MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 15 | Issue 1 Article 14

1989

Fixed Sentences and Judicial Discretion in Historical Perspective

Joel Samaha

FIXED SENTENCES AND JUDICIAL DISCRETION IN HISTORICAL PERSPECTIVE

JOEL SAMAHA†

The deputy Governor having . . . opposed . . . prescribing . . . set penalties in cases which may admit variable degrees of guilt, . . . wrote a small treatise about these points. . . . And because it is of public . . . concern and being a subject not formerly handled by any that I have met with, so as it may be of use to stir up some of more experience and more able parts to bestow their pains therein, I have therefore made bold to set down the whole discourse.[1]

Thus did John Winthrop explain why he wrote *Discourse on Arbitrary Government*,[2] the first defense of judicial discretion in sentencing in American criminal justice.[3] The principal thesis of the "small treatise"—that the law controlled the magistrates' discretionary authority to sentence convicted criminals—was unusual, if not contradictory.[4] Winthrop's thesis did "stir up" a prolonged debate. This debate has been both general—the proper function of discretion in a government professedly ruled by law—and more specifically over the roles of legislatures and judges in determining criminal penalties.[5]

---

† Professor of History, University of Minnesota. Professor Samaha received the B.A.(1958), J.D.(1961) and Ph.D.(1972) degrees from Northwestern University. He was admitted to the Illinois bar in 1962.

1. 2 J. WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649 209 (J. Savage ed. 1826) [hereinafter JOURNAL].

2. J. WINTHROP, *Discourse on Arbitrary Government*, in 4 WINTHROP PAPERS 1638–44 (1944) [hereinafter PAPERS].

3. For early examples of discretion and arguments concerning it, see Samaha, *Some Reflections on the Anglo-Saxon Heritage of Discretionary Justice*, SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 3–16 (1979).

4. *See* PAPERS, *supra* note 2.

5. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (the standard text describing discretion largely as a positive force). *But see* A. BOTTOMLY, DECISIONS IN THE PENAL PROCESS 130–75 (1973) (discretion can lead to the failure to achieve equal justice). *See generally* A. BLUMSTEIN, J. COHEN, S. MARTIN & M. TONRY, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (1983) [hereinafter BLUMSTEIN] (collection of essays describing factors which influence sentencing); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972) (a judge's highly critical assessment of judicial discretion which echoes those made during the early seventeenth century).

Early in the twentieth century, Roscoe Pound wrote in the *Columbia Law Review* that the tension between law and discretion was a unifying theme in Western legal history. According to Pound, from classical Greece and Rome, through medieval and Tudor-Stuart England, colonial, eighteenth and nineteenth century America, to the present (circa 1920) a pendulum swing between too much law and too much discretion took place. Strict rules, which prevent doing justice in individual cases, causes a reaction in the form of excessive discretion, which leads to abuse and uncertainty. The American Revolution, according to Pound, was a reaction to discretion in English law that led to tyranny over the American colonies. The Bill of Rights, and other procedural rules designed to limit discretion were effective until the complexities of modern life demanded flexibility. Hence, the need for more discretion to make the law just and effective.[6]

This paper assesses Winthrop's efforts to reconcile rule and discretion in the administration of criminal justice during the early years of the seventeenth century. Although I have tried to keep Winthrop's ideas firmly within their seventeenth century context, a major purpose of this paper is to depict the seemingly timeless quality the arguments surrounding the debate over fixed sentences possess. This debate has particular current relevance, in view of the several efforts to limit, or even eliminate entirely, judicial discretion in sentencing that arose during the 1970s, and the misgivings being expressed in the 1980s about fixed sentences.[7]

---

6. Pound, *The Future of the Criminal Law*, 21 COLUM. L. REV. 1, 1–16 (1921).

7. *See* S. SHANE-DUBOW, A. BROWN & E. OLSEN, SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT (1985) [hereinafter SHANE-DUBOW] (summarizes recent efforts to limit judicial discretion in sentencing). *See also* K. CARLSON, MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES (National Institute of Justice, 1982); J. CASPER, D. BRERETON & D. NEAL, THE IMPLEMENTATION OF THE CALIFORNIA DETERMINATE SENTENCING LAW: EXECUTIVE SUMMARY (National Institute of Justice Exec. Sum. 458759, 1982); F. CULLEN & K. GILBERT, REAFFIRMING REHABILITATION (1982); P. UTZ, DETERMINATE SENTENCING IN TWO CALIFORNIA COURTS (1981); Dershowitz, *Fair and Certain Punishment*, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976); Lachman, *Daring the Courts: Trial and Bargaining Consequences of Minimum Penalties*, 90 YALE L. J. 597, 597–631 (1981); O'Leary, *Criminal Sentencing: Trends and Tribulations*, 20 CRIM. L. BULL. 417, 417–29 (1984).

For a sampling of the enormous literature that has recently appeared on criminal sentencing see 68 JUDICATURE, Nos.4–5 (Oct.-Nov. 1984) which was devoted entirely to the subject. For the most recent example of large scale efforts to limit judicial discretion in sentencing see UNITED STATES SENTENCING COMMISSION, SENTENCING

John Winthrop, the Massachusetts Bay Colony's principal planter, was that colony's dominant figure during the first two decades of its history. From the summer of 1630 when he arrived with several hundred settlers from England until his death in the early spring of 1649, Winthrop served as governor, deputy governor, magistrate or some combination of these. Winthrop left behind a substantial store of evidence for criminal justice historians. His *Journal*, copious correspondence, detailed treatises and a miscellany of other papers illuminate all phases of the administration of justice during the 1630s and 1640s.

Furthermore, due to the advanced state of Puritan Studies, a rich literature is available to put Winthrop's ideas and actions concerning criminal justice in the broader context of early seventeenth century history. Winthrop's life has been fully narrated and his personality fully analyzed;[8] his role in religion and politics have been amply explored;[9] and early seventeenth century Massachusetts government and society have been reconstructed in considerable detail.[10] Despite this scholarship, Winthrop's role in criminal law and procedure has received little attention, far less than an authoritative history of criminal justice requires.[11]

I

Criminal law and procedure in colonial America have not been ignored. Substantial literature regarding seventeenth and eighteenth century criminal law exists, largely due to re-

GUIDELINES AND POLICY STATEMENTS, Sections 1.1–1.12 (1987) [hereinafter SENTENCING COMM'N].

8. *See, e.g.*, R. DUNN, PURITANS AND YANKEES 3–56 (1962); S. MORISON, BUILDERS OF THE BAY COLONY 51–105 (1930); E. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (1958).

9. *See* E. MORGAN, *supra* note 8.

10. *See id. See also* D. ALLEN, IN ENGLISH WAYS (1981); D. KONIG, LAW AND SOCIETY IN PURITAN SOCIETY (1979); F. BREMER, THE PURITAN EXPERIMENT (1976); D. RUTMAN, WINTHROP'S BOSTON (1965); R. WALL, MASSACHUSETTS BAY: THE CRUCIAL DECADE 1640–1650 (1972); Brown, *The Puritan Concept of Aristocracy*, 61 THE MISSISSIPPI VALLEY HISTORICAL REV. (1954–55).

11. John Winthrop is sometimes mentioned in connection with criminal law and procedure, but it is indirectly or in relation to making some other point. One of many examples is David Flaherty's excellent study of PRIVACY IN COLONIAL NEW ENGLAND (1972) where Winthrop crops up often but whose role is not assessed because it was not important to Flaherty's general analysis of privacy. Some of the cases in which Winthrop played a central role are mentioned by Flaherty.

cent interdisciplinary research by historians, lawyers, and social scientists. As a result, a considerable part of the story of seventeenth century criminal law and its enforcement can now be told. That story, however, lies mainly in bits and pieces strewn among the scattered results of recent research, making it inconvenient and impractical for criminal justice scholars to reach. Several insights and conclusions from this research are especially relevant to the topic of law and discretion.

