

A COMPARATIVE ANALYSIS OF CRIMINAL PROCEDURE IN
SEVENTEENTH-CENTURY FRANCE AND PURITAN MASSACHUSETTS

Mathew Stone
Bachelor of Arts, University of Lethbridge, 1997

A Thesis
Submitted to the Council on Graduate Studies
of the University of Lethbridge
in Partial Fulfilment of the Requirements for the Degree

Master of Arts

Lethbridge, Alberta
July 2000

Mathew Stone
2000

FOR
PENNY AND SAMUEL
IF IT IS ANY GOOD

FOR MYSELF IF IT IS NOT

ACKNOWLEDGEMENTS

This Thesis would not have been possible without the support of my family and friends. Specific acknowledgment has to be accorded to the efforts of Dr. James Tagg and Dr. Malcolm Greenshields. Their guidance and support were instrumental to completing this project. Thanks to my family for understanding the nature of this endeavour, and the willingness to support my every effort. This project would not have been possible without the assistance and advice of the following people: Joseph Kadezabek, Charlene Sawatsky, Dr. Raymond Huel, Dr. Tom Robinson, Dr. Chris Hosgood, Dr. Fiona Griffiths, Ike Tagg, and the entire History Department. Special thanks to the Interlibrary-Loan office at the University of Lethbridge Library for their ability to track down documents – no matter how obscure or remote they may have been. My wife Penny, along with Samuel, my parents, and siblings deserve thanks beyond what my words can express.

July, 2000

Note:

A Large part of this study is dependent on primary sources from the seventeenth century. Every effort has been made to preserve the language and spirit of these sources. In some instances corrections have been made for the sake of clarity and ease of reading. Despite the many corrections there are orthographic, spelling, and grammatical inconsistencies within quotes that were left in order to be true to the original source.

Table of Contents

Introduction.....	P.1
Chapter I: The Society of Orders.....	P.9
Chapter II: The Evolution of a Royal System of Justice.....	P.28
Chapter III: Seventeenth-Century French Criminal Procedures.....	P.46
Chapter IV: Life in the Massachusetts Bay Colony.....	P.121
Chapter V: Structures of Justice in the Bay Colony.....	P.148
Chapter VI: Criminal Procedures in Massachusetts.....	P.182
Chapter VII: Comparative Conclusions.....	P.218
Bibliography.....	P.256

INTRODUCTION

Systems of law, as they are comprised of courts and procedures, are complex entities designed to regulate conduct and ensure peace and order in society. Among the most basic features of the law is that it is often used by powerful social and political groups to advance their views and maintain their position within society. Laws can become a powerful tool for these groups, and thus work to unfairly punish or pursue targeted social groups. As a result, most developed systems of laws have a core of procedures to regulate the application of justice and ensure that contemporary concepts of fairness and truth are upheld. Central to the concept of criminal procedure is the series of rules that outline how law is to be applied. This, in fact, is the first and most basic function of criminal procedure. If, however, systems of criminal procedure are considered in the contexts in which they operated, other important functions arise. A second function of criminal procedure is that it acts as a meeting place between laws and the persons subject to them; it translates substantive laws to the members of society; it also translates the character of the society into forms suitable for legal remedy and mediation. Finally, because criminal procedure provides a set of rules, and works as a link between the social and judicial 'worlds', it also allows for interested constituents to maintain their social position and advance their views as to how people should interact. These three functions do not exist independently. Rather, a comparative analysis of the procedures used in *ancien régime* France and in Puritan Massachusetts, which will highlight the basic form to each process, will demonstrate that these functions are all inextricably linked.

This approach has been founded on the idea of comparing two seemingly different systems of procedure, and formed by the available sources (of both the primary and

secondary variety) on the subject. Both primary and secondary forms of evidence have shaped the form of the conclusions arrived at in this work. The amount of literature devoted to understanding criminal procedure in seventeenth-century France is surprisingly scant. The majority of studies have concentrated on either crime or criminal justice, but very few have sought to discuss one of the most obvious links between society and the law. The lack of concentrated study on criminal procedure may be due to the type of research required. Nevertheless, there are some historical studies that have shaped modern conceptions of criminal procedure in *ancien régime* France. Among the most renowned is The History of Continental Criminal Procedure by Adhémar Esmein. This book, produced in the late nineteenth century, presented a view of criminal procedure that was generally accepted as the standard on this subject for over one hundred years. Recent studies, however, have raised doubts as to the accuracy of Esmein's discussion. Alfred Soman has offered an alternative view of these procedures. While doing so, he casts Esmein's work in a different light. Esmein's libertarian synthesis, according to Soman, states: "that the judicial system was an organized repression imposed from above by the absolutist state."¹ This interpretation of Esmein also tends to emphasize that this was a system of justice that promoted arbitrary and brutal corporal punishments with few safeguards for the accused. Esmein's work, which concentrates on procedural developments, does acknowledge the influence of the Catholic Church on the French procedures as well.² These conclusions are all evident in Esmein's survey of the processes developed in France over hundreds of years. His book also contains a major flaw in that it does not present a thorough analysis of the entire French process. Instead, he only discusses some of the major relevant issues like the rights of the accused and

¹ Alfred Soman, "Criminal Jurisprudence in Ancien-Regime France: the Parlement of Paris in the Sixteenth and Seventeenth Centuries," in Crime and Criminal Justice in Europe and Canada, ed. L.A. Knafla (Waterloo, Ont.: , Published for Calgary Institute for the Humanities by Wilfrid Laurier University Press, 1981) , 43.

²Ibid., 43.

contemporary theories of proof. In these areas Esmein's study is extremely useful.

More recent historical studies have appeared that also deal with various features of French criminal procedure in our period. John Langbein's Prosecuting Crime in the Renaissance³ has often been analyzed and cited as an important work on this subject. Langbein compares the Marian Statutes of 1554 and 1555 in England with the *Constitutio Criminalis Carolina* of 1532 in Germany and the *Ordonnance de Villers-Cotterets* of 1539 in France. The object of this comparison is to uncover the developments relating to the power of the Justices of the Peace in England. By highlighting the major differences and similarities among the three legal proclamations Langbein manages to clarify the roles of these officials in England. For the purposes of understanding procedural developments in France this study is not terribly useful due to its narrow focus on this one concept. Certainly, it has to be acknowledged that Langbein's question may not have hinged on a complete discussion of the entire French process. The focus, however, does limit the usefulness of the book for those looking for a complete picture of French criminal procedures.

Another study that tackles a single aspect of French criminal procedure is "Criminal Jurisprudence in Ancien-Regime France: the Parlement of Paris in Sixteenth and Seventeenth Centuries"⁴ by Alfred Soman. This article investigates appeals to the *Parlement* of Paris in the seventeenth and eighteenth centuries. Soman's study is thorough on this single question, but more importantly, he uses this subject to raise significant conclusions about the entire French process. Not only does he attack Esmein's work, but he offers an alternative outlook that presents the French procedures as more humane and fair than previously thought.⁵ He also makes a call for more study on the

³³ John H. Langbein, Prosecuting Crime in the Renaissance: England, Germany, France (Cambridge, Mass.: Harvard University Press, 1974).

⁴Soman, "Criminal Jurisprudence in Ancien-Regime France"

⁵⁵Ibid., 44.

subject of criminal procedure. Though the article is very informative and points to important conclusions, it does not offer a complete view of the entire process. This is a common trait among all of these studies: they all avoid a thorough investigation of the entire French process.

One study that has proven to be extremely useful in outlining the basic structures of the criminal process in France is An Economy of Violence by Malcolm Greenshields.⁶ This book, which forwards the idea that the system of French justice was an integral part of an “economy of violence” in the Haute-Auvergne, provides a lucid description of an average process. This is one example of a study that has taken the time to clarify the order of the process in a criminal trial. Though this thesis did not depend on the Greenshields work in order to discuss the French criminal process, that book did offer clear structure for this study to imitate.

Other studies on the institutional aspects of the French system of justice have also proved to be useful. François Olivier-Martin’s Histoire du droit français⁷ demonstrates that there is a great deal of available information on the courts at work in this period. Olivier-Martin presents a discussion of the many courts in the Royal system of justice that also includes procedural discussions as they relate to jurisdictional issues. Julius Ruff presents a similar study in Crime, Justice and Public Order in Old Regime France. This work, though quite helpful, is not as thorough or as complete as Olivier-Martin’s large book.⁸ Both of these studies attempt to outline the objectives of repression and control within the Royal system of justice. All of these studies, taken together, work to present an inconsistent understanding of criminal procedure in *ancien régime* France. This student

⁶ Malcolm Greenshields, An Economy of Violence in Early Modern France, (University Park, Pa.: Pennsylvania State University Press, 1994).

⁷ François Olivier-Martin, Histoire du droit français: des origines à la révolution (Paris: Editions du Centre Nationale de la Recherche Scientific, 1988).

⁸ Julius R. Ruff, Crime, Justice and Public Order in Old Regime France (London, England: Croom Helm Publishers, 1984).

realizes that the inconsistencies from study to study are probably due to the individual interests of the historians undertaking the research. In order to compensate for this lack of concentrated study on criminal procedure, this study has turned to two major documents in order to piece together the entire criminal process in seventeenth-century France.

Among the most valuable sources to a student of French Criminal procedure is the Ordinance of 1670.⁹ This legal document was the result of years of reform and contains the basic procedural rules that guided the application of royal law in France for over one hundred years. The articles within this document, however, tend to lack any descriptive qualities. Moreover, they are not placed in an order that reflect the chronological phases of a trial. In order to complete the description of the phases of a typical trial we have turned to a manual of criminal procedure by Monsieur Le Camus.¹⁰ This student acknowledges the many dangers of using such a document in order to piece together the entire French process. Among the strongest arguments against using jurists' commentaries is that they are tainted by the views of the author who produced them, and thus, cannot be viewed as reliable legal sources. This is a major concern for anyone using this type of source. Instead of ignoring these characteristics this study takes them into account within the analysis. Despite these potential problems it has to be noted that this source was extremely useful. Camus' commentary is very thorough and descriptive. At every major phase he offers an example of the use of a specific procedure. Furthermore, this particular commentary seems to lack the monotonous repetition to which Soman refers.¹¹ Finally, it may well be that Camus' work was designed for an uninformed public, which as Soman suggests, forced the authors of such sources to avoid ugly truths about

⁹ André Isambert, et al., eds., Recueil générale des anciennes lois françaises depuis l'an 420 jusqu'a la revolution de 1789. 29vols. (Paris, Belin-Le-Prieur, 1822-23).

¹⁰ Monseigneur Le Camus, Stile Universel de Toutes les Cours et Juridictions du Royaume Pour l'Instruction des Matières Criminelles: Suivant l'Ordonnance de Louis XIV, Roy de France et de Navarre (Paris, 1698).

¹¹Soman, "Criminal Jurisprudence in Ancien-Regime France," 43.

the system of justice. But this does not weaken the authoritative value of the source. Instead, it enhances its value for someone looking to piece together a process that others seem to have avoided. Camus' work, which has been cited extensively here, is representative of most other commentaries. Though it does bear the distinctive outlook of the author, it still presents a fairly complete picture of the complicated set of procedures at work in *ancien régime* France because it is ultimately based on the procedures outlined in the Ordinance of 1670.

The intended methodology of this study was to examine similar documents relating to criminal procedure from Massachusetts and France in order to understand the criminal process in both contexts. Unfortunately, there are no jurists' commentaries available to help us understand the processes at work in Puritan Massachusetts. Though we use similar legal codes, we also depend a great deal on a series of court records in order to piece together the whole colonial process. The first set of sources, which come from the colonial leaders, are the two major legal codes adopted in the colony. The Body of Liberties¹² of 1641 and the Book of General Laws and Liberties¹³ of 1648 both contain the laws of the colony and some references to the procedures that regulated their application. Just as was the case in our examination of the French processes, these documents are not terribly descriptive and the use of other sources is required. In the absence of a jurist commentary we have turned to records from a range of courts in the colony. In doing so we have attempted to complete the picture of the criminal process in the colony by making use of court record entries from a range of trial phases. Because of the lack of descriptiveness of the entries in the records we have used them in tandem with the legal codes in effect in the colony.

¹² William Whitmore, A Bibliographical Sketch of the Laws of the Massachusetts Colony from 1630 to 1686 (Boston: Rockwell and Churchill Printers, 1890).

¹³ The Book of the General Laws and Liberties Concerning the Inhabitants of the Massachusetts, Collected out of the Records of the General Court (Cambridge, Mass.: Printed according to the Order of the General Court, 1648).

The bulk of this study, then, relies on a description and analysis of a select number of primary sources. These sources, though legal in nature, were interpreted from an historical perspective. Attempts have been made to expand on the legal points as they arise, but the major thrust of this study remains largely historical. With this in mind we have include not only procedural considerations, but also the social and judicial contexts of these two societies. The comparative component reflects this broad approach , and works to present ideas as to the importance of criminal procedure in both *ancien régime* France and Puritan Massachusetts.

Our goal here is to compare the systems of procedures used in seventeenth-century France and in colonial Massachusetts. But, in order to fully understand the true nature of the situation, and to defend our propositions of what criminal procedures can accomplish, it is necessary to take a broad approach. The procedural discussion are focused on the decades in which each set of processes was put into use. The procedural, judicial, and social contexts in both France and Massachusetts, however, are recognized to be the result of years of development and evolution. As a result, this study attempts to include discussion of previous eras when the subject warrants. Within this broad approach the structures and phases of the systems of criminal procedure in both situations will be outlined for the reader. Armed with this information we will then move to compare the two processes on the basis of the three aforementioned functions. This thesis is structured to reflect these intentions. Chapter I is a discussion aimed at providing the reader with a basic understanding of the complex system of social classification that was in place in *ancien régime* France for centuries. Chapter II outlines the development of a royal system of justice prior to our period and the royal courts, whose form and hierarchy were the result of years of reform. These chapters represent the judicial and social extremes that procedure linked. Chapter III is a thorough and complete discussion of the entire possible process in France during our period. This chapter clearly outlines the order of phases that the French courts followed in a typical prosecution and takes into account that these

procedures were the result of years of practice and experience. These three chapters are tied together with a review of the major concepts up to that point and presents a transition from France to a series of chapters devoted to understanding the situation in Massachusetts. Chapter IV is a discussion of the social and political contexts in the Massachusetts Bay Colony. Chapter V offers a chronological approach to the development of both laws and courts in the colony. Chapter VI consists of a discussion of the procedures used in the colonial courts, and attempts to identify the major English and Puritan influences within the colonial process as they arise. Again, these three chapters are tied together with a review of the major conclusions to be derived from the chapters on Massachusetts. This study concludes with Chapter VII, which offers the reader the comparative analysis of the two systems of procedure. This comparative chapter is structured to reflect the three basic functions we ascribed to criminal procedure at the outset of this discussion.

CHAPTER I THE SOCIETY OF ORDERS

When French society under the *Ancien Régime* is considered its true complexity is soon realized. Though the term *Ancien Régime* itself may imply a sense of stability, any analysis of the period, and its social classifications, quickly demonstrates the opposite. The seventeenth century was a time when the role of the nobility, for example, was seriously reconsidered.

the transition that the nobility underwent during these years (which was a kind of “identity crisis” with economic and social as well as psychological dimensions) coincided with the basic changes called to mind by such familiar phrases as the age of religious wars, the commercial revolution, and the scientific revolution.¹

It would seem that the rapidly changing character of the nobility was representative of a larger movement. This state of social flux has led historians to probe the evidence of the period in search of a workable definition of the society of the *Ancien Régime*. “Are we dealing with a society of traditional interest groups vying over status and position, or do we have a society of socio-economic classes struggling to maintain the control over resources and production processes - in short, was it a ‘society of orders’ or a ‘society of classes’?”² This debate may

¹ Davis Bitton, The French Nobility in Crisis: 1560-1640 (Stanford, CA: Stanford University Press, 1969), 1.

² William Beik, Absolutism and Society in Seventeenth-Century France: State Power and Provincial Aristocracy in Languedoc (Cambridge, Mass.: Cambridge University Press, 1985), 6.

seem tired to those familiar with the historiography of the period, but it is of vital importance if we are to understand the true nature of the situation.

By the eve of the French Revolution, many of the basic qualities of a class society were certainly evident. Roland Mousnier suggests that the political institutions were filled with men of talent and letters. The social realities of the late eighteenth-century were such that society was essentially divided into two groups:

One inferior, consisting of those who worked mainly with their hands and earned a living by this work, men referred to as 'mercenaries' and of 'base blood'; the other superior, consisting of those who were exempt from manual labour for profit, men whose principal occupations were mainly cerebral, of which account their profits were deemed 'more honorable than mercenaries; men who were called 'honorable' and 'worthy'.³

In light of this analysis it would also seem that many of the vestiges of the old society of orders were still present in France. Furthermore, the efforts of the National Constituent Assembly in 1789 to destroy the last remnants of the "feudal regime" point to the fact that these remnants were still present. "They showed that this "feudal regime" constituted one of the pillars of the *ancien régime*."⁴ If these two observations are to be considered legitimate then it becomes possible (and fair) to assume that *ancien régime* society was greatly affected by the influence of the society of orders. The farther back into French history an historian digs, the stronger the influence of this system of social classification seems to be. The early rumblings of social change seem to have been felt

³ Roland Mousnier, The Institutions of France Under the Absolute Monarchy 1598-1789: Society and State, vol 2. (Chicago: University of Chicago Press, 1979) , 675.

⁴ Pierre Goubert, Ancien Régime: French Society 1600-1750, translated by Steve Cox (New York: Harper and Row Publishers, 1973) , 5.

well before the revolution. In the period on which our discussion is focused, the seventeenth century, old society of orders still maintained a strong grip on the minds of the people of France. This consideration of social contexts necessarily includes relevant social developments that occurred not only in the years immediately surrounding the Ordinance of 1670, but also in the entire period known as the *Ancien régime*.

The influence of the society of orders was so important that relationships were often formed based on ability of the bond to advance one of the parties. Not only did the “master” benefit from the support of the *fidèle*, but the *fidèle* also gained in prestige. “He [the master] must see to the advancement of his *fidèle*, arrange a marriage for him, obtain offices and functions for him.”⁵ The presence of fealty in this society reinforced the importance of status and privilege.

Indeed, along with honour, social esteem, dignity, status and privilege were key factors in ranking members of society into orders. Charles Loyseau (1564-1627) provides a contemporary view of the society of orders in his work Traité des Ordres et Simples Dignités. He based the ordering of society on the will of God, who has arranged society into ranks and degrees in his mind.⁶ “For we cannot live together in a condition of equality, but of necessity it must be that some command and others obey.”⁷ The arrangement supposedly ordained by God for France was that of the three estates.

Atop the social and legal ladder rested the first estate, the clergy. The position accorded these men of the cloth was based on one important premise - that the men who

⁵ Mousnier, Institutions of France, 2 : 105.

⁶ Mousnier, Institutions of France, 1 : 5.

⁷ Charles Loyseau, Traité des ordres et simples dignités trans. Howell A. Lloyd (Cambridge, U.K.: Cambridge University Press, 1994) , 5.

represented God on earth should occupy the highest position. In all areas of French society, the Catholic Church and its ecclesiastical representatives assumed positions of authority and responsibility.

Charles Loyseau has presented us with some ideas as to the position of the clergy in France. As Michael J. Hayden and Malcolm Greenshields suggest, however, the clergy's position was much more than just theory.⁸ Through the use of *cahiers* for the Estates General of 1614, they demonstrate that the ecclesiastical claim to be the first order of society was considered real and substantial. "The local village and governmental *cahiers* for the first estate also make clear the clerical conviction that they were the first order in a society of orders because God wanted it and that they had the duty to defend that position against all comers in matters of ecclesiastical jurisdiction, status, and privilege."⁹ It should be noted, however, that status, privilege, and jurisdiction varied within the ecclesiastical order. Some ecclesiastics were richer or of nobler origins than others and these distinctions lent status both within and outside of the church. Regardless of their position in the religious order, however, the clergy's self-perception in communities was consistent. That perception of the clergy was tempered, however, by the views of the other two estates.

The Hayden and Greenshields study is also useful in uncovering this issue. The *cahiers* of the second and third orders also reflect a primary position for the clergy though this perception is only evident if the *cahiers* are viewed as lists of disappointments in the clergy and their proper behavior and training. "Members of the clergy were seen as primary agents of moral surveillance, as teachers; as property holders and managers; as

⁸ J.M. Hayden and Malcolm Greenshields, "The Clergy of Early Seventeenth-Century France: Self-Perception and Society's Perception", French Historical Studies 18, no. 1 (Spring 1993):145-172.

⁹ Hayden and Greenshields "The Clergy of Early Seventeenth-Century France," 153.

demographers and statisticians; employees and employers; as dispensers of a wide range of social services, whether medical, notional, educational, judicial or hospitable.”¹⁰ As such, any failure to fulfill these roles on a continual basis was likely to be a source of complaint. Though these grievances in the *cahiers* certainly varied between the second and third estate, their concerns are still quite revealing as to the perceived position of the ecclesiastical order. Both, for example, list accessibility to church positions among their concerns.¹¹ The list of complaints also goes on to include many grievances concerning issues such as ecclesiastical reform and the administration of sacraments as they pertained to each order. Interestingly, the *cahiers* also make mention of some of the scandalous activities of the clergy like hunting, charging for services, and frequenting the taverns.

These infractions may have been more commonly resolved within the order, but their appearance in a *cahier* at the Estates of 1614 indicates that that the clergy in the seventeenth-century were held to very high standards of behavior and training due to their legal position.

The functional realities of the first order demanded that the clergy perform many duties that managed to push them to a position of esteem in France. At the local level parish priests were often influential enough to compete with the local *seigneur* for whatever power and influence was available. The source of this power was two-fold. First, parishioners depended on the priest for administering the sacraments. Baptism was a clear example of the weight of religious sacraments in the local villages. Not only did it represent a child’s new relationship with God and the Church, but it was also an

¹⁰ Ibid., 157-158.

¹¹ The nobility does mention positions for their order specifically according to the authors of the study. Hayden and Greenshields “The Clergy of Early Seventeenth-Century France,” 158.

important rite that the church demanded. Baptism also served a legal function. “The record of his baptism constitutes the sole legal basis of his existence: not to be baptized is to be non-existent, even in civil law.”¹² Priests also controlled other important rites of passage with sacraments like marriage and last rites.

Parish priests also acted as mediators of local conflicts. Education and experience allowed them to help local residents resolve their civil and criminal issues. As Alfred Soman indicates, this was a role of some importance for villagers. “The local Clergy, whether Protestant or Catholic, undoubtedly played an important role in encouraging disputants to settle their differences amicably in a spirit of Christian charity instead of exposing the congregation to the scandal of a criminal suit.”¹³ Finally, and most importantly in this study, the parish priest assumed a position of power due to pressures exerted from systems of justice, commerce, and government. In rural France the physical structure of many communities was built around the church, thus focusing the attention of any visitor on the place of religion in the community.¹⁴ The church was also the psychological, and indirectly, the commercial center of the community. For example, market fairs (though their function was mainly economic) were associated with religious festivals, and few gatherings of people were accomplished outside the parish structure.

¹² Goubert, Ancien régime , 90.

¹³ Alfred Soman, “Deviance and Criminal Justice in Western Europe, 1300-1800: An essay in Structure”, Criminal Justice History,1 (1980) , 18.

¹⁴ The range of studies on this subject is enormous. Not only have historians managed to uncover the impact of the counter-reformation on the France nation as a whole, but many others have discussed it in the context of smaller communities as well. Key to this kind of study is the use of Pastoral Visits. In these documents many of the interesting events of village life are documented. See, Elisabeth Germain “La Visite Pastorale” Etudes 361, no.3, (1984); Malcolm Greenshields, “What Happened in Quibou?” Proceedings of the Annual Meeting of the Western Society for French History 18 (1991) ; John Bossy, Christianity in the West (Oxford: Oxford University Press, 1985); and Jean Delumeau Histoire du diocèse de rennes (1979). All offer detailed studies of the impact of Christianity and the counter-reformation on village life.

Moreover, fairs brought visitors and traders to the community whose centre, in turn, was the church. It was only logical, then, for local justices and government officials to use the priest and the parish in order to broadcast announcements.

To make them assume the role of the royal officers, judicial assistants and even 'advertiser' of sales of property seems a far cry from the 'pastoral' office of today, but what other channel was available to the central power and the courts when they wanted to communicate with a largely illiterate rural population whose sole point of regular assembly was the Sunday service?¹⁵

Considering the plethora of roles played by the clergy at the local level it is difficult to conceive of their position not commanding respect and esteem. It should be noted, however, that not all local priests performed these duties perfectly. Many were the subject of local distrust and anger due to their dereliction of duty. Many priests, as the Hayden and Greenshields study demonstrates, were more concerned with ensuring their financial futures than with tending to their flock. Those clerics with the financial security to concentrate on larger interests managed to assume a role of importance in the governing of the kingdom. It is in this regard that the clergy can be seen to be maintaining their position based on their functions and qualifications.

Any glance at the royal ministers who greatly influenced royal policies during the seventeenth century will find the presence of Cardinals Richelieu and Mazarin. These two Cardinals managed to attain positions of great power within the monarchy. Though they are two very popular examples, and do not necessarily represent the norm in ecclesiastical achievements in government, they do represent the clergy in politics. The services of these men were retained due to their education and experience. No other order could boast such an educated membership, as Joseph Bergin's study of the French Episcopate has shown.¹⁶ Though the effectiveness of seminaries as educational centers

¹⁵ Goubert, *Ancien régime*, 8.

¹⁶ J. Bergin, *The French Episcopate, 1589-1661*. University education, or its

fluctuated, basic education was essential to the successful career of a priest.¹⁷ “Political and legislative moves were stimulated by private persons, both clerics and pious laymen, who were anxious to teach priests who would approach the sacerdotal ideals.”¹⁸ If this educational background was coupled with good blood lines and extensive experience an ecclesiastic’s opportunities for a government position were strong. These qualifications positioned the first estate very well to adjust to the new standards of social classification and new attitudes that emerged in the seventeenth century.

The clergy had maintained its position as the first estate for a variety of important reasons. Though we have just covered a few perspectives on their place in the society of orders, it can be argued that they are representative of the type of pressures that could be exerted in this social system. Their use of their position as priests catapulted them to the head of the village, as well as the nation. It is not difficult, then, to understand why the order had no difficulty recruiting members, despite the often strict lifestyle. Men, after all, were not born into the clergy; they joined as a result of vocation, family pressures, and for potential social advancement. The ability of a benefice to advance a priest socially was rivaled only by the positions of the nobility.

Despite the relative social mobility of clerics, any ability to move up the social ladder was severely restricted by an emphasis on family blood lines. The second estate (the nobility) restricted potential members on this very basis. The second estate, then, emphasized the hereditary transmission of nobility.¹⁹ Unfortunately, the issue of nobility is much more complicated. There are many definitions of nobility available to the student

equivalent was the norm among bishops in the seventeenth century.

¹⁷ Mousnier, Institutions of France, 1: 340-353.

¹⁸ *Ibid.*, 342.

¹⁹ *Ibid.*, 121.

of history. Roland Mousnier specifically mentions four predominant thinkers who present their view of the order.²⁰ The wide range of definitions emphasizes a variety of ideals. “All writers are agreed on a prime feature of nobility: it is a quality inherent in the person.”²¹ This inherent quality that Mousnier points to is presented by many social theorists like La Bruyère, Boulainvilliers, Boileau, and Loyseau. They raise the qualities of virtue, wisdom, and descent as being primary features of nobility.²²

As Franklin Ford suggests, however, this emphasis on inherent qualities suffered from an important practical weakness. “Each is urging a conception of nobility, but not one helps to define a nobleman as he would have been defined under French law prior to 1789.”²³ These older definitions, moreover, were being replaced in the seventeenth century by concepts that emphasized a legal basis for nobility. “‘Nobility’, wrote Guyot in his great *Répertoire universel*, ‘is defined as a quality which the sovereign power imprints upon private persons in order to place them and their descendants above other citizens.’”²⁴ This definition best encapsulates the situation of the French aristocracy in the late seventeenth century. Consequently, royal recognition of birth and heredity gained in importance as nobles depended on them to protect their order from questionable members, and new nobles used them to prove that they had a worthy heritage. As we move to consider the nobility’s interaction with the rest of French society, it is important to remember that the definition presented by Guyot does not necessarily exclude conceptions of honour and virtue. Rather, these qualities are still prominent

²⁰ Ibid., 3-45.

²¹ Ibid., 121.

²² See Franklin Ford’s bibliographical essay in *Robe and Sword: The Regrouping of the French Aristocracy After Louis XIV* (New York: Harper Torchbooks, 1953).

²³ Ibid., 23.

²⁴ Guyot quoted in Ford, *Robe and Sword* , 65.

considerations when issues like *dérogeance* and the rise of the *noblesse de robe* are considered.

The concept of derogation serves as an excellent example of the definition of nobility at work dealing with the realities of day to day living in *ancien régime* France. It represents the tensions that existed between honour and financial well-being. Further, derogation raises the issues of the nobility entering the worlds of trade and commerce. Generally speaking, *dérogeance* was the social demotion that resulted from any activity that was pursued for financial gain, and any manual labour. The rule of derogation in the sixteenth and early seventeenth century was not a new concept. "In the western traditions we have only to recall the contempt of ancient Greek philosophers and educators for activities that smacked of labour or of sordid gain."²⁵ "Honourable" behaviors and pursuits, however, did not always provide nobles with adequate living. Noblemen were usually expected to live off their rents, which were often hardly adequate to maintain them and their appearance of nobility.

The pressures of this system forced the nobility to request certain exceptions to the rule of derogation that had been entrenched in French law through the Ordinances of 1560 and 1579.²⁶ Their requests were repeatedly ignored until 1629. With the code *Michaud* of that year, exceptions were granted allowing nobles to engage in wholesale and maritime trade without losing their status. Cardinal Richelieu's efforts had the dual intention of relieving the nobility of their restrictions and encouraging the development of a stronger French economy.²⁷ The end result, however, is not so clear. The relaxed rules of derogation may have allowed the nobility to begin trading, but they also allowed rich

²⁵ Bitton, *The French Nobility in Crisis* , 65.

²⁶ *Ibid.*, 66.

²⁷ *Ibid.*, 68.

merchants to acquire noble status. This form of ennoblement, however, was tenuous and did not always come with the related privileges. “Peu bénéficiaient des privilèges de la noblesse, à titre personnel, sans que pour autant le reste de leur famille en fait anobli.”²⁸ This new avenue for social advancement, though limited to those already participating in maritime trade, opened the door to the nobility for rich merchants. More importantly, the changing view of derogation indicated some of the financial pressures on the nobility, and their efforts to alleviate those pressures. Their requests to the monarchy to relax the rules on derogation reflect their influence on the standards of the social orders. It may be then argued that the second estate was flexing its “muscles” in regard to the confining nature of their order. Despite their many honorific privileges, they were seeking to maintain their influence and position in a changing world where the power of capital was rising. They could also be seen to be protecting themselves from a merchant group who had steadily gained power thanks to their growing financial wealth.

Access to the nobility was not ordinarily gained due to wealth alone. Rather, it was gained based on a family’s ability to educate a son in the legal profession. “Although ‘law’ was not a traditional *marque de noblesse*, it did become one. . . .”²⁹ This shifting standard of nobility gave rise to a battle between traditional nobles, who based their status on the land and military activities, and the *noblesse de robe*, who based their claims of nobility on their legal profession.

The legal profession itself tended to limit its membership through educational requirements. “Normally this [degree in law] required about six years study in the arts curriculum of the universities, culminating in the license in arts, then the two or three

²⁸ Roland Mousnier, “La mobilité sociale au XVIIe siècle,” *XVIIe Siècle* 31, no. 122 (1979), 30.

²⁹ Ellery Schalk, *From Valor to Pedigree: Ideas of Nobility in France in the Sixteenth and Seventeenth Centuries*. (Princeton, N.J.: Princeton University Press, 1986), 159.

years spent studying Roman law which normally were needed for the license in law.”³⁰

The cost of such an education was prohibitive for most in two practical ways. First, most families could not afford the costs of such an education. Second, few lower order families who farmed could afford to lose a valuable member of the family. The results, therefore, were that only the very rich could position themselves for social advancement through the law.

The continued rise of the legal profession embittered the debate between the *noblesse de robe* and the *noblesse d'épée* at the end of the seventeenth century. In this robe and sword conflict, the two groups bickered over access to privilege throughout the seventeenth and eighteenth centuries. The ascent of the legal profession, then, was the beginning of new standards of nobility. It is important to note that these new conceptions of nobility did not replace the old ones but, rather, that they rose alongside them. By the time the champion of ‘old nobility’, Saint-Simon, was lamenting a simpler past at the end of Louis XIV’s reign, the *noblesse de robe* had gained enough power and position to garner the attention of social theorists attempting to explain the difficult state of the nobility. In practical terms the debate centered on profession. “Conflict was expressed more in terms of a battle of professions than a real battle between social groups. . . .”³¹

The infighting also revealed a difference of lifestyles.³²

What can be learned from this conflict? The rise of the *noblesse de robe* seemed to have thrown the conceptions of nobility into crisis. The changes wrought by new standards, however, did not necessarily alter the basic structure of the society of orders. Though they allowed for easier movement up (and down) the social ladder, the basic

³⁰ Jonathan Dewald, *The Formation of a Provincial Nobility* (Princeton, N.J.: Princeton University Press, 1980), 22.

³¹ *Ibid.*, 160.

³² *Ibid.*, 24.

situation remained the same; opportunities for power and influence still excluded the vast majority of the population.

The psychological, economic, political, and social power of the second estate can be witnessed at all levels. The prominent position of a nobleman in a rural community is particularly revealing. Leading local *seigneurs* controlled many aspects of rural life. Not only did they often own much of the arable land, they also controlled local systems of justice until the rise of royal courts. It is interesting to ponder the psychological power of these individuals even after the monarchy had taken over most judicial and financial institutions. At the national level, all of the influential positions were ennobling offices, or reserved for noblemen. Again, members of the third estate had few prospects at this level. This barrier was clearly revealed by the struggle between the office holders and the King's commissioners during the seventeenth and eighteenth centuries. The core of the conflict was a philosophical difference between the office holders, who controlled the *Parlement*, and the King. The *Parlement* sought to preserve their place in the governing of the kingdom. "The *Parlement* stated that it had the duty, dating back to the time when Philip the Fair and Louis X had assigned it a permanent seat in Paris, to preserve the constitution of the state, to verify laws, ordinances, and edicts, . . ."³³ The significance here is clear; the nobility (through *Parlement*) had laid claim to a place in the governing of France. Furthermore, by virtue of their position, they were best suited to advise the king on all matters of state. The king held a different position. "The king's wish was to be an absolute sovereign with the power to appoint officers and *commissaires* of his own choosing and to issue as he deemed fit laws, regulations, and order necessary to the common good. . . ."³⁴ Though the king eventually won the struggle, the conflict points to

³³ Mousnier, *Institutions of France*, 2: 593.

