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The Ideological Origins of the Right to Counsel

John Felipe Acevedo

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The defense counsel is a paramount actor in modern criminal trials, but this was not always the case. Indeed, the allowance of counsel to felony defendants can be traced to only a few hundred years ago, a relatively modern innovation in the area of legal history. This Essay examines the intellectual origins of the right to counsel, which it situates in the era of the English Revolution. Drawing on pamphlet literature, cases, and statutes from the seventeenth century in both England and North America, it argues that the right originated from a fear of unfairness brought on by a mistrust of the law among puritan reformers who worried that without the guiding hand of counsel, defendants would be wrongly convicted. The right to assistance of counsel is found in nascent form in the Body of Liberties of Massachusetts Bay, which is the first Anglo-American legal code to remove the prohibition on defense counsel. Although initially opposed by the colony's leaders, the code reflected their desire to reform the common law and their attempt to blend religious law with English law. The intellectual origin of the right to counsel thus also represents the transatlantic circulation of legal ideas.

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*Assistant Professor at the University of La Verne College of Law. M.A., the University of Chicago; J.D., the University of Southern California Gould School of Law; Ph.D., the University of Chicago. I would like to thank the participants of the Early Modern Workshop and the Law, Culture, & Society Workshop both at The University of Chicago for reading and commenting on early drafts of this paper. I would also like to thank Deepa Das Acevedo, Fredrik Albritton-Jonsson, Cliff Ando, Robin Bates, Edward M. Cook, Jr., Cornell Fleisher, Richard H. Helmholz, Sonam Kachru, Tyson Leuchter, and Gerry Siarny for their input; all errors remain mine alone.

I. INTRODUCTION

The colonists of Massachusetts Bay drew heavily on their knowledge of English common law as they composed laws for their governance in the new world.[1] However, the colonists did not feel bound to the common law and incorporated other sources of law as they adapted to their new environment.[2] In particular, Massachusetts colonists drew on local customs, the Bible, and Mosaic Law as they configured an indigenous legal culture.[3] Nevertheless, the starting point of any investigation into the development of law in colonial Massachusetts must begin with the English common law.

The study of statutes alone is insufficient to gain a full understanding of legal culture or even how the law works, for there is always disconnect between statutes, how they are implemented by courts, and the discussion of theorists in pamphlet literature.[4] Nevertheless, it is necessary to begin with what the law says before examining how it was implemented and how it was viewed by those it purports to rule. This Essay examines the development of the right to the assistance of counsel in Massachusetts statutes. This Essay examines the intellectual origin of the right to counsel in Anglo-American legal culture, and argues that the idea arose among reformers active during the English Revolution and the founding of the Massachusetts Bay Colony. The Puritans of Massachusetts Bay did not assert an affirmative right to counsel, but removed the existing prohibition on counsel in felony trials;[5] this alteration is particularly surprising given the anti-lawyer stance of puritans.[6]

Until the middle of the twentieth century, felonies were defined under the common law as those crimes for which "the wrongdoer suffered judgment to lose everything he had: his life, his lands, and his personal

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1. George L. Haskins, *Reception of the Common Law in Seventeenth-Century Massachusetts: A Case Study*, *in* LAW AND AUTHORITY IN COLONIAL AMERICA 17, 17 (George Athan Billias ed., 1965).

2. *Id.* at 26.

3. *Id.* at 18–19.

4. *See* Darrett B. Rutman, *The Mirror of Puritan Authority*, *in* LAW AND AUTHORITY IN COLONIAL AMERICA, *supra* note 1, at 150. *See generally* Stanley N. Katz, *The Problem of a Colonial Legal History*, *in* COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA 457, 457 (Jack P. Greene & J.R. Pole eds., 1984) (providing an overview of the state of colonial legal literature).

5. THE CITY COUNCIL OF BOSTON, THE COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, at 39 (William H. Whitemore ed., Rothman & Co. 1995) (1889) [hereinafter COLONIAL LAWS]. Throughout this Essay, spelling will be maintained as in the original documents; sic erat scriptum.

6. GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 186 (Archon Books 1968) (1960).

goods."[7] The prohibition of defendants receiving counsel in felony trials can be traced back through time immemorial in the common law.[8] The prohibition of counsel was based on the belief that no specialized skills were needed to make an honest defense against any felony charge.[9] The right to the assistance of counsel was only adopted in Britain in 1836,[10] although counsel was sometimes granted to defendants after 1730.[11]

Around one-hundred years earlier, the colonists of Massachusetts Bay adopted the *Body of Liberties*, which included the provision:

> Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man angainst whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.[12]

This clause gave a vague, but blanket right for any party in a legal case to employ the assistance of counsel to assist him in pleading his case. It is proposed that this right was granted as part of a larger attempt by colonists to correct inadequacies in the common law when they developed laws for their new government.[13] The call for the right to the assistance of counsel was not limited to colonists or even Puritans, but rather it was a fairly common complaint leveled against common law criminal procedure.[14] This law raises the question, why did Puritans in Massachusetts feel it was necessary to introduce the possibility of assistance to criminal defendants? This Essay will examine existing English law as well as contemporary notions of criminal procedure to illustrate the engrained nature of the criminal procedure and show that the Puritan break was sharp. It will then

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7. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 502 (4th ed. 2002).

8. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282–83 (1978) [hereinafter Langbein, *Before the Lawyers*]. *See also* BAKER, *supra* note 7, at 510; JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10–11 (A.W. Brian Simpson ed., 2003) [hereinafter LANGBEIN, ORIGINS OF ADVERSARY].

9. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 356 (1986) (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 400 (1978)).

10. BAKER, *supra* note 7, at 510.

11. *Id.*

12. COLONIAL LAWS, *supra* note 5, at 39.

13. Laura I. Appleman, *The Community Right to Counsel*, 17 BERKLEY J. CRIM. L. 1, 9 (2012).

14. *See* DONALD VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640–1660, at 19–21 (1970).

discuss the growing dissatisfaction with criminal procedure in both England and the colonies, with particular emphasis placed on Puritan complaints. Finally, it will discuss the adoption of the *Body of Liberties* and this nascent right to counsel.

Part II of this Essay examines both the adoption of right to counsel in England as well as the arguments of the traditional legal theorists who argued against its adoption. Part III will examine the Puritan arguments for the right to counsel offered during the English Revolution. Finally, Part IV will examine the removal of the prohibition on the assistance of counsel by the Puritan leaders of the Massachusetts Bay Colony.

II. ENGLISH LEGAL PRECEDENT

The position of defense counsel is inextricably linked to the rise of the jury system in the common law; for without the existence of jury trials, there would have been no need for defense counsel.[15] That is to say jury trials can exist without defense counsel,[16] but under the common law system, defense counsel was not needed until jury trials existed.[17] The lack of defense counsel in felony trials stems from the unique way in which the jury trial developed in England.[18] By the seventeenth century, jury trial was the *de facto* method of trial since ordeals, trial by battle, and compurgation had all been abolished or ceased to be practiced.[19] Despite popular belief, the use of jury was never established as the sole method for trying cases; it simply was the last viable method available to defendants.[20] For this reason, defendants had to elect a jury trial or were forced into accepting it by threat of *peine forte et dure*.[21] The piecemeal development of jury trial procedure meant

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15. BAKER, *supra* note 7, at 509–10.

16. *See id.*

17. *See id.*

18. *See* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 238–41 (Vicki Been et al. eds., 2009) [hereinafter LANGBEIN ET AL., HISTORY COMMON LAW].

19. BAKER, *supra* note 7, at 73–74. *See also* 2 FREDRICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 598–602 (2d ed. 1996) (describing the ordeals as proof by hot iron or proof by cold water. In the first, the accused carries a red-hot iron for a set distance; if the person's burn heals, they are adjudged innocent, but if it festers, they are guilty. Similarly, if the person is received by a pool of water, they are innocent. The key is that both of these proofs required the participation of priests to bless the instruments and invoke God's judgment).

