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MANSLAUGHTER AND MOSAICISM IN EARLY CONNECTICUT

DAVID H. WRINN*

The distinction between murder and manslaughter is both a hallmark of the common law and a doctrine of longstanding in Anglo-American jurisprudence. Nevertheless, the Puritan Commonwealth of Connecticut did not formally recognize such a distinction until 1719, the better part of a century after settlement. Connecticut purported to ground its criminal law, and especially its capital sanctions, exclusively upon the Mosaical Law of Scripture.

The thesis that early New England law was fundamentally Bible law long ago fell to detailed scrutiny of the several early colonial legal codes.¹ There is now little doubt that English law was a much-used model for many colonial enactments, and that the legal proceedings employed throughout this period exhibit anything but the operation of some rough and rustic "popular law" which Reinsch and other scholars at the beginning of this century asserted was characteristic of seventeenth century New England justice.² Nevertheless, while subsequent research has exposed the relative

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1. *E.g.*, Woodbine, Book Review, 43 YALE L.J. 1036, 1042 (1934) (reviewing S. MORISON, RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680). Woodbine sees little evidence of Biblicism in the records and concludes that "undoubtedly the influence of that law as an active legal force in their [the New England colonies] civilization has been greatly overstated." See also Chafee, *Colonial Courts and the Common Law*, in 67 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS 132 (1952); Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. PA. L. REV. 842, 843 (1948-1949).

2. Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 370 (1907) [hereinafter SELECT ESSAYS]; Hilkey, *Legal Developments in Colonial Massachusetts, 1630-1686*, in 37 COLUMBIA STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW (1910) [hereinafter COLUMBIA STUDIES]; R. POUND, THE SPIRIT OF THE COMMON LAW (1921). These scholars viewed the history of early colonial law as very much an express rejection of the common law, and that only much later, in the eighteenth century, was there any significant reception of that law in American courts. Both Reinsch and Hilkey based their work chiefly on Massachusetts records. Of the Connecticut and New Haven colonies the former remarked that "[i]f possible, these colonies departed even

complexity of the law of that time, it has not entirely vitiated the proposition that in certain respects the influence of scripture in that law was pre-eminent. The continuous reenactment of what has come to be seen as a subcode of biblically framed and referenced *Capital Lawes* is neither easily overlooked nor explained⁸, and the student of early colonial court records is

further from the common law than Massachusetts in their system of popular courts . . . discretion of the magistrates, and in the case of New Haven, the clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters. . . ." 1 SELECT ESSAYS at 387. Hilkey concluded that "[t]he colonists did not consider English law binding. The statutes passed by the General Court were to them the positive, and the Scriptures the subsidiary law. Just so much of the English law was adopted, therefore, as the General Court chose to incorporate in its orders, or this court and the other judicial authorities saw fit to recognize in their decisions." 37 COLUMBIA STUDIES at 144. Both Reinsch's and, to a lesser extent, Hilkey's work was based primarily upon statutory research and not upon detailed study of the surviving court records. A more balanced treatment of the Massachusetts materials is found in E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS, 1620-1692, (1966). See generally G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960).

3. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 61 (1973), explains that, although the "subcodes" of capital laws—subcodes because of their prominent position in the legal codes of the day and because of their biblically referenced provisions unlike other provisions in the same codes—were used as "prime evidence" for the Bible law theory, these were but a small part of colonial law and even less of the criminal law of the time; that English law could have been cited as readily as Scripture in support of the provisions; and that much selection was involved in the enactment of these provisions, reflecting local needs and conditions. Though in the main conceded, these points really beg the question; they do not account for the hold of this manner of framing the law of serious crime on New England legal thought for a time well past that when there is general agreement that the common law had become well-entrenched.

The caution with which this topic should be approached is amply illustrated in Morris, *Massachusetts and the Common Law: The Declaration of 1646*, 31 AM. HIST. REV. 443 (1925-1926), a provocative reassessment of the General Court's response to the notorious Child Remonstrance (1646). Dr. Child and four other petitioners had complained of the discretionary powers of the Bay colony's magistrates and the lack of a book of laws with fixed penalties. They made note of the fact that despite the rights and immunities granted by the Crown charter and the understanding that Massachusetts would make no laws repugnant to those of England, "We cannot, according to our judgments, discern a settled forme of government according to the lawes of England, which may seeme strange to our countrymen, yea to the whole world, especially considering we are all English." A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 190 (T. Hutchinson comp.) (Boston 1769) [hereinafter COLLECTION], reprinted as *Hutchinson Papers*, in 1 PUBLICATIONS OF THE PRINCE SOCIETY 216 (Boston 1865) (repint 1967). The commission appointed by the General Court to answer these charges published its *Declaration*, comparing selected aspects of the settlement's law with that of England in an attempt to rebut accusations of a lack of conformity. Morris concludes that the "Pentateuchal motif" in Puritan law has been unfairly trivialized, considering the General Court's protestations of conformity in the *Declaration*, which he characterizes as "not a fair presentation of fundamental law in this constructive period" [i.e., Massachusetts in the 1640's]. Morris, *Massachusetts and the Common Law: The Declaration of 1646*, 31 AM. HIST. REV. at 446 & 452. See also R. WALL, MASSACHUSETTS BAY: THE CRUCIAL DECADE, 1640-1650, at 166 (1972). Wall concludes that the designed purpose of the *Declaration* was "to mollify any English critics of Massachusetts Bay," in light of the fact that the petitioners were threatening to go to England with their case against the colonial government. *Id.* at 179.

continually reminded of the extent to which scriptural references and usages permeate the whole, particularly the reports of criminal proceedings. The question is less whether there was ever some monolithic *Bible Law* in force at any time in the seventeenth century New England settlements, than that of the impact of scripture upon patterns of legal thinking, given what is known of the social, intellectual and political climate of that time.⁴

I propose to trace the introduction of manslaughter doctrine into the law of the Connecticut colony in an effort to reveal the mechanisms by which in the eighteenth century a Mosaicly-grounded homicide law came to be transformed into one more purposefully of common law origin. The reasons for focusing upon homicide of all the capital laws for the period are several. First, the sample of cases is marginally larger than for other categories of capital crime in this period. Secondly, the study of Mosaicism as a distinctive attitude toward the secular law is not advanced by the examination of religious crimes, like blasphemy, which, moreover, have an association with the ecclesiastical court system in early modern England. Finally, and of the greatest importance to the study of Mosaicism as a distinct jurisprudence is the fact that in this area of the criminal law the divergences between the common law and scripture are doctrinally distinct, owing to the peculiarities of the crime of manslaughter.

The present study of the Connecticut colony arises from certain peculiarities of time, place and practice. Most significant of the latter is Connecticut's distinction as the only Puritan settlement (aside from that at New Haven prior to its absorption by Connecticut in 1665) in which benefit of clergy, a prominent feature of contemporary English homicide law, never operated.⁵ The absence of this doctrine at very least suggests that some force other than the common law of crimes animated Connecticut's homi-

4. W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 37 (1975), argues from the Massachusetts trial records of the 1760's that "the continuing vitality of lingering puritanical standards is seen most clearly in the law of crime," and that "the criminal law was concerned primarily with protecting community religious and moral values . . . to give legal effect to the community's sense of sin and to punish those who breached the community's taboos."

5. G. DALZELL, *BENEFIT OF CLERGY IN AMERICA AND RELATED MATTERS* 215 (1955). The doctrine operated to spare the life of the defendant, for in England manslaughter, as felony, was punishable by death. Originally, only those in holy orders could make the plea, it having jurisdictional significance in that its granting removed the case to the ecclesiastical courts where the death penalty could not be imposed. Proof of holy orders was the ability to read scripture and this practice opened the plea to all who could read, though laity could have their clergy but once. The reading test was later abolished altogether. Eventually, the common law courts administered the case after a successful plea had been entered. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 422-424 (2d ed. 1979); I B. CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, at 48-50 (1983). Connecticut's first manslaughter act (1719) was thereby anomalous in prescribing a non-capital penalty for the crime. The act is found in 6 *PUBLIC RECORDS OF THE COLONY OF CONNECTICUT* 144 (C. Hoadly ed. 1872) [hereinafter *CONN. RECS.*].

cide law. Moreover, during this period, coinciding in its earliest stages with the Interregnum in England, there was serious Puritan agitation in Parliament for, among other proposals, the reform of certain of the criminal laws. Evidence of the transatlantic migration of ideas at this time is unexceptional enough to warrant drawing the inference that reformist platforms in the England of the 1640's and 1650's may reveal something of the motives of lawmakers in Puritan New England where, as is the case in Connecticut, the surviving records raise unusual questions but provide nothing that we might call a legislative history.

Finally, the very isolation and freedom from any direct Crown interference which characterized the early history of the Connecticut colony allow for a view of records spanning a longer period of time and undergoing more subtle changes than is possible, for example, in Massachusetts, where Crown control over the machinery of government and legal administration brought about substantial conformity to English laws as early as the 1690's. This insularity allowed Connecticut, over the course of the seventeenth century, the freedom to monitor not only *how much* but *how* English law would be received as circumstances required. Thus, in a most singular fashion, the colony enacted common-law manslaughter into law by express statute, a thoroughly unnecessary action considering that the doctrine's applicability had already been decided and allowed on appeal.⁶

In reconstructing the homicide law of early Connecticut, and in weighing the relative strengths of scriptural and common law influences, I shall endeavor to highlight both the convergences and divergences between the force and intent of the printed law and the actual proceedings before Connecticut tribunals. I think it is demonstrable that the peculiarities of this colony's homicide law are directly attributable to the lingering hold of biblicism over its legal proceedings, and that the chief mechanism for change was the virtually limitless but nonetheless circumspect application of magisterial discretion.

6. On appeal, the use of the doctrine was allowed as early as 1712. M. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 13 (1977), sees this case as "[o]ne of the few suggestions that colonials had any qualms about imposing criminal punishments without a statute. . . ." As I shall attempt to demonstrate, the reservation in this instance did anticipate "some modern conception of the primary legitimacy of statute law," *id.*, and does imply some doubt about how much of the common law they were entitled to use, *id.*, but that this particular case is *sui generis* at least; and at most, the doubt that it engendered derived more from the competing claims of *another source of law* than the more limited concern of how much of the law of England should be applied.

I.

A.

For a quarter century after its founding at Hartford (1637), the Connecticut settlement lacked any kind of charter or other formal recognition from the Crown.⁷ The Fundamental Orders (1638) which the settlers drafted in no way defined relations with the sovereign.⁸ The Orders pledged to form a government "to maintain and preserve the liberty and purity of the gospel of our Lord Jesus. . . ."⁹ The tenth provision of this quasi-constitutional document endeavored to guarantee the independence of the religiously inspired polity. It established a General Court as the "supreme power of the Commonwealth," granting it sole authority to make laws or repeal them.¹⁰ In addition, the public officers constituted themselves a Particular Court to administer justice in accordance with the "Lawes here established and for want thereof according to the rule of the Word of God."¹¹

The extent to which the Mosaical Law or *Lex Mosis* (that is, those laws regarding conduct to be gleaned from the Pentateuch) formed the foundation of the infant commonwealth's legal system readily appears in its first statute, a list of Captiall Lawes, promulgated by the General Court in December, 1642. The members of the General Court took as their source Article Ninety-four of the Massachusetts *Body Of Liberties* (1641), which consisted of a series of capital provisions with Old Testament authorities annexed to its margins. Unlike their brethren in New Haven who were also but recently out of the Bay Colony, they made no wholesale incorporation of the language of the Massachusetts statute. The Connecticut draftsmen made two excisions in the language of Article Ninety-four. They deleted

7. Connecticut did not receive a charter from the Crown until 1662.

8. *The Fundamental Orders*, in 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 519-22 (F.N. Thorpe ed. 1909). "They omitted, either intentionally or unintentionally, all reference to their royal sovereign across the seas and seem to have wished to cut themselves off from all connection with English authority and English law." C. ANDREWS, *THE BEGINNINGS OF CONNECTICUT, 1632-1662*, at 47 (1934). Parliament had not been sitting—it would not again until 1640—and Charles I was not considered likely to have granted a charter agreeable to Connecticut's Puritans. 1 N. OSBORN, *HISTORY OF CONNECTICUT IN MONOGRAPHIC FORM* 5 (1925).

9. 1 CONN. RECS. 21.

10. *Id.*; cf. Fundamental Agreement of New Haven (1639), Query V: "and the power of making laws according to the word . . ." 1 F.N. Thorpe, *supra* note 8, at 525. For the central place of scripture in their law see Query I: "Whether the scriptures do hold forth a perfect rule for the direction and government of all men in all duties which they are to perform to God and men, as well in families and commonwealth, as in matters of the church?" *Id.* at 523.

11. 1 CONN. RECS. 26. The settlement at New Haven, on October 25, 1639 decreed "thatt the worde of God shall be the onely rule to be attended unto in ordering the affayres of government in this plantatio[n]." 1 RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN 21 (C. Hoadly ed.) (Hartford 1857) [hereinafter *New Haven Records*].

altogether section five which read: "If any person slayeth an other suddenly in his anger or crueltie of passion, he shall be put to death."¹² Additionally, they removed the word "premeditated" from the murder provision which read: "If any person committ any wilfull murther, which is manslaughter, committed upon premeditated mallice, hatred, or Crueltie, not in a mans necessarie and just defence, nor by meere casualtie against his will, he shall be put to death."¹³

Why did they make these changes? Contemporary sources do not address the point. Having taken so much of the Massachusetts statute, why did they object to the homicide provisions? Certainly, the deletion of an entire crime and the alteration of the language of another are indicative of close scrutiny of the fine points of Article Ninety-four's language. One student of the period has characterized these changes as an attempt to resolve the inherent contradictions between scripture and the common law,¹⁴ but this suggestion does not account for what the Connecticut drafters might have viewed as wrong-headed about the Bay Colony homicide laws. Did these laws not conform to scripture? Were they impermissibly tainted by common law language? Did not section five of the Massachusetts law pose a distinction without a difference? These are not readily answered questions. But since the Connecticut statute was thus a self-conscious rejoinder to the Massachusetts law, as the latter was itself, in the first instance, a response to contemporary English legal practices, it is best for us to seek an answer to these questions by asking another: What do we know of the reasons behind the drafting of sections four and five of the *Liberties*? Here, the primary sources more readily support our inquiry.

The language of section five of the *Liberties* contains a peculiar turn of phrase. "Crueltie of passion" looks very much like "heat" or "furie" or any of the other phraseology that Elizabethan treatise writers had employed to describe the "hot blood" of manslaughter.¹⁵ The word "suddaienly" was, in

12. The 1642 Connecticut statute is found at 1 CONN. RECS. 77 (J. Trumbull ed.) (Hartford 1852).

It is conceivable that they dropped the provision because its citations did not conform to scripture—originally given as Numbers 25:20-21 instead of 35:20-21—but the Connecticut Code of 1650 also failed to enact a correctly cited form of the Massachusetts law which appeared in the LAWS AND LIBERTIES OF 1648. The remaining citation, Leviticus 24:17, merely reiterated the illegality of killing a man. Taken together, the passages still do not deal with sudden anger but killing by smiting in enmity or by lying in wait.

13. BODY OF LIBERTIES OF 1641, Art. 94, § 5 & § 4, reprinted in, COLONIAL LAWS OF MASSACHUSETTS 32-61 (W. Whitmore ed. 1890).

14. W. Holdsworth, Law and Society in Colonial Connecticut, 1636-1692, at 385 (unpublished Ph.D. thesis, Claremont Grad. Sch. 1974, in Connecticut Historical Society, Hartford, Conn.)

15. W. LAMBARDE, EIRENARCHA, OR OF THE OFFICE OF THE JUSTICES OF THE PEACE 252 (London ed. 1602); M. DALTON, THE COUNTRY JUSTICE 223 (London ed. 1619); E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54-55 (London 1809) (1st

truth, the touchstone of the entire doctrine.¹⁶ Manslaughter was thought of as a sudden, essentially unlooked for encounter, in which a heated quarrel gave rise to an intentional killing. On the other hand, "suddenly," as that term is employed in scriptural discussion of homicide, describes but an accidental killing without intent or passion of any sort.¹⁷ The Mosaic Law

ed. 1644). "Some manslaughters be voluntary, and not of malice forethought, upon some sudden falling out . . . [a]nd this for distinction sake is called manslaughter." *Id.*

16. Common law manslaughter originally arose in the sixteenth century as a response to statutory strictures placed upon what up to then was the rather free availability of the plea of benefit of clergy in cases of murder. Thus, clergy could no longer be interposed in cases where the facts alleged and proved involved a deliberate or premeditated killing. 3 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 44 (1883), and statutes cited therein. On statutes regulating benefit of clergy, see J. BELLAMY, in *Benefit of Clergy in the Fifteenth and Sixteenth Centuries*, *CRIMINAL LAW AND SOCIETY IN LATE MEDIEVAL AND TUDOR ENGLAND*, 130 (1984). Concurrently, the notion of "chance medley" as an accidental killing not altogether without the killer's fault and without an evil intent was altered to encompass sudden, unpremeditated but still intentional killings. The doctrine which accounted for this new distinction between murder and whatever was left of culpable homicide was that of "hot" and "cold" blood. Kaye, *The Early History of Murder and Manslaughter*, 83 L.Q. REV. 365, 589-90 (1967). Lambarde, a sixteenth century treatise writer, called it "furie, which was (at first) without malice and could not in so short time be appeased." W. LAMBARDE, *supra* note 15, at 252. Lest the hot blood be identified with the supposed cold blood of malice aforethought (malice prepenche), it had to have arisen from a spontaneous quarrel, thereby, it was thought, preventing premeditation. Hence, the statement by Lord Coke that "There is no difference between murder and manslaughter, but that the one is upon malice forethought and the other upon a sudden occasion, and therefore is called chance medley." E. COKE, *supra* note 15, at 55. The crime of manslaughter remained clergyable. 3 J. STEPHEN, *supra*, at 59-60, J. BAKER, *supra* note 5, at 429. In practice, however, this distinction was inexact and cumbersome, and it gradually fell out of use. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 285 (1st ed. 1971); see *infra* note 129.

