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AMERICANIZATION OF THE COMMON LAW: THE INTELLECTUAL MIGRATION MEETS THE GREAT MIGRATION

DAVID THOMAS KONIG*

PRELUDE

Americanization of the Common Law, the first of many significant monographs that William E. Nelson has produced in his career, redirected the writing of American legal history by demonstrating the explanatory power of using a comprehensive archival database to pose, test, and advance hypotheses about legal change. Nelson had been trained to appreciate such a methodology while a graduate student at Harvard University, where his mentor Bernard Bailyn had begun his own academic career with studies that aggregated large amounts of data from which to draw and test creative hypotheses about Early American social and economic change. In the work of both scholars we can see how a powerful “Intellectual Migration”—that of particular German social scientists who found welcome in the United States in the 1930s—transformed scholarly writing about the changes that overtook New England following the “Great Migration” of three centuries earlier—that of the Puritan founders of New England. The methods of aggregating legal usage that Nelson employed in Americanization, and then put to use in Conflict and Dispute Resolution in Plymouth County, Massachusetts, 1725-1825, have survived and transcended the historiographical debates of the 1970s and transformed the writing of Early American legal history.

William E. Nelson’s Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830 appeared in 19751 at the crest of a historiographical tidal wave. Three years earlier John Murrin, reviewing several of the many local-history studies of colonial New England, had observed that “[c]olonial New England has become, perhaps, the most thoroughly studied segment of world history. The year 1970 alone,” he continued, “produced eleven important books about a region which grew from only thirty-three thousand people in 1660 to roughly


one million by 1790. Influenced by the social-science turn of historical studies in the 1960s, and perhaps no less by the social disorders of that decade, these monographs drew on a school of thought that had begun to emerge in the social sciences a decade before. This concept—that of collapse of community—was not new, nor has it been confined to New England communities. As a basic unit of analysis, the town as the locus of community collapse has dominated American social science.

Propelling and unifying this scholarly output was the premise that early New England communities had achieved a cultural purity and social stability no longer within the reach of modern America. In adopting this premise, historians were channeling a good old New England tradition: that of “declension,” or a falling away from the presumably more pious and committed Puritan forebears whose “Great Migration” of the mid-seventeenth century colonized the region and founded the “City upon a Hill” that has become the mythic symbol of American national identity. What gave it greater force than the old-time religion, or even the notion of American exceptionalism built on it, was this premise’s intersection with the ascendancy of a “modernization” model resting on the idea that the homogeneous pre-modern “community” had collapsed into heterogeneous modern “society.” Whether these early communities had found the source of their stability in Puritan religious communalism, the normative secular

3. The Journal of Social History appeared in 1967, followed by the Journal of Interdisciplinary History in 1970 and Social Science History, which championed the use of quantitative methodology, in 1976. In its first issue, the editors of the Journal of Interdisciplinary History pointed to the appearance of several important monographs in 1966. American scholarship was also profoundly influenced by the social history of pre-modern Europe produced by the so-called “Annales” school in France (after its journal, Annales d’histoire économique et social), and its turn toward a histoire des mentalités, or collective attitudes. At the same time, a prolific group of historians in England coalesced around Peter Laslett and E. A. Wrigley, forming the Cambridge Group for the Study of Population, which in 1968 began publishing Local Population Studies.
5. Aboard the “Arbella” on the voyage to establish the Massachusetts Bay colony in 1629, John Winthrop took the allusion from the Sermon on the Mount, Matthew 5:14: “Ye are the light of the world. A city that is set on an hill cannot be hid.” Sermon of John Winthrop, City upon a Hill (1630), available at http://www.historytools.org/sources/winthrop-charity.pdf.
authority of hierarchy and subordination, the structural cohesion of family life and repressive methods of child rearing, the common labor of English collective agricultural practices, the affinity of interests within age cohorts, or the patriarchalism of town elders, historians followed their colleagues in sociology by training their focus on the town. It was there that these declensionist forces were most obvious, and town studies proliferated. Once again, as historian Thomas Bender commented in 1976, we saw how Americans “wistfully recall or assume a past made up of small-town communities.”

Cultural anthropologists were not surprised by the creation of this “myth of community,” which demonstrated “the great cultural weight borne by images of a harmonious small town, a face-to-face society,” but historians of Early America took to the model avidly, conflating cultural ideal or sociological ideal type and historical reality. Community studies became a staple of doctoral research in elite universities. In its most robustly constructed historiographical form, the resulting historical paradigm for early New England presented one such town as a “Christian Utopian Closed Corporate Community,” but other representatives of this new school of interpretation conformed in large part.

