources of law in seventeenth-century New England have been well treated in D. ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981); G. Haskins, *supra* note 10. For a discussion of the connections with Puritan law reform efforts in England, see Warden, *Law Reform in England and New England, 1620 to 1660*, 35 *WM. & MARY Q.* (3d ser.) 668 (1978).

not terribly formal, was as much a part of the communities it served as arbitration and church proceedings, the principal nonlegal alternatives to legal process. Disputing was a rather pluralist affair in terms of the procedural options that were available. Common law courts were not the only legitimate tribunals, and common law procedures were not the only legitimate rules. This is not to suggest that the alternatives were necessarily informal or offered substantively irrational *khadi* justice, only that their formality and legitimacy were not determined solely by reference to the legal system.

Legal change in the eighteenth century tended in the direction of greater formalism. In the large area of debt litigation, the changes were closely tied to commercialization of the economy and the changing social context of economic relations. In the equally large area of pleading and procedure, the changes had a rather different impetus. The rapidly increasing technical sophistication of pleadings was initially spurred by the efforts of Sir Edmund Andros in the Dominion period to conform colonial practice to English procedure. It was brought to fruition, however, by lawyers who were first licensed in Connecticut in 1708 and who in the next decade furthered the procedural anglicization of the legal system.<sup>61</sup> To be sure, the economic changes that produced the shifts in debt litigation also created opportunities for the skills of attorneys, but the procedural formalization of legal practice was largely an autonomous development that owed more to the professional tendency of lawyers to treat law as normative fact. Lawyers have the nasty habit of thinking like lawyers, which, as Alan Watson recently remarked, "inoculates them from too much concern with the demands of the society."<sup>62</sup> Lawyers in Connecticut educated themselves by reading English law books. Not unnaturally, they applied their new learning to a legal system created under a royal charter that authorized "All manner of wholesome and reasonable Lawes, Statutes, Ordinances, Direcçons and Instrucçons, not contrary to the lawes of this Realme of England."<sup>63</sup>

Although the procedural changes were largely autonomous devel-

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61. John M. Murrin has discussed different elements of anglicization in Massachusetts. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 540 (S. Katz & J. Murrin eds. 3d ed. 1983); J. Murrin, *Anglicizing an American Colony: The Transformation of Provincial Massachusetts* (1966) (unpublished Ph.D. dissertation, Yale University).

62. A. WATSON, *THE EVOLUTION OF LAW* 42 (1985). Watson also offers some trenchant examples of lawyers treating law as normative fact regardless of social disutility. *See id.* at 32-42.

63. 2 CONN. REC., *supra* note 17, at 8 (J. Trumbull ed. 1852). Max Weber attributed even greater effect on legal development to legal education and the class demands of lawyers than he did to economic phenomena. 2 M. WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 775-76, 785-88 (G. Roth & C. Wittich eds. 1978).



opments of the legal system, their social impact was considerable. Technical pleadings, which defined issues in legal terms rather than factual ones, sharply limited the use and discretion of the jury. The change was not to everyone's liking, but the numbers indicate that juries declined in intratown civil actions as well as intertown ones.<sup>64</sup> The changes in pleading and the use of juries, which were not primarily social or economic in origin, dovetailed with the changes in debt litigation, which were, to transform the nature of local litigation. The social contexts of disputes became increasingly irrelevant, at least insofar as the formal legal system was concerned. The decline of the civil jury, the use of pleadings that framed generalizable legal issues rather than individualized factual ones, the spread of instruments that were adjudicated on formal rather than substantive criteria, and, above all, the appearance of these changes within communities as well as without — all point to the conclusion that as communities changed and as law changed, not necessarily in tandem, the legal system became less responsive to individual communities. Conversely, the gains in certainty, predictability, and uniformity that accompanied the transformation allowed people from different communities to deal with one another within the common framework of an integrated legal system.

The intellectual strength and coherence of that framework fostered the growth of a legalist paradigm in the eighteenth century. Changes in arbitration and church disciplinary procedure — two quintessentially communal forms of disputing — demonstrated the growing hegemony of the formal legal system over the ways in which people resolved their differences. Law increasingly became the standard by which all forms of disputing were measured.

All this is not to suggest that law became divorced from society,

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64. John Collins of Guilford, for example, was fined twenty shillings for contempt of court in 1713 for his outburst in a tavern, after the judges of the superior court had denied him a jury. Although his plea had raised a question of technical law that was exclusively within the province of the bench to decide, Collins had, as he said later in his acknowledgment of fault, "thought it Law and Reason to have a jury," and was "very much Disappointed and my expectation wholly frustrated in not being allowed a tryall by a jury." *R. v. Collins* (Conn. Super. Ct.), 3 Court of Assistants Rec. 291, Superior Court Files box 323 (Conn. State Library, Hartford).

The decline of the jury in Connecticut contrasts with William Nelson's assertions that few cases in Massachusetts before the Revolution were tried without a jury, and that juries were able to serve as important agents of community norms and fairness. W. NELSON, *supra* note 11, at 20-30. Jurors can only perform those functions if they receive cases to decide. In Connecticut, it is quite clear that they did not and had not since the 1720s. There, the shift that Nelson attributed to the Revolution in Massachusetts was complete long before the Revolution had begun. John Murrin has suggested to me that the difference between the two colonies on this point may in part have been the difference between a corporate colony and a royal colony. Juries may have persisted longer in Massachusetts out of suspicion of royally-appointed judges, a suspicion that no one in Connecticut, where judges were chosen by a popularly-elected assembly, had reason to share.

but rather that it became divorced from community. One might argue, although here is not the place to do so, that the development of a legalist paradigm, with its emphasis on generalizable, predictable rules rather than individualized inquiries, was an essential step in the development of a revolutionary ideology that transcended particular communities and united the several colonies into a new nation.<sup>65</sup> Whether it was or not, and I tend to think that it was, it is abundantly clear that the relationship between law and community at the middle of the eighteenth century was quite different from what it had been only two or three generations earlier. Law and community had both changed, and the once-close link between them had been broken.

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65. This seems to be related to what Edmund S. Morgan had in mind when he wrote that "[i]n 1740 America's leading intellectuals were clergymen and thought about theology; in 1790 they were statesmen and thought about politics." Morgan, *The American Revolution Considered As an Intellectual Movement*, in *PATHS OF AMERICAN THOUGHT* 11, 11 (A. Schlesinger & M. White eds. 1963).