17. Numbers 35:22,24: "But if he thrust [push] him suddenly without enmity . . . [t]hen the congregation shall judge between the slayer and the revenger of blood according to these judgments. . . ." There is little doubt of a misreading. The Puritan GENEVA BIBLE (1560) (London ed. 1592), for example, translates this passage thus: "But if he punished him unadvisedly, & not of hatred. . . ." In the margin, the gloss "suddenly" appears as the Hebrew for "unadvisedly," thus making it clear that the act was understood as essentially unintentional. Therefore, according to scripture, one either "thrust" another of hatred, or "suddenly" without hatred. See, e.g., J. GREENSTONE, *THE HOLY SCRIPTURES: NUMBERS WITH COMMENTARY* 358 (Jewish Pub. Soc'y. of Am. 1939). That the common law allowed for additional categories of homicide was well understood by contemporary lawyers of any learning. Francis Bacon, Attorney-General, in an argument before Star Chamber in 1614 stated that "for the law of God, there is never to be found any difference made in homicide, but between homicide voluntary and involuntary, which we term misadventure . . . It is true that our law hath made a more subtle distinction between the will inflamed and the will advised; between manslaughter in heat, and murder upon prepenched malice, or cold blood, as the soldiers call it. . . ." F. BACON, *Charge Touching Duels*, in 2 *WORKS OF LORD BACON* 297 (B. Montagu ed. Philadelphia 1841). This distinction is still not appreciated: "The Bay Colony code instead employed the biblical death penalty for killing in the heat of passion." P. HOFFER & N. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803*, at 37 (1981). Scripture does not admit of the common-law distinction. 8 *ENCYCLOPAEDIA JUDAICA*, s.v. Homicide, at 944 (1971). Only the later Talmudic Law began to make those distinctions

accorded a city of refuge (exile) for the man guilty of such negligence, and it prescribed no additional penalty.¹⁸ Clearly, no part of section five, in spite of the biblical citations appended to it, had any literal foundation in scripture. In this respect, the section was unlike all the other sections of Article Ninety-four.

The conclusion is inescapable that by excising and reassembling biblical phrases, the Massachusetts drafters of the *Liberties* had in fact sought to reject outright this aspect of the English common and statute law. This determination is hinted at in the answer of the Bay Colony's Reverend Elders to certain questions propounded to them by the magistrates in 1644. The Elders cited Numb.35:16-18 and 20-21 for their reading of the colony's capital crime for killing "upon prepedned malice" and that "upon sudden provocation," even though they recognized that the former was "of a greater guilt" than the latter.¹⁹ The Elders cast their response in patently common law terms. More than this, Numb. 35:20-21 could not possibly support their position that the Lord's Word offered any sort of justification for their interpretation, because according to the cited passage, he who "thrusts him suddenly" should not die. The reason for this biblical conclusion was clear: the act was unintentional ("without enmity"). So unmistakable is the scriptural language, that it cannot even be assumed that the Elders took it as a "warrant," or justification by deduction, for their position. Thus, there is little doubt that the Elders knew well the difference between murder and manslaughter, and that they chose for some reason to act as if both crimes were equally proscribed by scripture. Other than this particular reply to the magistrates, however, there is no direct evidence to show why the Elders thought that manslaughter should invariably merit the same punishment as murder.

An explicit statement of the Puritan view on the subject of manslaughter can be found, however, in a contemporary English tract reporting the activities of the Nominated Parliament.²⁰ A Committee for Regulating the

between premeditated and unpremeditated homicide with which Anglo-American law is familiar. *Id.* at 945. *But see* M. SULZBERGER, *THE ANCIENT HEBREW LAW OF HOMICIDE* 40, 63 & 86 (1915).

18. Exodus 21:13: "And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee." Since the killing was unwilling by man in this circumstance, it was ascribed to the will of God. *Exodus*, in *CAMBRIDGE BIBLE COMMENTARY*, 134 (R. Clements commentator 1972); M. SULZBERGER, *supra* note 17, at 39-40.

19. The Elders responded that:

Certaine penalties may and ought to be prescribed to capitall crimes, although they may admitt variable degrees of guilt, as in case of murder upon prepedned malice and upon sudden provocation there is prescribed the same death in both, though murder upon a prepedned malice be a farre greater guilt then upon sudden provocation.

COLLECTION, *supra* note 3, at 183, 1 PUBLICATIONS OF THE PRINCE SOCIETY 209, 2 J. WINTHROP, *JOURNAL, History of New England* 252-53 (J. Savage ed.) (Boston 1853).

20. L.D., *AN EXACT RELATION OF THE PROCEEDINGS & TRANSACTIONS OF THE LATE*

Laws had been appointed to prepare a bill for a "new body or Modell of the Law," essentially, a thorough revision of statute, common and customary law. The committee's report on the criminal law of England found that both "right reason" and the "Law of God" were contrary to "the putting men to death for Theft, The sparing the lives of men for Murther, under the notion and name of Manslaughter, a term and distinction not found in the righteous Law of God. . . ." ²¹ The committee may even have made this statement in light of the Massachusetts legislation. ²²

In any event, whether specific scriptural authority could be cited or not, the Bay Colony Puritans and their reformist counterparts in England recognized the common law doctrine of manslaughter as illogical, often unfair ²³, and unsanctioned by God, for the crime still involved a "wilfull" killing. How clearly this view lay athwart common-law doctrine is seen in the fact that when Puritan Massachusetts fell under both a royal charter and governor later in the seventeenth century, the Privy Council in London took the opportunity to pass upon this and the other capital laws of the colony. The Council formally rejected six of the capital laws as repugnant to the laws of England, one being the killing in sudden anger provision. ²⁴ Predict-

PARLIAMENT (London 1654) (Beinecke Library, Yale Univ.), 2 SOMERS TRACTS 82-101 (London 1751). The author notes that the chief reasons for calling for a new body of law were "the Intricacy, Uncertainty, and Incongruity in many Things with the Word of God and right Reason, in the Laws as now they are." *Id.* at 15, 2 SOMERS TRACTS at 92.

21. *Id.* at 17, 2 SOMERS TRACTS at 93.

22. The tract says of the Committee's report:

A work great, and high and great esteem with many, for the great fruit and benefit that would come by it: By which means the great volumes of Law would come to be reduced into the bigness of a pocket book, as it is proportionable in *New England* and elsewhere: A thing of so great worth and benefit as *England* is not yet worthy of, nor likely in a short time to be so blessed as to enjoy [sic]. . . .

Id. at 17-18, 2 SOMERS TRACTS at 94. See S. E. PRALL, *THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION, 1640-1660, passim* (1966).

23. E.g., C.G. COCKE, *ENGLISH LAW: OR A SUMMARY SURVEY OF THE HOUSEHOLD OF GOD ON EARTH, AND THAT BOTH BEFORE AND UNDER THE LAW; AND THAT BOTH OF MOSES AND THE LORD JESUS* 77 (London 1651) (Beinecke Library, Yale Univ.) Cocke's diatribe on the present fallen state of English law contains the following description of benefit of clergy, by which one convicted of manslaughter might escape the noose: "[Some judges] go against their own knowledge in the Law; as in the case of admitting such to read as they know cannot, and more evidently such as are not capable by Law, as those branded before, not once, but seven times, whereby the Rogue is as preserved, so encouraged. . . ." *Id.* at 89. Cocke is referring to the practice of branding in the thumb, thereby indicating that the individual had already had his once-bestowed clergy. The author concluded that "it is evident, that the *English* now long and thirst after a rational settled Law in all the parts of the whole body, taking the Law of God for the Rule," *id.*, and proposed that a Committee undertake the task, thus foreshadowing the work of the Committee for Regulating the Laws.

24. E. POWERS, *supra* note 2, at 304-305. The other capital laws rejected were: idolatry, witchcraft, blasphemy, poisoning and incest. P. MILLER, *THE NEW ENGLAND MIND, FROM COLONY TO PROVINCE 168* (1953), notes that in the years after the Dominion of New England had displaced Massachusetts's original charter government (*i.e.* from 1689 onwards) two

ably, the Council pointed to the fact that killing "upon sudden heat" was not in all cases a hanging offense in England.²⁵

The Connecticut drafters of the 1642 statute, thoroughly unconstrained by the repugnancy clauses of contemporary royal charters, may not have felt the need to justify the removal of manslaughter from the homicide law; strictly viewed, scripture forbade its incorporation.²⁶ Something of the same attitude may have accounted for the second deletion made to the murder provision of Article Ninety-four. Expunging the word "premeditated" from the definition of murder thereby destroyed what remained of the common-law distinction between "malice aforethought" and killings "on the sudden" or "upon sudden provocation."²⁷ The resulting definition, though still cast in common-law terminology, was an injunction against killing much more in accord with the *Lex Mosis*.²⁸ An attitude similar to that of the Connecticut drafters had, after all, already surfaced in the Rev. John Cotton's proposed code for Massachusetts Bay (1638). Cotton's proposal, an example of rigorous biblical literalism in legal drafting, defines murder as "a willful manslaughter, not in a mans necessary defence, nor casually committed, but out of hatred or cruelty, to be punished with death."²⁹ Cotton's draft also has no provision akin to section five of the subsequently

"heavy obligations" were laid upon New England thought: (1) the incorporation into its social theory of loyalty to the Crown; and (2) accommodation to the idea of toleration (*i.e.* reference to the Act of Toleration, 1 William & Mary ch. 18 (1689)). Men like Increase Mather thus were compelled to set themselves the task of reconciling the notion of "a city upon a hill" to this new reality, in order to salvage what they could of self-government for their colonies. The attempt to re-enact the old capital laws was an essential part of the program, but the Privy Council was not fooled, particularly by the Bay Colony's attempt to skirt the issue of religious toleration. Miller writes: "The Matherian scheme suffered a serious setback when the Crown disallowed the capital punishment act (London was astute enough to appreciate that under the heading of subversive idolatry and blasphemy Quakers or even good Anglicans might find themselves, in the provincial sense of the terms, guilty.)" *Id.* at 174-75. Miller comments that Connecticut had less trouble than Massachusetts in carrying over the covenant idea intact and "moving with it into the eighteenth century." *Id.* at 177.

25. E. POWERS, *supra* note 2, at 305.

26. For the repugnancy clauses, see Charter of Massachusetts Bay (1629) in 3 F.N. THORPE, *supra* note 8, at 1853 ("And to make Lawes and Ordinances . . . soe as such Lawes and Ordinances by not contrarie or repugnant to the Lawes and Statuts of this our Realme of England.") Similar language is to be found in the later (1662) Connecticut charter. See *id.* at 533.

Besides murder, the *Lex Mosis* recognizes only accidental homicide and justifiable homicide (self-defence). It is not the case, as Hoffer and Hull assert, that Connecticut "removed killing in the heat of anger from the list of capital offenses. . . ." P. HOFFER & N. HULL, *supra* note 17, at 37. The colony had never enacted such a law, either in 1642 or in the code of 1650.

27. See *supra* note 16.

28. G. HASKINS, *supra* note 2, at 148-49.

29. COLLECTION, *supra* note 3, at 174, 1 PUBLICATIONS OF THE PRINCE SOCIETY at 198-99.

adopted Massachusetts *Liberties* of 1641. Interesting too is the correct ascription of verses from chapter thirty-five of Numbers to the murder provision: verses twenty-one to twenty-four, those prescribing exile for the accidental killer, thus justify the language "nor casually committed." The Bay Colony never adopted this code, but the Connecticut men who drew up the 1642 statute may have consulted a copy of it with approval.³⁰

Thus, in respect to the use of biblical warrants for their capital laws, the Connecticut drafters of 1642 achieved a greater fidelity to scripture than either Massachusetts or New Haven. Holdsworth values this result as a clarification of the uneasy relation between the common and biblical law, and as a response to little differentiation in the Bible between murder and manslaughter. Just so, but rather than the "practical and simple solution" to the confusion, as he sees it, the thrust of the Connecticut enactment is probably better viewed as the triumph of a parochialism which swept aside the attempts of the Massachusetts drafters to accomplish the same end by contrived and explicit negation. There is no need to view the embrace of the Pentateuchal law as either practical or simple; to do so is to undervalue the perceived need to make the change and the power of the choice made. No matter of practical necessity, we can rest assured, dictated that the first formal legal act of the General Court had to take the form of a litany of great crimes, but viewing these same crimes also as great sins makes their early promulgation comprehensible. Holdsworth's assertion that the Connecticut definition of homicide enlarged the discretion of the courts is sound, but not at this early stage in the settlement's history. The circumstances of the settlement's founding and her relations with Massachusetts, the mother colony, suggest, insofar as we have evidence to support it, at least an early aversion to the encroachments of magisterial discretion.³¹ We must not disable the 1642 murder statute with hindsight. Nothing, either in

30. It was available to the new Haven settlement's leader, the Rev. John Davenport, shortly after his group's arrival there in 1638. Calder, *John Cotton and the New Haven Colony*, 3 NEW ENG. Q. 82-94 (1930); R. OSTERWEIS, *THREE CENTURIES OF NEW HAVEN, 1638-1938*, 17-18 (1953).

31. In a letter dated 1638 to Gov. Winthrop of Massachusetts, the Rev. Thomas Hooker, founder of the Connecticut settlement, stated that:

in the matter which is referred to the judge, the sentence should lie in his breast, or be left to his discretion, according to which he should go, I am afraid it is a course which wants both safety and warrant. I must confess, I ever looked at it as a way which leads directly to tyranny, and so to confusion, and must plainly profess, if it was in my liberty, I should choose neither to live nor leave my posterity under such a government. Sit liber judex, as the lawyers speak. 17 Deut. 10,11—Thou shalt observe to do according to all that they inform, according to the *sentence of the Law*. Thou shalt seek the Law at his mouth: not ask what his discretion allows, but what the Law requires. . . . And we know in other countries, had not the law overruled the lusts of men and the crooked ends of judges, many times, both places and people had been, in reason, past all relief, in many cases of difficulty. . . .

1 CONN. HISTORICAL SOCIETY COLLECTIONS 11-12 (Hartford 1860).

the particular biblical definitions offered by this statute, or the Mosaic Law itself, necessitates the kind of discretion on the part of the civil magistrate to which Holdsworth makes reference.

Eight years after the enactment of the Captiall Lawes, the General Court promulgated the first full code of laws for Connecticut (1650).³² The old Capitall Lawes were transferred to the new statute in their entirety. A new title, "Manslaughter," compiled elsewhere in the code, was borrowed from the language of the Massachusetts *Laws and Liberties of 1648*.³³ This section read:

It is ordered by this Courte and Authority thereof, that if any person in the just and necessary defence of his life, or the life of any other, shall kill any person attempting to rob or murder in the field or high way, or to breake into any dwelling house, if hee conceive hee cannott with safety of his own person otherwise take the Felon or Assailant, or bring him to tryall, hee shall be holden blameless.³⁴

The designation for this title meant but killing in general and not the specialized term at common law.³⁵ What it actually described was homicide *se defendendo*³⁶ as it was then called (self-defence), and so it had been labelled in the Massachusetts code.

It is curious that the need was felt in either colony's code for additional language in support for the two exceptions that already existed in the Captiall Lawes, corresponding to the traditional exception for accident (called misadventure at common-law) and self-defence sanctioned by scripture. Originally drafted for inclusion in the *Laws and Liberties of 1648*, this provision was undoubtedly the fruit of that General Court's request for English lawbooks in 1647.³⁷ In this, the 1650 draft conformed with several minor

32. 1 CONN. RECS. 138.

33. LAWS AND LIBERTIES OF 1648, at 37 (1648) (facsimile reprint 1929).

34. 1 CONN. RECS. 539. There is similar language in the justice manuals of the period. See, M. DALTON, *supra* note 15, at 228-29, W. LAMBARDE, *supra* note 15, at 215. The Puritans did not, however, enact the language from the justice manuals that permitted the taking of a life in defence of one's property, this being without precedent in scripture.

35. BODY OF LIBERTIES, art. 94, § 4. An indictment from a 1667 Connecticut case reads, for example, "thou has committed murther which is man slaughter by murdering thy wife. . . ." 3 CONNECTICUT COLONIAL PROBATE RECORDS, COUNTY COURT 1663-1677, at 71, in CONNECTICUT STATE ARCHIVES; N. Lacy, Transcript of the Records of the Court of Assistants, 1665-1701, at 7 (1937) (unpublished M.A. thesis, Yale University, in Connecticut State Archives).

36. E. COKE, *supra* note 15, at 55.

37. The General Court sent off to London for copies of both Dalton's *Countrey Justice* and Coke's works. 2 MASS. COL. RECS. 212. Governor Winthrop of Massachusetts was known to possess a copy of W. LAMBARDE'S *Eirenarcha*, G. DALZELL, *supra* note 5, at 185, and Wm. Pynchon, Winthrop's contemporary and founder of Springfield, Mass., was familiar with both

changes of common law origin made to the text of the *Liberties*. It clarified the viability of certain English notions of self-defence (for example, the sanctity of the home), but what is most telling is again what the Connecticut draft omits. The provision makes no mention of defence of goods or property as sufficient justification for the taking of the life of another. Unlike any similar provisions found in the English lawbooks, this provision insists that the endangered party attempt to bring the attacker to trial. Puritan notions of justice would have recoiled at the suggestion of defence of property as sufficient justification for the taking of a life.³⁸ So too would they have considered the bringing of the villain to justice and the acknowledgement of his sin to be almost as important as the right of the endangered party to take strong measures for his own safety. Thus, the Puritans borrowed freely from English law where it was not at variance with scripture, but their refusal to add these distinctions to the capital laws proper underscores a reverence for the divine word which would not brook the emendation of foundational concepts: material drawn from outside scripture *had* to be compiled elsewhere.

