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Law and Disputing in Commercializing Early America

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NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT. By *Bruce H. Mann.* Chapel Hill: University of North Carolina Press. 1987. Pp. xi, 202. $27.50.

Bruce Mann's study of civil litigation and forms of disputing in early Connecticut is highly readable, tightly composed, and elegantly argued. It would stand out as a model case study illuminating changes in legal culture even if it were surrounded by a host of older monographs on other colonial jurisdictions. But Mann's distinctive approach and original findings give his book heightened importance for the field of American legal history. Few scholars who have gone before him have so successfully tackled longitudinal analyses of litigation patterns, and few have treated the colonial period as other than a static precursor to modern, "formative" developments in American law.[1] By linking his own careful analysis of civil suits, arbitrations, and church disciplinary proceedings with recent historians' work on economic and social change in New England, Mann shows that the experience of disputing changed in profound ways for the average New Englander between the middle of the seventeenth century and the eve of the American Revolution.

Neighbors and Strangers focuses on civil law, forgoing any discussion of criminal prosecution patterns. There are two good reasons for this. First, scholars are by now quite familiar with the changes in criminal law enforcement and punishment in the colonial period.[2]

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1. As a model study of civil litigation at the level of local courts, Mann's book ranks with R. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900 (1981). As a serious study of law and change in the colonial period, *Neighbors and Strangers* joins a handful of fine, recent monographs and extended essays. *See, e.g.*, D. GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 (1976); D. KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692 (1979); M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts,* 20 AM. J. LEGAL HIST. 282 (1976); Marcus, *"Due Execution of the Generall Rules of Righteousness": Criminal Procedures in New Haven Town and Colony, 1638-1658,* in SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY (D. Hall, J. Murrin & T. Tate eds. 1984); and Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England,* in *id.* at 152.

2. *See* D. GREENBERG, *supra* note 1; Marcus, *supra* note 1; *see also* E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692 (1966); Flaherty, *Crime and Social Con-*

Second, after a period of several decades in the seventeenth century when the lines between criminal and civil cases were blurred, privately initiated suits began to outnumber criminal cases by increasing margins in all jurisdictions. Thus Mann can justifiably claim that, especially in the eighteenth century, it was the civil law, not the criminal law, that touched the most people (p. 6). Faced with a literature lacking any in-depth study of civil litigation ("the vast majority of court business" between 1700 and the Revolution), Mann aims to "redress the imbalance."[3]

The backbone of Mann's book is found in his first three chapters, which analyze trends in civil litigation, especially debt litigation. Mann's interpretation draws on a coded sample of 5317 civil cases in the Hartford and New London county courts, as well as his reading and knowledge of "several hundred other cases from elsewhere in the colony," principally from New Haven county (p. 7). The data comprise the most extensive and revealing portrait of what went on in early American county courts to date. Mann presents his quantitative evidence unobtrusively, placing all the tables in an appendix, and weaving crucial statistical findings into the text. Best of all, Mann is a good storyteller, with an ear for the telling case, the litigant's lament, or the statutory decree that etches in bold relief the story of change told by the numbers.

If Mann's fourth and fifth chapters rest on more fragmentary evidence, it is through no fault of his own. No official records of arbitration proceedings were kept and few survive; Mann has performed quite a feat in combing through the hundreds of petitions submitted to the Connecticut legislature by disappointed civil litigants hoping for equitable relief or new trials. Among these he has uncovered eighty-nine cases that shed light on changes in the arbitration process, the subject of chapter four. In chapter five Mann describes two alternate forums for dispute resolution that Connecticut denizens might have

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trol in Provincial Massachusetts, 24 HIST. J. 339 (1981); Hoffer, *Introduction,* in CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA ix (P. Hoffer & W. Scott eds. 1984); Kealey, *Patterns of Punishment: Massachusetts in the Eighteenth Century,* 30 AM. J. LEGAL HIST. 163 (1986); Roetger, *The Transformation of Sexual Morality in "Puritan" New England: Evidence from the New Haven Court Records, 1639-1698,* 15 CANADIAN REV. AM. STUD. 243 (1984); Spindel & Thomas, *Crime and Society in North Carolina, 1663-1740,* 49 J. S. HIST. 223 (1983); Faber, The Evil that Men Do: Crime and Transgression in Colonial Massachusetts (1974) (Ph.D. dissertation, Columbia University). The scholarship on criminal justice in early modern and eighteenth-century England is even more extensive and more analytically advanced. *See* J. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986); Innes & Styles, *The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England,* 25 J. BRIT. STUD. 380 (1986).