³⁴ *Ibid.*, 595.

the traditional power of the nobility as it was being eroded by the monarchy.³⁵

Thus, the society of orders was in a continual state of flux. Furthermore, these orders did not exist in a vacuum. They owed their position to relationships with the other orders. Their ability to control, or work to control, their immediate surroundings was essential to their survival. The seventeenth century was witness to significant social change. That is not open for much debate. What is interesting, however, was the ability of the second estate to shift with these changes. The nobility of the seventeenth century no longer emphasized the concepts of honour and virtue, but concentrated on more practical definitions. "Nobility for them is simply a group, defined, determined, or justified by birth rather than virtuous deeds."³⁶ Even those members of the *noblesse de robe*, who acquired their nobility based on talent and wealth, returned to notions of birth and service to justify their place in society.

At the bottom of the social ladder was the third estate. This order comprised everyone who was not a member of the first or second estate. This order, then, is more easily defined by what it was not rather than what it was. The order carried with it no privileges, honorific or otherwise. Nor did it hold a place of distinction due to its functions or utility. For the purposes of our discussion it is impractical to present the order in its entirety. Rather, we shall focus on only two of the many groups; the

³⁵ Another clear example of this struggle is the Fronde. The nobility's concerns about the growing royal power was transferred into fears of being ruled by a despot. For a three year period (1649-1652), nobles used assemblies and open revolt in order to force their own participation in the administration of the country. The nobles attempted to administer areas of France on their own, but failed. The resulting anarchy and violence allowed the young Louis XIV to easily quell the rebellion. The result was a recognition that the crown's absolute power was preferable to a series of provincial rulers. The nobility still managed to demonstrate that their position was not to be overlooked. See, Schalk, Valor to Pedigree (1986); and William Beik, Absolutism and Society in Seventeenth Century France: State Power and Provincial Aristocracy in Languedoc (Cambridge: Cambridge University Press, 1985).

³⁶ Schalk, Valor to Pedigree, 115.

bourgeois and the peasantry. The peasantry can be identified as being subject to pressures exerted by other groups in the society of orders, while the bourgeois demonstrate that the third estate did have a political role to play.

The title of *bourgeois* was often just as ambiguous as that of the third estate. Bourgeois could refer to someone who resided in a town; in other instances the title was judicial, with certain standards of political involvement and wealth. Mousnier presents us with a definition which is most useful. "Bourgeois is a man who is not noble and who lives mainly by his work, but by a kind of work in which mental effort is more important than physical effort."³⁷ This definition allows for a whole hierarchical range of people of varying degrees of wealth and status. "It seems then that the term if not the title of 'bourgeois', which was used both by its bearers and by their inferiors, expresses a combination of substantial property, affluence and power, usually (but not always) urban, and usually common."³⁸ These men, though not noble, assumed a place of some importance in towns and villages. This prominence was due to their positions as businessmen, but more importantly, it was attributed to their participation in civic affairs. It was in this forum that non-noble bourgeois made their presence felt. The city of Bordeaux presents a unique example where the bourgeois managed to maintain control of many aspects of city administration. "The bourgeois de Bordeaux formed a privileged body possessing numerous advantages and powers of jurisdictions and police. . . ."³⁹ These privileges, granted in 1550 by Henry II, allowed groups of commoners to effectively exert pressure and advance their own interests. This power base in Bordeaux, though well sought after, was held by a relatively small demographic group. In short, they

³⁷ Mousnier, Institutions of France, 1: 237.

³⁸ Goubert, Ancien régime, 233.

³⁹ Mousnier, Institutions of France, 1: 566.

managed to entrench themselves into the fabric of political life. In the greater context of France, however, it would be difficult to accord these men similar positions of influence because there were few opportunities for them at that level.

At the other end of the spectrum in this order was the peasantry. “These are the ‘*viles créatures*’ who perform ‘*viles besognes*’ - ‘the dregs of the people as they are readily described in the conversations and writings of those men of culture who embody the indissoluble trinity of title, money, and power.’”⁴⁰ Their main source of living was the land that they cultivated. This is not to say that all peasants owned the land they worked on. Quite the contrary, only the very well off could afford to own all of the land they worked.⁴¹ The peasantry, then, was not an economically homogeneous group. “At the top of peasant society was the *laboreur aisé* who sometimes rivaled the bourgeois in importance. . . .”⁴² These farmers were able to cultivate relatively large areas of land, and at times hire others to work for them. The lowliest peasant - the day laborer - existed in a state of perpetual poverty. Pierre Goubert defines this group as ‘dependent peasants’ who are deemed such due to their dependence on others for their living, and by their need to rent the land they worked. Regardless of these distinctions, this group bore the brunt of social pressures more than any other. They enjoyed no privileges in relation to the other orders, but provided the means by which the other orders prospered. “Having become automatically liable to the *taille*, the salt-tax and every conceivable levy, they are put down on the tax-rolls, often for a few *sous* but never for nothing. . . .”⁴³ Beyond their financial problems the peasantry also endured judicial and religious pressure as well.

⁴⁰ Goubert, *Ancien régime* ,107.

⁴¹ *Ibid.*, 155.

⁴² Malcolm Greenshields, *An Economy of Violence in Early Modern France* (University Park, Pa.: Pennsylvania State University Press, 1994) , 152.

⁴³ Goubert, *Ancien régime* ,108.

This largely illiterate group was forced to follow the will of the Catholic church on a range of issues. Any person who withdrew from the church life was threatened with excommunication.⁴⁴ They were also subject to the jurisdiction of the seignorial courts.

The brief discussion above has emphasized the socially subordinate position of the peasants in the society of orders. With few opportunities for voicing their desires in a political forum, the peasantry made use of the most immediate avenue open to them — riots and uprisings. Peasant uprisings were seen as a danger to the social order for at least two reasons. First, the criminal nature of the activities tended to disrupt the peace in communities; property was often destroyed and citizens were attacked. Uprisings were also dangerous to the social order itself. As Beik suggests, the noblemen in a community were fiercely protective of their social, political, and economic assets as they had the most to lose to an angry mob.⁴⁵ The political character of peasant uprisings depended on the issues against which the peasants were rebelling. Various studies have stirred a great deal of debate as to the true nature of the peasant uprisings and the usefulness of these rebellions to historians as an indication of the tensions in French society.⁴⁶ The rebellions also serve to indicate their usefulness as a political voice for the peasantry. In short, they may be seen as instances where the peasantry had an opportunity to exert some pressure

⁴⁴ Any glance at the Pastoral visits of the period will confirm this outcome.

⁴⁵ Beik, Absolutism and Society in Seventeenth Century France, 188.

⁴⁶ Consider the debate between Boris Porchnev and Roland Mousnier regarding the uprising of the Nu-pieds in 1630-40. Porchnev's analysis emphasizes a Marxist interpretation that sees the uprising as a class conflict. Mousnier conversely attacks Porchnev on this point. Even Mousnier's other works would seem to advocate that the notion of class conflict is an inappropriate labeling. Another study has been offered by Yves-Marie Bercé. Her work focuses on the social contexts associated with the uprisings. See Yves-Marie Bercé, History of Peasant Revolts: Social Origins of Rebellion in early Modern France, trans. Amanda Whitmore (Ithaca, N.Y.: Cornell University Press, 1990), and Wolloch, ed. The Peasantry in the Old Regime for Porchnev's and Mousnier's debate.

on the social system. Further, they also can be seen as a reaction to the pressures exerted by other groups. “The usual cause of a disturbance was an assault launched from outside upon the community as a whole.”⁴⁷ These assaults ranged from a rise in the price of grain, thus rendering peasant life even more desperate, to the arrival of excisemen, a frequent symbol of unfair taxes on the poor. The uprising of peasants worked, then, to provide an outlet for their frustrations. “Many people thought it scandalous that a peasantry ravaged by famine and disease should in addition be called upon to shoulder an ever-growing burden of levies.”⁴⁸ The response to these groups of rioters was dependent on the grievances of the rioters and scale of the uprising. “Riots would force authorities to pay attention to the public grievance, and a disturbance would soon be followed [for example] by prohibitions on the export of grain, the freezing of the bread price and the regulation of sales.”⁴⁹ Because bread riots centered on the need of the peasants to eat and maintain some standard of existence, the response was generally in their favour. Tax revolts were not treated so kindly, however. The *Nu-Pieds* uprising in Avranches in 1639-40 presents an example where few changes were brought about. The Nu-Pied rebellion was brought down by the power holders in the area — the noblemen. “All of the documents concerning the uprisings in important centers point out the active role of the nobles in putting down the riots.”⁵⁰ Though no change in tax policy was really achieved, the rebellion illustrates the peasant voice at work. The unequal opportunities in society that forced some to react violently were similar to the unequal situation in the application of justice. Some simply had more access to courts than others.

⁴⁷ Bercé, The History of Peasant Revolts , 39.

⁴⁸ Ibid., 197.

⁴⁹ Ibid., 177.

⁵⁰ Wolloch, ed., The Peasantry in the Old Regime ,49.

Our focus here has been on the situation of the society of orders as it existed in the late seventeenth century. There has been an effort to argue that the population was categorized based on the principles of a 'society of orders'. This point, though relatively obvious, is closely linked to the application of justice in seventeenth century France. Ultimately, the social groups within this system of social classification were all subject to the law in some shape or fashion. This should not imply that French society was wholly receptive to the King's absolute law. Rather, as a powerful force in French society, the leaders of the society of orders worked to preserve their position. The king, insofar as his interests ideally represented those of his subjects, helped forge a situation whereby the law could accommodate the interests of some of his most powerful subjects. Jurists developed a system of procedures that was flexible enough to account for social, political, and religious differences among litigants. These procedures tended to serve as an important mediative force between the interests of social constituents and the ideals of the royal system of justice.

CHAPTER II THE EVOLUTION OF A ROYAL SYSTEM OF JUSTICE

When considering justice in our period it is important to clarify what is meant. There is a more abstract notion of justice that implies that citizens were to be treated fairly across all social and political boundaries. Our focus, however, is on a more practical notion contemporary to the seventeenth century. Justice is understood, generally, to be the means which society employs to pursue and punish those who offend the laws of the King. In other words, the “justice” system applies law which may or may not be “just” in the abstract sense. “Que la justice soit rendue ‘au nom du roi’ ou ‘au nom du peuple français’, les mots importent peu et, quel que soit le régime politique, le principe est le même; rendre la justice ne peut être que le fait du souverain.”¹ French justice in the late seventeenth embodies this point. By 1670, and with the adoption of the criminal ordinance of that year, the movement towards establishing a uniform system of justice that represented the King’s interest was almost complete. “Toujours pour le commun profit, il est inadmissible de laisser B[sic] une justice privée, qu’elle soit municipale, seigneurial ou d’église, la répression de crimes qui portent atteinte aux droits du Roi ou troublent l’ordre public dont il est responsable envers ses sujets. . . .”² In this regard the royal interest in criminal justice may be equated with the public interest in justice. The monarch’s responsibility to maintain order was not so much a personal prerogative as it was a major function of the throne.

In philosophical terms this shift may be expressed as the rise of conventional

¹ Arlette Lebigre, *La justice du roi*, (Paris: Editions Albin Michel, 1988), 14.

² *Ibid.*, 31.

justice over natural justice.

Justice as a necessary element of the state is divided into natural and conventional. Rules of natural justice are those which are universally recognized among civilized men. Rules of conventional justice deal with matters which are indifferent or indeterminate until a definite rule is laid down by some specific authority.³

A clear example of this shift is the duel. Prior to the legal prohibition of the duel in the early seventeenth century,⁴ duels were perceived as a natural outlet for nobles to resolve affronts to their honor. The nobility viewed the duel as their right and a privilege due to rank. "In spite of the monarchy's attempt to legislate against it, the nobility widely considered dueling a mark and privilege of status. . . ."⁵ The monarchy's prohibition of the duel was, quite plainly, an effort to lay down a rule that criminalized the activity. The rise of the authority of the king, therefore, was indicative of the rise of conventional justice and did not occur in a short period of time. Rather, these reforms took place over hundreds of years and tend to represent the complex nature of the royal system of justice at the end of the seventeenth century. The monarchical responsibility of providing justice was manifested in the efforts of the court officials to ensure that their authority and jurisdictions were respected.

The practical application of the king's justice began in earnest in the thirteenth century. "From the times of the judicial reforms of Louis IX in the thirteenth century

³ Sir Frederick Pollock, Essays in the Law (New York: Archon Books, 1969) , 33.

⁴ Greenshields, An Economy of Violence ,70-71.

⁵ Mark Motley, Becoming A French Aristocrat: The Education of the Court Nobility (Princeton, N.J.: Princeton University Press, 1990) , 39. There are a plethora of studies devoted to the duel. They present many interesting views in the point of honor. One of note is the concept of the duel as part of an economy of violence. See Greenshields, An Economy of Violence and François Billaçois, The Duel: Its Rise and Fall in early Modern France ed. and trans. Trista Selous, (New Haven, Conn.: Yale University Press, 1990).

until the end of the monarchy, the number of and competence of the king's magistrates grew."⁶ Though the rise in the number of magistrates certainly indicates an assertion of royal power in judicial affairs, it should be noted that the King had always maintained a superior position in these matters. "En droit et même au XIII siècle, l'autonomie judiciaire des seigneurs a toujours été limitée par la souveraineté, *superioritas*, du roi."⁷

One of the keys to the erosion of seigniorial justice was the concept of *cas royaux*. *Cas Royaux* was a theory presented by jurists in the thirteenth century in an attempt to justify the growing power and number of the royal courts. "According to this concept, the royal courts exercised sole jurisdiction over those crimes threatening either the peace of which the monarch was guardian or the person, property or rights of the king."⁸ The types of offenses included a wide range of acts such as *lèse-majesté*, rape, popular disturbance, and forgery of royal seals or currency.⁹ The movement of the monarchy into the affairs of local justice was sometimes welcomed. As Arlette Lebigre describes in *La Justice du Roi*, some *seigneurs* were too poor to maintain any real interest in the affairs of criminal justice. "Les juges seigneuriaux préfèrent les causes civiles, qui ne font courir aucun risque et peuvent rapporter gros."¹⁰ The only major group to uniformly oppose this shift was the church. "Seule l'église s'inquiète de voir ses prérogatives rognées par les juges laïques qui prétendent maintenant punir l'usure, l'adultère, le sacrilège et même, pour

⁶ Julius R. Ruff, *Crime, Justice and Public Order in Old Regime France* (London, England: Croom Helm Publishers, 1984), 24.

⁷ Daniel Martin, "La maréchaussée d'Auvergne face aux autorités administratives et judiciaires au XVIII^e siècle 1720-1780." *Cahiers d'Histoire* 4 (1973), 347.

⁸ Ruff, *Crime, Justice and Public Order in Old Regime France*, 24.

⁹ (For a complete list of *cas royaux*, and discussion of their importance see François Olivier-Martin, *Histoire du droit français* (Paris: Éditions du Centre National de la Recherche Scientifique, 1988); Ruff, *Crime, Justice and Public Order in Old Regime France*; Mousnier, *Institutions of France*; and Lebigre, *La justice du roi*.)

¹⁰ Lebigre, *La justice du roi*, 32.

finir, l'hérésie!"¹¹ This judicial battle was won by the monarchy, and the list of *cas royaux* continued to grow until the authority of royal justice controlled all areas of France.

Another theory, *prévention*, was used by jurists to justify royal judicial authority. In this theory it is universally accepted that justice is to be delivered within a reasonable amount of time. Further, it was recognized under this concept of *prévention* that ensuring prompt procedures was the King's responsibility.¹² The extensive system of courts was used to ensure that this occurred. "Le roi peut aussi, par l'intermédiaire de ses officiers, coucourir à cette besogne de justice qui ne souffre aucune délai."¹³ *Prévention* also worked to shore up the position of the diligent seignorial courts. "Once the power of *prévention* had been exercised by a royal magistrate, the responsible non-royal judge could request return of the case within a specified period of time."¹⁴ *Prévention*, then, worked to reform the speed of justice while allowing the royal claim of jurisdiction to continue to grow.

The last real 'theory' that helped the encroachment of royal jurisdiction on that of the *seigneurs* was the concept of '*justice retenue*'. "Le premier devoir du roi vis-a-vis de ses sujets est de faire à tous bonne et prompte justice afin que comme le dit ordonnance de juin 1510 veu le fait de la justice <ils vivent sous nous et notre autorité en paix, repost, et sureté.>"¹⁵ Realistically, it was impossible for the king to provide justice on his own. He therefore delegated some of the responsibilities to the royal courts. This delegation

¹¹ Ibid., 32.

¹² Ruff, Crime, Justice and Public Order in Old Regime France, 75.

¹³ Olivier-Martin, Histoire du droit français, 516.

¹⁴ Ruff, Crime, Justice and Public Order in Old Regime France, 25.

¹⁵ Olivier-Martin, Histoire du droit français, 518.

was not an alienation; the magistrates did not administer the law independently. Rather, they tendered judgments in the King's name. "Ils rendent la justice du Roi 'à la décharge de sa conscience', mais le roi rest personnellement responsable."¹⁶ Key to this idea is that the king still retained his right to intervene at any stage of a judicial process in any of his courts. Not only does this theory work to justify the many royal courts, but more importantly, it reinforces the judicial hierarchy in France with the king at the top.

As mentioned above in regard to the concept of *justice retenue*, the king retained the right to intervene in any case, at any point. The main tools of royal intervention were *Petites Lettres Patentes*. As Mousnier presents them, there were over thirty types of these letters. *Petites Lettres Patentes* usually had a very specific purpose, and as such allowed the king to personally intervene in a case without disrupting the entire system of justice.¹⁷ A *lettre de cachet* was a firm letter allowing the king to order a specific action; "la lettre de cachet fournissait aussi un moyen rapide pour arrêter une personne suspectée d'un crime; l'accusé était ensuite remis à l'autorité judiciaire normale."¹⁸ Though these letters were quite powerful, they rarely came from the king's own hand. Their use became so common that all of the secretaries of state kept pre-signed, blank letters on hand for their use.¹⁹ Despite their commonness, they still represented a firm action and carried a great deal of weight.

Other examples of letters representing the king's interest were *lettres d'abolition*, whereby the king "annuls, pardons, suspends, effaces, and abolishes a crime and eliminates the penalty imposed on the guilty party. . . ."²⁰ This direct intervention was

¹⁶ Ibid., 519.

¹⁷ Ibid., 521.

¹⁸ Ibid., 521.

¹⁹ Mousnier, *Institutions of France*, 2: 242.

²⁰ Ibid., 238.

absolute. Not all of the letters were aimed at pardoning or imprisoning; some were aimed at allowing access to other courts. Letters of committees granted permission to a party to plead a case before specific judges or courts.²¹ The list of avenues for the king to intervene in the system of justice was long, and provided many options for the monarch, emphasizing the breadth of his discretion as the ultimate judge in France during the *Ancien Régime*.

Acting on behalf of the king in matters of criminal justice was a series of royal courts: *parlemenets*, *présidiaux*, *bailliages*, *sénéchaussées* and *prévôtés*. At the top of the hierarchy of courts were the *Parlements*. “Approximately half the land area and population of France (before the conquest of Louis XIV) lay within the jurisdiction of the *Parlement* of Paris: the oldest and by far the most prestigious of the ‘sovereign courts’.”²² As a political body the *parlement* performed a wide range of services to the kingdom. These administrative duties typify the seventeenth century definition of “courts”.²³ As a criminal court the *Parlement* of Paris was the highest court in the land. As such, it served two distinct judicial roles, one as a court of first instance, and another as the highest court of appeals. This dual role placed the *parlements* (especially the *Parlement* of Paris) in a position of power. A third role of importance assumed by the *parlements* was as a source of edicts on judicial procedure. “The attention of historians has been so heavily concentrated upon issues where the *parlement* was opposed to the crown that there has been a tendency to lose sight of the obvious; edicts on judicial procedure—especially the landmark edicts of 1499, 1539, and 1670—could have no other source than the already

²¹ *Ibid.*, 233.

²² Alfred Soman. “Criminal Jurisprudence in Ancien-Regime France,” 44.

²³ Indeed, the position of the *Parlement* was primarily political and administrative. Mousnier presents in excellent discussion of their duties and position in society.

established jurisprudence of the *parlement*.²⁴ Our focus here is on the place of the *parlements* as criminal courts.

Most discussions of the *parlements* in France tend to focus on the *Parlement of Paris*. In reality, the *Parlement of Paris*'s jurisdiction covered all of France until Provincial *parlements* were gradually established.²⁵ The *parlements*, in most cases served as courts of last appeal. Cases tried in the *La Tournelle* (the criminal justice chamber of the *parlement*) were received on appeal from lower courts. "Ils statuent ainsi, on appelle, sur des affaires déjà jugées pas les tribunaux royaux inférieures ou par certaines juridictions des pairs de France, par exemple."²⁶ The appeals decided by the *parlements* ranged from appeals of judgments to appeals of sentencing. "It was established in principle that any sentence prescribing death, torture, corporal punishment, banishment, or public penance could be appealed orally and directly to the *parlement*, by-passing (for reasons of economy) all intermediate jurisdictions."²⁷ Their decisions, regardless of whether they confirmed lower court decisions or reduced them, were final. By Bernard Schnapper's calculations the *parlement* had a tendency to reduce sentences passed by other courts. Of the 373 cases heard on appeal to the *Parlement of Paris* in 1545, 232 resulted in reduction of sentence.²⁸ Soman finds that only five to ten percent of all sentences were upheld. John Langbein's study of torture and the *parlement* uncovers

²⁴ Soman, "Criminal Jurisprudence in Ancien Regime France," 45.

²⁵ Ruff, Crime, Justice and Public Order in Old Regime France, 35.

²⁶ Olivier-Martin, Histoire du droit français, 538.

²⁷ Soman, "Criminal Jurisprudence in Ancien Regime France," 46.

²⁸ Bernard Schnapper, "La justice criminelle rendue par le parlement de paris sous le règne de françois Ier." Revue historique de droit français et étranger, 52, no.2 (1974): 259.

similar figures.²⁹ For criminals attempting to have the weight of their sentence reduced, the appeal to *parlement* must have seemed to be an attractive option. Despite the restrictions on appeals, many appellants did use the supposed leniency of *parlement* to their advantage.

As courts of first instance the *parlements* heard very few cases. Most cases heard by the *parlements* involved litigants with *lettres de committées*, which exempted them from judgment by lesser courts.³⁰ The legal combatants who enjoyed this privilege were usually closely connected at the royal court. The *parlements* lacked the opportunity to judge most cases in the first instance because lower courts assumed those roles. Further, the *parlement's* primary activity was political and administrative. Their interests were more often turned to battles with the monarch, than to matters of justice. The hierarchy of courts below the *parlement* was large enough to ensure that most French subjects were able to obtain justice if necessary. The next level of courts in this system was the *présidial* level.

The *Présidial* courts might be considered to be the youngest of the courts. In contrast to the other royal courts, which evolved out of other institutions, the *Présidiaux* were created in 1552 by an Edict of Henri II. They were created for two reasons. First, Henri II created the offices attached to the courts as part of an attempt to raise money to pursue his war against Emperor Charles V of Spain. The creation of the offices proved to be an effective way to raise money. “Indeed, sales of the new magistracies prompted the crown to continue to create additional *Présidiaux* until their original number almost doubled.”³¹ The other reason for the creation of these courts was administrative. “The

²⁹ John Langbein, Torture and the Law of Proof (Chicago: University of Chicago Press, 1977).

³⁰ Ruff, Crime, Justice and Public Order in Old Regime France, 35; and Olivier-Martin, Histoire du droit français, 538.

³¹ Ruff, Crime, Justice and Public Order in Old Regime France, 34.

purpose of the edict was to free the *Parlements* of the burden of hearing minor cases, the *parlements* then being so inundated that some cases had to wait more than five years for final judgment.”³² Henri II had effectively inserted a new level of courts between the *Parlements* and the *Bailliages*.

The reaction to the creation of these courts was mixed. The *parlements* perceived these new courts as a threat to their position. “The *parlements* remained bitter enemies of the *présidiaux* and would register edicts concerning them [the *présidiaux*] on an express command of the king. . . .”³³ In order to protect their place as the ultimate courts of appeal, the *Parlements* refused to allow any expansion of the *Présidiaux* jurisdiction. Even members of the *présidiaux* courts were wary of future expansion. Officers of these courts depended on the *épices* for their livelihood. Each time a new *Présidial* was established the old jurisdictions would be divided among the new jurisdictions. This worked to greatly reduced their profit.³⁴

The new level of courts had an extensive competence. In civil matters they were able to judge all cases, without possibility of appeal, concerning 250 *livres* or less. They could judge cases valued between 250 *livres* and 500 *livres*, but these were subject to appeals to the *Parlements*.³⁵ The *présidiaux* were established in each *bailliage* in order to facilitate access for litigants. “The *présidial* and the associated *bailliages* formed a single body that rendered judgment sometimes as a *présidial* and sometimes as a *bailliage*.”³⁶ The criminal judgments rendered by this court centered around jurisdictional disputes

³² Mousnier, *Institutions of France*, 2 : 263.

³³ *Ibid.*, 264.

³⁴ *Ibid.*, 264.

³⁵ Olivier-Martin, *Histoire du droit français* , 554-555.

³⁶ Mousnier, *Institutions of France*, 2: 203.

involving *cas prévôtaux*. “In these cases the *présidiaux* rendered judgments of competence by ruling whether or not a crime was indeed a *cas prévôtal*.”³⁷ The court could even try *prévôtal* cases on its own, as long as all processes were begun before the *maréchaussée* (France’s national police force). This, however, caused other courts to protest against the jurisdiction of *présidiaux*. “There were certainly complaints in other *sénéchaussées* that the *maréchaussée* was being denied competence by the *présidial*.”³⁸ The issues of jurisdiction of *prévôtal* cases is a complicated one. Not only did the *présidial* courts claim some jurisdictions in these matters, so did the *sénéchaussées* and the *prévôts des Maréchaux*.³⁹

Another role played by the *présidiaux* was as a court of appeal. Under the edict of 1552, *Présidiaux* heard appeals from the *bailliages* in their area. It was this role that concerned the *parlements*. Further, this role as a court of appeals was very convenient for litigants as it saved them the costs of traveling in the nearest *parlement* to bring a case before them. Again, the battle for territory is based on jurisdiction. This theme is quite common to the history of the *Présidials*, despite the fact they were created to alleviate pressures on other courts and increase accessibility to justice. The confusion surrounding the *Présidiaux* existed at least until 1702, when Louis XIV clarified the jurisdiction of the *Présidiaux* in relation to the courts above and below them.

The next level of courts in this system was that of the *bailliages* and the *sénéchaussées*. The *bailliage* was a court or tribunal of justice which dispensed justice in the name of a *bailli*. But the term *bailliage* also referred to the geographical area over

³⁷ Ruff, Crime, Justice and Public Order in Old Regime France , 35.

³⁸ Ian A. Cameron, Crime and Repression in the Auvergne and the Guvenne, 1720-1790 (Cambridge: Cambridge University Press, 1981) , 137.

³⁹ For the most part, however, *cas prévôtaux* were dealt with in lower courts.

which the court had jurisdiction.⁴⁰ Because there exist few records as to the exact territorial jurisdictions of the *bailliages* over all of France, it is difficult to pinpoint the exact territorial jurisdictions of these courts. This should not, however, detract from their importance as dispensers of justice.

The jurisdiction of these courts was wide ranging. In criminal matters the *bailliages* and *sénéchausées* were the courts of first instance for all *cas royaux* prosecuted in their districts. The list of crimes considered to be *cas royaux*, as previously mentioned, was steadily growing throughout our period. The effect of these additions managed to ensure a place for the *baillis* in local justice. Further, this jurisdiction was exclusive; no other lower court could try a *cas royal*. “Lower judges had the power only to investigate the accused and issue a warrant for his court and then send either the prisoner or the files in the case to the *vice-sénéchal*.”⁴¹ This effectively allowed the *Bailliages* and *Sénéchausées* to establish a great deal of authority in their districts. Besides the *cas royaux*, the *Bailliages* and *Sénéchausées* could employ the principle of *prévention* to assume jurisdiction in other matters. “The *bailliages* and *sénéchausées* had jurisdictions over all crimes and misdemeanors committed within their district. . . .”⁴² This ability also managed to elevate the court above lower jurisdictions. Further, the competence of these magistrates over lower courts is not dissimilar to the relationship of the *parlement* to the courts below it. The interesting point here has to do with the ability of the *bailliages* and the *sénéchausées* to claim jurisdiction over the *prévôts des maréchaux* (leaders of the *maréchaussée*) in *cas prévôtaux*. *Cas prévôtaux* often punished members of the lower orders due to the definition of offence. The definition of *prévôtal* cases had been clearly

⁴⁰ Mousnier, *Institutions of France*, 2: 266.

⁴¹ *Ibid.*, 271.

⁴² *Ibid.*, 270.

set out in a series of ordinances, especially in the ordinance of 1670.⁴³ Ultimately, offenses were defined *prévôtal* based on the nature of the offense and the quality of the accused. “Thus even from the point of view of the crimes considered *prévôtal* by the nature of the offense, the threat to public security was assumed to come from below, and this was made even more explicit by the categories of charges which were *prévôtal* through the nature of the offender.”⁴⁴ The point cannot be overemphasized that because these types of offences were focused on the lower orders, the accused were basically being prosecuted for being homeless and poor. Cameron provides a chart that enumerates both categories of offences and the results only reinforce the view of *cas prévôtaux* as being, primarily, a lower class affair. The other significance here had to do with the *bailliage* hearing these cases. The *bailliage* could try *cas prévôtaux* if they were committed within its jurisdiction, but not within the jurisdiction of a *prévôt des maréchaux*. Not only does it exemplify the position of the *baillies* and *sénéchausées* in the French countryside, but more importantly, it emphasizes some of the jurisdictional disputes that occurred between courts.

Another important ability of the *bailliage* was to hear cases involving members of the clergy and nobility. Because the nobility was exempt from judgment in lower courts, the *baillies* were frequently the courts of first instance for noble matters. In dealing with the clergy, the *bailliage* assumed jurisdiction in those cases where the ecclesiastical courts could not hand down a suitable sentence for the offense. “Some crimes and misdemeanors committed by ecclesiastics entailed penalties involving death, personal restraint, or penal servitude, however, and these punishments, which went beyond the penalties set forth in canon law, could not be administered by church judges.”⁴⁵ These

⁴³ Greenshields, *An Economy of Violence* , 54.

⁴⁴ Cameron, *Crime and Repression in the Auvergne and the Guyenne* ,136.

⁴⁵ Mousnier, *Institutions of France*, 2 : 271.

cases reinforced more than the authority of the *bailliages*, they also reflected the interests of the king in ensuring that justice is served to all subjects, not just the poor and homeless but also the religious and the noble as well.

The lowest ordinary royal court in this system was the *prévôtés*. As they were the lowest court of the system, they only dealt with offenders from the lowest orders. “The division of competence between the *baillis* and *sénéchaux* on the one hand and *prévôtés* on the other was based largely on the principle that judgment should be rendered by peers of the parties to a case.”⁴⁶ This principle effectively removed most cases from the jurisdiction of the *prévôts*. “Normalement, les prévôtés ne connaissent ni des cas royaux, ni des affaires des nobles, ni des nombreuses autres affaires réservées aux baillages.”⁴⁷ This left the *prévôtés* to deal mainly with *cas prévôtaux*.

The royal *prévôtés* were first created in the eleventh century and were intended to be the link between the disparate *seigneurial* courts and the system of royal justice. Their jurisdiction was severely limited by the fact that they only had purview over those cases not attributed to the higher courts. Though not terribly glamorous, these courts did manage to provide a service by trying *cas prévôtaux*. Even these cases were not as simple as one might think. Vagabondage, for example, could involve a range of transgressions. There was the simple charge of being a vagabond—“a person who had not had a job in six months and could not persuade some respectable member of the community to testify to his good character.”⁴⁸ Despite the arduous task of dealing with the lowest members of society at their worst, many of the cases typically considered within the jurisdiction of the *prévôtés* were directed to the *sénéchausées* and *bailliages* of the region by decisions of a

⁴⁶ *Ibid.*, 274.

⁴⁷ Olivier-Martin, *Histoire du droit français*, 553.

⁴⁸ Cameron, *Crime and Repression in the Auvergne and the Guyenne*, 137.

présidial court.

The royal *prévôtés* were not the only courts trying *cas prévôtaux*. The *Prévôté* was originally a military court and a *tribunal d'exception*. It is important to note again that most *tribunaux d'exception* were not concerned with affairs of justice, but their jurisdictions could be turned towards matters of legal importance. The *prévôt* presents such an example. The *Prévôt des Maréchaux* was intended to deal with crimes committed by soldiers on the march, but their jurisdiction was extended in 1536 by François I to include some civilians. Specifically the military tribunal had jurisdiction to try crimes committed on the highways.⁴⁹ It should be remembered that the *Prévôts des maréchaux* were essentially the judicial wing of a military/police force. As such, their competence was often in dispute. Ordinary royal courts often complained of the work of the *Prévôts des maréchaux*. "This jurisdictional jealousy must have been widespread in France, for in August 1647, a royal edict protested the impediments placed in the way of *Prévôts des maréchaux* by the officers of royal courts, who frequently wrangled over the question of competence. The *baillis* and *prévôts* were therefore encouraged as much as possible to render justice 'on the spot'."⁵⁰ Despite this royal edict, wrangling continued over jurisdictional issues throughout the seventeenth century. Both the *prévôtés* and the *Prévôts des maréchaux* played an important role in day to day rural life. For the majority of peasants, these courts were the only justice they might know. Further, it was these authorities which would help to deal with the majority of minor disputes; anything of any severity would require them to take their case to a higher court. Finally, these courts were the first line of royal judicial authority in France.

The police force in France was known as the *maréchausée*. This group was led by a *vice-bailli*, *lieutenant criminel*, *vice-sénéchal*, or a *prévôt des maréchaux*. All of these

⁴⁹ Ruff, Crime, Justice and Public Order in Old Regime France , 27.

