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John Winthrop's Concept of Law in 17th Century New England, One Notion of Puritan Thinking

Rosezella Canty-Letsome*

INTRODUCTION

Most legal historians generally agree that the 17th century witnessed the birth of American law.¹ They differ, however, in their theories on its conceptions, and throughout the general works on early American legal history, three dominant themes emerge.

The first idea to be advanced was the "orthodox legal theory,"² the belief that the English immigrants carried with them the common law of England to the colonies. This theory has been accepted in two judicial opinions³ and has been acknowledged by the distinguished Mr. Justice Story in his *Commentaries on the Constitution of the United States*.⁴ Supporters of the "orthodox theory" rationalized any differences between English and American law by emphasizing that circumstances in the colonies required some departures from English common law.⁵

A quite contrary position was adopted by some scholars: the colonists, upon their arrival to America, established their own law. One great proponent of this "indigenous law" theory was Paul S. Reinsch.⁶ He conceded that the colonists were influenced by their former contact with English law, but believed that any use of this law was voluntary.⁷ Advocates of the "indigenous law" theory sug-

* B.A., Howard University (1970); M.A.T., Antioch College (1970); J.D., Duquesne University (1973); LL.M., Harvard Law School (1977).

1. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960) [hereinafter cited as HASKINS]; M. HOWE, *READINGS IN AMERICAN LEGAL HISTORY* (1949) [hereinafter cited as HOWE]; R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* (1930).

2. See Chafee, *Colonial Courts and the Common Law*, 68 *MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS* 132 (1952), reprinted in D. FLAHERTY, *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 53 (1969) [hereinafter cited as *ESSAYS*].

3. See *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137 (1829); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

4. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 32 (2d ed. 1851).

5. See *ESSAYS*, *supra* note 2, at 64.

6. See Reinsch, *English Common Law in the Early American Colonies*, 31 *BULL. U. WIS.* 397 (1899).

7. See *ESSAYS*, *supra* note 2, at 66. Chafee more fully discusses the Reinsch position.

gest that the colonists turned for guidance to rules founded upon the Old Testament and not the laws of England.

These theories represent the extremes and disregard the possibility of modification. Proponents of what I call the "modification combination" theory⁸ believe that colonial law was a mixture of English common law, English local law and customs, and indigenous law. Necessarily, this approach considers the complexities and short-comings of humanism — elements foremost in the minds of New England Puritans, and in particular, John Winthrop. Furthermore, there is substantial evidence that this is in fact how the law of the Massachusetts Bay Colony settlement was formed.⁹ For these reasons, the "modification-combination theory," as it is applicable to a study of the Massachusetts Bay Colony, will be the focus of discussion.

The Massachusetts Bay Colony played a major role in the development of American law. Provisions of the famous Massachusetts Code of 1648 have appeared in the Codes of New Haven Colony, Connecticut, and New York,¹⁰ and the effects of the Massachusetts legislation also spread southward to the Middle Atlantic colonies.¹¹ The total influence of Massachusetts Bay Colony legislation throughout the colonies has not been fully examined, but it is recognized that the influence was substantial.¹²

Early 17th century Massachusetts law was framed largely to meet the conditions of Puritan society.¹³ A major contributor was John Winthrop, Puritan Governor and Magistrate of the Massachusetts Bay Colony, who at an early age incorporated the doctrines of Puritanism into his life.¹⁴ The "Moses of the Puritans," Winthrop had

8. See generally HASKINS, *supra* note 1.

9. See J. CUSHING, *THE LAWS AND LIBERTIES OF MASSACHUSETTS, 1641-1691* (1976) [hereinafter cited as CUSHING]. See also *THE COLONIAL LAWS OF MASSACHUSETTS 29-64* (W. Whitmore ed. 1887) [hereinafter cited as *THE BODY OF LIBERTIES*]; *THE LAWS AND LIBERTIES OF MASSACHUSETTS* (M. Farrand ed. 1929) [hereinafter cited as *THE LAWS AND LIBERTIES OF 1648*].

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

11. *Id.* at 417.

12. *Id.*

13. *Id.* See also P. MILLER, *ERRAND INTO THE WILDERNESS 143-45* (1956) [hereinafter cited as MILLER]; Osgood, *The Political Ideas of the Puritans*, 6 POLITICAL SCI. Q. 1 (1891) [hereinafter cited as Osgood].

14. E. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 7* (1958) [hereinafter cited as MORGAN].

enormous influence¹⁵ on the formation of society, government, and the development of Puritanism in the Massachusetts Bay Colony. Thus, to obtain an understanding of the concept of law acceptable to the majority of Puritans in early 17th century New England, this study will be confined to the views of John Winthrop.

Reconstruction of the perceptions and concepts of a man from an era other than one's own is indeed a difficult task. Accomplishment requires an examination of the intricate interplay of the political, social, and religious environments of 17th century England and New England.

17TH CENTURY ENGLAND, A FEW RELEVANT INCIDENTS

Although this study is primarily concerned with 17th century New England, it would be incomplete if the events of 17th century England, that paved the way, were not mentioned.

Throughout the 16th and 17th centuries, the Church of England underwent several crises and reforms. James I, who arrested reformation of the church, allowed Parliament to gain a share of the sovereign power. The Puritans, a vociferous minority and at times a majority in Parliament, demonstrated their influence by moving Parliament to strictly enforce the laws of God, a great desire of the Puritans. Unfortunately for the Puritans, their influence was short-lived; James I died in 1625 and was succeeded by his son, Charles I, who did not approve of Parliament's newly won authority and formally dissolved Parliament on March 10, 1629.

Charles promoted the ceremonious religious doctrines of Arminianism¹⁶ which was quite alarming to those who adhered to the teachings of Puritanism. The Puritans believed that the Anglican Church should be purged of its hierarchy and the forms and ceremonies it inherited from Rome,¹⁷ finding no justification in the Bible

15. *Id.* at 86.

16. The Arminians believed that men using their own willpower could achieve faith and thus win salvation.

17. HASKINS, *supra* note 1, at 16. This is a superficial definition of Puritanism. See MILLER, *supra* note 13, at 48-98. See generally MORGAN, *supra* note 14.

To accurately define Puritanism is almost impossible. However, some generalizations about the nature of Puritanism can be made. It was a way of life with political and social implications of great magnitude. Puritans conceived of man and the universe much as did John Calvin; therefore, one thinks of them as Calvinists. However, they were not Calvinists. The Puritans did not consider Calvin "the fountainhead of their thought but regarded him

for these traditions.¹⁸

At the same time, the tenets of Puritanism were filled with contradictions,¹⁹ prompting various responses. For example, many reacted by completely separating from the Anglican Church, while others chose to stay within the Church of England, in hope of reforming it. This latter group was further divided into two factions: the non-conformists, who disobeyed the laws of the Church rather than compromise, and the conformable Puritans,²⁰ such as John Winthrop, who attended the prescribed services according to the Book of Common Prayer, while wishing for better things. Conditions, however, only worsened. Archbishop Laud, Charles' appointee, hated Puritans and insisted upon total conformity with the Church of England. At the same time, Protestantism was suffering throughout all parts of Europe.²¹

as one among many 'juicious' divines." MILLER, *supra* note 13, at 50 n.1.

In the Puritan conception of God, He was not to be understood but adored; He was the sum of all perfections; He could not be approached directly. Puritans saw the relationship between God and man as resting on "the Covenant of Grace." This covenant was God's contract with man concerning eternal life. In essence, the doctrine of the covenant was the mainpart of the program of salvation. Both God and man were committed by the terms of the covenant. As a result of "the Fall of Man," man was unable to do anything on his own. God demanded of man a belief and simple faith in Christ the mediator. On God's part, He voluntarily undertook to save those who believed and supplied the power of belief so that man could fulfill the terms of his covenant. The covenant was the only method by which God dealt with man. Salvation came only through the covenant and only to those who were in covenant with God. God elected those whom He wanted to take the covenant. Not all were chosen. The covenant theology became the foundation for the state and church in New England.

