

BOOK REVIEW

AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830. By William E. Nelson. Cambridge: Harvard University Press, Studies in Legal History. 1975. Pp. ix, 269. \$14.00.

Professor Nelson's *Americanization of the Common Law* records the conclusions of a mighty research project. The author has undertaken a comprehensive account of the changes in Massachusetts law over a period of 70 years. Anyone who has ever been tempted to tackle a project of this magnitude has been humbled quickly enough by the immense problems of assembling the sources. Legal records, especially those of the colonial period, are typically mountainous in bulk, difficult of access and untracked by previous researchers. Nelson has overcome this obstacle, however: he has read not only all the published case reports and statutes for his period, but also "all available manuscript material, including unpublished judicial opinions, lawyers' notes, and, most commonly, records of pleadings, judgments, and other papers incorporated into official court files" (p. vii). This exhaustive coverage of the sources¹ means that when Nelson mentions creditors' remedies or pleading rules, we can be extraordinarily confident that he is not guessing the shape of a larger bulk, but knows the thing itself; we learn what there is to know.² Moreover, this mass of detail has been succinctly and lucidly reported.

Yet, although Nelson traverses every inch of ground, he has chosen some odd boundaries for his study. The "law" in this work consists largely of the rules applied by courts. We learn a lot about criminal law, contracts, debtor-creditor relationships, land and water use, corporations and master-servant rules. In a few contexts, Nelson gives us glimpses of the law in action as well. In his discussions of civil procedure, for example, he considers jury dis-

¹ This is as good a place as any to complain about the production of this book. The Harvard University Press has not only bunched all the footnotes in the back—especially annoying in a book aiming to serve as a guide to its sources (p. vii)—but has printed footnote numbers in brackets in the same type size as the body of the text, thus breaking up sentences without even rewarding the reader with a footnote at the bottom of the page.

² In this respect Nelson's study goes beyond its predecessor as the most complete record of 18th century Massachusetts practice since the superb edition of the *LEGAL PAPERS OF JOHN ADAMS* (L. Wroth & H. Zobel eds. 1965).

cretion and the practices followed by litigants in framing responsive pleadings; in analyzing criminal law, he reports the types of offenses for which people were prosecuted. Otherwise, the author pays practically no attention to aspects of the legal order other than its formal rules. For instance, he ignores changes in the structure and functions of the legal profession, or in the social origins or political affiliations of the judiciary.

Most legal historians would have chosen the same emphasis. In Nelson's book, however, the limitations of the traditional materials of legal history are notably perverse because Nelson's goal is far different from that of traditional historians.³ He seeks to relate legal change to "more basic changes in American thought and society" (p. vii). To that end, he seeks to fit his account into a framework of general social change, a framework he expects will help to explain specific incidents of legal change and will be illustrated by them.

That effort represents both the book's greatest ambitions and its deepest flaws. The shortcomings, as I see them, are the author's monolithic view of the nature of social change and his often unsupported connections between social change and transformations in legal rules. Those basic points in Nelson's study are so oversimplified that they lead repeatedly to a distorted and idiosyncratic interpretation. The following analysis takes up each of these problems in turn.

I

The book begins with a characterization—a sort of still photograph—of Massachusetts in 1760 as a society almost frozen in stasis: a collection of tightly-knit corporate communities—stable, homogeneous, harmonious, religious. Such a society would not seem to possess any notable internal dynamic, and in Nelson's account it does not. Rather, it is the American Revolution, portrayed in this book as a mysterious event originating from outside the community, which seizes this peaceful society and sets off its rapid metamorphosis into a polar opposite society—atomistic, acquisitive, competitive, materialistic, secular, relativistic, utilitarian. As the society mutated, so did its law. A legal system devoted in the 18th century to the maintenance of what Nelson calls "ethical unity" and of economic and social stability, became, by the 19th century, simply a forum for competition among diverse interest groups seeking power and wealth.

³ See text accompanying note 31 *infra*.