⁵⁰ Greenshields, An Economy of Violence , 55-56.

titles refer to the man in charge of the local police force. Modern conceptions of the word “police” are much different than those of the seventeenth century, when broad administrative responsibilities were associated with the term. Their criminal interests are what concerns us most, however, and those were clearly outlined in the ordinance of 1670.⁵¹ The ordinance ultimately provided the *maréchausée* with their jurisdictions. “Connoitront en dernier ressort de tous crimes commis par vagabons, gens sans aveu et sans domicile, connoitront aussi des oppressions, excès ou autres crimes commis par gens de guerre. . . .”⁵² The guidelines may have provided for strict limitations as to the interests of the *maréchausée*, but the reality of the situation demanded that the *maréchausée* fill many roles other than what was laid out in the Ordinance of 1670.

The many duties of the *maréchausée* demanded a great deal of the leader of the police force. “In his role as a guardian of the peace and agent for the crown, the *vice-bailli* appeared in many guises, as a chief of police, a military policeman, a soldier, a judge of last resort, an examining magistrate and even on occasion as a diplomat.”⁵³ The wide range of responsibilities is representative of his ultimate duty of touring the countryside, responding to problems, and trying to prevent others from occurring. In order to carry out his responsibility the *prévôt des maréchaux* was supplied with a relatively small number of men. The lack of support points to a glaring difference in scale between modern police forces and the ones at work in the seventeenth century.

Studies of the police force point to the complaints of local law enforcement representatives regarding the lack of men. “Such a small force of around four thousand

⁵¹ André Isambert, Recueil général des anciennes lois françaises depuis l’ans 420 jusqu’à la révolution de 1789. 29 vols. (Paris, Belin-Le-Prieur, 1822-23): Ordinance of 1670, Tit.1, Art.11 and 12.[Hereafter referred to as Ordinance of 1670, with all references made to title numbers of the Ordinance]

⁵² Ordinance 1670, Tit. Art.12.

⁵³ Greenshields, An Economy of Violence , 50.

men scattered over an immense kingdom is supposed to be able to contain 26 million people. Such a thing is impossible, and public security will never be assured until the force is enlarged.”⁵⁴ This observation was made late in the eighteenth century, but it serves to demonstrate the basic problem of the *maréchaussée* throughout its existence; they were equipped with too few men to effectively police their area. Consider the situation in the Haute-Auvergne as another glaring example. The total number of men recruited to police the Haute-Auvergne at the beginning of the eighteenth century was twenty four.⁵⁵ “These men were to police a rugged area of almost 6000 square kilometers and a population that probably varied between 150,000 and 200,000.”⁵⁶ This situation continued well into the eighteenth century up to the Revolution. The reasons for this situation may be reduced to finances. The royal government budgeted less than two million *livres* for maintaining a national police force.⁵⁷

Another reason for the inadequate policing may be discovered in two distinct responses to the *maréchaussée*. Not only did the *prévôts des maréchaux* encounter jurisdictional barriers from the royal courts, they also encountered less than enthusiastic support from the villages they were policing. The jurisdictional debate with the ordinary royal courts was based on the worries of the courts over competence. The *présidial*, you will remember, was often forced to decide competence over *cas prévôtaux*, and they often passed the cases over to the higher royal courts, out of the hands of the *prévôt des maréchaux*.⁵⁸ The struggle between the *maréchaussée* and the courts may be narrowed

⁵⁴Remarks of M. Dejean in “Observations sur la maréchaussée” circa 1773 as cited in Cameron, Crime and Repression in the Auvergne and the Guyenne , 50.

⁵⁵ Greenshields, An Economy of Violence , 49.

⁵⁶ *Ibid.*, 49.

⁵⁷ Cameron, Crime and Repression in the Auvergne and the Guyenne , 17.

⁵⁸ Ruff, Crime, Justice and Public Order in Old Regime France , 37.

down to the ambiguous responsibility of the police. The courts, according to Daniel Martin, were quick to ensure that the *maréchaussée* did not exploit their wide purview. "On trouve trace d'une action en justice engagée par le procureur du roi du présidial d'Aurillac contre la maréchaussée de cette résidence par fautes de service."⁵⁹ It would seem, despite their useful service to the system of justice, the *maréchaussée* were feared by other jurisdictions.

The response of the rural population to the *maréchaussée* may also contribute to an understanding of the policing problem. First, the *maréchaussée* had what might be viewed as an image problem. They were often viewed as outsiders in the communities they visited. This caused local authorities to be hesitant to hand any authority over to them. "Consuls, other royal officials, *seigneurs*, and local authorities of all sorts jealously guarded their jurisdictions against incursions by this freewheeling police force."⁶⁰ Though significant, the lack of cooperation between local authorities and the *maréchaussée* was only indicative of a larger problem. Few trusted a police force who were agents of royal authority. As such, the *maréchaussée* were often the ones restoring order after riots, protecting excisemen, or enforcing royal edicts. Many incidents exist where members of the *maréchaussée* were killed in such situations.⁶¹ It quickly becomes obvious the *maréchaussée* had a difficult job policing rural society. Despite these obstacles, however, they still proved to be only royal presence ever encountered by many peasants. Further, as a group the *maréchaussée* were a necessary force that was used to implement justice in France.

⁵⁹ Daniel Martin, "La maréchaussée d'auvergne face aux autorités administratives et judiciaires aux XVIIIe siècle:1720-1780," Cahiers d'Histoire, no.4 (1973): 346.

⁶⁰ Greenshields, An Economy of Violence , 52.

⁶¹ From notes by M. Greenshields on Police Reports in Chevrauchées, 18 March 1647, 16 October 1649. See also Cameron, Crime and Repression in the Auvergne and the Guyenne , 83.

The system of justice had but one ideal objective: to enforce the royal law in the name of the king. With the rise of royal courts and the jurists' theories of *cas royaux*, *prévention*, and *justice retenue* to support them, a system of justice was established that maintained the king as the ultimate judge in all legal affairs. Regardless of the perceived privileges of some orders, one principle was static: the king's law would apply to everyone. As the system of royal courts evolved, the *seigneurial* courts jurisdictions were overruled. The duel, for example, was once seen as a noble privilege but passed into a state of criminalization. The monarchy was affirming its right to judge—regardless of the status of the offender. Key to the assertion of royal authority was providing the procedures by which these laws could be applied. Criminal procedure, in so much that it offered the basic rules of applying justice, also served to render the system of royal justice more palatable to powerful social groups like the nobility by taking status into account. These procedures can be viewed as more than a simple set of rules, for they also comprised a mechanism of reconciling the ideals of law with the demands of society.

CHAPTER III SEVENTEENTH-CENTURY FRENCH CRIMINAL PROCEDURE

The importance of criminal procedure cannot be overstated. It provides the basic rules and processes that govern the application of law. The historical study of the law in general reveals that there has never been one uniform procedure in place for all systems of justice. Rather, procedures in any specific system of justice may be remotely similar in form to others around the globe, but the character of most systems was formed by both the system of justice at work and the history of the region. As systems of justice evolved, and the powers of the broader national political regimes grew, certain theories of procedure that represented the ruling power's will to bring about peace in a region through laws and justice came into common use. This is no less the case in seventeenth-century France. The criminal procedure at work in France was the product of legal evolution and practice, thus creating a uniquely French system. The basic tenets of this system are rooted, however, in the inquisitorial form of procedure.

The basic concepts of the inquisitorial procedure were so commonly accepted that its influence on European legal systems grew, and even to this day many elements of the procedure are still in use. One of the most prominent characteristics of this type of system is a dependence on the written word that contributes to the scientific and complex nature of the inquisitorial process. What, then, are the basic elements at work here? Perhaps the most accurate description comes from John Langbein.

The essence of the [inquisitorial process] consists in this, that public initiative tries the appearance of the first signs of suspicion in the 'case' to clarify things in the sense of investigation of the substantive truth. The judge appears here as the governmental organ principally concerned. His task is to take the whole proceeding in hand with full responsibility for

justice and by his own initiative assemble the grounds for decision in the form of a comprehensive factual investigation.¹

The French magistrate, in the inquisitorial procedure, plays a role of primary importance. In his search for proof and truth in every case, he is the driving force of justice in every community. "The magistrate proceeds of his own accord and according to certain rules, with the inquiry, that is to say, with every search for evidence allowed by the law."² The French magistrate, however, only represents the king's interest in justice. The monarch is the ultimate judge in the kingdom. In the king's name the inquisitorial magistrate acquires information and systematically judges the guilt or innocence of the accused. While using these main features of the inquisitorial process, the French system of criminal procedure slowly developed and evolved.

Though France managed to develop a unique form of procedure based on her history and experience, many of the elements at work there were borrowed. "It [should never be] doubted that the mature Inquisition process which appears in the sixteenth-century statutes in Germany, France, and elsewhere on the continent was derived from the system developed by the Roman church."³ While the church devised this system in the thirteenth century, the process did not mature until much later. Because the influence of the church was important in France during this period, it should not come as a surprise that the French jurists borrowed heavily from Church ideas. Even in France, the ecclesiastical courts claimed a near infinite jurisdiction in criminal matters. So, when France began slowly to develop its own form of procedure, it was natural that they relied on the influence of the inquisitorial procedure of the Roman Catholic Church.

The root of early modern criminal procedure in France can be found in the

¹Langbein, Prosecuting Crime in the Renaissance, 132.

²Adhémar Esmein, A History of Continental Criminal Procedure: With Special Reference to France, trans. John Simpson (New York: Rothman Reprints, Inc., 1968), 9.

³Langbein, Prosecuting Crime in the Renaissance, 133.

Ordinance of Villers-Cotterets in 1539. The Ordinance was intended to simplify the diverse and complex system of justice by forcing all courts to adhere to the ordinance. “We make known to all men living and to those yet unborn, that in order to provide in some measure for the good of our legal system (justice), for the shortening of proceeding, and for the relief of our subjects, we have by perpetual and irrevocable edict established and decreed . . . the following things.”⁴ The ordinance then went on to outline the basic procedures for prosecuting criminals. The Ordinance also dealt with specific issues of jurisdiction (Article 144), information (Articles 145, 146), witnesses and confrontation (Articles 152, 153, 154), the role of the *procureur* (Articles 147, 156), and the costs of the trial (Articles 160, 161).⁵ Not only did the Ordinance of 1539 establish set procedures for the prosecution of criminals, it also set a new course for French criminal procedure that would culminate with the Criminal Ordinance of 1670.

Among later events that most influenced French procedural developments was the *Grands Jours D’Auvergne*. The *Grands Jours D’Auvergne* was a special tribunal sent to Clermont to investigate internal problems in the Auvergne region.⁶ Though the special court was certainly an attempt by the young Louis XIV to remind local inhabitants of his power, it was also a sincere effort to resolve the legal problems in the region.⁷ “Pendant qu’ils résidaient à Clermont, les magistrats du Parlement entreprirent des réformes judiciaires de leur propre initiative, principalement dans le domaine de la procédure

⁴Ordinance de Villers-Cotterets, 1539 in Langbein, Prosecuting Crime in the Renaissance, 310.

⁵Ibid., 310-312.

⁶Greenshields, An Economy of Violence, 209-210.

⁷Albert H. Hamscher, “Les réformes judiciaires des grands Jours d’Auvergne, 1665-1666,” Cahiers d’Histoire, no. 4 (1976): 425.

civile et criminelle.”⁸ Their intentions of judicial reformation were not only instigated by the abuses of the nobility, but also by the abuses of the local magistrates and court officials.⁹ The end result of the *Grand Jours d’Auvergne* was a series of judicial reforms that would greatly affect the drafting of the Ordinance of 1670. “Leur but était de réduire à la fois la durée et le cout des procès.”¹⁰ With this broad goal in mind the *Grand Jours* began to issue *arrêts* that would greatly affect the criminal procedures in 1670. A survey of the reforms highlights some of the important changes. Accusers were no longer required to become *parties civiles* (civil parties) in every case.¹¹ This measure may have made it much easier for poorer litigants to obtain justice as they were no longer required to bear the burden of the costs of a trial. The *Grand Jours* eventually considered every important step of the criminal procedure, and issued fourteen articles of reform that dealt with many problems and worked to rein in renegade nobles who rejected the supreme authority of the king.¹² “Les grand Jours d’Auvergne émergent donc plus comme une démonstration ostentatoire de l’autorité royale contre la puissance nobiliaire dans l’arrière pays français.”¹³ This royal authority was just as much social as it was judicial.

The most comprehensive document outlining the details of the French procedure came in 1670 with the Criminal Ordinance of that year. In the context of procedural development, the Ordinance of 1670 officially reconfirmed the processes which could guide the application of royal justice. From an evolutionary perspective, however, it

⁸ *Ibid.*, 426.

⁹ *Ibid.*, 427-428.

¹⁰ *Ibid.*, 430.

¹¹ Greenshields, *An Economy of Violence*, 226.

¹² Hamscher, “Les réformes judiciaires des grands jours d’Auvergne,” 441.

¹³ *Ibid.*, 441.

broke little new ground. Though new processes were added, it merely collected all the diverse statutes and brought them into one document. In Esmein's view it took the system which the Ordinance of 1539 had organized and clarified some of the details.¹⁴ This view, though reasonable, tends to dismiss over one hundred years of practice, politics, and reforms. It may be more reasonable, rather, to consider it as a continuing process of development and refinement. Its longevity as a useful document also points to its prominence, as French jurists used this Ordinance well into the revolutionary period.

In order to understand seventeenth-century procedures in France, we will lean on two types of sources. First, there is the Criminal Ordinance of 1670 itself. Though it comprised all of the official statutes and articles pertaining to criminal procedure, there are few clarifications or explanations included in the text. The result is a useful but difficult document. This is why it is useful to employ jurists' commentaries. Jurists' commentaries were manuals produced to teach others on the practice of the law. As one jurist wrote, "[Q]ue j'ay esté obligé de composer les procedures Criminelles en l'ordre qu'elles sont pour les rendre plus faciles, autrement ce qui est net et excelent sous un titre de l'Ordonance, eust esté obscur et difficile en une seule chapitre."¹⁵ Despite the best intentions of this jurist, there are still potential problems when using these sources. Most obviously, these manuals tend to reflect the ideas of the authors producing them.¹⁶ The steps they stress, naturally, are not always important to the reader, thus offering the

¹⁴Esmein, A History of Continental Criminal Procedure , 49.

¹⁵Monsieur Le Camus, Stile universel de toutes les cours et jurisdictions du royaume pour l'instruction des matières criminelles: suivant l'ordre de Louis XIV, roy de france et de navarre (Paris, 1698) , 6. [Hereafter cited as Stile Universel]

¹⁶Alfred Soman draws our attention to their usefulness. See Soman Criminal Jurisprudence in Ancien Régime France and Soman, Deviance and Criminal Justice in Western Europe: And Essay in Structure. In both instances he warns that these manuals often conceal uncomfortable truths of the procedure, thus clouding, not clearing the situation.

potential of misleading the reader as to what steps of the process were important. In short, these are not completely objective sources. Nonetheless, they provide some unique insights into the application of criminal processes. Furthermore, as primary sources they can be an excellent window into the period. The authors often present valuable examples that work to highlight the use of procedures in a case. As long as the reader is aware of the pitfalls inherent in such documents a great deal can be gleaned from them.

Finally, despite Monsieur Le Camus' best intentions, the task of explaining the procedures outlined in 1670 is still an arduous one. The sheer length of the process, and the many possible avenues of a trial make any discussions of the subject quite lengthy and complicated. In an attempt to glean as much as possible from the process, this chapter will trace steps of procedure in the order they might arise in a typical case.¹⁷ In the end, the chapter will approximate a large web of procedures, with a distinct path and a definite ending.

The usual starting point of any judicial action was the commission of a criminal act.¹⁸ Because our focus is not on the criminal acts that forced a judicial reaction, our discussion appropriately begins with the first stage of the process - the *plainte* or *dénonciation*. Though a criminal case might arise out of the proceedings of a civil trial,¹⁹

¹⁷ This author acknowledges that many cases may not have required every procedure mentioned here. In fact, many lesser offences that were judged by lower courts and officials proceeded quite quickly and likely did not consider many of the steps mentioned in this study.

¹⁸ There are many theories of crime and criminal justice available for discussion here. Our focus, however, is not the relationship between crime and justice, but only criminal procedure. As such we are less concerned with why a case is brought to court than how it is dealt with.

¹⁹ See Criminal Ordinance of 1670, Tit. XX, Art. I, which allows judges to transfer a civil case to a criminal jurisdiction. "Les juges pourront ordonner qu'un procès commencé par voie civile sera poursuivie extraordinairement s'ils connoissent qu'il peut y avoir lieu á quelque peine corporelle."

most cases only began once a plaintiff submitted a *plainte* to a magistrate. The *plainte*, once submitted in writing, forced the magistrate to respond to the charges. “Les plaintes pourront se faire par requête, et auront date du jour présentement que le juge les aura répons.[sic]”²⁰ This type of *plainte* contained a detailed account of the event in question. Camus’ manual gives an interesting account of such a form.²¹ Once the *plainte* was received, Camus advises the reader to ensure that the date of the reply to the charge was placed at the bottom of the form. This simple requirement, though seemingly cursory, is of utmost importance in jurisdictional terms. Higher jurisdictions might have had the opportunity to take over a case within a set period of time (usually twenty four hours). The practice of dating the response to the matter was a measure of protecting the case from being hijacked by higher courts.

A plaintiff also had the option of submitting a *plainte* orally. In such circumstances the statement was heard only by a *greffier* and a judge, and the charge was transcribed onto paper by a *greffier* of the court. If the oral *plainte* was received by anyone other than the *greffier* and a judge, the case was automatically nullified. Regardless of the manner in which the *plainte* was received, all pages of the document were to be signed by both the judge and plaintiff (if he or she could sign), or by the prosecutor. “Tous les feuilles des plaintes doivent estre signées par le juge & par le plaignant, s’il sçait ou peut signer, ou par son procureur fondé de procuration spéciale.”²²

²⁰Ordinance of 1670, Tit. III, Art. I.

²¹Camus, Stile Universel, 6-7. The example provided by Camus is revealing on two fronts. First, it provides some clear insight as to the type of information provided in a *plainte*. It also points to the perspective of the author. In this particular example the accuser tells of a highway assault where not only are the men on horse back struck with swords and clubs, but the horses are also threatened. The would be thieves seemed to have realized the perceived value of the animal and used it to their advantage. The mere mention of the threats may have simply been an important piece of information. But it may also point to the authors orientation as to what was valuable as well.

²²Camus, Stile Universel, 10.

It should be noted that we are dealing with a largely illiterate society, and consequently there are frequent accommodations for those who may not have been able to sign the form. Finally, unless the plaintiff withdrew the *plainte* within twenty-four hours, the official process was initiated.

The other manner in which a case could be set in motion was through a *dénonciation*. Similar to a *plainte*, a *dénonciation* described criminal occurrences and identified those involved. The major difference between the two was that a *dénonciation* only had the effect of forcing a magistrate to investigate, and there was no guarantee of charges being laid. Unlike a *plainte*, only the individual giving the *dénonciation* was required to sign the form, if he or she knew how. The magistrate was not involved in the process of receiving the information. Upon reception of the form the prosecutor then submitted a request to investigate to the *Lieutenant Criminel*. “Ce considéré, MONSIEUR, il vous plaise permettre au dit procureur du Roy de faire informer des faits contenus en la presente requeste, circonstances & dépendances; pour ce fait, & information a luy communiquée, requerir ce qu’il appartiendra. . . .”²³ At this point the investigator went on to discover the nature of the offence in question. If it was found that the *dénonciation* was false there were severe repercussions. False *dénonciations* were subject to the same stiff sanction as those bringing ill-founded accusations in *plaintes*.²⁴ This ensured that the system of justice was not used improperly by those looking to solve other problems and conflicts. Further, it may have been an attempt at reducing the instances of vexatious litigation.

Though the *plaintes* and the *Dénonciations* represent only the first stage of a criminal process, there are other serious implications associated with this phase that

²³Camus, *Stile Universel*, 15.

²⁴*Ordinance of 1670*, Tit. III, Art. 7. Curiously, Camus makes no mention of false *dénonciations*.

could have affected the outcome of the entire case. Further, the issues of cost and jurisdiction were operating under new rules brought forward by the Ordinance of 1670. One of the most radical changes was in relation to the plaintiff's responsibility as a *partie civile*. This requirement had worked to prevent the poor from bringing a case to court. "Les plaignants ne seront réputés parties civiles, s'ils ne le déclarent formellement ou par la plainte, ou par subséquent guise pourra faire en tout état de cause, dont ils pourront se départir dans les vingt-quatre heures, et non après."²⁵ This removed the burden of costs from a potential accuser. But it also potentially restricted them from collecting any financial rewards arising from a case. The process, then, is pursued in the name of the King by the *procureur* or the *procureur seignorial*. "S'il n'y a point de partie civile, le procès seront poursuivis à la diligence, et sous le nom de nos procureurs ou les procureurs des justices seignoriaux."²⁶ This seems to be another clear example of the rising prevalence of public justice over the initiative of private persons to achieve justice. Though this measure removed a certain financial risk for some plaintiffs, it did not necessarily protect those attempting to manipulate the system for their own purposes. It did not, for example, protect those who brought about false charges. Those found to be filing false charges were financially responsible for their actions. "Les accusateurs et dénonciateurs qui se trouveront mal fondés[sic], seront condamnés aux dépens, dommages et intérêts des accusés, et à plus grande peines s'ils y échoit: ce qui aura lieu à l'égard de ceux qui ne seront rendus parties. . . ."²⁷ The innovations of these new articles were far reaching, as legal recourse seemed to be available for most citizens, regardless of their financial standing.²⁸

²⁵Ibid., Tit. III, Art. 5.

²⁶Ibid., Tit. III, Art. 8.

²⁷Ibid., Tit. III Art. 7.

²⁸This may seem slightly idyllic as there is no accounting for the social and

The Ordinance's new provisions on jurisdiction were representative of the increasing royal control over justice. Among the changes effected by the Ordinance was the jurisdiction of the court over the place of the offence. "La connaissance des crimes appartiendra aux juges des lieux où ils auront été commis. . . ."²⁹ This resolved some disputes about who might investigate an offence and judge a case. However, it did not exclude all other jurisdictions. If a *plainte* had been brought before another court, and the accused did not demand its transfer before the reading of the charges, the action continued in that location.³⁰ The jurisdictional changes did not stop there. The royal prerogative was also affirmed in Article IX of Title I. "Nos baillis et sénéchaux ne pourront prévenir les juges subalternes et non royaux de leur ressort, s'ils ont informés, et décrété dans les vingt-quatre heures après le crime commis."³¹ The window of opportunity for non-royal judges to begin a case narrowed, thus allowing royal jurisdiction to supercede others in most cases.

Despite all of these changes, many jurisdictions remained the same. The nobility and the clergy were still out of reach for most lower courts.³² This effective exemption for the nobility and the clergy further cemented their privileged status. At the lower end of the social spectrum, the competence of the *prévôts des Maréchaux*, *vis baillis*, and *vis sénéchaux* were also clearly outlined. As with the state of the higher orders, few changes were made.³³

psychological barriers that often prevented many from initiating litigation. But the jurists removed the only mechanism available in order to allow most to participate in the system of justice as accusers.

²⁹Ordinance of 1670, Tit. I, Art. 1.

³⁰*Ibid.*, Tit. I, Art. 3.

³¹*Ibid.*, Tit. I, Art. 9.

³²*Ibid.*, Tit. I, Art. 21.

³³Both Camus and the Ordinance clearly outline which prevotal cases were

The issues of jurisdiction and cost associated with the *plainte* and *dénonciation*, as outlined in the Ordinance of 1670, present some major changes to the form of French criminal procedure. Not only did they seriously affect the rest of the procedure, but they were representative of the forces of royal power at work in the seventeenth century. As was discussed earlier in the study, the royal prerogative in matters of justice was growing, and the provisions supplied in the Ordinance confirm this trend. As the members of *Parlement* refined and debated this ordinance, they realized the monarchical interest in judicial affairs. "The real property of (criminal) justice, which is called 'jus gladii' is a right of taking life over the king's subjects, lying properly speaking, in the hands of his majesty, who communicates this to his officers."³⁴ The new provision for *parties civiles* and the different rules of jurisdiction certainly inhibited the ability of private subjects to control judicial processes, and reinforced the royal interest in prosecuting criminals.

Once a *dénonciation* or a *plainte* was officially filed the official investigation was undertaken. As the formal investigator of a case, the magistrate typically proceeded to the scene of a crime to acquire the necessary information. The *procès verbal* was the report of such a visit. As this was a required phase of the procedure, the magistrates were instructed by Camus and the Ordinance to record all of the relevant information. "Les juges doivent dresser sur le champ & sans déplacer procès verbal de l'estat auquel seront trevez les personnes blessés ou le corps mort: ensemble du lieu où le délit a esté commis, & de tout ce qui peut servir par la décharge ou conviction. . . ."³⁵ The form presented by Camus as an example not only contains all of the basic information such as dates and

subject to the jurisdictions of the judges. In the case of any confusion, a jurisdiction decision was to be rendered by the closest presidial court. See Camus, *Stile Universel*, 4-6 and *Ordinance of 1670*, Tit. I, Articles 11, 12, and 16.

³⁴First President Pusport in Esmein, *A History of Continental Criminal Procedure*, 212.

³⁵Camus, *Stile Universel*, 17.

locations, but it also contains the conversations that the magistrate had with those on the scene. In this way the investigator not only learned of the manner in which the deceased was killed, but he also learned of the circumstances which led to the murder. All of this information, which was recorded by the accompanying *greffier*, was of utmost importance to the investigator. Based on his observations the magistrate ordered the confiscation of all pertinent evidence from the scene. In addition, Camus offers a direct piece of advice: “Faire inventaire des habits, des papiers et autres choses qui seront dans les poches. . . .”³⁶ All of the evidence that was confiscated was deposited with the *greffier*, whose major concern was to protect the integrity of the evidence. Further, once the evidence was in the possession of the court it could be reexamined at any time.

After making all of his observations the magistrate informed the plaintiffs (who were on the scene in this particular example) that he was intending to proceed with the case. Further, he even explained that the contents of his reports were going to be submitted to the *procureur du Roy* for his conclusions. All of the information, including the *procès verbal*, inventoried evidence, and articles were first submitted to the *greffier* within twenty-four hours so as to be included in the *dossier*, and then communicated to the *procureur*.³⁷ If all the appropriate evidence supported the original *plainte*, the *procureur* recommended that the case continue. “Veu le present procez verbal, je requiers pour le roy qu’il soit informé à ma request des faits y contenus, circonstances, & dépendances pour ce fait & à moi communiquer. . . .”³⁸ The process then moved to a more thorough investigation of the case.

Though the magistrate probably noticed the wounds of the victim, and noted so in the *procès verbal*, the court could order a more thorough examination by a doctor or

³⁶Ibid., 19.

³⁷Ibid., 21.

³⁸Ibid., 21.

surgeon. The reports of the *Chirurgiens* and *Médecins* were more detailed than the observations of the investigator, and were thought to be as sound as a medical examiner's reports are in today's courts. Not only did these medically trained men see to the wounds of those injured in a criminal case, but they also performed rudimentary autopsies. All of their observations were then submitted to the court as evidence. "Les personnes blessés [sic] peuvent se faire visité par médecins et chirurgiens qui affirmeront leur rapport véritable, ce qui aura lieu à l'égard des personnes qui agiront pour ceux qui seront décédés; et sera le rapport joint au procès."³⁹ The voluntary visit of such an official could also be followed by another court-ordered visit.⁴⁰ Such requests pointed to the value of the information provided by the *medecins* and *chirurgiens*. Though their observations were rudimentary by today's standards, they nonetheless offered some conjecture as to possible causes of death or injury.

Il faut mettre en cet [forme] l'estat de la personne blessé ou du corps mort, le nombre et endroits des blessures, avec quels armes l'on peut présumer que le blessures on esté faites; si c'est un corps mort, dire de quels coups l'on croit qu'il est décédé; et n'obmettre aucune circonstance qui puisse faire conoistre l'estat des blessez ou des cadavres.⁴¹

Once all of this information had been presented to the court, and the official had sworn to its truthfulness, it was submitted to the *greffier*. All of the information was added to the file and compared to the testimony. It should be noted that this type of evidence did not seem to serve any purpose other than to confirm or deny the statements made by others involved in the case. These crude examinations were unlikely sources of any new evidence. Armed with this evidence, the court proceeded to receive information from possible witnesses.

³⁹Ordinance of 1670, Tit. V, Art. 1.

⁴⁰Camus, Stile Universel, 22.

⁴¹*Ibid.*, 24.

Having completed the *procès verbal* and acquired the reports of the *medecins* and *Chirurgiens*, the case moved to one of the most important stages—the *informations*. At this point in a case the court prepared to hear witnesses who had any information related to the case. Those who were called (names likely supplied via the *plainte*, *dénociation*, or by the *procès verbal*) to testify were served with a summons by a *huissier* of the court. “De l’ordonnance de nous M.. Conseiller de Roy, Lieutenant Criminel en la Sénéchaussée de ___ à la request de A__ soit donné assignation aux témoins qu’il vaudra faire ouïr, à comparoir demain huit heures du matin pardevant Nous en nostre Hostel, pour déposer en l’information qui sera par nous faite; & en outre proceder comme de raison ___.”⁴² When this order was served, and after the *huissier* submitted a report declaring it was done, the witness was legally bound to appear. “Ceux qui seront assignée pour estre ouïs en témoignage, sont tenus de comparoir suivant les assignations.”⁴³ Any failure to appear was subject to court action.

In reality, failure to respond to this summons must have been a frequent occurrence as Camus explains in detail the manner of dealing with such eventualities. The ordinance prescribes such penalties as fines and possible imprisonment for failing to appear. One possible explanation is that inhabitants of smaller communities were unlikely to be willing witnesses for cases against their neighbours. Nevertheless, Camus explains the recourse available to the court. The first failure to appear, for example, merited a fine.⁴⁴ If the witness was unable to pay the amount, the court could seize and sell their possessions to pay the fine. “Le receveur des Amendes peut faire contraindre par saisie et vente de meubles de ceux qui on été condamnez a payer l’amende.”⁴⁵ A second

⁴²Ibid., 26.

⁴³Ibid., 27.

⁴⁴Ibid., 28.

⁴⁵Ibid., 28.

absence brought about imprisonment until such time as the witness decided to testify.⁴⁶ These warnings did not, however, apply to everyone in a community. If the witness was an ecclesiastic, different punishments were prescribed. A secular cleric could have run the risk of losing his *revenue temporel* and his privileges. A regular cleric was given two opportunities to give evidence. Failure to comply was subject to a fine or a suspension of privileges. “[O]rdonnons qu’il y sera contraint par saisie du revenue temporel dudit couvent, & demeurent en suspension des privileges accordez par sa Majesté au dit couvent, jusqu’à ce qu’il ait satisfait. . . .”⁴⁷ The regular cleric obviously jeopardized more than just his or her own situation, but also risked the fortunes of the convent as well. Overall, these stiff sanctions were intended to demonstrate that no one person could impair the court’s pursuit of justice.

Once the court secured the appearance of witnesses they proceeded to depose them. As with most other stages of the procedure, there were strict rules governing the process. First, the prosecutor was to administer the process of receiving testimony.⁴⁸ The most telling rule, however, was in relation to the supposed secrecy of the process. Each witness was to give a deposition separately and secretly. “Seront ouïs secretement & separément.”⁴⁹ Though seemingly of minor significance, this simple rule is representative of the whole procedure. Everything was kept secret, and no one but the court officials knew exactly what was said to the court. It should be remembered that this was an ideal condition, and did not necessarily represent the true nature of things. It is unlikely that the ideal of secrecy was ever achieved, given the close proximity of the residents to one

⁴⁶Ibid., 29-30.

⁴⁷Ibid., 31-32.

⁴⁸Ordinance of 1670, Tit. VI, Art. 1.

⁴⁹Ibid., 33.

another.

Camus provides other rules for conducting depositions. Each witness was to take an oath before testifying. Neither Camus, nor the Ordinance, however, offer advice on dealing with those who refused to take the oath. Curiously, neither document offers rules for dealing with those who take the oath and lie anyway.⁵⁰ Again, however, the Ordinance and Camus were dealing with ideals and the oath may have seemed to be an adequate measure of securing truthful testimony. In the end the court could decide to simply not use certain suspect depositions as evidence.

Another important rule for administering depositions was the requirement of the witness to give some personal information. “Seront enquis de leurs noms, surnoms, âges, qualitez, & demeures . . . s'ils sont serviteurs ou domestiques, parens ou alliez des parties, & en quel degré.”⁵¹ Here the court is concerned with the quality of the testimony being supplied. They scrutinized any possible links to both the accusers and the accused. If, for example, a deposition was given by someone closely related to the litigants, it is unlikely that the statements carried as much weight as the statements of an unbiased witness.⁵² The court also seems concerned with the social station of the witness. By demanding that they state their ‘*qualitez et demeures*’ the court was inquiring as to any possible relationship the witness might have with one of the litigants. By getting the witness to provide this information the court was able to ascertain if any relationship was apparent. All of the information was then recorded in the deposition and included in the dossier.

⁵⁰Esmein presents an interesting discussion that took place in the Parlement of Paris on this subject. It appears that the *délégués* were aware of the paradox involved with the oath. Issues of perjury, and the right of a defendant to not condemn him/herself by his/her own tongue were all debated at length. See Esmein, *A History of Continental Criminal Procedure*, 225-227.

⁵¹Camus, *Stile Universel*, 32-33.

⁵²This is just as much a concern as the quality of proof. Concepts of truth and proof will be covered at the end of this piece.

Besides the previous rules, the court was also required to follow certain guidelines in recording the deposition. First, the deposition was to be written only by the *greffier* in the presence of a judge in order to ensure that nothing was added that was not stated. Second, in order to avoid any confusion in the deposition, no words or statements were to be written between the lines in a statement. “Il ne fera fait aucun interligne, & s’il ya quelques ratures ou renvois, le greffier les fera approuver par le témoin & par le juge.”⁵³ The recorded statements were to be free of removed words and added statements in the hopes of maintaining as accurate a recording as possible. Next, after the deposition was complete, the statements were read back to the witness and confirmed; “Lecture sera faite au témoin de sa déposition, & declara s’il y persiste.”⁵⁴ Once all of the statements had been confirmed, the witness was asked to sign, if able, the deposition. Finally, each page of the deposition was marked by the magistrate. This ensured that everything that was said was kept in the file. It also represented the magistrate’s approval of the process. Every one of these rules was intended to ensure that the *information* was conducted as legally as possible. Further, and perhaps more importantly, these steps demonstrate that the court was quite concerned with the truthfulness and accuracy of the statements.

Once the deposition was complete, and all the necessary steps had been taken to protect the information, the witness was financially compensated for his/her time. The ordinance prescribes that fees be paid to witnesses for lost wages from work and traveling expenses. “La taxe pour les frais et salaires du témoin sera faite par le juge.”⁵⁵ Camus also presents a similar provision, but he adds : “l’on ne rien donner au témoins s’il n’est pas

⁵³Camus, Stile Universel, 33.