3. Pp. 6-7. Curiously, Mann omits any discussion in his text or footnotes of William E. Nelson's *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825,* a short study that argues that Plymouth residents before the 1790s resided in cohesive communities and chose to settle their neighborly disputes in front of their church congregations instead of in county court. W. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825 (1981).

sought to expand: an ad hoc equity court created by the Assembly in 1717 to try one complex debt case, and an ecclesiastical hearing of a dispute between two church members. The experiment with a separate equity court was never repeated, and Mann draws on the few series of surviving church discipline records to show that by the mid-eighteenth century church-sponsored hearings had shed their informal, private, conciliatory tone and assumed the procedural trappings of the secular courts. These two chapters testify to Mann's resourceful use of seemingly lost and intractable records. Even more significantly, they illustrate how legal anthropology persuaded one "law and society" historian to look within and beyond official court records for evidence on the whole spectrum of a society's methods of resolving disputes.

Overall, Mann posits "a transformation from a legal system that allowed litigants to address their grievances in ways that were essentially communal to one that elevated predictability and uniformity of legal relations over responsiveness to individual communities" (pp. 9-10). By the mid-eighteenth century, ordinary litigants no longer had available to them a legal system whose rules and structure assumed the uniqueness of individual disputes, insisted on lay pleading, and promoted the airing of grievances among neighbors. Instead, external changes — notably in economic relations — and internal changes — in rules of courtroom procedure and in the growing necessity for lawyers — had transformed the system. Once privileged, "neighborly" modes of resolving disputes were displaced by rationalized modes that met the needs of an expanding commercial economy. In effect, the legal system now "treated neighbors and strangers alike" (p. 10).

Mann explains this complex shift away from a communal model of disputing by identifying three crucial areas of change: (1) the economy and the nature of credit relations, and how these structured lawsuits over debt; (2) legal culture, or the ordinary litigant's experience in court; and (3) the fate of arbitration and church hearings, those two "quintessentially communal" forums for resolving disputes that existed outside the formal court system (pp. 164-68).

Perhaps the single most original and important contribution Mann makes to our understanding of the interdependence of law, economy, and community in early America is his explication of the shift from book debt to written instruments. Until the 1710s, "book debts were the primary method of contracting debt obligations" in the Connecticut countryside, and book debt actions constituted a large majority of the civil actions on county court dockets (p. 26). Since they were short of specie and since their government did not issue any paper money until 1709, Connecticut inhabitants paid for merchandise and services with their own agricultural produce and labor. They reckoned the value of those exchanges in pounds, shillings, and pence, and

recorded their face-to-face dealings in the ledgers or account books kept by nearly every farmer, household head, artisan, or merchant. Such book accounts contained no express promise to pay by a certain date; they did not bear interest; and, as running accounts, they typically accumulated for several years before the creditor attempted to collect the balance due.

When a dispute over a book debt ended up in court, the parties typically pleaded under the general issue and submitted their cases to the jury for decision. Given the nature of book debt and of their favored plea, the parties could raise in court whatever factual evidence pertaining to their business transactions and general relationship they believed to be relevant. Thus, "[t]he procedural and evidentiary flexibility of book debt invited the parties to explain their dispute in ways that would place the legal issue of indebtedness in the larger context of their social relations" (p. 23). While Mann concedes that most book debt actions were straightforward efforts to collect sums due, he demonstrates that in many cases suits were excuses to air long-festering grievances between individuals or families who, given the texture of life in the small villages of early New England, "knew one another in a variety of contexts": not just as economic associates, but as neighbors, kin, fellow church members or militiamen, "rivals for the affection of the same widow, parents whose children had quarreled or whose livestock had eaten each other's grain" (p. 18). In arguing that book debt actions performed social as well as economic functions, Mann draws on the insights of anthropology. In small, face-to-face communities where familial and economic survival rests on mutually dependent relations among neighbors, the ability to air a range of accumulated grievances, even if they are not all immediately adjudicated, permits villagers to resume their neighborly relations of daily interaction and exchange (pp. 19-26).