20. BAKER, *supra* note 7, at 71–74.

21. *Id.* at 508–9. *See also* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 74–77 (2006) [hereinafter LANGBEIN, TORTURE AND THE LAW OF PROOF]. The procedure of peine forte et dure involved inflicting

that the system was never systematically designed but slowly developed over the centuries following the Fourth Lateran Council prohibition of priests participating in ordeals.[22]

Before the introduction of lawyers into the criminal procedure of the common law, criminal trials were based on what John Langbein has termed the "accused speaks" model of trial.[23] The treatise, attributed to Britton and written in the thirteenth century, reflects this early adversarial model of criminal trials in which both the accused and plaintiff were expected to represent themselves: "We forbid any attorneys to be received either for the appellor or for the appellees, or any essoin to be allowed on one side or the other, in any case of death."[24] In this formulation, neither party was allowed the assistance of counsel, but had to come forth and state the facts as they saw them.[25] The jurors for these trials were to be selected among the freemen of the community from which the crime occurred.[26] Initially this meant that the jurors we expected to be self-informing or have some knowledge of the character and veracity of the parties and witnesses if not information on the crime itself.[27]

As the size of cities grew, it became less likely that jurors would have actual knowledge of the crime or the participants therein, and the jury became the judge of the facts with witnesses presenting their information and the defendant attempting to explain it away.[28] The judge was the supervisor of the trial, ensuring that exchanges were not abusive and remained on point, as well as counsel to the accused.[29] In the sixteenth century, the trial procedure began to change and tip in favor of the plaintiff

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enough physical pain and injury on the defendant that he would either relent and except trial by jury or be killed by the process. The most common way for peine forte et dure to be carried out was for the defendant to be slowly pressed to death under weights, hence it was commonly referred to as "pressing." Defendants were motivated to endure this process in order to prevent the forfeiture of their property to the crown if they knew they would be convicted at a jury trial, since no trial would have taken place if they died while being pressed. *Id.*

22. LANGBEIN ET AL., HISTORY COMMON LAW, *supra* note 18, at 51.

23. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 2, 48.

24. 1 HENRY D'BRITTON, BRITTON: THE FRENCH TEXT CAREFULLY REVISED WITH AN ENGLISH TRANSLATION INTRODUCTION AND NOTES 101 (Francis Morgan Nichols ed. trans., 1865).

25. *Id.*

26. POLLOCK & MAITLAND, *supra* note 19, at 621.

27. *Id.* at 622. *See also* BAKER, *supra* note 7, at 75.

28. *See* BAKER, *supra* note 7, at 76–81; POLLOCK & MAITLAND, *supra* note 19, at 620–22.

29. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 16.

as the Marian Committal Statute directed justices of the peace to issue search and arrest warrants to assist in the construction of a case.[30]

Despite the unanimous judgment of early treatise writers that no defendant in a felony or treason trial should be granted the assistance of counsel,[31] defendants were not so quick to forego the possibility. In his trial for plotting to overthrow Mary I, Nicholas Throckmorton complained that he had been held in prison for fifty-eight days without any information about the charges against him.[32] A more substantial complaint was that he did not know the law under which he was charged and therefore could not properly put up a defense.[33] His request for law books or other assistance was denied, "for where doth arise any doubt in the law, the judges sit here to inform the court."[34] Similarly, John Udall's request for counsel to assist him in answering an indictment for publishing seditious books was also denied, although without any reason given by the presiding judge.[35]

Although the role of the jury had been transformed and assistance in constructing cases had tipped in favor of plaintiffs, by the seventeenth century, the idea that the accused should speak for themselves and explain away evidence remained part of the system.[36] Edward Coke stated,

> "Where any person is indicted of treason or felony and pleadeth to the Treason or felony, not guilty, which goeth to the fact best known to the party; it is holden that the party in that case shall have no councel to give in evidence, or alledge any matter for him."[37]

There was not a complete prohibition of counsel as theoretically a defendant could, "pray councel learned generally, but must shew some

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30. *See id.* at 40–41.

31. *See* 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 352–53 (1978).

32. *The Trial of Sir Nicholas Thockmorton, Knight, in the Guildhall of London, for High Treason: 1 Mary, April 17, 1554: Together with the Proceedings Against Sir Nicholas Thockmorton's Jury, reprinted in* 1 A COMPLETE COLLECTION OF STATE TRIALS AND FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 870, 886 (T.B. Howell ed., London, T.C. Hansard, Peterborough-Court, Fleet Street 1809).

33. *Id.* at 886–87.

34. *Id.* at 888.

35. *The Trial of Mr. John Udall, a Puritan Minister, at Croydon Assizes, for Felony: 32 Eliz. 24th July, A.D. 1590, reprinted in* 1 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 32, at 1277.

36. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 40–41.

37. EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, SIXTH EDITION 137 (Historical Writings in Law and Jurisprudence, 2nd Ser. No. 5B, R.H. Helmholz & Bernard D. Reams Jr., eds., William S. Hein Co. 1986) (1680).

cause."[38] If a point of law, not fact, arose the defendant could have counsel to argue the point of law only.[39] This was a practical bar as most defendants would not have sufficient knowledge of the law to recognize if a point of law could be contested.[40]

The rationale behind the prohibition of defense counsel to accused in felony and treason cases is given best by Edward Coke, who, although a reformer, was not willing to go as far as his more radical contemporaries as will be discussed in Part III:

> First, for that in case of life, the evidence to convict him should be so manifest as it could not be contradicted. Secondly, the court ought to see that the indictment, trial and other proceedings, be good and sufficient in law; otherwise they should be . . . erroneous judgment attaint the prisoner unjustly.[41]

This rational held up in England until the Revolution of 1688, when the first crack appeared and defense counsel was allowed for defendants accused of treason.[42] The primary deficiency was seen to be treason trials where highly partial judges convicted people who were probably innocent, including the trials around Monmouth's Rebellion, the Rye House Plot, Popish Plot and Fitzharris trials.[43] The origin of the right to counsel in England has been thoroughly explored by John Langbein and John Beattie,[44] both of whom trace the origins of the right to counsel to the adoption of the Treason Trials Act of 1696,[45] which they cite as the turning point in common law criminal procedure and the form of the jury trial.[46]

The trials associated with the political machinations of the late Stuart period and attempts to prevent James II from ascending the thrown created a

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38. *Id.*

39. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 26.

40. *Id.* (citing David J. Seipp, *Crime in the Year Books*, *in* LAW REPORTING IN BRITAIN 15, 22 (Chantal Stebbings ed., 1995)) (noting that there are rare instances where defendants were able to raise points of law and have counsel assigned to assist them).

41. COKE, *supra* note 37, at 137.

42. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 67–68.

43. *Id.* at 67–79.

44. *See generally* BEATTIE, *supra* note 9, at 356–62 (discussing the origin of defense counsel); LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 68–103 (discussing the advent of defense counsel).

45. BEATTIE, *supra* note 9, at 358–59; LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 67–68.

46. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 67–68.

negative image of existing criminal procedure.[47] Following the Glorious Revolution, these trials came under increasing criticism in pamphlet literature, which focused on the high probability that innocent defendants were convicted as a result of procedural shortcomings.[48] The major criticisms of these trials were the partiality of the bench, especially judge Jeffrey's during the Bloody Assizes following Monmouth's Rebellion, restrictions on the ability of defendants to examine evidence in the pretrial stage, and the lack of defense counsel.[49] The need for defense counsel was viewed as essential in treason trial cases because of the partiality of judges, the ability of the crown to use counsel (in normal trials the accuser would often appear without an attorney), and the complexity of the charge of treason required the assistance of learned counsel to erect a viable defense.[50] The resulting act sought to remedy these deficiencies, and in doing so, it planted the seeds of the modern adversarial system.[51]

The Act of 1696 provided that all persons accused of treason be given a copy of the indictment and be allowed the assistance of legal counsel to "make any Proof that hee or they can produce by lawfull Witnesse or Witnesses . . . ."[52] The act also provided that all courts had to immediately provide up to two lawyers at the request of the defendant.[53] The rationale given for the passage of the Act was that persons accused of a crime which not only carried the penalty of death, but also forfeited estates and bloodlines "should not bee debarred of all just and equal Means of Defence of their Inocencies . . . ."[54] Defense counsel was allowed as a matter of grace to some criminal defendants in the mid-1730s, but it would not become an established right until 1836.[55]

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47. *Id.* at 68–69. *See also* BEATTIE, *supra* note 9, at 357 (citing JOHN HAWLES, REMARKS UPON THE TRYALS OF EDWARD FITZHARRIS, STEPHEN COLLEDGE, COUNT CONINGSMARK, THE LORD RUFFEL, COLLONEL SIDNEY, HENRY CORNISH, AND CHARLES BATEMAN 1 (London 1689); JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 383–416 (London, Macmillan & Co. 1883)).

48. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 78. *See also* BEATTIE, *supra* note 9, at 358 (noting that some radical reformers wanted all defendants to receive defense counsel).

49. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 79–84.

50. *Id.* at 98–100.

51. *Id.* at 102–04. Langbein views the passage of the act as unfortunate, since it preempted other less radical changes that would not have led to an adversarial system, but could have still provided safeguards for defendants. *Id.*

52. 7 THE STATUTES OF THE REALM 6 (London, John Raithby ed., 1820).

53. *Id.*

54. *Id.*

55. BAKER, *supra* note 7, at 510 (citing Trial for Felony Act 1836, 6 & 7 Gul. IV, c. 114; J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the*

The role of attorneys in criminal trials did not begin to spread until the 1730s when judges began to appoint counsel for defendants in ordinary felony cases.[56] Once defense counsel was allowed into the system, it took them comparatively little time to assert themselves fully into the regular proceedings of the criminal cases.[57] The ability of defense counsel to gain a firm role is attributed to the piecemeal implementation of defense counsel, which obscured judges' views of the radical changes the counsel participation would create.[58] Prosecutions by private thief-takers has been cited as another reason that defense counsel was welcomed into the court, since the thief-takers were viewed with suspicion and thought to fabricate evidence in order to secure convictions and their pay.[59] The introduction of defense counsel forced a structural shift in criminal trials by dividing the roles of "defending and speaking to the merits, that had previously been concentrated in the hands of the accused."[60] This division transformed the trial from a forum for the defendant to answer charges leveled against him into one where trained lawyers sought to dismantle a prosecutor's evidence and case.[61] The analysis put forward by Langbein and Beattie as to the reasons for and results of the introduction of defense counsel into English criminal trials is essentially correct.[62] In addition, it seems to apply to the colonial development in general, but does not explain why the right was granted to all defendants immediately in the colonies rather than in a piecemeal manner as in England.

Eighteenth and Nineteenth Centuries, 9 L. & HIST. REV. 221, 221–22 (1991); Langbein, *Before the Lawyers*, *supra* note 8, at 307–14).

56. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 106.

57. *See* BEATTIE, *supra* note 9, at 357 ("[T]he rule prohibiting the defendant to have counsel gave way suddenly.").

58. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 169. *See also* BEATTIE, *supra* note 9, at 356–57. Beattie notes that while the routine appointment of counsel took several years to develop, the prohibition against defense counsel came to a sudden end in the 1730s. He also notes that some judges were hostile to the introduction of defense counsel out of a desire to maintain the traditional defendant speaks model. *Id.*

59. See BEATTIE, *supra* note 9, at 55, 362 (noting that thief-takers had a reputation for pursuing convictions for financial reasons). *See also* J.M. BEATTIE, POLICING AND PUNISHMENT IN LONDON 1660–1750: URBAN CRIME AND THE LIMITS OF TERROR 393–95 (2001) [hereinafter BEATTIE, POLICING AND PUNISHMENT] (discussing the possibility that appearance of prosecutorial lawyers may have persuaded judges to allow defense counsel and noting that financial rewards from prosecution of crime encouraged thief-taking).

60. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 310.

61. *Id.*

62. *See generally* BEATTIE, *supra* note 9, at 356–62 (discussing the origin of defense counsel); LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 68–103 (discussing the advent of defense counsel).

Blackstone, writing around a century and a quarter after Coke, confirmed that "a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated."[63]

However, he viewed it as

> a rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law.[64]

Blackstone questioned the denial of counsel to felony defendants by pointing out that there is no proof that it was an ancient practice to deny counsel to defendants.[65] He also argued that it was not logical to allow defendant's counsel in cases of petty crimes, when there is no risk of life, but deny it to them in felony cases.[66] The problems raised by Blackstone echoed the complaints of law reformers active in the first half of the seventeenth century.[67]

III. THE PURITAN MOVEMENT FOR LAW REFORM

The early seventeenth century witnessed calls for legal reform from multiple groups with a variety of complaints against English legal practice.[68] In his work, Veall divides the reformers into four groups: Levellers and opponents of the common law, Diggers, those in favor of adopting a civil

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63. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354 (Philadelphia; Childs & Peterson 1898) (1765).

64. *Id.*

65. *Id.*

66. *Id.* at 349-50.

67. *See* Barbara Shapiro, *Law Reform in Seventeenth Century England*, 19 AM. J. LEGAL HIST. 280, 292 (1975) ("The desire for limited procedural reform, which had been expressed continuously since early in the century, was voiced again in the Grand Remonstrance and continued throughout the revolutionary era.").

68. *See generally* CHRISTOPHER HILL, LIBERTY AGAINST THE LAW: SOME SEVENTEENTH-CENTURY CONTROVERSIES (1996) [hereinafter HILL, LIBERTY AGAINST THE LAW] (discussing how outlaws, beggars, the poor, vegabonds, and godly nonconformists were critical of the law in the seventeenth century); VEALL, *supra* note 14, 97–126 (discussing varying group approaches to reform); Shapiro, *supra* note 67, at 280 (discussing efforts to reform the English legal system.

law model, and moderate reformers epitomized by Matthew Hale.[69] The Levellers were concerned with securing individual rights against what they saw as greedy lawyers and favored codification and an increase in authority for juries as the solution to the ills of the law.[70] The Diggers (or True Levellers) were virtually identical to the Levellers except that they focused on economic rights rather than broader individual rights and had a distrust of juries.[71] The moderate reforms were a mixed group with some seeking to amend criminal procedure, such as John Cook, and others focusing on reforms in civil cases, such as Matthew Hale.[72] Puritan reformers fell into each of these three groups, although they tended to be most heavily concentrated among the Levellers and Moderates.[73]

Although located on the periphery of the empire, Puritans in Massachusetts shared views similar to their brethren in England.[74] In addition, there is some evidence that ideas of law reform circulated in the empire as evidenced by the publication of some Massachusetts tracts in London.[75] It is proposed that the Puritan reforms instituted in the *Body of Liberties* were part of this larger movement for law reform and that the ideas exposed by Puritan rights in general also reflected some of their concerns.[76] However, the Puritans in Massachusetts did not adopt every proposed reform and adapted those they did to their own needs.[77]

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69. VEALL, *supra* note 14, at 97–98.

70. *Id.* at 98.

71. *Id.* at 98, 106.

72. *Id.* at 112–17.

73. *See id.* at 100–06, 111–22.

74. *See generally* EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 41–48 (3d ed. 1958) (discussing the move of Puritan leaders to New England and John Winthrop's move to Massachusetts Bay Company). *See also* G.B. Warden, *Law Reform in England and New England, 1620–1660*, 35 WM. & MARY Q. 668, 669 (1978) ("This essay argues that the Puritan Revolution had a profound, immediate effect on English law, if the term "English law" includes the legal reforms proposed and actually adopted by the English people who emigrated to New England before 1660.").

75. *See, e.g.*, JOHN COTTON, AN ABSTRACT OF THE LAWES OF NEW ENGLAND, AS THEY ARE NOW ESTABLISHED 66 (New Haven Cty. Bar Ass'n, 1938) (1641) [hereinafter COTTON, AN ABSTRACT] (proposing a code of laws for Massachusetts Colony that was never accepted there, but utilized for a short period in New Haven).

76. *See* David Little, *Calvinism, Constitutionalism, and the Ingredients of Peace, in* 4 THE KUYPER CENTER REVIEW: CALVINISM AND DEMOCRACY 21, 33 (John Bowline ed., 2014) (citing DAVID D. HALL, A REFORMING PEOPLE: PURITANISM AND THE TRANSFORMATION OF PUBLIC LIFE IN NEW ENGLAND 152 (2011)) (discussing the legal reforms present in the *Body of Liberties* which sought to create a more "equitable society").

