RATIONALITY, LEGAL CHANGE, AND COMMUNITY IN CONNECTICUT, 1690-1760

BRUCE H. MANN*

The paper examines certain legal changes in eighteenth-century Connecticut, primarily in the area of debt litigation, and links them with economic development and with changes in the nature and meaning of community. The legal changes proceeded in the direction of greater rationality as expanding economic activity disrupted the multiplex ties that had once characterized communities and paired people instead in single-interest relationships. Max Weber's concept of rationality provides a theoretical base for the historical study of legal change.

One can read local court records in Connecticut from 1700 and "see" the people whose disputes they recount. Personalities leap from the pages. The sounds of contention are audible, and the recreational qualities of litigation surface alongside the more strictly legal ones. The records of a half-century later, on the other hand, are rather colorless. One strains to discern the people behind the entries. It is as though the uniform italic script that replaced the idiosyncratic scribblings of the older clerks also homogenized the people and their problems. Case records take on a dreary sameness made all the more stupefying by the fact that debts of one sort or another accounted for some ninety percent of all civil actions.[1]

---

* I am grateful to Barbara A. Black, Anthony T. Kronman, H.C. Macgill, and Aviam Soifer, for their comments and suggestions on various drafts. Thanks are also due to Robert Gordon, Stanley Katz and Thomas Stone for their most helpful comments as reviewers of the manuscript. Edmund S. Morgan planted the original idea, although he should not be held responsible for what grew from it. An earlier version of the paper was presented to the Center for Law and Liberal Education at Brown University on May 4, 1978.

[1] The litigation figures are my own compilation, as are all statistics on court activity in this article, and are drawn from the manuscript records and files of the county and superior courts at the Connecticut State Library, Hartford. Citations to the record books of the county court will be by volume and page number—e.g., 7 NHCCR 7 (for New Haven County, or HCCR for Hartford County), and to the file papers by drawer number—e.g., NHCCF 7. Citations to the superior court records and files will be similar, although without the county designation for the record books, which rode circuit with the judges—e.g., 7 SCR 7, NHSCF 7. Before 1711 the superior court was known as the court of assistants (CtA).

LAW & SOCIETY REVIEW, Volume 14, Number 2 (Winter, 1980)

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

For all its superficial unattractiveness, however, the new uniformity of the court records reflects changes in the way people ordered and litigated their legal relationships, economic changes, and, ultimately, changes in the nature and meaning of community.

What follows is an attempt to identify and explain certain legal changes in eighteenth-century Connecticut, primarily in the area of debt litigation. Connecticut is a good object of study. Its relative insularity before the Revolution allows us to focus on sources of change more clearly. Moreover, the profusion of records makes the world of eighteenth-century Connecticut relatively easy to recapture. In their depiction of that world, the sources provide us with an opportunity to fashion a theoretical framework for the historical study of legal change. The foundation for the framework is Max Weber's concept of rationality, a concept which has found some use in the literature of law and development (e.g., Abel, 1973; Friedman, 1969a, 1969b; Galanter, 1966; Trubek, 1972a) but has attracted surprisingly little notice from legal historians.[2] This neglect is unfortunate, particularly since Weber himself fashioned his sociological constructs to further his historical inquiry. Here, the historical inquiry can also further our

---

[2] One putative exception is Allen (1972). However, Allen's discussion of legal rationalization is too brief and ill-defined to merit the prominence given it in the title. Assorted vague references to "rationalizing tendencies" in eighteenth-century Continental law in Kelley (1979), seem to be tied with codification. An awareness and understanding of legal rationalization underlies much of Lawrence Friedman's work (e.g., 1967; 1974).

The complex historical relationship between legal change and economic development has not, of course, gone unnoticed. In addition to the obvious exception of Weber himself, students of the relationship include the Handlins (1947), Hurst (1964), Horwitz (1977), and Friedman (1973). But rationalization, like modernization theory in general, is not a construct that historians have found congenial. Historians often see sociological concepts as theoretical straitjackets that leave little room for the diversity and disorder of historical phenomena. To an historian's eyes, the inexorably evolutionary and developmental overtones of modernization bear a distastefully close resemblance to the disfavored Whig interpretation of history (see Butterfield, 1931). Social scientists have criticized such tendencies themselves (e.g., Friedman, 1969b: 20-22; Trubek, 1972a: 10-21), but it is difficult to correct stereotypes once formed. On the turnaround, as Thomas Bender has observed (1978: 23), historians have an unfortunate tendency to plug their data mechanistically, uncriticially, and, ultimately, ahistorically, into gross frameworks labeled "modernization."

A recent attempt by an historian to apply modernization theory to early America is Brown (1976), which has been criticized by Henretta (1977). Brown's entire treatment of law consists of one paragraph on the codification movement of the early nineteenth century (Brown, 1976: 104-105). The most sophisticated uses of modernization theory in the historiography of early America are Zuckerman (1977) and Henretta (1973, 1978). A noteworthy contribution in another field is Wrigley (1972), which offers insightful comments on the influence of rationality on the definition of social and economic roles. However, exept for a few stray references in Henretta (1973), none of these discuss law.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

theoretical knowledge by offering new insight into the sources and functions of rationality and its companion, irrationality, in the law. The relationship between legal change and economic development will dominate our perspective, but both lead inevitably to changes in the character of community.

I. WEBER'S CONCEPT OF RATIONALITY

The concept of rationality is a pervasive theme in Weber's work. Although he used the term somewhat ambiguously, as perhaps he had to in order to make it serve the variety of applications to which he put it, he formulated the concept most precisely in his discussion of law.[3] Weber began with the two basic categories of legal activity—creating law and finding it, once created—and then defined two methodological types based on the degree of consistency, systematization, reason, and generality evidenced in the process. Legal activity is thus rational or irrational. Moreover, one can measure rationality or irrationality by either formal or substantive criteria (Weber, 1978: 653-657). In broadest terms, the difference between rational and irrational lawmaking or lawfinding is whether or not the process is directed by reason.[4] Legal process is formally irrational if it is guided by means which cannot be controlled by reason or the intellect, yet which nonetheless operate within a framework of rules or ritual, such as an oracle or an ordeal. It is substantively irrational when its decisions react to particular facts of individual cases rather than rest upon general norms. Without the guidance of generally applicable norms, lawmakers and lawfinders appear to decide arbitrarily, unpredictably, without reference to anything beyond the facts before them.[5]

On the other hand, lawmaking and lawfinding are substantively rational insofar as they do follow general principles of some kind, with the exception of logically derived legal norms. The stuff of substantive rationality includes ethical imperatives, religious precepts, political maxims—in short, any ideology other than law that offers a coherent,

[3] For discussions of Weber's notions of legal rationality, see Bendix (1960: 387-403); Friedman (1966; 1969b: 18-20); Morris (1958); Trubek (1972b: 727-731). The clearest presentation is still Rheinstein (1954: xl-lii). Weber always recognized that "rationalism" is a multifaceted word that may mean many different things (Weber, 1946: 293; see Schluchter, 1979: 11, 13-15, 14 n.8).

[4] The following is based on Weber's exceedingly compact formulation (1978: 656-657).

[5] Weber analogized substantive irrationality to "*khadi* justice" (1978: 976-978). Had he lived longer, Weber might also have likened it to the model of American legal realism.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

articulated system of general principles. Lastly, lawmaking and lawfinding are formally rational to the extent that they consider in both substantive law and procedure only the operative facts of a case, identified and evaluated according to some generalized criteria rather than from case to case. The determination of the general characteristics of such facts can proceed in either of two ways; hence, there are two types of formal rationality. The legally relevant characteristics of facts may be purely external and physically observable, such as the use of formulary words, the presence of a seal or a signature, or the performance of a symbolic act. Or the determination can be of a logical nature, where logical analysis of meaning has disclosed the legally relevant characteristics of facts and elevated them to "fixed legal concepts in the form of highly abstract rules" (Weber, 1978: 657).[6]

The mere statement of Weber's ideal types—irrational modes that seem to proceed from case to case in an aleatory fashion without evincing any capacity for generalization, and rational modes in which all cases are integrated into generally applicable schemes of norms and procedures—implies poles of evolutionary development from the particular to the universal. The movement from one pole to the other is, of course, the essence of rationalization. Casting the process in evolutionary terms, however, invites overstatement of the inevitability of the process. Because of man's self-proclaimed status as a rational animal, there is a sense in which movement from irrational to rational modes is inevitable. As social scientists have observed, people rely on abstract symbols and social cooperation to pattern their behavior. " 'Human nature' is such that there is in

[6] Weber regarded the use of abstract concepts created by law itself rather than by any religious, ethical, political, or other system of ideology—thus distinguishing formal from substantive rationality—as peculiar to western civilization. Rheinstein (1954: xlvi) reminded us that, despite their differences, logically formal rationality (the conceptual jurisprudence of old) and substantive rationality (what Pound called sociological jurisprudence) are both methods of rational thought. As a continental lawyer, Weber regarded logically formal rationality with its transcendence of the particular case, its reliance on highly logical systematization and deductive reasoning, and its use of criteria intrinsic to the legal system, as the apex of rationality (Friedman, 1966: 149-150).

One should remember that Weber's "ideal types," of which rationality and irrationality are but two, are mental constructs designed as categories of thought, not descriptions of reality. Weber did not intend them, at least not consciously, as models for human behavior (Weber, 1978: 9-22).

Milsom (1969: 30-32, 358-360) noted the disarray of English procedure after the Lateran Council in 1215 barred priests from participating in the ordeal. Consideration of facts became important when the court ceased simply to preside "over the ritual formulation of a question to be put to an oracle beyond the need of human guidance" and became responsible for the answer itself. The rationalizing effect of the change lay in that "consideration of the facts require[d] expression, for the first time, of rules of law" (1969: 31).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

cultures a strain toward conceptual consistency or logical integration" (Fallers, 1969: 316). Moreover, if one can agree with Talcott Parsons, this "strain" is weightier than a mere inclination—it approaches divine ordinance.[7] However, we must not regard—as Weber did not—"less rational" as meaning "more primitive," or "more rational" as meaning "more modern."

II. LEGAL AND SOCIAL STRUCTURE

The legal system of eighteenth-century Connecticut was neither quaint nor primitive—those two adjectives so dear to later observers whose whiggishness transcends mere political bounds. Connecticut had many centuries of English experience on which to draw. Through an amalgam of parliamentary imperative, adaptation to local conditions, and fondness for things familiar, it created a well-differentiated legal system that was simple yet complex, colonial yet English. Consider the county court, which will be the focus of our inquiry.[8] Each county court was a panel of three to seven magistrates appointed by the General Assembly. It met twice a year in regular sessions and usually twice more in adjourned sessions. A judge presided, and beside him sat justices of the quorum—men who had the authority of justices of the peace when acting alone but whose social position and previous experience as justices of the peace qualified them for more exalted labors.[9] All actions for forty shillings or less where land title was not concerned were tried to the bench unless either party requested a jury, in which case the requesting

---

[7] Parsons numbered a "generalized universalistic legal system" among the "evolutionary universals" that societies "hit upon" as they attain "higher levels of general adaptive capacity" (Parsons, 1964: 339-341, 350-353).

