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Book Review

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BOOK REVIEW

The Effect of the American Revolution on the Law

AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830. By William E. Nelson. Cambridge, Mass. and London: Harvard University Press. 1975. Pp. ix, 269. $14.00.

*Reviewed by James W. Ely, Jr.**

Several years ago a prominent historian questioned the neglect of the colonial and post-Revolutionary periods by students of American law. Although recognizing that "[w]ork on the law during the revolutionary period is still in a primitive state,"[1] he nonetheless suggested that a large measure of legal continuity might be established between the colonial years and the early national period:

> [I]t would seem reasonable to argue that 1750-1800 is the critical period for legal historians if continuity between colonial and national law is to be demonstrated . . . . Our concern witb the public law and constitution-making of the last part of the century has perhaps blinded us to the persistent characteristics of private law. In any case, the argument for testing the hypothesis of continuity in early American law seems strong.[2]

The hypothesis of continuity has now been ably tested and challenged by William E. Nelson's fine book, *Americanization of the Common Law*. Relying upon years of painstaking research in courthouse files throughout Massachusetts, Nelson utilizes unpublished opinions, court records, and attorneys' notes to fashion a striking interpretation of the significant changes that occurred in Massachusetts law following the Revolution. The author undertakes an analysis of the doctrines of substantive law and techniques of law-making and enforcement in order "to trace the emergence of modern American law . . . ."[3]

Nelson emphasizes the ethical unity and social stability of the

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1. Katz, Book Review, 33 U. CHI. L. REV. 867, 884 (1966).

2. *Id.* at 882-83.

3. W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 3 (1975) [hereinafter cited as NELSON]. The author is an associate professor at the Yale Law School. Portions of the book have appeared previously in article form. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. REV. 450 (1967); Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts As a Case Study, 1760-1775*, 18 AM. J. LEGAL HIST. 1 (1974); Nelson, *The Reform of Common Law Pleading in Massachusetts, 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973).

pre-Revolutionary Bay State, which sustained a process of conflict resolution by "consensus building that produces legal rules acceptable to a broad base of society as a whole."[4] To achieve widespread acceptance, laws had to reflect the shared values and ideas of the community.

The author begins his analysis with a detailed consideration of Massachusetts law in the late colonial period. Citizens of Massachusetts, anxious to restrain governmental power, saw the jury system as their most important legal institution. Juries in colonial Massachusetts, unlike modern juries, possessed extensive power to decide the law as well as the facts. In the years before the Revolution nearly every case was tried before a jury, and the parties usually submitted the cause under the general issue rather than a special plea. Judicial devices for controlling jury findings were rarely employed in Massachusetts. For example, instructions by the court were ineffective as a means of jury regulation. All cases were tried before at least three judges, each of whom delivered his own charge, seriatim fashion, to the jury. Moreover, counsel were permitted to argue questions of law before the jury. As a result, jurors held de facto power to determine which view of the law was correct.

Several consequences followed from this power of the jury to find law. Since jury verdicts were not precedent, the law as decided by jurors had a great potential for adaptation to the circumstances of individual cases. Hence, Nelson observes that the Massachusetts practice "gave the legal system real flexibility while simultaneously giving the illusion of stability—two values that are important in doing justice in individual cases and in convincing litigants that justice has been done them."[5] More importantly, the author contends that "the representatives of local communities assembled as jurors generally had effective power to control the content of the province's substantive law."[6] Hence, laywers regularly relied upon community customs as well as English common law in their arguments before juries. This wide latitude of juries, coupled with the lack of governmental coercive power and the liability of officials for damage judgments and statutory penalties, meant that the provincial officers could not govern without the consent of the towns. Colonial officials were unable to move against those who lived in accord with local norms. Nelson concludes:

> In sum, the only way for officials to ensure enforcement of the law was to obtain community support for the law, and the best way to obtain that support

4. NELSON 4.
5. *Id.* at 29.
6. *Id.*

was to permit local communities to determine the substance of the law through legal institutions such as the jury.[7]

The substantive law reflected the common ethical values of pre-Revolutionary Massachusetts. Nelson argues that the criminal law "was concerned primarily with protecting community religious and moral values."[8] Sexual transgressions and offenses against religion constituted a majority of all criminal prosecutions. Similarly, the extensive remedies afforded creditors were "at least in part, a product of a shared moral or religious belief that debtors ought to make full repayment of all they had received."[9] Contract and property rules protected social stability and "insured that the distribution of wealth did not change substantially or rapidly over time and that men had well-defined places in their community. . . ."[10] The society not only guaranteed a subsistence income through the poor laws, but sought to maintain the existing pattern of resource allocation. Customary rights received generous protection. Prevailing contract doctrines impeded speculation and overreaching and endeavored to ensure that exchanges of goods or services occur at a customary rate. Such rules were designed to promote ethical living, not economic efficiency or the pursuit of wealth.

