The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History

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OVER the last decade, historians of early American law have worked, by and large, within familiar paradigms.[1] Studies of the carryover, adaptation, and development of legal institutions and doctrines and of the careers of prominent judges and lawyers continue to appear, suggesting that the field's long-standing concerns still evoke interest.[2] Scholars have also thickened the literature on a

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[1] Two caveats: First, I shall concentrate on the legal history of colonial New England, treating other regions less thoroughly. Second, my working definition of "early American legal history" is somewhat idiosyncratic. I exclude the vast literature on constitutional history, while considering the work of several scholars who neither identify themselves as nor are commonly thought of as "legal historians."

[2] See, e.g., David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill, N. C., 1981); Thomas G. Barnes, "Thomas Lechford and the Earliest Lawyering in Massachusetts, 1638–1641," in Colonial Society of Massachusetts, *Publications*, LXII, *Law in Colonial Massachusetts, 1630–1800* (Boston, 1984), 3–38; Barbara A. Black, "Nathaniel Byfield, 1653–1733," ibid., 57–105; W. Hamilton Bryson, "English Common Law in Virginia," *Journal of Legal History*, VI (1985), 249–256; David H. Flaherty, "Chief Justice Samuel Sewall, 1692–1728," in William Pencak and Wythe W. Holt, Jr., *The Law in America, 1607–1861* (New York, 1989), 114–154; Marilyn L. Geiger, *The Administration of Justice in Colonial Maryland, 1632–1689* (New York, 1987); David Thomas Konig, "'Dale's Laws' and the Non-Common Law Origins of Criminal Justice in Virginia," *American Journal of Legal History*, XXVI (1982), 354–375; Deborah A. Rosen, "The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691–1760," *Legal History Review*, V (1987), 213–247; Carole Shammas, "English Inheritance Law and Its Transfer to the Colonies," *Am. J. Legal Hist.*, XXXI (1987), 145–163.

Scholars of doctrine and institutions devote less attention these days to what was once the grand project in the field—establishing the relationship between the colonial and the British legal structure and practice. Current work is somewhat more eclectic. Peter Russell, for example, situates the 18th-century history of the Massachusetts Superior Court within a framework of modernization theory, while Michael A. Bellesiles traces the "bottom-up" percolation of legal institutions in early Vermont; Russell, *His Majesty's Judges: Provincial Society and the Superior Court in Massachusetts, 1692–1774* (New York, 1990); Bellesiles, "The Establish-

host of research problems introduced decades ago but reinterpreted or redirected in the 1970s and early 1980s: we now know more about dispute settlement;[3] the social functions of litigation and legal rules and institutions;[4] legal education, the legal profession, and the process of professionalization;[5] lawbooks and print culture;[6] the changing role of the jury;[7] the status of women;[8] and criminal law and

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ment of Legal Structures on the Frontier: The Case of Revolutionary Vermont," *Journal of American History,* LXXIII (1987), 895–915.

[3] See, e.g., Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629–1692* (Chapel Hill, N. C., 1979); William E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725–1825* (Chapel Hill, N. C., 1981); Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, N. C., 1987); William McEnery Offutt, Jr., "Law and Social Cohesion in a Plural Society: The Delaware Valley, 1680–1710" (Ph. D. diss., Johns Hopkins University, 1987).

[4] See, e.g., Konig, *Law and Society;* Mann, *Neighbors and Strangers;* Jonathan M. Chu, "Nursing a Poisonous Tree: Litigation and Property Law in Seventeenth-Century Essex County, Massachusetts: The Case of Bishop's Farm," *Am. J. Legal Hist.,* XXXI (1987), 221–252; Peter Charles Hoffer, "Honor and the Roots of American Litigiousness," ibid., XXXIII (1989), 295–319; Gwenda Morgan, *The Hegemony of the Law: Richmond County, Virginia, 1692–1776* (New York, 1989); Roger Thompson, "'Holy Watchfulness' and Communal Conformism: The Functions of Defamation in Early New England Communities," *New England Quarterly,* LVI (1983), 504–522.

[5] See, e.g., Stephen Botein, "The Legal Profession in Colonial North America," in Wilfrid Prest, ed., *Lawyers in Early Modern Europe and America* (New York, 1981), 129–146; Hoyt P. Canady, *Gentlemen of the Bar: Lawyers in Colonial South Carolina* (New York, 1987); Richard Scott Eckert, *The Gentlemen of the Profession: The Emergence of Lawyers in Massachusetts, 1630–1810* (New York, 1991); Charles R. McKirdy, "Massachusetts Lawyers on the Eve of the American Revolution: The State of the Profession," in *Law in Colonial Massachusetts,* 313–358; A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill, N. C., 1981); Russell, "The Development of Judicial Expertise in Eighteenth-Century Massachusetts and a Hypothesis Concerning Social Change," *Journal of Social History,* XVI (1983), 143–154.