⁵⁴Ibid., 33.

⁵⁵Ordinance of 1670, Tit. VI, Art. 13.

ordonné”⁵⁶ This did not imply that every witness was automatically paid for time and expense. Nor does it mean that all witnesses received a flat rate for their trouble. Rather, in an example of an *information*, Camus shows that fees were only paid if they are requested by the witness. “[S]i le témoin demande salaire, il faut adjouter. Et après qu’il a requis salaire, luy avons taxé. . . .”⁵⁷ It would seem that the court kept a tight rein on the purse strings! Seriously, however, the advice by Camus points to the fact that not all witnesses felt compelled to ask for money. If money was requested it was paid based on the status of the individual, the time involved, and the distance traveled. “La taxe se fait eu égard à la qualité du témon & au temps qu’il a employé à venir déposer.”⁵⁸ The court was cognizant of the individual situation of each witness, and understanding of the sacrifice involved .

The previous discussion on depositions raises many pertinent social and judicial issues. One example that was not mentioned was the testimony of children. Both Camus and the Ordinance provide for allowing children to testify, but only when absolutely necessary. “Les enfants de l’un et l’autre sexe, quisqu’au dessou de l’âge de puberté, pourront être reçus à déposer, sauf en jugeant d’avoir par le juges tel égard que de raison à la nécessité et solidité de leur témoignage”⁵⁹ The question of the validity of children’s statements had both legal and developmental implications. In judicial terms the legal responsibility for children lay with their parents or guardians, not with the minor. Like servants and other dependents or allies, they were subject to persuasion. The strength of their statements was obviously in doubt. The developmental implication is just as valid

⁵⁶Camus, Stile Universel, 33.

⁵⁷Ibid., 36.

⁵⁸Ibid., 36.

⁵⁹Ordinance of 1670, Tit. VI, Art. 2.

today as it was then; children were unlikely to understand the ramifications of their words, a trait that might reduce the strength of their testimony. Finally, the court seemed hesitant to place a child in such circumstances for moral and legal reasons. Simply put, why implicate a child in such matters when it was not absolutely necessary? Yet, if the information children provided was pertinent, their statements were accepted into the record.

The *information*, quite clearly, had the potential to supply a great deal of evidence. The magistrate now possessed a substantial amount of information in the *dossier*. Not only did the record contain depositions, but he also had the reports of the *medecins* and *chirurgiens*, the *procès verbal*, and the *plainte* itself. In most cases the court would have been prepared to issue a warrant for the accused. But in those cases where the evidence was lacking, and yet there still existed substantial suspicion, the judge could turn to an age-old means of collecting more information: the *monitoire*.

The *monitoire* was simply an announcement made at church by an ecclesiastic calling for any information about the case at hand. This action was not an automatic step in every case; it was used only when a case had effectively stalled. In order to have a *monitoire* read a request had to be submitted detailing the reasons for the measure. Further, only the details supplied in the request could be announced in the call for assistance. "Les monitoires ne contiendrent autres faits que ceux compris au jugement qui aura permis de les obtenir, à peine de nullité, tant des monitoires que de ceux qui aura été fait in conséquence."⁶⁰ The *monitoire* was considered to be an effective tool for the court because of the penalties that could be applied to those who failed to come forward. Specifically, the priest could threaten to withhold the sacraments or even threaten to excommunicate those who did not comply with the announcement. Though the courts sometimes required a *monitoire* to acquire evidence, the details of the case were still

⁶⁰Ibid., Tit. VII, Art. 3.

kept secret. This may have been a measure of preventing the accused from learning the details of the case against him or her. It was also just an attempt to protect the sacrosanct secrecy of a process, which not only kept the accused in the dark, but also protected the anonymity of witnesses and promoted an air of spontaneity and truthfulness in their testimony.

The use of a *monitoire* also points to the perceived position of the church in most communities. Though the church maintained a position of responsibility and authority in the village, the use of *monitoires* did not necessarily imply any collusion between the ecclesiastical and judicial institutions. In fact, by the late seventeenth-century priests were increasingly reluctant to threaten their flocks in order to help advance an investigation. When the courts called upon the clergy to announce a *monitoire*, many refused. Its effectiveness was being called into question. "Public order was still, however, under the religious sanctions, though by the middle of the century [18th century] the *monitoire* was becoming obsolete."⁶¹ It was becoming obsolete because it was rarely responded to. Few parishioners must have felt compelled to testify. Those who refused were threatened with ritualistic punishments that soon became the subject of ridicule.⁶² "Such lurid anathemas soon became bad form, the official view being that a *Cur *, in publishing an excommunication in connection with a *monitoire*, ought to do no more than the minimum required by law."⁶³ An important aspect of the church's refusal to work with the courts through the *monitoire* was that this measure subjected local priests to the ridicule of their flock. Many soon realized that the priest was simply being used by other agents.

⁶¹ John McManners, French Ecclesiastical Society Under the Ancien Regime (Manchester England: Manchester University Press, 1960) , 149.

⁶² *Ibid.*, 21.

⁶³ *Ibid.*, 21.

Those priests who refused to barter the administration of the sacraments for information were themselves subject to judicial and financial sanctions. “Il vous plaise ordonner que le dit official sera contraint par saisie de son revenu temporel à accorder le monitoire que vous avez permis. . . .”⁶⁴ These measures, which threatened a priest’s ability to support himself, were among the only punishments available to the court.

If the *monitoire* was approved and the priest agreed to deliver it, the action might still be opposed. “Les opposans à la publication du monitoire doivent élire domicile dans le lieu de la jurisdiction du Juge qui aura permis de l’obtenir. . . .”⁶⁵ These objections, which were essentially an appeal, were delivered to the *Lieutenant Criminel*. The *Lieutenant Criminel* then heard the objections and decided accordingly. If the objections were overruled the *monitoire* was finally read.

As a call for information the notice asked those with any evidence to notify the priest. The priest then communicated the information to the *greffier* of the jurisdiction. “Les révélations qui auront été reçues par les curés ou vicaires, seront envoyés par eux cachetées au greffe de la jurisdiction où le procès sera pendant. . . .”⁶⁶ This information was then communicated to the *procureurs* of the case to be included in the *dossier*. These new revelations were then presented to the court. Any new witnesses were then required to appear before the court to be deposed. “Ce considéré, MONSIEUR, il vous plaise ordonner que les témoins ouïs en révélations, seront repetez pardevant nous par forme d’information.”⁶⁷ These depositions were then officially a part of the case. Again, the element of secrecy was maintained. The effectiveness of the *monitoires* as a tool for

⁶⁴Camus, *Stile Universel*, 45-46.

⁶⁵*Ibid.*, 53.

⁶⁶*Ordinance of 1670*, Tit. VII, Art. 10.

⁶⁷Camus, *Stile Universel*, 59.

retrieving information, however, is open for debate in light of its fading use.

Nevertheless, it was still an avenue available to the court to collect information for a case.

By this point in the procedure the court had accumulated information through depositions, *monitoires*, medical reports, *procès verbaux*, and from the *plainte*. All of this was kept in a *dossier*, which the *procureur* now examined. At this phase in the procedure he presented to the court his recommendations on how to proceed. If the evidence warranted he could ask the court to bring the accused in for questioning. In order to summon the accused to the court, the *procureur* had three options: he could issue an *assignation a être oïi*, which was a summons to be heard at court, or an *adjournement personnelle*, which was a more severe summons to be heard, or the court could issue a *decrèt de prise de corps*, which was an arrest warrant. The initial summons that was issued depended on the type of offence in question, the quality of the evidence, and the suspect to be examined: “Selon la qualité des crimes, des preuves, et des personnes, . . .”⁶⁸ These conditions were not only sensitive to the charges at hand, but were also sensitive to those involved. That is, *procureurs* were particularly hesitant to issue an arrest warrant where there was a possibility of conflict. If a *decrèt de prise de corps* was issued for a local noble, for example, it might require that the officers of the court fight their way into a fortified and guarded castle to carry out the court’s orders. Such a move also risked insulting the honor of the noble. It was not a particularly attractive option. But, if the accused was a poor villager such a decree would be relatively easy to carry out. Further, they based their summons also on the quality of the evidence in the case and the gravity of the charge at hand. It would have been extreme to issue an arrest warrant based on a petty charge with only a few depositions as evidence. The decision to issue an initial summons, therefore, was a well thought out matter.

⁶⁸Ordinance of 1670, Tit.X, Art. 2.

Each type of summons carried specific implications based on the case at hand. The rules associated with each one seemed to have been intended to ensure that the accused would appear before the court. If the accused refused to respond, the summons could be converted to a more serious court order. An *assignation d'être oïi*, as was previously explained, was simply a polite request to appear before the court.⁶⁹ The language used in this type of summons was even polite. It should also be noted that there is no mention of an interrogation, nor of an arrest. In the event that this request was ignored the court simply acknowledged the absence and converted that summons into a *décret d'ajournement personnel*.⁷⁰ When the court was forced to convert such summonses they reviewed the report of the delivery of the original summons. If all had been done properly the conversion was automatic. This new summons was delivered in exactly the same manner as the last. The defendant, it would seem, was given ample opportunity to comply with the court's orders.

If such a summons was against multiple defendants the *huissier* was advised by Camus to ensure that the warrant contained only the essential facts needed to execute the warrant. This warning carries particular weight when the co-defendants were being served with arrest warrants. "Il n'en faut donner qu'un extrait à celui contre lequel il y a adjournement personnel, de peur qu'il n'avertisse ceux contre lesquels on a décrété prise de corps, si on luy en donnoit une copie entière."⁷¹ This practical advice was not only useful, it was necessary in those cases where there was a perceived risk of flight.

If the accused did not respond to the *décret d'ajournement personnel*, it was automatically, without review, converted to a *décret de prise de corps*. Such a decree was

⁶⁹See Camus, *Stile Universel*, 70. Here Camus provides a detailed summons for each type of warrant.

⁷⁰*Ibid.*, 71.

⁷¹*Ibid.*, 72.

very serious business. It required that court officers apprehend and imprison the accused. The accused remained a prisoner until such time as the court was prepared to interrogate. "Nous ordonnons que le dit B__ sera pris au corps, & conduit és[sic] prisons de cette cour, pour estre oüi and interrogé, sur les faits resultants desdites charges & informations, & autres, sur lesquels le procureur du Roy le voudra oüir."⁷² In some cases defendants escaped the clutches of court officers, and were therefore not brought before the court. In the event of such an occurrence the court did not end its enquiry, but rather, continued on without the accused.

When an accused was declared absent, or *contumace*, it was likely that the defendant had fled the jurisdiction and could not be tried in person. This did not imply, however, that the court curtailed its efforts to try the case. Not only did the court make every effort to find the accused, they also simply continued the process without them. A court required to take such actions was governed by specific procedures. In many respects, these procedures provide some of the most interesting aspects of the whole process due to a lack of a defendant. French justice, it would seem, was just as much about punishing a crime as it was about punishing a criminal. Further, the institution of a process against the name of an accused may point to the important concepts of honour and retribution (albeit financial and moral retribution rather than corporal retribution) in this process that worked to sully the reputation of an absent accused.

Once it was obvious that the accused was defying the orders to appear they were declared to be in a state of *contumace*. In order to ensure that the accused were not simply hiding in their homes, the court ordered a search of their property. "[L]a perquisition doit estre fait en son domicile ordinaire, ou au lieu de sa residence, si aucune

⁷²Ibid., 64. This type of warrant could be issued immediately for dueling, vagabonds, domestic offences, strangers and even those who can only be identified by their clothing. Also see Camus, *Stile Universel*, 64-65.

il a dans le lieu. . . .”⁷³ The point here is clear; the court exhausted every avenue in search of the accused. The *procès verbal* of the *perquisition* also reveals that the court officers questioned those on the site for any clues as to the whereabouts of the accused.⁷⁴ They also proceeded to question the neighbours as to the possible location of the accused. All of the information was recorded and delivered to the court. If the accused was homeless, or lived outside the jurisdiction, a notice was posted to the door of the court. “Si l’accusé n’a point de domicile, ou ne reside au lieu de la jurisdiction il faut afficher la copie du Decrèt à la porte de l’auditoire”⁷⁵ A similar notice was affixed to the door of the searched house. The purpose of these notices was simply to inform everyone that the accused was wanted in court.

This routine step was essential for the court. Not only did it serve to notify those involved in the search and inquiry, but once completed it allowed court officers to seal the house and seize the belongings within. Once the decision was made to seize and inventory the belongings, court officers were forced to follow procedures outlined in the Ordinance. This basic requirement ensured that all parties were protected from fraudulent activities. The entire process was watched and guarded by officers of the court, and no one else. “Sa majesté défend ___ d’établir pour gardiens ou commissaires les parens ou domestiques des fermiers & receveurs du domaine, ou des seigneurs à qui la confiscation appartient.”⁷⁶ Any evidence that was uncovered by this process was sealed in the house. “L’on peut aussi requérir le juge de sceller dans la maison de l’accusé, & d’y establir garnison, si l’on croit trouver quelque chose qui puisse servir à la conviction.”⁷⁷

⁷³Ibid., 73.

⁷⁴Ibid., 74.

⁷⁵Ibid., 76.

⁷⁶Ibid., 76.

⁷⁷Ibid., 77.

The court seemed very concerned with protecting the integrity of both the evidence and the process.

Having searched the premises, and seized the accused's goods, the court now moved to present a series of notices ordering the accused to appear. Here, the court had four distinct notices at their disposal. The first was an *assignation à l'accusé en son domicile à comparoître dans la quinzaine*. This, basically, was a notice that was posted at the home of the accused. This notice required them to appear before the court within fifteen days. The same notice was then posted to the door of the *auditoire*. If the accused did not comply with these notices the court turned to the use of public announcements. "Si l'accusé ne compare dans la quinzaine, il faut le faire assigner par un seul cry public à la huitaine. . . ."⁷⁸ The *sergent* of the court then went to the most public place in the jurisdiction, typically the market, and made an announcement for the court.⁷⁹ Camus also suggests that the *sergent* also proceed to the home of the accused and make a similar announcement. "Si l'accusé a un domicile ou residence au lieu du jurisdiction, le sergent s'y doit transporter avec la trompette, & continuer son procez verbal ainsi. . . ."⁸⁰ If the accused failed to appear after all of these measures the judicial process continued. "Il sera procédé sans autre formalitez au reste de l'instruction et jugement du procez contre l'accusé."⁸¹ The court took great care to ensure that the defendant was given ample warning and opportunity to appear. If this did not prove to be sufficient the court proceeded with the conclusions of the *procureur*.

The *procureur du Roy* received the whole case under advisement, and decided

⁷⁸Ibid., 80.

⁷⁹Ibid., 81.

⁸⁰Ibid., 81-82.

⁸¹Ibid., 83.

whether or not to continued prosecuting the accused in *contumace*. If there was sufficient reason to continue the *procureur* would proclaim his recommendations to be in favour of the King. “Je requiers pour le Roy qu’il soit ordonné que les témoins ouïs en ladite information seront recollez en leurs depositions, & que le recollement qui sera fait d’iceux, vaudra confrontation à l’accusé.”⁸² As the prosecutor recommended that a process continue, the case would advance through a court in similar fashion to a regular case, only there was no defendant present. As such, these processes allowing for the defendant to confront the witnesses, offer *faits justificatifs* (justifiable reasons for the offence in question), and undergo the interrogation were all notably absent. Due to this, a case carried on in *contumace* was much quicker. In reality, all that was left in a trial by *contumace* was the *récollement des témoins*, the conclusions of the *procureur*, sentencing, and the execution of the sentence.

The *récollement des témoins* was simply a verification of the depositions. It was a vital step in the process because it meant that all of the information was reconsidered to ensure that it could be used as evidence in the case. First the *récollement des témoins* could only occur if there was an order to do so. In certain circumstances it was possible to proceed with the process. “Pourrant néanmoins les témoins fort agées, malades, haletudinaires, prêt a faire voyage, ou quelque autre urgente necessité.”⁸³ In these instances the *récollement* could occur without an order by the court. Regardless of the timing of the event, all *récollements* were constrained by a series of specific rules.

Camus prescribes eight such rules for conducting this phase of the process, and many are similar to the previous rules on receiving depositions.

Les témoins seront recollez separément, feront serment de dire verité, après quoy sera faite lecture de leur deposition,... seront

⁸²*Ibid.*, 84.

⁸³Ordinance of 1670, Tit. XV, Art. 3.

interpellez de declarez s'il y veulent ajoûter ou diminuer: et s'ils y persiste, seront écrite ce qu'ils y voudront ajoûter ou diminuer, lecture sera faite du récollement, le récollement sera paraphé & signé dans toutes les pages, par le juge, & par le témoin, s'il sçait ou veut signer, sinon sera faite mention de son refus, le récollement des témoins, sera mis dans un cahier separé des autres procédures.⁸⁴

All of these rules were intended, again, to ensure that those giving evidence to the court were certain of their depositions. Further, all of the witnesses committed themselves to the truthfulness of their statements by signing their names—if possible.

All of the proceedings of the *récollements* were submitted to the *procureur* for review. This information, coupled with the entire *dossier* were all that was available to him in a *contumace* case. Further, the decisions of the *procureur* as to the fate of the absent accused were based only on this information. If this is compared to a regular case there is much less evidence in play. Any additional information could only have come from the participation of the accused in the process. This seems to be one of the biggest drawbacks of this type of prosecution. Nevertheless, the court was forced to come to a decision in order to render justice. In handing down his decision the *procureur* again spoke in reference to the king. “Je requiers pour le Roy que le contumace soit déclarée bien instruite a l'encontre de l'accusé, & adjugeant le profit d'icelle, qu'il soit déclaré deüement atteint & convaincu de . . . pour réparation de quoy condamné à estre pendu & estranglé. . . .”⁸⁵ Not only did the *procureur* provide a decision and recommendation for sentencing, the whole proclamation was rooted in language that clearly stated that the process had been properly conducted. It seems as though the *procureur* felt obligated to ensure that everyone knew that the process had been conducted properly and justly up to this point.

Once the recommendation was received from the prosecution, the court proceeded

⁸⁴Camus, *Stile Universel*, 86-87.

⁸⁵*Ibid.*, 89.

to make its own decision on the sentence. It is important to note that though there may not have been a body to sentence it did not mean that the convicted person necessarily escaped punishment. Rather, the court punished felons by ruining their names, thereby ruining them *in absentia*. Further, if a physical punishment was prescribed, it was carried out in effigy. The punishments available ranged from death to banishment, branding, or whipping. Only the punishment of death, however, was carried out in effigy. “Les condamnations des Galères, amende honorable, bannissement perpetuel, fletrisseure[branding] & du foüet, seront seulement ecrites dans un tableau, sans aucune effigie. . . .”⁸⁶ The public display, though not as dramatic as a death by effigy, was still evident in the process and symbolized a civil death. Besides the punitive aspect of sentencing and execution, the absent accused often endured a financial penalty as well. “[L]e condamnons en outre en . . . livres de reparation, dommages & intérêts envers le demandeur. . . .”⁸⁷ The financial punishment was likely the most severe penalty for an absent accused, though being forced into voluntary banishment was also a severe hardship. This severity is amplified when communal attitudes to strangers are also considered. For a felon on the lam, relocating to a new community was very difficult. Outsiders were viewed skeptically in small villages; the success of the stranger in a new home was extremely limited.

Though execution of a sentence seemed to be a simple matter in cases of *contumace*, there were certain rules still attached. First, if the accused reappeared, or were captured, within one year of the execution they could reclaim their belongings and proceeds of any sale. They then had to pay the fine prescribed at sentencing. “[I]l peut obtenir main-levée de ses meubles & immeubles, & le prix provenant de la vente de se

⁸⁶Ibid., 92.

⁸⁷Ibid., 91.

meubles luy sera rendu en consignat l'amende à l'aquell il aura esté condamné. . . ."⁸⁸

Though Camus makes no mention of the rest of the sentence, it would be consistent to assume that any other terms of the sentence were also carried out.

If the accused appeared within five years of the judgement the state of *contumace* was nullified and a regular trial was undertaken.⁸⁹ All evidence, depositions, and *récollements* were still considered valid, even if the witness had died. "Si le témoin qui a été recolé est décédé ou mort civilement pendant le contumace, sa déposition subsistera et en sera faite confrontation littéraire à l'accusé. . . ."⁹⁰ If an accused remained absent for a period greater than five years after the execution, the orders of the court stood as a decree. "[V]oudront comme ordonnées par arrest."⁹¹ Further, the receiver of the area, charities, or a seigneur could claim the belongings after a period of the same five years.⁹² Anyone who died while absent more than five years was considered civilly dead from the date of the judgement of *contumace*. Finally, if the absent accused returned and presented letters that cleared them of the offence, and if the court accepted them, all charges and penalties were reversed. Their belongings and money were also returned to them. Coincidentally, this possible scenario also represents the beginning of a regular trial.

Having just considered the processes for pursuing a trial against an accused who was absent, it is important to note that the processes involved in pursuing a regular trial were much more extensive. Where the last procedures for a *contumace* were primarily focused on ensuring the absent defendant was well notified, a regular trial incorporated

⁸⁸Ibid., 94.

⁸⁹Ibid., 94-95. See also Ordinance of 1670, Tit. XVII, Arts. 18,19,20.

⁹⁰Ordinance of 1670, Tit. XVII, Art. 22.

⁹¹Camus, Stile Universel, 95.

⁹²Ibid., 96.

many similar aspects. It also added many more new procedures that reflected the presence of the accused at court. Further, and perhaps more importantly, the many other stages involved seemed to have been in place for the benefit of the accused. As we begin to follow the rest of a regular process we should note that not all of these steps were necessarily followed. Quite the contrary, some judges may not have incorporated a great many of these procedures. But for the purposes of our study it is important to trace every possible avenue of a case to ensure a complete understanding of the subject at hand.

One procedure that was not always encountered is the presentation of letters of pardon, abolition, or remission. Usually, these letters were used in exceptional circumstances, and by well-placed individuals. As was previously discussed, these letters were signed by the king. It was quite common, however, that they were dispensed by a secretary of state another powerful administrator. Furthermore, though the letters represented a firm intervention in a case, there existed certain conditions on the use of these letters. These conditions came in three forms: rules as to how the letters were to be addressed; rules about the circumstances in which the letters might be applied; and specific rules as to how these letters were to be received at trial.

When letters were presented, the courts required that they be addressed in a specific fashion. “Les lettres obtenues par les gentilshommes doivent estre adressées aux cours souveraines chacune suivant la jurisdiction & la qualité de la matière . . . peuvent aussi estre adressées aux présidiaux, si leur competence y esté jugée. . . .”⁹³ Following the jurisdictional privileges of the nobility, the letters for noblemen were presented to the higher courts. Further, those noblemen obtaining letters had to expressly state the quality of their nobility. “Les gentilshommes doivent exprimer nommément leur qualité dans les

⁹³Ibid., 104.

lettres de remission & pardon, a peine de nullité. . . .”⁹⁴ This measure of checking an applicant’s status is also reflected at the other end of the social spectrum. “L’adresse des lettres obtenues par les roturiers doit estre faite aux baillis & sénéchaux des lieux où il ya siège présidial. . . .”⁹⁵ *Nom, age, and demeure* were standard requirements for everyone; they served as an essential part of their identity and helped others locate them on the social ladder. The availability of these letters to the nobility only reinforces the fact that access to justice and courts was largely based on social position.

Though the letters carried a great deal of weight, and in some cases ultimately freed an accused, there were some crimes which could not be exempted by a letter. Camus and the Ordinance both provide an extensive list of offences that the king designated exempt from letters. At the top of the list is dueling.⁹⁶ This particular activity not only caused fatalities, but it symbolized an affront to the monarchy’s right to justice. Other crimes that were listed included premeditated murder, violent abduction, and civil disobedience.⁹⁷ These serious offences obviously posed a threat to order and as such, could not be quietly brushed aside. The implication here is clear, though the king retained the ultimate right to judge through these letters, there were some offences which could not be dealt with by a basic letter. Rather, the offences in question required some type of judicial prosecution.

If a letter was obtained, however, there were prescribed procedures in place that guided their introduction at a trial. First, an accused was required to present the letter in a timely fashion. “Les accusez doivent presenter les lettres dans trois mois du jour

⁹⁴Ibid., 104.

⁹⁵Ibid., 104.

⁹⁶Ibid., 105.

⁹⁷Ibid., 105-106.

d'obtention, passé lesquels temps, il est fait défenses aux juges d'y avoir égard."⁹⁸ Simply put, an accused could not await the outcome of a trial and use the letter as a trump card, thereby voiding the entire process that had already passed. A letter of pardon, remission, or abolition also could not affect a change in the execution of decrees. "L'obtention & la signification des lettre d'abolition, remission, et pardon ne pourront empêcher l'exécution des decrets, n'y l'instruction, jugement & execution de la contumace, jusqu'à ce que l'accusé soit actuellement en estat dans les prisons du juge auquel l'adresse en aura esté faite. . . ."⁹⁹ Being absent, therefore, was not excusable, even if the accused were absent because they were obtaining the letters. Finally, those presenting letters must do so on their knees and bare headed. "[L]es demandeurs en lettre seront tenus de les presenter à l'audience teste nuë & à genoux & affirmeront après qu'elles auront esté levés[sic] en leurs presence, qu'elles contiennent vérité. . . ."¹⁰⁰ Again, though the letters were of great significance, the truthfulness of the documents and respect for the court were still an important factor.

Once the letters had been read to the court, they were then accepted to the record. This is a step of prime importance as it carried with it the potential to alter the outcome of a case. Furthermore, these letters might have also affected the civil parties in a case, as they might be forced to pay reparations and damages as a result. The strength of these letters, therefore, cannot be overlooked. In the end they still represented the monarch's swift prerogative in judicial affairs.

The consequences of an accused not appearing before the court have already been discussed in terms of a *contumace*. Not all absences, however, were immediately shifted to a state of *contumace*. In some cases the court acknowledged the fact that the accused

⁹⁸Ibid., 107.

⁹⁹Ibid., 107.

¹⁰⁰Ibid., 107-108.

may not have been able to appear for medical reasons. When such a situation occurred the accused had to request an *exoine* for themselves. “Lexoine ou excuse de l’accusé se presente au juges lors qu’il est indisposé, & que sans danger de sa vie il ne peut comparoir en personne, ny se mettre dans les prisons, pour purger les decrets d’adjournement personnel, ou de prise de corps decernez contre luy.”¹⁰¹ In order for such a request to be granted the accused must be visited by a doctor approved by the court. The doctor then drafted a report for the court. “Qui dressera son rapport de la qualité & des accidens de sa maladie, ou de ses blessures, & declarera si l’accusé ne peut sans peril de vie se mettre en chemin. . . .”¹⁰² This report was then presented to the court by the doctor, who testified to its contents and its truthfulness. If the request was granted, the court then waited until such time as the accused could appear without risk to life or health. All of the defendant’s belongings that had been seized by the court remained in storage until the accused appeared before the magistrate. If the accused died before appearing at court, an autopsy was ordered and conducted. In the event of the death of the accused, the case was brought to a close. The medical exemptions were the only reasons the accused could claim in order to justify their absence. Any other claim was usually unacceptable and proved to lead to a state of *contumace*.

If any of the parties suffered serious damage due to the offence the court could hand down a provisional sentence at this time. These *sentences de provision* were intended to help defray any costs for medicine and treatment. “Les juges peuvent s’il y échet, adjuger à une partie quelques sommes de deniers pour pouvoir aux alimens & medicamens.”¹⁰³ The amount of money provided in this type of sentence depended wholly on the jurisdiction of the court and the nature of the ailment. A sovereign court could

¹⁰¹Ibid., 123.

¹⁰²Ibid., 123.

¹⁰³Ibid., 131.

allot an amount not to exceed two hundred *livres*, other royal judges were limited to sums of no more than twenty-five *livres*, and *seigneurial* courts were restricted to one hundred *livres*.¹⁰⁴ This sentence was to be executed immediately and was not subject to appeal.¹⁰⁵ There existed only two conditions for such a sentence to be pronounced. First, the accused was supposed to be in the custody of the court, and the wounded party was to be visited by a *chirurgien*. The *chirurgien*'s report was then forwarded to the court for consideration. This report, coupled with the arrest of the accused and the information in the *dossier* of the case up to that point, were all considered. If the information was strong enough, and the medical report warranted, a provisional sentence was handed down.

Camus also provides some rules on the dispensing of provisional sentences. First, one judge could not provide provisional sentences for both parties. "Les mesmes juges ne pourront accorder des provisions à l'une et l'autre des parties, à peine de suspension de leurs charges."¹⁰⁶ If one defendant, then, intended to seek a provisional sentence from a court that had already provided one for another party they were forced to bring the case before another court; if they were healthy enough to appear. Subsequent provisional sentences were possible, but required a period of at least fifteen days after the previous sentence.¹⁰⁷ Those awarded a provisional sentence could seize the belongings of the accused in order to pay the amount. "La partie qui a obtenu sentence de provision, peut faire saisir les biens & emprisonner le condamné[sic] sans donner caution."¹⁰⁸ Though the provisional sentences were intended to compensate the wounded and sick for their costs,

¹⁰⁴*Ibid.*, 131.

¹⁰⁵*Ibid.*, 131.

¹⁰⁶*Ibid.*, 133.

¹⁰⁷*Ibid.*, 133-134.

¹⁰⁸*Ibid.*, 134.

this type of sentence could cause severe hardship. A fine of up to two hundred *livres* may have been an extreme burden for some defendants. Furthermore, the ability of the receiver of these sentences to imprison the accused without warning was a powerful tool. In light of these conditions, provisional sentences seem to have been of major importance in a trial due to the financial and personal ramifications involved.

Another severe step within the criminal procedure was the capture of accused criminals. As was previously discussed, a *decrèt de prise de corps* was the most serious of all the measures available to the court for bringing an accused before the magistrate. But the decree to arrest was but one half of the situation. The court officers still had to capture the persons in question and bring them into custody. Continuing in the vein of thoroughness, Camus provides some specific procedures for completing this task. He also presents one of the most revealing statements as to the power of the officers effecting an arrest warrant. "Si l'accusé veut purger le decret de prise de corps, & éviter la violence que l'on pourroit faire pour le mener en prison, il peut y aller luy mesmes, sans qu'il soit necessaire d'exploit d'emprisonnement. . . ."¹⁰⁹ The language he uses here suggests it was preferable, for both the court and the accused, that the event occur without incident. When the decree had been satisfied the court received a *procès verbal* of the situation. In that report the *huissier* explained that the prisoner complied with the court's order and followed him to prison.¹¹⁰ Further, the jailer also submitted a *procès verbal* acknowledging the peaceful arrival and registration of the prisoner.¹¹¹ Copies of both reports were submitted to the court to be included in the *dossier*. Though the process seems quite simple, the procedure was still absolutely necessary in order to ensure the event was properly and fairly conducted.

¹⁰⁹Ibid., 136.

¹¹⁰Ibid., 136-137.

¹¹¹Ibid., 138.

Both the Ordinance and Camus also provide specific procedures for conducting all arrests. First, the *Prevôt des Maréchaux* did not have to wait for a court order to arrest someone; in some cases they could set out on their own. “Il est enjoit aux Prévôt des Maréchaux par l’article quatrième du titre second, d’arrester les criminels pris en flagrant delit, ou à la clameur publique.”¹¹² These officers of the law, then, were required to act on their own when they encountered a criminal act in progress, or in response to public outrage. Once the suspects were captured the *Prevôts des Maréchaux* were required to take an inventory of all of the belongings found on the accused. “Les prévôts des maréchaux en arrestant un accusé, sont tenus de faire inventaire de l’argent, hardes, chevaux, & papiers donc il se trouvera saisie, en presence de deux habitans des plus proches du lieu de capture, qui signeront l’inventaire, ou declarons la cause de leur refus, il fera mention. . . .”¹¹³ This measure of witnessing the inventory may have protected the accused from having any property stolen. But it also worked against them if the seized possessions could be used as evidence in court. Regardless of the perspective, the step represents the official nature of arrests, even hurried arrests. The Ordinance of 1670 also takes another step in protecting the property of the accused. According to Camus, and Title II, Article Eleven of the ordinance, it was illegal for officers of the *maréchaussée* to claim any property during the arrest. Any attempt to do so incurred a swift penalty: “à peine de privation de leurs offices, cinq cens livres d’amende, & de restitution quadruple.”¹¹⁴ With these safeguards in place the prisoner was then taken to the nearest prison for incarceration.

There they were registered by the *Geollier* and provided with accommodations. Interestingly, the accused could accept no other food other than what was supplied by the

¹¹²Ibid., 137-138.

¹¹³Ibid., 138.

¹¹⁴Ibid., 138.

prison. “Les prisonniers pour crime ne pourront pretendre d’estre nourris par la partie civile, & leur sera fourny par le Geollier du pain, de l’eau, & de la paille bien conditionnez.”¹¹⁵ That these basic necessities of life were even mentioned in the manual or in the ordinance raise some interesting issues. One could conceive that a bed and something to eat were basic necessities that did not need codification. Or did they? Prisons of this era were not as sanitary as they might have been in later periods. Such conditions point to the punitive aspect of awaiting trial in prison. Nevertheless, prisons were the only place for the court to hold accused criminals who might have posed a risk of flight. The codification of the basic necessities of life may have been an attempt to reform the institution.¹¹⁶

Our discussion to this point has been focused on a few of the possible procedures in place to deal with exceptional circumstances. The purpose of numerous arrest procedures was to ensure that the accused was brought to court without incident. Once the accused were in a position to answer the charges against them the court could proceed to interrogate them. It should be very clear that the interrogation was key to the process. It was a prime opportunity for the court to allow the accused to resolve some of the issues related to the case. This may imply that the accused were well informed of the case against them. Quite the contrary, the accused were supposed to have no foreknowledge of the case being built by the court. This situation contributed to the daunting nature of the scene. The rules provided by Camus tend to reveal a great deal about the roles played by the accused, the magistrate, and the *procureur* in the whole process. Quite simply, the magistrate (assisted by the *procureur*) had all of the information, while defendants were

¹¹⁵Ibid., 140.

¹¹⁶Michel Foucault discusses this subject at length in Discipline and Punish: The Birth of the Prison (New York: Vintage Books, 1995). As a result of his work a great deal of study has since been devoted to the topic. Specifically, scholars have focused on the use and state of prisons in our period.

left alone to defend themselves against the charges of the court.