18. The Puritans looked to the Bible text as the whole word of God to provide the primary means of discovering the purposes of God. HASKINS, *supra* note 1, at 13, 16; S. MORISON, BUILDERS OF THE BAY COLONY 54 (1930) [hereinafter cited as MORISON].

19. Puritanism required that [a man put] his whole hope in Christ but taught him that Christ would utterly reject him unless before he was born God had foreordained his salvation. Puritanism required that man refrain from sin but told him he would sin anyhow. Puritanism required that he reform the world in the image of God's holy kingdom but taught him that the evil of the world was incurable and inevitable. Puritanism required that he work to the best of his ability at whatever task was set before him and partake of the good things that God had filled the world with but told him he must enjoy his work and his pleasures only, as it were, absent-mindedly, with his attention fixed on God.

MORGAN, *supra* note 14, at 7-8.

20. A large group of conformable Puritans settled in Massachusetts.

21. Cardinal Richelieu had destroyed the power of the French Huguenots who had risen in rebellion against a Catholic king. In Germany, Wallenstein overran Palatinate. John Winthrop, in a letter to his wife, succinctly described the tenor of the times:

My Good Wife, . . . I prayse the lord for the wished newes of thy welfare & of the rest of our companye, & the continuance of ours heer: it is a great favor, that we may enjoy so much comfort & peace in these so evill & declining tymes, & when the

Against this background, the Puritans in England began to think seriously about resolving their dilemma by emigrating. Emigration was not a novel idea. The "Separatists," a Puritan group, emigrated to Holland in the early 17th century.

The conformable Puritans looked to New England, where they could be physically, but not spiritually, separated from the Church of England. New England would afford them the opportunity to purify and perfect their religion by working out the complete reformation which had not yet been accomplished in England.

THOSE WHO CAME WITH THE CHARTER

For some time there had been interest among several prominent English Puritans to colonize in America. In 1628 a group of Puritan merchants, the New England Company, received a charter from the Council for New England authorizing the company to settle and govern part of the New England area. One year later, a royal charter confirmed the grant, changing the name of the company to "The Governor and Company of the Massachusetts Bay in Newe-England."

The charter did not direct the corporation to remain in England; therefore, the members decided to transfer the government of the Company to the soil of New England. The decision to transfer the

increasings of our sinnes gives us so great cause to looke for some heavey scourge & Judgment to be cominge upon us: The Lorde hath admonished, threatened, corrected, & astonished us, yet we growe worse & worse, so as his Spirit will not allwayes strive with us, he must needs give waye to his furye at last: He hath smitten all the other Churches before our eyes, & hath made them to drinke of the bitter cuppe of tribulatio, even unto death. We sawe this, & humbled not ourselves, to turne from our evill wayes, but have provoked him more than all the nations rounde about us: therefore he is turninge the Cuppe towards us also, & because we are the last, our portion must be, to drinke the verye dreggs which remaine: My dear wife, I am verly persuaded, God will bringe some heavey Affliction upon this lande, & that speedyllye: but be of good comfort, the hardest that can come shall be a meanes to mortifie this bodye of corruption, which is a thousand tymes more dangerous to us then any outward tribulation, & to bringe us into nearer comunion with our Lord Jesus Christ, & more assurance of his kingdome. If the Lord seeth it wilbe good for us, he will provide a shelter & a hindinge place for us & others, as a Zoar for Lott, Sarephtah for his prophet, & c: if not, yet he will not forsake us: though he correct us with the roddes of men, yet if he take not his allsufficient; if we have him, we have all things: if he seeth it not good to cutt our portion, in these thinges belowe, equall to the largenesse of our desires, yet if he please to frame our mindes to the portion he allotts us, it wilbe as well for us.

1 R. WINTHROP, *LIFE AND LETTERS OF JOHN WINTHROP* 295-97 (1869) [hereinafter cited as *LETTERS OF JOHN WINTHROP*].

company government proved to be of great importance. It provided a substantial degree of independence from English authority for the Massachusetts Bay Colony.

To motivate people to embark upon this adventure, a host of incentives was employed. Emphasis was placed on economic opportunity and material betterment, ideas quite attractive to most Englishmen in light of the deteriorating standard of living in England. England was going through a depression: growth in industry was hampered by governmental regulations; wages were inconsistent with the increasing prices; rents were high; poverty was widespread. To attract Puritans, however, Winthrop stressed the relationship between religious opportunity and economic opportunity available in America.²² The prospects of owning property and the adventure embodied in exploring the unknown did not attract Puritans. Thus, the Massachusetts migration was, in some respects, an unprecedented event in the modern world.²³ The members of the corporation who emigrated were, in large part, men of the professional and middle classes, some very well-to-do, many middle-aged and older. These men, inspired by the Puritan doctrines,²⁴ had a clear purpose for uprooting themselves and their families from the homeland. They intended to establish a commonwealth under a commission directly from God.

GOVERNOR JOHN WINTHROP: THE FATHER OF NEW ENGLAND

John Winthrop was the prime impetus in this enterprise, himself leaving behind the life of a country squire, magistrate, and lawyer. Wise, conscientious, and modest,²⁵ Winthrop was recognized early by his colleagues for his strength and leadership ability.²⁶ Although intensely religious, Winthrop was amazingly broadminded in his views. Cotton Mather rightfully referred to John Winthrop as the "Father of New England."

22. 2 WINTHROP PAPERS 139 (Massachusetts Historical Society 1931) [hereinafter cited as WINTHROP PAPERS].

23. See MORISON, *supra* note 18, at 71.

24. For a discussion of these doctrines, see note 17 *supra*.

25. John Winthrop kept a journal of the voyage aboard the *Arbella* and of later events in New England until his death in 1649. It contains invaluable information on historical occurrences in Massachusetts. See generally 1 & 2 WINTHROP PAPERS, *supra* note 22 (letters and other communications of John Winthrop revealing the above stated traits of his character).

26. During his 19 years with the Massachusetts Bay Colony, Winthrop served as Governor for nine years and as Deputy-Governor or Assistant for the other ten.

Winthrop was not one to pass up an opportunity to put his Puritan belief into practice; therefore, he accepted the governorship of Massachusetts Bay Colony as a chance to lead and shape a society according to the word of God. Little did he know of the great impact he would have on American law.²⁷

“A DUE FORME OF GOVERNMENT”: 17TH CENTURY NEW ENGLAND

A single purpose unified the emigrants: to establish a “due forme of government” that would provide the mechanism for controlling and shaping all aspects of the colonists’ lives in accordance with the aims and purposes for the founding of the Massachusetts Bay Colony. The full accomplishment of this task took years to realize.

The source of the Massachusetts Bay Company’s power was the Charter which gave the colony leaders free reign to regulate colony affairs.²⁸ The *only* limitation the Charter placed on the colonists was that their actions could not be repugnant to the laws of England.²⁹ The Charter was more specific in setting out the organization of the company. It called for the establishment of a General Court consisting of officers, assistants, and general members known as “freemen.” The Court was to meet four times a year to make laws and generally to manage the colony’s affairs. Each year, the Court was to elect a Board or Court of Assistants made up of the governor, a deputy governor, and eighteen assistants upon whom fell the responsibility of managing the colony between the designated meetings

27. Haskins sums up well the Winthrop Puritan group influence:

This handful of men and women, inspired by the creeds and platforms of Puritanism, and believing themselves children of Israel bent on the achievement of a mission that was divinely inspired and protected, was the nucleus not of a colony but of an American commonwealth. Thousands were to come after them during the ensuing decade of the great migration, but the ideals of the firstcomers continued to inspire and permeate the enlarging community. Little did Winthrop know how accurately would be fulfilled his prophecy that his “Citty upon a Hill” should be made “a prayse and glory.” Separating first from the English Church, later from English ways, they and their children began slowly to form the matrix of a new and indigenous American civilization.