[6] See, e.g., Roeber, *Faithful Magistrates;* Morris L. Cohen, "Legal Literature in Colonial Massachusetts," in *Law in Colonial Massachusetts,* 243–272; John A. Conley, "Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America," *J. Legal Hist.,* VI (1985), 257–298; Patrick H. Hutton, "The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions," *Vermont History,* LVI (1988), 154–165; and Erwin C. Surrency, "The Beginnings of American Legal Literature," *Am. J. Legal Hist.,* XXXI (1987), 207–220.

[7] See, e.g., Mann, *Neighbors and Strangers;* Morgan, *Hegemony;* Murrin, "Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England," in David D. Hall, Murrin, and Thad W. Tate, eds., *Saints and Revolutionaries: Essays on Early American History,* (New York, 1984), 152–206; Murrin and Roeber, "Trial by Jury: The Virginia Paradox, Part I," *Virginia Cavalcade,* XXXIV (1984), 52–58, and "Trial by Jury: The Virginia Paradox, Part II," ibid., 118–125.

[8] See, e.g., Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, N. C., 1986); Joan R. Gundersen and Gwen V. Gampel, "Married Women's Legal Status in Eighteenth-Century New York and Virginia," *William and Mary Quarterly,* 3d Ser., XXXIX (1982), 114–134; C. Dallett Hemphill,

administration, sanctions, and "crime and society."[9]

Theoretical and methodological innovations introduced in the 1970s have deepened their influence in the field. We have seen a growing sophistication in the use of litigation statistics to uncover legal culture and social values, as shown in the work of David Thomas Konig, David Grayson Allen, Cornelia Hughes Dayton, William E. Nelson, William McEnery Offutt, and Bruce H. Mann.[10] Geertzian cultural anthropology

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"Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683," ibid., 164–175; and Cornelia Hughes Dayton, "Women Before the Bar: Gender, Law, and Society in Connecticut, 1710–1790" (Ph. D. diss., Princeton University, 1986).

[9] The history of crime has become a bustling academic cottage industry. See, e.g., Bradley Chapin, *Criminal Justice in Colonial America, 1606–1660* (Athens, Ga., 1983); Hoffer and N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England, 1558–1803* (New York, 1981); Hull, *Female Felons: Women and Serious Crime in Colonial Massachusetts* (Champaign, Ill., 1987); Donna J. Spindel, *Crime and Society in North Carolina, 1663–1776* (Baton Rouge, La., 1989); Mark D. Cahn, "Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts," *Am. J. Legal Hist.*, XXXIII (1989), 107–136; Daniel A. Cohen, "A Fellowship of Thieves: Property Criminals in Eighteenth-Century Massachusetts," *J. Soc. Hist.*, XXII (1988), 65–92; Flaherty, "Crime and Social Control in Provincial Massachusetts," *Historical Journal*, XXIV (1981), 339–360; Flaherty, "Criminal Practice in Provincial Massachusetts," in *Law in Colonial Massachusetts*, 191–242; Richard Gaskins, "Changes in the Criminal Law in Eighteenth-Century Connecticut," *Am. J. Legal Hist.*, XXV (1981), 309–342; Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," ibid., XXVI (1982), 293–325; Adam J. Hirsch, "From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts," *Michigan Law Review*, LXXX (1982), 1179–1269; Hoffer, "Disorder and Deference: The Paradoxes of Criminal Justice in the Colonial Tidewater," in David J. Bodenhamer and James W. Ely, Jr., eds., *Ambivalent Legacy: A Legal History of the South* (Jackson, Miss., 1984), 187–201; Linda Kealey, "Patterns of Punishment: Massachusetts in the Eighteenth Century," *Am. J. Legal Hist.*, XXX (1986), 163–186; Barbara S. Lindemann, "'To Ravish and Carnally Know': Rape in Eighteenth-Century Massachusetts," *Signs*, X (1984), 63–82; Gail Sussman Marcus, "'Due Execution of the Generall Rules of Righteousnesse': Criminal Procedures in New Haven Town and Colony, 1638–1658," in Hall, Murrin, and Tate, eds., *Saints and Revolutionaries*, 99–137; Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *Am. J. Legal Hist.*, XXVI (1982), 326–353; Robert W. Roetger, "The Transformation of Sexual Morality in 'Puritan' New England: Evidence from the New Haven Court Records, 1639–1698," *Canadian Review of American Studies*, XV (1984), 243–257; and Offutt, "Law and Social Cohesion."

The history of crime in colonial America has been deeply influenced and invigorated by the scholarship on crime and society in early modern England. For an overview see Joanna Innes and John Styles, "The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England," *Journal of British Studies*, XXV (1986), 380–435.