[8] The county court, however, was not the lowest trial court. Individual justices of the peace had jurisdiction over all actions in which title to land was not in issue and where the amount sued for as debt or damage did not exceed forty shillings. Justices usually tried these "small causes," as they were called, in their own homes, and had the authority to compel the appearance of parties and witnesses and to grant executions on their judgments. On the criminal side, their authority to try cases extended only to the minor misdemeanors that fell under the rubric of "delinquency"—drunkenness, profane swearing, sabbath-breaking, breach of peace. In more serious offenses, they questioned the accused and weighed the evidence to determine whether there was sufficient reason to bind the suspect over to the county or superior court for prosecution (*Acts and Laws 1715*: 15). Good primers on Connecticut's legal system in the eighteenth century are Swift (1795-1796) and the introduction to Farrell (1942).

[9] Taking 1715 at random, the six men who sat as justices of the quorum on the New Haven county court had among them 36 previous terms as justices of the peace—an average of six terms apiece, with a median of four terms. Mere justices of the peace did not sit on the county court unless by designation to substitute for an absent justice of the quorum.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

party had to bear the jury's costs. Where the amount in controversy exceeded forty shillings, trial was by a jury of twelve men selected from a panel that had been chosen by lot from a list of those who owned freehold worth forty shillings a year or who had in the county personal estate valued at fifty pounds. Jurors who failed to attend when summoned could be fined unless they had good excuse.[10]

Above the county court was the superior court of judicature—a chief judge and four judges who rode circuit, sitting in each county twice a year to hear all pleas of the crown relating to life, limb, or banishment, divorce, and all other actions brought by appeal, review, or writ of error. In the eighteenth century the buck stopped here—judgment of the superior court was final.[11] Litigants who were entitled to review or appeal an adverse judgment could receive a trial *de novo*. Not simply once, but twice. Qualified litigants could persist through three trials of the same action if the same party did not prevail in the first two attempts. The party who lost in the county court could either review to the next county court six months later or appeal to the superior court, which usually met within four months. If he took the former route, the loser in the second county court could appeal to the superior court for one last fling. However, if he appealed directly from the first county court to the superior court and won, his adversary could review to a second superior court (*Acts and Laws 1715*: 2-4, 150).[12]

---

10 *Acts and Laws 1715*: 2-4; 9 *Conn. Col. Rec.* 45-47. The county court also had jurisdiction over all criminal offenses except those extending to "life, limb or banishment," that wonderfully descriptive litany for felonies, and responsibility for certain county administrative functions—but for our purposes, these are unimportant. On the administrative functions of the county court, see Daniels (1978: 46-47).

11 It had not always been so, however. Until 1697, a dissatisfied litigant could carry his appeals from the county court through the court of assistants (the predecessor of the superior court) to the General Assembly—if, of course, he paid the requisite fees at each level. Since few people liked to take "no" for an answer, particularly those who could afford the costs of litigation, the tendency of cases to climb to the top of the legal system and there impede legislative activity was troublesome. So in 1697, the assembly ordered that civil cases appealed to the court of assistants from the county courts should have one review there with no appeal to the assembly (4 *Conn. Col. Rec.* 200). Appeal to the Privy Council of England was a theoretical possibility, but Smith (1950: 667, 670) found only seven civil and two probate appeals from Connecticut in the period 1696-1783.

12 There were limitations on this broad right to relitigate entire cases, some jurisdictional and some procedural. For example, defendants convicted of criminal charges that had been instituted initially in the county court could proceed no further than one review in the same court (*Acts and Laws 1715*: 131). And individuals convicted in the county court of drunkenness, profane swearing, or sabbath-breaking—those "delinquency" offenses that were tried by a justice of the peace and were appealable to the county court—could have no further appeal or review (*Acts and Laws 1715*: 149). The assembly barred

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

Connecticut at the turn of the century was a colony of subsistence farmers who produced for the market on a limited basis. The universe for most people was the town they lived in. As long as land was available, individuals sought to improve their lot within the community rather than seek their fortunes elsewhere.[13] Anchored by the meeting house at its center, the town was the primary focus of civil, ecclesiastical, and social authority. Connecticut was something of a backwater, and few of its inhabitants glimpsed the larger Atlantic community that was everyday life for the merchants of Boston (see Bailyn, 1955). Trade was not unknown, but rocky soil and the high cost of labor relative to the price of land hindered production of a commercial surplus and thus kept most trade within well-worn local channels (Bushman, 1967: 25-32; Zeichner, 1949: 14-15; Walton and Shepherd, 1979: 46-48). Consequently, trade did not dominate local society. Trading relationships tended to be familial and intimate. As one historian has observed in a nice turn of phrase, townsmen "were in the market, but not of it" (Bender, 1978: 66-67).

Book debt fit nicely into this organic pattern of life. Anyone could keep a book, and accounts charged on book created obligations for which the law inferred a promise to pay if certain loose statutory conditions were fulfilled. The procedure for suing to collect a book debt was sufficiently simple and flexible not to discourage litigation. To sue, a creditor merely declared that the debtor owed him a certain sum on a book account that he had never paid, "though often requested." Both parties could testify in court, which they could not do in other kinds of debt actions. If the jury found that the amount due differed from the amount demanded, the discrepancy was not fatal to the suit. The only statutory constraint was that unless a debtor signed his book account and thereby acknowledged his obligation, a creditor had to sue within a set period of time after the debt had been incurred. If

appeal to the superior court in actions that were not land-title matters unless the amount in controversy exceeded ten pounds. And debts on bills and specialties were allowed only one trial in the county court (*Acts and Laws 1750*: 3-7). On the procedural side, a defendant who appealed from a court's denial of his pleas in abatement could not substitute different pleas in abatement on appeal ("Memorandum . . . for the better ordering the proceedings and pleadings in this Court of assistants," 4 CtA 1 [1710]). Of course, even if one had exhausted one's allotment of reviews and appeals, or if none were permitted in the first place, one could always sue out a writ of error from the superior court or petition the assembly for equitable relief.

13 The generational conflicts that erupted when land grew scarce and the consequent emigration of younger sons characterized many New England towns by the third or fourth generation of settlement (see Grant, 1961: 98-103; Powell, 1963: 93-97, 116-132; Lockridge, 1968; Greven, 1970; Gross, 1976: 74-83).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

he did not, he lost his right of action against the debtor. Rather than depriving creditors of their remedies, however, the limitation simply brought creditors into court to offer proof of their accounts and to reduce them to judgments.[14]

The simplicity of book debt—the ease with which it could be contracted and the free-form fashion in which it could be litigated—had several consequences. Book accounts relied on a creditor's willingness to extend credit without an explicitly stated or limited promise to repay. They thus implied a measure of trust between creditor and debtor. The trust might be that of friends, or it might be that of businessmen who have developed expectations through a series of exchanges. The former is emotional; the latter, while it may acquire a personal dimension, is more likely to rest on a core of rational self-interest.[15] In both, the basis is a continuing relationship of some kind. Debtor and creditor each act in the belief that the other will fulfill his promises, not necessarily because of legal coercion, but because not to perform would damage a relationship that each considers worth preserving. But trust can sometimes be misplaced or abused, and when it was, the weaknesses of book debt were exposed. Consider, for example,

[14] The earliest limitation on recovery of book debts was three years (*Book of General Laws 1673*: 19-20). This was extended to seven years for book debts of forty shillings or less in 1681 (3 *Conn. Col. Rec.* 79), a period that the assembly applied to all book debts in 1696 (4 *Conn. Col. Rec.* 66). The seven-year limitation originated in the biblical injunction that loans be canceled every seventh (sabbatical) year (Lev. 25: 1-25, Deut. 15: 1-2). In 1705, however, the assembly declared that "all book-debts shall be recoverable at any time, provided the original debtor be living," and provided that a creditor could prove his account simply by swearing to its accuracy (4 *Conn. Col. Rec.* 502). Ten years later, in 1715, the assembly modified its stand and repealed the 1705 legislation. In its place, the assembly declared that book debts incurred since 1697 "shall at any time be recoverable during the natural life of the debtor," and made determination of the sufficiency of a creditor's proof of his account an issue for the jury to decide (5 *Conn. Col. Rec.* 505). Curiously, the official compilation of laws published in 1715 printed both the 1715 statute and one embodying the seven-year limitation period (*Acts and Laws 1715*: 26, 204). Francis Fane, standing counsel to the Board of Trade and Plantations, thought the life recovery period too liberal. In his eighth report to the Board in 1738, he noted that England limited recovery on book debts to six years. Seven he thought unobjectionable. But he recommended that the Board reject the 1715 act because he did not "see any reason for making book debts recoverable during the life of the debtor" (Fane, 1915: 173). [I am obliged to Everett C. Goodwin of Meriden, Connecticut, for this reference.] A creditor who improvidently let the limitations period pass could, I suppose, contemplate suicide after the fashion of Chinese creditors in the expectation of pursuing his debtor after death (see Weber, 1978: 678).

[15] Weber (1978: 327-329) explored how each partner to an exchange depends on the egoistic interest of the other in the continuation of the exchange relationship, quite apart from the existence of any external coercive order. Konig (1979: 79-80, 82-88) has commented on the element of trust in both mercantile and noncommercial debtor-creditor relations in seventeenth-century Essex county, Massachusetts, and noted that the social bonds between debtors and creditors were reflected in the fact that litigation was a function of the geographic distance between the parties.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

the falling-out between Thomas Bannister and James Lewis.[16]

In September, 1695, Lewis, a trader from Farmington, Connecticut, purchased from Bannister, a relatively prosperous Boston merchant, various kinds of cloth, material, buttons, and ribbons to the value of £25 14s 8d on book account. The following April, Lewis made a partial payment of £15 and purchased additional dry goods—also on book—worth £38 5s 2 1/4d. Lewis appears to have overextended himself, and Bannister was not his only creditor. When Bannister sued Lewis in the Hartford county court in September, 1696, to recover his due, Lewis produced in his defense his own book, in which he had recorded payments to Bannister of all but £2 14s 8d of his debt. Lewis swore to the accuracy of his book, and the jury awarded Bannister the reduced amount that Lewis claimed was due. Bannister himself was not present, and his attorney had evidently not expected Lewis's ploy. Understandably, Bannister was not pleased. Lewis's book was a sham. Bannister's petition on appeal to the court of assistants illustrates the place of trust in book debt transactions. Bannister argued that proper evidence of satisfaction of a book debt was testimony, a receipt, or credit marked in the creditor's book. More to the point, at least to Bannister, "it is a thing contrary to all methods of marchants dealing when thay trust men with considarable qantitis of goods to take their pay in that specie a man after becoms a debtor to turn him self round and to enter payments in a book and make oth to said acount this seems to be an esy way of payment though a dangerous way."[17]

Bannister won his appeal on the strength of testimony that Lewis had admitted owing Bannister a substantial sum after the payment dates marked in his sham book. Without that testimony, however, Bannister would have had little more than his word against Lewis's. The relative informality of book accounts virtually required trust because of the lack of any formally embodied promise to pay or evidence of payment. If a debtor violated that trust, recovery was not impossible, but it could be difficult.[18] That was not the only consequence of the

---

[16] The following is based on the documents in 4 Connecticut Archives, Private Controversies (Ser. I), 307-331 (Connecticut State Library, Hartford). [I am indebted to Christopher Bickford of the Connecticut Historical Society for this reference.]