After the first decade of the eighteenth century, book debt was increasingly eclipsed by "a very different kind of debt obligation" (p. 28) — formal, written instruments such as conditional bonds or promissory notes, each representing a single economic transaction and binding the debtor to pay a specific sum by a given date. The predictability and assignability of these signed instruments made them particularly attractive to creditors. A debtor could challenge a written obligation only by contending the instrument was not his or her deed, whereas book accounts could be challenged on all sorts of grounds. Thus, the collection of notes and bonds took on a high degree of certainty, and debt actions of this nature could not readily stand in for noneconomic disputes. Spurred to expand their surplus production by a booming economy driven by the coastal and West Indies trade, Connecticut farmers welcomed the new debt instruments because creditors now could advance cash — the colony's newly printed paper currency — and that cash could purchase new land or tools, seed or livestock. But

farmers and artisans were not simply debtors. Promissory notes, the most common form of the new written instruments, were assignable, and they circulated almost like currency. Most household heads still kept a book of running accounts, but they also held notes for small sums due, and at any one time, owed several debts by note.

In Mann's formulation, a new credit regime, one in which book debt took a back seat, had taken hold in the Connecticut countryside by the 1730s. Most inhabitants found notes and bonds to be serviceable credit instruments, and they often found themselves holding notes due from persons who lived one or two towns away, persons with whom they had no other ties. This "lengthening . . . geographic reach of credit relations" (p. 54) meant that more and more often the ties between creditor and debtor were "impersonal" (p. 43); thus the parties rarely had reason to use debt litigation to air personal grievances. Indeed, Mann shows that the proportion of contested actions dropped precipitously after 1710 (Table 2). The court records make it clear that by mid-century, litigation had become chiefly a recording device for rationalized debt collection: debtors defaulted or confessed judgment in over 90% of the cases, and creditors waited to execute those easily won judgments until they wished to call in the debt (pp. 39-40).

Mann characterizes the mid-eighteenth-century Connecticut legal system as "formalistic" because of a set of three interrelated courtroom changes which coincided with the transformation in the structure of credit relations. It was in the 1710s that judges and lawmakers began to insist that stricter rules of "orderly pleading" and legal procedure be enforced. Such rules brought colonial courtroom procedure and the drawing up of writs more into line with English common law practice, though colonial legal forms still lacked the complexity of those of the mother country. Moreover, it was also during this period that defendants in contested suits abandoned their almost universal practice of pleading the general issue and began to submit dilatory pleas or demurrers. Over the next fifty years, only twenty to thirty percent of defendants broached the merits of their cases by pleading the general issue. Most of the time, courtroom disputes turned not on factual issues but on technical and abstract legal issues (pp. 83-84).

Two things followed from this change in the formality and structure of pleading. First, the role of juries in deciding civil suits declined sharply. This was dictated partly by the rise of technical and narrow pleadings which specifically precluded resort to juries, and partly because litigants chose less frequently to submit applicable cases to juries. Whereas in the 1690s juries had decided most civil actions, by 1745 judges decided more than 80% of contested civil suits (p. 75). In Mann's eyes, the Connecticut legal system thereby lost one of the key aspects of its communal nature. Jurors had once brought community knowledge and norms to bear on most courtroom disputes, but in the

eighteenth century they were rarely called upon to serve that "mediating function between law and society" (p. 75).

Formal pleadings also brought professional lawyers into court in significant numbers for the first time. County courts began licensing attorneys to their bars in 1708, and Mann is able to document that litigants, who in the seventeenth century had felt competent to plead their own cases, now were often confused by the stricter rules of pleading and increasingly hired lawyers. In turn, lawyers skilled in courtroom pleading strategies undoubtedly educated and pressured many litigants into using dilatory tactics. While many New Englanders continued to represent themselves in court, the typical contested civil action by mid-century featured two attorneys for each party; trials had turned into "duels between opposing lawyers" (p. 99).