[10] Konig, *Law and Society;* Allen, *In English Ways;* Dayton, "Women Before the Bar"; Nelson, *Dispute and Conflict Resolution;* Offutt, "Law and Social Cohesion"; Mann, *Neighbors and Strangers*. Some of this work, either explicitly or implicitly, has drawn on the law and society movement's rich literature on dispute resolution and theories of disputing. See, e.g., Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," *Law and Society Review*, VIII (1973), 217–347, and Marc Galanter, "Adjudication, Litigation, and Related Phenomena," in Leon

has underscored the crucial role of rituals and expressive symbols in reinforcing and circumscribing legal authority.[11] Following the lead of colonialists, legal historians have become more interested in the "clash of cultures" in early America, a development that has enriched comparative legal history. In addition to traditional intercolonial and transatlantic legal comparisons, scholars have done more cross-cultural comparisons—explorations of how norms, institutions, and legal cultures differed among ethnic groups. In this camp we can place the writings of Yasuhide Kawashima, Finbarr McCarthy, Kenneth M. Morrison, and William Cronon on the English and the Indians, Donna Merwick on the English and the Dutch, and A. G. Roeber on the English and the Germans.[12]

Amid this pronounced continuity in methods and approach, Ellen Mosen James, Christopher D. Felker, and Robert A. Williams, Jr., have done something new in tracing the "interplay between language and power" within early American "legal discourses."[13] The arrival of theoretically self-conscious "discourse analysis" in colonial legal history years after its deployment elsewhere—a pattern seen earlier with Geertzian cultural anthropology—suggests a larger point about the field: it has long depended on the ideas and methods of others. Legal historians are intellectual consumers, not producers; importers, not exporters.

I do not wish to decry borrowing from other areas of history and from the social sciences; it has undoubtedly enriched the field. Rather, I want to

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Lipson and Stanton Wheeler, eds., *Law and the Social Sciences* (New York, 1986), 151–257.

[11] See, e.g., Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill, N. C., 1982); Roeber, "Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750," *WMQ*, 3d Ser., XXXVII (1980), 29–52; Russell, *His Majesty's Justices;* Offutt, "Law and Social Cohesion"; G. S. Rowe, "The Role of Courthouses in the Lives of Eighteenth-Century Pennsylvania Women," *Western Pennsylvania Historical Magazine*, LXVIII (1985), 5–23. Legal historians have relied most heavily on Clifford Geertz's *The Interpretation of Culture: Selected Essays* (New York, 1973).

[12] Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630–1763* (Middletown, Conn., 1986); McCarthy, "The Influence of 'Legal Habit' on English-Indian Relations in Jamestown, 1606–1612," *Continuity and Change*, V (1990), 39–64; Morrison, "The Bias of Colonial Law: English Paranoia and the Abenaki Arena of King Philip's War, 1675–1678," *NEQ*, LIII (1980), 363–387; Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York, 1983); Merwick, *Possessing Albany, 1630–1710: The Dutch and English Experiences* (Cambridge, 1990); Roeber, " 'He read it to me from a book of English law': Germans, Bench, and Bar in the Colonial South, 1715–1770," in Bodenhamer and Ely, eds., *Ambivalent Legacy*, 202–228; Roeber, "The Origins and Transfer of German-American Concepts of Property and Inheritance," *Perspectives in American History*, N. Ser., III (1987), 115–171.

[13] James, "Decoding the Zenger Trial: Andrew Hamilton's 'Fraudful Dexterity' with Language," in Pencak and Holt, eds., *Law in America*, 6; Felker, "Roger Williams's Use of Legal Discourse: Testing Authority in Early New England," *NEQ*, XLIII (1990), 624–648; Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York, 1990). Williams and Felker acknowledge a debt to Michel Foucault, James to J. L. Austin.

further and deepen the process—and perhaps redirect it a bit—by suggesting work that could be done at the intersection of legal history with intellectual and cultural history. I shall take a critical look at the concept of legal culture, and I shall suggest ways to broaden the intellectual history of law in colonial New England, the region most familiar to me.[14]

The concept of "legal culture," which Lawrence M. Friedman introduced and popularized in the late 1960s and 1970s, has become a mainstay of legal history scholarship.[15] Colonial legal historians adopted the idea in the 1970s and put it to work in earnest in the 1980s. Examples are legion. Roeber, for example, organizes both his book on Virginia, *Faithful Magistrates and Republican Lawyers,* and his more recent work on German-American conceptions of property and inheritance around the idea of legal culture. Offutt's dissertation looks at the effect of legal culture on civil litigation and criminal administration in the Delaware Valley at the turn of the eighteenth century. The concept of legal culture has proved especially useful in work comparing the legal systems of different peoples, times, or regions. According to Kawashima, contact between New England settlers and native Americans led to a "clash of legal cultures." Hendrik Hartog contrasts the "discontinuous" legal cultures of the mid-eighteenth century and early nineteenth century, while Peter Charles Hoffer notes the "distinctive legal cultures" of the northern and southern colonies.[16]

I propose to look briefly at how historians of colonial law might use the concept of legal culture. First, though, a few cautions. For all its importance, legal culture remains murky in theory and elusive in practice. Historians commonly write about legal cultures without explaining what they are or how to find and depict them. I suspect, however, that Friedman's explanation of the concept roughly matches the working definition of most historians. A legal system, Friedman suggests, is made up of three components: institutions and their processes; rules; and a legal culture, the "values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole."[17]

[14] I do not advocate abandoning the methods and concepts currently inspiring colonial legal history. My ideas are meant only to supplement and to expand what we are now doing.