No acts were passed after 1650 which bear upon the issue of homicide. The revisors of the 1672 Connecticut code of laws did delete the phrase "wCH is manslaughter" from the murder statute. This emendation occasioned no change in the effect of the law. The drafters may have been concerned that the term "manslaughter," increasingly employed in the seventeenth century to describe a particular crime under English law, confuse the meaning of the provision (although the self-defence provision continued for decades to retain the word in its more antique usage).

More generally, the closing years of the seventeenth century did see a significant increase in a number of enactments in other areas of the law which tended to bring colonial ways into closer conformity with the legal customs of the mother country.³⁹ In the face of these developments, the capital laws remained scriptural. The colony grew and with it the incidence of serious crime and the frequency and formality of criminal proceedings. But there was no rush to redesign the penal code.⁴⁰ In England, the re-

Dalton's work and Fortesque's *On the Laws of England*. COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639-1702, at 157 (J. Smith ed. 1961).

38. Cf. *infra* note 43.

39. 3 N. OSBORN, *supra* note 8, at 53. The royal governorship of Sir Edmund Andros, briefly imposed in the late 1680's, also heightened the pressure upon Connecticut to conform its laws to those of England. Reinsch traces the colonial assertion of certain English rights like that of habeas corpus to this period. 1 SELECT ESSAYS, *supra* note 2, at 384.

40. R. BUSHMAN, FROM PURITAN TO YANKEE 189-90 (1967). Actually, any disproportion in the number of criminal laws was probably as great as at the establishment of the settlement, at which time, as I have argued, the Capitall Lawes appeared more severe and numerous than the needs of the people might have warranted.

Connecticut did incorporate two new capital offenses in the 1672 code. The incest provi-

sponse to changing social conditions was the swelling of capital crimes to over some two hundred by 1702.⁴¹ In Connecticut, legislative efforts attempted to eradicate criminal behavior more by the pervasive encouragement of godly living in day-to-day matters than by fear of greater punishment.⁴² Such a response was consistent with a view that true law and the outlines for the shaping of the righteous community were to be found in the Book: the capital crimes could not be enlarged without express authority in scripture.⁴³

sion was definitely in response to the word of scripture, for the General Court so passed upon the question of its punishment in an advisory opinion in 1665. (It was dropped from the 1702 revision of the statutes.) This crime was never capital in Massachusetts, although the Cotton draft had made it so. Cotton Code Ch. 7.19, in COLLECTION, *supra* note 3, at 175, 1 PUBLICATIONS OF THE PRINCE SOCIETY 199. In England, Blackstone states that incest was made capital (along with adultery) during the Interregnum, but non-capital again at the beginning of the Restoration and relegated to the ecclesiastical courts. 4 W. BLACKSTONE COMMENTARIES *64. The rape statute, unlike its Bay Colony counterpart and English law, contained no age of consent. *Id.* at *212, G. HASKINS, *supra* note 2, at 150-52, detailing the history of the various Massachusetts laws leading up to the enactment of 1648. This law was mitigated somewhat by its calling for conviction only upon speedy prosecution and complaint, evocative of the earliest English law on the subject, 4 W. BLACKSTONE COMMENTARIES at *211-212, but not in accord with the contemporary practice which made the crime a felony and non-clergyable. *Id.*

41. 1 N. OSBORN, *supra* note 8, at 430. By the end of the seventeenth century, the following crimes were excluded from benefit of clergy in England: (1) high treason (always so); (2) petty treason; (3) murder; (4) arson; (5) burglary; (6) housebreaking and putting in fear; (7) highway robbery; (8) horse stealing; (9) stealing from a person anything above the value of a shilling; (10) rape and abduction with intent to marry. 1 J. STEPHEN, *supra* note 16, at 467. Worse was to come. For one view of the legislative mindset, see E. THOMPSON, WHIGS AND HUNTERS (1975) (contextual study of the "Black Act" of 1723).

42. R. BUSHMAN, *supra* note 40, at 6. Bushman claims that opportunities for private gain vastly increased after 1690 with the expansion of markets for farmers and merchants alike, and that this economic boom "precipitated clashes" with religion, law and authority, as the internal cohesiveness of a society in which obedience to its laws and magistrates was a reflection of God's eternal dispensation for the faithful disintegrated in the face of the headlong pursuit of prosperity. It was in this state of affairs that the Great Awakening flourished in the first half of the eighteenth century. *Id.* at 183-87 & 193-94.

43. The two acts imposing the death penalty which were exclusively of English origin appeared in the 1702 Connecticut code, but these provisions were excluded from the list of capital laws, following in separate sections (like the self-defence provision). One, an Act Against High Treason, was undoubtedly a direct response to political pressures, chiefly from the Board of Trade in London to submit laws for review. The law is nearly verbatim rendering of Massachusetts legislation from the ACTS AND LAWS OF MASSACHUSETTS BAY (1699). See generally C. ANDREWS, FANE'S REPORTS ON THE LAWS OF CONNECTICUT (1915). The other statute, an Act to Prevent the Destroying and Murthering of Bastard Children, first enacted in 1699 and patterned after Massachusetts legislation of 1696, was a response to a recent case in the Connecticut village of Farmington. CONNECTICUT COLONIAL RECORDS, NEW ENGLAND 1659-1701, at 92-93, N. LACY, *supra* note 35, at 290-92, CONNECTICUT STATE ARCHIVES, 1 Crimes and Misdemeanors 219-23 [hereinafter C & M], 4 CONN. RECS. 285. Since the Massachusetts act is a literal version of a Jacobean statute, 21 Jac.1, ch. 27, this is the first instance of Connecticut's directly enacting English criminal legislation (although the English statute is not cited). Hoffer and Hull correctly note that infanticide is just as well a biblical

B.

This substantive as opposed to predominately didactic function of scripture in Connecticut's criminal law is better understood when compared to the contemporary statutory framework of a sister colony. There, Puritan orthodoxy did not constrain the settlers to limit their legal authorities in the same manner; on the contrary, their heterodoxy probably had the opposite effect. Rhode Island in fact owed its existence to Roger Williams' banishment (1636) and that of other dissenters from Massachusetts for religious intransigence and sedition. Rhode Island's *Acts and Orders of 1647*,⁴⁴ besides guaranteeing all the protection of "some known law, and according to the letter of it,"⁴⁵ proclaimed its resolve to make laws "conformable to the laws of England so far as the nature and constitution of our place will admit."⁴⁶ In contrast, the Epistle⁴⁷ to the Connecticut code of 1672 proceeded to limit the effect of English law to its "understanding" of that law,⁴⁸ and reiterated its chief goal of ensuring that "pure Religion . . . according to

crime, but they also assert that the use of the Jacobean statute is thus evidence of the fact that "the codemakers of New England did not mention the crime of infanticide for they never derived their notions of homicide from holy scripture." P. HOFFER & N. HULL, *supra* note 17, at 37. No puritan settlement enacted all of the judicial law of Moses, but by the beginning of the eighteenth century it is conceded that they would have preferred the English statute to the unelaborated scripture. The authors do suggest at another point in their analysis that the adoption of the English statute occurred at a time when Puritan courts were becoming increasingly Anglicized and when the statute's chief virtue was clarity and a formalized restatement of Puritan views on criminality. *Id.* at 59. Moreover, the fact that infanticide was not outlawed earlier hardly proves a nonreliance upon scripture, for the evidence surrounding the eventual enactment of laws against adultery, rape and incest all agree that the Word provided justification and not the common and statute law.

44. 1 RECORDS OF THE COLONY OF RHODE ISLAND 156 (J. Bartlett ed. Providence 1856); EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719, at 3-57 (J. Cushing ed. 1977).

45. ACTS AND ORDERS OF 1647, Touching Laws, 1.

46. *Id.* at 4.

47. The early codes all contained an introductory epistle or letter, explaining the provenance of the laws and the polity which promulgated them. The intended audience was probably the king and his ministers and not the people at whom the laws were directed. The Connecticut Epistle in the code of 1672 was the work of John Allyn, Secretary of the General Court. The letter is declarative of the purposes of the ensuing particular legislation and is modelled on a similar epistle or preface to the Massachusetts LAWS AND LIBERTIES OF 1648. The epistles purported to settle the question of the order of precedence of the rival scriptural and common law. The Massachusetts epistle, drafted two years after the irksome Child Remonstrance, *supra* note 3, instructed that all of the law for the settlement was derived from that body of laws given by God to the Israelites. See *infra* note 83. The primacy of the law of God as manifested in the law of Moses is also clearly stated in the epistle to the Code of 1658 of Plymouth Colony. See *infra* note 82. Indeed, the Bay Colony epistle intoned that the "distinction which is put between the Lawes of God and the lawes of man, becomes a snare to many as it is mis-applied on the ordering of their obedience to civil Authorities. . . ." See Morris, *supra* note 3, at 453 note 68.

48. See *infra* note 85 and accompanying text.

the Gospel of Our Lord Jesus may be maintained amongst us, which was the end of the first Planters . . . and ought to be the endeavours of those that shall succeed to Uphold and Encourage unto all Generations." The Rhode Island codifiers merely paraphrased St. Paul (the "Doctor of the Gentiles"): "that the law is made or brought to light . . . for the lawless and disobedient" and concluded without more that "upon the point, may be reduced the common law of the realm of England, the end of which is . . . to preserve every man safe in his own person, name and estate. . . ."49

The contrasting position on the source of law mirrored the disagreements that Williams had had with the Bay Colony (and, *ex hypothesi*, would have had with Connecticut as well). Williams' difficulties in Massachusetts stemmed as much from his views on secular authority as from his Separatist leanings within the Church. His conviction that worldly experience partook of both a spiritual as well as natural dimension had led him to question the Puritan assumption—fully operational in Massachusetts—that the institutions of Church and State were subsumed in the unique calling of the civil magistrate or ruler in a Christian polity to promote both order and religious purity. Williams called for a separation of Church and State whereby the civil magistrate was given leave to function only within the natural world: to the Church was left spiritual concerns without the means of temporal enforcement.⁵⁰

49. ACTS AND ORDERS OF 1647, Touching the Common Law.

50. Mosaicism found no ally in Williams. On the contrary, he explicitly denied the value or binding nature of Mosaic precedents. He asserted that the Old Testament dispensation under the laws of Moses had been forever displaced by that of Christ; that He had appointed "spiritual remedies" for "spiritual maladies" and never had indicated any need of the sword to achieve the salvation of the world. R. WILLIAMS, *The Bloody Tenent yet more Bloody* (1652), in 4 COMPLETE WRITINGS OF ROGER WILLIAMS 185-86 (1872) (reprint 1963). Israel's laws were time-bound and of limited religious or even allegorical import: "To make the *shadows* of the *old Testament* and the *Substance* or *Body* of the *New*, all one, is but to confound and mingle *Heaven* and *Earth* together, for the *state* of the *Law* was *ceremoniall* and *figurative*, having a *worldly Tabernacle* with *vanishing* and *beggarly Rudiments*. . . ." *Id.* at 450 (emphasis in original).

Williams penned both this tract and a previous one, *The Bloody Tenent, Of Persecution, For the Clause of Conscience* (1644), while in England where he hoped to procure recognition for his new settlement from Parliament. Meanwhile, aware of the potentially adverse impact of Williams' writings on its relations with the as yet unstable home government in England, the Massachusetts colony set the Rev. John Cotton to the task of refuting Williams' claims. Cotton's rebuttal, entitled *The Bloody Tenet, Washed, and Made White in the Blood of the Lambe* (London 1647) (Beinecke Library, Yale Univ.), deliberately took up the question of the civil magistrate's duty to safeguard religious purity and, *inter alia*, declared that the judicial law of Moses, such as was of "moral equity" (*infra*) was binding upon the government of men. *Id.* at 55. According to Cotton,

It is evident the civill sword was appointed for a remedy . . . by that Angell of Gods presence . . . And that Angell was Christ . . . And therefore it cannot truly be said, that the Lord Jesus never appointed the civill sword for a remedy in such a case. For he did expressly appoint it in the Old-Testament; nor did he ever abrogate it in the New. The

Here we see clearly the theo-political import of the Bay Colony and Connecticut *Capitall Lawes*. For these Puritan communities the Lawes stated first principles of social control; they were directed with equal and undifferentiated vigor at heresy and social disorder; indeed, the one was synonymous with the other. For men like Williams and his fellow settlers in Rhode Island, the very insistence on separation of the State from the Church, whether narrowly grounded on Separatist doctrine or more widely conceived as a unifying element in a heterodox climate⁵¹, led naturally to the abolition of sanctions for purely religious offenses as well as the free importation of more secular legal language and principles. For this latter purpose the common and statute law of England was largely unobjectionable.⁵²

In consequence, the capital laws of Rhode Island follow the English pattern set forth in any of the justice manuals (that is, in descending order of seriousness, of high treason, petit treason, rebellion and so forth), citing

reason of the Law, (which is the life of the Law) is of eternell force and equity in all Ages.

Id. at 67 (emphasis in original). Because Christ "expressly authorized civil magistracy in the New Testament", and "has given no express laws or rules of righteousness . . . in the administration of civil justice," Cotton concluded that "either He leaves them to act and rule without a rule (which derogates from the perfection of Scripture), or else they must fetch their rules of righteousness from the law of Moses. . . ." *Id.* at 177-78.

In respect to the specific issue of capital offenses, Cotton countered that the civil magistrate had jurisdiction over heinous religious as well as secular crimes, citing St. Paul's appeal to Caesar's judgment seat for alleged wrongs of both a civil and religious nature. *Id.* at 58 citing *Acts* 25:10. From this scriptural authority, Cotton deduced four principles, the first being, "That a man may be such an offender in matters of Religion (against the Law of God, against the Church, as well as in civill matters against *Caesar* as to be worthy of death," and the fourth being, "That the civill Magistrate . . . may and ought to be so well acquainted, not onely with civill causes, but also with causes of Religion, especially such as concerne life, as to be able to judge, though not of all questions, yet of capitall offences, against Religion, as well as against the civill State." *Id.* at 50 (emphasis in original).

51. Warden, *The Rhode Island Civil Code of 1647*, in *SAINTS AND REVOLUTIONARIES* 138, 141-42 (G. Hall ed. 1984).

52. Warden argues that the Rhode Island code gives but the appearance of conformity to English law, and that any appeal to that law had as its motive unity/consensus among the constituent towns, and the avoidance of criticism and scrutiny by both Parliament (*cf.* the Child Remonstrance in Massachusetts) and Rhode Island's more powerful neighbors. *Id.* at 145. Nevertheless, Warden concedes that the Rhode Island code avoids biblical citations as justification for its specific provisions. *Id.* at 148. His argument that the illogical arrangement of crimes in the code owes its origin to the order of the second table sins of the Decalogue, *id.* at 149, cannot be used profitably to claim that the code incorporates as much biblical substance as the Massachusetts, Connecticut and New Haven documents. Not coincidentally, the Rhode Island code included only those crimes capital by both the law of England and scripture, thereby implying that the issue of conformity was less "superficial" than Warden suggests. See Murrin, *Trial by Jury in Seventeenth-Century New England*, in *SAINTS & REVOLUTIONARIES*, *supra* note 51, at 167.

English statutes and English treatise writers.⁵³ In a section entitled "Touching Murdering Of Fathers and Mothers," the code acknowledges the "wisdom of the State of England, under whose command we are. . . ."⁵⁴ The list of homicides and statutory citations are substantially those of Michael Dalton, a treatise writer whose manual for justices of the peace was popular at the time. This section speaks of those homicides "tolerated by the laws of England," that is, the necessary execution of justice and self-defence.⁵⁵ So too does this Rhode Island statute, unlike both the Connecticut and Massachusetts codes, contain an express misadventure provision, citing more English statutes and the law of forfeitures. Under a heading elsewhere entitled "Casual Death," non-human agents of death (animals, falling limbs of trees and the like) are to be prized "as the deodands are in England, and given to the overseers for the use of the poor."⁵⁶

Manslaughter was specifically provided for in the Rhode Island code, correctly defined in all of its details by "divers laws of England," and by further references to Dalton.⁵⁷ This section confusingly heaps together manslaughter proper, excusable and justifiable homicide, and that done by lunatics. It does not attach a penalty, but it is safe to assume that the benefit of clergy was intended to operate in the jurisdiction, for the Murder provision employs the language "felony of death, without remedy," the only remedy at common-law being the grant of clergy. Likewise, this Manslaughter provision does provide for forfeiture, another aspect of the English doctrine: "and yet his goods and chattels are to the king's custom."⁵⁸

By 1664, the Rhode Island Act for Punishing Criminal Offenses had laid down the entire English law, along with the benefit of clergy:

That whosoever shall be Convicted of High Treason, Petit Trea-

53. *E.g.*, C. ST. GERMAIN, DOCTOR AND STUDENT (1st Eng. ed. 1530). Warden, *supra* note 51, at 144, notes that some of the statutory citations in the Rhode Island code may date from later than 1647, and that these marginalia were unwittingly printed at the end of each paragraph in the original text in the nineteenth century. Conceded; but there are enough citations embedded in the actual text of each paragraph in order to validate the point which I am presently making.