Bender’s study of “the changing structure and meaning of community in American history” identified as seminal the work of Harvard literary historian Perry Miller, whose 1941 essay “Declension in a Bible Commonwealth,” influenced a generation of students of colonial New England. Bender finds Miller’s theological model of declension crossing disciplinary boundaries in the early social historical work of Bernard Bailyn, and then further advanced with “renewed expression in the work of

13. Thomas Bender, Community and Social Change in America 6 (1978).
some of Bailyn’s best students.”17 Along with his Harvard mentor and colleague Oscar Handlin, Bailyn is said to “have played a central role in transforming Miller’s theological idea, rooted in history, into a sociological one with a tendency to escape from history.”18 As argued in the present essay, the intellectual trajectory as depicted here is as superficial in its understanding of Miller’s work as it is of Bailyn’s,19 but it is important to discuss if we are to understand the scholarly discourse of the mid-1970s and the reception given to Nelson’s Americanization of the Common Law when it appeared in 1975.

Like any paradigm, that of New England communitarianism could not maintain its explanatory power when scholars invoked it to explain far more than it could. Murrin’s review essay posed the most thought provoking and, as it turned out, the most important challenge to a paradigm that had reached its breaking point. A brilliant review, it was crafted with skill and erudition, and was supported by an unmatched breadth of sources in both English and colonial American history. Its array of factual and interpretative insights provided what Thomas Kuhn had called the “incommensurables” that could end the ascendancy of any paradigm, no matter how well entrenched.20 Written in a sprightly manner that pulled no punches, its critique was so widely (and deservedly) accepted that it quickly became a staple of graduate education and a widely cited standard for assessing the field.

The community collapse paradigm also came in for withering criticism in Bender’s study. His primary target was the simplistic, uni-linear notion of modernization, whose fons et origo he located in the work of the German sociologist Ferdinand Tönnies. Tönnies, who had migrated from a small German farming community to an urban and cosmopolitan milieu in the latter part of the nineteenth century, had proposed two contrasting concepts for understanding social groupings—Gemeinschaft und Gesellschaft. As summarized for a later American translation, “[i]t focuses on the universally endemic clash between small-scale, kinship and neighbourhood-

17. Bender, supra note 13, at 52.
18. Id.
based ‘communities’ and large-scale competitive market societies.”

21 In Tönnies’s words,

the theory of Gesellschaft takes as its starting point a group of people who . . . live peacefully alongside one another, but in this case without being essentially united – indeed, on the contrary, they are here essentially detached. In Gemeinschaft they stay together in spite of everything that separates them; in Gesellschaft they remain separate in spite of everything that unites them.”

22 Despite his long-term editorship of the American Journal of Sociology and his status as “the Altmeister or veteran among German sociologists,” Tönnies’s book enjoyed a far greater vogue in Germany than in the United States, appearing in eight German editions by 1935, the year when Nazi pressure forced the loss of his academic position. Though American sociologists had been referring to his book since the 1920s, Gemeinschaft und Gesellschaft was not translated into English until 1940, as Fundamental Concepts in Sociology (without, notably, its German subtitle, “An Essay on Communism and Socialism as Historical Social Systems”).

The fate of Tönnies’s book is an ironically sad commentary on the vicissitudes of scholarship in the twentieth century. Tönnies’s social democratic leanings and antifascism had cost him his professorship. Nevertheless, in the hands of the fascists he so courageously opposed, his ideas on German communal life became, in the words of Peter Gay, “ghastly caricatures” of a premodern culture of “primitive bonds that overwhelming events and insidious forces had loosened or destroyed.” Gemeinschaft und Gesellschaft, Gay writes, had great appeal in Weimar Germany, where “[m]any of the youth leaders hailed an idealized, romanticized medieval Germany as a refuge from commercialism and fragmentation.” Taken to support their “invidious contrast between the authentic, organic harmony of community and the materialistic fragmentation of business society,” the hijack of Tönnies’s ideas and the Nazi application of the term in Volksgemeinschaft were a cruelly ironic rebuke to the scholars

21. FERDINAND TÖNNIES, COMMUNITY AND CIVIL SOCIETY 1 (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887).
22. Id. at 52.
23. For a fuller account, see Werner J. Cahnman, Toennies in America, 16 HIST. & THEORY 147 (1977) [hereinafter Cahnman, Toennies in America]; see also WERNER J. CAHNMAN, FERDINAND TÖNNIES: A NEW EVALUATION (1973).
24. The term is used in Louis Wirth, The Sociology of Ferdinand Tönnies, 32 AM. J. SOC., 412, 415 (1926).
27. Id. at 55.
then being turned out of academic positions in Germany, Austria, and elsewhere on the Continent, forced to flee to North America as an “Intellectual Migration” three hundred years after the Great Migration of the Puritans.28

In the United States, shorn of its Marxist subtitle, finally translated into English and retitled, Community and Society found a growing receptive audience of scholars, especially among a new generation of historians who came of age in the 1960s and 1970s, for whom its evocation of a harmonious, precapitalist world of villages had great appeal.29 Tönnies’s work, however, was only one element of the profound impact of social science brought to America by German-speaking exiles—what Bernard Bailyn has described as a “vast Exilliteratur.”30 These scholars recognized an American intellectual culture receptive to their ideas, and they brought with them a desire to “diffuse their influence through American culture at large.”31 So fully was their scholarship in the social sciences absorbed into American universities that its influence needed no express citation. Many students, like William E. Nelson, studied with Bernard Bailyn at Harvard and were probably not fully aware of this influence in the many seminar and colloquium sessions that pushed them to engage masses of archival material, clarify the significance of their research findings, and apply them to the larger questions of the age. There, they faced the deceptively simple (and now notorious) Bailyn question, “So what?”32