[15] Friedman, "Legal Culture and Social Development," *LSRev.,* IV (1969), 29–44; Friedman, *The Legal System: A Social Science Perspective* (New York, 1975).

[16] Hartog, "Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History," in Hartog, *Law in the American Revolution and the Revolution in Law* (New York, 1981), 229–257; Offutt, "Law and Social Cohesion," esp. chaps. 3, 5; Kawashima, *Puritan Justice,* 3–17; Roeber, *Faithful Magistrates;* Roeber, "Origins and Transfer of German-American Concepts of Property and Inheritance"; Hoffer, *Law and People in Colonial America* (Baltimore, 1992), 23. I list here only a sampling of works that explicitly speak of "legal culture." Numerous other articles and monographs illuminate early American legal culture without using the concept.

[17] Friedman, "Legal Culture," 34.

> Legal culture refers . . . to those parts of general culture—customs, opinions, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways. . . . The term "legal culture" can also be used in an anthropological sense—those traits of behavior and attitude that make the law of one community different from that of another, that make the law of the Eskimos different from French law. . . . The term can be used in a slightly different way to describe underlying traits of a *whole* legal system—its ruling ideas, its flavor, its style.[18]

Historians of legal culture probe the intersections of a given legal system, the values and attitudes that animate, influence, and constrain it, and the general culture and social structure underlying it.[19]

Unfortunately, legal historians are not quite sure about how legal culture, general culture, and society fit together. We assume that the legal culture and the general culture reciprocally influence one another but have not explained the mechanisms, the *process,* by which this occurs. Still less do we understand their interconnection if we imagine a plurality of general and legal subcultures of differing stability and influence, many of them following the lines of race, class, gender, ethnicity, religion, occupation, and geography, and all of them interrelated and changing over time. We generally fail to distinguish between the components and the determinants of legal culture and between legal norms and general cultural norms, thereby avoiding hard thinking about causality. And what is the connection between legal culture and social structure? Problems of these sorts have long vexed social scientists studying culture, yet legal historians have not adequately addressed them. If we import into legal history the concept of legal culture, do we import with it the methodological and analytic challenges that have occupied students of culture in the social sciences?

In practice, scholars use legal culture as a catchall that can take in institutions and local practices, legal doctrines and informal norms, and values, ideas, and folk wisdom.[20] Some add to this mixture ideology and "consciousness."[21] Because we lack consensus on how to reconstruct a

[18] Friedman, *Legal System,* 15, 15n.35, chaps. 8, 9. In *The Magic Mirror: Law in American History* (Oxford, 1989), 6, Kermit Hall defines legal culture as "the matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law." Galanter, a "law and society" scholar, describes "local legal culture" as "a set of norms, understandings, concerns, and priorities shared by the community of legal actors and significant audiences" in "Adjudication," 181.

[19] Because of space constraints, I have chosen not to discuss how law and society scholars have used the concept. I note only that the historians' rubric of legal culture would include law and society work on legal pluralism, legal ideology, and legal consciousness. I am indebted to Prof. Austin Sarat for this point.

[20] See, e.g., Kawashima, *Puritan Justice;* Roeber, *Faithful Magistrates* and "Origins"; Offutt, "Law and Social Cohesion."

[21] Hartog, "Distancing Oneself from the Eighteenth Century," 240, 252.

legal culture, there is no list of essential elements that we must include, no approved technique; the process is flexible, free-form. We juxtapose, say, an interesting feature of institutional structure, a jury control device, a revealing fact about legal education or legal literature, an impressionistic account of a legal mood, some litigation statistics, perhaps an important development in political theory, and then claim that the amalgam is indicative or constitutive of a legal culture. The result is a slippery concept that can include what we want grouped together and exclude what we want left out. Readers who examine two scholars' portrayals of a legal culture may find themselves comparing apples and oranges. And readers who compare legal cultures across time may be comparing the apples of one century to the oranges of another.

Yet despite its murkiness—or, to some extent, because of it—the concept has invigorated recent historiography. Its lack of conceptual clarity and rigor makes it a useful heuristic and a scholarly catalyst. The alluring ambiguity of legal culture offers a standing invitation to arrange seemingly unconnected bits of the past in new and revealing patterns without damping enthusiasm or imagination by suggesting in advance what should and should not matter or by prejudging how the elements might be arranged. Consider Hartog's reconstruction of the legal world of the mid-eighteenth-century Massachusetts whigs. Using legal culture as an organizing principle, Hartog saw as parts of a related whole the following apparently disparate elements of their society: that "property rights are definitive of citizenship and personality"; that a mob had a "claim of ownership" on its "right to riot against unresolved grievances"; that "justices of the peace derive[d] their effective authority from local publics rather than from centralized institutions"; that the legal system was supposed to serve as a "restraint on power"; that law was not a "separated, bounded, distinctive sphere of activity and thought," but rather was characterized by the "permeability of conceptual boundaries"; and that a "dominant oral culture" held sway over print culture.[22] This characteristic inclusiveness of legal culture, coupled with the multiplicity of ways to understand the concept, can prod historians to make unexpected connections and stimulate scholarly inventiveness (and allow, to be sure, for much foolishness).