It has been established, in the first place, that early colonial law was broad in scope; crime was almost, if not quite, synonymous with sin. After surveying both statutes and court cases, for example, David Flaherty has demonstrated that fornication, incontinence, swearing, drunkenness, and other "immoralities" were considered serious threats to building the godly "city on a hill" so central to Puritan aspirations. Hence, such infractions were dealt with harshly in colonial criminal law.[12]

Colonial criminal law reached beyond overt immoral conduct. It embraced offensive words (criticizing magistrates, for example), unorthodox beliefs (religious dissent among Protestants as well as Roman Catholics), and some personal conditions (scolding wives, lazy servants, rootless vagabonds and rude children) that were perceived to undermine the ultimate goal of puritan society—a sin free community, created in God's name and dedicated to enhancing His glory.[13]

In addition to documenting the broad sweep of seventeenth century criminal law, the existing literature establishes that a wide range of barbarous punishments were attached to this long list of crimes. The most severe was capital punishment, prescribed not only for murder but also for adultery, sodomy, and even incorrigible children. In addition, numerous noncapital offenses were subject to only slightly less brutal punishments. Mutilation, molded in the mosaic "eye for an eye," was frequently prescribed. Slitting nostrils, castration, and amputating hands and feet are examples that speak for themselves. Corporal punishments, such as whipping, and shaming by means of the ducking stool, the pillory, and the stocks further

12. Flaherty, *Law and the Enforcement of Morals in Early America*, LAW IN AMERICAN HISTORY 203 (1971). Although limited to serious crime and devoted to the eighteenth century, I also found suggestive, Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 THE HISTORICAL JOURNAL 339 (1981).

13. *See* E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 1620–1692 400–23 (1966).

demonstrate the formal colonial criminal's law draconian punishments.[14]

Other research has softened considerably this harsh picture of early colonial criminal law. Haskins showed that the fourteen capital offenses in colonial Massachusetts were trifling compared to the blood law of felony in old England where all the common law felonies, and a rapidly growing list of statutory crimes as well, carried the death penalty. Furthermore, death, mutilation, whipping, and shaming hardly exhausted the list of punishments inflicted on wayward colonists. Milder penalties were widely prescribed, although some writers have largely ignored these more benign penalties. Fines were frequently prescribed in statutes; so was restitution, either in the form of direct money payments to, or performing services for the victim. These pecuniary and service penalties, whether punitive or restitutive in nature, far outnumbered punishments prescribing physical pain and humiliation.[15]

Moreover, although the letter of the law authorized blood and shame punishments, in practice they were infrequently prescribed and rarely carried out. To be sure, some colonists were sentenced to stand with nooses around their necks for an hour or two but practically none were ordered to hang from them until dead. More were merely admonished, or simply asked to repent their wrongdoing publicly, as a sufficient punishment for first, second, and sometimes even third offenses. And still more, although sentenced according to prescribed penalties, magistrates exercised their discretion to reprieve their sentences, sometimes temporarily, more often permanently.[16] John Winthrop's writing and magistracy reveal what rules and principles guided that discretion.

Before turning to this central point, one more significant recent finding must be mentioned: Limits were placed both on the broad sweep of criminal law and the penalties it prescribed. Some limits placed on seventeenth century law enforcement have been documented in research already published. It has been shown that codification significantly restricted the crimi-

14. *Id.* at 162–211, 254–55. *See also* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 145–53, 204–12 (1960).

15. *See* G. HASKINS, *supra* note 14, at 209–10.

16. *See* Zanger, *Crime and Punishment in Early Massachusetts*, 22 WM. & MARY Q. 471, 471–77 (1965).

nal law. The Massachusetts Body of Liberties, adopted in 1641, and that colony's more famous Body of Laws and Liberties, enacted in 1648, were early but by no means exclusive examples. This general struggle for codification and its considerable success in preventing arbitrary government in early seventeenth century Massachusetts have been documented in detail.[17]

The rules governing criminal procedure also restricted the criminal law. Smith demonstrated that the colonists quickly put English adjectival criminal law into force in Massachusetts. Albeit in rudimentary fashion by modern standards, arrest, examination, information, indictment, and jury verdict were all in operation within a very short time after the first colonists arrived. This meant that, at least in cases of serious felony, no suspect could be punished except by rigid rules that required the acquiescence of most segments of the community.[18] Although the law left the magistrates with considerable discretion, John Winthrop's work, as we shall shortly see, shows that this discretion itself was hedged about by strict guidelines.

In addition to successful efforts to codify the criminal law and the firmly entrenched rules of criminal procedure, the realities of life on the New England frontier, to say nothing of the "frailties" of human nature, substantially reduced the capacity of the criminal law to intrude into the colonists' daily lives. In assessing what law enforcement officers actually did, as opposed to what the law books said they should do, Flaherty has shown that a host of impediments stood in the way of implementing the broad range of conduct and condition that colonial criminal law was aimed at controlling. Incompetent, indifferent, or simply exhausted constables; corrupt, spiteful, or sympathetic jurors; indeed, a general lack of qualified and devoted officers of any kind severely hampered criminal law enforcement.[19]

Besides these practical limits, Flaherty also discovered in-

17. *See* S. MORISON, *supra* note 8, at 217–43. More prosaically, but in greater depth and detail is G. HASKINS, *supra* note 14, at 113–40.

18. J. SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 1639–1702 129–58 (1961).

19. D. FLAHERTY, *supra* note 11, at 189–218, 236–244. For English examples to the same effect, see Samaha, *Hanging for Felony: The Rule of Law in Elizabethan Colchester*, 21 HISTORICAL JOURNAL 763 (1978) [hereinafter Samaha] and C. HERRUP, THE COMMON PEACE (1987).

klings of a right to privacy. According to his research, the sensitivity colonial magistrates displayed toward both intrusions into colonists' homes and secrets about their private lives reflects the extent to which privacy was appreciated and honored. Limited "rights" against self-incrimination and unreasonable searches constrained criminal investigation and prosecution.[20]

II

Most existing literature about the limits of early colonial criminal justice focuses either on these nascent concepts of individual rights or the realities of seventeenth century life and society in New England. John Winthrop's writings reveal two other limits on criminal law enforcement in colonial Massachusetts. Winthrop actively participated in all the leading criminal cases of the first two decades of the Massachusetts Bay Colony's history, and he wrote copiously about most of them. Winthrop's writings clearly demonstrate both that he valued the rule of law highly, and that written guidelines restricted judicial discretion to sentence criminals.

The first of Winthrop's work to be considered here, *Discourse on Arbitrary Government*,[21] was written in 1644. Some scholars view it mainly as a political document; to some extent it was. Winthrop defended the magistrates' power against challenges from the delegates. The delegates were eager to replace the magistrates' power with that of the delegates, or at least to reduce that power to writing. The magistrates were drawn from the ranks of upper gentry, while the delegates were lesser lights in the social order.[22]

Two fundamental questions addressed in the Treatise were: (1) whether the government of Massachusetts Bay was based on some form of consent or compact; and (2) whether that government was operated by rule or caprice. Winthrop answered most emphatically that compact and rule, not whim and caprice, governed Massachusetts. Because the first question does not bear directly on Winthrop's contributions to criminal justice, we need not address it here. Whether the colony was governed by rule or caprice, on the other hand, is directly rele-

20. D. FLAHERTY, *supra* note 11, at 85–88, 232–41.
21. PAPERS, *supra* note 2.
22. *See* R. WALL, *supra* note 10, at 85–89.

vant. Winthrop's answer takes as its main point of departure the attempt to subdue persistent criticism that penalties were not sufficiently spelled out to prevent magisterial discretion from becoming mere arbitrary caprice.

Winthrop's intricate, if at times gnarled, defense of magisterial discretion in sentencing—bearing strong resemblance to the modern debate—is much more than a mere political tract aimed at rationalizing the magistrates' political dominance in the guise of defending a wide use of their judicial power. Winthrop offers six reasons to prove that Massachusetts was governed by rule in sentencing criminal convicts. First, he maintained, the Charter granted in 1629 to Massachusetts Bay by King Charles I, forbade the magistrates to act "contrary . . . to the laws and statutes of this our realm of England."[23]

Second, he asserted, the Body of Liberties enacted by the General Court in 1641 bound the magistrates to act strictly according to law:

> No man's life shall be taken away; no man's honor or good name shall be stained; no man's person may be arrested, restrained, banished, dismembered, or anyway punished; no man shall be deprived of his wife or children; no man's goods or estate shall be taken from him; or any way damaged, under color of law or countenance of authority unless it be by the virtue or equity of some express law of the country, warranting the same, established by a general court and sufficiently published; or, in case of the defect of a law in any particular case, by the word of God, and in capital cases, or in cases concerning dismembering or banishment, according to that word, to be judged by the general court.[24]

Third, he contended, unlike the English magistrates, a still higher law bound the Massachusetts magistrates "in all their administrations, which rule is the Word of God, and such conclusions and deductions, as are, or shall be regularly drawn from thence."[25]

Fourth, Winthrop argued, all commonwealths have general rules which magistrates must apply to particular cases after the legislatures have enacted them:

> And though no commonwealth ever had, or can have, a par-

23. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 12 (N. Shurtleff ed. 1853).