54. Connecticut never made such an acknowledgement. As an example of Rhode Island's approach to legal authority, in a section entitled "Touching Whoremongers" (sodomy), the 1647 code cites *Romans* 1:27 for justification, but adds: "[t]he penalty concluded by that state under whose authority were are is felony death without remedy [*i.e.* without clergy]," thus firmly grounding the offense and the penalty therefor in the common and statute law of England.

55. ACTS AND ORDERS, *supra* note 45, *s.v.* Manslaughter.

56. The law of deodands is laid out in all the justice manuals and treatises. *E.g.*, E. COKE, *supra* note 15, at 57-58. Connecticut never formally recognized these, but utilized the language in the process of imitating the form of the English writs beginning in the eighteenth century.

57. ACTS AND ORDERS, *supra* note 45, *s.v.* Manslaughter.

58. *Id.*

son, Wilful Murder, or Manslaughter; shall be Punished for such Offense, according to the Statute Laws of the Realm of England, with Death; the Benefit of Clergy reserved where allowable . . . ⁵⁹

The contrast with Connecticut is patent. The Rhode Island statute makes clear the fact that Connecticut's use of English law was limited only by the conscious choice to narrow the cognizable sanctions and to exclude unwanted practices.

C.

This sense of encapsulation,⁶⁰ of a largely unchanging subcode of serious crime or the great sins, raises the question of the exclusivity of these provisions as a source of legal authority. Without doubt, though most Englishmen of the sixteenth and seventeenth centuries were steeped in biblical learning, and the courts unexceptionally cited its language as some kind of authority, it is still fair to say that English Puritans were more inclined than others to embrace the language of scripture literally.⁶¹ Biblicism—the notion that all secular laws should find their justification in the revelations of scripture—was indeed a movement of considerable extent and vigor.⁶² In Reformation England and especially during the early years of the seventeenth century, the law either directly or indirectly figured prominently in the writings of the Puritan divines. Not infrequently, the urge to reform the Church manifested itself in more wideranging proposals for the bringing of society generally closer to God. The assumption of the magistrate as God's officer followed naturally from the Puritan view that the ruler should maintain the true religion, even by force, and that the Church as well as the

59. RHODE ISLAND ACTS COLLECTED 4 (1719).

60. To be attributed to the fact that most of the capital laws were modelled upon the Decalogue, that is, the moral law, which was immutable and not susceptible of selection as were the so-called judicial laws which, comprising God's special revelation, were mutable according to His Will. G. HASKINS, *supra* note 2, at 158-59. In a manuscript abstract prepared by Cotton of a discussion of the Jewish law entitled "How Far Moses Judicials Bind Mass[achusetts]", it is stated that "The pRpet Lawes are 1: the 10 Command. as delivRd on M: Sinay . . . all these pRpet. Lawes bind vs." The manuscript is dated to sometime in 1636. 16 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS 280-84, 281 (2d series 1903). *Cf.*, 1 NEW HAVEN RECORDS, *supra* note 11, at 130 & 191 ("it was agreed, concluded & settled as a fundamentall law, not to bee disputed or questioned hereafter, that the judiciaall lawes of God, as they were delivered by Moses . . . shal be a constant direction for all proceedings here & a generall rule in all courts of Justice how to judge betwixt partie and partie, & how to punish offenders, till the same may be branched out into perticulars hereafter." (Feb. 24, 1644-45). In England, Cromwell appointed the Decalogue to be read each Sunday from all pulpits in the country. Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 423 n.14 (1931).

61. G. HASKINS, *supra* note 2, at 141.

62. J. GOEBEL, *supra* note 60, at 423-25.

State had a right to punish evildoers and heretics.⁶³ For example, the debates between Thomas Cartwright (d.1603), a Puritan professor of divinity whose views led to both exile and imprisonment, and John Whitgift (d.1604), head of the Prelatical party and Archbishop of Canterbury after 1583,⁶⁴ did in fact touch upon the matter of capital laws. The Puritan insistence upon the putting into place of the judicial laws of Moses alarmed Whitgift, who reasoned that by this logic the pardoning power of the sovereign in such cases was endangered, the lawbooks must be abandoned, and the clergy must be triumphant over the judiciary and the legal profession. Cartwright, for his part, pressed the point that the magistrate was, as an officer of God, disabled from abolishing or hedging about any of the Mosaic laws, for these laws were perpetually binding; and that he must yield to the Church upon any question respecting what was binding.⁶⁵ Cartwright argued that lawbooks must be harmonized with the Pentateuchal Law.⁶⁶

Cartwright's particular arguments respecting capital crimes explain why it was important to punish offenses against God so severely: these sins of the first table of the Decalogue (idolatry, blasphemy, heresy) described a state of society which could not but give rise to the sins of the second table (murder, adultery, theft). Therefore, irreligion and unrighteousness had to be rooted out; once they were, and the people were returned to God, the social ills of the second table would wither away.⁶⁷ It is not surprising then to find that Connecticut's first statute was a set of capital laws embracing most elements of the Decalogue. Adherence to Cartwright's position inevitably led to the argument that the blasphemer was no more entitled to escape death upon repentance than the murderer.⁶⁸

63. A.F. PEARSON, *CHURCH & STATE: POLITICAL ASPECTS OF SIXTEENTH CENTURY PURITANISM* 105-107 (1928).

64. E. MOYER, *WYCLIFFE BIOGRAPHICAL DICTIONARY OF THE CHURCH* 78 & 432 (rev. ed E. Cairns 1982). As Vice-Chancellor of Cambridge University in 1570, Whitgift was responsible for the dismissal of Cartwright from the latter's professorship on account of his vigorous support of the Puritan cause. *Id.*

65. 1 *Works of John Whitgift* 273 (1851-53), and *Second Replie of Thomas Cartwright* 95, 100-104, & 118 (1575), cited in A.F. Pearson, *supra* note 63, at 108.

66. *Id.*

67. *Id.* at 117-18. Consider, for example, the following, from a Massachusetts election sermon delivered by Solomon Stoddard of Northampton in 1703: "Rulers are to be keepers of both tables; and as they must practice Religion and Morality themselves, so they must take care that the people do it; they must use all proper means, for the suppression of Heresy, Prophaness & Superstition & other Corruptions in Worship." P. MILLER, *supra* note 24, at 176.

68. See also J. COTTON, *supra* note 50, at 67. But the New England Puritans did not apply the rigor of this logic. For example, in the case (1651) of John Clarke of Rhode Island and two other Baptist companions, their visit to Massachusetts resulted in fines and the whipping of one of them for espousing false doctrine. Before sentencing by the court, Cotton gave a sermon affirming that "denying infants Baptism would overthrow all; & c. this was a capital offence; and therefore they were foul-murderers. . . ." Clarke continued: "When therefore

The significance of the opposing views of men like Whitgift and Cartwright lay in the probability that if and when Puritanism gained a political outlet, there would probably be a major reordering of affairs. This certainly was true of the Puritan settlements in the New World where the ordering of a society in covenant with God was a mission of the first order. In England, pushed by Stuart policy to the breaking point, Puritanism entered the political lists. During the Interregnum several Puritan tracts urged fundamental law reform, the chief plank in the platform being a return to Mosaic Law and the abandonment or substantial revision of much of England's tangled web of courts and laws.⁶⁹ As previously mentioned, manslaughter was specifically singled out by the Committee for the Regulation of the Laws in 1653, as was the doctrine of deodands.⁷⁰ Benefit of clergy generally

Governor M. John Indicot [John Endicott] came into the Court to pass Sentence against them, he said thus, you deserve to dy, but this we agreed upon . . ." and imposed a choice of fines or scourging. J. CLARK, *ILL NEWES FROM NEW-ENGLAND: OR A NARATIVE O NEW-ENGLANDS PERSECUTION* 7, 26-27 (London 1652) (Beinecke Library, Yale Univ.).

From all that appears, obstinacy was the determinant of whether the full warrant of the law would be imposed. "A civill Magistrate ought not to draw out his civill Sword against any Seducers (Whether Hereticks, or Idolaters) till he have used all good meanes for their conviction, and thereby clearly manifested the bowels of tender commiseration and compassion towards them." COTTON, *supra* note 50, at 83. Of course, Cotton's tract was directed at the question of how far the civill magistrate might go to enforce the First Table of the Decalogue; testing for obstinacy was irrelevant in respect to social crimes. See text II.A. *infra*.

69. *E.g.*, Hugh Peters, member of the law reform commission appointed by Parliament in 1652, proposed the following:

For a Bodie of Laws, I know none but such as should bee the result of sound reason, nor do I know anie such reason, nor do I know anie such reason, but what the God of wisdom hath appointed. Therefore the Moral Law (that short Law called ten words) is doubtless best; to which Moses's judicials added, with Solomon's Rules and experiments, compleat. I wish our lawyers would urge these for Law; and not those obsolete presidents, which will hardly prove . . . to fit our occasions.

H. PETERS, *GOOD WORK FOR A GOOD MAGISTRATE, OR, A SHORT CUT TO GREAT QUIET. BY HONEST, HOMELY PLAIN ENGLISH. HINTS GIVEN FROM SCRIPTURE, REASON, AND EXPERIENCE, FOR THE REGULATING OF MOST CASES IN THIS COMMON-WEALTH* 32 (London 1651), *quoted in* S. PRALL, *supra* note 22, at 66. An anonymous tract from the year 1652 urged that:

But if the laws were few and short, and often read, it would prevent those Evils [referring to criticism of the present common law]: As Moses laws in Israels common-wealth: The people did talk of them when the lay down, and when they rose up, and as they walked by the way; and bound them as bracelets upon their hands: so that they were an understanding people in the laws wherein their peace did depend.

ARTICLES OF HIGH TREASON DRAWN UP IN THE NAME OF ALL THE COMMONS OF ENGLAND AGAINST ONE HUNDRED AND FIFTY JUDGES 4-5 (London 1652), *quoted in* S. PRALL, *supra* note 22, at 70.

70. In a paraphrase of the Committee For The Regulation Of The Laws' report, that unreasonable law, that if a waggon or cart &, driven by the owner, or some other, with never so great care and endeavour, fall and kill any person, the owner, though it were his own son or servant, could not way help it, shall lose his horse and waggon, by the prophane and superstitious name of deodand. And the owners of the good shall loose them also upon the same account, though they were as innocent as Abel. . . .

was set down for abolition.⁷¹ There was agitation to make theft not capital and both adultery and blasphemy capital.⁷² The English reform efforts largely came to nothing, the work of the Committee for the Regulation of the Laws nullified by the dissolution of Parliament in December, 1653. Nevertheless, some considered the reform threat very real and Cromwell himself, not altogether displeased with the vote to dissolve, is said to have remarked that the body's work would have "subverted" the nation's laws and liberties with the setting into place of the Mosaic Code.⁷³

It may therefore be asserted that Puritan Biblicist practice, which attempted to abolish manslaughter and benefit of clergy in England, and which favored the definition of murder as contained in the Judicial Law of Moses, was substantially the same force behind the explicit outlawing of manslaughter in Massachusetts and the implicit prohibition of the same in Connecticut where the work of lawmakers involved not merely reform but the enactment of a body of law to guide the New Israel in a newer wilderness. The early Massachusetts codes and those of Connecticut were always in agreement in this respect: that nowhere was God's Word to be more exclusive than in the guaranteeing of purity of religion and the setting of extreme penalties. Thus, the early government of the Bay Colony specifically legislated adultery capital in accordance with scriptural dictates.⁷⁴ Similarly, at no time were lesser crimes like theft made capital upon the first offense as came to be the case in the England that the Puritans knew. The Mosaical laws in their sphere operated to the exclusion of any other.⁷⁵

AN EXACT RELATION at 17, 2 SOMERS TRACTS at 93. C.G. COCKE, AN ESSAY OF CHRISTIAN GOVERNMENT 160 (London 1651) (Beinecke Library, Yale University).

71. E.g., March, *Amicus Reipublicae*, May 19, 1652, cited in D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, at 117 (1970). The Hale Commission (1652) likewise set it down for abolition. *Id.* at 120 & 138. The doctrine was not abolished until 1827 generally, and for peers in 1841. *Id.* at 235.

72. C. COCKE, *supra* note 23, at 70.

73. Speech before the Committee of Ninety-nine of the Second Protectorate Parliament, April 21, 1657: "To set up, instead of Order, the Judicial Law of Moses, in abrogation of all our administrations; to have had administered the Judicial Law of Moses *pro hic et nunc*, according to the wisdom of any man that would have interpreted the text this way or that. . . ." 2 T. CARLYLE, OLIVER CROMWELL'S LETTERS AND SPEECHES 323 (New York 1845). Cocke reports that there was considerable argument in Parliament over the extent to which the enactment of Moses' Judicials would displace the common and statute law. Some "desired the drawing of *Englands* Laws to their primitive rule, namely the Judicials," C.G. Cocke, *supra* note 23 at 70, but others objected that there was no proper way to distinguish the parts of the Judicials which were a Christian duty, counseling that a "rule of pure reason" founded upon the law of Christ and his doctrine would properly view the Judicials as "a wise Law, yea the wisest . . . but desired such as were consonant to Christian reason to be established amongst us." *Id.* The New England Puritans did substantially this.

74. LAWS AND LIBERTIES, *supra* note 33, at 6.

75. Wolford, *The Laws and Liberties of 1648*, 28 B.U.L. REV. 426, 461 (1948), argues that nowhere was colonial independence greater than in the classification of capital crimes. Consider the sentence pronounced in a bestiality case in New Haven in March 1641/42:

The existence of this subcode rather suggests a true derogation from the common law and its whimsically changing statutory directives in favor of a scripturally mandated system.⁷⁶ True, some provisions did appear and disappear from the capital laws. Incest was dropped from the list in the 1702 Connecticut revision of the laws, even after the General Court had found that scripture demanded the death penalty. Adultery had been capital in the earliest laws, but was downgraded in the 1672 code. Nevertheless, selection from the Mosaic Law was always permitted.⁷⁷ But the important point to keep in mind is that the Puritans were always careful not to enact any capital law for which justification could not be found in scripture, even though those laws might change over time.⁷⁸ It must be remembered that despite the strained textual justification in scripture for the Bay Colony's outlawing of manslaughter, the Mosaic Law would not have countenanced such a category of homicide and the attendant possibility that a plea of clergy would result in the defendant's discharge. Consequently, a fair con-

And according to the fundamentall agreemT, made and published by full genRLL consent, when the plantatio[n] began and government was settled, that the judiciaall law of God given by Moses and expounded in other parts of scripture, so far as itt is a hedg and a fence to the morrall law, and neither ceremonial nor tipicall, nor had any reference to Canaan, hath an everlasting equity in itt, and should be the rule of their proceedings. They judged the crime capital . . .

1 NEW HAVEN RECORDS, *supra* note 11, at 69.

76. Sodomy, for example, was always capital in New England; by contrast, in England, it was, if committed with man or beast, a felony under 25 Hen. 8, ch. 6, was partially repealed by 2 & 3 Edw. 6, ch. 29, totally by 1 Phil. & M. 1, ch. 1, but was revived under 5 Eliz. 1, ch. 17. E. COKE, *supra* note 15, at 58.

77. H. Bullinger, *Decades*, in PURITAN POLITICAL IDEAS, 1558-1794, at 32 (E. Morgan ed. 1965). Bullinger was a Zwinglianist and mentor of many English Puritans. He had warned that by applying all the law originally ordained by God for ancient Israel, disregarding the peculiarities of time, place and national character, "we should seem to shew ourselves more than half mad." *Id.* The general parallels that the Puritans perceived between themselves and the ancient Israelites not only encouraged literal borrowing from the Mosaic Law and the Old Testament, but bounded their legislative impulses as well. See H. SCHNEIDER, THE PURITAN MIND 26-27 (1930).

78. Conspiracy against the commonwealth (later, the colony) is not covered by the Pentateuchal law; hence, no scriptural citations are appended in any of the Connecticut codes (indeed, Cotton's code lacks citations as well). There are, however, references to conspiracy in the Old Testament, for example, the machinations of King David's son Absalom, 2 Samuel 15:12, 15:31, or the conspiracy of Baasha against Nadab, King of Israel. The usage in the Old Testament is descriptive, not injunctive, and so no scriptural authority could be annexed to the capital provision in the Puritan Capital Laws. The biblical sense of the term is to do wrong against another; it appears not to comprehend the notion of plotting against the state, a notion derived vaguely, it is said, from Germanic and Roman law. See 1 INT'L STANDARD BIBLE ENCYCLOPAEDIA, s.v. Conspiracy (G. Bromiley ed. 1979); J. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 3-5 (1970). Connecticut's code of 1672, however, placed the marginal annotation "conspiracy" next to this provision, indicating that there was likely felt to be a warrant in scripture for what was known from the common law as treason. Subversion, betraying the state into the hands of foreign enemies and such were aspects of the common law crime of high treason. See E. COKE, *supra* note 15, at 2.

sistency of outlook prevailed, and much the same crimes were successively proscribed in the Massachusetts, Connecticut and New Haven colonies.⁷⁹

Finally, no better proof of the exclusivity of the Lex Mosis in the matter of high crimes exists than the Epistles to the early Puritan codes. These guaranteed no punishment without a sufficiently published law:

It is therefore ordered by this Courte and authority thereof, that no mans life shall bee taken away . . . no mans person shall be arrested, restrained, banished, dismembered nor any way punished . . . unless it bee by vertue or equity of some express Law of the Country warranting the same, established by a Generall Courte, and sufficiently published, or in case of defect of a Law in any particular case, by the Word of God.⁸⁰

The source of law for crimes was thus closed and circular: what God ordained the General Court should enact; what that body failed to enact God's Word should control.⁸¹

Thus, the Connecticut code of 1672, in its Epistle explaining the reasons for a new edition of the laws, acknowledged the charter of 1662 as a new source of authority from the Crown, but still accorded first place to "JEHOVAH the Great Law-giver: Who hath been pleased to set down a Divine Platforme, not onely of the Morall, but also of the Judicial Lawes, suitable for the people of Israel."⁸² It also made express reference to the authorities for serious crimes, as if to make the point unmistakable: "We have endeavored not onely to Ground our Capital Lawes upon the Word of God, but also all our other Lawes upon the Justice and Equity held forth in

79. Haskins & Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, 106 U. PA. L. REV. 413 (1957-1958).

80. 1 CONN. RECS. 509. The Epistle to the Massachusetts LAWS AND LIBERTIES OF 1648 similarly had declared that life, personal honor, goods, person and family were not to be tampered with "unles it be by the vertue or equity of some expresse law" or the Word of God. LAWS AND LIBERTIES, *supra* note 33 at 1. The GENERAL FUNDAMENTALS OF THE LAWS OF NEW PLYMOUTH § 4 (1671) contained much the same language, but added, as Massachusetts and Connecticut did not, that authority was also to be found in "the good and equitable Lawes of our Nation suitable for us, being brought to Answer by due process thereof." The marginal heading indicates that "our Nation" was: "None to suffer but according to Law of this Colony, Law of God or Law of England." *Id.* Goebel spoke of the "irrefragible confidence in the written word" as that other dominant Puritan attitude besides biblicism. J. GOEBEL, *supra* note 60, at 432.