HASKINS, *supra* note 1, at 24.

Certainly there were others who contributed to building a solid foundation for American law. Just to name a few: Master John White of Dorchester, Master Thomas Shepard, John Cotton, Nathaniel Ward, Thomas Dudley, Richard Bellingham, Henry Dunster, and Samuel Vassall.

28. THE CHARTER OF THE COLONY OF MASSACHUSETTS BAY (1628), reprinted in THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 1-18 (1814).

29. *Id.* at 14.

of the Court.³⁰ (All members of the Court of Assistants were referred to as magistrates.) The quarterly meetings of the General Court required a quorum of the governor or deputy governor and at least six assistants; seven members constituted a quorum for the Court of Assistants.

From the beginning, the colonists proceeded along a course contrary to the Charter. At one of the early meetings of the General Court, it was decided that freemen should elect the assistants, who would then select the governor and deputy-governor from among themselves.³¹ Hence, the effect was to place the entire legislative, judicial, and administrative powers of the government in the Court of Assistants. In other words, the power was concentrated in the hands of the magistrates. This was clearly antithetical to the Charter.³²

Legal historians have questioned why strict constructionists such as John Winthrop agreed to such a proposal. Perhaps the need for the approval of the men they governed and the powers derived from such approval outweighed any risk of overstepping the boundaries of the Charter.³³ John Winthrop, however, gave no explanation for

30. See MORRISON, *supra* note 18, at 53. One should not be surprised that the annual election was agreeable to John Winthrop and the other magistrates. It was purely a necessity which was imposed upon them by the terms of the Charter and by the wishes of the freemen.

31. 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 79 (N. Shurtleff ed. 1853) [hereinafter cited as MASS. BAY RECORDS].

32. The Charter gave the General Court the power

from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, not contrary to the laws of this our realm of England, as well for settling of the forms and ceremonies of government and magistracy, fit and necessary for the said plantation, and the inhabitants there, and for naming and settling of all sorts of officers, both superiour and inferiour, which they shall find needful for that government plantation, and the distinguishing and setting forth of the several duties, powers, and limits of every such office and place, and the forms of such oaths warrantable by the laws and statutes of this our realm of England, as shall be respectively ministered unto them for the execution of the said several offices and places; as also or the disposing and ordering of the elections of such of the said officers shall be annual, and of such others as shall be to succeed in case of death or removal, and ministering the said oaths to the new elected officers, and for impositions of lawful fines, mulets, imprisonment, or other lawful correction, according to the course of other corporations in this our realm of England

THE CHARTER OF THE COLONY OF MASSACHUSETTS BAY (1628), reprinted in THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY (1814). See also HASKINS, *supra* note 8, at 27.

33. No doubt the Puritans maintained that government originated in the consent of the people because that theory was an implement for chastening the absolutism of

agreeing to the diversion,³⁴ although he might have justified the Court's action as enforcing the prevailing Puritan belief that an oligarchy was a desirable form of government whereby God's special commission could be executed.³⁵ Nevertheless, the actions could, at least arguably, be viewed as an unconscious planting of the seeds of democracy.³⁶

The colonists continued to develop their own system of government, notwithstanding the Charter mandates. In 1631, they decided that a substantial number of colonists would be admitted as freemen,³⁷ but admittance to this status was limited to those who were members of churches within the colony.³⁸ On its face, the order may appear reasonable; when the situation is examined more closely, however, it is observed that the number of individuals who could qualify for church membership was small.³⁹ Once again, Winthrop

the Stuarts; but they maintained it also because they did not believe that any society, civil or ecclesiastical, into which men did not enter of themselves was worthy of the name.

MILLER, *supra* note 13, at 147.

Morgan states:

In Winthrop's view, then, he had not in any way limited or reduced the authority of government by extending to church members a voice in the selection of the men who were to exercise the authority. Rather he had given to government a practical strength which it could not otherwise have possessed, for Winthrop was enough of a politician to know that, regardless of any divine authority a ruler might claim, people would submit to him more readily if they had a voice in choosing him, especially a Puritan people well educated by their ministers in the principle of government based on covenant.

MORGAN, *supra* note 14, at 95.

34. Winthrop did not mention this matter in his journal.

35. P. OLIVER, *THE PURITAN COMMONWEALTH* 53-55 (1856). Haskins agrees that an oligarchy of magistrates had been formed. HASKINS, *supra* note 8, at 87. "Governor Winthrop, who like the other magistrates, had no wish to see the colony's objectives jeopardized by allowing its management to fall into the hands of those who might not be sympathetic with the leaders' views." *Id.* at 28.

36. The transferred power also included the granting of land, the establishing of town boundaries, the levying of taxes, the appointing of officers, and the issuing of orders which regulated all aspects of the settlers' lives.

37. See 1 MASS. BAY RECORDS, *supra* note 31, at 366. Morgan feels that the door to freemanship was opened wide because of the Puritan conception of the social compact. MORGAN, *supra* note 14, at 93. Haskins is not sure why Winthrop and his colleagues took this measure. He questions whether it was the result of a formal demand, of political expediency, or of the social compact. HASKINS, *supra* note 8, at 28.

38. See 1 MASS. BAY RECORDS, *supra* note 31, at 366. Haskins recognizes three groups of freemen — the magistrates, the ministers and elders of the church, and the remaining freemen. HASKINS, *supra* note 8, at 103-04.

39. See 1 MASS. BAY RECORDS, *supra* note 31, at 366-79.

and his colleagues pursued a course of action that violated the Charter;⁴⁰ one can only speculate as to why such pious, determined men would continue to issue orders contrary to the Charter. hindsight reveals that the church membership requirement effectively placed the colonial government on a narrow religious basis. Perhaps Winthrop and the other assistants (magistrates) foresaw this result and its importance in aiding them to carry out their special commission. Winthrop's declaration that the major aim of the undertaking was to build a "Citty Vpon a Hill," implies how immensely important Winthrop perceived this enterprise to be.⁴¹ Hence, it is reasonable to infer that Winthrop and the other magistrates, burdened with an enormous task, could rationalize any inconsistencies between their orders and the Charter provisions. They had a divine commission, and once elected, they were given supreme authority in their God-ordained magisterial office to govern the colony according to gospel ordinance, disregarding the Charter if necessary. Winthrop epitomized these beliefs by stating that magistrates "are God's vpon earth."⁴²

The concentration of governmental power in the hands of the assistants did not long remain unchallenged. In 1632, the inhabitants of Watertown became infuriated over a tax imposed by the Court of Assistants. They vigorously opposed their having no voice in assessing the tax,⁴³ and an examination of the Charter revealed that no authority had been given to the assistants to levy taxes and assessments on non-freemen.⁴⁴

Governor Winthrop, in his attempt to smooth over this uncomfortable situation, maintained that the levy of the tax was proper because the assistants, as elected representatives of the people, had the power to legislate and levy taxes, powers similar to Parliament in England.⁴⁵ Winthrop's explanation was not convincing, and the

40. The charter states no qualification for membership in the General Court. *THE CHARTER OF THE COLONY OF MASSACHUSETTS BAY (1628)*, reprinted in *THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY (1814)*.

41. 2 *WINTHROP PAPERS*, *supra* note 22, at 295.

42. 4 *WINTHROP PAPERS*, *supra* note 22, at 476.

43. See *HASKINS*, *supra* note 8, at 29. This was just one incident of many where the colonists attempted to obtain a stronger voice in the government and to restrict the power of the governor and assistants.

44. *THE CHARTER OF THE COLONY OF MASSACHUSETTS BAY (1628)*, reprinted in *THE CHARTER AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY (1814)*.