24. PAPERS, *supra* note 2, at 472.

25. *Id.*

> ticular, positive rule, to dispense . . . justice in every case; yet where the fundamentals, or general rules hold forth such discretion, as no great damage, or injury can befall, either the whole, or any particular part, by any unjust sentence, or disorderly proceeding, without manifest breach of such general rule, there the rule may be required; and so the government is regular and not arbitrary.[26]

Fifth, Winthrop maintained, these general rules are not applied to individual cases arbitrarily. In addition to the patent, the Liberties, and the Word of God, the magistrates were restrained by the great number of precedents that had descended to them from ancient Israel. These precedents embodied not only abstract fundamentals or general rules as such, but they also included all the deductions, additions, and explanations of the wisest legal minds who had applied God's law to individual offenders.

Finally, Winthrop declared, except for capital cases, few laws have ever prescribed, in advance, particular penalties to cover the crime that the law proscribes. God deliberately chose not to designate the exact penalty in advance. In the most difficult cases, God wished the judges to decide the penalty on a case by case basis. But, Winthrop warned, this did not mean that rules did not govern those cases. The rules governing such cases, however, required special wisdom to discover, a wisdom ordinary people lacked. Even the kings of Israel—who were also the judges—had to study the laws every day of their lives in order to grasp their complexity. Despite their study, neither they nor any of their successors ever possessed sufficient wisdom to apply these rules *before* an actual case fell out.

Besides, Winthrop cryptically concluded this opening section: "[T]he case, and the book hold forth the sentence, and any schoolboy might pronounce it; and then, what need were there of any special wisdom, learning, courage, zeal or faithfulness in a judge?"[27]

Although convinced that discretionary sentencing created no risk of arbitrary government, Winthrop was aware that thoughtful members of the colony were less sanguine than he about the dangers of discretionary sentencing. In order to settle the understandable anxiety his position generated, he pro-

26. *Id.*
27. *Id.* at 473.

posed to search Scriptures, practice, and reason to prove the arguments outlined above. Winthrop devoted the remainder of the Treatise to laying out the results of his search.

In an initial foray supporting discretion in sentencing, Winthrop surveyed current practice in old and new England. He concluded that plenty of evidence proved that prescribed penalties were unusual in both the mother country and Massachusetts Bay. Juries, he pointed out, awarded damages in a wide range of civil cases without any prescription. Sometimes, great wealth and estate were at stake in these verdicts, yet no one attributed their results to arbitrary action. Why, therefore, could not wise judges determine penalties of much less consequence in criminal cases?

Furthermore, more than forty Massachusetts penal statutes carried no prescribed penalties, and in enacting them, no one ever proposed that they should do so. Moreover, no one contended that old England's government was arbitrary and it had far more statutes without prescribed penalties than Massachusetts did. More to the heart of the matter, Winthrop charged that reason itself stood in opposition to fixed penalties. In order to set a just sentence prior to a specific wrongful act required prescience, which it should be clear to all, only God possessed. So it must follow that God alone could prescribe a just penalty before an actual case fell out.

Reason also compelled the conclusion that "[j]ustice ought to render to every man according to his deserving."[28] To accomplish this, according to Winthrop, required careful attention both to the surrounding circumstances of the particular crime and the "quality" of the individual offender. Winthrop insisted that Scripture amply supported that conclusion. For example, Luke 12:47 read that a servant who knowingly broke his master's rules should be beaten with more stripes than the servant who did so out of ignorance. And, if an honest youth was punished with the same number of stripes for lying the first time as an old inveterate liar who had been at his evil work for years, "it were not just to punish both these alike." Furthermore, it is true that punishments must be "afflictions" but, except in the few capital cases, they ought not be "destruction[s]." "But in prescript penalties authority shoots at adventure: If the same penalty hits a rich man, it pains him not, it is

28. *Id.* at 474.

no affliction to him, but if it lights on a poor man, it breaks his back."[29]

Furthermore, every offender need not suffer actual physical pain. Thus, "a reproof entereth more into a wise man than 100 stripes into a fool."[30] Rigidly prescribed penalties would destroy admonition as the potent tool it was in enforcing the criminal law. Without the power to admonish, judges could not do justice according to the circumstances of the case and the "quality" of the offender.

But as "Gods upon earth," judges' duties did not stop with their heavy responsibility to administer the law according to justice. They also had to "hold forth the wisdom and mercy of God." Scriptures abounded with examples of great judges who administered justice wisely tempered with mercy. Only a few of many examples Winthrop cites are: Bathsheba, who was spared death for her otherwise capital adultery with King David because "the king's desire had with her, the force of law"; Abiather, who was saved from death for his treason because of his former "good service and faithfulness"; and Shemei, who was reprieved for "repenting" his crime.[31] If the judges in any of these cases had been "tied to a prescript penalty," Winthrop concluded "here is no place left for wisdom or mercy. Whereas Solomon sayeth: mercy and truth preserve the king; and his throne is upholden by mercy."[32]

Hence, Winthrop firmly believed that to be just, wise and merciful, a sentence had to take into account both the particular circumstances of each crime and the individual condition of every criminal. That amounted to weighing such information as the offender's state of mind (mens rea), record of past offenses (recidivism), remorse over the crime, duress, good character, and other "mitigating circumstances." Such considerations still determine judges' sentencing. Recent surveys demonstrate convincingly that trial judges in the 1980s take these same elements into account.[33]

In addition, and crucial to his whole thesis, Winthrop held

29. *Id.* at 474–75.
30. *Id.* at 476.
31. *Id.*
32. *Id.* at 476–77.
33. *See, e.g.*, A. BLUMSTEIN, *supra* note 5, at 69–125; S. SHANE-DUBOW, *supra* note 7; SENTENCING COMM'N, *supra* note 7; P. WICE, CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS 145–50 (1985).

that simply because penalties were not prescribed did not mean that they were beyond rule. Quite the contrary. The requirement that they be just, wise, and merciful was itself a rule. And to be just, wise, and merciful required that judges apply yet more rules—the seriousness of the offense, the nature and quality of the offender, the surrounding circumstances of the offense, and so on. Indeed, penalties prescribed in advance of committing offenses violated the rule that penalties had to be just, wise and merciful. Since only God was prescient, mere men could not sentence an offender until the particular case actually fell out.

Moreover, there was no need to fear that judges would not act according to the dictates of justice, wisdom, and mercy. God "will . . . teach his ministers, the judges, what sentence to pronounce." All they need to do is "observe his word and trust in him. . . . [R]ely . . . upon . . . his grace and blessing." So, if the judges only listened to God, they would have nothing to fear. And when they do,

> see . . . how the wisdom of God . . . [is] glorified and the authority of the judge strengthened . . . whereas in men's prescript sentences, neither of these can be attained, but if the sentence hit right, all is ascribed to the wisdom of our ancestors, if otherwise, it is endured as a necessary evil, since it may be altered.[34]

Modern critics of discretion are less sanguine than Winthrop about judges', or for that matter any criminal justice official's, capacity to administer justice according to justice, wisdom and mercy. Recent experience and changing standards have led to the more cynical view that baser motives like self or class interest and racism most often guide the exercise of discretion. In short, they have much less confidence in the judges than Winthrop did. As already pointed out, Winthrop himself was under no illusions that the arguments he advanced in his treatise would be accepted without objection. No less than in modern times, critics in his own day had serious doubts about the likelihood that judges could meet out punishment untempted by promise, threat, ambition, pride, and other corruptions. Knowing this, Winthrop struggled to blunt their fears.[35]

The principal objections centered on the judges' weakness

34. PAPERS, *supra* note 2, at 475–76.
35. *See id.*

in the face of worldly temptations that it was believed discretion was powerless to control. Winthrop readily conceded that temptation was a potential problem, but he was convinced that prescribed penalties were worse because they violated the rule that sentences be just, wise and merciful.