To the benefit of the imprisoned accused, the court was required to conduct an interrogation within twenty-four hours of incarceration. “[L]es interrogatoires commences[sic] aux plus tard dans les vingt quatre heures apres leur imprisonment.”¹¹⁷ Despite this provision, the court was not necessarily concerned with the comfort of the prisoner. Rather, considering the use of words like *interrogez incessamment*, it is quite clear that the court was more interested in acquiring solid information. With this objective in mind the court proceeded to interrogate the accused.

One of the clearest rules here is that the accused faced the judge and the *greffier* alone. “Les accusez doivent estre interrogez separément, sans assistance d’autre personne que du juge & du greffier.”¹¹⁸ This rule set the tone for the whole process of interrogation. Faced with this daunting situation the accused was forced to answer all of the questions of the magistrate. Most importantly, the interrogator was supplied with a great deal of information, whereas the accused had only his or her wits. “Messieurs les procureurs du Roy, ou ceux des Seigneurs, & les parties civiles, pourront donner des mémoire au juge pour interroger l’accusé, tant sur les faits portez par l’information, qu’autres, pour s’en servir par le juge ainsi qu’il avisera.”¹¹⁹ Armed with this, the judge proceeded to question the prisoner as to the facts of the case, their whereabouts on the day of the offence, and even about their personal history. The accused, after taking an oath, was forced to answer every question orally. Further, the judge could ask the accused to explain or verify any piece of evidence in the court’s possession.¹²⁰ Finally, if the accused made any change to their statements the judge could begin the questioning over again in order to check the

¹¹⁷Camus, *Stile Universel*, 148.

¹¹⁸Ibid., 149.

¹¹⁹Ibid., 147-148.

¹²⁰Ibid., 152.

consistency of all the statements. “Si ce changement donne quelque lumière au juge pour continuer l’interrogatoire sur d’autres faits que sur ceux des charges & informations, il doit encore l’interroger l’accusé de la mesme manière. . . .”¹²¹ The situation was such, then, that the accused could incriminate themselves further for other crimes instead of helping their own cause.

As with many stages in this process there existed certain ‘housekeeping’ rules that the court was forced to follow. First, all of the proceedings had to be read back to the accused once the interrogation was over. Further, the accused was also supposed to sign the same record. Next, it was the responsibility of the *greffier* to ensure that no comments were added or removed from the record. “Il ne sera fait aucune interligne dans la minute des interrogatoires, & si l’accusé y fait quelque changement, il en fera mention dans la suite de l’interrogatoire.”¹²² The objective here seemed to have been to protect the legitimacy of the written record. Again, it reflects the importance that this system placed on the written record. Finally, the accused was supposed to be notified if the case was judged in last instance. This condition carries some significance as the accused was at least allowed to consider the implication of every answer that was supplied to the court. These conditions applied to every interrogation. There were also several guidelines in place to deal with unique interrogations like: interrogating deaf defendants, interrogating accused criminals who did not speak French, and interrogating those people who were voluntarily deaf and mute.

Though these provisional procedures were used from time to time, they were not determining procedures. That is, their use did not necessarily effect a change in the original rules of interrogation. They are valuable for study because they provide some

¹²¹Ibid., 152.

¹²²Ibid., 150.

interesting insight into some of the few flexible aspects of French criminal procedure. Further, in some small measure they point to the fact that this system of criminal procedure was not totally unresponsive to the various social and physical conditions that existed in *ancien régime* France. Accused who were deaf and mute, for example, were allowed to have questions submitted to them in writing. Further, the accused could have council appointed to help them communicate with the magistrate. “Si l’accusé est muet, ou tellement sourd qu’il ne puisse ouïr, le juge luy nommera d’office un curateur qui saura lire & écrire. . . .”¹²³ Though the advisor also took an oath of honesty, and could not supply answers to the accused, having another person present at the proceeding was a tremendous psychological benefit. Similar provisions existed for those who did not speak French. In those instances the court provided a translator to communicate with the accused. “Si l’accusé n’entend pas la langue Française, le juge enommera d’office un interprete.”¹²⁴ Once the interrogation was complete, there existed the possibility for the accused to consult legal counsel. This privilege was accorded to those accused of a specific type of offence.

Après l’interrogatoire, les juges peuvent ordonner, si la matière le requiert, que les accusez communiqueront avec leur conseil, ou leur Commis dans les cas exprimers en l’article huit du titre quatorzième, qui sont, crime de peculat, concussion, banqueroute frauduleuse, vol de commis ou associez en affaires de finances, ou de banque, fausseté de pieces, supposition de part. . . .¹²⁵

For financial or corporate matters, then, the court seemed willing to allow the defendant the benefit of counsel. Offences of this type obviously required that the accused be able to completely understand the nature of the charges against them. Further, however, this

¹²³Ibid., 158.

¹²⁴Ibid., 155.

¹²⁵Ibid., 173.

provision may be viewed as an attempt to favour the upper strata of French society. How many peasants, after all, would be in a position to declare bankruptcy or counterfeit their own currency?

The criminal procedure was not wholly bent in favour of the nobility and the clergy. There was one provision for most other offenders. “Si le crime n’est pas capital, les juges peuvent aussi après l’interrogatoire permettre aux accusés de conférer avec qui bon leur semble.”¹²⁶ This permission for the accused to confer with advisors should not indicate, however, a full *carte blanche* for all defendants accused of non-capital offences. Rather, because such a provision is limited to the discretion of the magistrate, it is unlikely that the right to consult another person was granted in every case.

Once the interrogation was complete, the records were sent to the *procureur* and to the *parties civiles*. The *procureur* took notice of as much or as little of the information resulting from the interrogation as was needed to reach a decision. “Les interrogatoires seront incessamment communiqués à Messieurs le procureurs du Roy, ou à ceux des seigneurs, pour prendre droit par eux, ou requérir ce qu’ils aviseront. . . .”¹²⁷ Again, the role of the *procureur* is clear. It was his responsibility to gauge, according to the evidence, whether or not to continue further with the case. It should be noted that he was not to judge the accused, but rather the weight of evidence in the *dossier*.

The manner in which the case could proceed from this point depended on how the court viewed the evidence on hand. If the contents of the *dossier* pointed towards more investigation then the case proceeded. If, by contrast, the evidence clearly demonstrated that the issue at hand did not merit further criminal prosecution, the case could be transferred to a *procès ordinaire*. “S’il parôit, avant la confrontation des témoins, que

¹²⁶Ibid., 173.

¹²⁷Ibid., 174.

l'affaire ne doit pas être poursuivie criminellement, les juges recevront les parties en procès ordinaire, . . .”¹²⁸ Though neither Camus, nor the Ordinance are clear on this point, the contents of the *dossier* were used in an *enquête*. Though the case was in a state of flux criminally, it was still being pursued civilly. This step may have been an attempt to free the court from trying a stalled case. If more evidence was revealed during the *enquête*, the case could be returned to the original court for criminal prosecution. “Quoy que les parties ayent esté reçues en procez ordinaire sera reprise s’il échet, . . .”¹²⁹ If this occurred the trial simply picked up where it last left off and continued with the *récollections* and the *confrontation* of the witnesses.

In order for a case to proceed extraordinarily towards the *récollections des témoins*, the court required that the *procureur du roy* submit his conclusions once again. The *procureur*'s conclusions were still definitive or preparatory in nature. His *conclusions préparatoires* were simply an indication that more evidence was required to accurately determine an appropriate outcome for a case. The views of the *procureur* were recorded in the *dossier* as part of the official record. The only indication by the court that any decision had been made was a court order that recalled the witnesses. “Nous ordonnons que les témoins ouïs és informations, & autres qui pourront estre ouïs de nouveau seront recollez en leurs dépositions, & si besoin est confrontez à l'accusez. . . .”¹³⁰ This court order was of extreme importance. If the witnesses complied they were about to contribute to the case against the accused. If, however, they refused, the case could be jeopardy as the accused had the right to present a request for acquittal. Though

¹²⁸Ordinance of 1670, Tit. XX, Art. 3.

¹²⁹Camus, Stile Universel, 219.

the accused probably proclaimed their innocence throughout the procedure, the absence of a witness at the *récollement* presented a firm opportunity for defendants to prove their claims.

. . . et come il est injustement accusé, le dit A . . . ne veut point luy faire confronter les témoins qui ont déposé, de peur de fair connoistre son innocence . . . ce considéré, Monsieur, il vous plaise faire par le dit A . . . d'avoir fait recoller & confronter les dit témoins au suppliant, ordonner qu'il sera déchargé & envoyé absous de la calomnieuse accusation dudit A. . . .¹³¹

This type of request is couched in strong language demanding an acquittal. Despite the passionate terms, an automatic acquittal was not in the works. The court could again demand that the witnesses appear before the court for the *récollement* and the confrontation. If they failed to do so the accused was conditionally released. “Nous ordonnons que le dit B__ sera élargy & mis hors des prisons à la caution juratoire de se présenter à toutes assignations quand il sera par justice ordonné. . . .”¹³² This outcome did not proclaim innocence, it was a statement by the court that there was not enough evidence to convict or acquit. The accused, it would seem, existed thereafter in a state of judicial and social limbo.

If a witness did appear before the court for the *récollement des témoins*, the procedure was quite simple and rather brief. Witnesses were brought before the court separately and asked if there was anything that they wanted to add to their depositions.

¹³⁰ *Ibid.*, 222.

¹³¹ *Ibid.*, 222-223.

¹³² *Ibid.*, 223.

“Seront interpellés de déclarer s’ils y veulent ajouter ou diminuer: et s’ils y persistent.”¹³³

Not unlike earlier *récollements* for procedures against absent defendants, the depositions were then read back to the witnesses. If no changes or clarifications were provided the deposition was then signed by both the witness and the magistrate. This phase seems to have been very important to the process. It represented the court’s willingness to ensure that the statements used in the case were truthful. Further, it may also have been a manner of weeding out false and calumnious statements. Once all of the statements were confirmed in the *récollement* the process moved to the confrontation of the witnesses.

This stage of the process was often a source of great drama. This was the only opportunity for the accused to face their accusers. Interestingly, however, the accused could only challenge the witnesses before the deposition was read to the court. “Le juge interpellera ensuite l’accusé de fournir sur le champ, des reproches si aucuns il a, contre le témoin, & avertira qu’il n’y sera plus receu[sic]; après avoir entendu la lecture de sa deposition dont il faudra faire mention.”¹³⁴ This left the accused very little to contest. The accused could present some reservations as to the witness and their relations to either party. Furthermore, this was a prime opportunity for the accused to describe any biases the witness might have, thus reducing the value of the deposition. The purpose of this singular opposition seems to be centered on the ability of the witness to objectively testify to the facts of the case.

All of the interactions between the accused and the witness were recorded by the

¹³³Ibid.,85.

¹³⁴Ibid.,225.

greffier. Any further confrontation was strictly regulated by the court, and only approved by the judge based on a written request by the accused. “L’accusé pourra néanmoins en tout état de cause proposer des reproches, s’ils sont justifiés par écrit.”¹³⁵ Clearly, the ability of the accused to further confront a witness was based on the severity of the claims. If an accused presented concerns that were relatively weak, it was unlikely that the judge would approve them and present them at court. Ultimately, however, the accused personally could not protest the facts of the depositions at the time. They could, however, make certain requests to the magistrate that achieved similar ends. “Si l’accusé remarque dans la déposition du témoin quelque contrariété ou quelque circonstance qui puisse éclaircir le fait & justifier son innocence, Il pourra requérir le juge de les reconnoître, sans pouvoir luy même faire interpellation au témoin. . . .”¹³⁶ Again, the concerns were submitted to the judge who then took the necessary action.

This step was so vital to the entire process that the court demanded that the accused even confront the statements of those witnesses who had died since giving their depositions. This type of confrontation, a *confrontation littéraire*, worked in much the same way as a regular confrontation. The accused, as before, took an oath of honesty and was only able to challenge the person, not their statements. The deposition was then read by the *greffier*. Any protests to the statement required written proof of the challenge. “[I]nterpeller l’accusé de fournir presentement de reproches contre le dit défunt C__ lesquels le dit accusé sera tenu de justifier par pieces, sinon & à faute de ce faire qu’il n’osera plus recevoir. . . .”¹³⁷ Again, the weight accorded the written statement is clear. Though witnesses had died, their words reached beyond the grave through the *dossier*.

¹³⁵*Ibid.*, 226.

¹³⁶*Ibid.*, 229.

¹³⁷*Ibid.*, 232.

Once the confrontation and the *récollement* were complete, the accused and the *parties civiles* had an opportunity to present specific requests to the court. Obviously the nature of the request depended entirely on the outcome of the previous phase. If, for example, the *récollement* and the confrontation pointed to the guilt of the accused the civil parties might submit a request for financial restitution. “Ce considéré, MONSIEUR[sic], il vous plaise déclarer le dit B__ denüement [sic] attaint et convaincu d’avoir assassiné le suppliant & autres cas mentionnez au procez, pour reparation de quels le condamné en . . . livres d’interest civil envers le suppliant.”¹³⁸ The accused could also submit a request condemning the accuser of pursuing a vexatious suit. “Ce considéré, MONSIEUR, il vous plaise décharger le suppliant de la calamieuse accusation dudit A . . . le condamner envers le suppliant en telle reparation d’honneur qu’il appartiendra, avec dépens, dommages & intérêts; & en conséquence, ordonner qu’il sera élargy & mis hors des prisons. . . .”¹³⁹ It is interesting to note that this request not only raises the issue of monetary retribution for the false charges against the accused, but it also raises the concept of honor. The financial aspect is of some importance, but so is the idea of an accused’s standing in society after surviving a trial. Both requests were submitted to the court for consideration and were not necessarily answered immediately. Their impact on the outcome of the process depended on the validity of the requests. If valid, a request could only retard the process. “Le jugement du procès puisse être retardée.”¹⁴⁰ The decision as to these request was then based on two factors, validity of the claim, and the appropriateness of the information contained in the claim.

Once all of the possible requests were submitted the process shifted its focus back

¹³⁸Ibid., 246.

¹³⁹Ibid., 247.

¹⁴⁰Ordonance of 1670, Tit. XIII, Art. 3.

to the *procureur du roi*. All of the information contained in the *dossier* was reviewed by the *procureur* so that he might arrive at a recommendation as to how to proceed. As was previously discussed, his recommendation was either definitive; which pronounced guilt or innocence, or preparatory; which was a call for more information. It is important to note, however, that the *procureur* only handed down his recommendation and not the rationale for such a recommendation. “Les raisons sur lesquelles les conclusions seront fondées n’y doivent pas estre exprimées, . . .”¹⁴¹ When the *procureur* did provide a conclusion he did so in the name of the king. A guilty conclusion was stated as: “Je requiers pour le Roy”;¹⁴² and a not guilty conclusion was expressed as: “Je n’empêche pour le Roy.”¹⁴³ If the *procureur* decided that the *dossier* was inconclusive then he announced that the accused had another opportunity to defend themselves by presenting some *faits justificatifs*. “Je n’empêche pour le Roy que l’accusé soit reçue à nommer témoins pour la preuve des faits justificatifs, & reproches pour luy alleguez au procez, pour iceux si aucuns sont par luy nommez estre ouys d’office à ma requeste.”¹⁴⁴ Again, the process was allowed to proceed in the name of the King for the purpose of acquiring more information.

The phase of receiving *faits justificatifs* was another manner for the court to collect information. In contrast to the other phases the information raised here was presented by the accused rather than the court. *Faits justificatifs* consisted of relevant information presented by the accused such as an alibi, or any other strong objection to the depositions. The accused could raise any number of *faits justificatifs* as a part of their

¹⁴¹Camus, *Stile Universel*, 249.

¹⁴²*Ibid.*, 250.

¹⁴³*Ibid.*, 250.

¹⁴⁴*Ibid.*, 252.

defense. This did not necessarily imply that all of them were considered in the trial. Rather, an accused submitted a list to the judge who then selected the objections he considered relevant and useful at trial. “Les faits justificatifs de l’accusé, ou de reproches contre les témoins, seront choisis par les juges du nombre de ceux que l’accusé aura articulés dans les interrogatoires, et confrontations. . . .”¹⁴⁵ Ultimately, this phase of the process provided the only instance where the accused was given a clear opportunity to mount a defense. Though the judge controlled the extent of the defense, the accused was still able to provide evidence and supply witnesses. “Et l’aurions nommé et interpellé de nommer les témoins, par lesquelles il entend les justifier, sinon, & à faute de ce faire présentement, luy avons déclaré qu’il n’y sera plus reçu.”¹⁴⁶ When the window of opportunity was presented the accused was forced to act. Once passed, however, the accused could no longer offer any new evidence. In terms of contemporary conceptions of justice, the *faits justificatifs* offer a relatively weak measure of protection for the accused. In terms of *ancien régime* justice, however, the *faits justificatifs* seem perfectly appropriate. This fact becomes all the more clear if the basic nature of the French procedural system is reconsidered. It has to be remembered that the inquisitorial procedure is not so concerned with the personalities involved in a case. Rather, this system is focused on the investigation of the case at hand. Ideally, the court formulated a verdict based on this investigation. Any defense for the accused is only incidental, and was in place (it would seem) to provide the court with more information. In many respects this faceless form of justice removes the human equation from the procedure, and replaces it with information in the *dossier*. In this vein the *faits justificatifs* become very important as they presented the court with a solid opportunity to gather more

¹⁴⁵Ibid., 258.

¹⁴⁶Ibid., 261.

evidence. Once this avenue was explored the court simply moved on to the next phase of the trial.

Once again the process hinged on the recommendation of the *procureur*. Only at this point his decision carried potentially severe consequences for the accused. If the information was still lacking the accused might have been released unconditionally or conditionally. As was previously discussed, a conditional sentence did not carry with it unquestioned innocence. If, however, the *procureur* found enough information in the *dossier*, the process then had the potential to turn towards the dark phase of torture.

Before any defendant was subjected to the rigours of torture they were summoned before the court for another interrogation. "L'accusé est amené en la chambre du Conseil, & estant assis sur la sellette, Monsieur le Lieutenant Criminel l'interroge sur les faits resultants des charges & informations."¹⁴⁷ Though the nature of the interrogation was clear, they reinvestigated the *dossier* with the prisoner present, their intentions were somewhat clouded. It may be speculated that the court was attempting to ensure that the proper procedures were followed, and that the information in the *dossier* merited the severe consequences to follow. Further, the court was looking to have the accused confess to the offence. Indeed, this does not seem out of place in a system that rigorously search for the truth. Further, as the entire proceeding was recorded in the *dossier*, it might appear that this step was an attempt to guarantee that no in discrepancies were raise on appeal - if one was initiated. Once the interrogation was complete the prisoner was returned to prison to await an announcement of the *rendez-vous* with the torture chamber.

Though torture was available to the courts as a means of extracting more information, its use was severely regulated and its forms greatly varied. John Langbein presents a variety of forms of torture used during this period. Whether the torturer applied thumbscrews or the rack the objective was always the same; to extract from the subject

¹⁴⁷*Ibid.*, 265.

information that would normally not be volunteered. Despite the variety of possible forms of torture, Camus makes mention of only one—the ordeal by water. Curiously, however, he acknowledges the fact that the types of torture varied throughout the kingdom. “Le genre de la torture est different en diverse Provinces, et dépend de l’ordonnance du Juge selon la grandeur du crime, & la qualité ou disposition de l’accusé.”¹⁴⁸ As Langbein discussed, and as Camus mentions, there was no standard regulating the type of judicial torture to be applied in any given case. This variation seems to have worked against the accused as they could not have been certain what rigours they were to endure; this situation was especially daunting to an accused who did not reside in the region where an offence was committed.

Camus does prescribe in detail the method of torture used in Paris. “À Paris on donne la question ordinaire & extraordinaire avec de l’eau. . . .”¹⁴⁹ This focus on the method used in Paris is interesting as the *Parlement de Paris* was regarded as the highest court in France.¹⁵⁰ Perhaps, Camus realized that the manual he produced could be encumbered with a discussion of all the types of torture in use in France at the time. What is interesting about his discussion of the ordeal is his detailed description of its application. His description merits full citation.

après l’accusé a été étendu sur un banc, & attaché par les bras & jambes à des boucles, anneux[sic] de fer, avec des cordes, & que son corps ausquels les pieds & les mains sont attachés. On appelle question ordinaire passer un treteau sous les cordes qui attachent les pieds de l’accusé, qui fait une plus grande extension du corps, & en cet estat luy faire boire quatre potées d’eau. . . Et question extraordinaire passer un treteau plus haut sous les mesme cordes, & faire boire à l’accusé quatre autres potées d’eau . . . dans le temps d’hyver, l’on se sert d’une autre espect de torture, comme de

¹⁴⁸Ibid., 268.

¹⁴⁹Ibid., 268.

¹⁵⁰See Chapter II on the structures of justice for a detailed discussion of the hierarchy of courts in France in the late seventeenth century.

brodequins, etc. . .¹⁵¹

The previous passage is particularly revealing for several reasons. First, Camus provides an uncharacteristically candid insight into the process of the ordeal. Not only does this point to the importance of the event, it also gives one indication of its severity. Another interesting point is that Camus highlights the difference between torture for an ordinary question and torture for an extraordinary session. Though the physical difference is only a matter of a more severe stretching of the limbs, for those enduring the pain it was surely a significant change! Third, he prescribes that a different type of torture be applied in the winter. He is not clear, however, as to exactly what new ordeal should be applied; he only recommends that the court turn to a different method. Furthermore, it is also not clear whether this other method was any more lenient than the ordeal by water. It may be supposed that this was an attempt by Camus to present some kind of reprieve in difficult seasons. Finally, the text offers a unique passage that stands apart from the rest of the manual. Where most passages lack character and vivid descriptions, this one does not. This is due, in large part, to the nature of the material being discussed. The application of torture was a serious affair. The need to thoroughly describe its use, therefore, tended to underline the unique character of the event. In no other stage of the process did the prisoner risk experiencing real physical harm. The desire to standardize the application of this particular type of torture may be one of the driving forces behind Camus' extensive description.

It should be very clear at this point how severe the application of torture was in seventeenth century France. The procedures associated with torture also tend to mirror the description given by Camus. Though it was regarded as another method of gathering information, the application of torture required a preponderance of evidence against an accused criminal. The Ordinance of 1670 held that certain standards be met before torture

¹⁵¹Camus, Stile Universel, 269

was used. “Que le crime dont on se plaint soit constant, qu’il y ait preuve considerable, que le preuve ne soit pas suffisante, et que le crime merite la peine de mort.”¹⁵² Clearly, these points do not exist independently of one another. Rather, for a defendant to enter the torture chamber, all four of the criteria had to be met. These strict rules were intended, it would seem, to prevent courts from using torture as anything but a last resort. Its use was to confirm and support other pieces of evidence, not to provide the basis of a conviction. Indeed, the standards tend to reflect this notion. Studies on the subject of torture reveal that the practice was rarely responded to, and was the subject of many appeals to the *parlement* of Paris. The Study by Soman may reflect that the ordeal was more of a threat than anything else. This does not negate the power of this phase to induce an accused to confess.¹⁵³

Even if an order for torture demonstrated that the standards were met, the application of torture was not automatic. The ordinance requires that all orders for torture be approved by the royal courts.¹⁵⁴ “Les sentences de condamnation à la question ne pourront être exécutées qu’elles n’aient été confirmés par arrêt de nos cours.”¹⁵⁵ This allowed the accused an opportunity to appeal the judgement.¹⁵⁶ This step also allowed the courts to ensure that the application of torture was both merited and needed. Once the judgement was approved the court clearly stated on what level the torture was to be

¹⁵²Camus, Stile Universel, 269.

¹⁵³ See Soman, criminal jurisprudence in Ancien Régime France.

¹⁵⁴This would seem logical as few other courts could impose a sentence of death.

¹⁵⁵Ordinance of 1670, Tit XIX, Art. 7.

¹⁵⁶Obviously the fear of enduring torture was enough for some defendants to appeal the decision. See Soman, Criminal Jurisprudence in Ancien Régime France on the rates of successful appeals to the *Parlement* of Paris.

applied. “Arresté que l’accusé sera seulement appliqué à la question ordinaire.”¹⁵⁷ This specific restriction seems to have depended on the case at hand. Camus offers an example where the court was given *carte blanche* to discover the truth of the matter. “Nous ordonnons que l’accusé sera appliqué à la question ordinaire & extraordinaire pour apprendre par sa bouche la vérité d’aucuns faits resultants du procez. . . .”¹⁵⁸ An order such as one allowed the court to increasingly apply torture until the truth was proclaimed by the subject. Not only does it point to the powers of the court in pursuing the case, it also highlights the goal of any torture session; to uncover the truth from the mouth of the accused.¹⁵⁹ With the truth in mind the court then proceeded to administer torture.

Before the accused were subjected to the ordeal of torture they were interrogated by the magistrate. “Il ne faut interroger, après luy avoir fait prester le serment de dire vérité, & luy faire signer son interrogatoire, sinon faire mention de son refus.”¹⁶⁰ This interrogation served two purposes. First, it seemed to provide the court with a fresh basis for their questions in the torture chamber. With a written record of this encounter the court officers could compare statements and determine the accuracy of the subject’s confessions or defenses. Second, this interrogation was probably used by the court to provide the accused with one last opportunity to confess and avoid the terrors of the torture chamber. Whether it was possible to do so at this point is unclear. But the courts search for a confession could be satisfied, thus avoiding unnecessary pain for the accused.

¹⁵⁷Camus, Stile Universel, 270.

¹⁵⁸*Ibid.*, 271.

¹⁵⁹The effectiveness of torture as a tool to extract the truth is, and was, questionable. There was always as much potential for an innocent man to confess under duress as there was for a guilty man to do the same. See Langbein, Torture and the Law of Proof.

¹⁶⁰Camus, Stile Universel, 272.

If no confession was provided the *question* was set to occur without delay.

A session of torture was not a private affair between the accused and their tormentor. Rather, a host of court officials were present in order to validate and record the event. This did not, however, negate the secretive quality of the episode. “La question doit estre donné[sic] en presence du Rapporteur & l’un des autres juges qui feront leur procez verbal de l’état de la question, & des réponses à chacun article de l’interrogatoire.”¹⁶¹ With another judge in the room the court was looking to accurately record the proceedings. Further, this requirement protected the integrity of any evidence offered in the session. It is important to note at this point that it was absolutely necessary that everything said by the accused was recorded.¹⁶² Finally, the court was only allowed to question the accused as to the facts of the case. “Il faut interroger l’accusé sur les faits resultants du procez, et non d’autres. . . .”¹⁶³ The jurists seemed concerned with the possibility of torture sessions being used indiscriminately. Further, the possibility that the court desired to question the accused about other crimes not mentioned in the case was strong enough to warrant a prohibition of all questions except those directly related to the case at hand. This did not, however, prevent them from recording the statements and using them in another case.

The actual ordeal, as described by Camus, was brief. Despite the sample *procez verbal* of a torture session, these occurrences must have been anything but routine. The ordinary *question* comprised of giving a stretched out subject up to four pots of water. “Après quoy le questionnaire a faire boire un pot d’eau a l’accusé qui a dit . . . au deuxième pot a dit . . . au troisième pot a dit . . . au quatrième pot a dit . . .”¹⁶⁴ With four

¹⁶¹Ibid., 273.

¹⁶²Ibid., 275.

¹⁶³Ibid., 275.

pots of water in their stomach the accused had survived the *question ordinaire*. If the session was restricted to only the ordinary phase the accused was read the *procès verbal*, and asked to verify the truthfulness of the statements. The court then, theoretically, proceeded to check all of the facts stated in the confession. If the accused were to suffer through the *question extraordinaire* the process was repeated; only they were stretched harder and given more water to drink.¹⁶⁵ Once the session was complete the same steps of verification were taken. The entire process was then communicated to the court and entered into the dossier. Our own sense of revulsion makes it difficult to see torture as a simple tool to acquire information for a case. It was, without doubt, a difficult stage of the process due to its emphasis on pain and suffering. As such, jurists realized the potential danger of the abuse of torture, and advocated the use of torture only as a means of last resort.

At this point in the procedure the process of accumulating evidence against the accused had effectively ended. The court now turned to analyzing the information in order to arrive at a judgement. This step was regarded as seriously as any other in the process. In fact, the Ordinance of 1670 called upon the courts to come to a decision quickly. “Enjoignons à tous juges, même à nos cours, de travailler à l’expédition des affaires criminelles, par préférence à toutes autres.”¹⁶⁶ With an emphasis on a speedy judgement the courts seemed to be cognizant of the position of the accused awaiting their fate in prison. Upon initial consideration this requirement seems to be a very considerate attempt at ensuring that the prisoner did not suffer in the prisons needlessly. But the courts were also trying to ensure that the prisons and the machinery of justice were not bogged down with prisoners awaiting a decision. Regardless of the intention of this

¹⁶⁴Ibid., 275.

¹⁶⁵Ibid., 276-277.

¹⁶⁶Ordinance of 1670, Tit XXV, Art. 1.

requirement, the magistrate heeded the advice and proceeded with the processes of judgement.

One of the most important phases of judgment was the *instruction*. Simply put, this was the process of informing the rest of the magistrates as to the details of the case. Major cases, it should be remembered, were decided by a panel of at least seven judges. The process of *instruction*, therefore, was vital to rendering a verdict. As such, there existed no condition that could prevent the *instruction* from occurring. “Il sera procédé à l’instruction et au jugement des procès criminels, nonobstant toutes appellations, même comme de juge incompetent et récusé: et si les accusés refusent de répondre sous prétextes d’appelations, le procès leur sera fait comme à des muets volontaires jusques à sentence définitive.”¹⁶⁷ This stage was more than a mere formality. If, for example, there lacked sufficient information in the *instruction* the whole process could be restarted. “Les procez criminels pourront estre instruits & jugez encore qu’il n’y ait point d’information. . . .”¹⁶⁸ Not only did this ensure that the court was given enough information to make an appropriate decision, but the *instruction* also tended to weed out vexatious suits and false charges,(if they had not been discovered already). The only condition imposed on the judges revisiting a process was that of a death sentence in the offing. “Ne pourront estre jugez de relevée, si Messieurs les procureurs du Roy, ou ceux des seigneurs y ont pris des conclusions à mort, ou s’il écheoit une peine de mort naturelle, ou civile, des Galères, ou de bannissement à temps. . . .”¹⁶⁹ If these sentences were recommended, all the judges had to do was refer to the evidence to see if the sentence recommended by the *procureur* was appropriate. Furthermore, these sentences corresponded with the standards for torture. It

¹⁶⁷Ibid., 283.

¹⁶⁸Ibid., 284.

¹⁶⁹Ibid., 284.

is likely, therefore, that the *dossier* held a full confession from the accused and sufficient evidence for a conviction. Once the *instruction* was complete the court then handed down a judgement.

A judgement handed down by the court was presented and signed by at least seven judges. “Les juges en dernier ressort se donneront par sept juges au moins, & si ce nombre ne se rencontre dans la siége, ou si quelques-un sont absens, recusez, ou s’abstiennent pour cause jugée legitime par le siége, il sera pris des graduez. . . .”¹⁷⁰ This minimum number of judges reflected the severity of the affair. When dealing in matters of life and death, personal liberty, and potential financial ruin it was necessary to have the full weight of the court behind the decision. Not only did this prevent most miscarriages of justice, it may have also protected the individual judges from any potential community retribution for an unpopular verdict.

As part of any death sentence the judges could order that the convict be subject to torture. This type of torture—*la question préalable*— was used by the court to reveal any accomplices. “Il pourra estre ordonné par le jugement de mort que l’accusé sera préalablement appliqué à la question pour avoir révelation de ses complices.”¹⁷¹ Though the court did not intend to use torture as a part of the punishment, it is difficult to avoid the conclusion that this form of torture was anything but an integral part of the sentence. Nevertheless, the court was trying to use this opportunity to completely resolve a case. Further, this was their last chance at gathering names in a case where the evidence supported the notion that there existed more than one offender. This was especially important if the court was also trying other suspects involved in a case. If, however, the convict refused to reveal his or her accomplices, they could be forced to confront their

¹⁷⁰Ibid., 285.

¹⁷¹Ibid., 285.

accomplices in open court. “[R]evele aucuns de ses accomplices qui soient arrestez sur le champ, la confrontation pourra estre faite, encore que le Prevost n’ait déclaré competent pour connoistre des complices; sera tenu neamoins de faire après juger sa competence. . . .”¹⁷² Though the case against the convict was complete, the court may have had other cases to try and used this tool in order to accumulate still more information for those other cases. Beyond this, however, the court had no other opportunity to gather information.

As the court continued with judging and sentencing they had a wide range of sentences available to them. The only restriction imposed on the court at this point was in relation to the *curateurs*.¹⁷³ Because a *curateur* was simply a representative of the accused party he was immune from sentencing. “Dans le dispositif du jugement définitive contre l’accusé qui sera sourd ou muët ou ensemble sourd et muët, il ne fera fait mention que de l’accusé, & non de son curateur.”¹⁷⁴ The *curateur* was not, however, immune from the potential infamy of being linked to the defendant. In a social context where honor and standing ruled, this measure was an attempt to protect those providing a service to the court.

Camus also presents the possibility of a *curateur* representing a whole community in a case. When a case against a whole community reached sentencing, some interesting variables are raised. Quite simply, it was impossible to impose a physical sanction against the whole town. As such, the court turned to the only possible avenue open to them - financial punishments. “Les condamnations contre les commnauitez, corps, ou

¹⁷²Ibid., 286.

¹⁷³*Curateurs*, it should be remembered, were appointed by the court to represent those defendants who could not communicate to the court due to some physical impairment. They also stood as a representative for a community of defendants, and as a representative of a deceased defendant.

¹⁷⁴Camus, Stile Universel, 287.

compagnies ne pourront estre que de reparation civile, dommages, & intérêts envers les parties, et d'amende envers le roy, privation de leurs privileges, & de quelque autre punition qui marque publiquement la peine qu'elles auront encourue par leur crime."¹⁷⁵

These types of sentences, inevitably, affected most citizens in a given community. Any significant fine was likely to have been absorbed through increased taxes, thus placing a distinctly individual responsibility on most people in the area.

As for the sentences pronounced against individual criminals, the potential harshness ranged from a simple fine to death. Camus provides a list of sentences ordered by severity. The range of punishments available to the judges allowed them some latitude in sentencing. As there was no explicit formula for sentencing, the judges were expected to choose the appropriate punishment that suited the offence (and offender) in question. As Camus presents them, the most severe punishment was death, then perpetual sentence in the gallows, then perpetual banishment, then a milder form of torture, then honorary amends, and finally temporary banishment.¹⁷⁶ Within each of these sentences the court often prescribed specific instructions that pointed to the nature of the offence. A death sentence, for example, often carried with it a detailed description for additional punishment. A convict might have been sentenced to be burnt, hanged, or mutilated before or after death on the scaffold.¹⁷⁷ Due to these variations in sentences it is clear that the court was aiming to have a specific sentence handed down for a specific type of offence. A blasphemer, for example, might be sentenced to the following punishment:

Nous avons le dit B . . . déclaré deuëment atteint et convaincu d'avoir proferé des blasphèmes contre dieu, la sainte vierge, & les saints; pour reparation de quoy le condamnons de faire amende honorable, nud en

¹⁷⁵Ibid., 287.