45. 1 *WINTHROP'S JOURNAL: HISTORY OF NEW ENGLAND* 74 (J. Hosmer ed. 1908) [hereinafter cited as *WINTHROP*].

issue was resolved only after Winthrop agreed that the freemen from each town could appoint two deputies who would be sent to confer with the Court of Assistants on the matters of taxes and assessments.⁴⁶

Two years later, to Winthrop's dismay, these delegates, after seeing the Charter,⁴⁷ restored to the General Court, *i.e.*, to the deputies, some of the governmental power previously assumed by the Court of Assistants. The rights originally granted by the Charter were thus substantially reestablished. Nevertheless, the magistrates still played the major role in the enactment of laws and in the executive and judicial work of the government, and this retention of power by the Court of Assistants continued to disturb the freemen.

Particularly troublesome to the deputies was the magistrates' power to administer discretionary justice.⁴⁸ The deputies feared that lack of control over the magistrates' power could result in a taking away or compromising of liberties given the colonists by the Charter.

Another struggle between the magistrates and the deputies centered around an issue of ultimate judicial authority — the

46. *Id.* at 79. See also 1 MASS. BAY RECORDS, *supra* note 31, at 87. It is interesting to note that some scholars saw this act as the beginning of representative government. HASKINS, *supra* note 8, at 30. See also CUSHING, *supra* note 9, at xv.

Although representative government was the result, at least in a limited sense, it certainly was not Winthrop's or the other Puritan leaders' intent. "They regarded themselves as instruments in the divine hand for carrying out a great religious mission and there was nothing democratic in their political theory." ESSAYS, *supra* note 2, at 48-49. For a more complete discussion on the Puritan political theory, see notes 99-108 and accompanying text *infra*.

47. 1 WINTHROP, THE HISTORY OF NEW ENGLAND 84, 152-53 (J. Savage ed. 1853) [hereinafter cited as HISTORY OF NEW ENGLAND]. Until this time, the Charter had only been seen by the small ruling elite.

48. One of the major complaints against the magistrates was the wide discretion they exercised in the courts in imposing penalties. The deputies were concerned with the difference in penalties for similar crimes. They thought that the only remedy to this situation was to define punishment for certain types of crime in the fixed written law. The magistrates and clergy opposed fixing penalties by laws. John Winthrop expressed their position in the following statement: "I would nowe by what Rule we may take vpon vs to prescribe penaltyes, where God prescribes none." 4 WINTHROP PAPERS, *supra* note 22, at 477. He also argued that

because the magistrates had been called to office by the people, they derived their authority from God and should, therefore, govern according to the rules of God's laws and what might be derived from them by reason. They [the magistrates] should not be needlessly fettered in the performance of their divinely ordained duties by any narrowly conceived code which, unlike either the Bible or the common law, might attach specific penalties to the violation of specific laws.

CUSHING, *supra* note 9, at xvi.

“Negative Vote.”⁴⁹ The magistrates had a weighted no vote in deciding judicial and legislative matters in the General Court. The celebrated case of *Sherman v. Keayne*⁵⁰ illustrates the controversy. In 1640 Robert Keayne, the defendant, had been acquitted by a county court of taking and killing a sow belonging to plaintiff’s husband. On original petition to the General Court in 1642, a majority of the assistants voted for the defendant, but a majority of the deputies voted for the plaintiff. Thus, despite the fact that a majority of the General Court voted for the plaintiff, he lost due to the “Negative Vote.” Winthrop defended the magistrates’ position on the basis of English precedents that “the assistants, as a distinct body within the General Court, had an original and fundamental authority to reject all matters brought before that Court.”⁵¹ Winthrop’s view prevailed until the issue was put to rest by an act of 1644, providing for the formation of two bodies — the body of assistants and the body of deputies — and for the concurrence of both in proceedings on any measure.⁵²

The third major controversy between the deputies and the magistrates related to the power of the standing council, established in 1636. When the General Court was not sitting, the council, composed of magistrates, exercised executive and consultative powers. The deputies thought this placed too much power in the hands of the magistrates and too little power with them. Winthrop’s discourse on arbitrary government⁵³ for a time successfully defended the magistrates’ position against the deputies’ quest for added power.

Although the magistrates never made a formal distinction between their legislative, executive, or judicial powers, such lines were drawn in practice. A clear illustration is the elaborate and comprehensive judicial system that developed out of legislation enacted by

49. See 1 MASS. BAY RECORDS, *supra* note 31, at 170. The origin of the controversy was in a statute passed in 1636 which gave magistrates the prevailing voice in the settlement of disputed questions in the General Court.

50. See 2 WINTHROP, *supra* note 45, at 64-65, 116-20. For John Winthrop’s summary of the case of *Sherman v. Keayne*, see HOWE, *supra* note 1, at 110-13.

51. HASKINS, *supra* note 8, at 39. See also 2 WINTHROP, *supra* note 45, at 120.

52. See 2 MASS. BAY RECORDS, *supra* note 31, at 58-59. Haskins believes that the Act of 1644 resulted in the establishment of the bicameral legislature in Massachusetts. HASKINS, *supra* note 8, at 39.

53. See 2 LETTERS OF JOHN WINTHROP, *supra* note 21, at 440-59.

the General Court in 1636⁵⁴ and 1638.⁵⁵ Even though courts of first jurisdiction were established, appellate jurisdiction was reserved for the General Court, the colony's supreme court of judicature. Hence, the magistrates continued to retain their power by keeping the ultimate control over the judicial process.

The magistrates themselves repeatedly justified the concentration of power as necessary to ensure the success of the colony's mission. The deputies refused to acquiesce, and through continued persistence, secured an order of the court in 1635 appointing a committee⁵⁶ to draft laws for the Court's consideration. This committee's inaction forced the Court to appoint another committee⁵⁷ the following year charged to "make a draught of lawes agreeable to the worde of God, which may be the fundamentalls of this commonwealth." At the same time the magistrates were to proceed as usual in executing their executive and judicial functions.⁵⁸

"MOSES HIS JUDICIALS"

John Cotton, a minister and teacher and member of the committee, initiated committee action by preparing a written code based on the Bible. Winthrop referred to it as "Moses his Judicials."⁵⁹

54. The Act of 1636 created County Courts which exercised general civil jurisdiction and criminal jurisdiction in cases where the penalty was less than banishment, loss of member, or loss of life. The judges of these courts were the assistants (magistrates), or if none resided in that county, the General Court appointed other persons to serve. However, at least one magistrate had to be present in the quorum of three for the five judge court. The courts normally held trial by jury. See 1 MASS. BAY RECORDS, *supra* note 31, at 58-59.

55. The Act of 1638 empowered the General Court to appoint three freemen to hear and decide suits where the damages were not more than twenty shillings. See 1 MASS. BAY RECORDS, *supra* note 31, at 239.

56. The committee consisted of the Governor, John Haynes, the Deputy Governor, Richard Bellingham, John Winthrop, and Thomas Dudley. See 1 MASS. BAY RECORDS, *supra* note 31, at 147.

57. The second committee consisted of Sir Henry Vane, the new governor, three members of the clergy — John Cotton, Hugh Peters, and Thomas Sheppard — and the four former members, John Haynes, Richard Bellingham, John Winthrop, and Thomas Dudley. See *id.* at 174-75.

58. See *id.* at 147.

59. See HISTORY OF NEW ENGLAND, *supra* note 47, at 240. For the text of "Moses his Judicials," see 5 MASS. HIST. SOC'Y, MASSACHUSETTS HISTORICAL SOCIETY COLLECTION 173 (1st ser. 1798). See also Ford, Cotton's "Moses his Judicials," 16 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS 274 (2d ser. 1902).