> We may not transgress rules to avoid temptations. For God will have his servants exercised with temptations, that the power of his grace may be made manifest in man's infirmity . . . we do not forbid wine to be brought to us, though we know it is a great occasion of temptation to sin.[36]

The plain truth is, according to Winthrop, that legislators are more susceptible to corruption and error than magistrates. Too readily, they fall prey to the dangerous belief that nothing restrains their legislative power. Besides, although it seems easy enough for lawmakers to prescribe penalties in the abstract, these sentences regularly work injustices in practice because, "he who prescribes a punishment in a case, wherein no person stands before him to be judged, cannot be so wary of shedding innocent blood or sparing a guilty person, or committing other injustice, as the judge. . . . Dangers more remote are ever less heeded."[37] Also, lawmakers "have not so clear a calling in prescribing penalties as judges have in passing sentence, and therefore cannot be expected the like blessing of assistance from God."[38] And,

> [i]f a judge should sometimes err in his sentence, through misprision or temptation: the error or fault is his own and the injury or damage extends not far: but an error in the law resteth upon the ordinance itself, and the hurt of it may reach far, even to posterity. There is more unrighteousness and dishonor in one unjust law than in many unjust sentences.[39]

Winthrop's Treatise did not persuade his critics. The reaction to it was, in fact, virtually all negative. A committee from the House of Deputies found, and the full General Court agreed, that the treatise contained the following "dangerous positions": That general rules are sufficient to clear a state from arbitrary government; and that judges ought to have liberty to vary from such general rules when they see cause. With

36. *Id.* at 479.
37. *Id.*
38. *Id.*
39. *Id.* at 479–80.

respect to these positions "there are many dangerous passages and bitter censurings of all penal law."[40]

The particularly offensive passages were: that prescribed penalties were mere "paper" backed only by human authority; that they excluded God's wisdom and the judge's authority; that they usurped God's authority; that sentences should not be prescribed until an actual case fell out; that they were not just; and that they lacked rule. In a final sweeping statement, the deputies charged that the examples Winthrop offered to prove his dangerous positions, the reasons advanced for them, and the consequences he predicted would follow from them, were "pernicious and dangerous."[41]

As if this was not enough, the colony's elders also came out strongly in favor of prescribed penalties.[42] In capital offenses such as homicide, the elders maintained, the circumstances of guilt vary considerably. Premeditated murder differs greatly from manslaughter upon sudden provocation. Hence, the statutes ought to prescribe the specific penalties for murder and manslaughter. The result would be to eliminate magisterial discretion for capital crimes. The elders urged that the same principle should apply to non-capital offenses. That is, the statute must prescribe specific penalties for varying degrees of culpability. If striking a neighbor is a less serious crime than assaulting a father, then it may well be that assaults on neighbors should be punished by fine only while the children who assault their fathers should be hanged. But statutes alone, admonished the elders, not judicial discretion, ought to determine these distinctions.

As for recidivists, the elders advised that statute should dictate precisely how much to punish a first, second, third offender, and so on. The elders allowed that the condition of the criminal—a first offender, an accessory, one enticed into crime and so on—should vary the penalty. For these circumstances the statute ought to decree a minimum and maximum. But even in these cases, fairly rigid rules should establish how to apply *minima* and *maxima*. Finally, in cases where judges believed in good faith that the penalty should exceed the maximum, they could so recommend. Still, the sentence could not

40. *Id.* at 483.
41. *Id.* at 484.
42. *See* JOURNAL, *supra* note 1, at 205–07.

be imposed unless the General Court (the two houses of the legislature) approved.

This double rebuke from both legislature and elders brought only one substantial concession from Winthrop (even though he insisted it was only a clarification and not a concession). Winthrop's concession had to do with how broad the judges' discretionary power to sentence was intended to be. Winthrop admitted that, if the language in the Treatise were adhered to strictly, reasonable readers might conclude that he meant to encompass the whole of the penal law; he stoutly denied that he intended such broad application. He recognized several major exceptions, including capital offenses and recent statutory (*mala prohibita*) offenses. Hence, the Treatise covered only the ancient non-capital common law (*mala in se*) crimes.

> I know well that most of the later statute laws have their penalties prescribed, and it must needs be so . . . for a judge can have no rule for his sentence upon the breach of such a law, except he have it from the law itself: as for instance, if the law which forbids any man to kill a hare or partridge with a gun, had not also set down the penalty, the judge could not have found out any, which might have been just because no law of God or nature makes such an act any offense or transgression.[43]

Even among the non-capital *mala in se* wrongs, not all prescribed penalties were bad, according to Winthrop. They deserved censure only insofar as they, "cross with the rules of justice, and prudence, and mercy also, in such cases of smaller concernment, as wherein there may be lawful liberty allowed to judges to use admonition, or to respite an offender to further trial of reformation."[44]

For the rest, his response to the deputies was at the least determined—perhaps even truculent—for the mild-mannered Winthrop. He refused to answer to the "dangerous passages": "If the Committee had found such dangerous passages, as they intimate, they should have . . . imparted their particular observations . . . unto us, that we might have considered . . . them, for want whereof it cannot be expected, we should deliver any opinion about them."[45] He dismissed the "bitter censuring"

43. PAPERS, *supra* note 2, at 486–87.
44. JOURNAL, *supra* note 1, at 209.
45. PAPERS, *supra* note 2, at 485.

sarcastically: "The like we may say for such bitter censuring as they mention: only it is usual for men to call such things bitter, which themselves disrelish though they may be harmless and wholesome notwithstanding."[46]And in a haughty parting shot, he concluded:

> I will not justify every passage in my book. There are 2 or 3 words that offence has been taken at, and although I can give a safe account of them, yet, I must confess they do not now please me, but where the matter is good, and the intention of the writer honest, the Lord forbids us to make a man an offender in a word.[47]

III

Winthrop's powerful, thorough, and elaborate defense of judicial discretion in sentencing criminal defendants and the equally spirited call for "prescript penalties" mounted by the elders and deputies provokes the obvious question: Why did Winthrop favor discretion over prescription in criminal penalties? Did he do it solely to serve his own political ends? To keep the power to sentence in the magistrates' hands would provide the dominant elite in the colony, of which Winthrop was himself a first among equals, with badly needed insurance against threats to their supremacy. Although never offered specifically as an explanation for Winthrop's defense of judicial discretion in determining criminal penalties, this position has been strenuously argued since the Committee of Deputies report.

Nearly a century ago, Brooks Adams assailed the autocratic government of the early Massachusetts Puritans.[48] Samuel Eliot Morison's convincing correction to that view appeared in 1930—the tercentenary of the Puritans' arrival in Massachusetts[49]—and Professor Edward M. Morgan's brilliant analysis of Winthrop,[50] and Perry Miller's interpretation of Puritanism,[51] have demonstrated conclusively that the matter is much more complicated than this facile view of an opportunistic

46. *Id.*
47. *Id.* at 487.
48. B. ADAMS, THE EMANCIPATION OF MASSACHUSETTS (1887).
49. S. MORISON, *supra* note 8.
50. E. MORGAN, *supra* note 8.
51. P. MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (J. Hoopes ed. 1981).

Winthrop might suggest. Yet, it has been advanced again only recently, demonstrating both its tenacity and appeal.

Robert Emmett Wall has marshalled a good case for the position that the struggle over prescribed penalties was part of the political contest between the upper gentry whose power was located in the central organs of government and its middling ranks whose influence was lodged in the rapidly growing towns.[52] The considerable merit in this interpretation should not, however, obscure other reasons why Winthrop wrote this first defense of judicial discretion in the history of American criminal justice.

Part of the explanation lies in the personal makeup of Winthrop himself. John Winthrop was first, and always, deeply and devoutly religious in an overwhelmingly religious age. He believed, as did most people of his time, that God was personally interested in everyone and rewarded those who were good and punished those who were wicked. Winthrop was a Puritan. Superficially, this meant that he favored removing all signs of Roman Catholicism from the English church. But it also meant, according to the modern scholar who understands the man best, "the problem of living in this world without taking his mind off God. It would have been easier to withdraw from the world, as the monks and hermits did, to devote oneself wholly to God, but that was not permitted. Puritans must live in the world, not leave it. . . ."[53] But:

> He was a countryman of simple tastes who liked good food, good drink, and good company. He liked his wife. He liked to stroll by the river with a fowling piece and have a go at the birds. He liked to smoke a pipe. He liked to tinker with gadgets. He liked all the things that God had given him, and he knew it was right to like them because they were God-given. But how was one to keep from liking them too much? How love the world with moderation and God without?[54]

This dilemma—choosing between moderation and excess—and Winthrop's personal experience in working it out in his own life, engendered in him a special sensitivity to individual weaknesses and a corresponding belief in the need for moderation and compromise in government, especially in communi-

52. R. WALL, *supra* note 10.
53. E. MORGAN, *supra* note 8.
54. *Id.* at 8–9.

ties in their "infancy." This awareness of, and his sympathy for, human frailty had a powerful impact not only on Winthrop's position favoring judicial discretion in sentencing, but as we shall see later, it also affected the way he actually administered punishment to individual offenders.

The search for moderation in his life in general and its natural consequence—moderation and the need for discretion in criminal sentencing in particular—were strongly fortified by the tracts of Winthrop's favorite political writer, the Puritan scholar, William Perkins. If Winthrop has written the first defense of discretion in the history of American criminal justice, Perkins's own treatise surely aided Winthrop immensely. *EPIEKEIA, Or a Treatise On Christian Equity and Moderation*,[55] is a fundamental document in the history of judicial discretion. It contains all the ideas that Winthrop advances but it is infused with exceptional lucidity, eloquence, and power. It could well be recommended as a primer for modern judges, and made required daily reading for prosecutors, defense attorneys and modern critics of discretion who may think they have heard everything there is to say about fixed and discretionary sentencing.