This view of prerevolutionary society depends heavily on Michael Zuckerman's study of Massachusetts, *Peaceable Kingdoms*.⁴ That work, perhaps more than any other analysis of the 18th century, stresses the existence of communitarian consensus in what the author believes to have been the only important unit of social life—the town. Other historians argue that that picture of consensus better describes the world of 1720 than of 1760, by which time the Christian corporate communities of New England were breaking up under the tensions created by generational conflicts, by new settlers competing for land and by the religious schisms of the Great Awakening.⁵ Nelson's fidelity to the Zuckerman thesis is, in fact, rather remarkable in view of the criticism that thesis has provoked,⁶ and of Nelson's often differing interpretations (*e.g.*, of the significance of litigation in prerevolutionary Massachusetts).⁷

The real problem with Nelson's pre- and postrevolutionary social paradigms, however, is not that they reflect the minority view among historians, but that he rigidifies the structure of social change. While there was obviously an overall pattern of change from provincial corporate communitarianism to the individualism of Jacksonian America, it is absurd to suppose that this pattern was replicated in every detail of social life.

For example, Nelson repeatedly contrasts the religious, other-worldly values of the 18th century with the pecuniary ones of the

⁴ M. ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* (1970).

⁵ *See, e.g.*, R. BUSHMAN, *FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765*, at 186-95, 235-38, 257-88 (1967); A. HEIMERT, *RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION* 2-14, 88-93, 129-30, 136, 251-60 (1966); K. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS: DEDHAM, MASSACHUSETTS, 1636-1736*, at 79-163 (1970); 1 W. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1833*, at 329-488 (1971).

⁶ For criticisms especially relevant to law in provincial Massachusetts, see Murin, *Review Essay*, 11 *HISTORY & THEORY: STUDIES IN THE PHILOSOPHY OF HISTORY* 226, 245-72 (1972), and Wroth, *Review Essay: Possible Kingdoms: The New England Town from the Perspective of Legal History*, 15 *AM. J. LEGAL HIST.* 318 (1971).

⁷ ZUCKERMAN, *supra* note 4, at 89-92. Nelson adverts to this matter in a footnote (p. 185 n.5), taking the position that the presence of litigation does not mean that consensus was not still "the ideal toward which Massachusetts communities strived." He says that litigation may in fact have been an integrative force, tending to strengthen "social unity and stability," and finally, that "the lawsuits that were brought could not have been resolved if they had been destructive of the underlying ethical consensus in Massachusetts." One can only conclude that, although Zuckerman and Nelson may both be right to argue that provincial Massachusetts was a consensus society, a writer who takes the absence, and one who takes the presence, of litigation as an index of consensus probably do not have the same conception of "consensus."

19th, an opposition that limits his ability to perceive the complex interrelationship between ethics and economics in both societies. In Puritan New England, people emphatically refused to distinguish money-making endeavors from religious life. They thought it entirely proper for men to labor in their callings to increase their stock of wealth, but, when this activity produced an increasingly luxury-loving society, they experienced confusion and guilt. As Perry Miller put it, "the wrong thing," acquisitiveness, "was also the right thing."⁸ Indeed, the revivalism of the Great Awakening may have been most intense where settlers had achieved the greatest commercial success.⁹ There are similar conflicts at the base of the Jacksonian character. No people as purely economically oriented as Nelson's social types of the Jacksonian era could have responded as deeply as Jacksonians did to a rhetoric of yeoman virtue, simplicity and frugality.¹⁰

Nelson draws another rigid dichotomy between ethical unity and ethical relativism. Massachusetts, by his description, changed from a society whose members were expected to subscribe unanimously to one set of religiously-derived values to one in which values were believed to be wholly subjective (p. 115). This change is illustrated by the withdrawal of the state's legal system from enforcement of a unitary ethical standard. Gradually deviations from the standard were no longer punished under the criminal law, and institutions for promoting compliance with accepted values—including the established churches—lost support. Like the ethics/economics dichotomy, this one corresponds crudely to differences between provincial and Jacksonian societies. Yet it completely fails, for example, to account for the evangelical impulse behind the disestablishment of churches. Pietists, more than rationalists, urged the state to disestablish religion on the ground that a voluntary system of religious worship and financial support would help to eliminate religious conflict (at least among Protestants) and would encourage the spread of Christianity.¹¹ In fact, perceptive visitors like Alexis de Tocqueville¹² and Philip Schaff¹³ concluded that voluntarism had

⁸ P. MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* 51 (1967).