81. The Massachusetts General Court had, in 1636, decreed that the decisions of the courts should apply the Word of God, failing any positive law. 1 MASS. COL. RECS. 174-75 (N. Shurtleff ed.) (Boston 1853-1854).

82. Much the same language is to be found in the "Adress" to the code of 1658 of Plymouth Colony. *Plymouth Colony Records, Laws 1623-1682*, at 72-73, reprinted in, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 267-68 (J. Goebel ed. 1946). English legal sources were given more direct recognition than by the evasive Connecticut epistle, but these were still announced as secondary to God's ordinances. *Id.*

that Word which is a most perfect Rule."⁸³ A strong statement, this, in light of the Epistle's attempt to reconcile the predisposition of the 1672 drafters with the language of the royal charter they had so recently obtained.⁸⁴ The Epistle did not shrink from raising the issue of legal authority, but did so in a disingenuous fashion:

Now in these our LAWS, although we may seem to vary or differ, yet it is not our Purpose to Repugn the Statute Laws of England, so far as we understand them; professing ourselves alwayes ready and willing to receive Light for Emendation or Alteration as we may have opportunity; Our whole aim in all being to Please and Glorifie God, to approve our selves Loyal Subjects to our Sovereign, and to promote the Welfare of this People, which will be the more Establishing to his Majesties Crown and Dignity. . . .⁸⁵

English law now became an acknowledged authority, but hypothetical only, so long as its operation depended upon the "understanding" or "opportunity" of Connecticut's lawmakers. No actual emendation or alteration of the capital laws was to come to pass for at least another half-century.

83. EPISTLE, CONNECTICUT GENERAL LAWS OF 1672. The Epistle to the Massachusetts code of 1658 also paid homage to that body of laws given by God to the Israelites, from which it declared all its laws were derived: "These were breif [sic] and fundamental principles, yet withall so full and comprehensive as out of them clear deductions were to be drawne to all particular cases in future times." LAWS AND LIBERTIES OF 1648 (reprint 1929).

84. If, indeed, the code's prefatory letter was not a mere sop to the sensitivities of the Crown (see DECLARATION OF THE GENERAL COURT (1646) of Massachusetts, *supra* note 3), what it proposed was on the order of local custom in derogation of the common law. This would not have been unusual in itself, but such customs of local districts did not encompass felonies. J. GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE 82 (Steubenville 1819). Furthermore, the threat of disallowance overlay colonial enactments, which was not true of ancient customs or special laws. Connecticut was increasingly subjected to pressure from the Board of Trade to send over its laws for review. CONNECTICUT STATE ARCHIVES, 1 *Civil Officers (1669-1724) passim*.

85. EPISTLE, *supra* note 83. In 1698, two years after the appointment of a committee of revision for the overhaul of the 1672 code, and without doubt in response to pressure from London, a recommendation was sent to the Governor and Council containing suggestions for appropriate enactments. One was to prepare a bill "for direction and limitation of lawes of England, how farre to be in force here." 2 CONN. RECS. 261-62. Nevertheless, no such bill was ever drafted and Connecticut never formally adopted or clarified the position of English law in either the colony or the state by some express statute. *Fitch v. Brainerd*, 2 Day (Conn.) 163, 189 (1805).

II.

A.

The records of the Connecticut Court of Assistants corroborate what recent scholarship has found in the course of its review of capital crimes in other Puritan communities, that is, few convictions and mitigated punishments.⁸⁶ The small sample of capital cases may be attributed to various factors. The incidence of serious crime was low where, as in these communities, the population was dispersed and homogeneous. For that period the actual number of capital offenses was not great.⁸⁷ The insistence upon the biblical requirement of two witnesses (Deut. 17:6), incorporated into the laws, doubtless prevented some defendants from receiving the maximum penalty that the court could have imposed.⁸⁸ There is also the possibility that the bulk of the Mosaic provisions were, in the actual practice of the courts, treated more as idealized standards of conduct, such that their severity manifested a potent *in terrorem* function.⁸⁹

Finally, in the proceedings of the courts the spectre of magisterial discretion looms large. The tension between those factions desiring a written code with fixed penalties and the advocates of a more unrestricted magisterial discretion is well-documented in Winthrop's *Journal*. In 1641, the same year in which the General Court of Massachusetts approved the *Body of Liberties*, the magistrates prepared arguments against further attempts to ground all penalties in certainty. They argued for the proposition that "All punishments, except such as are made certain in the law of God, or are not subject to variation by merit of circumstances, ought to be left arbitrary to the wisdom of the judges."⁹⁰ The arguments employed make it clear that

86. E. POWERS, *supra* note 2, at 252-53, G. HASKINS, *supra* note 2, at 200.

87. E. POWERS, *supra* note 2, at 275 states that throughout the Bay Colony's seventeenth century history, any capital offender had a very good chance of escaping the noose, murderers excepted. He calculates that in the period from 1630-1692, of recorded executions, the total was but fifty-six of fifty-seven for capital crimes, eleven of them for murder.

88. G. HASKINS, *supra* note 2, at 210. E. POWERS, *supra* note 2, at 285 recalls the case (1665) of John Porter, Jr., who as a rebellious son nearly was convicted of that capital offense, were it not for the fact, according to the court, that the mother had relented "overmoted by her tender & motherly affection to forebear" and refused to join her husband in "complaining & craving justice." But for this lack of two witness-complainants "the Court must necessarily have proceeded with him as a capitall offender, according to our law, being grounded upon & expressed in the Word of God, in Deut. 22:20,21. See Capital Lawes, p. 9, sec. 14." 4 MASS. COL. RECS. 217-18 (1665), 3 Ct. Assts. 138-39 (1663), 3 Essex County Ct. 111, 117 (1663) and 227 (1664).

89. Thus, HASKINS, *supra* note 2 at 152, offers evidence of an order of the General Court of the Bay Colony that heads of households ensure that their children and apprentices have "knowledge of the Capital Lawes," citing the LAWS AND LIBERTIES at 11. The same language was incorporated into the Connecticut Code of 1650. 2 CONN. RECS. 521.

90. 2 J. WINTHROP, *supra* note 19, at 67.

they viewed the death penalty not as a punishment to be rigidly employed, but, in the cases provided, as the "highest degree of punishment which man's justice can reach."⁹¹ Thus, when they spoke of punishments "certain in the law of God," what they meant was that the "ground or equity" of the law was certain as was the nature of the guilt. God Himself, they pointed out, varied the punishments for the same offences, and they specifically mentioned manslaughter; and, they queried, because of the circumstances, it was questionable whether Bathsheba should die for her adultery.⁹²

To the objection that the statute laws of England set down "certain penalty for most offenses," they replied that they were "not bound to make such examples. . . ."⁹³ Winthrop, a strong supporter of this point of view, argued in his essay *Arbitrary Government* (1644) that prescribed penalties were unnecessary infringements upon the ability of judges to do justice.⁹⁴ In the specific case of capital penalties, Winthrop acknowledged the weight of capital laws made certain in the law of God, but noted that even here the penalty was prescribed "onely in such Cases as are betweene party and party, and that is rather in a waye of satisfaction to the party wronged, then to Justice and intention."⁹⁵

In this continuing controversy the magistrates consulted the Reverend Elders as well. In a series of answers to questions propounded to them in 1644, the Elders said that penalties for the great crimes might be mitigated out of respect for a man's former worthy contributions to the state. Nevertheless, they held that "[c]ertain penalties may and ought to be prescribed to capital crimes, although they may admit variable degrees of guilt. . . ."⁹⁶ Thus, in respect to Puritan attitudes toward capital punishment for the "great crimes," it is fair to characterize their response as ambivalent, unwilling to apply all the biblical "examples" rigidly to current cases, but also unwilling to draw too many distinctions in light of the heinousness of some of the crimes and in the interests of maintaining order and Godliness. Of Connecticut specifically, there is virtually no documentary evidence on this point save for Hooker's letter to Winthrop.

From the interplay of these factors, it is scarcely surprising that neither the records of Massachusetts nor of Connecticut reveal any sentence of death for idolatry or blasphemy.⁹⁷ In some cases this reluctance to invoke certain of the capital laws manifested itself in a perhaps deliberate mislabelling by the court of the offence. For example, in 1662/63 a defendant

91. *Id.* at 68.

92. *Id.*

93. *Id.* at 69.

94. 4 WINTHROP PAPERS 468 (MASS. HIST. SOC. 1944).

95. *Id.* at 477.

96. 2 J. WINTHROP, *supra* note 19, at 252.

97. E. POWERS, *supra* note 2, at 255.

was sentenced in Connecticut for "a flagitious Crime of an high Offence in saying Christ was a Bastard and she could prove it by scripture."⁹⁸ Powers also makes the argument that the Massachusetts courts seldom applied the death penalty whenever they could find mitigating circumstances, and despite the fact that death was the only penalty recorded in the law.⁹⁹ The analysis of the magistrates' handling of the biblical ordinance sufficiently accounts for this observation. The practice was apparently in accord with Winthrop's view that "the matter of the scripture be always a Rule to us, yet not the phrase."¹⁰⁰

But if New England Puritans were in practice relatively unwilling to extirpate the sins of the first table of the Decalogue with the severity recommended by Cartwright and Cotton, they showed less reserve when dealing with crimes of the second table, particularly sexual crimes and those against the person. These did occasionally lead to the gibbet. Again, Winthrop, ever attuned to God's special dispensation for New England, recounted several cases where great crimes were found out and punished.¹⁰¹ In Connecticut, the picture was much the same. Holdsworth cites the deletion of adultery from the list of capital laws of the 1672 code as indicative of a loosening of the strict views of the first generation,¹⁰² but that same code also imposed capital punishment for incest and rape for the first time.¹⁰³ The one area where the law was much less likely to have been mitigated out of regard for the value of life or in deference to hearty repentance was that of homicide. The law here, like the other crimes to which

98. *Records of the Particular Court, 1639-1663*, in 22 CONNECTICUT HISTORICAL SOCIETY COLLECTIONS 268 (1928). See also the 1694 case of John Rogers of New London who actually claimed *inter alia* that his body was "the humane body of Christ," and worse, made similarly blasphemous assertions, so it was reported, on the Sabbath. The court ordered, however, that for this he deserved "severe punishment," sentencing him to a symbolic hanging and a fine. RECORDS OF THE COURT OF ASSISTANTS AND SUPERIOR COURT, 1687-1715, at 25, N. LACY, *supra* note 35, at 209.

99. E. POWERS, *supra* note 2, at 451.

100. 4 *Winthrop Papers* 483.

101. 2 J. WINTHROP, *supra* note 19, at 58-60 recounts the last days of a young man accused, tried and convicted of buggery with a cow. In accordance with the Mosaical Law the animal was slain before the prisoner's eyes and he was then hanged. The case is a good example of the Puritan notion of "conviction of sin" whereby the offender was urged to make full confession; publically proclaim his fault; warn others not to do the same; and ensure eternal peace for his soul. Cf. 1 RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN at 62-73 detailing a similar case. Repentence did not lessen the severity of the punishment, though it could save souls. The "execution sermon" provided a unique homiletical opportunity for Puritan pastors to exhort the assembled to forswear vice and wickedness and return to God. In a 1677 murder case in Connecticut the court itself appointed a minister "to preach the lecture that day execution is to be done." CONN. COL. RECS., *supra* note 43, at 23, N. LACY, *supra* note 35, at 69. Few examples of this literary genre survive; a few of the best are collected in 1 THE PURITAN SERMON IN AMERICA, 1630-1750 (R. Bosco ed. 1978).

102. W. HOLDSWORTH, *supra* note 14, at 580-81.

103. CODE OF 1672, *Capital Lawes*.

the Mosaic Law ascribed the penalty of death, remained scriptural and unelaborated, but unlike these other offences, the viciousness of this crime and the physical threat it posed to the community militated against any mitigation or alteration in the penalty should the matter before the court have been proved.¹⁰⁴ The exceptions to a finding of willful murder were narrow. The question is whether Puritan attitudes toward the common law of crimes were, because of their biblicism, such as to be able to ignore the wholesome opportunities for the practice of discretion within the bounds of justice presented by English manslaughter doctrine. A review of the trial records thus allows us to examine whether the Connecticut courts ever dealt with cases that might have strained the strict law, and how the courts came to prepare the way for the reception of this particular doctrine.

B.

Homicide cases not adjudged murder are few in the records, but a general idea of how the law was applied can be grasped. The murder provision by its own terms clearly seemed to allow for two exceptions to its coverage, corresponding to the familiar legal notions of self-defence and accident, but application of the Mosaic Law could engender difficulty. In the first place, self-defence upon necessity is not explicitly covered by the law of Moses: it is an interpolation of the Talmudic Law¹⁰⁵ with which it is doubtful that the Puritans were familiar. The only instance cited by the Judicial Law is the killing of a burglar at night by a householder (Exod. 22:1)¹⁰⁶, for which no bloodguilt accrued. Consequently, this is the only biblical citation to be

104. J. WINTHROP, in his essay on arbitrary government noted the special circumstances where God's law required satisfaction as much as punishment for turning away from His will. He argued that judges' sentences be attuned to the facts and circumstances of each case, yet allowed that in such cases as these "Justice will not allowe a Judge any Libertye to alter or remitt any thinge: nor can any circumstance leade to qualification: A Riche man hath the same right to satisfaction for his goods stollen from him, as a poore man: and the poorest mans life is the life of man, as well as a Princes." 4 WINTHROP PAPERS 480. Though all of the other Capital Lawes have fallen to reform efforts, murder remains enmeshed in legal controversy. Consider the following language from a nineteenth century Massachusetts State Senate Committee:

There are those, and they constitute a large part of the people of the State, who believe, that as to this crime, Jehovah himself hath fixed the penalty, and that to abate an iota of its severity, to violate a law of the Most High.

SEN. DOC. No. 58 (1846) at 22, quoted in E. POWERS, *supra* note 2, at 315.

105. 8 JEWISH ENCYCLOPAEDIA, *supra* note 17, at 945.

106. The presumption being that a burglar would likely commit murder. INTERPRETER'S DICTIONARY OF THE BIBLE, s.v. Crimes, at 739 (G. Buttrick ed. 1962). Exodus 22:2 makes it clear that one could not with impunity slay a thief in the daytime, for theft was punished by loss of the thief's own property and not his life. *Id.* The passage from Exodus thus describes a privilege and not a punishment, again emphasizing the underlying theme in the Old Testament that life and property were "incommensurable." See Greenberg, *Some Postulates of Biblical Criminal Law*, in THE JEWISH EXPRESSION 26-27 (J. Goldin ed. 1976).

found in Dalton's *Countray Justice*, in an expanded context, and it is precisely this language from his or another's treatise that was adopted by both the *Laws and Liberties of 1648* and by the Connecticut code of 1650, the rest of Dalton's lengthy discussion of self-defence—apparently having less warrant in scripture—being omitted.¹⁰⁷ The decision to enact but this narrow category, though helpful in amplifying the language “not in a mans just and necessary defence,” nevertheless did not accurately summarize either the English law, where some types of self-defence killings did result in forfeiture and suit for pardon, or both the common law and biblical requirements that the killing of a thief was only blameless if done at night.¹⁰⁸ It specifically did not clarify whether the common law doctrine of retreat applied, in cases of avoidable necessity, whereby to kill a “true man,” that is, a man with no felonious intent, demanded special proof of no alternative but the utter necessity of striking back. Dalton's manual advised: “[I]t is a safe principle (in these cases) not to trie an extremitie, till thou hast tried all meanes.”¹⁰⁹ The Connecticut self-defence statute figures little in the trial records, except in one late case (1705) which we shall have occasion shortly to consider.

The other exception to the murder provision, dealing with accidental killing, was never amplified by other statutory language, and the reason for this may well be that there were several examples of this category to be drawn from scripture. The Mosaic Law was not, however, very helpful respecting the imposition of penalties. The biblical texts provided for “cities of refuge” which, once established, would act as places of exile for the accused.¹¹⁰ A less cumbersome remedy was needed.