[17] Bannister's petition to court of assistants, *id.* at 317.

[18] In this regard, the deposition of Hannah Cowell, widow, aged 55, is of particular interest (*id.* at 308). She had put aside cloth goods worth £30 for Lewis, "expecting to be paid ready money for them." When her daughter learned the goods were for Lewis, she cautioned Cowell, "Don't Trust him,

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

simplicity of book debt. Book debts were community matters, at least to a greater extent than were notes and bonds. *Bannister* v. *Lewis* notwithstanding, almost ninety percent of all book debt actions litigated in Hartford county in 1700 pitted one inhabitant of the county against another, and in sixty percent of the cases, both parties lived in the same town. On the other hand, actions on signed obligations had fewer local ties—litigants were from the same county sixty-three percent of the time, and from the same town only twenty-seven percent of the time.[19] The local nexus of book debt is significant.

Local communities are interesting animals. They provide endless fodder for anthropological and sociological studies, opinion polls, and soap operas. That they serve all of these enterprises equally well stems from the web of interpersonal relationships that characterizes them. The kinds of social ties that can link individuals with one another are legion. Beyond the emotional or familial, they can be economic, political, religious, educational. They may be cooperative or antagonistic, organized or informal, enduring or casual. In differentiated societies, an individual's ties are likely to be with different persons, each relationship limited to a single interest or purpose. In small communities, on the other hand, where social and economic relations are less differentiated and where contact outside the community is less regular, one relationship may serve several purposes at once (see Nader, 1965: 397). Max Gluckman (1967: 18-20) called them "multiplex" relationships. People in small communities deal with one another in several capacities—as neighbors, as relatives, as fellow church-members, as suppliers of goods and services, as extra hands to call upon when needed. Multiplex relationships may, of course, persist in differentiated societies (Abel, 1973: 294)—social transactions do not all become impersonal or limited only to single interests. Conversely, single-interest relationships may exist in undifferentiated societies. But when multiplex

Mother, for he owes Mr. Banister Fifty pounds." When Lewis came by for the goods she refused to deliver them and "told him, she could not Trust, being a woman was not able to ride up and down to get in debts." Cowell's reluctance to complete a transaction with Lewis after she discovered reason to doubt his trustworthiness illustrates the importance of trust in book debt relationships—without it, there would be no relationship.

[19] The actual numbers of cases are rather small, but not statistically insubstantial. Of the 51 actions for debts filed in all sessions of the Hartford county court in 1700, 32 were for book debts and 11 for signed instruments. Twenty-eight of the book debt actions matched litigants from within the county, and in 19 of those the parties came from the same town. For actions on instruments, the figures are 7 and 3, respectively. The imbalance between book debts and signed obligations is discussed below. A localized debt network has also been suggested for Long Island (Ehrlich, 1974: 154).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

relationships dominate the major areas of social activity, as they did in Connecticut at the beginning of the eighteenth century, the consequences for the way individuals process their disputes are significant.[20]

When a dispute arises within a relationship that embraces a variety of interests, the tie closest to the dispute is not the only one that may be disrupted. Just as disputes may surface as litigation far from their source,[21] they may also send tremors throughout the spectrum of a multiplex relationship. There is a way, of course, in which multiplex relationships provide internal cohesion in a community on the strength of the web of interlocking ties and bonds they create (Gluckman, 1967: 20). But one should not infer from this a community of sweetness and light, peace and harmony. Social ties may be multiplex not by choice, but by necessity—because of the mutual dependence thrust on people when they live close together and when their contacts outside the community, for whatever reason, are irregular and tenuous. Disputes in such circumstances can be particularly nasty and long-lasting precisely because personal relations are close and frequent (Weber, 1978: 360-363).[22] As Gluckman (1967: 21-22) discovered with the Lozi, disputes played out in this social context may stir up an array of seemingly trivial and unrelated grievances from the distant past. The informal multiplicity of social ties may, in fact, leave law as the only vehicle available for formal resolution of differences.[23]

Even with this unromanticized view of multiplex relationships, their principal influence on dispute processing lies in the fact that, in addition to offering a fertile source of quarrels, they bind communities together. Their preservation, then, may be more than individually desirable—it may be a community necessity. To this end, Gluckman (1967: 20-21, 55) noted that Lozi courts proceeded differently in disputes where the parties were in a multiplex relationship than they did

---

[20] I have here accepted the preference for "dispute processing" over "dispute settlement" or "conflict resolution" suggested by Abel (1973: 228), Cartwright *et al.* (1974: 5 n.1), and Felstiner (1974: 63 n.1).

[21] Fallers (1969: 101-102) offers a brief, but illuminating, discussion of marriage and relations between the sexes as fertile sources of disparate-appearing litigation.

[22] Michael Zuckerman (1970: 48-50) has suggested a similar multiplicity of social relations for Massachusetts, but he draws from it the different and, for many historians, unacceptable conclusion that communities were of necessity peaceful, harmonious, and uncontentious. Noting the high incidence of intra-town litigation, reviewers have suggested otherwise (Murrin, 1972; Wroth, 1971).

[23] I am grateful to Dietrich Rueschemeyer of Brown University for this suggestion.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

where the parties were comparative strangers to one another. In the former instance, reconciliation was important to enable the parties to continue to live together, as they had to. In the latter, reconciliation was less important because there was nothing valuable to preserve. This is not to suggest that litigants in multiplex relationships seek compromise rather than victory, or that courts always prefer to reconcile such disputants rather than award the spoils to one or the other. Regardless of the ongoing nature of a relationship, compromise may not be appropriate when the parties differ in status or power, or when the dispute entails a finite resource that is a source of status or power, such as land (Starr and Yngvesson, 1975). What is pertinent for our purposes is the way reconciliation can be effected when it is sought. Where social relations serve several purposes at once, the range of facts relevant to a dispute may be broad. If reconciliation is valued, the factual inquiry in the course of processing the dispute will have to be equally broad. Narrow conceptions of relevance are appropriate only where the social relations involved are themselves narrowly defined (Gluckman, 1967: 20-21, 78; Abel, 1973: 289, 294).

In the multiplex world of early eighteenth-century Connecticut, when parties were from the same town or, to a lesser extent, from neighboring towns, the transactions that gave rise to book debts did not define the whole of their relationship. Single-interest relationships may have been more common in embryonic cities like Boston or New York, and, outside of mercantile circles, they probably characterized dealings between widely separated individuals. But Connecticut towns were too small to permit such specialization. Consequently, book debts were litigated within the context of a range of social dealings between the creditor and the debtor. It would be too much to say that judges in book debt actions sought to reconcile the litigants rather than adjudicate their dispute. Adjudication would have been ill-suited for the task (see Abel, 1973: 333 n.335), which was better served by mediation or arbitration. However, the fact that the range of evidence admissible in book debt actions extended beyond the book itself implies a liberty by judge or jury to inquire into whatever was thought relevant to understanding the dispute. If in a particular instance reconciliation were more appropriate than adjudication, notions of relevance were broader, and the evidentiary flexibility of book debt permitted the inquiry to stretch to fit the need. This is not to suggest that

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

a judge or jury could use a book debt action to resolve other grievances between the parties. But to the extent that such other grievances bore on the book debt in litigation, they would be aired, and airing them served a valuable social function. In the context of multiplex relationships, the mere act of dragging an adversary into court and holding him up for judgment on something—anything—represented a victory over someone against whom the plaintiff had other grievances, whether or not those other grievances were on trial.[24] This done, the parties could resume their normal quarrelsome—but mutually dependent—neighborly relations.

Consider the dispute between a brother and sister, Thomas and Hannah Hitchcock, on the one hand, and their brother-in-law, Jacob Robinson, on the other.[25] Robinson was administrator of the estate of his mother-in-law, Sarah Hitchcock, mother of Thomas and Hannah. Thomas and Sarah had been co-administrators of the estate of the patriarch of the family, Sarah's husband Eliakim. In mid-March, 1714, Thomas Hitchcock sued Robinson for book debts totaling £4 14s 7d pay.[26] The first suggestion that the debts represented a deeper grudge came at the county court in April when Robinson pleaded payment of all but £1 11s 8d, for which he had made a "reckoning" in 1704 with Sarah and Thomas Hitchcock in their capacity as administrators of Eliakim's estate and which was now due to Sarah's estate. The accounts that Hitchcock and Robinson exhibited against one another[27] were primarily for the performance of various labor services—mowing, harrowing,

[24] Gluckman (1967: 21-22) noted this function in Lozi litigation. In a similar vein, John Demos (1970: 48-51) has offered an intriguing explanation of intra-community litigation in seventeenth-century Plymouth colony. Houses in early Plymouth were too small and families too large to permit anything approaching privacy as we know it. The potential for family discord was great but was, as far as anyone can tell, largely unrealized. On the other hand, court records reveal a surprising volume of acrimonious litigation among neighbors. Demos advances the hypothesis—and he stresses that it is only a hypothesis—that such litigation stemmed from displacement of the anger and aggression generated by cramped living conditions. The family was the fundamental unit of puritan society—its equilibrium had to be maintained. Although not verifiable, Demos's suggestion (1970: 51) that "a man cursed his neighbor in order to keep smiling at his parent, spouse, or child," is persuasive.

[25] The following account is based on the records and files of *Robinson* v. *H. Hitchcock*, 3 NHCCR 33-34, 45, NHCCF 3 (1714); *T. Hitchcock* v. *Robinson*, 3 NHCCR, 32, 38, NHCCF 1 (1714); *Robinson* v. *T. Hitchcock*, 3 NHCCR 37, NHCCF 3, 3 CtAR 369, 1 SCR 14 (1714); *Robinson* v. *T. Hitchcock*, 3 NHCCR 45 (1714); *T. & H. Hitchcock* v. *Robinson*, 3 NHCCR 50, NHCCF 1 (1715); *Robinson* v. *T. Hitchcock*, NHCCF 2 (1715); *Robinson* v. *T. Hitchcock*, 3 NHCCR 60, 1 SCR 197 (1716). All three lived in East Haven.