Legal culture's summons to combine what we might otherwise keep apart makes the concept especially valuable for studying the colonial legal system (as opposed to its nineteenth- and twentieth-century successors). If one of the hallmarks of legal modernization is separation—of legislative, executive, and judicial powers, of public from private law, of legal professionals from the laity, of legal norms from ethical norms—then one of the characteristics of a premodern legal system is fusion, the amalgamation of what would later become separate.[23] By asking us to meld together

[22] Ibid., 234–235, 242, 256.

[23] See Galanter, "The Modernization of Law," in Myron Weiner, ed., *Modernization: The Dynamics of Growth* (New York, 1966), 153–165; Max Weber,

different spheres of society (law, religion, politics) and disparate elements of the legal system (institutions, rules, values, perceptions), the concept of legal culture pulls us into the premodern legal world. It thus combats the natural tendency to read back into early American law the relatively greater functional and conceptual autonomy of modern legal systems.

Legal culture holds out a special promise to "law and society" scholars who have long been trying to situate the colonial legal system within its social context.[24] By directing our attention to interconnections among diverse spheres of society and elements of the legal system, legal culture broadens the context we intuitively consider relevant. The protean quality of the concept also helps us study law and society outside traditional institutional and jurisdictional boundaries. Many of the best studies of early American law and society have taken a colony or county as the basic unit of analysis.[25] Legal culture invites us to look at geographical and social units that we are not accustomed to examining.[26] Historians could venture beyond the limits of a court system, a county, or a colony in search of the legal culture of different cultural regions, of British North America, or of the Anglo-American world.[27] They could also explore the fluid legal subcultures that cut across jurisdictional lines, subcultures defined by race, occupation, class, ethnicity, gender, and religion.[28]

The power of legal culture to reshape our perspective and draw us away

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Economy and Society: An Outline of Interpretive Sociology, ed. Guenther Roth and Claus Wittich (New York, 1968), II, 641–651; and Anthony T. Kronman, *Max Weber* (Stanford, Calif., 1983), 47, 65, 79.

[24] The following provide different perspectives on the origin, role, and aims of the law and society movement in law schools and social sciences: Leon Lipson and Stanton Wheeler, eds., *Law and the Social Sciences* (New York, 1986); Friedman, "The Law and Society Movement," *Stanford Law Review*, XXXVIII (1986), 763–780; Galanter, "The Legal Malaise: Or, Justice Observed," *LSRev.*, XIX (1985), 537–556; David Trubek, "Back to the Future: The Short, Happy Life of the Law and Society Movement," *Florida State University Law Review*, XVIII (1990), 1–55. For examples of historical work rooted in a law and society approach see Botein, *Early American Law and Society* (New York, 1983); Konig, *Law and Society;* Allen, *In English Ways;* Mann, *Neighbors and Strangers;* and Nelson, *Dispute and Conflict Resolution.*

[25] Konig, *Law and Society;* Roeber, *Faithful Magistrates;* Mann, *Neighbors and Strangers;* Dayton, "Women Before the Bar"; Allen, *In English Ways;* Nelson, *Dispute and Conflict Resolution.*

[26] In this respect, legal culture resembles such concepts as ideology and identity.

[27] Jack P. Greene's "Interpretive Frameworks: The Quest for Intellectual Order in Early American History," *WMQ*, 3d Ser., XLVIII (1991), 515–530, calls attention to the importance of the "cultural region" in recent historiography. Through its exploration of regional "learning ways," "rank ways," "power ways," and "freedom ways," David Hackett Fischer's *Albion's Seed: Four British Folkways in America* (Oxford, 1989) suggests how legal culture varied in different areas of colonial America.

[28] Offutt made a start in this direction by noting the disjunction between the institutional boundaries of the Delaware Valley's county courts and the social groupings created by location, religion, ethnicity, and occupation. Offutt, "Law and Social Cohesion," esp. chap. 2.

from traditional institutional and jurisdictional boundaries should prove particularly valuable to historians of early American law. The colonial legal world, it bears remembering, recognized or tolerated a hodgepodge of local customs, some stemming from England, others, more alien, coming from Ireland, Holland, and Germany. It applied different norms to different races, genders, occupations, and personal statuses. It comprised a variety of institutions with ill-defined and conflicting responsibilities and differing bases of legitimacy (such as Parliament, the king and Privy Council, assemblies, governors and councils, various courts and local legal officials, counties, towns, and churches), each busy articulating norms, distributing resources, and settling disputes. It took in large numbers of people, such as Scots-Irish, Germans, Dutch, Africans, and some native Americans, either hostile to English legal control or eager to preserve familiar legal mores or both. South of New England, it included, in the words of Stephen Botein, "vast expanses of territory beyond the reach of coastal officialdom where settlers of varied ethnic and religious backgrounds simply had to make do in the absence of an effective sovereign state."[29] The legal boundaries traced out by institutions and jurisdictions may have meant less than the cultural boundaries circumscribing regions and racial, ethnic, religious, occupational, and status groups.[30] We could recover more of the diversity and fluidity of this world by studying how legal subcultures arose and changed in response to transatlantic patterns of politics, economics, and immigration and by investigating how these legal subcultures interacted within and across institutional and geographical lines.