“So what?” was fraught with meaning. Bailyn’s father-in-law, the great sociologist and Austrian emigré Paul F. Lazarsfeld, was regarded by many as the founder of modern empirical sociology. Lazarsfeld, who moved permanently to the United States from Vienna in 1935 after losing his teaching position and seeing his relatives arrested, is best known for his work in the field of empirical sociology. His contributions to the understanding of social phenomena through statistical analysis and the development of the concept of “équilibre social” have left a lasting legacy. 

28. Id. at 56–57. Gay makes explicit the comparison of the two migrations. Id. at 11–12. On Volksgemeinschaft, see John Samples, Ferdinand Toennies: Dark Times for a Liberal Intellectual, 24 SOC’Y 67, 67 (1987).

29. See generally Rudolf Heberle, The Sociology of Ferdinand Tönnies, 2 AM. SOC. REV. 9 (1937); Cahnman, Toennies in America, supra note 23. Heberle was Tönnies’s son-in-law.


32. This interrogation is fondly recalled by many of his former graduate students. See, e.g., Michael Kammen and Stanley N. Katz, Bernard Bailyn, Historian and Teacher: An Appreciation, in THE TRANSFORMATION OF EARLY AMERICAN HISTORY. SOCIETY, AUTHORITY, AND IDEOLOGY 13 (James A. Henretta, Michael Kammen & Stanley N. Katz, eds., 1991); Jack N. Rakove, “‘How Else Could it End?’ Bernard Bailyn and the Problem of Authority in Early America” in THE TRANSFORMATION OF EARLY AMERICAN HISTORY, SOCIETY, AUTHORITY, AND IDEOLOGY, supra note 32, at 274 n.3 (quoting Bailyn: “All this is very interesting . . . . But . . . so what?”).
work on how the mass media influence the way people make decisions. Lazarsfeld also continued his work on communities, and Bailyn had a profound understanding of the subject as interpreted by sociologists on both sides of the Atlantic. Few students were aware of Bailyn’s deep immersion in social theory, or of the influence of his friend Robert K. Merton that added to it, for he eschewed social science jargon and preferred to use historical examples to make his point. Two of those students remark,

Reading through the corpus of Bailyn’s major work, one might not readily guess that he is deeply conversant with the social sciences and even with the natural sciences as modes of scholarly inquiry and enterprise. It is rare, indeed, to encounter in Bailyn’s prose a phrase like “functional integration,” and rarer still to find in his footnotes any citations at all to works by sociologists, social psychologists, anthropologists, or political scientists.

Like Tönnies, Lazarsfeld was part of the revolution in social theory that convinced American sociologists that their German-speaking counterparts had abandoned their “philosophical and speculative” interests. In their place they developed what once was known as “sociography.” Lazarsfeld admitted, “I was not familiar with various papers by Tönnies in which he tried to introduce the idea of sociography into the tradition of German sociologists,” but he did more to advance it in the United States than anyone else, at first renaming it “empirical social research” before settling on “survey analysis.” The older term, he explained, had come “to connote a mechanical description instead of a systematic analysis of concrete data which it originally meant.” In the process, he brought to it a quantitative methodology that gave it a “more concrete” basis, acknowledging and building on Tönnies’s “sociography.”

Tönnies has been aptly described as a “utopian visionary,” and his contrast of “community and society” meshed nicely with scholarly critiques


37. Id. at 283.

38. PAUL F. LAZARSFELD, MAIN TRENDS IN SOCIOLOGY 12 (1973).


of American society in the 1960s and 1970s. What these studies found in Tönnies’s work, however, was not exactly what he had intended. Werner Cahnman, imprisoned in a concentration camp before emigrating to the United States, had had a first-hand view of the misuse of social science in Germany, and he was sensitive to the way that Tönnies’s ideas had been embraced on American campuses: by 1977, he wrote, its attractive postulation of “dichotomies,” “ideal constructs,” and “polar types” had spread into college textbooks and learned journals, where its basic premise was “more often ritualistically invoked than actually known.” The same may be said of a classic work that Tönnies admired: Henry Sumner Maine’s widely cited *Ancient Law*, whose basic premise was the oft-quoted statement that “the movement of the progressive societies has hitherto been a movement *from Status to Contract.*” Like *Gemeinschaft und Gesellschaft*, Maine’s status-to-contract paradigm contrasting law in the village community and in the modern city led to facile misappropriation by later scholars.