The Cotton Code consisted of 10 chapters. It stated the powers and duties of officers of the colony and the freemen. It provided regulations for taxing, commerce, administering justice, crime, etc. The penalties and provisions in the criminal area were austere and severe.

Although Cotton's Code was never enacted, it deserves consideration because remnants of it appeared in later enacted codes, the Body of Liberties of 1641 and the Code of 1648.⁶⁰ Also, "Moses his Judicials" had an influence outside of Massachusetts; it became the basis of the early laws enacted at New Haven and Southampton.⁶¹

Neither the contemporary writings nor the Records of the General Court give any explanation for the failure of the Court to enact Cotton's Code. Perhaps the Court thought Cotton's Code failed to address all necessary situations, especially individual rights. A comparison of the Cotton Code and the enacted laws of 1648 supports this hypothesis.

Of particular interest are the reasons Winthrop, a member of the second committee and the General Court, would not accept Cotton's Code which substantially relied upon the literal text of the Bible. Each man's divergent approach to Puritanism and the law gives a hint of the answer. John Cotton believed that the laws of the Pentateuch were eternally binding on man and that the written law should be a reflection of the Bible. John Winthrop, on the other hand, was willing to give man and human reason a part in framing the law. Winthrop drew a distinction between penalties and the concept of "law"; whereas "law" should be taken from the Bible, penalties should be a function of the magistrate's discretion. Since the Cotton Code explicitly imposed penalties, it eliminated such discretion. Thus, Winthrop probably rejected those provisions of the Cotton Code because the penalties imposed were too harsh and because their imposition was mandatory.

Cotton's Code was the only accomplishment of the second committee. Hoping to receive a draft of laws agreeable to the word of God, the General Court appointed a third committee⁶² in 1638. This committee, however, also failed to produce a codification.

Cotton paid close attention to the Old Testament particularly the Pentateuch when writing the criminal and several noncriminal provisions. One can infer that he saw treason and willful perjury as extremely serious offenses because he proscribed the death penalty for both even though there was no authority in the scriptures for this measure. Many of the other provisions were reflective of the then present colony practices. "Moses his Judicials" was first printed in London in 1641.

60. See notes 64-68, 80-92 and accompanying text *infra*.

61. See Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103 (1949).

62. The third committee consisted of John Winthrop, Thomas Dudley, Richard Bellingham, Nathaniel Ward, representatives of the church, and two freemen, William Spencer and William Hathorne. See 1 MASS. BAY RECORDS, *supra* note 31, at 222.

In his journal, Winthrop explained why it was so difficult to frame a set of acceptable laws.⁶³ The magistrates deliberately continued to impede the formation of written laws because they desired that laws emerge from their judicial decisions rather than from legislative enactments. According to Winthrop, the Bible was the law, but its application was to be flexible, reflecting the particular circumstances of each case. To apply the scriptural law exactly as stated would impose an impossible rigidity that would defeat God's will. Winthrop believed that the magistrates' discretionary powers gave the law the necessary flexibility.

Another reason for Winthrop's dislike of legislation emanated from his concern with the Charter's limitation on the legislative power of the colony, prohibiting colony laws contrary to the laws of England. Winthrop feared that some of the colony's previous enactments, such as the exclusion of clergy in officiating at the marriage ceremony, if codified, would be considered as measures contrary to the laws of England and not part of local custom.

THE BODY OF LIBERTIES

The first major break into the magistrates' wall of resistance was made in 1639 by Nathaniel Ward,⁶⁴ who, as a member of the third committee, drafted a code of laws for the court's consideration. Following Ward's presentation, the Court appointed a fourth committee consisting of four magistrates — John Winthrop, Thomas Dudley, Richard Bellingham, and Israel Stoughton — and two or more deputies from several towns in Massachusetts. The committee was to review all the draft codes presented to the Court and devise a final code⁶⁵ to be reviewed by elders of the towns.

The fourth committee chose Nathaniel Ward's Code, entitled "The Liberties of the Massachusetts Colonie in New England," commonly known as "The Body of Liberties." Unlike Cotton's Code, the scope of the Body of Liberties was much broader; many of its propositions in fact were similar to constitutional provisions.

63. HISTORY OF NEW ENGLAND, *supra* note 47, at 388-89.

64. Nathaniel Ward settled in Ipswich, the second largest settlement in the colony at the age of 55 in 1634. He was an outspoken man. Older than Winthrop, he had completed ten years of legal training and practice in London, practiced ten years on the Continent, and served ten years as rector of Stondon-Massey in Essex. He pastored at Ipswich a few years until his health failed him. See MORGAN, *supra* note 14, at 169.

65. See 1 MASS. BAY RECORDS, *supra* note 31, at 279.

The Body of Liberties was divided into one hundred sections of which ninety-eight were articles.⁶⁶ The first 7 articles have been referred to as a bill of rights,⁶⁷ protecting the inhabitants of Massachusetts against arbitrary government. Articles 18-57 entitled "Rites Rules and Liberties concerning Juditiall Proceedings," provided the basis for a judicial system. Articles 58-78, entitled "Liberties more Peculiarlie Concerning the Freeman," described, in less than detailed form, the machinery of Massachusetts government that had been developed during the preceding decade. For example, article 62 reaffirmed the General Court's decision in 1634 giving each town the right to choose deputies for the Court. Article 67 guaranteed the right of freemen to annually elect all officers of the government. Articles 58-61 defined the relationship of church and state in Massachusetts. A summary of Puritan Church policy was found in article 94, entitled "A Declaration of the Liberties the Lord Jesus Hath Given to the Churches." The rights of women, children, servants, foreigners, and strangers were covered in articles 78-91. Articles 92 and 93 were devoted to prohibiting cruelty to animals.

One of the most important provisions of the Body of Liberties was article 94, containing the criminal section of the Code entitled "Capitall Laws." Twelve capital crimes were listed in this section, most of which were drawn from and supported by the Pentateuch. Comparing this section of Ward's Code with the list of Capital Laws in Cotton's Code, one observes striking similarities.⁶⁸ The only major difference is that Cotton's seventeen capital crimes were reduced to twelve in the Body of Liberties.

Article 94 was the only section that bears a subtitle using the word "laws." For the most part, there was a concentrated effort to avoid describing the "liberties" as "laws."⁶⁹ John Winthrop believed that referring to the sections as liberties, not only avoided conflict with Charter provisions prohibiting the colony from making laws repugnant to the laws of England, but also avoided conflict with the Puritan belief that rules of conduct, established by humans, could

66. See BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY, FROM 1660-1686, at 29-65 (W. Whitmore ed. 1890) [hereinafter cited as THE BODY OF LIBERTIES].

67. MORGAN, *supra* note 14, at 170. See also CUSHING, *supra* note 9, at xvi.

68. Both Codes contain elements of the laws of England, the common law, scriptural law, customs of the colonists, and laws previously enacted by the General Court.

69. See THE BODY OF LIBERTIES, *supra* note 66, at 61 (article 96 explicitly states).

not be considered law. Undoubtedly, Winthrop would have preferred that the Body of Liberties not be codified.⁷⁰ There seemed to be no question in Winthrop's mind, however, that the Body of Liberties defined what Edmund Morgan calls "the New England Way."⁷¹ After much debate and revision, the Body of Liberties was accepted by the General Court in December, 1641. Although accepted, it appears that the Body of Liberties was never printed.

Despite their admitted success, the deputies were not fully satisfied with this codification of colonial laws since there were still some unresolved matters. They wanted a complete, comprehensive code stating specific rules to be applied in specific situations. Thus, the major dissatisfaction with the Body of Liberties was that it did not restrict the magistrates' discretion. The feeling persisted among many colonists that the Massachusetts government was an arbitrary government directed by a small ruling elite class mainly composed of magistrates. Specifically, the dissident element of the colony opposed the Massachusetts government's exercise of powers not granted by the Charter, including the right to inflict capital punishment, to assess taxes, to seize property, and to levy fines. Further charges included that the small oligarchic group of colony leaders were attempting to establish an independent state, having no legal ties with England, that there were no laws in the colony to guarantee the Massachusetts inhabitants their rights as Englishmen, and that certain colonists were discriminated against by not being permitted to vote or hold office because of their association with the Church of England or their failure to become members of a church in Massachusetts.