⁹ BUSHMAN, *supra* note 5, at 188-91.

¹⁰ See M. MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 12-17, 115-18, 132-35, 152-53 (1957).

¹¹ See generally McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, in *ESSAYS ON THE AMERICAN REVOLUTION* 197, 247-55 (S. Kurtz & J. Hutson eds. 1973).

¹² I A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 300-14 (P. Bradley ed. & H. Reeve transl. 1945).

¹³ P. SCHAFF, *AMERICA: A SKETCH OF ITS POLITICAL, SOCIAL, AND RELIGIOUS CHARACTER* 73-82 (P. Miller ed. 1961).

contributed to establishing a degree of cultural homogeneity unapproachable in European society.

These simplified social categories do no harm as long as they are left as dicta, or as incidental commentaries on the main text. Occasionally, they even help to explain the legal data. That is true, for example, of Nelson's valuable treatment of changes in contract law from an 18th century system in which community notions of fair exchange generally determined the terms of an obligation to a 19th century system which enforced the parties' express intentions (pp. 54-61, 136-43). Trends in criminal law also fit Nelson's general thesis of secularization. He finds that, starting in the 1780's, crime gradually ceased to be viewed as sin: prosecutions for minor sexual offenses, for missing church and for Sabbath-breaking dwindled. At the same time, prosecutions for theft increased. "By the turn of the century," he says, "the criminal was no longer envisioned as a sinner against God but rather as one who preyed on the property of his fellow citizens" (p. 118).

Generally, however, the rigidity of Nelson's categories leaves him in the predicament of a biologist with a collection of unadjustable microscopes. If the fixed focus isn't just right for the object, the image comes through fuzzily. For example, Nelson explores property law chiefly through the categories of communitarianism and individualism. This is an unhappy choice for analyzing any society. Nelson sees rules restricting property uses as communitarian and rules expanding such uses as individualistic. But the relationship of ideology and practice is frequently more complex; it is not unusual for framers of property rules to argue that individual fulfillment is maximized by strict regulation of some property uses or that the community as a whole will profit from leaving other uses unregulated. Furthermore, since any system specifying property rights inevitably both recognizes and restricts such rights, Nelson has placed himself in the position of trying to describe differences between 18th and 19th century property law by reference to elements common to both periods. He is further entangled by his desire to fit property law into his general framework of social change—a change from communitarianism to individualism.

Difficulties appear as soon as Nelson starts feeding the evidence through the categories. We learn that in provincial Massachusetts, "[r]ights in property were not granted for the benefit of the individual; on the contrary, property rights received legal protection only to the extent that a person used his property consistently with the community's interests" (p. 51). Property was, therefore, subject to extensive regulation (pp. 51-52). For example, the community sought social stability by restricting competition for

uses of property (pp. 47-54). We might expect to be told that post-revolutionary property law expressed the growth of individualistic ideology by lifting these anti-competitive restraints. Such a trend is indeed discernible by the time that the *Charles River Bridge* case¹⁴ is decided by the Massachusetts court in 1829 (pp. 161-63). But on the contrary, immediately after the revolution the courts *expanded* the kinds of first-user property rights that the law was willing to protect from the incursions of competitive, would-be users (pp. 121-26). This development puzzles Nelson (p. 126), because it reveals not only that his categories are too rigid but also that they are fundamentally unsound. As Nelson himself observes:

the postrevolutionary rules allocating property did not result in increased individual liberty; they merely identified the individuals who would enjoy it. For every person who gained liberty by obtaining protection of a property right, some other person usually lost at least an equivalent amount of liberty (p. 126).

If specification of property rights is always this sort of zero-sum game, it is hard to see how any particular regime of property rules could ever be more individualistic than any other.¹⁵

The same analytic confusion pervades Nelson's treatment of postrevolutionary public works that devalued neighboring properties—projects such as the enlargement of jail yards and the improvement of public roads (pp. 131-32). Nelson says that these actions signify that “private property” had come to be seen as “a value of less importance than promotion of the will of a democratic majority” (p. 130). This comment is an effort to preserve his general thesis of the growth of individualistic attitudes in the 19th century by redefining individualism to embrace the political aggregation of individual wills into a “democratic majority.” Confusion deepens when, two pages later, he undertakes to summarize trends in property law as a whole:

¹⁴ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 419 (1837), *aff'g* 24 Mass. (7 Pick.) 344 (1829). The Court held that the first proprietors of a bridge over the Charles River did not possess a monopoly over that waterway.