The trial records show that the court turned for its remedy to the common law doctrine of “death by misadventure.” This crime involved the doing of a lawful act (without intent to do harm) which occasioned the death

107. Compare the Code of 1650 “manslaughter” provision with the language of Dalton:

To kill an offendor, which shall attempt feloniously to murder or rob me in my dwelling house, or in or neere any highway, horseway, or footway, or that shall burglarily, to breake my dwelling house in the night; this is iustificable by my selfe, or by any of my servants, or company. And this being so found by verdict upon triall, we shall be all discharged without loss of life, lands, or goods, or pardon.

M. DALTON, *supra* note 15, at 228-29. The language in W. LAMBARDE, *supra* note 15, at 215 (ed. 1581/82), is substantially the same. The primary source is the statute 24 Hen. 8, ch. 5.

108. M. DALTON, *supra* note 15, at 229, states that to kill such a person in the daytime would result in forfeiture of the killer's goods and chattels and suit for pardon, *unless* it could be shown that the thief-assailant had a felonious intent to kill or rob.

109. *Id.* at 229-30. Such cases usually involved quarrels followed by swordplay or stabbing—not an unusual circumstance in that period. 2 J. STEPHEN, *supra* note 16, at 59-60.

110. The Rabbis interpreted Numbers 35:22-23 to apply to contributory negligence only. Complete innocence in an accidental killing did not, for them, require exile, while grave carelessness—here, approaching the English doctrine—was too serious to be cured by mere exile. THE PENTATEUCH AND HAFTORAHS 721 n.22 (J. Hertz ed. 1962).

of a man. The punishment was forfeiture of the killer's goods and the requirement of suit for a pardon.¹¹¹ There would have been no great obstacle in the way of the Connecticut's use of the common law penalties, for they were substantially consonant with scripture. According to Dalton:

Homicide by Misadventure or Misfortune, is when any person doing of a lawful thing, without any evill intent, happeneth to kill a man: by the law of God there was a citie of refuge appointed for such person to flie unto. [biblical citations] And by our Law now, this is no felony of death. . . .¹¹²

Two cases are of interest. The first is from the records of the Particular Court for February 14, 1643. The court found that one John Ewe, "by misadventure," was the cause of the death of one Thomas Scott. Its judgment was that Ewe pay a fine of L.5 "to the Country" and a further L.10 to Scott's widow.¹¹³ Eight years later, in December, 1651, Thomas Allyn was indicted for carelessly having walked behind his neighbor, Henry Stiles, with a loaded musket. The gun discharged, killing Stiles. Allyn confessed to the indictment and the court instructed the jury to find "man Slaughter or Homicide by misadventure." The latter only found, the court sentenced the defendant to pay a fine of L.20 "to the Country . . . for his sinful neglect and Carless [sic] Carriages"; ordered him not to bear arms for a year; and made his father pay a recognizance of L.10 [. . .].¹¹⁴ The term "homicide by misadventure" is employed twice in the record of the 1651 case: there is little doubt that the court was invoking the terminology of English law (On the other hand, the reference to "man Slaughter" in this case still is being used in its common signification.) Nevertheless, the court did not slavishly follow English precedents. The common law required a forfeiture of all the goods of the killer to the king "in regard that a subject is killed by his meanes."¹¹⁵ The Connecticut court not only set a specific amount for a fine to the commonwealth, but also required restitution to the victim's family. Restitution is common enough in scripture, but not in circumstances of killing. No homicide could escape exile by the payment of any ransom: that would have cheapened life without removing the taint from the land.¹¹⁶

111. M. DALTON, *supra* note 15, at 224.

112. *Id.* According to Bacon, the law of God provided, in the case of "misadventure itself, there were cities of refuge; so that the offender was put to his flight, and that flight was subject to accident, whether the revenger of blood should overtake him before he had gotten sanctuary or no." F. BACON, *supra* note 17 at 297.

113. RECORDS OF THE PARTICULAR COURT, *supra* note 98, at 25.

114. *Id.* at 106-107.

115. M. DALTON, *supra* note 15, at 224. Lambarde says that forfeiture, when exacted in homicide cases, was out of consideration for "having killed the kings lawful subject." W. LAMBARDE, *supra* note 15, at 216.

116. Numbers 35:32-34, M. SULZBERGER, *supra* note 17, at 143-44. The CONNECTICUT CODE OF 1672, *s.v.* Indians, complained that Indian justice was not dealing with those who

What we probably have here in these cases of death by misadventure is an admixture of biblical and common law influence with the latter predominating, because it was both theoretically in harmony with the Judicial Law and more attuned to the cultural framework of the Puritan settlements. What we see is the substitution of forfeiture for exile and a deduction that the former was adequate to remove bloodguilt.¹¹⁷

Both the Connecticut law of self-defence and these cases of accidental death demonstrate a magisterial willingness to employ the common law of crimes when it was approved by or consonant with scripture. As the self-defence provision demonstrates, however, the reliance upon English law, at least initially, was rather restrictive. The ability to borrow from the common law would theoretically have played itself out in the case of a deliberate killing, but one neither occasioned by accident nor by "mallice, hatred, or Crueltie." For a case of true manslaughter at common law the code provided no answer and scripture made no such distinction. Conceivably such a case could have been forced to fit the requirements of the murder statute, but that was not the result when, on February 15, 1686, a special Court of Assistants was convened. The instruction given the Grand Jury was as follows: "Whereas there hath been an Indian Killed at the House of Samuell Smith of Wethersfield, as is Said by his means. The Grand Jury were Ordered to make Inquiry whether he be guilty of Murder, or Man-slaughter, Homicide, or Chance-medly, or what they shall find. . . ." ¹¹⁸ The finding was that of chance medley.¹¹⁹ The case is remarkable for its use of this term, one strictly confined to the preserves of the common law and often employed as a synonym for common law manslaughter. The Grand Jury apparently understood the implications of the term; so also did the defendant, who immediately submitted himself to the judgment of the court. Taking advantage of the prior rulings that it had fashioned for death by casualty, the tribunal announced that Smith pay restitution to the deceased's children.¹²⁰

Chance medley appears once more in the Records of the Court of Assistants, in 1705 in Cuppocossou's Case, and for the first time in the Superior Court Records for 1712 in that of one Thomas Mitchell. The former

killed other Indians upon English land, "as may take off the guilt of Blood from the land. . . ."

117. See *Epistle*, LAWS AND LIBERTIES OF 1648, *supra*, at note 83.

118. RECS. OF THE CT. OF ASSTS., *supra* note 98, at 2 [reverse of volume], N. LACY, *supra* note 35, at 154.

119. *Id.* "The Grand Jury make return, that they find Samuell Smith guilty of the death of the Said Indian only by way of Chance Medley."

120. *Id.* The sentence of the court was as follows: "This Court having Considered the Case, and the Custome of the Indians in Such Cases, Do order Samuell Smith to pay to the Indian Nesecanuns daughters, Four yards of Trucking Cloath, or twelve bushells of Indian Corn, to be divided by the daughters amongst her relations, as they Shall See Cause."

involved an attack upon the defendant's family in their wigwam by one Everes, a "distracted man." The court record states that Everes assaulted the defendant, who thereupon shot him to death.¹²¹ The examination of the prisoner seems to have established that he was not in the wigwam at the beginning of the assault, but had responded to the uproar, by which time Everes was outside and on the run, thus making self-defence more difficult to prove.¹²² The indictment charged murder, and on the same paper is the following, written in a different hand: "GentlmN of the Graniury if you find not the Prisoner Guilty of Wilful murder, You may bring in what You find him Guilty of that is Either Manslaughter of [sic] or Chancemedly of [sic] or Manslaughter in his own defence."¹²³ The jury found self-defence, "described in the laws of this Colony which being by the law blameless."¹²⁴ Mitchell's Case involved a New London shipwright, accused of killing "by chance-medley without any malice prepedced" a Mohegan, one Sion, by "striking him on ye head with a stool of six pence value." The prisoner was found not guilty and was discharged.¹²⁵

In each case, the court entertained a homicide theory that had no authority in the Connecticut code of laws, falling neither in the category of "just and necessary defence," nor that of "mere casualty against his will." There should have been but two categories of homicide, that by accident or that in self-defence upon necessity, conforming to Governor Thomas Hutchinson's characterization of pre-1691 Massachusetts.¹²⁶ The insertion of another crime in the scheme amounted to a significant change in the law,¹²⁷

121. RECS. OF THE CT. OF ASSTS., *supra* note 98, at 49-50, N. LACY, *supra* note 35, at 472. Powers identifies two guilty verdicts in trials for manslaughter in Massachusetts in the 1680's. Both cases resulted in monetary forfeitures, but not execution as decreed by the law. Both involved assaults resulting in bodily injury and death; one explicitly involved a quarrel, and the same by implication in the second case. 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY, 1630-1692, at 242-43, 306-07 & 321 (J. Noble ed. 1901), *cited* in E. POWERS, *supra* note 2, at 277-78. In the 1683 case, the defendant was sentenced to endure branding in the hand and forfeiture of all his goods, a punishment indistinguishable from a successful plea of clergy in English law for the crime of manslaughter. The temporal affinity of these cases with Smith's case in Connecticut is interesting, perhaps indicative of some willingness in later practice to consult English law manuals, and in the exercise of magisterial discretion. As indicated, English manslaughter doctrine, as understood in the term "chance medley," centered about killings arising from violent quarrels.

122. 1 C & M *supra* note 43 at 386.

123. *Id.* at 387.

124. *Id.* Note that the jury referenced their decision to the printed laws of the colony. What would they have done if they had agreed upon a finding of chance medley—merely return their finding as in Smith's Case?

125. 1 SUPERIOR COURT RECORDS 243.

126. Hutchinson wrote: "They did not make the distinction of manslaughter from murder." 1 T. HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 371 (ed. 1936) (1st ed. Boston 1764).

127. The trial records reveal that the Connecticut Court of Assistants in civil cases did occasionally employ other law, but by the consent of the parties to the suit. An example of this

for as Hutchinson put it to a grand jury in his day (1765):

I don't know a nation in the world that makes that distinction between murder and manslaughter which the English do. It was not made in this country before the charter 1691 for our forefathers founded their laws upon the law of Moses which makes no such distinction. This may properly be called the benignity of English law.¹²⁸

Setting these cases against the background of contemporary English law is fraught with difficulty, in part because of the sketchiness of the record, but largely owing to the ever-shifting doctrinal bases upon which the term "chance medley" rested throughout the seventeenth century.¹²⁹ If the

procedure is found in the records for 1700, in an appeal in which the plaintiffs had been dispossessed and ejected from their ship at New London. The record reads: "It is Agreed by Plaintiffs and Defendants that the Lawes of England Shall be pleaded and made use of in this Case, and it is allowed of by this Court." CONN. COL. RECS., *supra* note 43, at 113, N. LACY, *supra* note 35, at 322-23. The first references to statutes of Parliament are found in the records of 1698 in a case brought by the Royal Customs Collector of the Port of New London. *Id.* at 88, N. LACY, *supra* note 35, at 282.

128. G. DALZELL, *supra* note 5, at 192.

129. The seventeenth century saw a gradual return of chance medley to what it had been before its elaboration by Elizabethan treatise writers, but lawyers of the next several generations alternatively associated it with death by accident or killing in self-defence. Hale's stark and unfinished outline *Summary* clearly defined chance medley as homicide *per infortunium*. His complete treatise, *Historia Placitorum Coronae*, repeated this identification. Under this heading he gives the following example: "So if a man be felling a tree in his own ground, and it fall and kill a person, it is chance medley." I M. HALE, *HISTORIA PLACITORUM CORONAE* 472 (London 1736). Dalton gives the same example, classified as misadventure. M. DALTON, *supra* note 15, at 224. Michael Foster, writing in the mid-eighteenth century, vigorously attacked Hale's classification of chance medley as misadventure as mistaken. His analysis correctly associated the term with killings which would have once amounted to manslaughter:

The Term *Chance-medley* hath been very improperly applied to the Case of accidental Death, and in vulgar Speech we generally affix that simple Idea to it. But the antient legal nation of Homicide by Chanced-medley was when Death ensued from a Combat between the Parties upon a sudden Quarrel.

M. FOSTER, *A REPORT OF SOME PROCEEDINGS ETC. DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW* 275 (1ST ED. 1762) (DUBLIN 1767). Foster traced the history of chance medley back to a species of killing in self-defence, taking as his source the statute 24 Hen. 8, ch. 5. That statute, which had attempted by its own terms to resolve a legal ambiguity in the law of self-defence, had decreed that one who slew a robber or burglar (*i.e.* one with a felonious intent) should not suffer any forfeiture or have to sue for a pardon. The ambiguity had been whether such a killer should forfeit his goods and chattels "as any other person should do that by chance medley should happen to kill, or slea any other person in his or their defence." 24 Hen. 8, ch. 5, *collected in* F. PULTON, *A COLLECTION OF SUNDRIE STATUTES* 133-34 (London 1618). Foster argued from this language that chance medley could not be homicide *per infortunium* because this statute supposed at least the intent to do great bodily harm "at the Time the Death happened at least, but did it for the Preservation of his own life." M. FOSTER at 276. Foster concluded that chance medley was a variety of self-defence, and that it

Connecticut court got the term from one of the Elizabethan or Jacobean justice manuals, or Coke's *Institutes*, which seems more than likely, then it had to have understood the term as synonymous with that of manslaughter, that is, a killing "upon the sudden" without malice aforethought.¹³⁰ Moreover, the facts of all three cases, so far as the court records reveal them, appear to support the notion of killings "on the sudden." It is true that chance medley was variously identified both with avoidable (culpable) self-defence and with casual or accidental killing. The substance of these usages lay in the justice manuals, but neither Lambarde, Dalton nor Coke ever explicitly associated the term with these situations. The only evidence of such an explicit association of the term chance medley with a fact situation not amounting to manslaughter which the Connecticut court might have seen, to the extent to which this can be determined, is part of the Rhode Island statute of 1664 (*supra*), which stated: "That whosoever shall be Lawfully convicted, of Killing any Person by Chance Medley or Misadven-

encompassed the hypothetical case in which a man embroiled in the heat of a sudden affray "quitted the Combat before a mortal Wound given, and retreated or fled as far as he could with Safety, and then urged by meer Necessity killed his Adversary for the Preservation of his own Life." *Id.* Foster was aware of how near this scenario was to manslaughter as known in the courts of his day, and he draws a perhaps too facile distinction between the two:

This Case bordereth very nearly upon Manslaughter, and in Fact and Experience the Boundaries are in some Instances scarce perceivable: but in Consideration of Law they have been fixed. In both Cases it is supposed that Passion hath kindled on each Side, and Blows passed between the Parties. But in the Case of Manslaughter it is either presumed that the Combat on both Sides both continued to the Time the mortal Stroke was given, or that the Party giving such Stroke was not at that Time in imminent Danger of Death. *Id.* at 276-77. Foster's association of chance medley with homicide *se defendendo* found its way into 4 W. BLACKSTONE, COMMENTARIES *184, and thence into modern definitions. *E.g.*, D. WALKER, OXFORD COMPANION TO LAW 202 (1980).

On the other hand, manslaughter during the latter seventeenth and early eighteenth centuries became more closely related to those theories upon which murder doctrine had made such great strides. Greater emphasis was placed upon the relation of malice to intent and the role of provocation. *See, e.g.*, *R. v. Mawgridge*, Kel. 119, 84 E.R. 1107, 9 St. Tr. 61, S.C. (Holt, J. 1707). A contemporary source defined it as differing from murder "because it is not done with foregoing malice and from Chance-medley, because it has a present intent to kill." BLOUNT'S LAW DICTIONARY, s.v. Manslaughter (London 1670). With the ascendance of provocation as that doctrine's chief animating concept, chance medley's rather quaint and confusing notions of "sudden fury" declined, although their persistence throughout the eighteenth century is evident in both Foster's and Blackstone's efforts to establish it on a firmer conceptual footing.

130. According to Dalton, "[m]anslaughter, otherwise called Chancemedlye, is when two doe fight together upon the sudden, and by meere chance, without any malice precedent, and one of them doth kill the other; this also is felony of death." M. DALTON, *supra* note 15, at 222. Coke's views have already been noted. E. COKE, *supra* note 15, at 54-55. According to Pulton, whose work was known in Massachusetts, "[m]slaughter, otherwise called Chance-medley, is when two do fight together upon the suddaine, without any malice precedent, and one of them doth kill the other, in which case the offendor shall have his clergy." F. PULTON, DE PACE REGIS ET REGNI AT FO. 120 (London 1610). *See also* CROMPTON, L'OFFICE ET. AUTORITIE DE JUSTICES DE PEACE 20 (London ed. 1584).

ture, shall forfeit his Goods and Chattels. . . ."¹³¹ Also, there is evidence of some English printed sources like Matthew Hale's (d.1676) summary, *Pleas Of The Crown*, published in 1678, which might have made their way to the colonies. In that work, for instance, the author explicitly defines chance medley as homicide *per infortunium*, that is, misadventure or accident: "Chance medley, where a Man doing a lawful act, without intent of hurt to another, and death casually ensues."¹³²

Thus, although it would be theoretically more consistent with the printed law to think of the court's applying the law of self-defence or accident, the aforementioned cases deny this possibility. The court in Smith's Case submitted only two theories to the jury, murder or chance medley; if it had thought that it had a case of death by misadventure or homicide in self-defence, it would not have cast the charge to the jury in this language. Moreover, in Cuppocossou's Case, the court explicitly gave chance medley and "manslaughter in his own defense" to the jury as entirely separate findings suitable for a special verdict (that is, if they could not bring in a verdict of murder on the general issue). If, then, the court knew that it was applying a category of homicide unsanctioned by the printed law, it must have done so either through magisterial discretion—which raises the issue of how rigorously it felt itself bound by the code and scripture—or, just possibly, from a view that this crime too was sanctioned by scripture. This latter supposition is based upon language in Dalton who, after stating that chance medley as manslaughter was nonetheless felony of death, states: "And yet in case of manslaughter, the offender shal [sic] have the benefit of Clergy: and by the law of God, there was a cite of refuge appointed for such to flee unto. Exod. 21:13, Deut. 19:3,4."¹³³ No matter that Dalton had misconstrued the meaning of the citation from Exodus (really a casual or unwitting killing) or the Mosaic Law in general; no matter that it was clear to contemporary Puritans that the English doctrine of manslaughter was incompatible with the Mosaic Law; no matter that benefit of clergy was to those selfsame Puritans superstitious and popish as well:¹³⁴ the association between the crime and scripture, however unharmoniously accomplished, may have provided a "warrant" for the Connecticut court. Failing that, could the court have been so cynical as to have done this more out of sympathy for the English defendant than his Indian victim?¹³⁵ Suffice it to say,

131. RHODE ISLAND ACTS COLLECTED, *supra* note 44, at 4.

132. M. HALE, PLEAS OF THE CROWN 26 (London 1678).

133. M. DALTON, *supra* note 15, at 222.

134. Of the benefit of clergy Governor Hutchinson remarked of the Puritans of Massachusetts that they considered it to be "of popish extract, and burning in the hand with a cold iron appeared to them a ridiculous ceremony." T. HUTCHINSON, *supra* note 126, at 371.