It is very difficult to pick the best of many worthy passages from this great work. Take, for example, Perkins's definition of "public equity" and how it contributes to the "glory" of the law:

> [P]ublic equity is . . . a moderation and mitigation of the extremity of a law, upon honest and convenient reasons, and in such cases, as were not directly intended in the law. The observation and due practice of this equity, is the glory, credit and honor of all . . . courts of justice; and without the observation of this, when need be is, all that they do is flat injustice in that case. For they lame and maime the law, they fulfill but one part of the law: for in every law there are these two things: *the extremity in plain terms, and the mitigation implied,* and these two together make the law perfect: and the glory of the law stands as well in practicing of the mitigation, as in the execution of extremity; nay, sometime it stands in the mitigation, and not in the extremity, insomuch as the moderation is then the equity of the law, and the ex-

55. W. PERKINS, *William Perkins on Christian Equity*, in PURITAN POLITICAL IDEAS 1558–1794 64 (E. Morgan ed. 1965) (excerpt from W. PERKINS, TREATISE ON CHRISTIAN EQUITY AND MODERATION).

tremity is mere injustice. . . .[56]

Just as the glory of the law resides in the proper balance between moderation and extremity, it is the glory of judges and magistrates thus to execute the laws, and to temper them with such discretion, as neither too much mitigation, do abolish the law nor too much extremity leave no place for mitigation. Therefore . . . two sorts of men are reproveable. First, such men (as by a certain foolish kind of pity, are so carried away) that would have nothing but mercy, mercy and would have all punishments, forfeitures, penalties, either quite taken away and remitted, or at least lessened and moderated, they would also have the extremity of the law executed on no man. This is the highway to abolish laws, and consequently to pull down all authority, and so in the end to open a door to all confusion, disorder and to all licentiousness of life. . . . But I need not to say much herein, for there are but few who offend in this kind, man's nature being generally inclined rather to cruelty than to mercy. . . . But . . . this doctrine . . . condemns another sort of men, which are more cumbersome; that is to say, some men have nothing in their mouths but the *law, the law*; and *justice, justice*; in the meantime forgetting that justice always shakes hands with her sister mercy, and that all laws allow a mitigation.[57]

Steering a proper course between extremity and leniency in sentencing criminal defendants was part of a judge's "calling," a fundamental concept in Puritan thinking. God gave to every person a talent that He expected would be used in the service of mankind. Every person entered a "covenant" (another fundamental concept in Puritan thinking) with God to carry out this service faithfully. Thus, a magistrate who failed to temper the law's extremity with the proper amount of mercy breached his covenant with God and failed in his calling. Winthrop's strong passion for the worldly pleasures, and his successful struggle to control them, naturally led him to support this view of the magistrate's calling. His devoutly Puritan beliefs, therefore, fortified his conviction that judges must not be shackled with legislatively fixed penalties.

Politics, experience in controlling without denying worldly pleasure, and his deeply devout Puritanism partially elucidate why John Winthrop favored judicial discretion in sentencing

56. *Id.* at 64 (emphasis in original).
57. *Id.* at 64–65 (emphasis in original).

criminal defendants. But they do not wholly explain his position. Another force was also working on him, making him comfortable with judges' power to sentence without fixed penalties prescribed in advance of deciding particular cases. That force was a confident belief in the rule of law. It can be seen in his adamant claim that discretion was itself subject to rule and it reflected the atmosphere in which his own legal background was steeped.

It has been demonstrated convincingly that the rule of law was a firmly entrenched principle in sixteenth century English criminal justice, even when so important a public policy as enforcing the Henrician Reformation was at stake in the late 1530s.[58] I have tried to show elsewhere that adherence to that principle was also strong at the local level during the reign of Elizabeth I.[59] That effort will not be duplicated here, but one case deserves special mention. It involved another devout Puritan lawyer—this one living in the borough of Colchester during the 1570s, not too far from the Suffolk border where Winthrop had lived and administered the law as a justice of the peace from his manor of Groton.

The Puritan lawyer was James Morrice, Clerk of the borough of Colchester. In that capacity, he acted as legal counsel to the town's magistrates, called bailiffs. Living in the borough during the 1570s and 1580s was Thomas Debell, servant to the prominent Catholic Audley family and himself, by all accounts an outspoken, obstreperous papist. On numerous occasions, he had loudly denounced the execution of Mary Queen of Scots, brazenly speculated about the successor to Queen Elizabeth, and publicly criticized the execution of traitorous Catholics.

Morrice agreed that Deeble was dangerous, but since he had broken no specific law, according to Morrice there was no legal means by which to proceed against him. The law did not allow prosecuting a man simply because he was "lewd, foolish or vain," even if he was a papist. Since they had nothing more than mere suspicion against Deeble, the magistrates were told to confine their actions to keeping Deeble under careful watch until they could come up with sufficient evidence to prosecute him for an offense specifically proscribed by law.

58. *See* G. ELTON, POLICY AND POLICE (1972).
59. Samaha, *supra* note 19.

I have argued that this case, among others, demonstrates strong commitment to the rule of law in late Elizabethan Colchester. Indeed, it would be hard to find a stronger one. After all, James Morrice was an almost fanatic Puritan; he loathed papists. To stand firmly for the proposition that the hated papist could be taken into the criminal law's net only upon sufficient proof of clear wrongdoing is eloquent testimony that what the law allowed and not what Morrice wished must determine Deeble's fate.

It should be added that devotion to the rule of law emphatically was not meant to protect and glorify what today are called the rights of criminal defendants. The association of the rule of law with an ideology that places primacy on individual liberty and all that association has come to mean in the twentieth century was of much later vintage than the days of either James Morrice or John Winthrop. It only meant—and this is still a remarkable bit—that prosecution had to follow prescribed rules in criminal cases. The primacy of the individual never entered the heads of those adhering to, and applying, the principle in the sixteenth century, and at least the early years of the seventeenth as well. Rather, the opposite was true. Building the "city on a hill" was a community goal, one which required individual sacrifice, even repression, if it was to become a reality.

IV

John Winthrop's guide for magistrates aspiring to satisfy their "calling" was not easy to follow in practice. It required that the magistrate walk by God's rules and punish criminals only to the extent necessary to satisfy what God demanded—according to justice, wisdom and mercy. Since this could not be done until specific cases arose, judges had to weigh the circumstances of each offense and every offender individually, according to God's general rules. Judges had to put aside all the most human weaknesses—greed, fear, lust and pride—in order to do this. Otherwise, they would fail in their calling, breach their covenant with God and His people whom they served, destroy the "city on a hill," and bring ruin, pestilence, and all manner of suffering and chaos in its place.

Such awesome responsibility and such awful consequences for failing in it! How, in fact, did John Winthrop fare in his

calling as a magistrate, according to the standards he set? The criminal cases discussed in Winthrop's *Journal* strongly indicate that he administered criminal justice according to rule. Winthrop's role in, and his attitude toward, several leading cases clearly demonstrate that he would have escaped the ringing "vote of no confidence in [their] human compassion and fairness," that critics give modern judges in that respect.[60]

Captain John Underhill possessed qualities that, to say the least, were mixed in their value to building the Massachusetts Puritans' longed-for "city on a hill." He was a highly successful military man, fighting in the British forces in the Low Countries, Ireland, and at Cadiz prior to emigrating to New England. In 1636–37 he was a leading figure in winning the war against the Pequot Indians and in the 1640s was instrumental in helping the Dutch to win their own war against the Indians on Long Island.[61]

On several occasions he acted as a personal military aide to Governor Winthrop. On one of these, he escorted an accused bigamist from Plymouth to Boston so that the latter could be extradited to England. On another, he led a reconnaissance mission for Winthrop against the Indians who were suspected of planning an attack on the colony. And on a third, he was commissioned to apprehend and escort Roger Williams from Naragansett to Boston to answer charges that he was setting up a separate colony with improper religious views.[62]

Not only was Underhill a valuable and trusted military man, but he was also an active member of the community. He was among the founding members of the highly esteemed First Church of Boston; he sat in the original House of Deputies—the lower legislative house in the General Court; and later, when the exiled Reverend John Wheelright moved to Dover, Underhill became governor of that plantation. The Bay Colony's leaders did not favor this last position because Underhill was a freethinker who challenged the Bay Colony's religious orthodoxy and, somewhat paradoxically, he was at the same time a womanizer of unusual proportions.

Captain Underhill's troubles with the authorities in Massa-

60. *See* W. GAYLIN, PARTIAL JUSTICE (1974).