77. *See* MORGAN, *supra* note 74, at 161 (discussing that in the code, the people of Massachusetts purposely parted from the English mixture of church and state and "archaic forms of land tenure," and eventually a unique form of local government formed). *See also*

The Leveller movement in the New Model Army believed in the sanctity of private property but sought to expand democratic participation in the new government.[78] The movement originated after the battle of Naseby when soldiers feared that they would not be given back pay, but it soon developed into more sophisticated complaints about the perceived failure of Parliament to implement more sweeping reforms.[79] The level of understanding and the amount of changes desired varied among the Levellers, although the most radical demanded an expanded franchise to include all adult males.[80] The Leveller movement ended with the escape of Charles and the end of dissent in the face of loyalist opposition.[81] The regiments that continued to mutiny were easily crushed in November 1647.[82] The Levellers were not a unified group, but were composed of Puritans and other religious dissenters from various parts of England and strata of society.[83]

In addition to complaints about democracy in England, the Levellers issued several pamphlets stating their complaints regarding the common law.[84] They complained that "unjust judges and corrupt lawyers"[85] often guided juries to reach the end they wanted and otherwise subverted justice.[86] The Levellers as a group were afraid of the undermining of juries as part of a general erosion of individual rights.[87] They, like many of the other reformers, complained that the law was not written down, "for where there is no Law declared, there can be no transgression," which meant that people could run afoul of the law because they did not know their actions were illegal.[88] Like the Diggers and other law reformers, Lilburne traced the

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Warden, *supra* note 74, at 669–70 (noting that New Englanders adopted some practices that did not have precedent in English legal procedures).

78. CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 123 (1991) [hereinafter HILL, WORLD TURNED UPSIDE DOWN].

79. BARRY COWARD, THE STUART AGE: ENGLAND 1604–1714, at 228–29 (3d ed. 2003) (noting that although more sophisticated complaints surfaced, a majority of soldiers were probably still most concerned with "bread-and-butter" issues).

80. *Id.* at 232–33

81. *Id.* at 233.

82. *Id.*

83. *Id.* at 239.

84. ENGLANDS TROUBLERS TROUBLED, OR THE JUST RESOLUTION OF THE PLAINE-MEN OF ENGLAND AGAINST THE RICH AND MIGHTIE 6 (London, 1648) [hereinafter ENGLAND TROUBLERS].

85. *Id.* at 6.

86. *Id.*

87. *Id.*

88. JOHN LILBURNE, ENGLANDS BIRTH-RIGHT JUSTIFIED 3 (London, Larner's Press at Goodman's Fields 1645) [hereinafter LILBURNE, ENGLANDS BIRTH-RIGHT].

injustice in English law to the Norman Conquest, which usurped the existing common law and marked the straying of the English law from God's law.[89]

John Lilburne had several specific objections to criminal law; in particular, he found it odious that men were required to speak in trials and thus condemn themselves or risk being thrown in prison for failure to speak.[90] He also wanted the law to be in English so that each man could understand the law for himself.[91] He further proposed limiting the number of lawyers admitted to practice in each court and placing limitations on the fees that lawyers could charge.[92] This was because Lilburne distrusted lawyers as being driven by "an insterest of their own,"[93] and "putting false glosses on the law (meerly) for their own ends,"[94] which cannot be known to the average person as the law is in an unknown tongue.[95] Lilburne hoped that Parliament would rid "this kingdom of those vermine and caterpillars, the lawyers, the chief bane of this poor Nation."[96]

Lilburne's dislike of lawyers faded during his 1649 treason trial, as he repeatedly asked to consult with counsel, "to inform my ignorance" of the law.[97] Indeed, he repeatedly requested the assistance of counsel during his trial as he was afraid that because of his ignorance he might destroy himself: "I must need be destroyed, if you deny me all the means of my preservation."[98] During the trial he also protested that he had not been given the charge before the start of the trial and was ignorant of the law as he had no books on law to consult or knowledge of French or Latin.[99] In response to his pleas, the court recited the reasons given by Coke for why counsel was denied to defendants and informed him that if a point of law was at issue counsel would be assigned.[100]

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89. JOHN LILBURNE, THE JUST MANS JUSTIFICATION 10–11 (London, 1646) [hereinafter LILBURNE, JUST MANS].

90. LILBURNE, BIRTH-RIGHT, *supra* note 88, at 5.

91. *Id.* at 38.

92. *Id.* at 35.

93. *Id.* at 8.

94. *Id.*

95. *Id.*

96. JOHN LILBURNE, FOUNDATIONS OF FREEDOM; OR AN AGREEMENT OF THE PEOPLE (London, R. Smithurft 1648), *reprinted in* WOLFE, LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 303 (Don M. Wolfe ed., 1967).

97. *4 The Trial of Lieutenant-Colonel John Lilburn, at the Guildhall of London, for High Treason*, *in* 4A COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1293 (London, R. Bagshaw et al., 1809).

98. *Id.* at 1297.

99. *Id.* at 1293.

100. *Id.* at 1297. Despite the denial of counsel, Lilburne and other protests raised about procedure by him, Lilburne was acquitted. *Id.*

There was no agreement within the ranks of the Levellers about the degree to which law needed to be reformed, although there was unanimity that it needed reform.[101] Although Lilburne believed that the law needed reform, he did not go as far as Hugh Peters whom he accused of denying that there was any law in England at all.[102] Peters is reported as saying that there was no law in England but only "the sword, and what it gives."[103] Peters put his emphasis not only on the reform of law, but on those who administer it: "Good men, not good Lawes must save Kingdomes: not that I would separate them."[104] Practically, Peters advocated speedier trials, the lowering of fees and costs for trial, and the elimination of robes for lawyers, since they are marks of rank.[105] As with others, Peters also opposed the pardoning of convicted persons as it created inequity among those being punished.[106] In addition, he advocated for the repeal of the disinheritance of the heirs of convicted felons and the equal application of the law to all persons regardless of religion, rank or national origin.[107]

Although he did not advocate for removing all lawyers, he favorably commented on Holland where the people turned away from the use of lawyers as their system was so efficient that it could be navigated without counsel.[108] However, because this was not a realistic possibility, Peters also advocated for all salaries of lawyers, judges, and sergeants of law to be paid from public funds,[109] and punishments implemented for any who subvert justice.[110] In terms of assistance of lawyers in cases he stated,

> "Let everie man plead his own caus, and if hee think's his adversarie too strong, or himself too weak, hee shall have libertie to take a friend, or Neighbor to plead for him, who he judges

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101. COWARD, *supra* note 79, at 233.

102. JOHN LILBURNE, A DISCOURSE BETWIXT LIEUTENANT COLONEL JOHN LILBURNE CLOSE PRISONER IN THE TOWER OF LONDON AND MR. HUGH PETER 4 (London, 1649) [hereinafter LILBURNE, DISCOURSE BETWIXT].

103. *Id.* at 5.

104. HUGH PETERS, A WORD FOR THE ARMIE. AND TWO WORDS FOR THE KINGDOM 10 (London, M. Simmons for Giles Calvart at the black Spread-Eagle at the Westend of Pauls 1647) [hereinafter PETERS, WORD FOR THE ARMIE].

105. *Id.* at 13.

106. HUGH PETERS, GOOD WORK FOR A GOOD MAGISTRATE OR A SHORT CUT TO GREAT QUIET 53 (London, William Du-Gard 1651) [hereinafter PETERS, GOOD WORK].

107. *Id.* at 55.

108. PETERS, WORD FOR THE ARMIE, *supra* note 104, at 13.

109. PETERS, GOOD WORK, *supra* note 106, at 43.

110. *Id.* at 37.

> able . . . then to admit Lawyers to plead, if one, or both parties desire it."[111]

This allowance of assistance to people who felt themselves incapable of pleading their own cases was an attempt to mitigate the problems of people not knowing the law, while minimizing the increase in work for lawyers.

The close resemblance between the reforms proposed by Hugh Peters and those adopted in Massachusetts Bay should not be surprising as Peters was John Winthrop's father-in-law[112] and spent time in the colony before going to England as a representative of the colony and eventually joining the New Model army as Cromwell's chaplain.[113] Before departing Massachusetts Bay, Peters played an important role in the trial of Anne Hutchinson as one of the ministers who questioned her.[114] He therefore represents the clearest bridge between England and its colonies regarding the reform of law. The views of Peters and Lilburne were representative of Leveller views on the reform of law, although they were not the only views. In general, the Levellers sought to reform the existing law to make it more efficient and to protect individual rights to a greater degree.[115]

The Digger movement is most closely associated with Gerrard Winstanley and the cultivation of St. George's Hill in 1650,[116] although there were numerous Digger communities in England around the same time.[117] The Diggers wanted to cultivate the wastelands in every town in order to assert the rights of the poor who were without property and thus start a redistribution of wealth on an equal basis for all people.[118] They believed that private property would be abolished and communal cultivation established in its place.[119] These ideas were not shared by Levellers in the army, who actively sought to distance themselves from the more radical Diggers.[120]

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111. *Id.* at 42.