The protestors demanded that the colony adopt the fundamental law of England so that all colonists could enjoy the same rights they would possess in England, including access to a court administered according to English practice.

THE CHILD REMONSTRANCE AND THE DECLARATION OF 1646

The Robert Child affair exemplified this ongoing controversy be-

70. See HISTORY OF NEW ENGLAND, *supra* note 47, at 66. Without comment, Winthrop recorded in his journal the acceptance by the General Court in December, 1641 of the Body of Liberties.

71. MORGAN, *supra* note 14, at 155-74.

tween the deputies and magistrates.⁷² On May 6, 1646, Dr. Child and his associates charged that the Massachusetts colonial laws abridged their rights as Englishmen and violated the Charter. The General Court was very much offended by the Child Remonstrance, and on October 7, 1646, John Winthrop, Thomas Dudley, Richard Bellingham, and Nathaniel Duncan were commissioned by the General Court "to draw up such an answer" to the remonstrance "as they thinke most meete."⁷³ Their answer was the Declaration of 1646 rejecting the remonstrance. The Declaration set down, in parallel columns, the fundamental laws of England and of Massachusetts. According to John Winthrop, the magistrates' intent in drawing the parallel was to demonstrate that their "politic and fundamentalls [were] framed according to the lawes of England, and according to the charter."⁷⁴

A close examination of the parallel reveals Winthrop's statement that the fundamental laws of the colony were framed according to the laws of England and the Charter is misleading. For example, Liberty 1⁷⁵ in the Massachusetts column provided for infliction of capital punishment according to the word of God. This rule was extended to include all criminal cases with no express penalties, and the Charter was cited as authority for the rule. Yet, in response to an inquiry, the Court confessed, "we do not find by the [charter that we] are expressly directed to proceed according to the word of God."⁷⁶ Nevertheless, the Court continued to exercise the privilege.

Similarly misleading was paragraph 13 of the "Fundamentalls of the Massachusetts,"⁷⁷ providing that theft would not be punish-

72. See 1 T. HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* 124-27 (L. Mayo ed. 1936); HOWE, *supra* note 1, at 199-208. In essence, Dr. Child's petition denounced the congregational organization of churches, the limitation of political rights to colony church members, and the independence which Massachusetts claimed with regard to England. The petition demanded closer dependence on the laws of England, extension of political rights, and abandonment of the requirement of regenerate membership in churches. Barring such an opening up of church membership, Dr. Child wished that dissenters from colony churches be permitted to settle themselves in a church way.

73. See 2 MASS. BAY RECORDS, *supra* note 31, at 162.

74. 1 WINTHROP, *supra* note 45, at 288.

75. "No man's life, honor, liberty, wife, children, goods or estate shall be taken away, punished or endamaged, under colour of lawe, or countenance of authorities, but by expressed lawe of the generall court, or in defect of such lawe, by the word of God, &c." See *COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS BAY* 201 (Hutchinson ed. 1769) [hereinafter cited as *HUTCHINSON PAPERS*].

76. See 2 MASS. BAY RECORDS, *supra* note 31, at 91.

77. "13. Treason, murder, witchcraft, sodomie, and other notorious crimes, are punished

able by death because the scripture prohibited capital punishment in cases of simple theft. The rule was claimed to be based on common law authority. However, in the corresponding paragraph 13 of the "Common Laws of England," it was stated that "simple theft and some other felonies are not punished with death, if the offender can read in scripture."⁷⁸ In short, there were considerable discrepancies between the fundamental laws of England and those of Massachusetts.⁷⁹ John Winthrop's apprehension over codifying the laws of Massachusetts was beginning to be realized. His concern, however, did not prevent the movement toward perfecting all colonial laws so that they might be published and made available to the colonial citizens.

THE LAWS AND LIBERTIES OF 1648

The Robert Child affair and similar disturbances were partly responsible for the delay in compiling a comprehensive code of laws for Massachusetts. During the interim, between the enactment of the Body of Liberties in 1641 and adoption of the *Laws and Liberties of 1648*, several committees had been formed to compile for print all the laws, liberties, and orders of the colony. This was a large task because legislative activity during that period was sizeable.⁸⁰ No doubt a great deal of time, effort, and care went into the preparation of the *Laws and Liberties of 1648*. One can guess that tremendous pressure was on the Court, and in particular, on the magistrates. Not wanting to experience a remonstrance similar to the Child affair, the Court relied upon several legal texts⁸¹ widely used in England for revising the law. The Code was completed in the spring of

with death: But theft, &c. is not so punished, because we reade otherwise in the scripture capitalls, &c." See HUTCHINSON PAPERS, *supra* note 75, at 205.

78. See HUTCHINSON PAPERS, *supra* note 75, at 204.

79. Perhaps some of the discrepancies can be attributed to the drafter's ignorance of the common law, despite the fact that all of the members on the committee had had some form of legal training in England.

80. See 2 MASS. BAY RECORDS, *supra* note 31, at 179. A number of new criminal statutes were passed to secure conformity with the scriptures and to define certain acts as criminal. Haskins believes the outburst of legislative activity was a result of recommendations of the law committees. HASKINS, *supra* note 8, at 134. He finds support in the RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY. See 2 MASS. BAY RECORDS, *supra* note 31, at 176.

81. See 2 MASS. BAY RECORDS, *supra* note 31, at 212 (the following texts were used: COKE ON LITTLETON; COKE ON MAGNA CARTA; COKE'S REPORTS, THE NEW TERMS OF THE LAW; THE BOOK OF ENTRIES; DALTON'S COUNTRY JUSTICE).

1648, and its adoption was a clear victory for those who advocated legal control over the magistrates' discretion. In a sense, it was a postponed victory for Dr. Child.

The importance of the *Laws and Liberties of 1648* cannot be over-emphasized.⁸² It was a detailed and comprehensive statement of the orders and enactments in force in the Massachusetts colony⁸³ as well as a code of statutes for the future, all arranged under alphabetical headings. The intended comprehensiveness of the *Laws and Liberties of 1648* is certainly illustrated by the statement in its Epistle that "all generall laws not heer inserted nor mentioned to be still of force are to be accounted repealed."⁸⁴ Although the Code was comprehensive, it did not, and did not purport to, set forth every legal rule applied or to be applied in the courts. For example, the Code did not include the nonstatutory law applied in the courts.

Some attention should be given to a few of the important and characteristic provisions of the Code to get an overall sense of its quality.⁸⁵ There was an attempt to settle the age-old problem of the magistrates' discretionary power in the section on "Magistrates."⁸⁶ The section provided that no act or sentence declared by the magistrates was to be valid unless voted on by a majority of both the deputies and the assistants.

In many areas, the Code represented a sharp break with traditional English law. One instance of colonial departure was the less than well-defined division between civil and criminal procedure. Another was the role of forms of action; the form in which the action was brought was far less important in Massachusetts than in England. Massachusetts also allowed jurors more latitude than did England. In the provision covering debts and bills, the colonists again

82. "In this one instrument the Puritan legislators sought to provide a foundation for colonial administration, civil and criminal procedure, church, government, registry of important instruments, property rights, domestic relations, regulation of trade, and criminal law." Wolford, *The Laws and Liberties of 1648*, 28 B.U.L. REV. 426, 431-32 (1948) [hereinafter cited as Wolford].