61. *See* J. WINTHROP, 1 THE HISTORY OF NEW ENGLAND FROM 1630 TO 1649 89, 217 (J. Savage ed. 1826) [hereinafter 1 JOURNAL].

62. *See* 1 JOURNAL, *supra* note 61, at 54–55.

chusetts began when he joined the "wrong" side in an acrimonious struggle that pitted Winthrop and most other colony leaders against the followers of Anne Hutchinson and her brother-in-law, the Reverend John Wheelright. The principle matter dividing them was the explosive question whether "good works" were evidence of God's election or whether His grace was impossible to discover by means of such "mere" human effort. Anne Hutchinson and her followers supported the "covenant of grace," which ruled out "good works" as proof of election. Winthrop steadfastly opposed the Hutchinsonians. The matter is much more complicated than this, but the lines drawn between the factions were hopelessly irreconcilable.

Winthrop and most of the General Court, probably quite rightly, believed "that two so opposite parties could not contain in the same body, without apparent hazard of ruin to the whole."[63] Called to repent of his dangerous opinions, John Wheelright instead delivered a passionate defense of the covenant of grace, for which he was promptly convicted of sedition and contempt. Some of his followers drew up and submitted a remonstrance, declaring Wheelright innocent of the charges against him, and claiming that the General Court had condemned the "truth of Christ" by its actions.

Sentence was postponed until the next meeting of the General Court, held conveniently after the annual elections when the current governor, Sir Henry Vane, the young, dashing champion of the Hutchinsonians might be unseated. He was. Winthrop was returned to the governorship and immediately took action to crush the opposition. Wheelright was exiled and the sixty signatories to the remonstrance were either banished or stripped of whatever power they possessed.

Underhill was one of these signatories. Called to answer for it, he "insisted . . . upon the liberty which all states . . . allow . . . military officers for free speech. . . ." Whereupon, because he "stood to justify" his actions, he was stripped of the franchise and ordered to surrender "all such guns, pistols, swords, powder shot and match" as he possessed.[64]

Less than a year following this challenge to authority in matters of religious orthodoxy, Captain Underhill's womanizing

63. *Id.* at 245.
64. *Id.* at 247–248.

activities came—or it was decided to bring them—to light. In questioning a "sober, godly woman" about remarks he had made comparing the magistrates to the Pharisees and Paul before his conversion, in short accusing them of hypocrisy concerning their faith, she told how Underhill seduced her and brought her to his own unorthodox religious views. As if this was not enough she added the damning testimony that he had told her that God had absolved him from the "bondage" of all orthodox views then supposedly prevailing in the colony. And as a fitting fillip to his outrageous claim, and while smoking a pipe of tobacco no less, Underhill gloated, "the Spirit set him an absolute promise of free grace with such assurance and joy, as he never since doubted of his good estate, neither should he, though he should fall into sin."[65]

Underhill refused to confess to any of this. Instead, he denied all, attacking the court for crediting one witness's testimony as sufficient to convict him. His claims to free grace, sexual license, smoking tobacco, and his truculent challenge to the charges against him brought the magistrates' wrath down upon him. But, he added to their consternation by withdrawing his retraction to the Hutchinsonian heresy. When asked if he still stuck to the opinions he signed to in the remonstrance, "[h]e answered, yes, and that his retraction was only of the manner, not of the matter." After reading his retraction, "the court committed him for abusing the court with a show of retraction, and intending no such thing." The next day he was brought before the court and sentenced to be banished. Within a week, in what could only be regarded by the leaders as a wanton outburst of sinful pride, he made a speech to the general court, defending his "moderate" use of tobacco, "wondering" about the severity of the court's sentence, and claiming that he knew "Christ was his." For this the elders reproved him and the august Reverend John Cotton reminded him that it was against the law to condemn a sentence publicly before convincing at least some of the magistrates privately that he was right.[66]

On the "Lord's Day" the next week, Underhill was faced with another seduction charge. After "having been privately dealt with upon suspicion of incontinency with a neighbor's

65. *Id.* at 270.
66. *Id.*

wife, and not hearkening to it," he was questioned publicly and admonished. It seems the captain was found locked in a room alone several times with a "woman, being young and beautiful and . . . of a jovial spirit and behavior." Although he admitted that "it had an appearance of evil in it," the real reason for his visits was to comfort her because she "was in great trouble of mind, and sore temptations." As for being found behind locked doors with the "fair maid," far from seducing her, he maintained that "they were in private prayer together."[67] Winthrop reports that the wise elders of Boston's First Church were not fooled by any of this. They complained that Underhill should have called in some brother or sister to sit with them while they prayed. Besides, the elders declared, on a prior occasion Underhill had "procured them to go visit her, telling them that she was in great trouble of mind; but when they came to her, (taking her, it seems, upon the sudden) they perceived no such thing."[68]

That was in September 1638. By December, the fiery Captain Underhill had added a good bit of fuel to an already more than smoldering ember. The Reverend John Wheelright and some of his followers had removed to set up a new church and begin a new plantation in neighboring Pascataquack, proposing to make Underhill their governor at Dover. Winthrop, with the backing of the General Court, wrote to those at Pascataquack strenuously objecting to Underhill's imminent appointment, informing them of the latter's alleged adulterous life. Underhill, who intercepted the letter, was enraged. He wrote to Reverend John Cotton and to a young man in Winthrop's own household, reviling the governor and his letter. He threatened to destroy the Bay colony and did, in fact, commit the unforgivable—he tattled what he perceived to be the magistrates' high handed actions to England.[69]

To his treachery, according to Winthrop, he added duplicity. At the same time that he was reviling Winthrop behind his back, and plotting the destruction of Massachusetts, "he wrote . . . to the governor in very fair terms, entreating an obliterating of all that was past, and a bearing with human infirmities,

67. *Id.* at 271.
68. *Id.*
69. *See id.* at 281.

. . . disavowing all purpose of revenge. . . ."[70] As a result, Captain Underhill was ordered to Boston to answer charges against him. A safe conduct was sent with it. Protesting that it was inadequate to protect a banished man, the captain refused to be a party to his seemingly certain conviction. Governor Winthrop and his council obligingly sent Underhill a second safe conduct, this one valid for three months, in order to assure against any unwarranted intrusions and deprivations against Underhill's person.[71]

This episode brought the errant captain to his senses. Winthrop confidently reported by the following July: "Capt. Underhill, having been dealt with and convinced of his great sin against God and the churches and state here . . . returned to a better mind, and wrote diverse letters to the governor and deputy . . . bewailing his offenses, and craving pardon."[72]

A very contrite Captain Underhill, "brought . . . to remorse for his foul sins" arrived in Boston on September 3, 1640.[73] Following the lecture day sermon, the pastor of Boston Church called the captain forth and gave him leave to speak, "a spectacle which caused many weeping eyes, though it afforded . . . much rejoicing to behold the power of the Lord Jesus . . . holding forth the authority of his regal scepter. . . ."[74] Being known as a man who always dressed in high fashion, he "came in his worst clothes . . . without a band, in a foul linen cap pulled close to his eyes" to pour out his soul to the whole assemblage.[75]

Pour it out he did. In a deeply moving public confession:

> [W]ith many deep sighs and abundance of tears, [he] lay open his wicked course, his adultery, his hypocrisy, his persecution of God's people here, and especially his pride (as the root of all, which caused God to give him over to his other sinful courses) and contempt of the magistrates.[76]

Underhill did everything the authorities could have wanted. He justified God, the church, and the court in all that was done

70. *Id.* at 291–92.
71. *Id.*
72. *Id.* at 306.
73. JOURNAL, *supra* note 1, at 13.
74. *Id.* at 14.
75. *Id.*
76. *Id.*

to him;[77] he admitted his own depravity, a depravity that Satan preyed upon and used to take hold of him; he conceded that Satan could not have overpowered him if he had remained under the church's protection; he elaborated upon the terrors, torment and misery he felt since becoming Satan's "bond-slave"; and he accepted God's goodness in finally breaking his heart and bringing him to "humble himself before [God] night and day with prayers and tears till his strength was wasted. . . ."[78]

Obviously convinced and moved, Winthrop, without a trace of malice, reported that Underwood:

> [a]ppeared as a man worn out with sorrow, and yet he could find no peace, therefore he was now come to seek it in this ordinance of God. He spake well, save that his blubbering . . . interrupted him, and all along he discovered a broken and melting heart, and gave good exhortations to take heed of such vanities and beginnings of evil as had occasioned his fall; and in the end he earnestly and humbly besought the church to have compassion of him, and to deliver him out of the hands of Satan.[79]

The church did take Underwood back. When the General Court assembled, Underwood did a repeat performance, openly confessing his sins and begging pardon, which in their "private judgment" they "freely" bestowed. As for his adultery, however, the General Court

> would not pardon that for example's sake, nor would they restore him to freedom, although they released his banishment, and declared the former law against adultery to be of no force; so as there was no law now to touch his life, for the new law against adultery was made since his fact committed.[80]

Finally, to these confessions Underwood added one more. The repentant captain admitted that he had tried for six months to overcome the cooper's wife's chastity before she finally gave in, "which he thought no woman could have resisted."[81]

> And to make his peace the more sound, he went to her hus-

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 14–15.
81. *Id.* at 15.