In *Neighbors and Strangers,* Mann is demanding, in essence, that American legal historians and colonial historians come to terms with two critical eighteenth-century developments: the emergence of a culturally powerful, formalistic, rationalized legal system, and the redefinition of community in New England. Mann finds final confirmation of these developments in changes occurring outside the official courts. Arbitration proceedings — which were attractive to seventeenth-century New Englanders for their flexible and equitable remedies, their semi-private nature, their low costs, and their emphasis on reconciliation and the mutuality of awards — were in trouble in the early eighteenth century. From fragmentary documentation, Mann infers that arbitrators, who traditionally wielded no sanctions other than community pressure, were increasingly unable to secure compliance with awards. Disputants resorted to a variety of devices to enforce performance — deeds, the exchange of conditioned bonds, and finally depositing promissory notes with the arbitrators (pp. 111-17). By the mid-eighteenth century the arbitration process was scarcely distinct from official courtroom adjudication in nature or result. Disputants used lawyers, sworn witnesses, and sophisticated tactics; winners garnered only monetary awards, not the individually tailored, multifaceted awards of yore.[4] Furthermore, church-sponsored hearings of disputes were increasingly held to standards of "procedural rigor" (p. 149). That both religious leaders and community arbitrators were invoking legal language and forms as a source of authority is testimony, Mann argues, to "the growing hegemony of the formal legal system over the ways in which people resolved their differences" (p. 168).

For Mann, the critical context for the shift away from informal, communal modes of dispute resolution lies in the changing nature of community in eighteenth-century New England. Mann eschews the

4. Readers who have previously relied upon Mann's article, *The Formalization of Informal Law: Arbitration Before the American Revolution,* 59 N.Y.U. L. REV. 443 (1984), should be aware that his analysis of arbitration in chapter 4 of his book contains substantive revisions.

concept of "decline" in community, preferring the notion of community redefined. Summing up the literature on New England communities, Mann notes that towns, the primary local unit in seventeenth-century New England, ceased to be cohesive, homogeneous, "group-minded" entities in the eighteenth century. Population growth, pressure on the land, religious dissent, and land speculation promoted the settlement of many new towns and outlying parishes (pp. 110-11, 166-67). The neighborhood parish, rather than the town, became the relevant local community for mid-eighteenth-century New Englanders. Moreover, the rhythms and needs of the local community no longer shaped New Englanders' legal experience; law was more responsive to the needs of the larger society, embodied most notably in the state and the world of merchants. Formal, standardized legal procedures not only lent certainty to commercial transactions "between strangers," but also created a common framework under which denizens of an increasingly pluralistic society could settle civil disputes. While local life and loyalties were still important to New Englanders in 1750, colonists were beginning to perceive that within a diverse society they were tied to other communities which transcended local boundaries. These communities — of credit, of occupational ties, and of shared religious belief — could all resort to a common method of settling disputes, a common language of law (pp. 167-69).

Mann's skillful presentation of the years between 1690 and 1750 as a decisive era of change in American law raises several important questions for future research. The most obvious line of inquiry would focus on developments in other regions. To what extent did the set of interrelated events identified by Mann (the shift from book debts to notes and bonds, the decline of contested and juried cases, the disappearance of lay pleading, and the emphasis on procedural rigor) occur in courtrooms outside of Connecticut?[5]

Second, who were the losers in the changes described by Mann? Where did Connecticut neighbors take their multifaceted, personal disputes once the very scale of judicial business[6] and the formality of pleading made the county court a rather intimidating, unwelcoming forum? Mann suggests that we look to the courts of local justices of the peace, where villagers were able to air and reconcile escalating dis-

5. Answering this question would entail conducting archival research at the level of local jurisdictions, because court and civil procedures were neither standardized nor clearly explicated before legal treatises, manuals, and state reporters began to roll off American printing presses in the early nineteenth century.