83. About one-quarter of the provisions of the *Laws and Liberties of 1648* "can be traced to enactments or orders made prior to 1640, but these were thoroughly revised and expanded. About one-third date from the period 1646-1647 when the Code was being completed, and of these about one-half were entirely new." HASKINS, *supra* note 8, at 136.

84. Farrand, *Introduction to THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS* (1929) [hereinafter cited as LAWS AND LIBERTIES].

85. See Wolford, *supra* note 82, at 426 (brief analysis of the Code). See also 1 CUSHING, *supra* note 9, at xxi n.29.

86. See LAWS AND LIBERTIES, *supra* note 84, at 36.

departed from traditional English law by permitting debt assignment, and allowing the assignee to sue with the same rights as the assignor.⁸⁷

The colonists, however, most revealed their independence from English common law in their classification of capital crimes. The Code eliminated many of the capital crimes that were recognized in England. The colonists looked to the law of Moses and hence, some of the offenses were consistent with those of the common law of England. For example, blasphemy and witchcraft were punishable by death in Massachusetts and England.⁸⁸

On the other hand, many of the Code's basic provisions were incompatible with English law. The tenor of the Code strongly suggests that the leaders of Massachusetts never intended to imprison anyone for debt unless property was concealed, thus revealing their general dislike of debtors' prison.

Several of the laws of 1648 were products of local colonial needs, and the regulation of inheritance was one such law.⁸⁹ Intestate real property of a deceased relative was divided among all the children rather than in accordance with the rules of primogeniture. Apparently, the colonists did not hesitate to modify or ignore traditional rules inconsistent with the colonists' general plan.⁹⁰

Reflected throughout the Code is the Puritan emphasis on logic and reason in the formulation of political and religious doctrines. Generally, the *Laws and Liberties of 1648* represented a great ad-

87. See *id.* at 4.

88. The Biblical basis for this rule was *Leviticus* 24:15-16.

89. The needs of younger children in the colonial economy where money and personal goods were scarce required a departure from the English rules of primogeniture. For a thorough discussion of the matter, see Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 *YALE L.J.* 1280 (1942).

The Puritans' demand for certainty in religious affairs was carried over into their secular law. The Code of 1648 ordered that both the judgment of any court and the reasons for the decision should be recorded.

90. See Ware, *Was the Government of Massachusetts Bay Colony a Theocracy*, 10 *PUBLICATIONS OF THE COLONIAL SOC'Y* 151-80 (1906). Horace E. Ware believes that the leaders of Massachusetts Bay established a policy of placing all functions of government under civil courts and officers. In support of his theory that the government of Massachusetts was not a theocracy, he states that several matters which in England were under ecclesiastical authority or done in an ecclesiastical way came under the authority of the State of Massachusetts, *i. e.*, the various matters arising out of the marital relations, such as divorce, etc.; the marriage contract itself was treated as a civil act and was entered into before a magistrate. See also *HISTORY OF NEW ENGLAND*, *supra* note 47, at 382.

vance over the technicalities in the law that had evolved from years of English legal history. It produced a system of civil polity "that was at once logical, coherent, comprehensive, intellectually and politically sophisticated, and above all, eminently workable."⁹¹

One can reasonably conclude that John Winthrop, although remaining steadfast in his belief, recognized the futility of continued opposition to codification. Rather than leaving the task to those having different ideas than his, he chose to play a major role in developing a written code for the colony — a code that would not move far from his view of the central purpose of the Massachusetts colony.

THE CAMBRIDGE PLATFORM: A CONCURRENT RELIGIOUS CHANGE

The period from 1641 to 1648 was a time of change not only in the civil sphere of Massachusetts but also in the religious realm. There was a movement throughout the colony for a consolidation of church principles and practices. A ministerial convocation was called in a futile effort to resolve certain differences in the church. Later, a number of leading members of the clergy requested a synod of delegates from the New England churches to discuss church polity. The synod was held in 1646 but accomplished little. The passage of time intensified the need for an effective religious convention and in 1648, the synod reconvened at Cambridge, Massachusetts. From this synod came the *Cambridge Platform*, a precise codification of the ecclesiastical disciplines of New England which was well received and sanctioned by the colony.

Attempting to assure Dr. Child and other dissidents that the Church of Massachusetts was in line with the Church of England, the drafters of the *Cambridge Platform* stated in the preface, "Our Churches here, as (by the grace of Christ) wee believe & profess the same Doctrine of the trueth of the Gospell, which generally is received in all the reformed Churches of Christ in Europe: so especially, wee desire not to vary from the doctrine of faith, & truth held forth by the churches of our native country."⁹²

A brief examination of the *Cambridge Platform* reveals a "congregational" orientation, evidenced in the provision on church

91. HASKINS, *supra* note 8, at 136.

92. See W. WALKER, *THE CREEDS AND PLATFORM OF CONGREGATIONALISM* 194 (1893).

membership⁹³ as well as in the section describing the rights of the congregations in selecting and removing their elders.⁹⁴ A third indication of congregationalism in the *Cambridge Platform* is the independence of the individual churches. Although consultive, nonbinding synods and the common bond of Christ's body were allowed, the churches were to maintain the uniqueness and equality of the congregations.⁹⁵

The congregational church polity, defined in the *Cambridge Platform*, withstood the assaults of future decades. It is feasible to believe that the work of the synod was consistent with the views of the majority of Massachusetts Puritans. Yet, one might inquire why John Winthrop, so violently opposed to codification of civil law, favored the synod. Arguably, the same problems presented by written civil law would emerge with written church law. Perhaps, after reflecting on past events in the colony and the controversies surrounding the *Laws and Liberties of 1648*, Winthrop thought that opposition to the synod would do more harm than good in fulfilling his original purpose. Winthrop might also have believed that since the civil polity was already made known through the *Laws and Liberties of 1648*, the damage, if any, had already been done. Consequently, a written ecclesiastical polity would alleviate misunderstandings or misinterpretations of secular and temporal law since the *Laws and Liberties of 1648* placed only some limitation on the civil government's authority over the Church;⁹⁶ civil government maintained considerable latitude over church matters.

It is no surprise that the *Cambridge Platform* came to fruition the

93. *Id.* at 205-06, 221-22.

94. *Ordinary* church powr, is either the power of office, that is such as is proper to the eldership: or, power of priviledge, such as belongs unto the brotherhood. The latter is in the brethren formally, & immediately from Christ, that is, so as it may according to order be acted or exercised immediately by themselves: the former, is not in them formally or immediately, and therefore cannot be acted on exercised immediately by them, but is said to be in them, in that they design the persons unto office, who only are to act, or to exercise this power

And if the church have powr to *chuse* their officers & ministers, then in case of manifest unworthyness, & delinquency they have powr also to *depose* them.

Id. at 210, 215.

95. "Although Churches be distinct & therefore may not be confounded one with another: & equall, & therefore have not dominion one over another: yet all churches ought to preserve Church-communion with one another, because they are all united unto Christ." *Id.* at 229-30.

96. See *LAWS AND LIBERTIES*, *supra* note 84, at 18.

same time as the *Laws and Liberties of 1648*. Religion was so influential in men's lives in Massachusetts, one could expect religious change whenever a substantial change occurred in the civil sphere.

The *Cambridge Platform* and the *Laws and Liberties of 1648* represented the culmination of major developments of this period of experimentation in Christian living. The foundation of this Kingdom of God in the wilderness rested in the political ideas of the New England Puritans.