¹⁵ Yet Nelson attempts to explain that expansion of property rights by noting that the postrevolutionary generation equated “the protection of property with the preservation of liberty” (p. 126).

Arguably, however, property rights were expanded because people were becoming more sophisticated about the variety of resources susceptible to commercial exploitation, and believed that conferring monopoly rights on a user was a necessary incentive to potential exploiters. This argument is both plausible and consistent with Nelson's general observations about the role of law in promoting economic growth (pp. 145-64).

[In the view of the Massachusetts court, a] rapacious, and authoritarian crown, which threatened the liberty and stability of Massachusetts communities, had been replaced by the majoritarian and egalitarian democracy of the Age of Jackson. The interests of community and of selfish individualism had changed sides. *Absolute and total protection of the owner in his enjoyment of property no longer seemed necessary to the interest of community*; instead, the individual now appeared as an obstruction to continued social progress, liberty, and equality—a perception that emerged with particular clarity in cases involving the limits of jail yards. By 1830, in short, private property was ceasing to be seen as an institution that promoted community values and was becoming instead a tool for the aggrandizement of the individual (pp. 132-33) (emphasis added).

What is going on? We were once told that 18th century law restricted property uses in the interests of community; now we hear that it gave owners “[a]bsolute and total protection.” Now 19th century law is cast in the role of restricting property in the interests of community. The judges had come to think of property as a vehicle for selfish individualism, and thus believed they had to control it for the sake of community values.

Yet just as the reader has reconciled himself to this revised perspective, Nelson pulls another switch. He cheerfully relates how these same judges gradually *privatized* the law of corporations and of contracts, releasing market behavior from the constraints of governmentally defined purposes. He concludes that “[t]he pre-revolutionary legal system, in which community was the primary social value, had largely been destroyed. A new system emphasizing rugged individualism as its fundamental value had begun to take its place” (p. 143).

These contradictions derive, I think, from Nelson’s insistence that the legal system, at any given time, must express some single set of values. As he moves from subject to subject, therefore, he is driven to assert the dominance first of one set of values and then of the other. Several excellent studies of law and public policy in the 19th century American states, however, suggest that state policy embodied both individualistic and communitarian norms. The content of both norms was considerably transformed as they were used to sanction novel forms of public support for business enterprise; as different factions came to dominate state politics, the ideologies of power-holders and of their opponents naturally tended to stress whichever individualistic or communitarian elements of commonly shared norms suited their interests.¹⁶ Nelson may be detecting the

¹⁶ See O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev.

influence of these ideological shifts. But explaining the rules in these terms would require strict attention to the chronology of events, particularly to political events outside the legal system, and would require abandonment of the thesis of universal and unidirectional social change.

Nelson's simplification of social categories also causes him to miss subtleties of interpretation. For example, in his discussion of liquor license regulation, he describes how sessions courts in the early 1820's routinely resisted petitions from townsmen praying for reduction in the number of liquor licenses, but started to grant such petitions in the late 1820's and early 1830's. He analyzes this trend as part of the growing tendency to subordinate private property values to the "will of a democratic majority" (p. 130). Yet the early temperance movement in Massachusetts is probably better understood as an attempt by a declining Federalist-Calvinist elite to "re-establish prestige by 'lifting' the rude mass to styles of life enunciated by an aristocratic moral authority."¹⁷

Similarly, Nelson sees the great *Dedham Church* case¹⁸ as evidence that the legal system had grown indifferent to the enforcement of religion and was trying instead to deal with church property disputes by adhering strictly to secular rules of property law (pp. 128-29). But strict property law did not actually resolve any of the issues in the case. The case may, therefore, represent something more interesting—a desire to strengthen the authority of ministers in Massachusetts by widening their corporate constituencies and thus ensuring that *parish* majorities, even if they left the faith of the church's founders, would be able to retain its property.¹⁹

ed. 1969); L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 3-33, 173-75, 306-15 (1948); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 7, 30-32, 37-40 (1956); H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861*, at 26-28, 90-94, 353-56 (1969); Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248, 248-51 (1973).