112. Carla Gardina Pestana, *Hugh Peter*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, http://www.oxforddnb.com/view/article/22024 (last visited Sept. 20, 2016).

113. *Id. See also* MORGAN, *supra* note 74, at 126 (noting that Hugh Peter became Cromwell's chaplain).

114. *Id.* at 167, 171.

115. ENGLAND TROUBLERS, *supra* note 84, at 6.

116. HILL, WORLD TURNED UPSIDE DOWN, *supra* note 78, at 110.

117. *Id.* at 118, 130.

118. *Id.* at 128–29.

119. CHRISTOPHER HILL, PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE 17TH CENTURY 77 (1997) [hereinafter HILL, PURITANISM AND REVOLUTION].

120. *See id.*

A key component of the Digger complaints was the use of law to suppress the poor of England.[121] They believed that the common law was a vestige of the Norman conquest of the island and represented a yoke placed on the English people, which had to be overthrown so they could return to an idyllic state before the fall of man.[122] Gerrard Winstanley wrote, "England is a Prison; the variety of subtilties in the Laws preserved by the Sword, are bolts, bars, and doors of the prison; the Lawyers are the Jaylors, and poor men are the prisoners."[123] In this belief, the Diggers shared a common desire with Puritans and Levellers to return to a more godly law, uncorrupted by lawyers, magistrates and kings.[124]

The Diggers singled out lawyers for particular abuse because they were seen as becoming rich off of the misfortune of the people: "The Lawyers they are next (after priests), by whom the poor are vext; Their practice is most base, For they will plead mens Case, According to the length o'th Purse, And so the Lawyers prove a Curse."[125] In Digger songs, lawyers are portrayed as "flatt against their oath," loathsome individuals who gain their sustenance from other people whom they overawe with the law.[126] Winstanley warned parents to not "send their children to those Nurseries of Covetousness, The Innes of Court."[127] The origin of lawyers was tied to the Norman Conquest as William had the laws "written in the Norman and French tongue and then appointed his own Norman people to expound and interpret those laws, and appointed the English people to pay them."[128] In the Digger formulation of grievances, lawyers were part of an oligarchy, including landed elite, Norman King's and their supporters, and Anglican priests, who was conspiring to take money and land from the poor.[129]

The solution for the Diggers was a true religion led by the people with the word of God available to all, the removal of landed elite and Norman

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121. *Id.* at 76–77.

122. *Id.* at 77–78.

123. GERRARD WINSTANLEY, A NEW-YEERS GIFT FOR THE PARLIAMENT AND ARMIE 10 (London, Giles Calvert 1656) [hereinafter WINSTANLEY, A NEW-YEERS GIFT].

124. HILL, PURITANISM AND REVOLUTION, *supra* note 119, at 77–78.

125. *The Diggers Christmas-Caroll*, in DIGGER TRACTS 1649–50, at 20, 22 (Andrew Hopton ed., Aporia Press 1989) (1650).

126. *The Diggers Song*, *in* DIGGER TRACTS, *supra* note 127, at 27–28 [hereinafter Diggers Song].

127. WINSTANLEY, A NEW-YEERS GIFT, *supra* note 123, at 11 (italics omitted).

128. GERRARDE WINSTANLEY ET AL., AN APPEAL TO THE HOUSE OF COMMONS 19 (London, Giles Calvert 1649) [hereinafter WINSTANLEY, AN APPEAL].

129. *See* Diggers Song, *supra* note 126, at 27–28.

Kings, and implementation of the "righteous Law of creation."[130] The central tenant of this new law was to be love, "Christs last commandment," which if practiced would lead to an end to envy and discontentment and thus the need for lawyers.[131] To this end they urged the army and parliament to reform the law and "cast out this couetous corruption whereby corrupt Lawyers doe opress the People, it is another Branch of the Kingly power."[132] The Diggers' manifesto on law was to create a society without the need for lawyers, as property would be held in common and people would love each other according to Christ's precepts.

Between the Levellers, with their focus on individual rights, and Diggers, with their economic reforms, were other writers who sought to reconstruct English law in harmony with God's law. This group of reformers is exemplified by Booth, who authored *Examen Legum Angliae* in 1656, and stated "that all laws, by whomsoever instituted, repugnant to those holy laws of Almighty God, are to be rejected because they have not the stamp of the chief law giver upon them."[133] Unlike the moderate reformers, Booth saw Coke as a barrier to law reform as he provided an edifice to build half reforms onto.[134] According to Booth, the foundation of all just law was the Holy Scriptures, which taught that good law was based on living honestly, to harm no one, and "to give to everyone his right."[135]

Booth explained why all commandments or laws in the Bible should not be adopted by dividing law into those that relate to ceremonial law,[136] laws given to the Jewish commonwealth to govern their homeland,[137] and "the rest are laws of common Justice and Equity. These and none others, were given to the Jews as men, and not only bound the consciences of the Jews but also those of the Gentiles."[138] It was only this last group of laws on which the laws of England should be based.[139] As such Booth objected not only to existing laws that were unjust or created inequality among men, but

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130. GERRARD WINSTANLEY ET AL., A DECLERATION FROM THE POOR OPPRESSED PEOPLE OF ENGLAND 1, 5–6 (London 1649) [hereinafter WINSTANLEY, DECLERATION FROM THE POOR].

131. WINSTANLEY, A NEW-YEERS GIFT, *supra* note 123, at 11.

132. *Id.*

133. A. BOOTH, EXAMEN LEGUM ANGLIAE OR THE LAWS OF ENGLAND EXAMINED BY SCRIPTURE, ANTIQUITY AND REASON, at Intro x (London, James Cottrel 1656) [hereinafter BOOTH, LAWS OF ENGLAND EXAMINED].

134. *Id.* at Intro xi.

135. ETHELRED TAUNTON, THE LAW OF THE CHURCH: A CYCLOPEDIA OF CANON LAW FOR ENGLISH-SPEAKING COUNTRIES 392 (1906).

136. BOOTH, LAWS OF ENGLAND EXAMINED, *supra* note 133, at 5.

137. *Id.*

138. *Id.*

139. *Id.* at 7.

also to the lack of laws that regulated the publication of Bibles, upheld Biblical prohibitions against gambling, swearing, prohibiting the marriage of infidels, adultery, lascivious gestures, or fornication (presumably before marriage although it is not clarified).[140] Booth spent a large part of his treatise condemning the existing criminal law and procedure.[141]

Booth's overarching condemnation was the inequality of the law in terms of application and distribution of punishments for various crimes.[142] The first complaint was the inaccessibility of the law to the average person as the law was written in French or Latin, which were not understood by the average person.[143] Like other groups Booth linked this to the Norman yoke, "as if we were resolved for ever to wear the tokens of our former captivity."[144] Although Booth did not object to the institution of the jury, he did complain about the practice of paine fort et dure as it punished people without proof, trial, or charge being entered.[145] He also condemned benefit clergy as it was a vestige of the Roman Church, which he equated with the Antichrist, as well as allowing people charged with severe crimes to escape punishment.[146] The continued existence of trial by battle, which decided guilt in an arbitrary manner and was a vestige of Saxon paganism and compurgation, which encouraged men to profane God's name in order to save themselves or their relations were also condemned.[147] All of the proposed reforms were designed to make the law less arbitrary in its execution of punishment and in harmony with Mosaic Law.[148]

The moderate reformers, such as Edward Coke, John Milton, Mathew Hale, and John Cook, tended to come from the gentry and held positions within government.[149] Like the Levellers, the moderate reformers had different views on the common law and to what degree it needed to be reformed.[150] The overall goals of the moderate reformers were to protect real property while simplifying the legal system and to make it more economically efficient.[151] Milton stated that it was the responsibility of the people to ensure that they had justice and that the justices ought to be

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140. *Id.* at 7–8, 115–29.
141. *See id.*
142. *Id.* at 65.
143. *Id.* at 14.
144. *Id.*
145. *Id.* at 56.
146. *Id.* at 54.
147. *Id.* at 53.
148. *Id.* at 53–86.
149. VEALL, *supra* note 14, at 98.
150. *See id.* at 98, 111–22.
151. *Id.* at 22.