THE POLITICAL IDEAS OF THE NEW ENGLAND PURITANS

It is generally accepted that the New England Puritans were politically conscious.⁹⁷ Their political ideas were founded in their religious doctrines, beliefs they attempted to put into practice.⁹⁸ Although the Puritans were not Calvinists, the Puritan concepts of church organization and state government were rooted in Calvinistic principles and the ideals embedded in their heritage.⁹⁹ The Puritan theory of the state and government began with the fall of man. If Adam had not sinned, government would not be necessary because men would be just in their dealings with each other. The Bible, the true word of God, said men will murder and fight among themselves; relying on this, the Puritans believed that life and property would not be safe and secure without magistrates, the law, jail, and a coercive state.¹⁰⁰ Hence, they found it necessary to establish a state that controlled all aspects of human behavior.¹⁰¹

Both state and church governments were aristocracies, but it was the consent of all Puritans that aided in putting this form of government into practice.¹⁰² Herbert Osgood believed that while the leaders defended an aristocracy, their thoughts were rooted in democracy.¹⁰³ Believing the relationship between church and state in Massachusetts to be Calvinistic, Osgood summarized the theory practiced in Massachusetts:

97. See MILLER, *supra* note 13, at 141; Osgood, *supra* note 13, at 1.

98. See note 17 and accompanying text *supra*.

99. See MILLER, *supra* note 13, at 144.

100. *Id.* at 142-43.

101. See note 9 *supra*. These codes were honest and in some respects successful attempts to regulate human behavior.

102. See MILLER, *supra* note 13, at 147. One belief of the Puritan creed was that government originated in the consent of the governed. The social theory of Puritanism was based upon the voluntary submission of the citizens.

103. Osgood, *supra* note 13, at 21-22.

State and church are distinct in the sense that they work for different objects, and are controlled by different persons. The end of the state is to preserve "external and temporal peace," and that of the church to "maintain internal and spiritual peace." The work of both is to be done "in all godliness and honesty." Both are to be guided by the rules of the Word. The church is to promote holiness and thus to be the bulwark of the state. The state in return is to give "free passage" to the gospel. . . . Finally, all freemen should be church members, the magistrates should be chosen exclusively from them.¹⁰⁴

Those who steadfastly advocated government by aristocracy were a minority.¹⁰⁵ Thus, one might ask why this system survived as long as it did. The answer lies with the holders of power—the governing class in Massachusetts. They were a small group of ministers who were also statesmen and political leaders as well as the majority of the magistrates.

John Winthrop, a man of great influence in Massachusetts, was a member of the ruling class; logically, we can assume that he completely endorsed the politics of aristocracy.¹⁰⁶ Against this background of political ideas and the foregoing historical development of 17th century New England, then, one can deduce John Winthrop's concept of law.

JOHN WINTHROP'S CONCEPT OF LAW, A FINAL NOTE

There has been no attempt thus far to give a concrete definition of law.¹⁰⁷ Much has been written on what the law was in 17th century Massachusetts. Attention has been devoted to the Puritan society in England and New England. But, what was John Winthrop's concept of law?

Winthrop's idea of law is clearly visible through the activities of the governing class of Massachusetts and the tenets of Puritanism.

104. *Id.* at 22.

105. Miller states that there were probably no more than one-fifth of the total population who were regenerates. MILLER, *supra* note 13, at 150.

106. See generally Gray, *The Political Thought of John Winthrop*, 3 *NEW ENG. Q.* 681 (1930).

107. Since analytical jurists, followers of the historical and philosophical schools of thought, as well as others have not been able to construct a definition of law free of shortcomings, such undertaking will not occur in this work.

His ideal was that of a Bible commonwealth: a community where men should live according to God's commands as expressed in the Bible.¹⁰⁸ He believed it was God-ordained that man, as a result of Adam's fall, had to submit to civil and ecclesiastical authority.¹⁰⁹ If an idea or action could fit within this mold, Winthrop usually had no objections to it. At times he was more lenient than was customary of Puritan leaders in his acceptance of concepts different from his own. His leniency, however, was generally exercised cautiously and only in situations where he felt it would benefit the master plan.

Believing that all men were not equal, Winthrop wrote the following opening sentence to *A Modell of Chritian Charity*: "God Almightye in his most holy and wise providence hath soe disposed of the Condicion of Mankinde, as in all times some must be rich some poore, some highe and eminent in power and dignitie; others meane and in subieccion."¹¹⁰ He believed that civil government was to be handled by a few for the many.¹¹¹ Finding no scriptural authority for democracy, Winthrop was appalled at the thought of majority rule. Democracy had no place in Winthrop's concept of law; throughout his work, he strongly condemned it, while expressing his preference for aristocracy.

Now if we should change from a mixt Aristocratie to a meere Democratie: first we should have no warrant *in scripture* for it. . . . A Democratie is, among most Civill nations, accounted the meanest and worst of all forms of Government And Historyes doe recorde, that it hath been allwayes of least continuance and fullest of troubles.¹¹²

It was only under pressure that he yielded to the introduction of representative government in Massachusetts, and he continued to fight to contain it.

One can understand Winthrop's concept of law in light of H. L. Hart's "Positive Law Principles of Primary and Secondary

108. Winthrop saw God as the sovereign and His commands coming from the Bible. In short, this was the Austinian theory of law. See H. HART, *THE CONCEPT OF LAW* 18-76 (1961) [hereinafter cited as HART].

109. See G. BILLIAS, *LAW AND AUTHORITY IN COLONIAL AMERICA*, at xvii (1965). In the civil realm, one was to submit to the magistrates' authority. In the religious sector, one had to submit himself to the dictates of his congregation and minister.

110. 2 *WINTHROP PAPERS*, *supra* note 22, at 282-95.

111. See MORGAN, *supra* note 14, at 88.

112. 2 *LETTERS OF JOHN WINTHROP*, *supra* note 21, at 340-41.

Rules."¹¹³ Winthrop's primary rules would be the law of nature, which he identified with the law of God. The source of this law was found in the scriptures. He would conceive the secondary rules as being the interpretive power given to man from God. He believed the interpretive power belonged "principally to the highest authority in a commonwealth, and subordinately to other magistrates and judges according to their several places."¹¹⁴

In a broad sense, Winthrop's concept of law was practical. It reflects a combination of his past customs and experiences as an English gentleman and attorney as well as his religious purpose for emigrating to New England.

Winthrop's notion of law was, for the most part, operable throughout early 17th century New England. While his concept was not the only one adhered to at that time, it is possible to argue that Winthrop's notion of law was in fact the *orthodox* Puritan concept of law. Supportive evidence for this proposition is not as strong as desired, but several legal historians have so concluded.¹¹⁵

Shortly after Winthrop's death, his idea of the law began to lose its foothold in Massachusetts. This should come as no surprise because Massachusetts was rapidly moving from an idealized community notion to a society rooted in individualism and materialism. Nevertheless, his strength and beliefs shaped Massachusetts law and have had a lasting effect on our American legal system.

113. HART, *supra* note 108, at 77-96.

114. 2 LETTERS OF JOHN WINTHROP, *supra* note 21, at 240.

115. See Osgood, *supra* note 13, at 23. Osgood states in referring to the relationship between the ministers and the colony leaders: "The magistrates, with an occasional exception, were orthodox, and the ministers could count upon a majority among the deputies."

Wall, in generally commenting on the years immediately proceeding Winthrop's death and specifically on the Child Remonstrance, states that those who reacted to the Remonstrance were orthodox Puritans. R. WALL, MASSACHUSETTS BAY: THE CRUCIAL DECADE, 1640-1650, at 323 (1972).

Writing about Winthrop, Ellis stated, "Winthrop stands as not only the founder and the real promoter of the colony, but also as its wisest, most faithful counsellor, fosterer, and ever loyal friend, the sincerest purest spirit of the Puritan Theocracy." G. ELLIS, THE PURITAN AGE AND RULES IN THE COLONY OF THE MASSACHUSETTS BAY, 1629-1685 (1888).

Howe says that Winthrop's treatise on arbitrary government expressed "the views of an orthodox Puritan on problems of law and government more effectively than did any other single writing by any person holding high judicial (and political) office in the Bay colony." HOWE, *supra* note 1, at 20.