135. Cf. W. BRADFORD, HISTORY 432-35 (ed. 1898) (1st ed. Boston 1856) (detailing how, in 1638, three whites were hanged in Plymouth Colony for the robbery and murder of an Indian. Governor Bradford reported that some of the English questioned whether any white

whatever the court's motivation, its decision to employ a legal doctrine heretofore expressly outlawed in both Massachusetts and New Haven, and unaccounted for in Connecticut's laws, occurred some years before the supposed first employment of English manslaughter law in a 1712 trial which, unlike that of shipwright Mitchell, proceeded to verdict.¹³⁶

B.

That case, the trial of Daniel Gard of Stonington, unfolded in New London in September, 1712. Gard had had a falling out with one William Whitear, a stranger, at the house of a third party. He had "challenged sD Whitear to fight; whereupon they went out of the house, and closed in with one another. . . ." ¹³⁷ In the course of the ensuing struggle, Gard struck Whitear a mortal blow from which the latter died a few days later. The Queen's attorney obtained an indictment for murder, but the jury returned the case to the bench with special facts that certainly would have warranted a finding of death by chance medley. The court did not direct such a verdict; indeed, a portion of the court record unreported in Hoadly's note on the case in the *Public Records Of The Colony Of Connecticut* suggests that the charges might have been dropped altogether but for the court's intervention.¹³⁸ In view of the tribunal's subsequent appeal to the General Assembly on the issue of the English law of manslaughter and its subsequent finding of that crime,¹³⁹ it may have intended the appeal to come up from the first, not an unreasonable assumption given the position of the Assistants as both judges and legislators.¹⁴⁰

should lose his life for an Indian's. They were punished nonetheless, there being, aside from legal justification, the threat of Indian reprisal or war. See also 1 PLYMOUTH COLONY RECORDS 96-97 (1638), cited in E. POWERS, *supra* note 6, at 302. The Connecticut records, however, reveal no comparable cases.

136. "The most convincing evidence of the rejection of the common law is found in the record before the General Assembly of two cases in which persons were tried for crimes that were known to the common law, but not recognized by the statutes of the State." D. LOOMIS, *THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT* 80 (1895). The 1719 act is noted at *id.*, 95-96.

137. 1 SUPR. CT. RECS. 258. The special verdict continued: "and that the prisoner threw sD Whitear on the ground and fell with him, and there lay until they were parted; and that said Whitear said he told the prisoner immediately he had killed him."

138. "John Gard of Stonington committed to ye Gaol of New London upon Suspicion of Murdering one Willm Whitear was cleared by Proclamation and this Court saw not Reason to acquitt him of ye Charge of his Prosecution." *Id.* at 260.

139. *Id.* at 265 ("are of the Opinion that it is but Manslaughter").

140. One critic of the colony's affairs said: "[A]nd in the general court, which also takes cognizance of appeals from the court of assistants, tho' . . . the same judges (tho' it may be more assistants with a great crew of deputies added to them) that you had in the court of assistants; and hence, partly by their vice, and partly by their influence upon the rest, there is little benefit to be expected by appeals." Bulkeley, *Will & Doom, or the Miseries of Connecticut* (1692), in 3 CONNECTICUT HISTORICAL SOCIETY COLLECTIONS 105 (1895).

The appeal itself was unexceptional in form. It was customary for the General Court (later renamed the General Assembly) to hear questions from magistrates relating to the construction of Connecticut's laws.¹⁴¹ This was natural and expected in a legal system which did not admit of unwritten or judge-made law. Just prior to the 1672 revision of the code of laws, the Deputy Governor and Assistants had before them a clear case of incest by one Thomas Rood with his daughter Sarah. The court first canvassed the area clergy whether the crime was capital. It received an affirmative response.¹⁴² Desiring to know the status of the sin in the colony's laws, for there was not provision for it in the code of 1650, it put the following question before the General Court:

Whether the law of this Colony that orders in defect of a lawe we should have recourse to the word of God for oR lawe, and seeing the word of God doth anex death to be the penalty of Incest, whether such person or persons that have comitted that sin ought not to be put to death. . . .¹⁴³

The General Court, as expected, held to scripture in defect of the code: "[S]uch persons as are proved to be guilty of Incest, they ought by the lawe of God and oR lawes as now they stand to be put to death."¹⁴⁴ The court sentenced the father to death; his daughter to be severely whipt "that others may heare and feare."¹⁴⁵

Similarly, the court in Gard's Case raised its question in reference to the language of the code:

The question being put by the HonBle the Judges of the Superior Court 1. whether upon a tryall for murther, and verdict brought in . . . the judges ought to determine the point . . . by the rules of the Common law, there being not so particular direction for the resolution of that point contained in our printed laws, and to give judgment accordingly; 2. If upon debate the crime . . . appear to be manslaughter and so determined, it is further queryed, what direction the judges ought to have reference to in determining the punishment and giving sentence. . . .¹⁴⁶

This request was, however, singular in other ways. Beginning about the turn of the century, the appellate jurisdiction of the General Assembly was

141. 1 N. OSBORN, *supra* note 8, at 440.

142. 1 RECORDS OF THE COURT OF ASSISTANTS 11-13 & 15, Connecticut State Archives, 1 ECCLESIASTICAL PAPERS 39.

143. 2 CONN. RECS. 184.

144. *Id.*

145. *Id.* The language is scriptural. Deuteronomy 19:20.

146. 5 CONN. RECS. 350-51.

periodically restricted and made specific to the end of dispensing with review of petty crimes; examining decisions of the Superior Court for error; and exercising equity powers in civil cases. Interlocutory appeals for "guidance" were unusual, even as early as 1712.¹⁴⁷ What the court was asking permission to do was clearly a departure from its past conduct. It was a recognition that the murder statute as it stood in the Captiall Lawes was insufficient for the needs of the bench; it was an admission that the Word of God was not sufficiently detailed or relevant to the questions which these judges were now asking in this area of the law. English answers were needed for increasingly English ways of legal thinking. This was already the case in the area of private law where acts of parliament were unabashedly cited and utilized, though sometimes only with the permission of the litigants.¹⁴⁸

Given permission by the General Assembly to apply English law,¹⁴⁹ the judges in Gard's Case ignored the otherwise lenient punishment afforded the successful plea of clergy and decreed:

That he the said Daniel Gard shall stand upon the gallows, with a halter about his neck, and the other end cast over the gallows, the space of one hour, and then be taken down and whipt on his naked body thirty nine stripes; and then be returned to prison, there to remain until he shall pay the charge of his prosecution and commitment.¹⁵⁰

Gard's punishment resembled that meted out with increased frequency by the court in cases involving the capital laws. While some "symbolic hangings" were ordered in those cases in which the evidence was insufficient for conviction, others were regularly prescribed for those religious and sexual offenses that otherwise might have ended in execution.¹⁵¹ Thus, although a major change had been effected in the law, it was masked by the court's

147. THE SUPERIOR COURT DIARY OF WILLIAM JOHNSON 1772-1773, Intro. at xvi (J.T. Farrell ed. 1942). Farrell specifically notes the Gard case as an oddity.

148. See *supra* note 127.

149. 5 CONN. RECS. 350-51.

150. 1 SUPR. CT. RECS. 265. The number of lashes is scriptural. *Deuteronomy* 25:3 and 2 *Corinthians* 11:24 ("Of the Jews five times received I the forty stripes save one.") See also RECS. OF CT. OF ASSTS., *supra* note 98, at 24; N. LACY, *supra* note 35, at 417 (the court (1703) ordered the defendant "to be Severely whipt not Exceeding fortie Stripes. . .")

151. In a later (1703) incest case, the Connecticut court sentenced a step-father to a symbolic hanging, a whipping and obliged him perpetually to wear the letter "I" upon his clothing for sexual relations with his wife's daughter. RECS. OF CT. OF ASSTS., *supra* note 98, at 24, N. LACY, *supra* note 35, at 417. The first symbolic hanging as can be determined from the records occurred in 1662 in Abigail Bets' case. See *supra* note 98. Her sentence was to be escorted "as a Malefactor to yE place of Execution wearing a rope about her neck and to ascend up the ladder at yE Gallowes to yE open view of Spectators that all Israille may hear and feare." RECORDS OF THE PARTICULAR COURT, *supra* note 98, at 268.

traditional behavior. The printed code itself remained unaltered to reflect the new changes in homicide law.¹⁵²

The foregoing review of homicide cases from the records of the Connecticut Court of Assistants points to magisterial discretion as the vehicle for the introduction of substantive aspects of the common law. In those cases of accidental death where the code of laws already provided a justification but no penalty, it was easiest to import much of the English doctrine of misadventure. The contours which the accidental death exception received at the hands of the Assistants were not entirely in accord with that law, but then the borrowing was more pragmatic than dutiful. They took no more, arguably, than they needed to give effect to what scripture endorsed if not what it demanded in terms of remedy. In the case of self-defence, it appears that clarification was sought in the justice manuals, but the language borrowed was broader than the justification contained in scripture. Whether this result be ascribed to carelessness or opportunity cannot be determined.

That magisterial discretion also provided for the introduction of the doctrine of chance medley, however, is not so readily reconciled with the model of legal activity that the Mosaic Laws have suggested. Such activity does coincide with what some have described as that cooling of the Puritan ardor which, at length, permitted particular rules of the common law to be utilized when the local codes were unavailing, or as standards of interpretation when those laws could not otherwise be interpreted.¹⁵³ The records do not reveal whether chance medley was ever the subject of an opinion from the General Court. If, in fact, no such question was ever put to that body, then here is evidence of a departure from the customary deference to the laws, scripture and, indeed, from such informal precedent as existed. Did the Assistants fear that a request to elaborate upon the law of homicide would meet with opposition? It might have engendered an undesirable political debate.¹⁵⁴ Throughout this period Connecticut legislators assiduously avoided the major issues of both political and legal conformity with England. On the other hand, perhaps the greater opposition lay among the clergy and scripturalists within the commonwealth who, like the Reverend Elders of the Bay Colony, found the punishment for the crime of manslaughter in English law disproportionately more lenient when compared to that for murder. In sum, if the discretion of the bench was responsible for an extralegal expansion of the homicide law, the significance that Gard's

152. The colony's first incest case had led to a prompt addition to the capital laws; Gard's case did not, even though a new version of the code of laws was soon to be prepared in 1715.

153. READINGS IN AMERICAN LEGAL HISTORY 235 (M. Howe ed. 1971).

154. The outline of such a debate is repeatedly framed in the Rev. Bulkeley's tract. See *infra* notes 160-62 and accompanying text.

Case holds was not that it was the first occasion upon which the common law of crimes was applied in Connecticut, but that it occurred at a time when the Assistants finally were emboldened to bring the matter into the open. Nevertheless, they circumspectly asked only for a ruling in the particular case, perhaps testing political and religious opinion, and the General Assembly itself did not hurry to alter the capital laws in order to reflect the change in the law which their decision had made.¹⁵⁵

III.

A.

The specific antecedents of this unprecedented request for authority to judge by the common law are obscure. External events could, arguably, make a case for yielding to common law ways. Ample evidence exists of increased tension from the 1690's onward between the colony and the Board of Trade; tension reflected in repeated requests by the Board of the colony to send over its laws for examination;¹⁵⁶ tension reflected in a committee resolution directed to the governor in 1698 querying to what extent English law was in force in the colony.¹⁵⁷ The old Puritan political and social structure had been stressed in the prior decade by the royal governorship of Sir Edmund Andros and in the last two decades by demographic change.¹⁵⁸ The sum of such forces at large, however, does not make a really persuasive case for the perceived need to alter the criminal law of the colony. To it must be added the far more interesting if narrower legal question of the extent to which there was a viable conflict of legal authority at issue behind these proceedings in New London.

Gard's Case itself offers little guidance to one seeking some specific legal necessity for the judges' precipitous action. Other evidence from the period does indicate that the question of legal authority on the level of proceedings (as opposed to broader concerns in the matter of governance) did occasionally surface. A most interesting document from the 1690's is the Rev. Gershom Bulkeley's *Will and Doom*, a rambling jeremiad aimed at Connecticut's government and judiciary. The Reverend Mr. Bulkeley, sometimes justice of the peace in New London, was an ardent supporter of Crown policies and supervision. His intention in writing *Will and Doom* was to demonstrate that the resumption of the old charter government after the period of Andros' royal governorship in the late 1680's had been illegal

155. 5 CONN. RECS. 351.

156. C. ANDREWS, *supra* note 43, at 11.

157. 2 CONN. RECS. 261-62.

158. *See supra* note 39. For changes in Connecticut society at large, *see* R. BUSHMAN, *supra* note 40, at 83, wherein he notes that Connecticut's population increased by 58 percent between the years 1670 and 1700, and between 1700 and 1730 by some 280 percent.

and a usurpation of what Bulkeley supposed was, at last, the bringing to heel under Crown rule of a stubbornly independent colonial administration. The chief blessing of this restoration had been a recognition of the preeminence of English law, both common and statute.¹⁵⁹ This charge, that the Assistants did not sufficiently conform the colony's laws to those of England, Bulkeley made repeatedly in his tract, along with the more particular argument that as a charter corporation the colony was legally incapable of enacting of its own accord capital laws:

The charter gave them a power to make laws not repugnant or contrary to the laws of England, and to erect judicatories to hear and determine matters civil and criminal, and to impose lawful fines, etc., according to the course of other corporations within the realm of England; and hence, such laws as the corporations in England may and do lawfully make, they might have made, but not such as only the king and parliament may make. . . .¹⁶⁰

Thus, it was his view that the English common law of crimes and statutory amendments thereof controlled completely in Connecticut, and he railed at what had become the centerpiece of Puritan justice, the broad discretion exercised by judges.¹⁶¹ How apparent and how heartfelt was Bulkeley's assessment of legal affairs in the colony is unclear, but his views were judged to merit a printed response from the Assistants.¹⁶² *Will and Doom* clearly

159. Bulkeley levelled four charges against the resumed charter government, the third of which was:

The abolition of the common and statute laws of England, and so of all human laws except the forgeries of our own popular and rustical shop and the dictates of personal discretion, and hence a most prodigious ignorance, as of our just liberties and rights, so of our bounden duty, both to the king and to one another. A strange fancy that, coming over from England to another of the king's dominions, we should so far cease to be his subjects as that the laws of our king and nation should not reach us, but we are become like Jews a separate people, that must have laws different from all other parts of our nation. Bulkeley, *supra* note 140, at Preface. Indeed, Bulkeley, perhaps without seeing past his own invective, had touched upon the heart of the matter, the whole purpose of the Puritan government there in New England since the first settlements some sixty years previous.

160. *Id.* at 111. See, 1 J. WINTHROP JOURNAL 324 (J. Hosmer ed. 1908) expressing similar concerns about the time (1639) of the preparation of the BODY OF LIBERTIES, and again in 1646. Winthrop sets forth arguments why by charter the colony was possessed of a government furnished with all the requisite parts and with a self-sufficiency which required but general allegiance to the Crown, the relation between Massachusetts and the king being not unlike that of the Hanse Towns of the Holy Roman Empire. 2 *Id.* at 290-91.