[26] Both parties were cited in their personal capacities, not as administrators.

[27] Robinson evidently used his account of Hitchcock's indebtedness as a counterclaim and swore to it in the county court on April 8, 1714.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

planting, spinning. Some of Robinson's items against Hitchcock went back almost seven years; and, as we have seen, part of the debt Hitchcock sought to recover was evidently ten years old. Thomas Hitchcock's suit against Robinson for the book debt arose within a multiplex relationship of long standing. Its immediate trigger appears to have been Robinson's conduct as administrator of Sarah Hitchcock's estate. After Sarah died sometime in late 1713, Robinson quarreled with Thomas and Hannah Hitchcock over Sarah's household goods and personal effects. The details of the quarrel are unimportant. What matters is that Robinson tried to play Thomas and Hannah against one another. Thomas retaliated by resurrecting the old book debts. A jury award of 13s 10d and costs settled Thomas Hitchcock's book debt action, but not the underlying grievances between the parties. That, of course, had not been the point of the litigation. The book debt action was one episode in a family squabble that continued after the book debt itself had been adjudicated.[28] The lawsuit aired grievances rather than settled them. The procedural flexibility of book debt allowed it to serve that purpose. As a means of litigating debt obligations, book debt had a low level of formal rationality. It was hardly irrational, but its lesser degree of rationality left room for a broad factual inquiry that went beyond the immediate terms of the debt in controversy.

The lesser rationality of book debt enabled book debt litigation to perform a community function. In undifferentiated communities characterized by multiplex relationships, book debt permitted litigants to air grievances without having them adjudicated—an act of traumatic finality that could sever all ties. This is not to suggest, of course, that all book debt actions served this social function. In all likelihood, most were exactly what they purported to be—actions to recover debts that happened to be due by book. What matters is that book debts could serve a distinct social function, and their ability to do so grew out of their comparative irrationality. Moreover, they were the primary mode of contracting debt obligations. They embodied the credit that ran the local economy. They thus

[28] Yngvesson (1976, 1978) has identified the importance of time as a variable in handling disputes in a way that reinforces Gluckman's distinction between multiplex and single-interest relationships. She concludes that where enduring relations are important, grievances are dealt with in diffuse, "informal" fashions over extended periods of time, with attention to the person rather than to the act. In contrast, disputes in circumstances in which the "past and future aspects of the relationship are not important" (1978: 83)—but not necessarily nonexistent—tend to be processed quickly in a manner that focuses on the act rather than on the relationship.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

suggest a congruence between the structure of the economy and that of society. If the same form served both, economy and society had to be equally specialized or equally undifferentiated—as we have seen, they were more the latter.

III. CHANGES IN DEBT LITIGATION

The structure of book debt did not change during the course of the century, but its frequency did. From 63 percent of all debt litigation in Hartford county in 1700, and 71 percent in New Haven county in 1710, book debts fell to 22 percent in Hartford county and 33 percent in New Haven county in 1750.[29] Conversely, actions on signed instruments soared from 22 percent of debt litigation in Hartford county in 1700, to 80 percent by 1730, and remained at that level for the rest of our period. The figures for New Haven county are comparable.[30] Scattered records of justices of the peace from other counties reveal the same pattern at the lowest legal level.[31] Actions on book hardly disappeared—in raw numbers, they increased five-fold in Hartford county from 1700 to 1750—but they no longer dominated debt litigation. There were no substantive or procedural changes that would explain the declining popularity of book debt as a mode of contracting and contesting debt obligations. In theory, book debt retained its potential social value for litigants in multiplex relationships. In practice, however, it is clear that litigants called upon book debt to perform that function less frequently. The new primacy of

---

[29] The figures for Hartford county are 32 book debt actions of 51 debt actions in 1700, and 150 of 674 in 1750; for New Haven county, 15 of 21 in 1710, and 56 of 169 in 1750. New Haven county court records for 1700 note only five debt actions, including two on book; therefore, I took 1710 as my base for that county.

[30] In Hartford county, 11 of 51 debt actions in 1700 were brought on instruments; in 1730 it was 362 of 454, and in 1750, 524 of 674. In New Haven county, the figures are 5 of 21 in 1710, 34 of 49 in 1731, and 111 of 169 in 1750.

I shall generally refer to notes of hand, bonds, and bills as signed or written obligations, or as credit instruments, to distinguish them from book debts. This is not to impute to such instruments a seamless homogeneity. In colonial parlance, promissory notes and bills obligatory were a form of bill, and bonds were a form of specialty (Beutel, 1939: 142). Until further study is done, however, it would be misleading to impute the modern clarity of the categories to colonial practice. For our purposes, the similarities among them are more important than the differences, and as a group they stand in sharp contrast to book debts. On the elaborate English background of credit instruments, see Holdsworth (1937: VIII, 113-177).

[31] For example, in a representative six-month period in 1754, a Windham justice of the peace heard 47 actions on notes and only four on book debts. During the same period his only other cases were five sabbath offenses, two presentments for swearing, one for breach of peace, and a replevin bond (First Record Book of Samuel Gray, Esq., of Windham, from June 6, 1754 to April 2, 1761, Connecticut Historical Society).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

signed obligations reflected the demands of a developing economy.

Connecticut's internal economy in the early part of the century operated largely on barter transactions. Cash was chronically scarce, and the General Assembly did not make its first cautious issuance of paper money until 1709 (5 *Conn. Col. Rec*. 11-12). The most common alternative was to use commodities as money. The majority of the population were farmers engaged in noncommercial, nonspecialized agriculture. They produced primarily for their own households, with only small surpluses available for trade. Their failure to produce for the market stemmed not from any lack of interest or aversion to commercial activity, but rather from conditions of labor and transportation. They were "pre-commercial" of necessity, not by choice (Bushman, 1967: 25-30). For what they could not grow or make themselves, people relied on local shopkeepers and merchants, whom they paid with agricultural produce.[32] For public transactions such as payment of taxes, the assembly assigned values to specified commodities at which they would be received and disbursed. In this form, commodity money was known as "country pay" or "current money" and was, strictly speaking, a means of payment rather than the medium of exchange (Nettels, 1934: 208-211; see Weber, 1978: 75-76, 78).

The barter aspects of commodity money emerged in private transactions. Individuals used the goods designated as country pay by the assembly in their own exchanges, although not necessarily at the rate set by the assembly for public business. They also exchanged a wide variety of other goods that were not sanctioned by the assembly. The parties in private transactions had to agree on the values they would attach to the commodities in their dealings. Bargaining over the values was certainly possible, but it was probably kept within a limited range by such market rates as existed.[33] Accepting produce in payment for purchases was essential to merchants who also traded outside the region. Only by collecting the small surpluses of many farmers through commodity money

[32] It would be a mistake to equate payment in kind with trading for beads and trinkets. Book accounts were figured in pounds, shillings, and pence. Produce was the medium of exchange rather than the object of the transaction. As Weber (1978: 86) pointed out, for purposes of organizing economic activity most rationally, calculation in terms of money is what counts, not its actual use. In fact, it is possible to find monetary calculation without actual use of money at all, or with only limited use (Weber, 1978: 89).

[33] From mid-century merchants' books, Martin (1939: 154) surmised that there was little bargaining over prices. Merchants doubtless held the upper hand, but competition among them for country produce placed some restraint on the degree of one-sidedness.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

exchanges could a merchant accumulate enough produce to trade in distant markets. Book accounting facilitated this process (Martin, 1939: 4-7, 153-154). However, credit with a local merchant could sometimes come to resemble economic bondage. Individuals whose purchases on book accounts outstripped their capacity to pay had to mortgage their futures to receive further credit to pay for past advances. As Solomon Stoddard (1722: 2) lamented, "Multitudes of people in the Country are not beforehand, they spend their Money before they have it; the extravagancy of their expences forces them to lie in Debt."

Much of this way of doing business changed with the advent and spread of paper money, which was both a cause and a symptom of economic transformation. The very appearance of paper currency signaled growing involvement in a commercial economy (Henretta, 1973: 7). Spurred by rapid population growth and by periodic military expeditions to Canada and against the Indians, trade expanded dramatically in the first half of the eighteenth century. Population, which had increased a healthy 58 percent in the generation between 1670 and 1700, ballooned another 380 percent in the next 30 years (Bushman, 1967: 83).[34] Population growth on such a scale helped to expand existing forms of economic activity and to spur new forms. Agricultural production swelled as new land was brought under cultivation, particularly in eastern Connecticut. Although market farming and agricultural specialization did not develop as fully in Connecticut as they did in eastern Pennsylvania, or as they already had in the Chesapeake tobacco country, Connecticut's agrarian economy grew enough to change the contours of commercial activity (Brown, 1976: 51-52).

Connecticut's merchants did not have the transatlantic contacts that their more substantial brethren in Boston and New York did. Instead, they directed their ventures to the West Indies and to the coasting trade—profitable, to be sure, but not where the big money was. Goods imported from Europe came through Boston and New York. Agricultural expansion did not alter Connecticut's external trade, but it did add an entirely new local dimension. With more products available for export, secondary ports along the Connecticut River and Long Island Sound and market towns on the road to Boston grew to accommodate the demand for markets and

[34] Zeichner (1949: 29-30) gives figures for 1730 of 38,000, for 1749 of 70,000, and for 1756 of 130,611.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

transportation. The concentrated population and market orientation of such towns encouraged the appearance of artisans and merchants and the specialization of business enterprise. Commercial prosperity and the lure of greater local trade opportunities encouraged men to enter the lists as small traders and challenge established merchants for a piece of the economic action. Farmers and craftsmen often took to trading on the side. With the kind of optimism possible in an atmosphere of prosperity and expansion, many new traders began business with little capital support and ran marginal operations. They thus favored the easy credit that paper money represented. Partly to satisfy its own needs and partly in response to the growing political influence of the new traders, the assembly authorized new issues of paper money after the first one in 1709. As the scarcity of currency eased, new merchants were able to enter towns and compete with established tradesmen by offering farmers cash for their goods. The farmer could then use the cash to repay debts he owed to the merchants with whom he usually ran up long book accounts (Bushman, 1967: 107-123; Henretta, 1973: 36-37, 78-81; Martin, 1939: 14).