¹⁷ J. GUSFIELD, *SYMBOLIC CRUSADE* 42 (1963). A social historian of the town of Springfield has concluded that even by the 1840's, when the temperance movements became more broadly based, they remained "confident, benevolent, inclusive, and assimilative" towards the immigrants they were trying to reform—behavior more conformable to Nelson's 18th than to these 19th century types. See M. FRISCH, *TOWN INTO CITY* 36-38 (1972).

¹⁸ *Baker v. Fales*, 16 Mass. 488 (1820). This case involved a dispute over succession to church property between a majority of church members (who were, however, a minority in the parish as a whole) who adhered to the Trinitarian principles of the church's founders, and a parish majority of Unitarians (who had called a Unitarian minister to the church over the objections of the church members). The Unitarians won.

¹⁹ Cf. 2 M'LOUGHLIN, *supra* note 5, at 1193-95.

II

The basic datum of Nelson's study, what he terms the "law," is the legal rule, especially as applied by a court. But the historian who asserts, as Nelson does, that study of the norms expressed in legal rules tells us something about the contemporary society must define at some point what he thinks that something is. "[T]he historical task," Nelson agrees, requires "the articulation of social theory as well as the narration of recorded facts" (p. ix). The biggest disappointment of this book is that it fails to articulate a viable social theory. Rather, its implicit theories of the relationships between legal rules and social change are either incoherent or implausible. In fact, these theories derive from what students in American law schools have learned to call "policy analysis"—extrapolation of the likely social consequences of the adoption of a legal rule, using no evidence but the rule itself.²⁰

Policy analysis, as usually practiced, relies upon a simple utilitarian model of the relationship between legal rules and social behavior. Social actors in this model look to the rules as their primary or even sole source of rewards and penalties. Their attention is riveted on the courts, so they may promptly react to any change in the rules. Finally, social actors are presumed to be rational—which is another way of saying that their behavior is expected to accord with the policy analyst's projections.

Nelson does not make extravagant claims for this method. His

²⁰ The following paragraph exemplifies the growing trend to mix a bit of economic analysis with policy analysis:

But prerevolutionary contract law probably furthered ethical unity and stability in the allocation of wealth and status at the expense of economic efficiency. Although careful empirical research would be necessary to confirm any correlation, it seems likely that the people who gain most in freely negotiated contracts are those with the greatest entrepreneurial skills, while those who lose most are those with the fewest skills. Two important entrepreneurial skills are an ability to predict future market trends and a knowledge of current market values; a man with these skills is better able than a man without the skills to make investments at a lower cost that are likely to satisfy future market requirements. To the extent that a legal system seeks to maximize economic growth and development, it should allocate resources to people who possess such skills. The legal system of prerevolutionary Massachusetts probably retarded economic growth by impeding the efforts of such men to acquire additional resources (pp. 62-63).

This paragraph vividly demonstrates the limited utility of this analytic method for historical inquiry. I cannot imagine what archives might be used to assist in the "careful empirical research" needed to support the correlation between entrepreneurial skill and victory in freely negotiated contracts. In any event, the passage's stress on rational calculation is poorly suited to the bubble-and-panic world of 18th century commerce. It is not insignificant that wealth in that world was called fortune.

use of it is appropriately tentative. Presumably, however, he would not use it at all unless he thought it had some explanatory or at least heuristic value. Its application to 18th century contract law, however, shows that, far from generating workable research hypotheses, the method leads to nothing but trouble. One example will suffice to illustrate the difficulties with this approach.