¹⁷⁶Ibid., 288-289.

¹⁷⁷Ibid., 289-293.

chemise, la corde au col, tenant en ses mains une torche de cire ardente, du poids de deux livres au devant de la principale porte, & entrée de l'église de . . . où il sera conduit par l'exécuteur de la haute justice, dans un tombereau servant à enlever les immondices de la ville, dira que méchamment il a blasphémé contre dieu, la sainte vierge et les saints, dont il se repent, & en demande pardon à dieu, au Roy & à justice. Ce fait aura la langue coupée par le dit exécuteur au devant d'icelle Eglise; & ensuite mené dans le même tombereau en la place de . . . où il sera pendu & étranglé, jusqu'à ce que mort s'ensuive, à une potence que sera dressé en la dit place, son corps mort jetté au feu, avec son procez, & réduits en cendres qui seront jettées au vent. . . .¹⁷⁸

This detailed account presents many interesting facets of the procedure of punishment. First, all of the death sentences required that the convict appear before the church in a long white shirt. This public display of confession symbolizes the role of the church in the affair. Though the right to life and death resided with the King, the church still acted as the spiritual representative of God. Furthermore, when convicts confessed their offences they publicly acknowledged their responsibility for the crime. Certainly, the court had already determined this fact through the trial, but it was important for the convict to do so as well. Finally, when the court prescribed that the body be burned once dead, they were effectively, and symbolically, erasing the person from existence.¹⁷⁹

Beyond the many punishments available to the court there was the possibility of an acquittal. Though it was unlikely that such a decision was reached after a trial had lasted into the extraordinary phases, the possibility was still present. Further, the only mention of an acquittal in both the jurist's commentaries and in the Ordinance of 1670 was in relation to false charges. For those that pressed false claims the court left the possible punishment open. "Les accusateurs & dénonciateurs qui se trouveront mal

¹⁷⁸Ibid., 290-291.

¹⁷⁹Peter Spierenburg's thesis on public executions does well to explain many of the intricacies and symbols behind public executions. Further, his work The Spectacle of Suffering (Cambridge: Cambridge University Press, 1984) offers some insightful information as to the governmental motives for using public displays of justice.

fondez, seront condamnez aux dépens, dommages, &intérêts des accusez, & a plus grandes peine, S'il y échet; ce qui aura aussi lieu à l'égard de cuex qui se seront rendus parties civiles. . . ."¹⁸⁰At the very least, false accusers were forced to pay the defendant for the claims, and cover the costs of the trial. Other possible hardships, it would seem, were considered based on the severity of the accusation and on the social standing of those involved. As sentencing and judging came to a close the focus of the court shifted to dealing with the possibility of an appeal.

For a person convicted of a crime there existed only one possible avenue of judicial escape—appeal. An accused could present an appeal at just about any interval of a case. It has to be supposed that the most common occasion for submitting an appeal was after a judgement was rendered. Regardless of when an appeal was presented, all appeals were received by the royal courts. This effectively removed the power of judgement in these cases from the non-royal and *seigneurial* courts, and gave it to the system of royal courts instead. “Toutes appellations de sentences préparatoires, interlocutoires et définitives, de quelque qualité qu’elles soient, seront directement portées en nos cours, chacun à son égard, dans les accusations pour crimes qui méritent peine afflictive, . . .”¹⁸¹ The higher royal courts, then were the only ones to hear the most severe cases. Due in large part to their experience and the social standing of the sitting judges, these courts used this jurisdiction as an exertion of their authority and power.

Once an appeal was presented the case in question did not automatically grind to a halt. Quite the contrary, if an appeal was presented in the middle of a case the court could still proceed on certain matters. “Aucune appellation ne pourra empêcher ou retarder l’exécution des décrets, l’instruction et le jugement.”¹⁸² If these steps were halted then the

¹⁸⁰Camus, Stile Universel, 286.

¹⁸¹Ordinance of 1670, Tit. XXVI, Art. 1.

entire system of justice would have been bogged down with the appeals of defendants attempting to stave off a trial. If a specific aspect of the investigation was halted the court required significant reason to do so. It was impossible for any such action to be taken without having read the charges and the *dossier*. For reasons of efficiency the process continued while the appeal was considered.

When the court presented its decision, it did so only after considering the *dossier* of the case, and after interrogating the accused. Their decisions either supported the appeal or denied it. Quite often it was a matter of simply confirming the previous sentence.

Veu par le cour le procez Criminel extraordinairement fait et instruit par the Prevost ou son Lieutenant Criminel, à la requeste de A . . . demandeur et accusateur, le sustitud du procureur Generale de Roy, contre B . . . accusé, prisonier es prisons de la conciergerie du palais, appellant de la sentence contre luy arrest, condamné l'intimé en ses dépens dommages et intérêts, et aux dépends, tant des causes principale que d'appel.

This particular example demonstrates how an appeal only delayed the fate of the accused. Another possibility was that the accused won the appeal and was set free. An *arrest D'élargissement* released the prisoner from jail based on the facts of the case. The decree freeing the prisoner contained only a mention of the reasons behind the decision. Yet, the information provided there was ample compared to the information contained in a decision against an appellant. Similar amounts of information were offered if the court was deciding an aspect of a trial that was still in motion. It was possible for defendants to appeal almost any decree issued by the court. A *decrèt de prise de corps* might be appealed as being too harsh. The appeal court could then decide on that one aspect of the trial.

The importance of appeals is clear when they are viewed as safety measures in a large system of justice. The procedures mirrored those of other trials in the courts. It was

¹⁸²*Ibid.*, Tit XXVI, Art. 3.

certainly possible for an accused criminal to challenge certain aspects of a trial in progress. Furthermore, it was possible for a convicted criminal to challenge an entire case. The system of appeals, however, did not guarantee a reprieve for every applicant. If an attempt to appeal failed, the convict faced the same prior sentence, no lighter nor harsher.

The last step in any criminal process was the execution of any sentence pronounced by the court. Under this interpretation the execution of a sentence could hold a positive implication as well as a negative one. As we discuss this final stage in the process it has to be noted that a range of possible outcomes was possible at this time. Regardless of the outcome, however, each execution held certain common characteristics. First, the defendant was supposed to be notified of the sentence within twenty-four hours of the pronouncement. “Les greffiers, même des cours souveraines, & ceux des seigneurs, sont tenus de prononcer aux accusez les arrêts, sentences, & jugements d’absolutions ou d’élargissement le même jour qu’ils auront été rendus, . . .”¹⁸³ Not only did this lessen the stress of not knowing for those found guilty, but it was especially relevant to those prisoners who were freed by the court. Unless an appeal was filed the accused was to be released from prison immediately. “[S]’il n’y a point d’appel par Messieurs les Procureurs du Roy ou ceux des seigneurs dans les vingt-quatre heures, ils doivent mettre les accusez hors des prisons.”¹⁸⁴ Not all innocent judgements came from the original court. In some instances this sentence originated from an appeal. Nevertheless, the procedures clearly stated that the prisoner was to be set free and no one was to prevent the release of the defendant from the prison. “Les geoliers, greffiers des geoles, guichetiers, cabaratiens ou autres ne peuvent empêcher l’élargissement des prisonniers,

¹⁸³Ibid., 325.

¹⁸⁴Ibid., 325.

pour frais, nourriture, giste, geolage, ou aucune dépense.¹⁸⁵ Clearly there was some concern as to the actions of these prison officials as they were specifically targeted in the ordinance. It is not unimaginable that some victims disagreed with the court's appraisal of the charge and attempted to bribe a jail keeper in order to keep the accused imprisoned.

If an accused was convicted of a crime, then the execution of the sentence could have a much more literal interpretation. As was mentioned previously, the range of sentences was large. A convict might face any number of possible punishments. The execution of sentences, as presented by Camus, can be clearly organized into two categories; financial and corporal. Though there were some procedures common to all types of sentences, there were also some procedures that were specific to a particular punishment.

Those sentences that carried a financial payment were executed based on the amount in question. As was discussed earlier, the hierarchy of courts was divided along jurisdictional lines. A key factor in deciding jurisdiction was the consideration of the severity of the offence in question. If an offence mandated a large financial payment then the judgement was likely rendered by a higher court. Minor cases that carried relatively small fines could be handled at any level. The same rules applied when the sentences were executed. A case tried in a *seigneurial* court had a ceiling of forty *livres*.¹⁸⁶ For those royal jurisdictions not directly linked to the *Parlement* the financial limit of an executable sentence was slightly higher. "Dans les juridictions Royales qui ne ressortissent nuëment au Parlement, si elles n'excederont cinquante livres envers la partie, et vingt-cinq livres envers le Roy."¹⁸⁷ If a case was tried in a *bailliage* or *sénéchaussée*

¹⁸⁵Ibid., 326.

¹⁸⁶Ibid., 327.

where there existed a presidial seat the limit was again higher. “Dans les bailliages et sénéchausées où il ya Siège Présidial, siège des duches et Paires, et autres ressortissants aux cours de Parlement, cent livres envers le partie, et cinquante livres envers le Roy.”¹⁸⁸

As the jurisdictions grew, so did the limits of executable fines.

Any fine paid due to a legal action was subject to a tax. At least one tax was paid to the king. When the fine was pronounced by the court another amount was also adjudged to be paid to the king. When the sentence was executed this amount was collected by a receiver. “Les receveurs des amendes se chargeront des sommes qui seront adjudgées au roy par forme de consignation, sans frais n’y droits.”¹⁸⁹ This amount was paid to the King for having provided the mechanisms of justice that tried the case. In those cases where a fine was executed prévôtally the tax was paid to a *rapporteur*. “Les dépens adjudgées par le jugement Prevôtal seront taxer[sic] par le prevost en pressence du rapporteur, qui n’en pourra pretendre aucuns droits. . . .”¹⁹⁰ Similar to a royal fee, this amount paid the *prevost* for his judicial services. Once a fine was paid the case was closed and the judgement carried no residual effects. “L’amande payée par provision en la manière cy-dessous, ne portera aucune note d’infamie, si elle n’est confirmées par arrest.”¹⁹¹ In legal terms the incident was forgotten.

Those sentences prescribing corporal punishment demanded different procedures. Most executions were to take place in the locale in which the case was judged. Even those cases decided on appeal in another jurisdiction were to be executed in the place of original judgement. “Si les arrests rendus sur l’appel d’une sentence portant

¹⁸⁷Ibid., 327.

¹⁸⁸Ibid., 327.

¹⁸⁹Ibid., 327.

¹⁹⁰Ibid., 326.

¹⁹¹Ibid., 328.

condamnation de peine afflictive, les codamnez soient renvoyer sur le lieux. . . .”¹⁹² The court that presented the appeal, however, could order the sentence to be executed in that jurisdiction instead. “ Et pour aucune cause et consideration,ordonne que l’execution du present arrest sera faite en la place de grève de cette ville de Paris. . . .”¹⁹³ The motives for ordering such a change depended on the information in the appeal. In some instances it may have been the locale which was appealed, thus prompting the change. Once the location was finalized the execution of sentence proceeded.

The only restriction of a corporal sentence was in relation to a pregnant woman. If a convict claimed she was pregnant and could not submit to the sentence the court took steps to verify her claim. “Si quelque femme devant ou après avoir été condamné à mort; paroit ou declare estre enceinte, les juges doivent ordonner qu’elle sera visitée par matrone..”¹⁹⁴ If the claim was true then the execution of the sentence was delayed until after she delivered the child. Otherwise, no other possible event could delay the convict’s appointment with the executioner.

When a sentence was pronounced so too were the details of how it was to be executed. Quite often, as was previously mentioned, particular offences evoked specific punishments. There were, however, certain procedures that were common to all sentences. First, those who were condemned to death were allowed access to a priest. “Le sacrement de confession sera offert aux condamnez à mort, et ils seront assistez d’un ecclesiastique jusques au lieu du supplice. . . .”¹⁹⁵ The religious implication here is clear. The priest not only performed a judicial service by receiving another confession, but he

¹⁹²Ibid., 322.

¹⁹³Ibid., 323.

¹⁹⁴Ibid., 331-332.

¹⁹⁵Ibid., 332.

also served a spiritual one as well. Another procedure common to all executions was the *testament de mort*. This was, quite simply, all of the recorded statements made by the convict prior to the execution. “L’executeur de la haute justice nous auroit avertir que le dit B . . . souhaitoit nous faire quelques declarations pour la décharge de sa conscience. . . .”¹⁹⁶ Not unlike a confession, these statements were recorded by the *greffier*. Further, all other statements, prepared or spontaneous, made by the convict up to his or her death were also included in this report. The record was then included in the *dossier* as a type of epilogue. Finally, the executioner proceeded to carry out the sentence as prescribed by the judgement. Once the gruesome task was complete the executioner filled out a *procès verbal* for the court. There he described the process of the entire execution. This entry in the *dossier* served to provide closure for the case. Not only did this *procès verbal* confirm the events of the execution, but it also confirmed that justice was completely and justly rendered.

And so ends the last possible phase of a criminal process in seventeenth century France. The procedures mentioned here represent the many possible avenues for a case . Not every case exhausted the plethora of options we have covered here. If these procedures are considered alongside the system of justice and the social structures of the period a much clearer picture of justice emerges.

¹⁹⁶*Ibid.*, 333.

Perhaps it is most appropriate to conclude our discussion of France with a brief recapitulation and a consideration of the standards of proof applied to the whole process. This discussion has focused thus far on the basic criminal procedures that existed in late seventeenth century France. It should be clear that the procedures in place at this time were developed over years of debate, experience, and through trial and error. When the Ordinance of 1670 was presented it outlined the basic processes for prosecuting criminals. Its importance is all the more clear when it is realized that the procedure guided every aspect of the “process of criminalization.”¹ Having outlined the procedures in France arising out of the Criminal Ordinance of 1670, some important observations merit further discussion.

The criminal procedure developed at the end of the seventeenth century in France was lengthy and complicated. The elements of secrecy, the preponderance of paper, the forces which drove the process, and the notions of proof are all key aspects of the French criminal process that require further discussion. It is hoped that by concluding this discussion on French criminal procedure in this manner that the reader will be able to keep some of these concepts in mind, and consider them in the ensuing chapters.

One of the clearest principles of the entire French process is that of secrecy. The deposition of the witnesses, the interrogation of the accused, and even the application of torture were all ideally conducted in secrecy. In fact, almost every phase of procedure was dominated by this characteristic. Certainly, in smaller communities the element of secrecy was reduced, but it was still maintained as an ideal. This trait was not a new development; its roots can be traced back to Roman-Canon procedures and to the

¹This phrase, used by Greenshields aptly describes the effects of a trial. See Greenshields An Economy of Violence.

Ordinance of Villers Cotteretts in 1539.² This tenet was so rigorously followed that the Ordinance of 1670 even reminds those present at an interrogation of the element of secrecy. “Défendons aux greffiers de communiquer les informations et autres pièces secrettes du procès.”³ The motivations for this veil of secrecy are two-fold. First, when witnesses were deposed in secret it was thought that they were more likely to provide objective and truthful testimony. With the elements of their depositions kept private, witnesses were less likely to be subjected to potential social repercussions outside of the court room. The second motivation was the protection of the evidence. The deposition that was provided freely in secret was added to the *dossier*, thus being revealed only when absolutely necessary. It was also thought that the element of secrecy would protect the witness from being influenced by outside sources. As the documents were compiled in the *dossier*, they became the heart of the case.⁴ Even the contents of the entire *dossier* were kept secret, available only to those judging the case. By keeping the facts of a case secret the court was able to accumulate information that was not tainted by outside influences. The element of secrecy worked to insulate the process from the effects of social relationships and influences. Witnesses, whose depositions were evaluated for objectivity, could give information without worry of social retribution from those against whom they testified.

The contents of the dossier point to another feature of this inquisitorial system; the preponderance of paper. A basic trial, as has been outlined here, depended on a mass

²Langbein, Prosecuting Crime in the Renaissance, 159.

³Ordinance of 1670, Tit. IV, Art 15,

⁴Esmein, A History of Continental Criminal Procedure, 220. It should be noted that absolute secrecy was an ideal. As with all ideals it is impossible to conceive of it being maintained in every case. There must have been instances, especially in small rural communities, where aspects of a trial or deposition were not kept secret.

of paper.⁵ The entire case was argued through a series of reports and depositions. The preponderance of paper seems to be a manner of protecting the integrity of the evidence. With every word, decree, and investigative venture recorded, the court essentially collected the evidence and filed it appropriately. With this mass of information the magistrate calculated a judgement. In a system that added up the proofs, a *dossier* and its contents were required in order to arrive at an appropriate judgement. Finally, it should be remembered that this was an inquisitorial process. As such, the reams of paper were the result of an inquisition or investigation into alleged offences. Any investigation produced a certain amount of information. Unlike other procedures where this was less of a concern, the inquisitorial process produced a trial on paper. Those officials who worked to push a trial through the various stages depended on this ream of paper to make their decisions. The mass of paper, as prescribed in the Ordinance of 1670 and in the jurist commentary, was a feature of this system that clearly reflected the social character of the process. By emphasizing literacy the procedures may have placed many poorer litigants at a distinct disadvantage and favoured educated parties who knew how to read, write, and sign their names. This situation was, intentionally or not, a clear link to the social hierarchy in *ancien régime* France. The privileged few, it would seem, maintained their position even in the legal arena.

When the entire process is considered it is interesting to notice what roles certain court officials played in a trial. The immediate impression was that the magistrate was the master of the process. In many respects this is accurate. The magistrate pronounced judgements, issued decrees, investigated the charges, and even interrogated the prisoners. But, any analysis of the procedures also demonstrates that the *procureur du Roi* also played an important role. As each phase of the process closed it was the *procureur* who

⁵Lawrence Freidman, Crime and Punishment in American History (New York: Harper Collins, 1993), 30.

received the *dossier* and issued a conclusion based on the evidence. These conclusions, either preparatory or definitive in nature, provided the thrust behind the process. If a *procureur* decided that more information was needed, he issued a *conclusion préparatoire*. This effectively pushed a trial into the next phase. This responsibility granted the *procureur* a great deal of power over the fate of an accused person. This unique feature tended to pit the court and the *procureur* against a defendant. Regardless of the potential inequity, officials based their decision upon a basic standard of proofs presented in the *dossier*.

The mechanism of applying the law that has been the focus of our discussion to this point was grounded within the theories of proof that operated within the system of criminal procedure. A process of prosecuting criminals required some basis from which to convict. Without some means of weighing evidence the entire process would have been wasted. All cases, then, are comprised of a structure (the procedure), which processes information (proof), in order to arrive at a decision (judgement). The magistrate performed the role of accumulating and evaluating evidence based on the rules of procedure and theories of proof. The system of proof at work in our period can be traced back to Roman-Canon laws of proof that were developed over generations and refined for use in most European courts.⁶ Under this old system of proofs there existed three basic rules.

First, the court could convict and condemn an accused upon the testimony of two eye witnesses to the gravamen of the crime. Second, if there were not two eye witnesses, the court could only convict and condemn the accused upon the basis of his own confession. Third, circumstantial evidence, so called *indicia*, was not adequate basis for conviction and condemnation, not matter how compelling.⁷

These basic rules were applied in every case. In order to apply them, however, a system

⁶Langbein, Torture and the Law of Proof, 3-4.

⁷*Ibid.*, 4.

was devised that allowed the proofs to be calculated—thus removing the human element from the equation. One eye witness, for example, constituted a half proof. The value of each piece of evidence was measured, and the magistrate arrived at a judgement. Ideally, however, a confession would be obtained, thus meeting the burden of a full proof. Further cracks appeared in this theory when it was painfully discovered that criminals who would not confess could be set free.⁸ This standard of proofs soon passed into disuse as a new system of statutory proofs was developed.

As the system of statutory proofs was developed it gained in popularity due to its more scientific approach. “Its overwhelming emphasis is upon the elimination of judicial discretion, . . . the system of statutory proofs insists upon the objective criteria of proof.”⁹ These new standards are what can be found, in one form or another, at work in our period. The standards of proof in use during the late seventeenth century tended to be more responsive to the wide range of cases tried in the courts of this period. As a result, the calculation of proofs consisted of a consideration of new forms of evidence. “The whole of the methods of proof, considered in regard to their value, were divided into three classes, complete proofs, proximate presumptions, and remote presumptions.”¹⁰ In order for a court to condemn an accused of a capital offence, a minimum of complete proofs was required. This complete proof could be fulfilled by a variety of forms of evidence.

Just as the nature of crime varied from case to case, so too did the evidence. As such, the new system of proofs had to be flexible enough to meet this variety. Complete proof, then, could be obtained in at least three ways: by testimony, by written evidence,

⁸You will remember that any court lacking the necessary proof to convict a defendant was forced to release the accused.

⁹Langbein, Torture and the Law of Proof, 6.

¹⁰Esmein, A History of Continental Criminal Procedure, 258.

and by “proximate presumptions”. Any combination of these forms could lead to a conviction. Testimony and written proofs were used in the old system. The use of proximate presumptions, however, was significantly more innovative. Commonly referred to as circumstantial evidence, this form of information could not necessarily convict on its own. But it was more frequently used to verify and strengthen a case. “The confession from its nature cannot effect the condemnation to capital punishment; for that the concurrence of several other circumstances are necessary.”¹¹ The use of proximate presumptions was then brought into the realm of useable proofs in a case.

Many of the phases in the criminal procedure clearly took these rules of proof into account. The deposing of witnesses, the application of torture, and the reception of doctors’ reports (to name only a few) all relate to the methods of proof mentioned above. Indeed, almost every investigative gesture of the magistrate probably took these standards of proof into account. Furthermore, this explains the court’s concern with protecting the integrity of the evidence. Finally, this system of proofs did seem flexible. The procedure in question is much more than a simple calculation of guilt or innocence. Rather, as the magistrate uncovered the evidence in a case he was judging its value as the case progressed. The calculation did not simply disappear, but assumed a secondary role. This, in turn, negated the possibility of cases being judged summarily without care or consideration of the available evidence.

The Ordinance of 1670 and the commentary by *Monsieur Le Camus* outlined many unique features that demonstrate the importance of criminal procedure in *ancien régime* France. These documents reveal the importance of criminal procedure as a set of rules that regulated the application of the king’s legal will. These rules tended to provide clear links between the system of law, which represented the king’s authority, and the people of France who lived within the confines of a system of social classification known

¹¹Ibid., 263.

as the society of orders. The principles of the society of orders were so powerful that they permeated every aspect of life, including the king's law. In order to accommodate these principles, French jurists drafted procedures that upheld the ideals of a royal system of justice, and at the same time made provisions that accounted for social status and social relationships. Authors of the ordinance and the commentaries, as social beings, made this one of the prime features of the criminal processes used in *ancien régime* France. Although in a much different social context, the roles assumed by criminal procedure may be seen to be common to other systems of justice in this period like the system of procedures in use in Massachusetts in the early seventeenth century.

CHAPTER IV LIFE IN THE MASSACHUSETTS BAY COLONY

Life in the Massachusetts Bay Colony was characterized by a complex mix of cultural, intellectual, political, and religious influences. Settlers who migrated to the colony soon realized the force of these influences and the interrelationship among them. As with any complex society, these seemingly independent aspects of life frequently collided. The result was a society that melded religious and political factors, a political system that was characterized as much by its English influences as by its Puritan leanings, and a justice system that joined English traditions and elements of Puritan doctrine. The underlying tone to most aspects of life in the Bay Colony was one of struggle. Settlers struggled with their faith, with their English heritage, and with their place in the vast wilderness.

In terms of justice this struggle was quite evident. The colony's leaders, bent on creating a religious Zion in the wilderness, managed to superimpose a set of Puritan ideas on an English hierarchy of courts. Inevitable problems arose applying religious laws within a system of English courts. The link that joined these two elements of Puritan religion and English tradition was criminal procedure. More than a simple set of rules that guided the application of the law, criminal procedure provided the means by which a Puritan jurisprudence was combined with English ideas and institutions of justice, and applied to the Massachusetts Bay.

In order to understand the place of criminal procedure in the application of colonial justice it is necessary to present a complete discussion of those institutions that were most often related to the criminal processes in the colony. For the sake of clarity this discussion will be approached categorically. First, there will be a discussion of the

relevant social, religious, and political institutions present in Massachusetts. The focus will then shift to a discussion of the development of courts and laws that ruled in the Bay Colony. Finally, there will be a discussion of the criminal procedures that operated within the established system of justice. English and Puritan influences, though important and deserving of whole chapters unto themselves, will be discussed whenever it is clear that they played a significant role. The objective here is not to re-tell events that occurred in the colony, but to present a broad canvass of the social, judicial, and procedural life in the colony and thereby produce greater understanding of criminal procedure in Massachusetts.

The arrival of the Puritans in the new world signaled the beginning of a new society founded on religious ideals. The colonists, led by Governor John Winthrop, intended to form a community based on Puritan values. "For we must remember that we shall be as a city upon a hill, the eyes of all peoples are upon us; so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a by-word through the world."¹ These settlers were not only aware of the significance of their mission, but of the importance as well of firmly entrenching Puritan beliefs in the colony for their own benefit.

In order to secure a society based on Puritan values the colonial leaders were forced to blend their religious institutions with the common English heritage of the settlers. This blend was accomplished in a series of isolated communities where congregational and civic institutions worked hand in hand to ensure a conformity to recognized Puritan ideals. The ideal goal was one where the colonists inwardly accepted

¹John Winthrop, "A Modell of Christian Charity", in The Puritans, vol 1, rev. ed., eds. Perry Miller and Thomas H. Johnson, (New York: Harper and Row Publishers, 1965) , 199.

the precepts of the Puritan faith. In some instances this was achieved. But there were many examples where the town leaders turned to the coercive potential of congregational and civic institutions in order to bring about conformity.² These two pillars of town life,

²One of the most interesting problems of analyzing life in Puritan Massachusetts is the lack of available sources that detail the situation of non-Puritans in the colony. Even some historians attempting to understand the true nature of life in the colony have realized that some interpretations have unfairly focused on the Puritans in the colony. "The stereotype has arisen as a result of a tendency among historians of early New England, and particularly the intellectual historians who have dominated the field in the last generation, to limit themselves to the study of the writings of the articulate few, on the assumption that the public professions of ministers and magistrates constituted a true mirror of New England." Darrett Rutnam, "The Mirror of Puritan Authority," in Colonial America, ed. H.T. Lefler and O.T. Barck, (New York: MacMillan and Company, 1958), 6.

More recent historiography has been devoted to understanding the situation of non-Puritans in the colony. Virginia DeJohn Anderson's work, The Great Migration and the Formation of Society and Culture in the Seventeenth Century, (Cambridge, Mass.: Cambridge University Press, 1991), and David G. Allen's In English Ways: the Movement of Societies and the Transferral English Local Law and Customs to the Massachusetts Bay in the Seventeenth Century, (Chapel Hill, N.C.: University of North Carolina Press, 1984) have both presented studies that chronicle the travels of non-Puritans to the Bay colony. Inevitably, these studies are constrained by the type of sources that are available on this group, Philip Greven's Four Generations: Land, Population, and Family in Colonial Andover Massachusetts (Ithaca, N.Y.: Cornell University Press, 1970) also discusses the lives of non-Puritans through his treatment of land use in the colony. All of these works do not tend to shed light on the individual experiences of non-Puritans in the colony. It may be assumed that non-Puritan settlers who migrated to the Massachusetts Bay were forced to acquiesce to the Puritan notions of how a society was to be organized in order to achieve some measure of economic and political success. It may further be assumed that for the laboring farmers who were not accepted by the congregation their social position was not all that different than what they had left behind in England. The major change for these settlers was the manner in which they may have gained a social or political voice for themselves. In England, any possible social advancement was based on blood, acquiring land, and family ties. See William Notestein, The English People on the Eve of Colonization (New York: Harper, 1954); Lawrence Stone, Family, Sex, and Marriage in England, 1500-1800 (London: Weidenfeld & Nicolson, 1977); and Christopher Hill, Change and Continuity in Seventeenth Century England (London, Weidenfeld and Nicolson, 1974) for a complete discussion of these ideas. In New England any possible social advancement was based on a judgement of a statement of faith.

which were infused with Puritan ideals, clearly guided the day to day lives of the settlers.³

The basis of political and social activity in the colony was Puritanism. Not only did this faith dominate most facets of life in the Massachusetts Bay Colony, it also influenced the operation of religious and civic institutions. The importance of Puritanism in the colony cannot be overstated, as it inspired the religious and political leaders of the Bay Colony in all aspects of their undertaking and mission.

³The amount of scholarship devoted to the understanding of Puritan New England is impressive. "Maybe we already know more about the Puritans than some men should want to know." John Demos, "Review Essay," *History and Theory*, XI no. 2 (1972): 227. The impressive scholarship has inevitably led to a variety of schools of thought that was particularly critical of the colony. See Thomas J. Wertenbaker, *The Puritan Oligarchy: The Founding of American Civilization* (New York: Grosset and Dunlap, 1947), and James Truslow Adams, *The Founding of New England* (Boston: Little, Brown and Company, 1921). Both studies present Puritan society as coercive and difficult. By the mid-Twentieth century a new school of study developed that essentially 'humanized' the Puritans. Led by Edmund S. Morgan and Perry Miller this generation presented studies that depended on literary evidence and court records in order to paint a more sympathetic view. Following in their foot steps, the next generation of historians further uncovered a range of topics within Puritan life. Timothy H. Breen and Stephen Foster are characteristic of this genre. In their works they also favour a more cohesive outlook of the colony. See Timothy H. Breen, "The Puritan's Greatest Achievement: A Study of social cohesion in Seventeenth Century Massachusetts," *Journal of American History*, 60 1 (1973) : 5-22. More recent historiography has tended to lean towards a more objective outlook, one that allows for both sympathetic and critical of the Puritan social ethic. See Andrew Delbanco, *The Puritan Ordeal* (Cambridge, Mass.: Harvard University Press, 1989); Stephen Foster, *The Long Argument: English Puritanism and the Shaping of New England Culture: 1570-1700* (Chapel Hill, N.C.: University of North Carolina Press for the Institute of Early American History and Culture, 1991); Francis J. Bremer, *Shaping New England: Puritan Clergymen in Seventeenth Century England and New England* (New York: Twayne Inc., 1994); Jim Egan, *Authorizing Experience: Reconfiguration of the Body Politique in Seventeenth Century New England* (Princeton, N.J.: Princeton University Press, 1999); Francis J. Bremer, *The Puritan Experiment: New England Society from Bradford to Edwards* (New York: St. Martins Press, 1976); David D. Hall, *The Faithful Shepherd: A History of the Puritan Ministry in the Seventeenth Century* (Chapel Hill, N.C.: University of North Carolina Press, 1972); Stephen Innes, *Labor in a New Land: Economy and Society in Seventeenth Century Springfield* (Princeton, N.J. Princeton University Press, 1983). The overall impression of the vast array of historical literature is that this was complex society that incorporated the strict elements of scriptural law and a softer outlook on personal relationships.

The roots of Puritanism can be traced back to the early days of the English reformation under Henry VIII. Its concrete foundations, however, were not truly set until the Marian Exile. As Ronald J. Vander Molen suggests, it was the debate between Anglicans and Puritans while in Frankfurt in 1554 - 1555 that clearly delineated the two branches of English Protestantism “for it was in the ‘troubles at Frankfurt’ that the historical pattern of the Anglican - Puritan division assumed a form which was to have such a great impact on Western society.”⁴ Yet, once the basic tenets of salvation, scripture, educated ministers, and congregationalism were established Puritan theology did not remain static. Puritan theologians within the Massachusetts Bay Colony took these tenets and modified them to meet the demands of a new and covenanted community. But theological and devotional change did not mean that the Puritan leaders in the colony did not have a clear concept of their own faith. Winthrop, Cotton and others were all aware of what they were promoting. Based on the works of Williams Ames, William Perkins, John Preston, and others, New England Puritans firmly believed in a modified Calvinism called “federal theology”, which will be discussed shortly.

The first great debates in Frankfurt during the Marian Exile between Anglicans and Puritans highlighted one of the central pillars of the Puritan faith—scripture. “The Puritan thought the bible, the revealed word of God, was the word of God from one end to the other, a complete body of laws, an absolute code in every thing it touched upon. . . .”⁵ This interpretation of the use of the Bible was unpalatable for an Anglican. “He could not imagine that everything in the Bible, every incidental history, every minute circumstance, was intended by God to be universally and literally binding on all men.”⁶ In

⁴ Ronald J. Vander Molen, “Anglican against Puritan: Ideological Origins During Marian Exile” in Puritan New England, eds. Alden T. Vaughan and Francis J. Bremer (New York: St. Martins Press, 1977), 2.

⁵ Miller and Johnson, eds., “Introduction,” The Puritans, 1: 43.

many respects this use of the Bible, as an Anglican might have argued, was extremely limited in that the Bible may not have been the sole source of God's direction while incidental parts of the Bible were subject to various interpretations. This was clearly contrary to the Puritan use of the Bible; for them scripture was to be read by everyone so that they could discover, using reason and education, the truth hidden in the Bible. As the Puritan ministers in New England applied it to the colonists, scripture tended to offer solutions to most problems. Consider Cotton's dependence on scripture when he drafted Moses His Judicials; all of the capital offenders he listed were scripturally based. Thus the Bible contained fundamental truths and, at the same time, demanded profound interpretation through the reason given man by God.

For Puritans establishing a church of their own, scripture played an important role. "He insisted that the church should be judged by scripture, confident that scripture upheld him, and prepared to assert that nothing which was not expressly commanded in scripture ought to be tolerated in the church."⁷ This dependence on scripture, then, presented Puritans with two conditions. First, it forced church leaders to remind their congregations of why there was such a dependence on scripture. "The Bible is believed, not on the authority of any church, but because it must be believed; nothing will 'prove' that scripture is divine, it must be believed to be divine."⁸ This is clearly linked to the concept of faith common to any protestant movement. Secondly, scripture allowed church leaders to focus the attention of the congregation. That is, all questions were directly answered by the Bible; any deviancies were dealt with in scripture, and any measure of social control was also scripturally derived. The Bible, then, was one of the few certainties in the life of

⁶Ibid., 43.

⁷Alan Simpson, Puritanism in Old and New England (Chicago: University of Chicago Press, 1955), 9.