None of this, however, meant that farmers were miraculously freed from debt—one historian has calculated that the number of debt cases in the county courts increased nineteen-fold in the first three decades of the century, five times the rate of population growth (Bushman, 1967: 136). Nor did it mean that people ceased doing business on book—in an economy that was still primarily agricultural, that would hardly have been possible. What it did mean was that debt obligations in general, and those that were litigated in particular, took a new form. Economic expansion created new demands for capital from farmers who wanted to buy or stock land and from traders who needed goods to trade. Paper currency answered these demands. As paper money supplanted commodity money, direct extensions of credit in return for written promises to repay became the dominant mode of contracting debt obligations. The promises were embodied in credit instruments such as promissory notes or bonds, which for the most part were distinguishable from notes only in form. Even trade that continued to be conducted on book account felt the influence of credit instruments as creditors demanded that debtors make their book accounts over into notes or bonds as a condition of further credit or forbearance (see Bushman, 1967:

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

127-130; Martin, 1939: 156-163).[35]

Written obligations—with their precise forms, prescribed deadlines for repayment, and provisions for interest—thus became widespread. Merchants naturally became the heaviest investors in notes and bonds, both because they were more likely to receive them in commercial transactions and because of the private banking functions that many of them performed (Martin, 1939: 27, 158-159, 176). For them, signed instruments were a more rational way of embodying debt obligations with nonmerchants than were book accounts.[36] Notes and bonds were more definite and less controvertible than book accounts. The debtor's liability on a signed obligation rested entirely on whether the instrument itself met the legal requirements of form. Parties to actions on notes and bonds could not testify, as they could in book debt actions. A debtor could only plead that the instrument was not his deed—meaning that his signature had been forged or that the document had been altered. He could not explain that he had intended something other than what he had signed.[37] This formal rationality of signed instruments was matched by attempts to circumscribe litigation on them. Whereas actions on book accounts were entitled to a full complement of reviews and appeals, each representing a new trial, the assembly in 1725 barred any review or appeal from the first trial in the county court in actions on bonds, bills, or notes for the payment of money only (6 *Conn. Col. Rec.* 559; 7 *id.* 15).[38] Instruments that could be adjudicated on their formal attributes did not require substantive review.

Notes and bonds thus embodied debt obligations with a certainty that was lacking in book debts. One reflection of this certainty is that signed credit instruments, unlike book accounts, were fully assignable.[39] This trait was not, of course,

---

[35] Johnson (1963: 4-14) noted a similar transformation in New York of a barter economy giving way to one based on credit, and the consequent importance of credit instruments.

[36] It is important to emphasize nonmerchants here. Merchants' dealings among themselves have often been characterized by distinctive customs and even informality that grew out of the habits of established business relationships. In such relationships, rigorously observed formality could be a hindrance. However, I am concerned here with changes in the way merchants dealt with individuals to whom they did not extend courtesies of the trade.

[37] If the bond was a conditional bond—a special category not of concern here—the debtor could plead performance of the condition.

[38] Eleven years later, in 1736, the assembly retreated, perhaps because of the economic downturn, and barred appeal where the amount demanded did not exceed forty shillings (8 *Conn. Col. Rec.* 55).

[39] Connecticut's Code of 1650 included an order that "any Debt or Debts due upon Bill or other specialty, Assigned to another, shall be as good a debt

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

a recent addition spun from the demands of Connecticut traders. Rather, it was an existing attribute of notes and bonds that made them more serviceable than book debts when commercial activity developed to the point that it required a secure method of transferring legal claims (cf. Weber, 1978: 681-682). The importance of a rational, predictable legal system to economic activity is a staple of the modernization literature (see Trubek, 1972a: 6-7, and 7 nn.17-19). Mercantile transactions can proceed more smoothly and on a grander scale when the impediment of individuality is removed. If the terms, conditions, and obligations of each agreement are unique to the underlying transaction and thus subject to interpretation in the context of the particular case, the scale of economic activity is perforce limited. An expanding economy requires that individual transactions be governed by generally applicable rules. Because of the sheer number of such transactions and the distances they may involve, they have to be conducted in a routine fashion. Their form and the legal rules overseeing them must be uniform and calculable. Rational economic exchange requires the assurance that like cases will be treated alike. To accomplish that assurance, rules of one stripe or another override the individuality of particular cases and force them into a common mold. The formal requirements of credit instruments—limiting litigation to the instrument itself, restricting appeals—all work to homogenize the underlying transactions and give them a uniform, predictable legal face.

The formal rationality of notes and bonds thus made them more suitable than book accounts for credit transactions in the expanding economy of eighteenth-century Connecticut. This is not to say that signed instruments represented the ultimate rationalization of the law of obligations. Formally rational modes by their very nature ossify quickly and become unresponsive to changing commercial practices, which then require new legal forms. The shift at the end of the century from debt on a penal bond as the dominant means of enforcing

---

and estate to the Assignee as it was to the Assigner, at the time of its Assignation, and that it shall bee lawfull for the said Assignee to sue for and recover the said Debt due uppon Bill and so assigned, as fully as the originall Creditor might have done" (1 *Conn. Col. Rec.* 512). The statute was modeled closely on one enacted in Massachusetts three years earlier (Beutel, 1939: 141). As Horwitz (1977: 212-226) has argued, despite English practice, it would be a mistake to read into such statutes full negotiability. Book accounts enjoyed a measure of assignability among merchants by force of mercantile custom, though not law, through factoring of open accounts, which became more common as book accounts developed more formally into accounts receivable and payable (Walton and Shepherd, 1979, 89-90; Johnson, 1963: 70 n.37). Our knowledge of the defenses and remedies available in commercial transactions during the eighteenth century is rudimentary.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

credit obligations to assumpsit for breach of a special contract, interpreted according to the intention of the parties, illustrates this (see Horwitz, 1977: 160-210). Weber (1978: 654-655, 687) recognized that economic phenomena can influence the systematization of law, but he knew that other forces were also at work. For example, he (1978: 775-776, 785-788) attributed greater effect on legal development to legal education and the class demands of lawyers. A professional bar had begun to emerge in the commercial centers of Boston and New York by the early part of the eighteenth century (see Murrin, 1971: 421-422), but nothing similar appeared in Connecticut until the eve of the Revolution. Even so, the economic changes that brought Connecticut within Boston's commercial orbit explain part of the shift to signed credit instruments. But only part. The value that the uniformity and predictability of notes and bonds offered also stemmed from changes in the structure and orientation of individual communities.

The structure of a society shapes the way that society processes its disputes. We have seen that the formal and procedural rules governing signed credit instruments in mid-eighteenth-century Connecticut made the outcome of litigation on them predictable. Ninety percent of all actions on notes and bonds in Hartford and New Haven counties in 1750 ended with the debtor's acknowledgment of indebtedness, confession of judgment, or default in appearance.[40] Such certainty and predictability are more appropriate to social relations that are instrumental than to those that are affective or multiplex (Abel, 1973: 289). Where the object of a relationship is a transaction rather than the relationship itself, the need to avoid a final decision is absent. Connecticut at mid-century was still a small society—commercial dealings did not suddenly become faceless and impersonal. But population growth, migration, and economic development drew people beyond town and county boundaries and changed the way they did business with one another. Multiplex relationships and the dealings appropriate to them did not disappear—the continued use of book accounts suggests their persistence. But they now shared

---

[40] In Hartford county, 470 of 524 actions on instruments were uncontested in 1750; in New Haven county, defendants did not contest 100 of 111. These proportions are substantially higher than the relevant ones for book debt actions. In 1750, defendants fought 106 of 150 book debt actions, or 70 percent, in the Hartford county court, while in the New Haven county court 30 of 56, or 54 percent, passed uncontested. The contrast underscores the greater predictability signed obligations offered debtor-creditor relations. It was, of course, a predictability that may have appealed more to creditors than to debtors.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

the stage with single-interest, instrumental relations shaped by new patterns of economic behavior.

Litigation on signed credit instruments crossed town and county boundaries far more frequently than did suits on book debts. Only 34 percent of the actions on notes or bonds in Hartford county in 1750 involved parties from the same town, while 51 percent of the book debt actions did. The contrast is even more striking in New Haven county—36 percent and 71 percent, respectively.[41] The differences for actions that looked outside the county are not as pronounced, but they are still significant.[42] When transactions were conducted at such a physical remove, the likelihood that the relationship between the parties extended no farther than the exchange in question increased substantially. Distance made the development of multiplex relationships unlikely. Dealings between established merchants may have assumed multiplex qualities—at the very least they could be of a continuing, repetitive nature—but that was not often the case in other business relationships where the parties were not equals or where the transactions were only sporadic. If book accounts implied a measure of trust between creditor and debtor, it was a trust made possible by the smallness of an economic universe in which people knew each other and dealt with one another in several capacities. When, however, people dealt with strangers rather than neighbors—when the whole of their relationship was defined by the single transaction at hand—trust was less likely, and, indeed, was out of place. The formal rationality of notes and bonds gave transactions the certainty and protection that in different circumstances would have been supplied by trust.[43]

We can see this growing impersonality reflected in the spread of land speculation in Connecticut. Towns founded in the seventeenth century began self-consciously as

---

[41] The actual numbers are, for Hartford county, 179 of 524 actions on instruments, 77 of 150 on book, and for New Haven county, 40 of 111 and 40 of 56, respectively. It is important to note that the weaker local nexus for actions on credit instruments was not a new phenomenon—in 1700 only 3 of the 11 actions on signed obligations, or 27 percent, brought in Hartford county matched litigants from the same town, while 19 (60 percent) of 32 book debt actions did. It simply illustrates once again a characteristic of signed obligations that made them more serviceable when the conditions of business relations changed.

[42] In the Hartford county court in 1750, 16 percent (86 of 524) of the actions on instruments and 10 percent (16 of 150) of those on book matched parties from different counties. The figures for New Haven county are again more clear-cut: 41 percent (45 of 111) and 12 percent (7 of 56), respectively.

[43] As Weber (1978: 636) noted, what gives market exchanges their impersonality is their matter-of-fact orientation to the commodity—"there are no obligations of brotherliness or reverence, and none of those spontaneous human relations that are sustained by personal unions."