Nelson sees no evidence that the Revolutionary leaders intended to alter the legal system of Massachusetts. Nonetheless, the efforts by the Revolutionary generation to justify the war set loose new intellectual movements that transformed the legal structure of the Bay State. The ethical unity inherited from the colonial period was gradually destroyed, with significant and often unexpected results. Ironically, the social structure that the Revolution sought to preserve was consumed by the forces of change.

The first breach took place in the 1780's, amid demands for the reform of legal institutions and procedures considered expensive or oppressive. Adopting a new style of politics, the reformers did not labor to build a consensus and relied on power rather than persuasion. Furthermore, the abolition of common-law pleading, which occurred piecemeal over half a century, began to produce unforeseen consequences. As the bar started to think in new substantive categories, law was seen less as a series of writs and procedures and more as a set of standards dictating conduct. Once lawyers debated which values ought to control a case, "they made plain the existence of differences over fundamental social values."[11]

7. *Id.* at 35.
8. *Id.* at 37.
9. *Id.* at 45.
10. *Id.* at 46.
11. *Id.* at 88.

The heightened concern for liberty that emerged after the Revolution also proved a catalyst for a new perception of law. Post-Revolutionary libertarianism, the author maintains, was "a potent force for legal change—perhaps the most potent one in the closing decades of the eighteenth century."[12] First, because authority resided in the people, not the crown, there was a greater willingness to vest power in government. Legislation came to rest on sovereignty and the power of the majority, not on conformity with past principles. Thus, liability of officials in common-law damage actions was curtailed. Secondly, the concept of liberty as procedural fairness was widely shared. The law of criminal procedure was reformed, and Nelson notes that Massachusetts judges "in their effort to promote liberty, decided nearly every question of criminal procedure that came before them in a manner favorable to defendants accused of crime."[13] Thirdly, the libertarian impulse manifested itself in post-Revolutionary egalitarianism. In the early 1780's Massachusetts courts moved toward the abolition of slavery. The status of women changed more slowly, but by the 1820's courts recognized the right of a wife to run a business separately from her husband. The most far-reaching egalitarian move was the disestablishment of the Congregational Church by the Constitution of 1780, which created instead a nondenominational Protestant religious establishment that placed all sects on an equal footing.[14]

These libertarian changes in the law, products of the breakdown of shared ethical concepts, contributed to the decline of the idea that government should enforce morality. Nelson asserts that, over a period of time, "the abandonment by government of its enforcement role . . . impair[ed] the notion that there was any one set of ethical standards that all men ought to obey."[15] Nelson notes a marked decline in prosecutions for fornication and religious violations after the Revolution and a corresponding increase in crimes against the social order "as individuals took it upon themselves to act in accordance with their own ethical code."[16] Criminal law became concerned largely with the protection of property. The collapse of the older unity of values also was reflected in the harsh

12. *Id.* at 90.

13. *Id.* at 101.

14. While Nelson recognizes that "liberty" had different meanings, his treatment of libertarianism raises some problems of terminology. Should an increase in "tbe arbitrary power of a majoritarian legislature" be classed as a libertarian change? Is it accurate to present egalitarian movements as an aspect of the libertarian impulse? It does not require much reflection to perceive the potential conflict between equality and liberty. This reviewer questions whether libertarianism is the best description for such diverse legal themes.

15. NELSON 111.

16. *Id.* at 115.

political rhetoric of the early nineteenth century and the changing views of the meaning of an oath. The author states that, with such attitudinal shifts, "the inherited legal system of Massachusetts was deprived both of its ultimate justification—the preservation of a shared ethical unity—and of its sole means of resolving disputes—an appeal to that unity."[17]

Simultaneously a new understanding of property and contract law undermined the economic and social stability of the state. Fear of lawlessness and mob rule impelled conservatives to seek protection for order and property. On the other hand, popular majorities endeavored to impose a "public interest concept" on the use of private property. As a consequence of these conflicting policy interests, "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."[18] The corporation likewise was transformed from a quasi-public institution into a device for the advancement of individual self-interest. Post-Revolutionary contract law permitted persons to enter into whatever bargains they wished and assumed that the law should enforce all contracts without reference to customary usage. Once the legal system afforded freedom to make economic bargains, "many men used their wealth chiefly for the purpose of acquiring even greater wealth."[19]