⁸Miller and Johnson, eds., "Introduction," The Puritans, 1: 42.

the Puritan. Believing in the Bible seemed to present some measure of serenity, but it could also cause questioning minds. “The converse duty of believing the Bible was the duty of doubting everything else. Thus one could assert with new force the supremacy of natural reason upon every point except that of the divine character of the one book, and then one could proceed to explore the vast field in which reason was Supreme.”⁹ This exploration could be fraught with pitfalls and challenges. In order to avoid problems, ministers were in a position to guide the flock in matters related, and unrelated, to the Bible.

Puritan ministers played a key role in the day to day life of the religion. Once elected to the head of a church, they served as leaders in a congregation that helped the average man see that the Bible was the word of God. Furthermore, they worked to ensure that their flock knew that the Bible infused their day to day existence with a sense of purpose. “They endeavored to assist the feebler understandings of the congregations by using the simplest and most comprehensible style, by employing a schematic organization for their sermons, with heads and sub-heads so clearly marked that earnest listeners could take notes and study the points during the week. . . .”¹⁰ The effect of this type of leadership was a type of reverence for a minister as an educated elite. This reverence hinged on the point that the minister was true to his faith. “Leadership by the learned and dutiful subordination of the unlearned—as long as the original religious creed retained its hold upon the people,” found its focus with the local minister.¹¹ In many respects, this raising of the minister to a higher level goes against the basic themes of Protestantism. It

⁹William Haller, The Rise of Puritanism (Philadelphia, Pa.: University of Pennsylvania Press, 1972) , 238.

¹⁰ Perry Miller, “The Marrow of Puritan Divinity,” in The New England Puritans, ed. Sydney James (New York: Harper and Row, 1968) , 13.

¹¹Ibid., 19.

seems to create a hierarchy in matters of faith, and not a sense of equality. But these were, in fact, moral and educated leaders who had to lead a congregation in the worship of God. To be able to convey colourful images and simple messages, as Haller describes them doing,¹² it was absolutely necessary that they maintain some sense of moral authority within a congregation.

The congregation presented one of the most powerful forces within a Puritan community. On the most basic level, the congregation represented nothing more nor less than a collection of individuals who were a church unto themselves.¹³ But in more practical terms the congregation was a powerful tool of social control and self control. "Puritans often imagined the congregation as a little commonwealth, replacing the organic imagery of Anglicans and Catholics with expressions deliberately drawn from the world of coercion and sovereignty."¹⁴ If the terms seemed political it is because they were. Even clerical leaders like John Cotton viewed the congregation in similar terms. "Congregationalism commended itself to clerical specialists like Cotton as the one form of church government prescribed by God for his saints."¹⁵ Here the spirit of the congregation is expressed as a "government". Indeed, this was how the congregation worked: as a local religious government. When it is understood that social hierarchies in the colony were couched in religious terms, the power of the congregation then is as much social as religious. "The inevitable conclusion to such conditions was that the congregation of elect souls following its heaven-sent teacher came more and more to

¹²Haller, The Rise of Puritanism, 19-20.

¹³ Simpson, Puritanism in Old and New England, 15.

¹⁴Micheal Walzer, The Revolution of the Saints (London: Weidenfel & Nicolson, 1966), 34.

¹⁵Simpson, Puritanism in Old and New England, 31.

regard itself as a law to itself.”¹⁶ This responsibility of the congregation to regulate conduct was derived from the collective view of salvation. In this manner the colonial congregationalists seemed to deal with Calvin’s uncertainty of salvation. Because there was real uncertainty as to who was saved, it meant that the moral authority of the congregation was to be imposed on everyone, whether they were a member of the congregation or not. A key sign of salvation for the Puritans was godly living, though this on its own was not a guarantee. Any deviation within the congregation away from such a life style not only risked the standing of the offender but also the entire congregation, and thereby garnered the attention of the offender’s peers. Thus, the congregation stood as a fundamental pillar of the Puritan faith.

The dependence on scripture, the reliance on educated ministers, and the evolution of a powerful congregation were all key to the success of Puritanism; especially in the Massachusetts Bay Colony. One key aspect of the situation that has not yet been raised is the concept of salvation. Not only did salvation provide a worthy objective for the faithful, but the Puritan notions of achieving salvation also demanded strict personal and social regulation. As Perry Miller presents it in “The Marrow of Puritan Divinity”: “The federal theology was not a distinct or anti-pathetic system: it was the simple condition in which these Protestants sought to make a bit more plausible the mysteries of the protestant creed.”¹⁷ Key to the Federal theology was a series of explanations that helped Puritans deal with the Calvinist fact that God was not to be understood, only to be adored. Puritans recognized that any attempt to understand the workings of God was futile. In the words of John Calvin, “To desire any knowledge of predestination than what is unfolded in the word of God, indicates as great folly as a wish to walk through

¹⁶Haller, The Rise of Puritanism, 16.

¹⁷Miller, “The Marrow of Puritan Divinity,” 19.

unpassable roads, or to see in the dark.”¹⁸ What made Puritanism attractive was not that it gave an answer to the unanswerable. Rather, it offered a pattern of living that was representative or suggestive of being saved. This type of godly living challenged Calvinist logic: “If I am elected; I am elected, there is nothing I can do about it.”¹⁹ In the Puritan vein, one does good works not to achieve salvation, as only God decides on that matter, but they act well because they are *already* saved. The concept that fueled this belief was covenant theology. Covenant theology held that man entered into a ‘contract’ with God that required only two things. The first requirement was faith in the Lord and the second requirement was simply good acts. Salvation still hinged on faith, as in other forms of Protestantism, and was reinforced by good works that symbolized salvation. Although the concept of God’s grace is easy enough to explain, discovering whether or not one was bestowed with God’s grace was impossible to know with certainty.

The concept of godly living, as a basic axiom of federal theology, clarified matters for Puritans. Furthermore, this view of possibly knowing about one’s fate demanded that Puritan theologians arrive at a plausible explanation of how God’s grace may have been bestowed. William Perkins, an author of federal theology, provided a unique approach that connected good works with salvation. Basically, God’s grace was likened to a seed planted in a man. “Instead of conceiving of grace as some cataclysmic, soul-transforming experience, he whittles it down almost, but not quite, to the vanishing point; he says that it is a tiny seed planted in the soul, that it is up to the soul to water and cultivate it, nourish it into growth.”²⁰ Key to this growth was not only leading a pure life but also the dedication to battling sin. This dedication to fight sin was a function of being saved. “The

¹⁸Ibid., 51.

¹⁹Ibid., 51.

²⁰William Perkins as quoted in Miller, “The Marrow of Puritan Divinity,” 58.

root of the matter is always a new birth, which brings with it a conviction of salvation and a dedication to warfare against sin.”²¹ This is, perhaps, the most defining characteristic of Puritanism in New England. The Puritan leaders seized upon this imperative and combined it with the power of the congregation, the influence of a minister, and the authority of scripture to effectively regulate the lives of the settlers in the colony. This regulation occurred on a least two levels. On a broad, “macrocosmic” level, the Puritan leaders presented a strict code of conduct. On a personal, “microcosmic” level, the doctrine of Puritan living offered a guide to a religiously rewarding life.

The settlers who migrated to the Bay colony had to be aware of these religious ideas when they prepared to move. Many, in fact, were ardent Puritans who viewed the voyage as an opportunity to escape the difficult political conditions in England. The migrants had witnessed personally the possible repercussions of living in Protestant England as a Puritan.²² But not every settler undertook the voyage for religious reasons. Many viewed the new settlement as a chance at economic security. “The economy of both regions [sic. East Anglia and Kent] depended heavily on the cloth trade, which for

²¹Simpson, Puritanism in Old and New England, 2.

²²Many of the problems encountered by Puritans can be traced back to the English reformation. Though the self-motivated actions of King Henry VIII initiated an era of reform, extreme Protestants felt that the reforms had barely scratched the surface. Puritans, who refined their beliefs during the Marian exile (1553-1558), arrived at a brand of theology that represented a stricter interpretation of scripture, more emphasis on the word of god, and a stronger church polity capable of ruling society. When Elizabeth I assumed the throne in 1558 Puritans anticipated an age of reform that would welcome their input. Their views of a strong church that could rule society proved to be distasteful to a young monarch looking to consolidate her power. Despite the unwillingness of the crown to adopt Puritanism the movement did not fade. Rather, they lasted through the seventeenth century. When James I assumed the throne in 1604 a period of persecution was initiated. The political situation under James I became intolerable for many Puritans. They soon realized that any chance to bring about reforms was dependent on a change of scenery. When the opportunity arose to move to the new world many seized the moment and migrated. For a complete discussion of these events see Haller, The Rise of Puritanism, and Walzer, The Revolution of the Saints.

some time suffered severely from the disruption of traditional continental markets and blunders of governmental policy.”²³ Even those economic motivations, however, cannot account for all of the possible reasons for migration to Massachusetts. The situation was much more complex, and any attempt to categorize and isolate the individual motivations for migration of every settler will certainly miss other considerations. As Breen and Foster claim, “the attempt to separate one cause from another not merely appears hopeless but unhistorical—a question badly posed.”²⁴ The migration of some 13,000 men, women, and children clearly involved a range of religious, economic, and political motivations. This group of colonists was characterized by a unique set of qualities that made it very different from those settling other colonies.

The demographic future of the settlers greatly contributed to the success of the colony. The group who migrated to the Massachusetts Bay Colony was characterized by a balance of age, gender, and background. Ultimately, this group was demographically stable in comparison to the population in other colonies; “the single most striking fact that an examination of the Great Migration discloses is how comparatively ordinary the migrants looked—how much like the non-migrating English population .”²⁵ This ordinary appearance was due to the fact that most of those migrating did so in family units.²⁶ The future success of the population was assured as these families established themselves in the new world. The migration of entire families also meant that traditional

²³ Virginia DeJohn Anderson, New England’s Generation: The Great Migration and the Formation of Society and Culture in the Seventeenth Century (Cambridge, Mass.: Cambridge University Press, 1991), 13.

²⁴ Timothy H. Breen and Stephen Foster., “Moving to the New World: The Character of Early Massachusetts Immigration,” William and Mary Quarterly, 3rd ser., 30 no.2 (1973): 201.

²⁵ Anderson, New England’s Generation, 19.

²⁶ Breen and Foster, “Moving to the New World,” 196.

forms of familial authority were also in place. Not only did this allow for Puritan values to be transmitted from one generation to another more easily but it also contributed to social stability in the colony. The Bay Colony would rarely encounter the same social problems as the southern colonies which had a large single male population.

Another demographic characteristic that contributed to colonial stability in the Bay Colony was the average age of the settlers. "In fact the age structure of New England's immigrant population closely resembled that of the home country, with both infancy and old age represented."²⁷ The absence of large numbers of young men meant that there were few itinerant workers roaming the country side looking for work. (Towns rarely accepted such individuals into their ranks.) A balance in the age groups also worked to maintain the hierarchy of authority; the young had to venerate the old.

One final characteristic of the pattern of migration that contributed to the stability in the colony was the familiarity of the colonists with one another. Settlers who established themselves in the colony found that they were familiar with their neighbors because they were often from the same regions in England. "The settlers in each of the five towns of Rowley, Hingham, Newbury, Ipswich, and Watertown came as a group from a different locality in England and brought with them distinctive social and economic institutions."²⁸ Not only did this contribute to the local nature of each town, but it also reinforced social and economic stability.

The success of the colonial institutions hinged on the receptiveness of the settlers. The demographic character of the migrant population can be viewed as being receptive due to its inherent stability. The balance of age and gender among the settlers ensured

²⁷Anderson, New England's Generation, 20.

²⁸David G. Allen, In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to the Massachusetts Bay in the Seventeenth Century (Chapel Hill, N.C.: University of North Carolina Press, 1984) , 16.

that known structures of authority would be easily applied in the colony. This balance was reinforced by the relative familiarity among the colonists. These characteristics were fundamental to the success of the colony. Though the leaders were looking to impose Puritan values on the colonists, they were not looking to radically alter the foundations of society. With a solid foundation in place colonial leaders were in a position to establish Puritan-driven institutions in the localized towns, while at the same time easily applying the laws that would help them achieve their vision.

Among the most important tasks for the colonists was the creation of the towns where the settlers would live. The General Court recognized that the formation of new towns was key to the future success of the colony. "The court wanted improvements that fortified the frontier, expanded the economy, and accommodated the growing population."²⁹ The court had a responsibility to see to the development of the land in order to assure the survival of the colonists. In an attempt to avoid granting town lands to greedy land speculators, who had no intention of developing the land themselves, the General Court judged each petition for a new town on the genuine willingness of the petitioners to settle on the land and develop it. Speculation reflected a greedy attempt at profiteering and not only impeded the immediate development of the land in question, but went against the religious character of the colony as well. One General Court magistrate, responding to the growth of land speculation, remarked: "God had provided this country and this corner as a shelter for the poor and persecuted, but now it was reduced to the rank of children's toys."³⁰ The distaste for land speculation reflected the importance of developing towns in the colony. Not only did a town grant provide land for settlers, it also

²⁹John F. Martin, Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century (Chapel Hill, N.C.: University of North Carolina Press, 1991), 38.

³⁰Ibid., 118.

allowed for interested colonists to establish structures of authority for administering the grant. In the face of a vast wilderness these isolated town authorities were instrumental to the future success of the colony.

With a grant of land, and a legal recording of their town's existence in hand, the local petitioners set about the business of establishing a covenant that would guide their community.³¹ This covenant was much more than a simple statement of intent; it was a declaration that reminded all settlers of the nature of the community. The covenant for Dedham presents one of the most theologically orientated declarations of all the Massachusetts town covenants. "The covenant began by binding every man to each of his fellows before God in a pledge to practice Christian love in their daily lives."³² The rest of this particular covenant outlines the Puritan principles which the community would follow. The covenant, as exemplified in Dedham, seems to be an expression of the town founders' goals. All of the clauses worked to exclude those who did not subscribe to their faith and way of living. This was further reinforced in Dedham when the founding citizens were required to sign the covenant, thus demonstrating their commitment to the principles of the document. It also held another commitment—to submit themselves to an examination for admission. "The culling began at the next meeting, on the 18th of August 1636, when it was agreed by all that a townsmen signing the covenant incurred an obligation to tell whatever he might know about future candidates for admission. Every candidate would undergo a public inquisition in which his entire past could be brought to light."³³

³¹ Benjamin W. Labaree, Colonial Massachusetts: A History of the American Colonies Series (Milwood, N.Y.: KTO, 1979), 49.

³² Kenneth A. Lockridge, A New England Town: The First Hundred Years, Dedham Massachusetts, 1636-1736 (New York: W.W. Norton & Company Inc., 1970), 4.

³³ *Ibid.*, 8.

This extreme requirement was not common to all towns. Others presented less religiously orientated covenants that only worked to reveal the fact that the settlers were simply committing to bind together to form a town. Some did not even label the declaration a covenant, preferring instead to call their statement 'articles of association' or simply 'town orders'.³⁴ Regardless of what they were called, these agreements all had the same effect— "of organizing a group of individuals into a society for the purpose of holding, dividing, and developing a tract of land."³⁵ In terms of legal authority the covenant set out the basic qualifications for acceptable behavior in the town. Any settlers who did not measure up to the standards set out in the town covenant, or any who demonstrated an unwillingness to commit to the mutual obligations required by the covenant, were likely to be excluded from the town.

As communities established themselves on the land a host of social and political hierarchies began to emerge. One of the clearest social definitions assigned to residents of a town was that of inhabitant. "This status, which implied both rights and responsibilities, was clearly granted by the town to men whom they wished to have a share in the town's common property."³⁶ Simply assuming a parcel of land near or in a community did not immediately qualify an individual for this title. Rather, prospective inhabitants were judged by the town members based on the standards outlined in the town covenant. "[The town of] Hadley voted that no one should be accounted as inhabitant or vote in town affairs till he had been received as an inhabitant."³⁷The main objective here seems to be

³⁴Martin, Profits in the Wilderness, 139.

³⁵Ibid., 142.

³⁶Sumner Chilton Powell, Puritan Village: The Formation of a New England Town (Garden City, N. Y.: Anchor Books, 1965), 128.

³⁷Martin, Profits in the Wilderness, 219. Martin also explains that the earliest admissions to the ranks of a town were done by the General Court, who then transferred the power to the town's political body when it was established.

the ability of a town to exclude settlers for economic, religious, and social reasons. Not all towns were equipped nor willing to take on the burden associated with impoverished settlers. And, as was seen in Dedham, some towns essentially closed their doors to all but those who were judged pious enough to enter.³⁸ Other towns viewed outsiders as possible insurgents against their established order. The town of Hampton adopted a similar policy of choosing inhabitants with great care. Unprincipled and disorderly persons might otherwise, in the infancy of the settlement, have come in from abroad and harassed the whole community by their irregularities, and exerted an influence for evil that could not have been easily counteracted. The power of admitting inhabitants was guarded with great strictness as the palladium of their civil rights.³⁹ The result of this exclusionary policy was that some town settlers lived in a town with no political rights, or they were forced to move to other communities. Many settlers who were not formally accepted as inhabitants in a community, but still resided in the town were labeled sojourners. Though the term sojourner implies that the resident was somehow transient, some may have resided in the town under this status for some time. Those towns which may have allowed sojourners to reside in the town presented a series of laws that were aimed directly at controlling the behaviors of these people. The main work of policing morality in these ranks fell to sojourner laws and the edicts of the local church.⁴⁰ Very early, then, towns developed a social hierarchy based on residency. Those who were inhabitants constituted the political voice of the town. They were allowed to vote and participate in town affairs. Those who were not inhabitants may have only been granted the privilege of residence;

³⁸Lockridge, A New England Town, 10-14.

³⁹Joseph Dow, History of the Town of Hampton, New Hampshire, vol. 1 (Portsmouth, N.H.: Published for the Town of Hampton, New Hampshire by P.E. Randall, 1893), 16.

⁴⁰Martin, Profits in the Wilderness, 231.

they did not gain a political voice. Inhabitant status was important in legal affairs. Though it brought with it no specific legal privilege it did carry a great deal of responsibility. Being accepted as an inhabitant implied that the person had the obligation to watch his fellow citizens and to guard them from sin.

As towns developed, inhabitants established governing structures that could effectively deal with the day to day business of a small town. Theoretically, the inhabitants decided together, through the town meeting, on town issues. But, in order to maintain consistency, they appointed selectmen (or commissioners—the term varied from town to town but the post was the same) to oversee the daily problems of the community. This group of officers was responsible for ensuring that every aspect of town life was supervised, and that the basic principles of the town covenant were upheld by all. “Commissioners soon evolved from a committee granting lands to a committee outlining the rules of conduct in the town.”⁴¹ The influence of these officials in the town was substantial. By virtue of their initiative in dealing with town matters the selectmen rose to a level of prominence that rivaled that of the town meeting.⁴² As a result of this power the selectmen became wardens of the community, with the responsibility of supervising their fellow residents and the power to initiate legal responses to their transgressions. This type of authority was especially useful to the colonial leaders in legal matters. The selectmen worked to preserve the established legal authority in every town.

Selectmen did not carry out these responsibilities entirely on their own. This board had the power to appoint other positions to deal with specific matters. To help deal with legal matters the board of selectmen often appointed a constable. This post, which

⁴¹Powell, Puritan Village, 109.

⁴²Kenneth A. Lockridge and Alan Kreider, “The Evolution of Massachusetts Town Government, 1640 to 1740,” William and Mary Quarterly, 3rd ser., XXIII (1966), 552-553.

had English roots, was common to most towns and performed a range of tasks. The wide range of tasks performed by the constable required an able person to fill the post.

And here, for the better choosing of these constables, you shall understand, that the law requireth that every constable be *Indoneous homo*, that is apt and fit for the execution of the said office; and he is said in Law to be *Indoneous*, who hath these three things, honesty, knowledge, and ability. Honesty to execute his office truly, without malice, affection, or partiality. Knowledge to understand what he ought to do. Ability, as well in substance or estate, as in body, that so he may intend and execute his office diligently, and not through impotency of body, or want, to neglect the place.⁴³

Qualities such as these were certainly an ideal. The board of selectmen choosing a constable likely looked for many of these attributes in a candidate because the post carried so much weight in the town. Furthermore, the range of responsibility carried by the constable granted him a great deal of authority. This authority helped him maintain the legal order of the town.

The majority of the towns in the colony were governed by institutions that had their roots in old England. Not only were town plans patterned after English manorial systems, but so too were the many civic positions in the community. The influence of the common English heritage of the settlers was the root for establishing the structures of authority in the towns. The Puritan leaders of the colony used these structures and infused them with a Puritan ethic. As a result, town structures not only worked very closely with the local congregation, but they were also used to enforce a Puritan legal authority because of the religious nature of the laws and procedures in the colony.

The other major pillar of Puritan town life was the congregation. The congregation was the association of Puritans in the town. "A congregation is by the institution of Christ a part of the militant visible church, consisting of a company of saints

⁴³Micheal Dalton, *The Countrey Justice*, ed. William Rawlins and Samuel Roycroft, (1690) , 56.

calling, united into one body by a holy covenant, for the public worship of god, and by the mutual edification of one another, in the fellowship of the lord Jesus.”⁴⁴ For colonial Puritans the congregation was a clear expression of their faith. Colonists viewed this association as more than a means of worship, but also as a valuable source of social stability. Admission to the congregation encouraged homogeneity, while at the same time excluded those people who refused to adhere to the lifestyle needed for congregational admission. The social power of the congregation was an important aspect of the religious mission of the colonial leaders. Not only did the congregation help bring about social conformity, but it also contributed to the social cohesion of the colony.

The town leaders who intended to form a congregation met informally at each other’s houses until the congregation was officially formed.⁴⁵ Their first task in building their church was drafting a covenant. “It is not enough that men be thrown together as neighbors or by circumstance, that they be driven to the church by law or reverere a minister put over them without their consent; there can be no true church until there is a covenant of saints, submitting to the rules of Christ in public observance out of their free wills.”⁴⁶ The most important aspect of the church covenant was its ability to bind the colonists together. Just as Puritans had a covenant with God collectively and individually, so too did the members with one another. The church covenant prescribed a clear standard of living that all perspective members had to publicly support. For colonial leaders the church covenants demonstrated a willingness to commit themselves to a spiritually guided life, and to guard each other against sin and illegal influences.

⁴⁴The Cambridge Platform of Church Discipline, Adopted in 1648, (Boston, Mass.: Congregational Board Publication, 1855) , 51.

⁴⁵Kenneth A. Lockridge, “The History of a Puritan Church, 1637-1736” New England Quarterly, XL (1967) , 93.

⁴⁶Ibid., 93.

Equally important in the creation of a congregation was a decision by the General Court to permit or deny an association of congregants. In an effort to ensure that only Puritan congregations were established in the colony, the General Court forced potential congregations to obtain their approval. "The court doth not, nor will henceforth, approve of any such companies of men as shall henceforth join in any pretended way of church fellowship, without they shall first acquaint the magistrates, & the elders of the great part of the churches in this jurisdiction with their intentions, and have their approbation herein."⁴⁷ With this order the colonial leaders effectively eliminated any religious diversity in the colony. In social terms this meant that every town would be dominated by a Puritan congregation. This move worked to guarantee that the congregations would have a role to play in legal matters as well.

The congregation, once established, was governed by a group of elders and a minister, all elected by the congregation. The elders were the ruling authority of the congregation, and assumed duties within the church that reflected this. The root of the elders' powers was, "To open and shut the doors of God's house, by the admission of members approved by the church, . . . to be guides and leaders of the church, in all matters whatsoever pertaining to church admission and actions, . . . to see that none in the church live inordinately, out of rank and place, without calling or idly in their calling, . . ."⁴⁸ The elders' ability to refer candidates for admission to the congregation, and their ability to deal with delinquent members raised them to a position of great importance. Ministers held an equally important position. As the congregational leaders, ministers were in a position to influence even town affairs. "If a candidate for office received the

⁴⁷Nathaniel B. Shurtleff, ed., Records of the Governor and Company of the Massachusetts Bay in New England vol. 1 (Boston: From the Press of William White, 1853), 148. [Hereafter referred to as Colonial Records]

⁴⁸The Cambridge Platform, 51.

support of the minister, the elders and other leaders in the congregation, he might reasonably count on election, if they threw their influence against him, his defeat was almost certain.”⁴⁹ In social terms this meant that ministers and elders were the de-facto leaders of the town. As the moral wardens of the community they were in a position to effectively control townspeople.

In many respects the power of the minister and the elders, as leaders of the congregation, was psychological. These men had the potential of controlling the fate of most colonists. As a result, villagers usually responded to their orders or recommendations out of fear of legal reprisal. But their power in the community was due to the relationship of the congregation to the political and judicial institutions of the colony. In 1631, the General court tied the franchise to church membership.⁵⁰ Any failure to accepted into a congregation severely limited the ability of a colonist to be politically active. In legal terms the congregation assumed an equally important role. The basic covenantal principles of godly living were scripturally derived. These rules were essentially the same as the theologically based laws in the colony. Thus, any violation of congregation rules might be seen as the same as a legal transgression. The demands that the covenant placed on the congregation were also closely linked to the criminal procedure that were at work in the colony. Where each member had a obligation to continually be on guard against sin, they had an equal obligation to report wrong doings to the appropriate authorities. The procedures used in the colony clearly welcomed such accusations.

Though the church elders, the minister, and the other church officials played important roles in the congregation, the core of the institution was still the visible saints, that is, the members of the community who constituted the congregation. The term

⁴⁹Wertenbaker, The Puritan Oligarchy, 70

⁵⁰Colonial Records, vol. 1, (18 May 1631), 87.

“visible saints” refers to those members of the congregation who had been invited to be full members of the church. “By saints, we understand, 1. Such as have not only attained the knowledge of the principles of religion, and are free from gross and open scandals, but also do together with the profession of faith and repentance, walk in blameless obedience to the word .”⁵¹ This definition of visible saints directly refers to those principles of faith offered in most of the Puritan doctrine. In fact, considering the standard that was applied to those intending to become full members of a church, it seems to be the clearest opportunity for church officials to apply Puritan doctrine to community members. Potential members, desiring all of the advantages of church membership, had to testify, first and foremost, to a genuine conversion experience “profession of faith and repentance”. But they also had demonstrate a compliance to church standards. Acceptance into a congregation not only required a clear faith, but also a willingness to lead a clean life. In order to be admitted the candidate must demonstrate a ‘clean record’ in these matters. “This he must do in a series of conferences in which he was interrogated upon his beliefs, his understanding of church doctrines, his personal conduct and his willingness to join in covenant.”⁵² This interrogation was undertaken by the church officials. The elders then recommended the qualified candidates to the rest of the congregation for admission. Their admission was not, however, guaranteed. The potential candidate still had to be questioned by the rest of the congregation. “No one can be admitted to the church by the elders without the consent of the brethren.”⁵³

This basic requirement reveals the importance of the congregation. As a group of “visible saints” gathered to worship God, only this entire group could really decide upon

⁵¹The Cambridge Platform, 52.

⁵²Wertenbaker, The Puritan Oligarchy, 66.

⁵³Ibid., 67.

the admission of new saints to their ranks. Those who were not accepted into the church of “visible saints” were forced to wait for their revelation in order to be accepted. “Those without the pale . . . were to submit to the rule of the saints and attend submissively upon divine ordinances, in which, unless they were suddenly to receive regeneration by other means, they could not participate.”⁵⁴ Despite the high standards, the rigorous testing, and the strict lifestyle, the privileges associated with congregational membership attracted many who benefited from social and political privileges. Submission to the rigorous standards of the congregation demonstrated a willingness on behalf of the colonists to obey the Puritan rule of law in exchange for political and social privileges. It also reinforces the principle of mutual obligation among the settlers. In fact, the success of the congregation rested on the idea that the visible saints would participate in the battle against sin, even if the sin appeared in other members, as part of their covenant with each other and God.

The partnership of these two institutions greatly affected the lives of the colonists. On a broad level these institutions were coercive and demanded a strict lifestyle. On a personal level, however, these two pillars advocated relationships that were kind and loving. Both realities were guided by the principle of mutual obligation that was inherent in covenant theology. Not only did the colonists have an obligation to live a clean life in order to fulfill their covenant with God, they also had an obligation to ensure that their neighbors did so as well.

The Puritan conception of marriage exemplifies this notion. Unlike other views of marriage, the Puritan concept was relatively devoid of spiritual references. “It was to be a close and companionate relationship, a union of love and harmony, an act of sexual fulfillment, and an institution with a firm economic base.”⁵⁵ Key to this union was the idea

⁵⁴Perry Miller, *The New England Mind: The Seventeenth Century* (Cambridge, Mass.: Harvard University Press, 1954), 440.

that the marriage replicated the covenant with God.⁵⁶ As a result, partners chose each other freely and were required to cultivate a peaceable and loving relationship guided by the standards set out by God.⁵⁷ Any violence between couples was strictly prohibited and carried legal punishments. But, more importantly, if any trouble appeared in the marriage neighbors had an obligation to intercede. “When outward signs of trouble appeared, the entire neighborhood was apt to swing into action; then the church intervened, and finally the courts. . . . the object of these proceedings was not punishment or retribution, but the restoration of good relationships within the family.”⁵⁸ This type of intervention was symbolic of the concept of mutual obligation. By guarding families from harm the colonists were protecting one of the foundations of the colony, thus providing the ultimate source of social stability in the colony.⁵⁹

The Puritan family also presented many of the elements of mutual obligation already discussed. One of the most vital aspects of raising children in the colony was ensuring that the children adopted the basic Puritan values early. “There was a determined effort to destroy the spirit of autonomy in a small child—a purpose which lay near the center of child rearing in Massachusetts.”⁶⁰ The strict regimen of discipline was based on the Puritan notion that children were ignorant of all good things and were predisposed to do evil.⁶¹ As a result, parents (and neighbors) kept a tight rein on their

⁵⁵David Hackett Fischer, Albion’s Seed: Four British Folkways in America (New York: Oxford University Press, 1989) , 82.

⁵⁶Edmund S. Morgan, The Puritan Family: Religious and Domestic Relations in Seventeenth century New England (New York: Harper and Row, 1944) , 30.

⁵⁷Morgan, The Puritan Family, 30.

⁵⁸Fischer, Albion’s Seed: Four British Folkways in America, 85.

⁵⁹*Ibid.*, 68.

⁶⁰*Ibid.*, 110.

offspring well into adulthood. This often entailed maintaining control and dominance over children in new ways. As Philip Greven documents in Four Generations, most fathers were reluctant to relinquish the deeds to the land he had given his sons at their marriages. This forced sons to wait until his death before acquiring a clear legal claim to the land they had already farmed for years. Because of this situation fathers could maintain a great deal of control and influence over sons who needed his land to survive.⁶² This dominance may have been especially useful for parents looking to control the spiritual paths of their children. The promise of land was an enticement to follow in the economic and religious foot-steps of the parent. The parents, through this lifetime of control, also ensured that the community of saints would be preserved by raising their children to guard against sin , thus continuing the concept of mutual obligation into the next generation.⁶³

The social experiment in the Massachusetts Bay Colony blended the civic and congregational institutions of the colony in order to form a society based on Puritan values. As the colonial leaders developed those civic institutions that would deal with the day to day problems of the town, they infused them with a Puritan ethic. The civic authorities that ruled these towns not only looked after basic problems, they also served as the moral wardens of the community. The congregation, as a basic tenet of Puritan theology, contributed to this situation by reinforcing the mutual obligation that all settlers had to one another to guard against evil. Settlers who resided on the colony, then, were forced to conform to Puritan values in the face of these two pillars of authority. The covenantal principles that dominated the social landscape of the colony were also present

⁶¹Morgan, The Puritan Family, 65.

⁶²Philip J. Greven, Four Generations : Population, Land, and Family in Colonial Andover (Ithaca, New York.:1970) , 75-80.

⁶³ As many studies have discovered, this control was reinforced by the long life expectancy in the colony. See Greven, Four Generations for statistics on this point.

in the legal arena. Both the laws and the procedures reflected the importance of citizens watching over each other. The courts, which administered a scripturally derived set of laws, welcomed complaints from anyone. The procedures, which were very accessible, provided everyone the opportunity to report wrong doings. The procedures also recognized the power of the civic and religious pillars in the colony.

Chapter V Structures of Justice in the Bay Colony

Puritan leaders in the Massachusetts Bay were very clear in their intentions to establish a society that adhered to their religious outlook. Though most of the colonists conformed to the socio-religious climate in the colony, they still carried with them clear notions of their English roots. A similar dichotomy existed in the legal affairs of the colony. Though the colonial leaders wished to adopt a system of justice that was representative of their religious mission, the colonists seemed to demand a system of justice that resembled the courts and officials they knew in England. These dual interests led to a system of justice that allowed English courts and Puritan jurisprudence to coexist as part of the colonial system of justice in the Bay colony.

To understand the nature of the English influence on the colonists of the Bay Colony is to understand that their collective experience was rooted in a complex system of justice. A plethora of courts were in place in England that claimed jurisdiction over a range of areas that required the application of different laws.

There were many other courts in England than those of the common law and equity and that each of these courts, whether it were that of the Admiral, that of the Bishop, that of the Mayor, that of the local lord, or one of the prerogative courts of the king - Star chamber, perhaps, or High commission, Court of Chivalry, court of requests - administers of systems of law than those known as the "common law of England" and as "equity"¹

These special courts did not, as Howe illustrates, pretend to administer the common law. Rather, their interests were specific and their attention was focussed on one set of at least

¹Mark de Wolfe Howe, "Sources and Nature of Law in Colonial Massachusetts" in Colonial America, eds. H.T. Lefler and O.T. Barck, (New York: MacMillan Company, 1958), 2.

fifteen other types of law.² The common law that was familiar to most Englishmen was administered by other courts. “By the time of James I, the courts of the common law included the King’s Bench, Common Pleas, Exchequer Chamber. These were the central courts of justice, and the law they administer was a national law, common to all England, as contrasted with the special or customary laws of particular localities.”³ The average Englishman, then, was exposed to a complex system of justice that was represented by a variety of jurisdictions and laws. If one were to ask an Englishman in 1600 to describe the judicial climate he lived under, the answer would certainly be quite complicated. He might have referred to a host of courts, some royal and others based on royal prerogative.⁴ The legal heritage of the average colonist, therefore, depended on their own experiences, and when those colonists settled in the colony they likely expected to turn to familiar institutions to resolve their quarrels. The institutions they were exposed to in England, either directly or indirectly, were not the high courts but the local courts. “It was inevitable that the local courts and the customary law would assume a position of transcendent importance in the life of the ordinary man.”⁵

The English influence was also formed by the amount of legally trained men in the colony. Unlike in England, legally trained officials were in short supply in the colony. The adoption of a complex and technical system could only be successful with the aid of many trained lawyers, but “they were generally not found in the colonies during the

²See Sir Edward Coke, The First Part of the Institutes of the Lawes of England, 1628 edition (New York: Garland Publishing, 1979).