Nelson describes the various writs available to plaintiffs seeking contractual or quasi-contractual remedies in provincial Massachusetts and makes a convincing case that the system of writs imposed obstacles to compensating plaintiffs for their full expectancy when executory agreements were breached. To oversimplify somewhat, unless a party took the trouble to write out (and perhaps file with a justice of the peace) his agreement in advance, and then performed his side of it, the writs available limited the other party's obligation to a reasonable or customary return for benefits conferred (pp. 54-61). Nelson's descriptive passage is, as usual, clear and compact. His conclusions, however, are less impressive. From the formality required for court enforcement of promises that might be unequal, Nelson infers that

[t]o the extent that it impeded change in the allocation of wealth, the law of contract may also have furthered ethical unity. A person who loses money in speculative transactions or in transactions entered into with imperfect knowledge often feels cheated. Sensing that the person who gained at his expense did so by failing to disclose relevant information, he may tend to feel an animosity that may long linger, only to arise under circumstances disruptive of community unity. By impeding speculative bargains and bargains whose terms did not reflect community norms of fair exchange, prerevolutionary law reduced the likelihood of such animosity and may thus have promoted social unity. By further allowing bargains in which there were opportunities for overreaching to be made only in the presence of others and under circumstances that promoted careful deliberation, contract law may similarly have reduced the likelihood of social rancor (p. 62).

To the extent that Nelson suggests that the system of contract remedies affected economic behavior, the assertion seems unprovable. In fact, available evidence supports the contrary view. For example, legal rules certainly did not deter trade or speculation in land. Engaging in any sort of commerce in the 18th century entailed speculation; a merchant could not even accept a bill of exchange without considerable risk.²¹ It is impossible to say whether

²¹ See R. ZEMSKY, *MERCHANTS, FARMERS, AND RIVER GODS* 193 (1971).

there would have been more speculation but for the restrictiveness of the writs. I think it is more likely that the hostility of the official legal system to enforcement of promissory exchanges helped to ensure that most exchanges would remain unaffected by the rules. As Morton Horwitz has pointed out,

[b]usinessmen [in the 18th century] settled disputes informally among themselves when they could, referred them to a more formal process of arbitration when they could not [T]hey endeavored to find legal forms of agreement with which to conduct business transactions free from the equalizing tendencies of courts and juries.²²

Although Nelson might admit that his rules are not always accurate guides to behavior, he might urge that they do say something about what contemporaries found desirable. What is bad or inadequate evidence for social or economic history may still be good evidence for the study of values and ideologies. If this is Nelson's position, I would be happier if he advertised it more prominently, since it is rarely clear whether his conclusions about the social significance of legal rules relate to attitudes or to practices. At any rate, if the rules are evidence of attitudes, we need to know *whose* attitudes. It will not do to adopt an a priori position that legal rules embody the deepest-felt, commonly-held norms of a society, or even that they embody the values of an important elite. Some rules may survive because they are irrelevant to anyone but an occasional litigant; no force has been at work to alter or abolish them. Others may be "symbolic," registering the pressure of a group with just enough influence to get its values declared in law, but not enough to have them enforced against the rest of society.²³

Nelson's own account of the legal system of provincial Massachusetts should inspire extreme caution in anyone tempted to draw inferences about social attitudes from that system's rules. Effective law-finding power was delegated to juries, a situation in which Nelson says that "legal change and development are imperceptible." He further notes that "[e]xplicit rules of law," which

²² Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 927 (1974). The most important of these legal forms was the penal bond with conditional defeasance, which Nelson himself calls a "highly flexible commercial instrument" (p. 61). Because of informal devices like the penal bond, and the disposition of merchants to work outside the common law writ system, the common law of contract fails even dimly to reflect commercial practice until the very late 18th century in England. See Thorne, *Tudor Social Transformation and Legal Change*, 26 N.Y.U.L. REV. 10, 19-21 (1951).

²³ Cf. M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 22-43 (1964).

counsel argued to the juries, "remain unchanged, while substantive law is still extremely flexible in its ability to adapt itself to social needs in individual cases" (p. 29). It is, therefore, difficult to determine what the operative common law rules were, much less whether they reflected the attitudes of Massachusetts society. Nelson suggests that juries usually followed the law as urged on them by counsel or by the court, and rejected only "whatever parts of that law were inconsistent with their own views of justice and morality or with their own needs and circumstances" (p. 30). But what were those inconsistencies? And supposing juries mostly followed the rules, where did the rules come from? According to Nelson, they were copied out of form and precedent books, or cited straight from English cases and texts; they were "adhered to . . . with a simple-minded rigor and consistency," and were rarely modified by statute or by judicial decision (p. 19). It requires some bravery to deduce prevailing social norms from rules like these, except on the desperate hypothesis that even mechanically borrowed rules would not be used unless they served *some* social need. Perhaps the social need they served was simply that of giving the impression to provincials that they lived under a fixed system of law—an impression easily given by almost *any* set of rules with a colorable common law origin.