The emergence of a desire to promote economic growth completed the destruction of the pre-Revolutionary society. Courts began to analyze cases in terms of the needs of business, with emphasis on certainty and predictability in the law. Major modifications in debtor-creditor laws, such as bankruptcy legislation, were advanced to encourage widespread participation in economic development. The preferred position for the first user of a natural resource was overturned because the initial developer might not utilize the resource in a way most profitable to society. This concern for economic growth caused men to reconsider the broad role of juries. Certainty was impossible if jurors remained free to find law. The problems created by juries that determined law were compounded by the breakdown of social unity in the state. Thus, during the years 1804-1810 juries ceased to articulate ethical standards of community conduct and the law-finding function was transferred to the judges. In the nineteenth century, Nelson concludes,

> the law came to be a tool by which those interest groups that had emerged victorious in the competition for control of law-making institutions could seize

17. *Id.* at 116.
18. *Id.* at 133.
19. *Id.* at 143.

> most of society's wealth for themselves and enforce their seizure upon the losers.[20]

Carefully researched and persuasively presented, Nelson's work represents a major contribution to the growing literature of American legal history. The validity of his thesis outside Massachusetts, however, is open to question. While the author recognizes that the Massachusetts experience was unique, he nevertheless suggests that a study of the Bay State can furnish "working hypotheses" for the transformation of pre-Revolutionary American law.[21] Nearly all scholars would agree that law in the nineteenth century responded to pressures different from those of the colonial period. Lawrence M. Friedman, for example, presents a view of the direction of legal change that accords with Nelson's view:

> But if colonial law had been, in the first place, colonial, and in the second place, paternal, empbasizing order and the struggle against sin, then, gradually a new set of attitudes developed, in which the primary function of law was not suppression but service. In this period, law was seen more and more as a utilitarian tool: to protect property and the established order, of course, but beyond that, to further the interests of the middle-class mass, to foster growth, to release and harness energy latent in the commonwealth.[22]

Still, the degree and process of post-Revolutionary legal innovation may not have been as pronounced in other states as in Massachusetts. For example, recent scholarship has indicated the persistence of a large amount of conservatism and continuity in South Carolina law after the Revolution.[23]

Nelson's analysis of pre-Revolutionary Massachusetts law places great weight upon the ethical unity and shared goals of local communities. It would seem that such a consensus was built upon the ethnic unity and religious homogeneity of colonial Massachusetts.[24] While one can readily agree that other New England states settled as a part of the Puritan migration would reflect a similar type of unity, it is more difficult to find this condition outside the

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20. *Id.* at 174.

21. *Id.* at 3.

22. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 99-100 (1973). *See also* J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6-32 (1956).

23. D. Senese, Legal Thought in South Carolina, 1800-1860, 1970 (unpublished dissertation in University of South Carolina Library); Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation*, 26 VAND. L. REV. 939 (1973); Harrison, *A Study of the Earliest Reported Decisions of the South Carolina Courts of Law*, 16 AM. J. LEGAL HIST. 51 (1972).

24. Other scholars have stressed that a desire for accommodation and unanimity, not majoritarianism, governed Massachusetts towns. "The community they desired was an enclave of common believers," Michael Zuckerman observes, "and to the best of their ability they secured such a society, rooted not only in ethical and cultural homogeneity but also in common moral and economic ideas and practices." Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. (3d ser.) 523, 538-39 (1968).

areas of Puritan domination.[25] Colonial New York was highly heterogeneous and faction ridden.[26] To what extent did this alter the development of law in New York? How did the presence of a large slave population affect the legal system of the southern colonies?[27] These questions are not adequately answered by reference to the Massachusetts model. Furthermore, court structures varied among the colonies. Did the absence of a chancery court in colonial Massachusetts influence the course of legal development?[28]

Studies of criminal prosecutions in other colonies indicate a different pattern from that which emerges from Nelson's work. Douglas Greenberg concluded that "the serious crime rate in New York was substantially higher than in Massachusetts."[29] Crimes of violence and theft accounted for a large percentage of prosecutions in provincial New York. Virginia and South Carolina only infrequently punished adultery and fornication, while bastardy proceedings were primarily instituted to protect the parish poor funds.[30] David H. Flaherty doubted that colonial criminal law changed abruptly at the time of the Revolution:

> The close identification of sins and crimes had started to change long before this time. Many jurisdictions had begun to ignore fornication much earlier in the eighteenth century.[31]

Scholars also have offered opinions about criminal behavior in the Bay State that differ from those of Nelson. Noting the post-Revolutionary increase in prosecutions for drunkenness, Michael S. Hindus has argued that "crimes against morality never ceased to be a concern of the legal system."[32] He further suggested that the rate of sexual offenses may be related more to shifts in sexual conduct

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25. The settlers of Connecticut and New Hampshire shared the religious and ethical convictions of Massachusetts citizens, and their legal institutions mirrored those of the Bay State.