6. My own research on the New Haven County Court shows that between the 1750s (when the annual civil caseload settled at a plateau of about 150 cases) and the Revolution, litigation rates more than quadrupled. In 1775 the New Haven county civil caseload peaked for the colonial period at 865 suits. For the years immediately preceding 1775 the average annual caseload was nearly 700 suits. In these years the docket was so large that the bench sat at some sessions for as long as four weeks.

putes without waiting months before a hearing.[7] At the same time, Mann's general analysis of law and community suggests another answer. As the nature of community changed and families became less oriented toward their towns and more oriented toward kin, business associates, and co-religionists nearby or several towns away, attitudes toward the propriety of expressing anger in public and airing complex, personal disputes in the public theatre of the courtroom may have changed significantly. We know that eighteenth-century families increasingly aspired to gentility through the elaboration of rooms and decorative objects in their houses; these new notions of display and privacy were also expressed in the public institutions of church and court. For example, the increased emphasis on the primacy of the family unit was clearly signalled in New England culture when churches rearranged their seating patterns: Men and women of the community no longer entered by separate doors and sat in separate sections by rank, but instead families filed in and out of church together and sat in reserved family pews. When the moral reputation of family members was at stake, eighteenth-century families less frequently chose to submit their grievances — in the guise of slander or paternity suits, for example — to the county courts.[8] By integrating our analyses of debt and slander litigation, and of civil and criminal caseloads, we should be able to illuminate further the extent to which the new legal climate identified by Mann shut out potential litigants, and the extent to which New Englanders withdrew certain disputes from the courts because of changing perceptions of family, community, and law.

Finally, what were the implications of the changed eighteenth-century legal system for the American Revolution? As Mann suggests at the end of his book, if rationalized courtroom procedures and formalistic modes of settling disputes had developed in most colonies by the 1760s, then the mirror of legal culture may have provided inhabitants of the disparate colonies with a reflected vision of themselves as a potentially national people (p. 168). On the other hand, we might surmise that a legal system that was no longer responsive to the local

7. Pp. 57-58. Indeed, scholars and archivists need to increase their efforts to identify justice court records that presumably lie uncatalogued and unnoticed within collections of family papers. As we come to understand in more detail the changing workloads of eighteenth-century county courts, our hypotheses about the social implications of those changes will be convincing only if we know what was happening in the more informal courts held by single justices. Laurel Thatcher Ulrich made this point dramatically clear in a recent paper. *See* Ulrich, Midwife's Testimony: New Evidence from the Diary of Martha Moore Ballard, 1785-1812 (presented at the Annual Meeting of the Organization of American Historians, Reno, Mar. 24-27, 1988).

8. These are themes I begin to develop in my analysis of litigation and prosecution patterns in the eighteenth-century New Haven County Court. *See* Dayton, Women Before the Bar: Gender, Law, and Community in Connecticut, 1710-1790 (1986) (Ph.D. dissertation, Princeton University). For a somewhat different formulation of similar themes based on a wide range of printed court records, see Wall, Private Lives: The Transformation of Family and Community in Early America (1983) (Ph.D. dissertation, Harvard University).

community had little to offer certain groups not operating within the new credit regime — all but the wealthiest women, the strolling poor, the illiterate, and others disadvantaged by race, ethnic background, or other social prejudices. With little reason to resort to the courts in the late eighteenth century, such groups were excluded from the actual and symbolic civic education and membership that came with court participation.[9] The national community of legal citizens defined by the newly rationalized, commercially oriented legal system silently matched and reinforced the exclusions based on race, gender, and property-holding which accompanied the revolutionary and constitutional settlement.

As a thoughtful extended essay on the relationship of law and community, *Neighbors and Strangers* has much to tell us about the economic, social, and political lives of early Americans. As a sustained argument for the emergence by 1750 of a legal system geared to serve the interests of a commercial (or capitalist) political economy, Mann's study challenges Morton Horwitz's familiar schema[10] and demands that we reconsider the ways in which we evaluate the stages of American legal development.

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9. While court records provide few reliable internal markers for tracing such groups as free blacks and the poor, the participation of women in civil litigation can be charted. In one Connecticut jurisdiction the declining presence of women in what I call the "litigated economy" is clear: In New Haven County, the percentage of civil suits (predominantly over debt) involving female litigants dropped from 20% in the 1710s to 5% in the early 1770s. *See* Dayton, *supra* note 8, at ch. 2.

10. In his extremely influential book, *The Transformation of American Law,* Horwitz argues that the seventy years after the American Revolution saw the most significant transformation in the American legal system. In that period, Horwitz maintains, "[l]aw, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community," came to be shaped into an instrumental force by "men of commerce and industry" so that common law policy would facilitate and promote "the existing organization of economic and political power." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 253 (1977).