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

communities. Town fathers distributed land to people who had been admitted as inhabitants upon demonstrating the requisite fitness of character and belief. Town bylaws limited or even barred altogether the liberty of property owners to sell land to outsiders. Some towns required newcomers to acknowledge a town covenant that was at times sacred in tone.[44] The degree of watchfulness in such communities, where land ownership represented a palpable commitment to the common weal, virtually guaranteed that no exchange could be limited impersonally to a single object separate from the multiplex tangle enmeshing the parties. But the eighteenth century was different. The only requirement for acquiring land in a new town was ability to pay. When the General Assembly in 1737 carved seven townships out of the Western Lands, an unsettled tract straddling the Housatonic River, it did so by dividing each into proprietary shares and selling them at public auction (8 *Conn. Col. Rec.* 134-137). Of the 41 men who purchased one or more of the 50 shares of the township that became Kent, only 16 ever took up residence in the town, and all of these acquired more than a thousand acres through their shares—far more than the fifty to one hundred acres needed to support their families (Grant, 1961: 14). It is true that absentee proprietors could not remain absent—the assembly stipulated that purchasers would forfeit their shares unless they took up residence themselves or by an agent within two years. But it is also true that land speculation was rampant, even if most of the transactions involved residents. Between 1738 and 1760, 772 different men engaged in six thousand separate land transactions, selling and reselling several times over virtually every inch of land in the town. In the first three years alone, the original proprietor-settlers averaged 12 deals each. One especially active gentleman sold 33 lots and bought 17. Moreover, it appears that most purchases were made, in effect, on margin. Land values were spiraling upward, and speculators simply pyramided the bonds they gave and received for purchase and sale. Kent was not without its traditional elements of community, but these were overshadowed by pervasive acquisitiveness and opportunism (Grant, 1961: 16-19, 31-56, 84-85). Under such conditions, single-interest relationships were likely to prevail, accompanied by growing attachment to new patterns of economic behavior and

[44] The classic example of the town covenant as a sacral document is the one subscribed to by the first inhabitants of Dedham, Massachusetts, in 1636 (Lockridge, 1970: 4-16). The best general study of land distribution in early New England is still Akagi (1924).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

unwontedly materialistic values (compare Henretta, 1973: 95-107).[45]

The formal rationality of notes and bonds fit the new regime. It was not, however, a fit with which everyone felt comfortable. We have seen that credit instruments insinuated themselves into book relationships when creditors required their debtors to make their book accounts over into notes or bonds as a means of purchasing forbearance or further extensions of credit. The General Assembly took rueful note of the abuses of this practice in 1734 when it enacted penalties against "ill minded persons" who compelled their debtors "to give mortgages, bills, bonds or notes under hand, for the payment of great and unlawful sums for forbearance, or to trade further with them, upon unreasonable advance, to the great oppression and undoing of many families" (7 *Conn. Col. Rec.* 514). The strength of the legislation was that it permitted debtors who were sued on their written obligations to turn the creditor's action into an equitable proceeding on the bond or note. If the debtor claimed that the instrument was usurious and had not been given for adequate or just consideration, the court would go behind the formal face of the instrument and examine the circumstances of the obligation. If the court decided that the note was usurious, it would ignore the creditor's claim on the note and award him only the value of the goods sold or the principal sum of the debt.[46]

---

[45] The ramifications of such changes cannot be underestimated. In an admirable study of English witchcraft, Alan Macfarlane (1970) traced the decline of witchcraft prosecutions in the seventeenth century to "the combination of a less collectivist religion, a market economy, greater social mobility, and a growing separation of people through the formation of institutional rather than personal ties" (1970: 202). He argued persuasively that the new emphasis on monetary gain rather than on the traditional values of village cohesion destroyed the neighborly intimacy in which witchcraft flourished (1970: 200-206). Paul Boyer's and Stephen Nissenbaum's (1974) findings for Salem complement Macfarlane's for Essex.

[46] Notes that debtors gave to purchase a creditor's forbearance constituted little more than hidden interest on the debt that the creditor agreed to defer—"hidden," because the notes rarely mentioned the original obligation and instead folded its terms into the new agreement. If such notes did not rest on their own adequate consideration and were for amounts that would be usurious if intended as interest on the original obligation, courts would hold the notes to be usurious and proceed accordingly. Forbearance from suing is normally adequate consideration for a return promise, as long as the claim on which the forbearing party had threatened to sue was valid and enforceable. However, a creditor is not necessarily bound by his promise to forbear. If the debtor had simply promised in the new note to pay the original debt, the past debt itself would be sufficient consideration to support his new promise because he was already under a legal duty to pay. But since such notes only had the effect of purchasing forbearance rather than bargaining for it outright—the new obligation swallowed the old one, and forbearance was technically not involved—courts focused more on the amount of the notes in their inquiry into whether a note was usurious. The practical effect of the statute is uncertain. I found no allegations of usury in any of the 524 actions on instruments filed in

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

The interest of the statute lies in its effort to soften the harshness that could result from rigid adherence to the forms governing notes and bonds. With book debts, no such amelioration was necessary. The formal rationality that made signed credit instruments so useful in an expanding economy built increasingly upon single-interest relationships did not, and could not, admit individual, differential treatment of cases. To have done so would have deprived them of the uniformity and calculability—the rationality—that made them useful. The price, however, was that mechanical application of formal attributes could at times compel inequitable results. On such occasions, the only relief from a burden imposed by a formally rational scheme was to inject a breath of equity—of substantive rationality—to redress the imbalance. What the statute suggests is that rationalization of the law of obligations did not proceed inexorably along formal lines. There were hesitations, uncertainties, objections. On one level, the resulting inconsistencies stemmed from discomfort with the change in community life and structure that made signed credit instruments dominant. On another level, however, they reflect the fact that rationalization is not a unilinear process. It cannot progress along a straight path defined solely and narrowly in formal terms. Rationalized practices that aid one group—here, creditors—disadvantage another—here, debtors. The legal system cannot long ignore the grievances caused by such disadvantage. So it tinkers with the newly rationalized practices to accommodate the needs of those disadvantaged by them. The accommodation need not be conscious or deliberate or complete, but it is nonetheless necessary. Rationalization thus proceeds pragmatically.

A further indication of the complexity of rationalization is that the persistence of multiplex relations may well have influenced the pattern of litigation on credit instruments. Proportionately more litigants were from the same town in contested actions on signed obligations than was the case with uncontested actions (41 percent as compared with 33 percent in Hartford county in 1750)—a relationship that paralleled that in book debt actions 50 years earlier (67 percent in contested cases, 55 percent in uncontested ones).[47] People may have been more likely to contest book debts in 1700 and notes and

---

Hartford county in 1750 and only two (of 111) in New Haven county (in both of those the parties were from the same town).

[47] The exact figures are 22 of 54 contested actions on instruments and 157 of 470 uncontested ones in 1750, and 8 of 12 contested book debt actions and 11 of 20 uncontested ones in 1700.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

bonds in 1750 when they were from the same town and thus presumably had at least the opportunity to know one another outside the debtor-creditor relationship. Nonetheless, as we have seen, uncontested actions far outstripped contested ones, and they reflected patterns of residence that supported single-interest rather than multiplex relations.[48]

IV. OTHER AREAS OF LEGAL CHANGE

The connection between economic development and changes in the structure of debt litigation in eighteenth-century Connecticut seems fairly clear. To avoid leaving an impression of rigorous economic determinism, it would be instructive to look briefly at other areas of law that changed in the direction of greater rationality, but without the same discernible economic nexus. The evidence in these areas is sketchy. Any conclusions must perforce be impressionistic, although not, I think, invalid.

At the beginning of the eighteenth century, all suits for trespass to land were common law actions.[49] Litigants joined issue quickly and submitted it to the jury or, occasionally, to the bench. Beginning in 1718, the assembly codified the most fertile sources of trespass actions, cutting timber and throwing down fences (6 *Conn. Col. Rec.* 60, 7 *id.* 80-82, 199), and within a few years most trespass cases were statutory actions. Concurrent with the shift from common law to statutory trespass actions was a change in the style of pleading. Common law form pleading had not taken root in New England, partly because of hostility to it, but also because of the dearth of attorneys trained to use it (see Haskins, 1960: 103). While it had to be guided by rules, pleading could not be more technical than the knowledge of the people engaged in it. This fact is recognized in Connecticut's liberal jeofailes statute (*Acts and Laws 1715:* 108).[50] The significance of lay pleading is

[48] Of the 470 uncontested actions on instruments in Hartford county in 1750, 316 (67 percent) paired parties from different towns. Of the 100 in New Haven county, 64 (64 percent) did.

[49] "All" is a limited number. In 1700 there were only three trespass actions litigated in the Hartford county court and none in New Haven. Trespass was not entirely untouched by statute. In 1693 the assembly set fines for "passing over any mans inclosed land . . . without the proprietors leave . . . where there is no allowed highway" (4 *Conn. Col. Rec.* 99). And there was a statute on cattle trespass (*Act and Laws 1702*: 113-114).

[50] A further reflection is the frustration of a lay pleader confounded by a lawyer—for example, the plaintiff who was so rattled by an attorney's attack on his complaint, which was actually rather well drafted, that he exploded in his reply to the lawyer's demurrer and closed in a large, angry hand with the cry, "The law hates Circuit of Action" (*Perkins v. Pierson*, 3 NHCCR 27, NHCCF 2 [1714]). Konig (1979: 158-165) suggests that the decline in civil litigation in the

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

that when pleadings were not narrowed with the precision inherent in common law form pleading, the range of discretion left to the jury was wide. Juries were free to judge the entire case rather than a limited issue. And since they did not have to articulate the grounds for their verdicts, the mystery of their inner workings and their capacity to respond to the individual case resembled the formal irrationality of the oracle or the ordeal (see Weber, 1978: 762).[51]

The increase in professional attorneys toward mid-century appears in the records as a perceptible increase in the technicality and rigor of pleadings.[52] Because change often threatens vested interests, lawyers are not necessarily or even usually purveyors of legal rationalization (see Weber, 1978: 785-788). But in mid-eighteenth-century Connecticut, just before lawyers had become sufficiently entrenched to acquire vested interests, the changes that accompanied them had rationalizing effects. Lawyers function best when they have a scheme of conceptual pigeonholes to classify the situations they encounter. While not a return to the terrible rigor of form pleading, increased technicality of pleading represented, from a lawyer's perspective, an internal simplification that allowed them to categorize things more precisely.[53] More importantly, when lawyers applied their pleading skills to trespass actions, the range of jury discretion was narrowed. In pleading terms, fewer trespass suits ended in a jury's verdict of guilty or not guilty and more in a judicial determination that one party's

---

courts of Essex County, Massachusetts, in the years of unaccustomed royal control under the Dominion of New England from 1685 to 1689, was partly attributable to the imposition of unfamiliar common law forms and technicalities of pleading on the local courts.

[51] The only constraint on the jury in eighteenth-century Connecticut—and in practice it was not much of one—was that if the judge thought a jury had not "attended the evidence given in, and true Issue of the Case in their Verdict," he could return the case to the jury for a second and even a third consideration. If the jury stood firm, however, it prevailed (*Acts and Laws 1715*: 2-4). The underlying similarity between lay pleaders, who frequently held powers of attorney, and jurors—all men of the neighborhood—was nicely illustrated in a case before the New Haven county court in 1716, when one of the jurors stepped off the jury to be sworn as an attorney-in-fact for one of the litigants (*Guy* v. *Mallory*, 3 NHCCR 73 [1716]).

[52] The General Assembly was not pleased with the growing domination of lawyers. In 1730 it attempted to limit the number of licensed attorneys in the colony, three in Hartford county and two in each of the four other counties, because "many persons of late have taken upon them to be attourneys at the bar, so that quarrels and lawsuits are multiplied, and the King's good subjects disturbed" (7 *Conn. Col. Rec.* 279-280). Alas, the assembly had to rescind the limitation seventeen months later (7 *id.* 358).