In his graduate seminar at Harvard, Bailyn offered informed, cautionary, and suggestive critiques of social science methodology. For this reason alone, classifying scholars such as Bailyn, as Bender did, among the wayward disciples of Tönnies or, for that matter, of Miller, is misplaced. Though he did not always identify Tönnies by name, Bailyn warned his students that such concepts as *Gemeinschaft und Gesellschaft*, as uni-linear and mutually opposed ideal types, had been overextended and oversimplified, much in the process that Thomas Kuhn described for scientific paradigms collapsing on themselves by bearing the sheer weight of too much interpretative work on too many subjects. Graduate students in Bailyn’s seminar were cautioned, as he recalled to an early student of his, that the historian’s facile borrowings of other disciplines were “rigged to accomplish some meta-purpose.”

An astute student of twentieth-century social science, Bailyn agreed with the many sociologists who warned that the *Gemeinschaft und Gesellschaft* paradigm could produce “sterile philosophizing if they are to be used as the perennial frames into which the many-sided, complex, and elusive facts of reality are to be squeezed.” As Werner Cahnman wrote, Tönnies’s first American followers “fixed many a mistaken image in the minds of those who relied on their statements. Innumerable textbook writers,” he

remarks, “have copied comments on Toennies from each other . . .”

Tönnies’s *Gemeinschaft und Gesellschaft* had imposed a Procrustean bed on the study of the social history of Early America, much as Miller’s “Declension in a Bible Commonwealth” had done for intellectual history or Maine’s *Ancient Law* had done for legal history. All three works—or, rather, their misuse by later admirers—had blinded scholars to a deeper understanding of the rich texture of social relationships.

Bailyn’s caution was well taken, if not by all his students, but by most of them, Nelson included. His critique reflected not only his own misgivings but also those of other historians and historically-inclined social scientists of the 1960s and 1970s. In 1966 one of these historically-inclined sociologists, Kai Erikson (a Vienna-born emigré son of the German psychoanalyst-sociologist Erik Erikson), also cast doubt on the idea that a community had to be a geographically defined area such as the town. In his *Wayward Puritans*, Erikson applied “community” by the way it defined deviant behavior—by “the relationship between a community’s boundaries and the kinds of deviance experienced.” Deviance was itself “normal,” in that it defined the boundaries of those norms by which a group of people sought to make real its shared understandings or obligations. Rather than demonstrating a fracturing of a community—because friction, conflict, and deviance were never absent in any society—he did not limit himself to the town as the definition of community. The terms “community” and “town” were conceptually too limiting; a community might or might not be co-terminous with a town’s spatial boundaries, but as a sociologist his argument about deviance “should fit all kinds of human collectivity.”

Community emerged, as it were, from the definition and punishment of deviance. Erikson had noted, among other things, that in the time and place he studied, “the offender rate seems to have remained quite stable.” But this was only prelude to his fundamental question: What did this empirical data mean? What did it have to do with the larger questions that historians and sociologist were asking? Or, to phrase it differently, “So

48. *Id.* at 19.
49. *Id.* at 8–10.
50. *Id.*
51. *Id.* at 181 (Erikson studied Massachusetts Bay in the seventeenth century, and used Essex County to quantify data on crime rates).
what?" This is not the place to examine all of Erikson’s conclusions flowing from this insight, but we should acknowledge the caveat he had made clear in his preface, and which shared Nelson’s purpose and method in *Americanization of the Common Law*: “[T]he data presented here have not been gathered in order to throw new light on the Puritan community in New England but to add to something to our understanding of deviant behavior in general.”52 His goal was a limited one, constrained within the limits of what it could explain, but also by what it must explain.

Completing his doctoral dissertation at Harvard under Bailyn, Nelson listed his mentor first in acknowledging scholars in the book’s preface. Bailyn deserved pride of place for substantive and alphabetical reasons. Not only did his seminar introduce his students to the history and historiography of the colonial era, but it subtly introduced students such as Nelson, whose training had been in law, to approach archives with the eye of a social scientist. Lazarsfeld’s impact—the combination of the quantitative and the qualitative—was clear, but more important yet was that of Lazarsfeld’s colleague and collaborator, Bailyn’s friend Robert K. Merton. This distinguished Columbia University sociologist acknowledged his own intellectual debt in 1957, “In recent years . . . I have learned most from Paul F. Lazarsfeld” and “it is evident from our countless conversations that he has no conception of the full extent of my intellectual debt to him . . . .”53 The social science of the Harvard seminar echoed Merton’s work, and Bailyn’s advice that his students avoid grand theoretical models and instead seek “mid-level” hypotheses called to mind Merton’s description of his own work:

I attempt to focus attention on what might be called theories of the middle range: theories intermediate to the minor working hypotheses evolved in abundance during the day-by-day routines of research, and the all-inclusive speculations comprising a master conceptual scheme from which it is hoped to derive a very large number of empirically observed uniformities of social behavior.54

Nelson, a law school graduate and former Supreme Court clerk, sought to understand why the legal system functioned as it did. His methodology of amassing as close to a comprehensive database of legal activity as possible addressed the concerns of a legal scholar more than those of a social historian. To paraphrase Erikson, he sought not to throw new light on the Puritan community, but rather to add something to our understanding of legal behavior in general. Nelson also was examining the New England community, but from a different starting and focal point than that of

52. *Id.* at viii.
53. MERTON, SOCIAL THEORY, supra note 34, at x.
54. *Id.* at 5–6.
religion, economics, family, or demography: Nelson’s focus was the legal system. Bailyn’s monitory influence about social science methodology—no matter how implicit or oblique—becomes clear on a close reading of Nelson’s book and with an awareness of the legal-historical community within whose debates and traditions Nelson was writing. Reviewing the book for the *Columbia Law Review*, legal historian Herbert A. Johnson ranked it with other “exceptional first books that with the passage of time may become a classic of historical literature.”