responsible to the people not the king.[152] Unlike the Levellers and Diggers, this group of reformers did not want a radical restructuring of society or a complete abolition of the common law or removal of lawyers.[153]

These reformers tended to have the work of Edward Coke as their starting point.[154] But, unlike Coke, they were more willing to contemplate alterations to criminal procedure.[155] As mentioned above, Coke affirmed in his Institutes the rule that counsel was not to be made available to defendants in criminal cases.[156] In the trial of *R. v. Walter Thomas*, Coke again affirmed his belief that "the law of England, is a law of mercy; the Judge, before whom the trial is, is to look unto the indictment, and to see that the same be sound, and good in point of law."[157] In addition to his earlier rationale for denying counsel to defendants, Coke asserted that judges are more impartial than lawyers and have a greater responsibility to see justice done.[158] Despite Coke's support of common law criminal procedure, the other moderate reformers were more willing to challenge the existing system.[159]

John Cook was a lawyer who served as prosecutor at the trial of Charles I and was a devout puritan.[160] While Cook does say that law should be in accord with God's precepts, he argues for more practical changes to the common law that would improve the lot of the average Englishman.[161] Indeed, he believed that "the Law of God is one principle ground of the Law of England."[162] Cook believed that benefit of clergy should have been abolished as it ". . . is a purely Popish, for in reason it is a greater offence for a scholler that knowes his duty, and the danger of the Law to offend, then an illiterate man that knowes nothing in comparison."[163] The prohibitions of

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152. *See generally* JOHN MILTON, *The Readie and Easie Way, in* AREPOGATITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 414, 414 (John Alvis ed., Liberty Fund 1999) (1660) (arguing for Parliament to avoid returning to a monarchy and to establish a republican government).

153. VEALL, *supra* note 14, at 99.

154. *Id.*

155. *See id.* at 111–22.

156. COKE, *supra* note 37, at 137.

157. 80 Eng. Rep. 1022, 1023, 2 Bulstrode, 147 (K.B. 1613). The Defendant was indicted for the killing of George Conard in Middlesex. He was found guilty, but allowed his clergy after reading Psalm 51:14. *Id.*

158. *Id.*

159. *See* VEALL, *supra* note 14, at 99.

160. AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION 1625–1660, at 431 (2002).

161. JOHN COOK, UNUM NECESSARIUM: OR THE POORE MANS CASE 46–47 (London, 1648) [hereinafter COOK, UNUM NECESSARIUM].

162. JOHN COOK, THE VINDICATION OF THE PROFESSORS AND PROFESSION OF THE LAW 26 (London, 1646) [hereinafter COOK, VINDICATION].

163. *Id.* at 22.

counsel to defendants and defense witnesses from being sworn were also singled out by Cook as odious to a free country: "[I]t has been an ancient Law, but upon serious consideration I fear that the Land has been defiled with much blood by that means, not as yet washed off, indeed in case of an assault the Law makes every man a Magistrate to defend himself . . . ."[164] Cook's complaints against the law continued on to note that while a murderer who is adept at the law could get off on a technicality, an illiterate man would be hung because he was not skilled enough in the law to defend himself.[165] Cook's complaints against the law echo those of the Levellers[166] and Booth,[167] in particular, his complaints about Catholic holdovers in the law and the inequity in distribution of punishments.[168] However, Cook saw the common law as inherently good and worth reforming.[169]

In his *History of the Common Law of England*, Mathew Hale sidestepped the issue of criminal procedure by focusing on jury trial for civil cases.[170] However, the law reform commission headed by Matthew Hale did advocate several reforms of criminal procedure.[171] Among the proposed changes to criminal procedure were the abolition of peine forte et dare and benefit of clergy, making two witnesses necessary for conviction in felony cases, that attorneys should be admitted to practice in all courts, and that criminal defendants be allowed lawyers if the prosecution had counsel.[172] These reforms adopted some of those promoted by the Levellers while not adopting the more radical proposals of either the Levellers or Diggers.[173]

Although these reformers differed in their rationales and the extent to which they wanted to amend the common law, they all had basic complaints about the cost and administration of justice, which produced seemingly unfair results, especially in criminal law.[174] Some of the complaints appear to be out of place in retrospect as the activities being objected to were designed to mitigate the harshness of the common law, such as the use of benefit of clergy to allow first time offenders to escape capital

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164. *Id.* It should be noted that the pagination of the pamphlet is misprinted in the original, so that there are two pages numbered 22; this is the first such demarcated page.

165. *Id.* at 22–23.

166. *See* VEALL, *supra* note 14, at 100–01.

167. *See* BOOTH, LAWS OF ENGLAND EXAMINED, *supra* note 133, at 65.

168. *See id.*

169. *See* COOKE, UNUM NECESSARIUM, *supra* note 161, at 46–47.

170. MATHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 160–67 (Charles M. Gray ed., The Univ. of Chicago Press 1971) (1739).

171. VEALL, *supra* note 14, at 79–80.

172. *Id.* at 155, 207–08.

173. *See* VEALL, *supra* note 14, at 106–09.

174. *See id.* at 83–84.

punishment.[175] These complaints about the common law were shared by Puritans in New England who were developing their own legal code at the time and affected the reforms they implemented in these new codes.[176] It has been argued by some historians that the colonial laws passed by New England Puritans represent the achievements of the Revolution.[177] The *Body of Liberties* can be seen as adopting various elements of these proposed reforms.[178]

IV. LAW REFORM IN THE MASSACHUSETTS BAY COLONY

The Charter of the colony of Massachusetts Bay in New England contemplated the creation of a colonial government including the establishment of colonial laws and courts.[179]

> That it shall and maie be lawfull to and for the Governor or Deputie Governor and such of the Assistants and Freemen of the said Company for the tyme being as shalbe assembled in any of their Geenrall Courts aforesaid, or in any other Courtes to be specially sumoned and assembled for that purpose . . . from tyme to tyme to make, ordeine, and establishe all manner of wholesome and reasonable orders, lawes, statutes, and ordinnces, direccons, and instruccons not contrarie to the lawes of this our realme of England . . . and for imposicons of lawfull fynes, mulcts, imprisoment, or other lawfull correcon, according to the course of other corporacons in our realme of England.[180]

However, when it came time to implement legal reforms, Governor Winthrop quarreled with other members of the drafting committee over the degree of order and stability to be kept.[181] He also opposed the drafting of any legal code, because any code drafted in harmony with Biblical Law

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175. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 334 n.47 (1972) (discerning that the use of the benefit of clergy in England mitigated the harshness of the law); THE DEATH PENALTY IN AMERICA 7 n.5 (Hugo Adam Bedau ed., 3d ed. 1982) (observing that the use of the benefit of clergy privilege was later applied in secular criminal courts to more persons and felonies).

176. Warden, *supra* note 74, at 668–69.

177. *Id.* at 676.

178. *Id.*

179. *The Colony Charter* 1628-9, *in* RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN ENGLAND, VOLUME I, 1628–1641, at 10–12 (Boston, The Press of William White 1853) [hereinafter RECORDS OF MASSACHUSETTS BAY].

180. *Id.* at 16–17.

181. *See* MORGAN, *supra* note 74, at 167.

would conflict with common law, and that was forbidden by the colony's charter.[182] If the laws of Massachusetts Bay were left uncodified then legal practice could differ from the common law and no one in England would be the wiser.[183] The desire of people to have the laws of the colony set down to protect them from the power of the magistrates finally won out,[184] and a committee headed by John Cotton and Nathaniel Ward was established in December 1639.[185] In 1641, the *Body of Liberties* was completed by two ministers John Cotton and Nathaniel Ward, who was also a former lawyer, and submitted for approval.[186]

A. The Trial of Anne Hutchinson

The impetus for a new code of laws can be traced to the first major criminal trial, one that almost tore the nascent colony apart: the trial of Anne Hutchinson and the surrounding antinomian controversy.[187] It should be noted that the trial of Anne Hutchinson is simply the most well-known of a series of trials revolving around the antinomian controversy.[188] The trials arguably began with the banishment of John Wheelwright in February 1637 and ended with the disenfranchisement of several supporters of Wheelwright and Hutchinson.[189] However, it was Hutchinson's admirable defense that is of key importance to the changes in criminal procedure in Massachusetts Bay.