The problem of determining what social attitudes are expressed in provincial law becomes still more complicated if one challenges Nelson's application of the Zuckerman thesis²⁴ to the world of the 1760's. If provincial society were static and homogeneous, organized around a stable consensus on values, then we could sensibly suppose that formal legal institutions helped to maintain equilibrium by discouraging deviance and by reaffirming shared values. Kenneth Lockridge has suggested, however, that society in 1760 was increasingly "polarize[d] . . . along lines of wealth, interest, and opportunity," and its politics dominated by a struggle between "rural reactionaries and a frightened elite . . . pushed as never before to justify its existence."²⁵ If he is correct, it is entirely possible that, far from expressing a stable consensus, the legal rules may embody one class's attempts to promote, or to resist, change.²⁶ Similarly, if John Murrin is right that Massachu-

²⁴ See text accompanying notes 4-5 *supra*.

²⁵ Lockridge, *Social Change and the Meaning of the American Revolution*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 490, 510, 515 (2d ed. S. Katz ed. 1976).

²⁶ Discussing enforcement of laws against moral deviance, Nelson comments:

The source of most of these stringent standards lay in the Puritan beginnings of New England. Although Puritanism had lost much of its forcefulness

setts was becoming "anglicized" in the late 18th century, and that one of the signs of this was increasing professionalization of bench and bar, then the rules may reflect little more than lawyers' bewitchment with English models.²⁷

The point is that it is impossible to decide what social reality a legal rule represents—how most people behave, how most people think, how one group thinks, how nobody but lawyers think—without some attention to a great web of processes. That web includes the social functions of litigation in the culture; nonjudicial sources of coercive and normative direction such as families, churches and employers; the extent of differentiation of legal from other norms and occupations; and the role of the courts in government and politics.²⁸

Nelson's sections on procedure, judicial control of juries, pleading reform and revision of appellate process are especially valuable because they provide some insight into the shape of the web connecting law and society. Nelson shows that, in provincial Massachusetts various devices available in England to control juries—special pleadings, instructions, postverdict motions—were left undeveloped or unused. Parties usually tried cases under the general issue; instructions were cursory or even conflicting when several judges delivered charges *seriatim*; and postverdict motions

by the 1760s, juries of the period, *perhaps only as a matter of reflex*, continued to give effect to puritanical traditions (p. 37) (emphasis added) (footnote omitted).

Also, pointing to the importance of the oath in provincial procedure, Nelson concludes:

The colonial approach to evidentiary questions rested in large part, then, on a conception of truth that we do not share. The conception—that truth would emerge not from a weighing of credibilities and probabilities but from the sanctity of an oath—looked backward to earlier times, in which God-fearing men had attached enormous importance to a solemn oath. *To the extent that such notions persisted*, they reduced somewhat the power of juries to determine facts both by keeping evidence from them and by reducing their freedom in weighing the evidence that they heard (pp. 25-26) (emphasis added).

These exquisite hedges register Nelson's awareness of, but do not solve, the problems that changing values pose for his view that law represented social consensus.

²⁷ Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth Century Massachusetts*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 415 (1st ed. S. Katz ed. 1971).

²⁸ It is instructive to contrast Nelson's book in this respect with the classic account of law in 17th century Massachusetts, G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960), which really does succeed in placing the legal order in the context of the total culture—its religious and political norms and institutions, social structure, economy, etc. It may be that the much greater differentiation of legal activities from other kinds of social activities in the 18th century led Nelson to believe that law could be studied as a relatively autonomous phenomenon. If so, I think he, like many legal historians, has made a mistake.

provided no effective sanction against juries who ignored instructions (pp. 21-28).

After the revolution all this changed. By 1820, a series of procedural reforms had shifted the lawfinding function from the jury to the judge. Trial was before a single judge, and trial *de novo* before the full bench of the Supreme Judicial Court was abolished. This reform had the effect not only of simplifying jury instructions but also of placing another level of review—full court review on a bill of exceptions—above the trial process. At the same time, the courts began to develop supervisory mechanisms, especially motions after verdict, for the relief of litigants whose juries had failed to decide in accordance with the instructions or the evidence (pp. 166-70).