Over the course of forty years, I am convinced, Johnson’s prediction has been fulfilled. Others at the time, however, were not as positive about its prospects. Nelson may have set himself up for trouble with the critics of the modernization paradigm by announcing in his preface that he was offering a “limited attempt” to “trace the emergence of modern American law from its colonial antecedents during the half century following the American Revolution.” However, the important word in Nelson’s confession was not “modern”; it was “limited.” Aware of the overreach characterizing the community studies appearing as he wrote, he was only asking his research method to prove what it could explain. Like Merton’s “middle range” inquiry or Erikson’s circumscribed project to “add to something to our understanding of deviant behavior in general,” Nelson examined the subsection of legal activity within a society to generate an explanatory theory of that feature of human behavior while remaining sufficiently grounded to enable empirical testing.

Even so, and not surprisingly, many reviewers of *Americanization* read it within the prevailing—albeit crumbling—paradigm of modernization in historical discourse: the social stability/community collapse paradigm. Lumping *Americanization* with them, they assigned to it the same flaws that they were rightly exposing in the earlier community studies, and of which scholars such as Nelson, less dazzled by the attractive simplicities of popularized versions of *Gemeinschaft* and *Gesellschaft*, were aware: making the two categories “empirically exclusive categories rather than ever-present dichotomic elements in a society.” To be sure, reviewers readily recognized the virtues of Nelson’s legal scholarship—virtues that endure, and are worthy of our attention before we proceed to re-examine the criticisms of his historical scholarship and return to take a closer look at Nelson’s version of colonial New England stability. Nelson’s debt to what

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56. NELSON, supra note 1, at 149.

he had learned in graduate school was obvious, if unspoken, in his unpre-
edented accumulation of an empirical universe of legal activity in the peri-
od he studied. Nelson had made an exhaustive examination of “not only all published statutory and judicial material for Massachusetts between 1760 and 1830 but also all available manuscript material, including unpublished judicial opinions, lawyers’ notes, and, most commonly, records of plead-
ings, judgments, and other papers incorporated into official court files.”

Typical of the many reviewers impressed with such diligence, Jamal Zainaldin praised Nelson’s engagement with the law:

Nelson places private law squarely in its societal context. In many ways, this book is a remarkable achievement. The breadth of analysis, the legal expertise, the imaginative employment of sources, and the novel interpretations of legal de-

velopment are indeed impressive.

At the same time, however, he offered a reservation shared by others: that Nelson had written two books: “While Nelson’s grasp of the historical common law process is unparalleled, in the end his flawed construction of the historical context of both the colonial and post-revolutionary eras seri-

ously jeopardizes the validity of his interpretation of legal change.”

Zainaldin divided his assessment of the book into two parts: one that “re-

views in depth Nelson’s argument and briefly summarizes his contribution to the field of legal history” and another that “examines the argument from the perspective of recent American historiography.” By such a reading, Nelson had expropriated the reigning paradigm of community collapse: He had focused “solely on the rise and fall of ethical unity.”

To be sure, Nelson did use the language of the communalist paradigm in describing colonial Massachusetts, against which he contrasted the post-

revolutionary departure toward a more individualistic world of material values. Unlike the post-revolutionary society that followed it, the colonial era was not a forum for contending groups to compete for the material gains of an economy unleashed from collective control and eagerly pursu-

58. NELSON, supra note 1, at vii.
59. Jamil S. Zainaldin, The New Legal History: A Review Essay, 73 NW. U.L. REV. 205, 206 (1978) (reviewing WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 (1975)) Use of Zainaldin’s review is not intended to single it out for special criticism. It was intended to be even-handed and judicious, giving credit where seen as due and offering criticism as seen where needed. Like the many other reviews of the book, however, it simply misses what Nelson is really driving at; see also David H. Flaherty, 26 U. TORONTO L.J. 108 (1976) (book review); Herman Belz, 82 AM. HIST. REV. 175 (1977) (book review).
60. Zainaldin, supra note 59, 206.
61. Id. at 214. Those who know Nelson and whose work has received his criticisms at the New York University law school’s legal history workshops will find such a review ironically reminiscent of Nelson’s frequent opening comment on scholarship presented at workshops: “What we have here are two books.”
62. Id. at 206, 222.
ing the benefits of autonomy both collectively and individually. He explained, “A society so divided cannot exist, I believe, when juries have power to accept or reject whatever law they wish.” And accept or reject they did, but in the aggregate—in the vast database of cases Nelson assembled—they demonstrated a remarkable consistency. In its place after the Revolution, there emerged a legal system in which the authority of juries eroded. Now too inconsistent in their verdicts, they lost their power to control the outcomes of lawsuits. By a variety of procedural changes, which Nelson described in clear, illuminating, and convincing detail, judges gained authority, applying “rules that once had a stabilizing effect [but] would now have precisely the opposite effect.” Such rules would have to be replaced. As Nelson explains,

The transformation of the economy produced much legal change, the most important element of which was the emergence of legal doctrines that recognized the materialism of the age and legitimated the idea of competition.