161. Bulkeley, *supra* note 140, at 114.

162. Allyn & Treat, *Their Majesties Colony of Connecticut in New England Vindicated* (Boston 1694), in 1 CONNECTICUT HISTORICAL SOCIETY COLLECTIONS 83-130 (Hartford 1860). P. MILLER, *supra* note 24, at 153, describes *Will & Doom* as "the first explicitly anti-democratic utterance in our literature. . . ." A copy of Bulkeley's tract was sent to London in 1704 by Joseph Dudley as part of a campaign to get Connecticut's charter revoked. Sir

raises the ultimate issue of legal authority and brings down to the level of the administration of justice broader themes of biblicism, Puritanism and the relation of king's law to that of God.¹⁶³

Bulkeley illustrated his charges with a case which has some relevance to the present discussion of the nature of legal authority in the colony. He was outraged by the irregularities of the trial of one Mercy Brown of Wallingford, which took place in 1691. The point upon which certain questions were raised was the defendant's mental state at the time she slew her adult son, and it is the first known instance in the colony's court records of anything like an insanity issue going to the jury. Though at length found guilty, the jury having great difficulty bringing in a verdict on the general issue, she was not sentenced. The court deferred "by reason of Some difficulty in this Case."¹⁶⁴ Bulkeley in *Will and Doom* accused the court of badgering the jury, reversing presumptions with respect to proof of insanity and swearing in a jury from the Hartford area, far away from where she had committed the deed, but he does not indicate that he had been asked to fashion an appeal on her behalf to the General Court.¹⁶⁵

His appeal argued two major points, that of *non compos mentis* and, predictably, his position that the colony, as a corporation, had no jurisdic-

Henry Ashurst, representative of the colony in England, excoriated *Will & Doom* before the Cabinet, but more helpful to the colony than anything he had to say in its defence was the premature filing of the manuscript in the Public Records Office, from which place it did not emerge until the end of the nineteenth century. *Id.* at 154-55.

163. Of the first law in the colony's code calling for no punishment, forfeitures, etc. in defect of a properly published statute or in defect of that the Word of God Bulkeley cynically remarked that by this "new Magna Charta" "all the law of England (common, or statute, or other) is exploded at once; it can neither hurt nor help us, unless it receive a new sanction from this general court. Verily the king and parliament have met with their match. All the law and authority in England cannot hang a traitor in Connecticut." Bulkeley, *supra* note 140, at 107. With respect to criminal procedure, Bulkeley noted that: (1) recognizances and appearances for criminal behavior were taken in the name of the corporation and not *domino regi* ("to his majesty the king") as required by 33 Hen. 8, ch. 39, "for it must be supposed that we have no breach of the peace, misbehavior, or any other crime, by the violation of any of the King's laws, but only of the laws of this corporation"; (2) defendants were indicted, tried and convicted upon Connecticut's code of laws and not those of the king; (3) the peace of the land was known as the Peace of the Colony and never as the King's Peace; (4) indictments were not framed in the traditional manner *contra pacem regis, coronam et dignitatem suam* etc., but "against the peace and dignity of the corporation, (for the corporation gives us all our laws, directly contrary to the statute 27 Hen. 8, ch. 24 and 4 Edw. 3, ch. 2, which last statute requires indicted persons to be delivered by the common law, and not by the private laws of corporations)"; and (5) criminal defendants were not regularly tried before a jury *ex vicineto* (*i.e.*, where the crime had taken place, as customary at common law). *Id.* at 109. It should be noted that most of these irregularities vanished, as the Connecticut court records attest, not long into the eighteenth century.

164. RECS. OF THE CT. OF ASSTS., *supra* note 98, at 12, N. Lacy, *supra* note 35, at 175.

165. 1 C & M, *supra* note 43, at 182.

tion to try felones. The appeal,¹⁶⁶ it appears, was successful, for sentence was not passed. The Assistants, however, delayed a ruling upon the matter for nearly two years, then declared the unfortunate woman to have been "distracted." They finally remitted her to the custody of magistrates in New Haven for an indeterminate period of confinement.¹⁶⁷

Even if due allowance is made for the relatively underdeveloped state of the colony's judicial machinery, the protracted nature of this proceeding is unusual. The court's hesitation may well have had much to do with larger questions of the application of law; and, it might have been asked, that of which law or laws. How telling had been the assertions made by the Rev. Bulkeley, and had this been a case where the finer points of English jurisprudence—to the extent the Assistants could take stock of it—were better able to point the way to a just disposition of the matter? The colony's code of laws did not address the matter and scripture provided little instruction for the treatment of those whom the Mosaic Law¹⁶⁸ already regarded as divinely punished for their sin (it in fact raised the possibility that her madness was the result and not the cause of her deed). But the Assistants may not have had to reach and determine the ultimate issue to which Bulkeley had addressed his appeal, that being whether the law of England was *de jure* that of Connecticut. Among the files of the General Court is preserved a petition submitted by the prisoner's husband advancing an altogether different argument on her behalf. Unlike Bulkeley's appeal, this one ingeniously analogized the defendant's situation to that of one who slays in error (that is, by accident):

According to the law of God & the kingdom no person is quilty of murther unless mallice premeditated boe proved or legally implied. . . . I humbly Pray therefore that as the laws of God the laws and statutes of this kingdom have provided an asylum or place of Refuge for the manslayer who slays not through guile but god delivers into his or her hand that so by the wisdom and mercy of this Court Such methods may bee used in the Business before ye. . . .¹⁶⁹

The argument is distinctly biblical, advancing for the court's consideration the texts from Exodus and Numbers dealing with sudden, inexplicable (save to God) but accidental killings and the notion of cities of refuge to which the perpetrator of such an act could flee and live in exile. It is not unreasonable to suggest that the Assistants might have found this argument altogether more persuasive than Bulkeley's assertion that they could not sen-

166. *Id.*

167. RECS. OF THE CT. OF ASSTS., *supra* note 98, at 19, N. LACY, *supra* note 35, at 193.

168. Deuteronomy 28:28.

169. 1 C & M, *supra* note 43 at 180.

tence her to death owing to their mishandling of trial procedures or lack of jurisdiction over the felony in the first place. The chief virtue in Samuel Brown's petition was its assumption that the resolution of the case was yet findable in scripture and, hence, in conformity with the colony's code of laws.

The serious and yet unresolved issues of law and legal authority raised by Brown's Case surfaced again in another murder trial much closer in time to that of Daniel Gard. Abigail Thompson was tried for the murder of her husband in 1705/06.¹⁷⁰ In the course of an argument she had thrown a pair of scissors which, striking him upon the head, pierced his temple; he died some two weeks later. Mrs. Thompson swore that she had not intended to kill him, but the jury, again after "Sometime of Withdrawing and Consideration" found her guilty as charged. Four of the judges postponed the execution of her sentence and took an appeal to the Governor and the rest of the Assistants. These stayed her execution and more than a year later they still had not decided what to do, "seeing the Case of the sD Prisoner is attended with great difficulty."¹⁷¹

The question raised by this case was a difficult one: how to take the measure of the intent to harm when the results of the act were all out of proportion to the harm intended or the provocation received. Resolving this case by any of the acknowledged authorities was an improbability. Scripture was of no avail; the striking of another with any implement of iron or wood capable of causing death was murder.¹⁷² Neither accident nor self-defence could be proved. The testimonies gathered for trial, if they can be believed, show that she was an abusive wife and that she probably did intend to cause some harm short of death to her husband.¹⁷³ The court could not make the case into one of chance medley; that doctrine was limited by the justice of the peace manuals and, it appears, by the usage of the Connecticut court to assaults with deadly weapons, not to the circumstances of

170. RECS. OF THE CT. OF ASSTS., *supra* note 98, at 56-59, N. LACY, *supra* note 35, at 485.

171. 2 C & M, *supra* note 43 at 5. The records do not reveal the final disposition of the case.

172. Numbers 35:16-18. *The Pentateuch and Hapjiorahs*, *supra* note 110, at 721 n.16 comments that "[a]s the fundamental distinction is one of *intention*, everything depends upon the weapon used." It is, therefore, of no little interest to note that the indictment in this case, 2 C & M 6a, charged that she "didst wickedly, wilfully Mattitiously and violently Throw an Instrument of Iron viz.T a pair of Taylor Sheares at the head of Thomas Thompson. . . ." CONN. COL. CT. RECS., *supra* note 43, at 56.

173. *Id.* at 57-58, N. LACY, *supra* note 35, at 488-93. They report that she had goaded him with a chair and had thrown stones at him. Unfortunately for the defendant, one of the affiants recalled that she had told another woman that she often slept with a knife by her side and that she would kill him "if he would not growe better." RECS. OF CT. OF ASSTS., *supra* note 98, at 58, N. LACY, *supra* note 35, at 490.

domestic quarrels even if "on the sudden."¹⁷⁴

The court was confronted with issues that called for the application of common law manslaughter—intent and provocation. The prisoner at her trial admitted throwing the shears, but swore that she had no intention of killing with them.¹⁷⁵ Furthermore, she testified that she had been provoked by him who had "Struck her upon the breast with a broom."¹⁷⁶ The General Assembly chose not to act but to direct that the governor "procure the best advice that may be had in the case."¹⁷⁷ That advice may have resulted in the odd turn that Gard's Case took but four years later.

174. Dalton gives the following example in his justice manual:

The husband, upon words betweene him and his wife, suddenly stroke his wife with a pestell, whereon she died, and it was adjudged murder at the Assizes at Stafford before *Walmesley*, 43 *Eliz. Quaere* the reason why it should be murder . . . considering there appeareth no precedent malice, and that it was done upon the sudden, and upon provocation.

M. DALTON, *supra* note 15, at 219. M. HALE, *supra* note 129, at 456, recounts that a case had come up for discussion at Sergeants' Inn in 1675 in which a party, responding to the insulting words of another, had thrown a broomstaff and had killed the victim by a blow to the head. The judges agreed that mere words were an insufficient provocation to mitigate the deed from murder to manslaughter, but could reach no consensus as to whether the nature of the instrumentality—which ordinarily would never be viewed as a lethal weapon—should mitigate the deed. (The prisoner eventually received a king's pardon.) Holt, J. in *Mawgridge*, *supra* note 129, at 131-32, cites D. Williams' case, *W. Jones* 423, 82 E.R. 227, in which a hammer was thrown in anger upon an insult received. Holt agreed with the court which excused the defendant of murder under the Statute of Stabbing, Jac. 1, ch. 8 (1603), but found him guilty of common law manslaughter on the ground that "it is not such a weapon, or act that is within that statute. . . ." He thought that an indictment for murder would have been good, because "the provocation did not amount to that degree, as to excite him designedly to destroy the person that gave it him." *Cf.*, *Rowly's Case*, originally reported by Coke and involving this same issue of the instrumentality employed. Foster commented that Coke was "totally silent" about these circumstances, reporting only that the killing in that case—a father's having run after and cudgelled a boy who had bloodied his son—was ruled manslaughter because "done in sudden Heat and Passion." The reason for Coke's silence very likely rests on no other grounds than that he was satisfied that manslaughter had been proved, because the killing was done on the sudden; the inquiry that Foster is making about the circumstances of the act (*e.g.*, the degree to which the child was beaten and the type of weapon used) typifies the greater sophistication of his day's approach to the crime of manslaughter. M. FOSTER, *supra* note 129, at 294-95. For a similar analysis in the context of a law officer's pursuit and subjugation of a fleeing defendant, see *id.* at 271. See also *Watts v. Brains*, *Cro. Eliz.* 778, *Noy* 171, 78 E.R. 1009 (1600). J. BAKER, *supra* note 16, at 285, cites this as an early case applying the notion of provocation to the circumstances of a sudden quarrel. The case involved a shopkeeper's having struck a customer who had tweaked his nose and made faces at him. The defendant was originally indicted and convicted of manslaughter; on appeal the crime was held to have been murder, there being insufficient grounds for a quarrel.

175. RECS. OF CT. OF ASSTS., *supra* note 98, at 57, N. LACY, *supra* note 35, at 487.

176. The record strongly intimates that she was pregnant at the time, this perhaps explaining the violence of her reaction. RECS. OF CT. OF ASSTS., *supra* note 98, at 59, N. LACY, *supra* note 35, at 493.

177. 2 C & M, *supra* note 43 at 92. No further mention is made of the case.

B.

Only several years after that appeal did the General Assembly take the sweeping step of allowing the use of the common law in all cases which Connecticut law could not resolve nor for which scripture could provide an answer. An otherwise undated resolution, among the Assembly's papers for the year 1717, reads as follows:

Resolved by this Assembly that wheresoever any Matter, Question or Difficulty shall happen in any of our courts of judicature wherein no rule can be found in ye express Acts of this govT nor in ye word of God any thing can be found in which ye Court can concur for ye deciding the Point in Question That ye Judges shall determine ye matter by ye laws of England known by ye Books to be then in force.¹⁷⁸

The traditional sources of law retained their preeminence: a court must still adjudicate by the Acts, and failing that, must search scripture for direction; but now it must go further and consult a binding secondary source of law. The next step in the process was predictable for those areas of the law which, like manslaughter, consistently fell under the supplementary rule: specially enact it.

A Manslaughter Act was finally passed in 1719. The new law was a curious hybrid of English and Puritan practices:

Be it enacted . . . That whatsoever persons shall be convicted of the crime aforesaid, by confession or verdict, before any of the superior courts shall forfeit to the publick treasury of this Colony all their goods and chattels which to them belonged at the time of their committing the said crime, and be further punished by whipping on the naked body, and stigmatized or burnt in the hand with the letter M on a hot iron, and be forever disenabled in the law from giving verdict or evidence in any of his Majesties courts in this government.¹⁷⁹

This forfeiture accorded with English custom. The stigmatization had one of two sources. It was an incident of a good plea of clergy at common law, but, since English judges, more for leniency's sake, as often prescribed only a perfunctory warming of the branding iron, the Connecticut statue saw fit to emphasize that the mark be permanent.¹⁸⁰ Alternatively, the branding

178. CONNECTICUT STATE ARCHIVES, 1 *Civil Officers* 180a. Contrast this resolution with New York's first book of laws (1665) which directed that its enactments were to be supplemented by the laws of England. 1 COL. LAWS N.Y. 45. J. GOEBEL AND T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK*, Intro. at xxiii (1944).

179. 6 CONN. RECS. 144.

180. Foster remarked that the court procedures attendant to a plea of clergy had degen-

amounted to no more than the usual Puritan practice involving certain offences like burglary which would have been capital in England. (The death penalty was reserved only for repeat offenders). Whipping corresponded to the traditional Puritan mode of punishment in cases requiring either severe measures or death where for some reason that penalty was not to be imposed. English law did not call for it.¹⁸¹ Neither did that law prescribe disablement.

It was on account of this last penalty that Francis Fane, the Crown's legal advisor to the Board of Trade between the years 1725 and 1746, whose task it was to prepare memoranda on the legality of various colonial enactments for that body's deliberations, would call for the law's disallowance in his Ninth Report (June 16, 1741), commenting that the additional penalties were not "suitable to the crime" of manslaughter.¹⁸² Clearly Fane, who was as much troubled by most of the Mosaic capital laws—declaring them to be "much in want of alteration," their scriptural pedigree notwithstanding—could understand neither the moral weight of the disablement nor that of public conviction of sin and humiliation.¹⁸³ In short, what he could not perceive was the shadow of the *Lex Mosis* which overlay the complex history of the enactment of 1719.

CONCLUSION

In the foregoing discussion, I have attempted to refocus attention on the Bible law theory of Reinsch and Hilkey. Their conclusion of a divergence of early colonial law from the common law, a specific rejection of the subsidiary character of English legal thought in the law of crimes, its replacement by the law of God, and a system of discretionary magisterial justice arising out of a predominately law interpretation of a biblical code

erated into "a nice piece of absurd pageantry, tending neither to the reformation of the offender nor for example to others. . . ." M. FOSTER, *supra* note 129, at 372, 4 W. BLACKSTONE COMMENTARIES *368-69.

181. Blackstone says that whipping was not substituted for branding until the statute 19 Geo. 3, ch. 74, only applying to manslaughter convictions and limited to not more than three lashes. 4 W. BLACKSTONE COMMENTARIES *371.

182. C. ANDREWS, *supra* note 43, at 190.

183. *Id.* at 65. Of the Capital Laws, Fane would have eliminated idolatry ("for atheism and infidelity are very common in this age . . ."), *id.*; blasphemy he found too severe and vague to merit death, *id.* at 66; witchcraft had been too much abused in New England he thought, *id.*; he would have altered the provisions on rebellious children, inasmuch as these were vague, uncertain and "would be attended with the greatest inconvenience," *id.* at 67. Above all, Fane was alarmed at the wideranging discretion afforded Connecticut's judges, in one case remarking that the law was "investing them with an extraordinary and arbitrary power, much exceeding what any person or court ought to be trusted with." *Id.* at 99. Fane's reports reflect an urbanity and rationalism which guaranteed his inability to understand the peculiar nature of the Puritan community with which he has dealing.

is—and in this I agree with the scholarship since Goebel's time—inaccurate as a *general* explanation of the state of early colonial law. There remain, however, elements of the theory that merit reexamination. Our more detailed knowledge of colonial court records has undercut drastically their view of a largely original American law, as well as their presumption of some formal reception of English law. Nevertheless, despite this appreciation for the relative complexity and common law character of early colonial private law proceedings, which point to a process of assimilation over time, it is an overstatement to make the claim that the same process held true of colonial criminal proceedings. The early Connecticut homicide materials show not so much steady assimilation as belated surrender. The vitality of the Mosaic Law lay not in its relentless application—the appearance of chance medley, if ever so fleeting, puts that argument to rest—but in its omnipresence in the minds of all who came to the bench and bar, and, as the 1719 Manslaughter Act itself demonstrates, in the minds of those who consciously sought to import English law into the colony's statutes. Mosaicism was never more apparent than real. The quintessential dilemma in the criminal law of the time was, once the initial decision to ignore the English common and statutory law of crimes had been made, how to tame the simple ferocity of the *Lex Mosis* to meet society's real crimes without replicating the greater barbarities, incongruities and caprices of English practice, and without engendering angry cries of either too much discretion among the magistrates or too little respect for God's Word. To note the differences between the discretionary operation of chance medley in the latter portion of the seventeenth century, the open but cautious appeal to employ English manslaughter doctrine in 1712 and the decision at length to incorporate that doctrine in the statutes in 1719, is to measure the extent to which the view of New England as the New Israel had weakened but not died.