To advance this project, I would like to put forth a few brief suggestions for studying early American legal culture.

(1) As an exercise in comparative history, we might explore the salience for different cultural groups of such issues as the problems and challenges of legal pluralism; the process and consequences of opting out of official legal institutions; contrasting visions of legal legitimacy; differing styles of legal reasoning; and patterns of legal knowledge and legal memory. Monographs organized under these rubrics could cut across traditional institu-

[29] Botein, *Early American Law and Society*, 15. "The most conspicuous failure in this regard," Botein writes, "was the colony of South Carolina, which supplied no judicial service at all outside the port town of Charleston"; ibid., 15–16. See also Rachel N. Klein, "Ordering the Backcountry: The South Carolina Regulation," *WMQ*, 3d Ser., XXXVIII (1981), 661–680.

Many of these features could be found in the legal systems of early modern Europe. But colonial America may have been unusual in the extent of its cultural pluralism and in the difficulty that the government's official law and institutions faced in regulating the territory and people theoretically within its jurisdiction.

[30] A hypothetical example may clarify the point. A shoemaker's apprentice born in Holland and living in colonial Manhattan participated in and helped shape the legal culture of early New York. But he also partook of the legal subcultures of apprentices, artisans, immigrants, city dwellers, and the Dutch. Perhaps his inclusion in one or several of those legal subcultures meant more to him—and means more to us as observers—than his inclusion in the legal culture of New York colony.

tional and jurisdictional boundaries.[31] To pick but one example, we might study how wary and culturally dissimilar groups throughout the colonial backcountry tried to mediate between their own, their neighbors', and the state's different understandings of law, while formally subject to an official legal system limited in reach, often unsteady, and sometimes simply indifferent; how this form of legal pluralism changed over time; and how the state's law and legal culture increasingly penetrated into geographical territory and social strata that it had hitherto only lightly touched.[32]

(2) Historians should more thoroughly investigate the dynamic process of cultural exchange among the various legal cultures of early America, that "continuing series of reciprocal relationships, involving borrowing and resistance, conflict and cooperation, modification and invention."[33] Scholarship on contact among different legal cultures has explored the imposition of English control on non-English groups,[34] the disastrous consequences of legal misunderstandings,[35] and, more recently, the ability of Indians, Germans, Dutch, and free blacks to manipulate the English legal system.[36] This literature raises two important, largely unanswered questions. First, as outsiders learned to use English law, how did their growing understanding of its procedures, logic, and assumptions transform their own legal cultures? Much of the work done to date has stressed loss and intrusion rather than amalgamation. Second, how was the basically English mainstream legal culture of the colonies influenced by the legal cultures around it?[37] Scholars have usually downplayed or ignored

[31] Expanding the scope of these inquiries should increase the likelihood of finding evidence. I fear, however, that several of the topics I propose would be undoable for lack of evidence.

[32] These issues have long occupied students of law and the social sciences. See, e.g, Friedman, *Legal System,* 193–267, Henry W. Ehrmann, *Comparative Legal Cultures* (Englewood Cliffs, N. J., 1976), and Sally Engle Merry, "Legal Pluralism," *LSRev.,* XXII (1988), 869–896.

[33] T. H. Breen, "Creative Adaptations: Peoples and Cultures," in Greene and J. R. Pole, eds., *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore, 1984), 197.

[34] See, e.g., Kawashima, *Puritan Justice;* Alden T. Vaughan, *New England Frontier: Puritans and Indians, 1620–1675,* rev. ed. (New York, 1979), 185–210; James P. Ronda, "Red and White at the Bench: Indians and the Law in Plymouth Colony, 1620–1691," *Essex Institute Historical Collections,* CX (1974), 200–215; and Linda Briggs Biemer, *Women and Property in Colonial New York: The Transition from Dutch to English Law, 1643–1727* (Ann Arbor, Mich., 1983).

[35] Morrison, "Bias of Colonial Law."

[36] For examples or summaries of this approach see James H. Merrell, " 'The Customes of Our Countrey': Indians and Colonists in Early America," in Bernard Bailyn and Philip D. Morgan, eds., *Strangers within the Realm: Cultural Margins of the First British Empire* (Chapel Hill, N. C., 1991), 117–156; Roeber, " 'The Origin of Whatever is not English Among Us': The Dutch-speaking and the German-speaking Peoples of Colonial British America," in ibid., 220–283; and Douglas Deal, "A Constricted World: Free Blacks on Virginia's Eastern Shore, 1680–1750," in Lois Green Carr, Philip D. Morgan, and Jean B. Russo, eds., *Colonial Chesapeake Society* (Chapel Hill, N. C., 1988), 275–305.