The “demise of the old ethical standards” was followed by “a desire for economic growth.”

Reviewers cited many examples, but Nelson’s presentation of a prevailing “consensus” before the Revolution will serve: “Consensus was promoted by the fact that nearly all members of society shared common ethical values and imposed those values on the occasional individual who refused to abide by them voluntarily.” Of the colonial courts that supported the stability of community life, Zainaldin could not comprehend “how the legal system of prerevolutionary Massachusetts came to assume this structure.” “Who is ‘the legal system’? Why does ‘it’ do such things to ‘itself’?” Nelson fails to offer answers to these questions. Zainaldin also implausibly characterizes Nelson’s thesis of the post-revolutionary society as “libertarian,” presenting a society of “rugged individualism.”

Criticisms along those lines miss the larger significance of Nelson’s work, which becomes clear when we place it in the long context and tradition of writing legal history by other major figures whose insights have transformed the field. Only then does the full import or purpose of Nelson’s prodigious investigation of so much data make its weight felt in the central themes of legal history. The ultimate crucial subject is the power of the

64. Id. at 7.
65. Id. at 6.
66. Id. at 7.
67. Id. at 4.
68. Zainaldin, supra note 59, at 208 n.9.
69. Id. at 210, 211.
Nelson produces an unassailably convincing portrait of the jury. “It is difficult to comprehend how greatly the legal system of prerevolutionary Massachusetts differed from that of modern America,” he states, with the “most important difference” being that pre-revolutionary juries “possessed far greater power than juries do now.”70 Nelson undertook to explain not only how they wielded such power, but why. Understanding his method and the intellectual foundations of his education in both law and history, we can appreciate his historical achievement. Finding overwhelming evidence of jury authority, he asks—dare we say it?—”So what?” What does such a phenomenon reveal about a society that could permit it? What does such a phenomenon reveal about the arcana of pleading and evidence—nowhere before explained so astutely by scholars of New England’s legal past—that made it possible? The analytical purpose of this question becomes clear by reference to Merton’s system of functional analysis: When a pattern of uniformity is perceived, it constitutes “an empirical regularity which would become significant for theory only if it could be derived from a set of other propositions . . . .”71 Only a society in agreement on normative basics, Nelson showed in case after case, could produce such a jury: “In a legal system in which juries have the power to find the law, whatever disputes arise cannot be resolved by mere majoritarian fiat but must be resolved by a process of consensus building that produces legal rules acceptable to a broad base of society as a whole.”72

Nelson’s conclusions rest on a firmer basis of legal and social science scholarship than many reviewers realized, and the richness of his inquiry into that intellectual world informs the way he went about his research. His debt to Bailyn and to the social science of community is more obvious than another equally profound debt, that to the long tradition of writing legal history and to the recurring themes of legal-historical development. One of these was the subject of an essay written in 1967 by the great S. F. C. Milsom on the relationship of “Law and Fact in Legal Development.”73 Milsom focused on the thirteenth and fourteenth centuries, in which he described a process of legal change analogous to that described by Nelson in his presentation of the jury and its decision-making power over both law and fact. The balance between law and fact as adjudicating authority, Milsom argues, is a central theme in the history of western law. In the emer-

70. Nelson, supra note 1, at 3.
71. Merton, Social Theory, supra note 34, at 96.
gence of modern law—which is, after all, Nelson’s major goal—Milsom’s “premiss is that legal development consists in the increasingly detailed consideration of facts. If so, the limit at any time is the extent to which the legal process presents the facts for legal handling.” Milsom makes many points about trial by ordeal, battle, and compurgation—procedures demanding explanation of how and why such apparently irrational practices could have possibly commanded any legitimacy—in ways that critics of Americanization would do well to heed. These procedures—like Nelson’s prerevolutionary juries—could have functioned only in a society constituted along lines of shared acceptance of certain normative beliefs. Milsom, like Nelson, asks a basic question: What is the logic behind the system? What social-cultural conditions are necessary to create and give legitimacy to the procedures and decisions that will follow?