26. P. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK (1971); I. MARK, AGRARIAN CONFLICTS IN COLONIAL NEW YORK, 1711-1775 (1940).

27. *See* P. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION (1974).

28. Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U.L. REV. 269 (1951); Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, 5 PERSPECTIVES AM. HIST. 257 (1971).

29. D. Greenherg, Crime in Provincial New York 2, Apr. 19, 1975 (unpublished paper presented to the Organization of American Historians).

30. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 280 (1930); M. Hindus, The Social Context of Crime in Massachusetts and South Carolina, 1760-1873: Theoretical and Quantitative Perspectives 17, Dec. 28, 1974 (unpublished paper presented to the American Historical Ass'n).

31. Flaherty, *Law and the Enforcement of Morals in Early America*, 5 PERSPECTIVES AM. HIST. 203, 247 (1971).

32. Hindus, *supra* note 30, at 16.

than a transformation of the legal system.[33] None of this is to detract from Nelson's achievement, but it does counsel caution in generalizing from his findings.

In addition, although well versed in the recent social histories of New England, the author sometimes fails to treat the broader political dimensions of his topic. For instance, he neglects the political aspects of judicial reform in post-Revolutionary Massachusetts. The Federalist Party favored strengthening the court system, while limiting the power of juries to the determination of facts. Jeffersonian Republicans, on the other hand, defended the right of jurors to interpret the law.[34] Likewise, Nelson does not discuss the codification movement of the 1820's, which reflected continued discontent with the law of Massachusetts.[35] Nelson tends to present legal developments as a category of intellectual history, isolated from currents in society as a whole.

The author's conclusion that governments were increasingly able to exercise coercive power upon dissident minorities also warrants scrutiny. Nelson believes that the locus of authority moved in the post-Revolutionary period from local communities to the states. Statewide political institutions did not attempt to rule by means of consensus, but rather secured only sufficient backing to make a decision enforceable. In particular, Nelson notes that the New York anti-rent movement of the 1840's was suppressed "with hardly any effort at all" and that "whenever large-scale resistance occurred it was readily suppressed by military force."[36]

As the scope of the governing unit grew larger, it undoubtedly became easier to isolate recalcitrant groups and compel their obedience to law. Still, the author may exaggerate the efficacy of governmental enforcement. It has always been difficult for the government to fly in the face of the wishes of an important segment of the population. American legal history provides numerous examples of the gap between formally proclaimed values and popular acceptance. The difficulties of enforcing racial equality and prohibition of alcohol illustrate the possibilities for successful evasion and passive resistance. Extra-legal violence, a legacy of the Revolutionary period, has never been far from the American experience.[37] The ob-

33. *See* Smith & Hindus, *Premarital Pregnancy in America, 1640-1971: An Overview and Interpretation*, 5 J. INTERDISCIPLINARY HIST. 537 (1975).

34. R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 184-229 (1971).

35. A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 51-56 (1962); C. Cook, The American Codification Movement: A Study of Antebellum Legal Reform, 1974 (unpublished dissertation in the University of Maryland Library).

36. NELSON, *supra* note 3, at 173.

37. Brown, *Violence and the American Revolution*, in ESSAYS ON THE AMERICAN

struction of the return of fugitive slaves, nativist riots, and Klan violence are all indications that force has been used to frustrate an announced policy. More specifically, this reviewer suggests that the New York anti-rent movement was not easily put down, and that the state government temporized and contented itself with meeting only acts of force against public officials. In contrast with Nelson, a historian of the New York estates has argued:

> It is the lesson that all government depends on the consent of the governed, not only in majoritarian theory but in hard political necessity. Real compulsion can only be exercised on a very few by an overwhelming majority. When any substantial part of a people reach the point of refusal to conform, government in some part changes or ceases to function.[38]

Nelson's stress upon nineteenth century majoritarianism and governmental coercion must be qualified by consideration of the difficulties inherent in the enforcement of any policy against the wishes of a large or determined minority. The role of consensus in the process of colonial conflict resolutions, which the author emphasizes, retains a measure of vitality in our own day.

While some of the author's conclusions will stir debate, his work will prove most helpful in further study of legal changes in the wake of the Revolution. By not limiting himself to published opinions of higher courts and the pronouncements of leading lawyers and treatise writers, he has been able to probe the legal process as it affected daily life in Massachusetts. Nelson's compact but readable book is a valuable addition, if perhaps not the final word, that will greatly assist our understanding of America's legal past.

REVOLUTION 81 (S. Kurtz & J. Hutson, eds. 1973).

38. Sutherland, *The Tenantry on the New York Manors: A Chapter of Legal History*, 41 CORNELL L.Q. 620 (1956).