> band . . . and fell upon his knees before him in the presence of some of the elders and others, and confessed the wrong he had done him, and besought him to forgive him, which he did very freely, and in testimony thereof he sent the captain's wife a token.[82]

After all this, it seems that Captain Underhill should have convinced the magistrates that he was, indeed, a reformed man. Not so. The next time we hear of him—September 1641—he was in trouble again. Visiting Boston, he was arrested under Governor Richard Bellingham's warrant "to appear at the next court, and bound for his good behavior in the meantime. . . ."[83] What this means is that he was under a bond that was subject to forfeiture for any behavior that might tend to disturb the peace until court was held. At the governor's behest he was, indeed, indicted at the next court session but was "acquitted by proclamation," that is to say, no witnesses could be found to testify against him and so all charges against him were dropped.[84]

The importance of the case for our purposes lies in Winthrop's assessment of this last encounter between Captain Underhill and the Massachusetts Bay authorities. It demonstrates Winthrop's firm commitment to the rule of law. He begins by pointing out that the captain's arrest, and binding him to his good behavior, "was ill taken by many" because he was not accused by any person and had, moreover, been reconciled to both the church and court. Winthrop was highly irritated because the action had been taken in spite of both the court's remission of its sentence of banishment against Underhill, and its readiness to "pardon him fully, but for fear of offence."[85]

Finally, the court, "having reversed the sentence against him for former misdemeanors, had implicitly pardoned all other misdemeanors before that time, and his adultery was no more than a misdemeanor."[86] Therefore, "it was certainly an error" to have proceeded against him.[87]

---

82. *Id.*

83. *Id.* at 41.

84. *Id. See* Samaha, *The Recognizance in Elizabethan Law Enforcement*, 25 THE AM. J. LEGAL HIST. 189–204 (1981) (for a general discussion of the uses of recognizances in England just prior to this period).

85. JOURNAL, *supra* note 1, at 41.

86. *Id.*

87. *Id.*

How did the authorities make such an error? To Winthrop the answer was clear. The governor, and those who supported him, had not tempered justice with wisdom and mercy, the cardinal principle controlling discretion according to rule. In a revealing passage, Winthrop explains it. "So easily may a magistrate be misled on the right hand by the secret whisperings of such as pretend a zeal of justice and the punishment of sin."[88] Fortunately, the situation was not totally lost, the former governor smugly concluded. Because, although "the [present] governor [Bellingham] caused [Underhill] to be indicted at the next court, he was acquitted by proclamation."[89]

This was a fitting decision according to Winthrop, not only for the technical reason that no witnesses had appeared to prosecute Underwood but also because wise public policy dictated that punishment should be tailored to fit the criminal. According to most available evidence, showing remorse, repentance, and submission to authority were valued extremely highly in Puritan New England, and weighed heavily in numerous sentences. Since Captain Underhill obviously had done all of these, as Winthrop had pointed out so elaborately and with such transparent pleasure, it was both unwise and unmerciful to punish him further. Justice, wisely tempered by mercy, mandated that he be set free to re-enter the community. Applying the general principles Winthrop espoused led to this conclusion.

A second case also demonstrates Winthrop's commitment to the rule of law. Charles de Saint Etienne de la Tour and Charles de Menon, Sieur d'Alney de Charnise were French rivals claiming the governorship of Nova Scotia. Their rivalry sometimes took them as far south as the Maine coast where they occasionally raided fishing villages. Winthrop became involved in their struggle when he permitted La Tour to seek aid from Massachusetts colonists. While La Tour and a fair number of his men were in Boston on one of these missions to obtain supplies, the occasion for the second case illustrating Winthrop's commitment to the rule of law arose.

An English sailor aboard a Portuguese ship delivering salt to Boston who had gotten drunk while ashore was promptly carried to his lodgings by his friends. Upon hearing of this, the

88. *Id.*
89. *Id.*

local constable, "a godly man, and zealous against such disorders," sought out the sailor, entered his room, and found him dead asleep in his bed. He awakened and led him to the stocks, where the bewildered sailor was secured until morning when he could be taken to a resident magistrate. Or so at least the constable thought.[90]

Shortly after being put in the stocks, one of La Tour's gentleman happened on La Tour, whereupon the latter set the English sailor free. The constable, discovering this mischievous act, went directly to the Frenchman responsible for it. The constable roused the Frenchman, who had retired for the night by the time the constable discovered him. He demanded that the French rescuer accompany the constable to the stocks. Speaking in French, the rescuer told the constable that he would go to prison, but not into the stocks. Not understanding French, the constable pressed the Frenchman to go to the stocks, which last the Frenchman resisted with a sword. The undaunted constable, having called for assistance, soon disarmed the Frenchman and forcibly carried him to the stocks. Shortly thereafter, he was removed from the stocks and taken first to prison and eventually to La Tour himself.

According to Winthrop, this caused "much tumult" among the many Frenchmen and other strangers then present in the town. La Tour was "much grieved" over his servant's misbehavior and perhaps even more over the "disgrace" it caused him "for in France it is an ignominious thing to be laid in the stocks."[91] Despite his discomfiture over the whole unpleasant business, La Tour agreed to leave it to the magistrates to settle. For their part, the magistrates apologized for "such occasion against any of his servants," but since they "must do justice" they were bound to commit the rescuer to prison unless he could find "sureties . . . to keep the peace."[92] La Tour's own gentlemen servants, though perfectly willing, were prohibited under English law to act as sureties (or bondsmen in modern terms). Two members of the Boston church, however, put up themselves as sureties for the Frenchman's appearance, after which he was bailed at once.

Criticism of these events by the "common people"

90. *See id.* at 87.
91. *Id.* at 188.
92. *Id.*

prompted Winthrop to comment on the case, and in the process to provide us with another opportunity to test his philosophy of criminal justice in the crucible of actual events. In the first place, Winthrop reminded his readers, "by our law bail could not be denied him."[93] Besides, "the constable was the occasion of all this in transgressing the bounds of his office."[94] The constable's errors were manifold. First, he acted illegally. According to law the constable had the authority to lock persons in the stocks who were in the course of disturbing the peace in an officer's presence. That authority, however, stopped as soon as the disturbance ended. Once over, Winthrop pointed out, it was for the magistrate alone to make inquiry, and to take whatever action was appropriate. The constable manifestly had exceeded his authority in entering the Frenchman's lodgings, and arresting him without warrant from a magistrate.[95]

The constable's actions were not only illegal but also unwise. What he considered the improper actions taken against both the Englishman and Frenchman in the episode offended Winthrop. "[F]etching a man out of his lodging that was asleep on his bed,"[96] as was the drunk Englishman, was unnecessary, illegal and unwise. The same was true of the constable's actions toward La Tour's man:

> In laying hands upon the Frenchman that had opened the stocks, when he was gone and quiet, and no disturbance of the peace then appearing, . . . In carrying him to prison . . . [and] in putting such a reproach upon a stranger and a gentleman, when there was no need, for he knew he would be forthcoming . . . (Such illegal, excessive and foolish behavior) might have caused much blood and no good done by it, and justice might have had a more fair and safe way, if the constable had kept within his own bounds, and had not interfered upon the authority of the magistrate.[97]

What should be done with the errant official? Winthrop warns that he could have been hauled before the court, convicted of false imprisonment, and publicly admonished for his misbehavior. The magistrates wisely decided against it; they

93. *Id.*
94. *Id.*
95. *See id.*
96. *Id.*
97. *Id.*

"admonished [him] for it in private" instead. What might appear as too lenient treatment was not so at all if, according to Winthrop, the surrounding circumstances of this particular case are considered. The constable acted in good faith and devotion to his calling. His fault lay in "ignorant and misguided zeal" in that calling, not malice and corruption.[98]

The magistrates were well aware that punishing a faithful and devoted constable would not only "discourage . . . and discountenance . . . an honest officer," but it would also "give occasion to offenders and their abettors to insult over him. . . ."[99] The private admonition tempered the zeal of the constable without discouraging him and other honest petty officers, and encouraging potential offenders. Besides, it took into account the devotion of the particular officer, who deserved some leniency for his goodness. Thus was justice administered wisely and with mercy, the very embodiment of discretion according to the rule of law which Winthrop treasured so highly.