The central argument of the first part of Americanization—and a touchstone of comparison for the rest of it—is the jury and its ability to hear the broad array of facts that a community would submit as bearing on the merits of the case and on the law as the jury believed it ought to be. Acting on those facts, the jury applied a notion of law of such force that it effectively restrained the power of judges. Americanization painstakingly demonstrates the ways that the Massachusetts jury presented a system in which pleading the general issue broadened the admissibility of facts, analogous to what Milsom describes for the thirteenth century. Like the ascendency of the jury in Nelson’s Massachusetts, this was a “complicated process, and one about which little modern work has been done,” namely “the splitting of the general issue in existing actions by letting defendants make special pleas.”

74. Id. at 1.
75. Nelson and Milsom ask essentially the same question as that posed by Keith Thomas in Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth- and Seventeenth-Century England:
This book began as an attempt to make sense of some of the systems of belief which were current in sixteenth- and seventeenth-century Europe but which no longer enjoy much recognition today. Astrology, witchcraft, magical healing, divination, ancient prophecies, ghosts and fairies, are now all rightly disdained by intelligent persons. But they were taken seriously by equally intelligent persons in the past, and it is the historian’s business to explain why this was so.
77. Milsom, supra note 73, at 15.
The earlier procedural preference for the general issue in the eighteenth century, over pleading the narrower range of facts relevant to pleading specially, was what Milsom had found in the thirteenth-century plea rolls. In the same manner demonstrated so amply by the Massachusetts court records undergirding the arguments of Americanization, the earlier English plea rolls show the system, as Milsom put it, “exploiting jury trial to the full and allowing parties to put formally before the court whatever facts seemed to them relevant.”78 In prerevolutionary Massachusetts, the stability and community agreement on normative matters of law supported the same procedural accommodation: pleading the general issue.

So, too, the steady rejection of the general issue pleading in Milsom’s fourteenth century paralleled that of Nelson’s nineteenth. In neither case should we ask, “Who is the legal system?” “Why does it do such things to itself?” Rather, in explaining how lawyers effected the courtroom distinction between law and fact through the general issue, Milsom notes, “Legal thinking has clearly outstripped legal forms,” and what is going on does not appear in what the clerks record. “What matters to us is not that this did happen . . . but that it could happen . . . .”79 Nelson applies the same deep insight to Massachusetts that Milsom applied to medieval England by noting how Massachusetts juries gained the upper hand in their courtrooms when he goes beyond the descriptive to the analytical:

A more difficult question to answer is why officials tolerated restraints that prevented them from effectively governing the province. Why, in particular, did the judges tolerate a legal system that left them much weaker than the judges of England, who had broad power to shape law by virtue of the fact that special pleas were often interposed and that they could grant new trials when juries failed to follow their instructions?80

There is nothing inevitable or permanent about legal change, of course, and the process of the erosion of jury power—largely seen in Nelson’s explanation of why pleading specially superseded that of the general issue in post-revolutionary Massachusetts—is no exception. No longer could society rest on the consistency of jury verdicts as it had in the years before the Revolution. So, too, Milsom’s English juries once had heard facts pleaded in the general issue; if a jury was likely to veer from justice,

78. Id.
79. Id. at 7.
80. Nelson, supra note 1, at 31. Richard B. Morris, a historian also trained in law, astutely identified the significance of this line of questioning in his review of Americanization in 21 Am. J. Legal Hist. 86, 86 (1977). Although he criticized Nelson for following too closely the analysis of Michael Zuckerman’s Peaceable Kingdoms, he also praised Americanization for “the light it sheds upon the transformation of American law and for the responses of legal institutions to the changing economic ethos of a dynamic society.” Id. at 89, 90.
only then might facts be pleaded specially. Neither scholar, relied on Maine’s simplistic formulation.

What Nelson had identified situated the anomalies within the grand sweep of English and American legal history. *Americanization* had demonstrated what Milsom had found when he explained, “The unofficial nature of much of the law produced by these mechanisms explains many things.” Of the difficulty of identifying the historical process, Milsom advises, in words that Nelson’s work substantiates, “But though rules which so operate will be tentative, hard for us to discover, and easy for unconscientious litigants to evade, still they are real. And slowly they will come into the open.” The jury’s power so expanded in the eighteenth century served as an agent of the community, a facilitator of the goals set before it by those who recognized the impact that legal institutions had on society. Readers might not appreciate the meaning of the book’s subtitle, “The Impact of Legal Change on Massachusetts Society,” because Nelson was not presenting the legal system as the driving force that used the formal powers of the state to transform society along the lines that those who controlled the legal levers of power might wish. More careful readers will note that Nelson describes that impact as one in which legal “rules of substantive law . . . *sustained* the building of consensus.” Support for the community’s normative goals was the impact, as “Law in a Changing Social Order” was one agent of change, not its principal agent or cause. Law reflected, and its rules implemented and mediated, the “demise of the old ethical standards” but they were not the cause of the change. When the members of the jury no longer shared a common fund of ethical ideals, their usefulness as mediators of conflict and agents of stability eroded.