Puritans believed in salvation by grace rather than works; in contrast to the Catholic emphasis, one could not obtain salvation by good deeds alone.[190] One of the issues between Hutchinson and her followers and the other ministers was whether God's moral laws had any power over a person who had received grace.[191] Those who believed that moral law no longer had an effect on those that were saved were deemed antinomians.[192] However,

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182. *Id.* at 157.

183. *Id.*

184. *Id.* at 158–59.

185. JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630–1649, at 314 (Richard Dunn et al. eds., 1996).

186. *See id.* at 380 n.32 (stating that in addition to Ward's scheme, portions of Cotton's proposed set of laws were incorporated into the final code).

187. MICHAEL P. WINSHIP, THE TIMES AND TRIALS OF ANNE HUTCHINSON: PURITANS DIVIDED 1 (2005).

188. *Id.* at 4.

189. *See* WINTHROP, *supra* note 185, at 210–11, 217–18, 228, 240–42.

190. FRANCIS J. BREMER, PURITANISM: A VERY SHORT INTRODUCTION 41–42 (2009).

191. WINSHIP, *supra* note 187, at 3–4.

192. *Id.* at 3.

the key issue seems to have been how to determine if you had received God's grace in the first place.[193] The debate's focus on knowledge of grace led Michael P. Winship to rename the controversy the "Free Grace Controversy," in his work.[194] Whatever name it goes by, the central issues under debate were the nature and extent of God's grace for salvation.

The controversy centered on the church of Boston, where John Cotton tolerated members of the congregation's questioning of central doctrines, so long as they were posed as questions not statements of belief.[195] Anne Hutchinson, a midwife and leader of women's prayer groups, accused all of the ministers in the colony except Cotton, Wheelwright and Hooker of preaching a covenant of works, essentially accusing them of Catholicism.[196] This was combined by the general belief that it was improper for a woman to preach, and it seemed that Hutchinson was coming close to doing this in her weekly meetings.[197] Of greater concern was the fear that Hutchinson's beliefs, which emphasized the personal nature of salvation over obedience to law, would lead to instability.[198]

Hutchinson was brought to trial in November 1637 and eventually convicted and banished for "traduceing the ministers and their ministery in this country, shee declared voluntarily her revelations for her ground, and that shee should be delivred and the Court ruined, with their posterity."[199] Before Hutchinson sealed her fate, on the second day of the trial, she was able to cause a stir by asserting a procedural flaw from the previous day.[200] The trial was conducted in the General Court with John Winthrop acting as questioner and judge.[201] During the first day of the trial, several ministers and magistrates spoke in accusation of her regarding when she began to hold beliefs contrary to the ministers.[202] In the first day, Hutchinson was able to

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193. *Id.*

194. *Id.* at 3–4.

195. *Id.* at 42–47.

196. LOUISE A. BREEN, TRANSGRESSING THE BOUNDS: SUBVERSIVE ENTERPRISES AMONG THE PURITAN ELITE IN MASSACHUSETTS, 1630–1692, at 20 (2001).

197. KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 92–93 (1966).

198. WINSHIP, *supra* note 187, at 37.

199. *See* RECORDS OF MASSACHUSETTS BAY, *supra* note 179, at 207.

200. WINSHIP, *supra* note 187, at 108.

201. ERIKSON, *supra* note 197, at 93.

202. *Examination of Mrs. Anne Hutchinson*, *in* THE ANTINOMIAN CONTROVERSY AT THE COURT AT NEWTOWN, 1636–1638: A DOCUMENTARY HISTORY 312, 317–26 (David D. Hall ed., 2d ed. 1990) [hereinafter *Examination of Hutchinson*]. The ministers who spoke were Hugh Peter, George Phillips, Zechariah Symmes, and John Eliot. The Magistrates were Simon Bradstreet, Thomas Dudley, and John Endicott. *Id.*

deflect these questions by asserting that there was no proof of what she had said to criticize the ministers of the colony.[203]

It is widely believed that Hutchinson received legal counsel in the night as she requested that all who testified against her the previous day be sworn and then re-testify under oath.[204] It was common practice under the common law for prosecution witnesses to be sworn, although defense witnesses were not sworn.[205] "The ministers come in their own cause. Now the Lord hath said that an oath is the end of all controversy; though there be a sufficient number of witnesses yet they are not according to the word, therefore I desire they may speak upon oath."[206] Although couched in religious language, the assistance of the ministers testifying under oath may have been enough for her to escape conviction given the seriousness of oaths to Puritans and the reluctance of several ministers to testify under oath. That this was as much a legal ploy as a religious belief is revealed by her subsequent statement, "if they accuse me I desire it be made upon oath."[207] The only minister who was willing to testify under oath was Hugh Peters as the others did not have a clear memory of their conversations with Anne Hutchinson eleven months previously.[208] For reasons that will never be clear, Hutchinson decided to reveal her beliefs that she received immediate revelation and held other contrary beliefs.[209] In a moot procedural victory, Hutchinson did force the ministers to swear an oath that their testimony was accurate, but this was done after she had spoken enough to convict herself.[210]

Part of the dilemma for the colony's leaders was the high stature of John Cotton, and this meant his banishment or voluntary departure would have been a severe blow to the colony.[211] It was therefore necessary to simultaneously convict Hutchinson while not alienating Cotton.[212] John Winthrop seems to have been especially keen on ensuring that Cotton did not leave.[213] In October 1636, during the height of the controversy, John Cotton was "requested by the general court, with some other ministers, to

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203. *Id.*
204. WINSHIP, *supra* note 187, at 108.
205. BAKER, *supra* note 7, at 509.
206. *Examination of Hutchinson*, *supra* note 202, at 327.
207. *Id.*
208. *Id.* at 328, 330–35.
209. *Id.* at 336–48.
210. *Id.* at 346; WINSHIP, *supra* note 187, at 108–10.
211. *See* WINSHIP, *supra* note 187, at 93.
212. *See id.*
213. *See id.* at 92–93.

assist some of the magistrates in compiling a body of fundamental laws."[214] It is not clear if Cotton's inclusion in the drafting in the new legal code represents an attempt to either legitimize his stature or induce him to remain in the colony, but the timing is interesting. Although Cotton's code was not accepted by the General Court, it did have some influence on the *Body of Liberties*. Most notably, the emphasis on Mosaic law in Liberty 65, which places the word of God above any "custome or prescription."[215]

B. Adoption of the Body of Liberties

The *Body of Liberties* was the combination of two proposals put forth by Nathanial Ward and John Cotton with the majority of the code taken from Ward's submission.[216] Further, the *Body of Liberties* was a combination of Mosaic Law, common law, and Puritan reforms.[217] However, the code does not reflect the more radical changes proposed by Levellers and Diggers in England or by some colonists in Massachusetts Bay.[218] The proposed code did not redistribute real property or re-order society; indeed, Winthrop, Cotton, and Ward were all in favor of maintaining a hierarchical society.[219] William Hawthorne and other deputies wanted to have fixed penalties assigned for all crimes in order to prevent magistrates from arbitrarily determining punishments.[220] This fear of arbitrary punishment is similar to the motivations behind the call for uniform punishment put forth by Booth as a rational for the abolition of benefit of clergy. Winthrop answered this charge by noting that "God himself varieth the punishments of the same offences, as the offences vary in their circumstances."[221] In a counter to reformers demanding absolute equality in punishment, Winthrop responds, "Justice requireth that every cause should be heard before it be judged, which cannot be when the sentence and punishment is determined beforehand."[222] These responses reflect the unwillingness of the legally-

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214. WINTHROP, *supra* note 185, at 195.

215. *See* COLONIAL LAWS, *supra* note 5, at 47.

216. 1 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS 456 (11th prtg. 1966). *See also* Letter from John Cotton to John Winthrop (late March or April 1648), *in* THE CORRESPONDENCE OF JOHN COTTON 400, 400 (Sargent Bush, Jr. ed., 2001) [hereinafter Letter from John Cotton] (explaining that although Cotton's model was presented, Ward's submission was ultimately accepted as the working document).

217. *See* ANDREWS, *supra* note 216, at 457–58.

218. *See id.* at 456–57; WINTHROP, *supra* note 185, at 380–82.