[37] The extensive literature exploring how English law adjusted to the military,

the two-way impact of cultural exchange when depicting English law as the standard that others reacted against, or fell victim to, or absorbed.[38] Richard White's distinction between "acculturation" and "accommodation" could prove useful here. Aware of British power over other races and ethnicities, especially in the eighteenth century, legal historians have told a tale of acculturation, the process in which one group adapts itself to another "under conditions in which [the] dominant group is largely able to dictate correct behavior to [the] subordinate group." In so doing, they have underplayed what White calls accommodation, cultural change by which

> diverse peoples adjust their differences through what amounts to a process of creative, and often expedient, misunderstandings. People try to persuade others who are different from themselves by appealing to what they perceive to be the values and practices of those others. They often misinterpret and distort both the values and the practices of those they deal with, but from these misunderstandings arise new meanings and through them new practices.[39]

We need to look closely at how the diverse European and non-European legal cultures within America, along with the at once alluring and threatening legal culture of metropolitan England, shaped one another and helped forge the mainstream colonial legal culture.[40]

(3) We might follow the lead of social scientists and historians who have shown how culture helps people understand and categorize experience.[41] Legal culture, like the general culture, shapes the terms in which people perceive and organize the world. It influences not only how people act within the sphere of society that we call the legal system but also how they distinguish what is a legal issue from what is not and how they demarcate the realm of the legal from other potentially conflicting or overlapping

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diplomatic, political, and economic presence of Indians and other Europeans seldom considers the impact of these foreign legal cultures.

[38] Kawashima, *Puritan Justice,* 15, provides a good example of this tendency. "The clash of legal cultures in North America," he writes, "took a peculiar one-way form, because the English settlers had no intention of learning from the Indians. No significant changes took place in the English legal tradition due to Indian-white relations."

[39] White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815* (Cambridge, 1991), x.

[40] This perspective has the added benefit of turning our attention away from the "carryover and adaptation" of English law and legal culture (our traditional focus) and directing it instead to the continuing process of cultural transformation in the less-studied years between the end of settlement and 1760.

[41] Richard Peterson argues that social scientists have increasingly come to view culture not as "a map *of* behavior" but as "a map *for* behavior," as a way to organize reality, in "Revitalizing the Culture Concept," *Annual Review of Sociology,* V (1979), 159. See also Gordon S. Wood, "Intellectual History and the Social Sciences," in John Higham and Paul K. Conkin, eds., *New Directions in American Intellectual History* (Baltimore, 1979), 27–41.

realms of society such as religion.[42] Consider, for example, the problem of dispute settlement. While we have fine studies of why colonists chose this or that dispute-settling institution[43] and of how they acted within those institutions, we need to go back a step and figure out how legal culture helped people place labels—for instance, the label of "legal dispute"—on the ambiguous words and deeds of daily life.[44]

Much intellectual history of colonial law falls into two broad categories.[45] First, there is a vigorous and painful literature exploring legal justifications for slavery, witchcraft prosecutions, coverture, the expropriation of the Indian territory, and other unusual or abhorrent practices. Second, and more commonly, historians examine how particular thinkers or intellectual developments affected the legal system. A series of articles and monographs has asked: how was colonial law influenced by Puritanism? by the Enlightenment? by Blackstone? by new lawbooks and print culture? by the civilian tradition? by the works of classical antiquity?

Unfortunately, these valuable and sometimes distinguished efforts stand out as irregular patches of color on a largely dark canvas. Since George Haskins's *Law and Authority in Early Massachusetts* showed how Puritan religious and social thought shaped the Bay Colony's law and legal institutions in its first two decades, no scholar has investigated the intellectual underpinnings of a colony's entire legal system.[46] Nor do we have a convincing synthesis tying together intellectual and legal change from settlement through 1770. To put the point bluntly, how did we get from John Winthrop to John Adams? Indeed, we need not confine our inquiry to lawyers and statesmen. How did we get from the legal assumptions of Anne Hutchinson to those of Abigail Adams and Mercy Otis Warren? How and why did constables and grand jurymen of 1760 think about law differently from their predecessors of a century before?

Broadening our traditional approach would help answer these questions. The extensive literature asking how *X* shaped the law, whether *X* was Blackstone or the classical tradition or civilian learning, tells a story of

[42] This theme is implicit in Dayton's work on abortion in early New England. In the mid-18th-century abortion case that she studied, men spoke about the incident in court in legalistic language, and women spoke in a more religious language. See Dayton, "Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village," *WMQ*, 3d Ser., XLVIII (1991), 19–49.

[43] See, e.g., Nelson, *Dispute and Conflict Resolution;* Mann, *Neighbors and Strangers;* and Offutt, "Law and Social Cohesion."

[44] William L. F. Felstiner, Richard L. Abel, and Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ," *LSRev.*, XV (1980/1981), 631–655, calls for this approach. Merry uses the concept "legal consciousness" to explore how participants in the modern court system decide whether problems are appropriately legal or not, in *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago, 1990), esp. chap. 3.