[53] I owe this observation to Barbara A. Black of the Yale Law School. One should note, however, that after the Revolution pleading changed in the opposite direction, away from the technicality of common law pleading, at least in Massachusetts (Nelson, 1975: 71-87).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

plea was "sufficient" or "insufficient." Whereas juries decided over 80 percent of all trespass actions at the beginning of the century, by mid-century they decided only 60 percent.[54] Fewer cases were decided by juries on the facts and more by judges on the law.[55] By implication, when cases were decided on the pleadings without factual determination of the merits, the facts were not as important as the law. And when facts lost their significance and thus their singularity, they became integrated into a more comprehensive legal universe that was larger than any individual case.

Rationalization could work to make private forms of dispute processing more law-like. For example, the General Assembly intruded upon arbitration in a way that I suspect, although I cannot prove, deprived it of the qualities that made it attractive in the first place. The fact that it was consensual meant that arbitration was a distinctly community-bound form of processing disputes. People did not sacrifice the compulsory process of law for the voluntariness of arbitration when they were strangers—the vagaries of the results were too great.[56] To be sure, individuals who submitted their grievances to arbitration did not do so entirely on faith. Each party executed a bond naming his adversary as obligee and deposited it with the arbitrators they had chosen. By the bonds, the parties defined the issues to be determined and bound themselves to comply with any award on penalty of forfeiture of the bond. Arbitration bonds provided a measure of legal protection, but that did not alter the fact that arbitration rested ultimately on the promises of self-enforcement that the bonds represented. With its implication of mutual trust, arbitration was not unlike book debt.[57] Both had commercial applications, but each fit more comfortably in a noncommercial community setting.[58]

---

[54] In New Haven county, juries decided 19 of 23 trespass actions (83 percent) from 1710 to 1720, but only 36 of 60 (60 percent) from 1735 to 1760. Of the 14 trespass actions litigated in the Hartford county court in 1750, juries decided nine, or 64 percent.

[55] If this shift was a general phenomenon, it undercuts Nelson's thesis (1975: 3-4) of the social function of the jury in prerevolutionary Massachusetts.

[56] This reflects the dualism Weber (1978: 695-696) noted between the law created to resolve disputes between groups and the settlement of disputes among group members. In primitive law, the former looks more like litigation and the latter like arbitration. Konig (1979: 108-116) discusses the local nexus of arbitration as "a procedure presupposing membership in a community."

[57] The similarity, or at least complementarity, of arbitration and book debt is underscored by a statute of 1724 (6 *Conn. Col. Rec.* 495-496), which established a procedure to appoint three auditors—who look very much like arbitrators—to adjust the accounts in book debt actions of more than ten pounds. The New Haven county court used this form of reference for eleven cases in 1750, in eight of which the parties were from the same town.

[58] Of course, commercial arbitration could have its own communal flavor as part of the mercantile community.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

Our view of arbitration is skewed by the fact that it did not loom into legal visibility unless it failed. Successful arbitrations left no records. Only when they broke down and became subjects of litigation through actions for breach of the arbitration bonds do we catch glimpses of the process. When it functioned properly, arbitration was quiet, informal, expeditious, inexpensive, and relatively harmonious, without the acrimony inherent in an adversary process. Parties who invoked it in good faith and honored their agreements to abide by the outcome had no reason to be dissatisfied, despite the lack of legally binding force. The character of arbitration seems to have changed, however, or at least to have acquired a new facet, when the assembly extended a measure of court supervision in 1753 (10 *Conn. Col. Rec.* 201-202). By legislation patterned on the English Arbitration Act of 1698 (9 Will.3,c.15), the assembly permitted parties to have the submission of their dispute to arbitration made a rule of court. They would then be under court order to submit to arbitration and to abide by the determination. More importantly, arbitrators of such disputes could file returns of their awards with the county court, which could grant writs of execution to collect awards "in case of disobedience of either party." Each step was discretionary, but in litigated actions referred by the court to arbitration, granting execution on the award was mandatory. The statute further extended court involvement in referred arbitrations by reserving to the court the authority to appoint a third arbitrator to sit with the two chosen by the parties.[59]

The legislation gave arbitration a legal stature that it had previously lacked and worked a certain formal rationalization of the process. But it also turned arbitration into more of a judicial proceeding. To the extent that this transformation occurred, arbitration lost its community-based identity as an alternative to litigation and became another legal forum. In extreme situations, the distinction between the two could disappear entirely, as when one arbitrator, who happened also to be a justice of the peace, issued writs of summons in his capacity as justice for witnesses to appear before the arbitrators (*Beecher* v. *Perkins*, 1757). The arbitrator-justice did not distinguish between his two roles, at least not clearly.

[59] Horwitz (1977: 145-155) discusses a similar arbitration statute passed in New York in 1791 as part of a process "of accommodation by which merchants were induced to submit to formal legal regulation in return for a major transformation of substantive legal rules governing commercial disputes."

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

Arbitration to him, and evidently to those involved in the dispute, was a judicial proceeding, and they saw nothing anomalous about using legal process to facilitate it. The analogy also seemed natural to Zephaniah Swift (1795-96: II, 7), who at the end of the century described arbitration as "a court created, constituted, and appointed by the parties, and the judges derive all their power and authority from the instructions which are given them." It may be that people continued to use arbitration without seeking judicial sanction or ratification. But the availability of the more legalistic, court-supervised arbitration meant that a uniquely community-bound process had lost its simplicity, and thus its uniqueness. Disputes that were settled with the assistance of legal process ceased to be truly private—they had, after all, become matters of public record. Rationalized arbitration may have been legally enforceable and thus more attractive to merchants, but it was something less than arbitration as it once had been.

V. THE GROWTH OF LEGAL RATIONALIZATION

As a characterization of legal change, rationalization can claim too much. Legal change does not have to be uniform. Although certain legal characteristics may occur in a sequential order (see Schwartz and Miller, 1964), the process toward rationality is hardly inexorable. Despite the overtones of evolution implicit in the very term "rationalization," we should not be surprised by the refusal of reality to be bound in a determinedly evolutionary straitjacket. Nonetheless, it is deceptively easy to see change as a unilinear process and conclude that things that have not changed—or, which is our concern, not become more rational—have therefore missed the boat. We then label them "traditional" or "irrational" and treat them as quaint anachronisms. But this overlooks the capacity of rationalization to generate new relations and needs that can be met only in ways that appear "irrational." A good example is the action of the Connecticut Assembly in 1734 extending equitable relief—by chancering a bond that a debtor proved usurious—when the formal rationalization of debt obligations foreclosed other means of ameliorating the burden. One could regard the statute as a recrudescence of "tradition" or "irrationality," which would be consistent with a unilinear notion of change. A more profitable approach, however, would be to see it as a necessary and appropriate response to new

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

circumstances created by rationalization. The latter view better reflects the complexity and texture of rationalization.

Rationalization may be a purposive process, but it need not be consciously directed. Uniformities of social action arise not from concerted orientation toward a general norm, but from the phenomenon that individuals acting in their self-interest tend to act similarly (Weber, 1978: 30).[60] People are rarely aware of the subjective meaning of their actions. It is thus essential, as Weber (1978: 18) cautioned, not to confuse "the unavoidable tendency of sociological concepts to assume a rationalistic character with a belief in the predominance of rational motives, or even a positive valuation of rationalism." This said, it would nonetheless be as feckless to suggest that legal rationalization is an accidental process as it would be facile to explain it by invoking economic determinism. The importance of the economic changes in eighteenth-century Connecticut should not be understated, even though one cannot talk of a truly rationalized, specialized market economy until the nineteenth century (see Horwitz, 1977: 173-188). However, as Weber (1978: 687) noted, economic circumstances do not so much create legal forms as permit them to spread once created. The early commercial prominence of Boston is significant in that it generated a demand for lawyers skilled enough to design the legal framework of an expanding economy. Connecticut did not have a similarly professional bar, but rationalized legal forms spread to Connecticut as its merchants established ties with their Boston counterparts and conducted business on Boston's terms.

Although Boston's example may explain the rationalization of legal relations to which Boston merchants were party, it can hardly be responsible, except perhaps indirectly, for the similar rationalization of local legal relations within Connecticut. As we have seen, the economic changes that Connecticut underwent in the eighteenth century weakened the multiplex relations that typified community life. Economic development was an important factor in rationalization, but other changes worked toward the same end. For example, population growth made the human ties within towns less close, more attenuated,

---

[60] The same phenomenon underlies that caricature of economic rationality, *homo economicus*. Economic analysis is based upon a handful of postulates about fundamental regularities in human behavior. The postulates do not imply conscious choices by individual actors so much as they do the natural desire of all individuals to act in ways that will satisfy their wants and preferences (see Alchian and Allen, 1977: 24-28). The similarity between Weber's notion of economic rationality and elements of microeconomic theory has been noted elsewhere (Trubek, 1972b: 744 n.47).

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

simply because size favors the formation of single-interest relationships over multiplex ones. Migration removed familiar faces and added unfamiliar ones, thus hindering the continuation of relationships through time. Before 1700, towns had a single center marked by a meeting house. After 1700, population growth and the settlement of outlying areas within towns drew people away from the central common. Too many people now lived too far apart, with interests that were too diverse, to limit attachment to a single unit. Individual relations became more specialized, as did the communities to which people belonged. One reflection of this specialization was the division of towns into parishes, each a territorial unit with its own meeting house (see Mann, 1977: 102-150). Towns did not fade into obsolescence, but parishes assumed from them responsibility for certain functions that no longer required the attention of the entire town, such as supporting a minister and a school. The creation of several parish communities within the larger town community weakened the former unitary nature of the town. Together with the expansion of population and of economic activity, the parish helped splinter the multiple-interest relationships that had characterized towns at the turn of the century.

In broad outline, these developments form the social context of the legal change I have been describing as "rationalization." When the town ceased to be the primary focus of community, it also ceased to serve as the framework that had tended to make relationships multiplex rather than single-interest. As the town became only one community among several to which a person belonged, individual relations became more specialized, more instrumental—relations of the kind better served by more rational legal forms than by less rational ones. Rationalized legal forms and procedures may have served economic purposes, but they took root for social reasons. In the course of the eighteenth century, local civil litigation in Connecticut became rather homogenized and lost much of what had made it "local" in the first place. The changes in legal process that allowed people from different towns to deal with one another within the common framework of an integrated legal system also allowed them to treat their neighbors as they did strangers, at least in terms of their legal relations. Law thus played a different role in the community on the eve of the Revolution than it had two generations before. To the extent that rationalization helped link disparate and distant towns, it may have been a precondition for the

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

development of a revolutionary ideology that transcended particular communities and united the several colonies into a new nation. If that sounds too much like a rationalization for this inquiry, we should perhaps retreat to Geoffrey Sawer's (1965: 63) wry observation that "one man's formalism is another's orderliness."

REFERENCES

ABEL, Richard L. (1973) "A Comparative Theory of Dispute Institutions in Society," 8 *Law & Society Review* 217.