A third case similarly illustrates how Winthrop's commitment to the rule of law shaped his ideas as to how to control and guide discretion. Daniel Fairfield, a neighbor to the Salem magistrate Mr. John Humfrey, and two of the latter's servants, Jenkin Davis and John Hudson, were the principals in the most notorious case of the Winthrop years. According to Winthrop, Humfrey was a neglectful parent. The main evidence for this was that Humfrey put his children in the hands of irresponsible servants, the consequences of which led directly to the sad case at hand.

Over a period of at least months, perhaps years, the three men repeatedly sexually abused Humfrey's two minor daughters, both of whom were under ten years old. Usually, these episodes took place during church and lecture times, while Humfrey was away from home. So frequent were these abuses that one daughter eventually even came to enjoy them, according to the horrified Winthrop.[100]

When one of the daughters confided the whole business to her newly married sister, the shocking tale became first the subject of a magisterial investigation, and quickly thereafter a

98. *Id.*
99. *Id.*
100. *See id.* at 45.

notorious public scandal. The principals were tried and convicted of sodomy and rape, largely on their own confessions and the victim's testimony. Eventually, they were sentenced to varying degrees of brutal punishment. Fairfield was whipped forty stripes at both Boston and Salem and,

> confined to Boston neck, upon pain of death, if he went out. . . . [Furthermore,] he should have one nostril slit and seared at Boston and the other at Salem, and to wear an halter about his neck visibly all his life, or to be whipped every time he were seen abroad without it, and to die, if he attempted the like upon any person, and 40 (pounds) to Mr. Humfrey.[101]

John Hudson was whipped at Boston and Lynn and ordered to pay Humfrey twenty pounds within two years. Jenkin Davis was whipped at Boston and Lynn, ordered to wear a halter and to pay Humfrey forty pounds.[102]

The case did not go down so easily as this brief rendition might suggest. Three questions troubled the magistrates greatly: (1) Whether the accused had committed the crimes of rape and sodomy, according to the law; (2) whether they were convicted according to proper procedural rules; and (3) what was the appropriate punishment for the offenses that were committed. In order to resolve these difficulties properly, the magistrates sought counsel from the elders of all the New England plantations. Some of the responses from Plymouth plantation have survived and are printed in Governor Bradford's *History of Plymouth Plantation*.[103] Winthrop reported not only the Plymouth responses but also summarized the rest of the elders' suggestions as well.

No doubt can remain about either the deep pain and revulsion that the whole sorry business engendered or the painful effort that was made officially to deal with it according to law. Perhaps no single case between the years 1630 and 1650 more clearly demonstrates the leaders' firm commitment to the rule of law than their dispassionate treatment of the legal questions surrounding acts they clearly considered atrocities. These legal questions ranged across the whole spectrum of criminal justice—from the substantive criminal law of rape and sodomy

101. *Id.* at 48.
102. *Id.*
103. 2 W. BRADFORD, HISTORY OF PLYMOUTH PLANTATION 315–28 (1912).

to the adjectival rules governing self-incrimination and the sufficiency of evidence, to exercising judicial discretion in punishing criminals. Throughout, feelings ran strong to execute the criminals, and clearly both the Bay magistrates and the elders they consulted looked hard for a way to accomplish that end. Yet they were limited—a limit self-imposed—by what the law allowed. Just what did the law allow?

As for the substantive law, a majority of the magistrates agreed that the principals had committed either rape or sodomy, or both. Accord, however, was not reached without strenuous objection from some elders and magistrates who were troubled because "penetration" had not been proved. Long and technical discussions were held in which they wrangled over whether it was necessary to prove actual penetration and effusion of semen in the vagina or whether it was enough—at least for sodomy—to prove that the accused had made external contact accompanied by sufficient manipulation to reach orgasm. In the end, the broader definition was hesitatingly accepted. But the problems in the case were far from exhausted.[104]

Next, the magistrates were faced with procedural difficulties. One was the matter of proof. Ordinarily, two witnesses were expected to testify in order to convict in criminal cases. There were exceptions, as the elders made clear in their response to the question the Bay magistrates put to them. For instance, if one witness's testimony had high probative value, then additional circumstantial evidence sufficed. Also, if an accused's confession corroborated the one witness's highly probative testimony, a conviction based on that evidence was good. This last was the rule that applied to Fairfield's case. The victim testified to the sexual acts; the accused confessed their guilt with respect to it.[105]

The matter of sufficient proof required that yet one more hurdle be cleared in order to convict Fairfield and his co-defendants. This was the rule against forced confessions. Since the accused had admitted their sexual abuses only under strong pressure from the magistrates, it was necessary to answer "how far a magistrate might exact a confession . . . in

104. *See* JOURNAL, *supra* note 1, at 46–47.
105. *See id.*

capital cases."[106] Winthrop reports that, according to a majority of the elders consulted, the rule was:

> where such a fact is committed, and one witness or strong presumptions do point out the offender, there the judge may examine him strictly, and he is bound to answer directly, though to the peril of his life. But if there be only light suspicion . . . then the judge is not to press him to answer, nor is he to be denied the benefit of the law, but he may be silent, and call for his accusers. But for examination by oath or torture in criminal cases, it was generally denied to be lawful.[107]

The magistrates concluded that since both "strong presumptions" and a highly credible witness existed against Fairfield and the others, the "strict" examinations were proper, the confessions based on them were legal, and they could convict the accused.

The most difficult problem of all, however, still remained because the court was much divided over the sentence. Moved by the particular circumstances of the case—the "foulness of the sin, and their long continuance in it . . . wrought strongly with many to put them to death."[108] But, "after much dispute, (and remaining doubts) the court agreed upon another sentence,"[109] the one already described. According to Winthrop:

> The only reason that saved their lives was that the sin was not capital by any express law of God, but to be drawn only by proportion; nor was it made capital by any law of our own, so as we had no warrant to put them to death, and we had formerly refrained (by the advice of the elders) upon the same ground, in a case of manifest adultery, and rape of a child under 7 by a boy of about 17.[110]

The heart of the matter was that however much the sin was abhorred and the culprits hated, they could only be punished to the extent that the law allowed. Winthrop applied the general principles of law to the revolting facts of Fairfield's case.

Lest it be thought that the punishments the culprits received were almost as harsh as—perhaps to some modern readers, worse than—death, a reminder about some realities of seven-

106. *Id.* at 47.
107. *Id.*
108. *Id.* at 47–48.
109. *Id.* at 48.
110. *Id.*

teenth century life are in order. Physical pain and suffering were constant companions to those living in colonial America. Disease was widespread, injuries frequent, infection rampant, and bodily decay ongoing. Moreover, such calamities were accepted with resignation. The threshold of pain was higher than in an age where drugs exist to numb the slightest discomfort.

Not only was this pain and suffering accepted with resignation. To have fought against it was regarded as an arrogant affront to divine providence. God was behind all these afflictions. They were proof positive that the "city on a hill" was not yet sufficiently pure to glorify God. Particularly foul sins such as Fairfield's, Davis's, and Hudson's seriously jeopardized the very foundation of the Bay Colony's existence. Slit nostrils, forty stripes, and the badge of shame were hardly too high a price to pay to placate God and carry on his work in New England.

V

How, then, can John Winthrop's role in the administration of criminal justice during the early seventeenth century finally be assessed? If his writing and actions merely underline the problems surrounding the exercise of judicial discretion, an excursion into early American history is hardly necessary to add to the vast amounts already written on the subject in modern times. If they are viewed as an addition to Puritan Studies they do so only marginally since John Winthrop's general ideas are but elaborated upon in his writings on discretion. But if they demonstrate just how long the best minds have been directed at solving the thorny issues generated by the tension between discretion and rule in the administration of criminal justice, they will have contributed substantially toward putting this current issue into its proper historical perspective.

Finally, if they bring into relief the degree to which discretion depends upon the individuals who exercise it, only then perhaps can John Winthrop's contribution to the history of criminal justice finally be assessed. In that respect, John Winthrop is an object lesson. Standing in so stark contrast to most administrators of criminal justice, he unwittingly proved how few individuals possess the capacity to be tolerant, to be fair, just, and merciful, and keep deep ideological commitment at

bay. In short, so rare is the ability to distinguish among convicted criminals without discriminating against them that in the long run our hopes for justice tempered with mercy surely must rest more safely in prescribed penalties, not in the hands of any individual. In short, by his own example, Winthrop proved what he so ardently denied—that discretion is not ruled by law but by the individuals who hold the power to administer law.