**CONCLUSION: A CODA**

*Americanization of the Common Law*, like *New England Merchants*, transformed the writing of Early American history by compiling and analyzing aggregated data to reveal patterns of behavior that lay behind the more obvious events noted by contemporaries. Historians might speculate or use their well-honed powers of inference to draw meaning from broad trends of historical change, but Bailyn and Nelson applied “a systematic

82. *Id.* at 18.
83. *Id.* at 8.
84. NELSON, *supra* note 1, at 4 (emphasis added).
85. *Id.* at 1–10 (title of Chapter 1).
86. *Id.* at 6.
analysis of concrete data.” 87 In this way, Nelson could discern the “emergence” 88 of a new legal system from the “uncertainty and inconsistency” of the old. 89 It was in “day-to-day” legal activity 90 of hundreds of cases that he saw changes made “unthinkingly.” 91 Such changes were what one learns of from Bailyn’s meticulously compiled shipping records, which reveal “latent events;” and what is most striking about them is that contemporaries may have been only partially aware of them, if at all.” 92

The purposefulness of their method is apparent in the coda that each supplied to enhance and augment their initial efforts. Four years after he published his New England Merchants in the Seventeenth Century, Bailyn returned to a problem he had faced in writing that book. “Without realistic notions of scale,” he wrote, “we cannot answer certain uniquely historical questions of growth and decline and the phasing of change.” 93 This was an empirical question, central to the tradition of scholarship brought to this country by the emigré social scientists with whom he was so familiar, and which would have such an impact on the writing of Early American history at Harvard. One result of his curiosity was the collaboration with his wife, Lazarsfeld’s daughter Lotte Bailyn, which led to publication of Massachusetts Shipping 1697–1714. A Statistical Study, 94 a volume tabulating and analyzing the records of a register of the colony’s shipping in that period 95 (and a coda to New England Merchants). From this mass of detail—collected on punch cards and laboriously loaded into the rudimentary computational devices of the time—they were able to extract conclusions about the “broader implications of the statistics” drawn from the register. 96 What they discovered was a “broadening distribution of the ownership of shipping [that] developed together with an increase in the holdings of leading entrepreneurs.” 97 The question, of course, was, “What did this mean?”

87. See supra note 38 and accompanying text.
88. Nelson, supra note 1, at 3.
89. Id. at 4.
90. Id. at 3.
91. Id. at 5.
94. Bailyn acknowledges that this project was possible “only in collaboration with Lotte Bailyn, who, trained in a more rigorous discipline than history and skilled in machine methods of data processing, worked out a program by which the significant information of the Register, in all useful combinations, could be extracted mechanically and be made available for tabular presentation.” Id. at vi.
95. Id. at v-vi, 3-12 (explaining the register in detail). The register served the requirements of the Act for Preventing Fraud and Regulating Abuses in the Plantation Trade, 1696, 7 & 8 Wm. III c. 22, available at http://www.british-history.ac.uk/report.aspx?compid=46829.
96. BAILYN & BAILYN, supra note 93, at 74-75.
97. Id.
They offered their findings as “a rich vein for historical speculation,” but unmistakable was the foundation erected on “more permanent elements of the American economy.” They also reported how the registry contained within it “not merely clear evidences of a forming economy, but also less clear signs of an emerging social order.” In the spirit of the Intellectual Migration that brought empirical methods to the United States, they offered their work as a means for other scholars to continue the advance of understanding one segment of early society in North America.

Six years after the appearance of *Americanization of the Common Law*, Nelson published *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725–1825*. In one review, John Catanzariti called it “essentially an extended footnote to his *Americanization*, paralleling it in underlying themes but actually testing the assumptions of consensus on which the earlier study was based.” Like the Bailyns’ study of shipping, *Dispute and Conflict Resolution* was heavily tabular, with twenty-three tables to the former’s thirty-three. Like *Massachusetts Shipping* it, too, was presented in the spirit of encouraging others to do the empirical research necessary to bring coherence to masses of data, from which both authors hoped would emerge the broad patterns on which reliable social scientific conclusions could be drawn. Within Nelson’s book, however, a note of apologia crept in, perhaps prompted by some of the unsympathetic reviews of *Americanization*. Nelson also had undertaken to promote the publication of the entire corpus of records of the Plymouth County courts as another resource for fruitful empirical research, and by 1981, the entire run of records from 1686 to 1859 had appeared in sixteen volumes. It was this body of data that Nelson used for *Dispute and Conflict Resolution*. Invoking the people of the Plymouth community whose lives left behind the records of their court activities, he reminded his readers that they knew that, if a field is to produce crops, it is more important to plow and sow it seasonably than to do so perfectly but too late. Like the farmers of Plymouth, I am quite aware that I have not plowed my field as exhaustively as it might...
be plowed. But I have plowed it seasonably and, I hope, well enough so that it will lead to new and fruitful ideas.\textsuperscript{103}

Nelson’s earliest scholarship, represented by these two books, was truly “seasonable” in the sense meant by his subjects: apt as a corrective for the intellectual spirit of its times, and weighty enough to announce the beginning of a new era in the writing of early American legal history.

\textsuperscript{103} Nelson, supra note 100, at xi.