AKAGI, Roy H. (1924) *The Town Proprietors of the New England Colonies: A Study of Their Development, Organization, Activities and Controversies, 1620-1770*. Philadelphia: University of Pennsylvania Press.

ALCHIAN, Armen and William R. ALLEN (1977) *Exchange and Production: Competition, Coordination, and Control* (2d ed.). Belmont, Calif.: Wadsworth Publishing Company.

ALLEN, David G. (1972) "The Zuckerman Thesis and the Process of Legal Rationalization in Provincial Massachusetts," 29 *William and Mary Quarterly* (3d ser.) 443.

BAILYN, Bernard (1955) *The New England Merchants in the Seventeenth Century*. Cambridge: Harvard University Press.

BENDER, Thomas (1978) *Community and Social Change in America*. New Brunswick: Rutgers University Press.

BENDIX, Reinhard (1960) *Max Weber: An Intellectual Portrait*. Garden City: Doubleday.

BEUTEL, Frederick K. (1939) "Colonial Sources of the Negotiable Instruments Law of the United States," 34 *Illinois Law Review* 137.

BOYER, Paul and Stephen NISSENBAUM (1974) *Salem Possessed: The Social Origins of Witchcraft*. Cambridge: Harvard University Press.

BROWN, Richard D. (1976) *Modernization: The Transformation of American Life, 1600-1865*. New York: Hill and Wang.

BUSHMAN, Richard L. (1967) *From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765*. Cambridge: Harvard University Press.

BUTTERFIELD, Herbert (1931) *The Whig Interpretation of History*. London: G. Bell and Sons.

CARTWRIGHT, Bliss, Marc GALANTER, and Robert KIDDER (1974) "Introduction: Litigation and Dispute Processing," 9 *Law & Society Review* 5.

CONNECTICUT: *Acts and Laws of His Majesties Colony of Connecticut in New England* (1702). Boston.

———: *Acts and Laws of His Majesties Colony of Connecticut in New England* (1715). New-London.

———: *Acts and Laws of His Majesty's English Colony of Connecticut in New-England in America* (1750). New London.

———: *The Book of the General Laws for the People Within the Jurisdiction of Connecticut* (1673). Cambridge.

———: J.H. Trumbull and C.J. Hoadly (eds.) (1850-90) *The Public Records of the Colony of Connecticut*. 15 vols., Hartford.

DANIELS, Bruce C. (1978) "The Political Structure of Local Government in Colonial Connecticut," in B.C. Daniels (ed.), *Town and Country: Essays on the Structure of Local Government in the American Colonies*. Middletown: Wesleyan University Press.

DEMOS, John (1970) *A Little Commonwealth: Family Life in Plymouth Colony*. New York: Oxford University Press.

EHRLICH, Jessica K. (1974) "A Town Study in Colonial New York: Newtown, Queens County, 1642-1790." Ph.D. Dissertation, Department of History, University of Michigan.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

FALLERS, Lloyd A. (1969) *Law without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga*. Chicago: University of Chicago Press.

FANE, Francis (1915) *Reports on the Laws of Connecticut* (ed. C.M. Andrews). New Haven: Tuttle, Morehouse, & Taylor Press.

FARRELL, John T. (ed.) (1942) *The Superior Court Diary of William Samuel Johnson, 1772-1773*. Washington, D.C.: American Historical Association.

FELSTINER, William L.F. (1974) "Influence of Social Organization on Dispute Processing," 9 *Law & Society Review* 63.

FRIEDMAN, Lawrence (1966) "On Legalistic Reasoning—A Footnote to Weber," 1966 *Wisconsin Law Review* 148.

——— (1967) "Legal Rules and the Process of Social Change," 19 *Stanford Law Review* 786.

——— (1969a) "Legal Culture and Social Development," 4 *Law & Society Review* 29.

——— (1969b) "On Legal Development," 24 *Rutgers Law Review* 11.

——— (1973) *A History of American Law*. New York: Simon and Schuster.

——— (1974) "Notes toward a History of American Justice," 24 *Buffalo Law Review* 111.

GALANTER, Marc (1966) "The Modernization of Law," in M. Weiner (ed.), *Modernization: The Dynamics of Growth*. New York: Basic Books.

GLUCKMAN, Max (1967) *The Judicial Process among the Barotse of Northern Rhodesia* (2d ed.). Manchester: Manchester University Press.

GRANT, Charles S. (1961) *Democracy in the Connecticut Frontier Town of Kent*. New York: Columbia University Press.

GREVEN, Philip J., Jr. (1970) *Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts*. Ithaca: Cornell University Press.

GROSS, Robert A. (1976) *The Minutemen and Their World*. New York: Hill and Wang.

HANDLIN, Oscar and Mary F. HANDLIN (1947) *Commonwealth, A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861*. Cambridge: Harvard University Press.

HASKINS, George L. (1960) *Law and Authority in Early Massachusetts: A Study in Tradition and Design*. New York: The Macmillan Company.

HENRETTA, James A. (1973) *The Evolution of American Society, 1700-1815: An Interdisciplinary Analysis*. Lexington: D.C. Heath and Company.

——— (1977) " 'Modernization': Toward a False Synthesis," 5 *Reviews in American History* 445.

——— (1978) "Families and Farms: *Mentalité* in Pre-Industrial America," 35 *William and Mary Quarterly* (3d ser.)3.

HOLDSWORTH, William (1903-1966) *A History of English Law*. 16 vol. London: Methuen & Co., Ltd., Sweet and Maxwell.

HORWITZ, Morton J. (1977) *The Transformation of American Law, 1780-1860*. Cambridge: Harvard University Press.

HURST, James Willard (1964) *Law and Economic Growth; The Legal History of the Lumber Industry in Wisconsin, 1836-1915*. Cambridge: Harvard University Press.

JOHNSON, Herbert A. (1963) *The Law Merchant and Negotiable Instruments in Colonial New York, 1664-1730*. Chicago: Loyola University Press.

KELLEY, Donald R. (1979) "Gaius Noster: Substructures of Western Social Thought," 84 *American Historical Review* 619.

KONIG, David T. (1979) *Law and Society in Puritan Massachusetts: Essex County, 1629-1692*. Chapel Hill: University of North Carolina Press.

LOCKRIDGE, Kenneth A. (1968) "Land, Population, and the Evolution of New England Society, 1630-1790," *Past and Present* 62 (no. 39).

——— (1970) *A New England Town, The First Hundred Years: Dedham, Massachusetts, 1636-1736*. New York: W.W. Norton & Company.

MACFARLANE, Alan (1970) *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study*. New York: Harper & Row.

MANN, Bruce H. (1977) "Parishes, Law, and Community in Connecticut, 1700-1760." Ph.D. Dissertation, Department of History, Yale University.

MARTIN, Margaret E. (1939) *Merchants and Trade of the Connecticut River Valley, 1750-1820*. Northhampton, Mass.: Smith College Department of History.

MILSOM, S.F.C. (1969) *Historical Foundations of the Common Law*. London: Butterworths.

MORRIS, Clarence (1958) "Law, Reason and Sociology," 107 *University of Pennsylvania Law Review* 147.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press

MURRIN, John M. (1971) "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in S.N. Katz (ed.), *Colonial America: Essays in Politics and Social Development*. Boston: Little, Brown.

——— (1972) "Review Essay," 11 *History and Theory* 226.

NADER, Laura (1965) "Choices in Legal Procedure: Shia Moslem and Mexican Zapotec," 67 *American Anthropologist* 394.

NELSON, William E. (1975) *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*. Cambridge: Harvard University Press.

NETTELS, Curtis P. (1934) *The Money Supply of the American Colonies before 1720*. Madison: University of Wisconsin Press.

PARSONS, Talcott (1964) "Evolutionary Universals in Society," 29 *American Sociological Review* 339.

POWELL, Sumner C. (1963) *Puritan Village: The Formation of a New England Town*. Middletown: Wesleyan University Press.

RHEINSTEIN, Max (ed.) (1954) *Max Weber on Law in Economy and Society*. Cambridge: Harvard University Press.

SAWER, Geoffrey (1965) *Law in Society*. Oxford: Oxford University Press.

SCHLUCHTER, Wolfgang (1979) "The Paradox of Rationalization: On the Relation of Ethics and World," in G. Roth and W. Schluchter (eds.), *Max Weber's Vision of History: Ethics and Methods*. Berkeley: University of California Press.

SCHWARTZ, Richard D. and James C. MILLER (1964) "Legal Evolution and Societal Complexity," 70 *American Journal of Sociology* 159.

SMITH, Joseph H. (1950) *Appeals to the Privy Council from the American Plantations*. New York: Columbia University Press.

STARR, June and Barbara YNGVESSON (1975) "Scarcity and Disputing: Zeroing-In on Compromise Decisions," 2 *American Ethnologist* 553.

STODDARD, Solomon (1722) *An Answer to Some Cases of Conscience Respecting the Country*. Boston: B. Green.

SWIFT, Zephaniah (1795-1796) *A System of the Laws of the State of Connecticut*. 2 vol. Windham, Conn.: John Byrne.

TRUBEK, David M. (1972a) "Toward a Social Theory of Law: An Essay on the Study of Law and Development," 82 *Yale Law Journal* 1.

——— (1972b) "Max Weber on Law and the Rise of Capitalism," 1972 *Wisconsin Law Review* 720.

WALTON, Gary M. and James F. SHEPHERD (1979) *The Economic Rise of Early America*. New York: Cambridge University Press.

WEBER, Max (1946) "The Social Psychology of the World Religions," in H.H. Gerth and C.W. Mills (eds.), *From Max Weber: Essays in Sociology*. New York: Oxford University Press.

——— (1978) *Economy and Society: An Outline of Interpretive Sociology* (eds. G. Roth and C. Wittich). 2 vol. Berkeley: University of California Press.

WRIGLEY, E.A. (1972) "The Process of Modernization and the Industrial Revolution in England" 3 *Journal of Interdisciplinary History* 225.

WROTH, L. Kinvin (1971) "Possible Kingdoms: The New England Town from the Perspective of Legal History," 15 *American Journal of Legal History* 318.

YNGVESSON, Barbara (1976) "Responses to Grievance Behavior: Extended Cases in a Fishing Community," 3 *American Ethnologist* 353.

——— (1978) "The Atlantic Fishermen," in L. Nader and H.F. Todd, Jr. (eds.), *The Disputing Process: Law in Ten Societies*. New York: Columbia University Press.

ZEICHNER, Oscar (1949) *Connecticut's Years of Controversy, 1750-1776*. Chapel Hill: University of North Carolina Press.

ZUCKERMAN, Michael (1970) *Peaceable Kingdoms: New England Towns in the Eighteenth Century*. New York: Alfred A. Knopf.

——— (1977) "The Fabrication of Identity in Early America," 34 *William and Mary Quarterly* (3d ser.)3.

https://doi.org/10.2307/3053312 Published online by Cambridge University Press