219. ANDREWS, *supra* note 216, at 456–57.

220. WINTHROP, *supra* note 185, at 381.

221. *Id.*

222. *Id.* at 382.

trained Winthrop to subvert his notion of justice in order to achieve uniformity. Despite these objections, the *Body of Liberties* was approved on December 10, 1641.[223]

Shortly after the publication of the *Body of Liberties*, John Cotton published his proposed legal code, which was not wholly adopted by Massachusetts Bay.[224] In this pamphlet, Cotton places the biblical basis for each part of the proposed legal code in the marginalia next to the clause.[225] The most relevant parts of the code are the criminal laws and procedure as these sections of Cotton's code are similar to the criminal law elements of the *Body of Liberties*.[226] The substantive crimes are all related to one or more biblical passages for support; most memorably, the death penalty for rebellious children based on Exodus 21:15 and Leviticus 20:9.[227]

However, when it comes to biblical justifications for criminal procedure Cotton could only muster two references, the first of which was Deuteronomy 19:10, which states, "so that the blood of an innocent person may not be shed in the land that the Lord your God is giving you as an inheritance, thereby bringing bloodguilt upon you."[228] The second was Deuteronomy 17:6: "On the evidence of two or three witnesses the death sentence shall be executed; a person must not be put to death on the evidence of only one witness."[229] Both of these citations offer a caution to ensure that the conviction and execution of the accused person is carried out in a just manner, but neither provides a firm basis for criminal procedure. Nevertheless, the two-witness rule would remain in some form in all Massachusetts criminal codes until the revolution.[230] For criminal procedure, Cotton had to turn to the common law, the only substantive law that he knew.[231] Indeed, Nathaniel Ward and John Winthrop as trained lawyers also turned to the common law when formulating the new laws of Massachusetts Bay.[232]

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223. *Id.* at 380; THE GENERAL COURT OF MASSACHUSETTS 1630-1930, at 58 (Frederic Cook ed., 1931).

224. COTTON, AN ABSTRACT, *supra* note 75. *See* Warden, *supra* note 74, at 675.

225. COTTON, AN ABSTRACT, *supra* note 75.

226. *Id.* at 10–15.

227. *See id.* at 77. *See also Exodus* 21:15 (New Oxford Annotated) ("Whoever strikes father or mother shall be put to death."); *Leviticus* 20:9 (New Oxford Annotated) ("All who curse father or mother shall be put to death; having cursed father or mother, their blood is upon them.").

228. *Deuteronomy* 19:10 (New Oxford Annotated) (emphasis omitted).

229. *Deuteronomy* 17:6 (New Oxford Annotated).

230. COLONIAL LAWS, *supra* note 5, at 39, 201.

231. ANDREWS, *supra* note 216, at 458.

232. *Id.*

In implementing the common law, Ward and Cotton addressed several of the complaints raised in subsequent years by legal reformers in England. The *Body of Liberties* protected inheritance from being alienated by a felony conviction, a development which was later called for in England by Hugh Peters.[233] The second liberty called for the law to be applied quickly and equally to inhabitants and foreigners, which was similar to later calls by Booth.[234] The *Body of Liberties* did not directly address all of the complaints raised by reformers; there was no mention of the abolition of benefit of clergy or peine forte et dure.[235] Although they were not articulated principles, the fact that the liberties were clearly set out in English as the rules of the colony satisfied the numerous complaints about vague laws in foreign languages raised by almost all of the English reformers. The *Body of Liberties* exemplified the continual desire for codified rights and laws that run through Massachusetts and American law in general.

The reforms proposed by Hugh Peters may have been taken from the *Body of Liberties* as they sound very much alike: "Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man angainst whom the Court doth not except, to helpe him."[236] This brief clause represented the first steps taken towards a right to counsel. The person employed to assist the accused did not have to be an attorney or learned in the law, but the right to have someone else assist in preparing and pleading the defendant's case was asserted.[237] The law also contained the universal anti-lawyer sentiment and fear that lawyers would turn a profit from the average person's misery: "Provided he give him noe fee or reward for his paines."[238] The prohibition of fees demonstrates the reluctance of Ward and Cotton to encourage the practice of law. The final clause of the liberty, "This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him," shows the limit of reform in Massachusetts Bay.[239] The requirement that defendants must speak in court ensured that the existing form of trial, "the accused speaks," would not be subverted by the inclusion of counsel.[240] The commitment to the existing trial form demonstrates that the Puritans of

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233. *Id.* at 35; PETERS, GOOD WORK, *supra* note 106, at 55.

234. COLONIAL LAWS, *supra* note 5, at 33. *See also* BOOTH, *supra* note 133, at 65 (opining that inequality in the severity of punishment for certain crimes is against the law of God).

235. *See* COLONIAL LAWS, *supra* note 5.

236. *Id.* at 39.

237. *Id.*

238. *Id.*

239. *Id.*

240. LANGBEIN, ORIGINS OF ADVERSARY, *supra* note 8, at 253.

Massachusetts Bay were not willing to completely break with common law criminal procedure.

A survey of the court records of the Massachusetts Bay Colony only revealed two instances when defense counsel appears to have been employed in a felony case, but it is not clear that they would have been recorded given that they would have been privately employed at private expense.[241] The first was the above mentioned incident surrounding Anne Hutchinson,[242] and the second involved the son of Nathaniel Ward, which will be discussed below.[243] The records unfortunately rarely provide a description of the actual interactions between defendants and the court. It is therefore not possible to know if any of the defendants took advantage of their ability to have unpaid counsel.

An unusual case that arose in May 1644 suggests that some defendants did receive council and clearly shows that not all did. In May 1644, John Weld and James Ward, both students at Harvard College and the sons of prominent ministers, were caught burglarizing two homes and stealing fifteen pounds.[244] The governors of Harvard ordered them whipped for their infraction and the president of the college carried it out himself.[245] However, when they were referred to the courts, it was pointed out that there was no punishment set forth for burglary in the *Body of Liberties*.[246] Despite the lack of a law, the court still ordered them to make double restitution, but inflicted no further punishment.[247]

Although this case seems to simply point out an oversight by the creators of the law, the question arises of why no one had noticed the lack of a law prohibiting burglary until their case? Indeed, three months before, Richard Gell, "servant to Frances Felmingham," was ordered to be severely whipped for breaking into a home "and stealing two parcells of tobacco."[248] At his trial, no one objected to the lack of a specific law criminalizing burglary, suggesting that no counsel had advised him.[249] In contrast James

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241. *See* John F. Acevedo, Harsh Mercy: Criminal Law in Seventeenth-Century Massachusetts Bay Colony 78, 135–36 (Dec. 13, 2013) (unpublished Ph.D. dissertation, University of Chicago) (on file with ProQuest) (examining more than 6,000 criminal cases between the founding of the Massachusetts Bay colony and the Salem witchcraft trials).

242. *See Examination of Hutchinson*, *supra* note 202, at 312–46.

243. WINTHROP, *supra* note 185, at 510.

244. *Id.* at 510, n.31.

245. *Id.* at 510.

246. *Id.* at 510, n.33. *See* COLONIAL LAWS, *supra* note 5.

247. *See* WINTHROP, *supra* note 185, at 510.

248. 1 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS 60 (1911).

249. *See id.* (stating nothing about the absence of a burglary law).

Ward was able to assert the lack of a law criminalizing his actions. That James Ward was the son of Nathaniel Ward, the primary drafter of the *Body of Liberties*, may indicate that his father acted as his counsel or interceded on his behalf. It is clear that Ward, like Anne Hutchinson before him, was provided enough knowledge of the law to challenge the procedures of the court.

V. CONCLUSION

An examination of the pamphlet literature confirms that the movement for the right to the assistance of counsel started in England and was then brought by colonists to North America where they were freer to experiment with reforms to the common law. The motivation of fair trial seems to have been the primary inspiration for the reformers. On both sides of the Atlantic these reformers sought to mitigate the harsher aspects of the common law of England. Although Puritan ideologues pushed for reforms in England, the reforms were not brought to fruition until the adoption of the *Body of Liberties* of the Massachusetts Bay Colony, which finally removed the prohibition on defense counsel in felony cases. While the court records of the Massachusetts Bay colony do not provide clear evidence the right to counsel was regularly used, the laws and pamphlets of the era indicate that it was contemplated. Indeed, there is evidence that on occasion defendants had counsel whispering in their ear. In this way, the path toward the modern criminal trial can be pushed back almost a century and with an eye cast beyond the shores of England to North America while simultaneously providing a clear example of the circulation of legal ideas in the Atlantic World.

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