Equally dramatic changes overtook the rules of pleading. In his most detailed and carefully documented chapter, Nelson shows that the Massachusetts courts moved gradually after the revolution to rid common law pleading of its extreme technicality and formalism. The courts began by freely allowing amendment for trivial defects of form, and then went on to overlook the pleading mistakes of parties who brought the wrong writ, so long as the basis for the action was clear. They also loosened up defensive pleading, slowly promoting a unitary defensive plea. Eventually, Nelson argues, their impatience with technicality led the judges to the point where they perceived substantive bases of obligation beneath the ancient procedural categories of the writs, and as they perceived these bases they began to articulate them, using their new authority to develop law on their own. Substance and procedure became distinct categories in their minds: the pleading process came to be understood simply as an instrument for giving notice of the essential elements of a claim (pp. 77-88).

These developments naturally simplify the task of the historian attempting to extrapolate social consequences from legal rules. The rules were increasingly the work of American judges, rather than excerpts from English books, and they were far less vulnerable to subversion by juries.

Legal procedures, however, represent only a few of the strands connecting the legal and social systems. For the most part, Nelson ignores the other strands, or substitutes for them the suppositions of policy analysis. For example, a short account of the postrevolutionary economic changes that turned Massachusetts into an "industrialized, market economy that reached into the interior of the state" leads into the assertion that "[f]ollowing such a transformation in the economy, change was inevitable in the rules of law" (p. 147). Nelson certainly demonstrates that changes in the

rules occurred. He does not, however, show why such change was "inevitable": he does not indicate what newly forged links had made commercial practice and common law courts interdependent. Furthermore, the critical question—how is it that judges and entrepreneurs both came to perceive *courts* as important places to resolve disputes and as important agencies for the promotion of social change?—remains unexplored.²⁹ It is insufficient to regard the view as the inevitable product of commercialization or of industrialization. Some of the available evidence weakens that presumption. For example, English judges and businessmen apparently did not share the perception of the utility of courts for industry; England lagged far behind the United States in developing legal devices to facilitate corporate enterprise. Yet England's entrepreneurs found they could function without such devices, and did.³⁰

III

There is a danger that readers will take away the wrong impression from the peculiar combination of virtues and defects of this book—its magnificence as research into the history of legal doctrine and procedure and its tendentiousness as social explanation. Perhaps readers will conclude that lawyer-historians should stick to technical legal history in the traditional mode. As one who is convinced that the older mode of historiography—with its focus upon the "development" of the internal details of the common law—led all too often to anachronism or to triviality, I can only celebrate the present shift towards a merger of legal and general history.³¹

My criticism centers not on Nelson's approach to fuse legal and general history but rather on his execution of that approach.

²⁹ I am at present engaged in trying to answer this question for New York in the early 19th century, and had hoped that Nelson's book would throw some light on it for Massachusetts. A promising beginning has been made towards discovering how judges arrived at this perception in Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287 (1971).

³⁰ For one of the very few treatments of the relationship between law and economic change in Europe, see Landes, *The Structure of Enterprise in the Nineteenth Century*, in 5 RAPPORTS, COMITÉ INTERNATIONALE DES SCIENCES HISTORIQUES, XI CONGRÈS INTERNATIONALE 107 (1960). A splendid recent study by Richard Danzig treats the relationship between law and social change in England. Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUDIES 249 (1975).

³¹ Nelson has made some very sensible and illuminating remarks on this subject in Nelson, *Legal History*, ANNUAL SURVEY AM. L. 625 (1974).

The kind of legal history that I want to see written would produce books far different from Nelson's, and perhaps less interesting. Their scope would be severely limited in time, locality and legal subject. Thus they would run the risk of sinking into a monographic obscurity from which the historian could only rescue them by relating them to general social theories of law. But Nelson's book illustrates as well as anything could the drawbacks of an approach that sacrifices depth to breadth. The legal historian cannot transform doctrinal history into social and intellectual history with a simple assumption that legal rules directly mirror social behavior and attitudes. If *Americanization of the Common Law* manages to get that point across, its weaknesses will prove as instructive as its considerable strengths.

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