[45] My comments do not take into account the vast body of work on legal doctrine and constitutional history.

[46] Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (Hamden, Conn., 1960).

how one discrete movement or thinker affected one intellectual arena—the law. This approach slights intellectual developments whose influence upon the law was more oblique and diffuse, especially developments that cut across diverse fields of knowledge.

Consider, by contrast, Barbara S. Shapiro's *Probability and Certainty in Seventeenth-Century England,* a monograph that shows how legal thought and practice responded to a new conception of epistemology spreading throughout the seventeenth-century English intellectual world.[47] Shapiro traces the breakdown of a centuries-old dichotomy between certain, scientific knowledge and uncertain opinion. Seventeenth-century English thinkers, she argues, began to array knowledge along a continuum, with certainty at one end, mere opinion at the other, and various forms of probable knowledge in between. The seventeenth century saw the introduction of probabilistic thinking in fields as diverse as law, natural science, religion, history, and literature. Within the law, such thought provided a formal philosophical rationale for the rules of evidence then being formulated. It also influenced how judges, jurors, and laymen evaluated evidence. "New modes of thought," Shapiro concludes, "came to shape men's views of what was and was not common sense, of what was and was not well argued, and of what was and was not assumed to be true."[48]

Colonial history would benefit from exploring how broad-scale changes in intellectual moods and foundational concepts affected the legal system and colonists' understandings of the law. Shapiro's work and Shannon C. Stimson's *The American Revolution in the Law* investigate the way the legal system responded to early modern developments in epistemology.[49] While there is much more to do with epistemology, we might also look at changing ideas of human nature, the rise of concepts of privacy and gentility, the slow unraveling of prejudices against innovation, and the vicissitudes of crucial metaphors, such as the notion of balance in the natural, intellectual, and political world. Developments of such magnitude would have had spillover effects, often in unlikely places, influencing the colonists' thinking about law per se and, as Shapiro points out with respect to epistemology, shaping the very notions of common sense that suffuse a legal culture.[50]

This approach makes particular sense for the colonial period, when intellectual life was not confined within boundaries set by disciplines or professions. Most early American lawyers and judges had little or no professional training; some labored at more than one calling, combining law with medicine, trade, ministry, or government. Intellectual conduits

[47] Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships Between Natural Science, Religion, History, Law, and Literature* (Princeton, N. J., 1983).

[48] Ibid., 167.

[49] Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton, N. J., 1990).

[50] Legal anthropologists such as Lawrence Rosen furnish historians with a sophisticated model for treating law as a system rooted in "concepts that extend across many domains of social life"; Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge, 1989), 5.

and mediators such as Samuel Sewall, Samuel Johnson, and Cotton Mather served as links between law and other fields of knowledge, a role played on a grander scale in England by Francis Bacon, John Locke, and Matthew Hale.

Like many other recent intellectual historians, Shapiro tries to find connections between high-level intellectual developments and mid-level workaday assumptions within a society, between a society's legal "mandarins" and its *mentalité*.[51] Comparatively little of this work has been done in colonial legal history. In part, we have been hindered by the relative lack of evidence of nonelite legal assumptions. But we have also been hindered by the scarcity of work on elite legal opinion in the years between the early Puritans and the Revolutionary generation, especially in the field of jurisprudence. We do not know much about colonial ideas about precedent, the interrelationship of common law and statutes, and the connection between positive law and custom. And although historians have explored the social function of law in colonial New England, we need to know more about what the colonists themselves thought law should do. In their minds, what were the goals and purposes of the law? What were its dangers? Why should men and women obey it?

We might get at the workaday legal assumptions of New Englanders by looking at the colonial system of education, both secondary and collegiate. What were the intellectual consequences of grounding seventeenth-century colonists in dialectics, in faculty psychology, and in the Ramist method of creating logical epitomes? What habits of mind did this instruction create, and how did these mental predispositions affect the courtroom and the legislature? To cite a particular example, how did New Englanders' training in logic and rhetoric shape their understanding of causation and of seemingly commonsensical terms such as similarity and difference and thereby influence their scrutiny of evidence and precedent?

Students of the intellectual history of early American law and students of legal culture have much to say to one another. To learn how epistemology or metaphors of balance affected legal thought and practice is to discover something about legal culture. To explore the extent to which different ethnic groups participated in mainstream legal culture is to provide a context for the intellectual history of colonial law. A vigorous exploration of pluralistic colonial legal culture, conjoined with an intellectual history that connects the settlers' legal ideas to broad-scale developments cutting across diverse fields of knowledge, can highlight the complexity and dynamism of the early American legal world and can help dispel the prejudice lingering in some quarters that colonial law was "stable, unchanging, and in the end uninteresting."[52]

[51] I have borrowed the image of the legal mandarin from Robert Gordon, "Critical Legal Histories," *Stanford Law Review*, XXXVI (1984), 57–125.

[52] Stanley N. Katz, "The Problem of a Colonial Legal History," in Greene and Pole, eds., *Colonial British America*, 473.