³ George Lee Haskins, Law and Authority in Early Modern Massachusetts: A Study in Tradition and Design (New York: 1960), 164.

⁴Howe, “Sources and Nature of Law in Colonial Massachusetts,” 3.

⁵Julius Goebel Jr. “King’s Law and Local Custom in Seventeenth Century New England,” Essays in the History of Early American Law, ed. David Flaherty (Chapel Hill, N.C.: University of North Carolina Press, 1969), 88.

seventeenth century. . . .”⁶ This is further reinforced by the colonial system of justice’s dependence on lay judges to administer the local courts. These officials, chosen mostly for their standing in the community, could not all have been formally trained in the law. “Therefore, practically all of the early colonial tribunals which were set up to handle disputes were composed of lay judges untrained in the law.”⁷ These officials were forced to draw upon their previous experiences in order to fulfill the obligations of their posts. Despite the preponderance of lay judges there were still a handful of legally-trained officials living in the colony. These men provided a talent that was not squandered in the local courts. Instead, they were soon put to work in the General Court. Consider the list of the most trained individuals: “John Winthrop, an attorney in Wards, Richard Bellingham, counsellor and recorder of Boston, Lincolnshire, the Reverend Nathaniel Ward, barrister, John Humphrey, barrister of Lincoln’s Inn, certainly Herbert Pelham DCL; possibly Richard Seltonstall the younger, Roger Ludlowe and John Winthrop the younger, all three of whom had been to an inn.”⁸ All of these names appear in the General Court records at one time or another. This would imply that they were mostly active at this court. More importantly, some of these men were the driving forces behind the legal evolution in the settlement. This gulf between legally trained and untrained colonists explains both the judicial struggle in the colony and the resulting form of the system of justice. While, the legally trained colonial leaders developed the substantive material of the laws based on Puritan jurisprudence, the colonists forced a conformity to the English institutions with

⁶Paul S. Reinsch “The English Common Law in the Early American Colonies”, in Select Essays in Anglo-American Legal History, vol 1, ed. Committee for Association of American Law Schools (Boston: Little Brown and Company, 1907) , 369-70.

⁷Ford W. Hall, “ The Common Law: An Account of its Reception in the United States,” Vanderbilt Law Review, vol. 4 (1958) : 795.

⁸Goebel, “King’s Law and Local Custom in Seventeenth Century New England,” 78-79.

which they were most familiar. In many respects this presents the extent of the English influence in the colony, which was largely institutional. The substantive laws created in the colony, however, tend to reflect the influence of Puritan jurisprudence. This is not to imply that the laws bear no English markings, it is just that the motives that gave rise to the string of codes were mostly Puritan, and are best considered in that light. This dichotomy gave rise to the struggle between English and Puritan influences that would characterize the entire process of legal development in the Bay colony.

The dichotomy between the Puritan desires of the colonial leaders and the influences of their English roots was in place well before the colonists arrived in the Massachusetts Bay. In fact, this dichotomy presented itself as soon as the Puritan group realized colonization was a viable option. No colonial venture was possible without a royal charter granting the land for a settlement. As such, the Puritans necessarily had to exist under any provisions within a charter. In the months prior to the voyage, the Puritan leaders of the Massachusetts Bay Company led by the company Governor John Winthrop, took steps that broke away from spirit of the royal charter. At the end of the arduous voyage, Winthrop presented those Puritan principles which would guide the administration of the colony. By the time the colonists established themselves the struggle between faith and experience was already well underway. It is this pre-settlement struggle that precludes our discussion of colonial laws and institutions.

In March 1629, King Charles I granted a royal charter for a colony to the Massachusetts Bay Company. In broad terms this charter represented the monarchial interests in the new world. In specific terms the charter outlined how the colony was to be administered and by whom. It clearly stated that the colony was to be governed by “one body corporate and politique in fact and name, by the governor and company of the Massachusetts Bay in New-England.”⁹ There is no mention of religion, God, or faith; it

⁹ Michael Kammen, Deputyes and Libertyes: The Origins of Representative

simply raises the financial and political interests of the company. More importantly, the charter presents how this administration was to be carried out.

That from henceforth for ever, there shall be one governor, one Deputy Governor, and eighteen Assistants of the same Company, to be from time to time constituted, elected and chosen out of the Freemen of the said company, ... which said officers shall apply themselves to take care for the best dispensing and ordering of the general business and affaires of, for, and concerning the said lands and premises hereby mentioned. . . .¹⁰

With these instructions the crown provided for a basic structure of government for the colony, and granted the colonial leaders the authority to administer these structures. The authority was vital to ensure that the settlement did not fall into a state of chaos. The charter, as expressed here, seems to ensure also that the interest of the crown and the company were secure within this proven system of governing.

The charter also outlines the judicial responsibilities of the company in the colony. First, the charter provided the company leaders with the ability “to make laws and ordonnances for the good and welfare of the said company, . . . and the people inhabit and to inhabit the same. . . .”¹¹ These broad powers were intended to allow the company the flexibility to deal with unique situations in the colony. This flexibility, however, was tempered by an important limit. “Such laws and ordinances [shall] be not contrary or repugnant to the laws and statutes of this our realm of England.”¹² In less than twenty words, the charter imposed a warning against any possible deviance from the age old standards of the English law. At the same time, this statement may be viewed as a

Government in Colonial America (New York: Alfred A. Knopf, 1969) , 117.

¹⁰Ibid., 118.

¹¹Ibid., 119.

¹²Ibid., 119.

positive assertion, a form of protection which extended to all settlers, guaranteeing, in a positive manner, that all settlers were to be accorded the customary rights available to all Englishmen. The language and intent of the clause provided the basic rules for the colonial jurists. It did not necessarily impede the development of organic laws suited singularly to the situation in the colony.

This sweeping power (though seemingly restricted) was accompanied by an ability to provide justice in the colony, that is to “prosecute, demand, and answer, and be answered unto, in all singular suites, causes, quarrels, and actions, of what kind or nature soever.”¹³ Again, however, this power was limited by the listing of specific courts to be used. When the ability to establish a system of courts was combined with the ability to judge cases and compile laws, the colonists had effective control over judicial affairs in the colony. All of these powers, it should be noted, were tempered by the rule of law dictated by the monarchy and the charter. And this, in the end, would prove to be strong enough to have an impact of the judicial affairs of the colony.

The motives of Winthrop and his followers were not directly in accord with the charter granted by the crown. The granting of the charter implied close supervision by the crown over the affairs of the settlement. The Puritan settlers, however, had other ideas. They had a very clear concept of their relationship with the crown. Their distinctive independence was clear in their own minds, and the steps that they took to assure their separate identity were as bold as they were ingenious. At a meeting in Cambridge, England on August 26th, 1629, the Puritan members of the company drafted and signed the Cambridge Agreement. The signers included John Winthrop, Increase Nowell, and William Pynchon. All were to be major players in colonial life. What is important about this document is not who signed it but rather to what they agreed. They recognized in the agreement that their endeavors might have serious consequences, and

¹³Ibid., 117.

those “whose names are hereunto subscribed, have engaged ourselves, and having weighed the greatness of the work in regard of the consequences, God’s Glory and the church’s good,” proved committed to their goal.¹⁴ Their emphasis on God and the church is a radical departure from the words of the charter.

Another point of importance in the Cambridge Agreement is their decision to take the actual patent granting the charter with them. “Therefore provided that before the last of September next, the whole government, together with the patent for the said plantation, be first, by an order of court legally transferred and established to remain with us and others which shall inhabit the said plantation.”¹⁵ The removal of the charter to New England was a vital step. “Doing so was neither customary nor legal, and led to many difficulties and constitutional controversies.”¹⁶ They, in effect, assured their separateness with this maneuver. The Cambridge Agreement represents a significant step towards the development of Puritan jurisprudence. If this document is considered in light of a struggle between Puritan motives and English influences it becomes quite clear that this move is the first in a series that cemented the Puritan position.

Though the Cambridge Agreement clearly outlines the motives of the Puritan settlers, it falls short of offering examples or the means for implementing their vision. In many respects the Cambridge Agreement serves as a bridge between the royal and Puritan outlooks in this particular struggle. The Puritan position is best exemplified by John Winthrop’s famous speeches “A Model of Christian Charity”. With his settlers gathered on the *Arabella*, Winthrop delivered his vision of a utopian community guided by theological principles. Though the document has often been edited down to a few

¹⁴Cambridge Agreement, 26 August, 1629, 1.

¹⁵Cambridge Agreement, 26 August, 1629, 2.

¹⁶Kammen, Deputyes and Libertyes, 115.

paragraphs, there is much more to be discovered in the speech as it serves as a window into the elusive Puritan mind-set and utopian vision. "For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us."¹⁷ Though this famous passage highlights the Puritan objectives in the Massachusetts Bay Colony, his main argument is found elsewhere in the text. He demonstrated quite clearly how colonial administration could deal with practical problems by looking to scripture, using it to outline how the colonists should act and interact. "This was, after all, one of the main objects of the whole experiment - to prove that the word of God could serve as a competent basis for human government as well as a guide to the usual business of life."¹⁸ Perhaps the most significant step taken by Winthrop in this speech was linking the role of 'state' to God. The basic link was based on the use of a religious state to glorify God. "That ourselves and posterity may be better preserved from common corruptions of this evil world, to serve the Lord and work out our salvation under the power and purity of his holy ordinances."¹⁹ This was a vital step for Winthrop. As leader of the colonists, he had to emphasize the nature of the future political and judicial organization of the settlement. Finally, Winthrop also presented the basis for legal developments in the colony. He demonstrated quite clearly that the Puritan jurisprudence was to be based on the law of Nature and of Grace. "Upon this ground stands all the precepts of the moral law, which concerns are dealing with men . . . that every man afford his help to another in every want or distress."²⁰

Winthrop and his followers seemed to be very aware of the theological

¹⁷Winthrop, Model of Christian Charity, 9.

¹⁸K. T. Erikson, Wayward Puritans: A Study in the Sociology of Deviance (New York: Wiley Press, 1986), 57.

¹⁹*Ibid.*, 9.

²⁰Winthrop, Model of Christian Charity, 2.

importance of the tasks ahead of them. The struggle that was evident in England, however, would continue on a more inward form in Massachusetts. Among the first tasks for the colonial leaders was to adapt the company structures, which were intended to administer business matters, to a system of governing. As they viewed this task, it involved the institution of legal and political arrangements which would most effectually control and shape the social and religious life of the colonists in accordance with the purposes for which the enterprise had been undertaken. From the start, however, the colonial leaders deviated from the spirit of the charter. The founding of the General Court and the Court of Assistants did not exactly follow the guidelines of the charter. The major difference was found in the concentration of power in the hands of a few freemen. The charter demanded that the General Court be comprised of company freemen. Because only a few freeman moved to the colony in the initial wave of immigration their numbers were significantly smaller than envisioned. "It appears that although the company consisted of something over a hundred freemen, practically none of them who was not also an assistant or an officer emigrated to the colony, and of these were no more than ten or eleven in Massachusetts in 1630."²¹ This small number of freemen presented a problem of court membership. The charter clearly outlined a difference in membership between the Court of Assistants, whose primary concern was judicial, and the General Court, whose primary concern was legislative. Due to the lack of freemen the membership of these two courts was identical. The Puritan leaders seized this opportunity and assumed absolute control of the political and judicial affairs of the settlement.

These men soon took steps to protect their position. The first step was taken by the Court of Assistants. They agreed at their first meeting that the magistrates of the

²¹George Lee Haskins, "The Government of the Massachusetts Bay Colony, 1630-1650" in The New England Puritans, ed. Sydney James (Harper and Row Publishers: New York, 1968), 73-74.

court should have the same broad powers of the justices of the peace in England. "These magistrates spent much of their time in the first years of the colony's existence in exercising powers that were as broad as those wielded by justices of any borough corporation in England."²² In the absence of any real structures the colonial leaders turned to those familiar positions from England that suited their needs. The next major step was taken by the General Court in October, 1630, when the members of the General Court bestowed upon the Assistants the power of selecting the Governor and Deputy Governor.

For the establishing of the [government] it was proposed if it were not the best course that the freemen should have the power of choosing Assistants when there are to be chosen, and the assistants from amongst themselves to chose Governor and Deputy Governor, who with the Assistants should have the power of making laws and choosing officers to execute them.²³

This move placed a great deal of power in the hands of the Assistants. "Hence the effect of the October meeting was to concentrate in the hands of the 'magistrates' all legislative, judicial, and executive powers of the government."²⁴ This move was a clear violation of the charter. The charter bestowed on all freemen the ability to make laws and administer the settlement. This move is also significant as it demonstrated the willingness of the Puritan leaders to manipulate the available structures for their own purposes. The Court of Assistants and the General Court were clearly English institutions. The Puritan leaders simply altered them in order to strengthen their position in the colony. Under this new structure it was difficult, if not impossible, for non-Puritans to infiltrate any branch of authority in the settlement.

²²Ibid., 87.

²³Colonial Records, 19 October 1630, 79.

²⁴Haskins, "The Government of the Massachusetts Bay Colony, 1630-1650," 73-74.

In the view of the colonial leaders, they were looking ahead to when the General Court might become too big to be able to handle the day to day administration of the settlement. This situation is highlighted by the fact that at the same General Court meeting of October, 1630, a list of over a hundred names were submitted to the General Court of people desiring to be admitted as freemen. Of these hundred people, not all could have been entirely sympathetic to the causes of the Puritans. Winthrop and the General Court must have been wary to place extensive judicial, legislative, and executive powers in the hands of so many people. The colonial leaders also held the view that such important responsibilities should only be assumed by a few qualified individuals.²⁵ As a result the General Court transferred powers originally designated for itself to the Court of Assistants.

This tactic, as will be discussed later, is directly attributable to the Puritan view of magistrates derived from Calvin's work, The Institutes of Christian Religion.²⁶ The magistrates, being the prime judicial officers in the colony, assumed a position of great authority. Though the position of magistrate obviously had English roots, the colonial magistrate also derived his authority from God. As a result of this view, which was influenced by John Calvin, these officials were of great importance in the colony. "If they [the magistrates] remember that they are the vice-regents of God, it behooves them to watch with all care, earnestness, and diligence."²⁷ As God's representatives on Earth the colonial magistrate was bestowed with the responsibility of ensuring that settlers acted according to standards set out by God which, coincidentally, were the same standards

²⁵Edwin Powers, Crime and Punishment in Early Massachusetts: 1620-1692 (Boston: Beacon Press, 1966) , 50.

²⁶ Kerr, Hugh T. ed., A Compend of the Institutes of the Christian Religion by John Calvin. (Philadelphia, Pa.: Westminster Press, 1964).

²⁷ *Ibid.*, 285.

outlined in the legal codes of 1641 and 1648.

As the Court of Assistants settled into its role in the colony it began to select those people who would enforce the wills of the court. There are, for example, numerous mentions in the court records of appointments for the position of town constable. "Ralph Sprague is chosen constable Charleton, John Johnson of Rocksbury, John Page for Watertown, for the space of one whole year, and after till new be chosen."²⁸ Despite the fact that these men were appointed only temporarily until a town could get itself organized, the General Court provides no clues as to why these men were chosen. None of these names appear on the rolls of freemen admitted to the colony. It is reasonable to assume that they were likely members of congregations within those communities. Though the constable was to enforce the motions of the courts, it was not a position that necessarily assumed independent authority because the actions of the constable were severely restricted to the orders of the court and did not extend to all matters. The records mention constables who were fined for carrying out duties that were not specifically related to their position. "Mr. Tho: Stoughton, Constable of Dorchester, is fined for taking upon him to marry Clement Briggs and Joanne Allen, and to be imprisoned till he hath paid his fine."²⁹ This one example shows how protective the courts were of their jurisdiction. It may also point to the fact that marriage was likely to be conducted by a magistrate and not by a constable.³⁰ When the Court of Assistants began to establish basic institutions for governing and maintaining the peace it is clear that they turned to those institutions that were distinctly English but they gave them a

²⁸Colonial Records, 19 October 1630, 79.

²⁹Colonial Records, 1 March 1631, 83.

³⁰On a more interesting level, it may demonstrate that magistrates were not always around when one was needed. As such, couples who were in a rush may have turned to the only source of judicial authority available - the town constable.

Puritan flavour. As more colonists immigrated to the area this proclivity would become even more obvious.

In May 1631 the General Court was forced to admit a group of 116 men to the colony as freemen, “most of whom were not members of any local churches.”³¹ This would prove to be the only instance in the history of Puritan New England where freemen were admitted without qualification. Wary of outside influences, the court quickly moved to qualify the standards for freemanship. “For the time to come no man shall be admitted to the freedom of this body politique, but as such as are members of some of the churches within the limits of the same.”³² This act presents a powerful example of the Puritan leaders adapting old structures to suit their situation. In England, the ability to vote was based on land ownership, but in the Bay colony this was changed to religious affiliation.

Directly related to the religious component of the franchise in the colony was the Puritan conception of the purposes of civil government. Colonial leaders seemed to have drawn inspiration from John Calvin when they began to erect the basic institutions of government. “[This] civil government is designed, as long as we live in this world, to cherish and support the external worship of God, to preserve the pure doctrine of religion, to defend the constitution of the church, to regulate our lives in a manner requisite for the society of men, to form our manners to civil justice, to promote our concord with each other, and to establish general peace and tranquillity.”³³ This notion of a civil government, presented by Calvin in 1536, is very similar to the form (and spirit) of governing used by the Puritan leaders in the colony ninety-four years later. With this

³¹Powers, Crime and Punishment in Early Massachusetts, 50.

³²Colonial Records, 18 May 1631, 87.

³³*Ibid.*, 203.

notion of governing clear in their minds it is not surprising that the colonial leaders worked so hard to funnel access to the colonial political structures through the congregation.

Though the leaders were eventually successful in limiting the standards of political participation to church membership, the damage was already done with the admission of non-Puritan freemen in 1631. After 1631, the composition of both the General Court and the Court of Assistants had ceased to be identical. Fortunate for the Puritan leaders, however, the General Court had already sequestered the important powers to the Court of Assistants. Despite the new admittance of more freeman, access to the political apparatus was still severely limited. "Assuming that the total population by 1641 was about fifteen thousand, the proportion of those who had any voice in the colony government cannot, even by that date, have been more than seven or eight percent."³⁴ The restricted access to government structures seemed to confirm the future path of the settlement. It also indicates that there was some form of struggle already occurring between the heritage of the English settlers and the future goals of the same group. This struggle, though slight at this point, was manifested by the attempts of the colonial leaders to adapt the only structures they understood to work in order to successfully build the Puritan utopia they had envisioned.

Not all colonists, however, shared this vision. Resistance to motions of the court by some colonists demonstrated that the Puritan vision would not be fully implemented without some obstacles. In 1632, a minister in Watertown advised his flock not to pay taxes to which they had not consented for fear of "bringing themselves and posterity into bondage."³⁵ Their protest called into question the seemingly absolute power of the

³⁴ Haskins, "The Government of the Massachusetts Bay Colony" 77.

³⁵ Powers, Crime and Punishment in Early Massachusetts, 53; Haskins, "The Government of the Massachusetts Bay," 77.

General Court.³⁶ Governor Winthrop, who answered their protest, admonished them for not paying by referring to the practical nature of the current structures. As part of a conciliation the protestors agreed to pay their taxes, while Winthrop agreed to allow the towns to send two deputies to the General Court to advise the court on matters that concerned all inhabitants in the colony.³⁷ The first steps towards some form of representative government were taken. More importantly, however, the Puritan leadership had received a response to their attempts at an absolute form of governing.

The power of the Court of Assistants was more strongly challenged two years later. In the spring of 1634 local deputies met to discuss issues which would be presented at the next meeting of the General Court. "An important result of their discussions was a request to see the charter, from which they learned that all laws were to be made in the General Court."³⁸ This was contrary to how the settlement was being administered. Armed with this information, the deputies went to the next meeting of the General Court, and the fall-out was nothing short of a constitutional revolution in the colony. While the deputies reminded Winthrop and the Court of the structures outlined in the charter, they also called for an absolute return to the English structures required by the law. They wanted to return to the representative nature of the General Court, as was originally envisioned when the charter was first drafted. In many respects, the deputies succeeded in their attempt at upheaval. Because of their protests the power to make laws in the colony was removed from the Court of Assistants and returned to the General Court. The

³⁶This protest may also highlight the perceived position of the minister in the colony. Not only did this particular minister lead his flock in protest, he was doing so on a secular issue. Further, this minister may have assumed to hold a greater role in political affairs than was truly accorded him. Refer to the previous chapter on the place of a minister in the town and colony. Winthrop's response clearly demonstrates that some issues were not within the interest of the church.

³⁷Haskins, "The Government of the Massachusetts Bay," 77.

³⁸Ibid., 78.

colonial leaders, who had endowed the Court of Assistants with this power in 1630 in order to ensure that only a few people had any real political power in the colony, were forced to adhere to the charter. With this move the General Court again became the true governing body in the colony. The Court of Assistants, however, still retained many of its extensive powers when the General Court was not in session.³⁹

Overall, the Puritan attempts at establishing a theocracy were cut short. The colonial leaders, though still responsible for governing the colony, were forced to turn to other means of implementing their vision. In terms of a struggle the influence of English law and traditions initially won out over the Puritan structures that dictated strong inaccessible institutions that governed absolutely. As the colony grew the structures of justice would continue to develop and the Puritan influence would be felt in the substantive content of the laws rather than by dominating the judicial structures.

The final stage of structural development came in 1636 with the creation of new courts of first instance which were known simply as County courts. The creation of these courts was a response to the flood of cases in the settlement. These courts should be viewed as an attempt by the colonial leaders to meet the judicial needs of the many new colonists. Four inferior courts were established at Salem, Ipswich, Newtowne, and Boston. Though these new courts were structurally lower than the Court of Assistants and the General Court, their purview was nonetheless extensive. "These courts shall try all civil causes, whereof the debt or damage shall not exceed X, and all criminal causes not concerning life, member, or banishment."⁴⁰ Ultimately, these courts could judge all non-capital causes and most civil causes. Any appeals arising from these courts were to be handled primarily by the Court of Assistants atop the judicial hierarchy. Furthermore,

³⁹Haskins, "The Government of the Massachusetts Bay," 78-79; Powers, Crime and Punishment in Early Massachusetts, 55-60.

⁴⁰Colonial Records, March 1636, 169.

the General Court seemed to recognize the need for a more complex system of justice. In reality it might be seen as an attempt to relieve the existing courts of a great many petty cases. In this spirit, the General Court provided for other judicial measures to ensure a smooth running structure.

For avoiding of the courts charge by bringing small causes to the Court of Assistants, it is ordered, that any magistrate, in the town where he may hear and determine by his discretion all causes wherein the debt, or trespass, or damage, doth not exceed 20S, and in such town where no magistrate dwells, the General Court shall from time to time nominate 3 men, who whereof shall have like power to hear and determine all such actions under 20S.⁴¹

In order to ensure that their measure was successful the General Court required that minor quarrels first be tried by these lower jurisdictions. "And if any person shall bring any such action to the Court of Assistants before he hath endeavoured to have it ended at home, he shall lose his action, and pay the defendant costs."⁴² With the creation of these commissioner courts the evolution of colonial structures of justice seemed complete. Furthermore, the final hierarchy was not altogether different from those institutions used in England. The resemblance of colonial structures to those in old England cannot be surprising. These colonists were, after all, English. "[Men] cannot all at once cut themselves loose from a system of thought or action under which they have lived; though they transfer themselves entirely to new conditions, their notions and institutions must necessarily be circumstanced and coloured by their former experience."⁴³ The colonists carried with them specific notions of how a system of justice ought to have functioned. This did not necessarily mean that they intended to exist under a hierarchy of courts that replicated the complex set of institutions in England. "To

⁴¹Colonial Records, September 1638, 239.

⁴²Colonial Records, September 1638, 239.

⁴³Reinsch, "The English Common Law in the Early American Colonies," 369.

suppose that they would introduce a system as complex and esoteric as that which prevailed in the king's courts is as absurd as to expect that they would establish a religious system on the principles of the Anglican church."⁴⁴ The nature of the influence, then, was reduced to the level of the common legal experiences of the settlers. Furthermore, the colonial leaders capitalized on this and shaped those experiences into a system that suited their situation. "Our ancestors brought with them its [English legal system] general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition."⁴⁵

Having failed in their attempt to alter judicial structures, the colonial leaders turned to the drafting of laws that would reflect the religious ethos of their mission. This process, which took nearly fifteen years, was thoroughly dominated by Puritan theology instead of past English experiences. This situation was evident from the earliest attempts at legal codification in the colony. On the 16th of May, 1635, the General court struck a committee to draft a set of laws for the colony. "The Governor, , Deputy Governor., John Winthrop, and Thomas Dudley are deputed by the court to make a draught of such laws as they shall judge need-full for the well ordering of this plantation and to present the same to the court."⁴⁶ The order, which came on the heels of the structural upheaval in 1634, makes no mention of any religious motivations. This committee never met and the court records make no mention of any reports that were submitted by this group. The lack of action may have been due to the lack of religious imperative in the order by the General Court. In May 1636 a new committee was struck with a very different set of instructions.

⁴⁴Goebel, "King's Law and Local Custom," 87.

⁴⁵Reinsch "The English Common Law in the Early American Colonies," 368.

⁴⁶Colonial Records, 6 May 1635, 147.

The Govn'r., the Deputy-Govnr., Tho: Dudley, John Hayes, Rich: Bellingham, Esq, M^r Cotton, M^r Peters, and M^r Shephard are entreated to make a draft of laws agreeable to the word God, which may be the fundamentals of this commonwealth, and to present the same to the next General Court.⁴⁷

This order, which expressly stated a request for a theologically oriented set of laws, seemed to have had a greater effect because this committee set to work. Interestingly, this committee contained at least one Puritan minister, John Cotton, to guide the other members in their legal endeavour. The presence of Cotton points to the importance of the theology to this process. Puritan theology thoroughly shaped the laws that were presented to the General Court. Among the strongest influences, besides the Bible, were the words of John Calvin and William Ames.

The colonial jurists had to have considered the works of Calvin due to the many direct similarities between his writings and their laws. Calvin viewed the law as a direct expression of Mosaic law. "By the word law, I intend, not only the decalogue, which prescribes the rule of a pious and righteous life, but the form of religion delivered from God by the hand of Moses."⁴⁸ The use of Mosaic law prescribed by Calvin, and adopted by the Puritans in Massachusetts, held a dual purpose. Not only were they used to regulate behaviour in the colony, but they were also used to save and protect souls.

First, let it be understood, that the law inculcated a conformity of life, not only to external probity, but also to eternal and spiritual righteousness... the superintendent of a mortal legislator extends only to the external conduct, and his prohibitions are not violated unless the crimes be actually committed. But, God, whose eye nothing escapes, and who esteems not much appearance as the purity of the heart, in the prohibition of adultery, murder, and theft, comprises a prohibition of lust, wrath, hatred, coveting what belongs to another, fraud, and every similar vice. For being a spiritual

⁴⁷Colonial Records, 25 May 1636, 174.

⁴⁸Calvin, Institutes, compend, 57.

legislator, he addresses himself to the soul as much as to the body.⁴⁹

With an interest in protecting the souls of an entire community, the Puritan leaders presented very strict rules of conduct that were aimed as much at guiding the hearts of colonists as their actions. By emphasizing the all-knowing eye of God, colonists were encouraged to live a pure life out of faith, instead of just out of fear of legal sanction.

Calvin's view of the law deriving from scripture is simple. He viewed laws as both rules and as strict guides for living. "In this precept, 'Thou shall not kill', the common sense of mankind will perceive nothing more than we ought to abstain from all acts of injury to others, and from all desire to commit any such acts. I maintain that it also implies, that we should do everything that we possibly can towards the preservation of the life of our neighbour."⁵⁰ The influence of this notion can be seen in the extensive laws and rules adopted in the colony. Simply, they were prescribing guidelines for day-to-day living. These laws were ultimately derived from the Ten Commandments. (Calvin even goes so far as to offer a range of applications for each commandment). Together, these commandments form the basis of Mosaic law. Though useful, Puritan theologians did not necessarily consider them to comprise the entire spectrum of possible laws.

Men like William Ames (1576-1633), a leading Puritan theologian contemporary with the Massachusetts migration, presented a more elaborate way of considering law. Among the many works of William Ames there is at least one exposition on the nature of law. Within his work "Conscience", published posthumously in 1639, Ames provided a discussion on the law of nature. For Ames, natural law and eternal law are interchangeable. "The right natural, or natural law, is the same which is usually called eternal law. But it is called eternal in relation to God, as it is from eternity in him. It is

⁴⁹Ibid., 61.

⁵⁰Ibid., 62.

called natural as it is engrafted and imprinted in the nature of man by the god of nature.”⁵¹ Not only does Ames point to the basic existence of a type of law handed down by God, he also revealed a distinct bias towards the word of God above all else. That is, the natural law is easily absorbed into the eternal law because, in his view, it could only have originated with God. As such, any other type of law tends to hold some elements of this eternal law within it. Civil law, for example, draws its basic elements from the natural law, despite the fact that its subject matter concerns the regulation of civil matters. “This civil law, therefore, is derived from the law of nature, either as a special conclusion inferred from a general proposition or as a special determination and application of a general axiom.”⁵² Those common civil relations regulated by the varieties of civil law are thus rooted in natural law. A similar argument was adopted by John Winthrop in 1646 as part of his justification for the laws adopted in the colony.⁵³ Furthermore, this position presents a clear link to the Puritans establishing a system of justice in the colony.

The influence of Calvin, Ames, and the Bible were all evident in the first legal document produced in the colony. Moses His Judicials, presented by John Cotton in 1636, was never accepted by the General Court yet it serves as an example of the first attempts at legal codification in the colony. There are no surviving copies available to historians for analysis. The document was originally re-published in England in 1641

⁵¹Puritanism and Liberty, being the Army debates (1647-49) from the Clarke Manuscripts with supplementary documents. (Chicago: University of Chicago Press, 1965), 187.

⁵²*Ibid.*, 187.

⁵³Robert Child argued that the laws of the colony were beyond the scope of the colonial leaders because they were, essentially repugnant and contrary to the laws of England. Winthrop responded by listing the laws that were in force in the colony, to demonstrate that they were not repugnant. As the basis for his position he argued that these laws were based on the word of God, just as was the Magna Carta – which was the basis for the laws in England. Simply, the Puritans demonstrated that they preferred to depend on the source of law, god, rather than on the confining limits of English Law.

under the title An Abstract of the Lawes of New England as They are Now Established.⁵⁴ It is within this document that John Cotton presented a scripturally based doctrine intended to provide judicial and political advice to the colonists. More specifically, Cotton offered his own scriptural interpretation of how the judicial and political institutions should have worked within the colony. In this vein his document required that magistrates be chosen based on some fundamental qualifications “All magistrates are to be chosen . . . out of rank of nobleman or gentlemen among them, the best that God shall send into country, if they be qualified with gifts fit for government, either imminent above others or not inferior to others.”⁵⁵ One may note the emphasis on God and rank. This seemed to be a deliberate wording by Cotton in order to create barriers to becoming a magistrate that would eliminate most of the colonists from contending for such a position. This restriction was based wholly on church membership. As Cotton put it no judge shall be appointed unless he was an upstanding member of a Puritan congregation—in short unless he was a “visible saint”. He also required that the magistrate be trained for the position. This requirement was likely difficult to fulfill in a settlement where qualified judges were lacking. As such, he also included the qualification: “the best that God shall send into country”⁵⁶ Trained judges, then, were an ideal. When lacking appropriate talent the positions could be substituted with lay judges.

Cotton’s requirements for a qualified corps of magistrates were directly

⁵⁴The historical debate surrounding the legitimacy of this edition is extensive. In fact, both Moses his Judicials and the General Book of Laws and Liberties of 1648 were lost. The 1648 edition of Laws and Liberties was only found in 1929, and an edition of Moses His Judicials was never found. The Massachusetts Historical Society meeting of 1843 contains some debate on the issue of the Abstract of Laws of New England. Based on their findings this edition has come to be accepted as a reprint version of “Moses His Judicials”.

⁵⁵John Cotton, An Abstract of the Lawes of New England, 1644, 1

⁵⁶*Ibid.*, 1.

proportional with his emphasis on a powerful General Court. "The Governor hath power with the assistants to govern the whole country, according to the laws established here after mentioned."⁵⁷ With these broad powers the leaders were responsible to, among other things: "consult and provide for the maintenance of the state and people . . . to preserve religion . . . [and] to direct all matters where an appeal is made to them from inferior courts."⁵⁸ Under Cotton's proposal the General Court, with the Court of Assistants, would effectively oversee all areas of colonial life. This proposed structure is not all that dissimilar from the original colonial structures. He did not discount the position of either court nor did he formally recognize the structures laid out in the charter.

The most significant aspect of Cotton's work, however, is not in relation to his structural or positional recommendations; it is how the distinctive jurisprudence was theologically based from the beginning. The most concrete evidence is supplied by his extensive list of capital offences. Among those crimes he judges to be capital were blasphemy, idolatry, witchcraft, willful perjury, profaning the lords day, treason, rebellion, heresy, rebellious and corrupted acts of children, murder, adultery, incest, sodomy, pollution of a virgin, whoredom, man stealing, bear killing, and false-witness.⁵⁹ He justified every one of these with scriptural references. The version used here neatly provides the scriptural passages where these laws may be justified. It is clear that Cotton was using mosaic law for his inspiration. The impact of this document on the colony is unknown as the document was never accepted by the court, and it is difficult to be absolutely certain whether the proposal was even thoroughly debated as the colony was soon absorbed by other concerns.

⁵⁷Ibid., 1.

⁵⁸Ibid., 1.

⁵⁹Ibid., 10-11.

The Pequot War rose to the head of colonial concerns along with the Anne Hutchinson trial in 1637. Constitutional issues quickly assumed a secondary role. Once the Antinomian controversy died down and the Pequot war was resolved, the court again returned to constitutional concerns. At a meeting on March 12, 1638 the General Court ordered the freemen of the colony to assemble in their towns and “collect the heads of such necessary and fundamental laws as may be suitable to the times and places where God by his providence hath left us. . . .”⁶⁰ This request for widespread participation of freemen was radical, and was a departure from the traditional approaches to drafting laws for a society. Suggestions were soon collected and submitted to a court committee for review. This new committee then set to the task of sifting through the documents in order to arrive at another proposal. “Upon the survey of much heads of laws, make a compendious abridgement of the same by the General Court attume [sic], adding yet to the same or detracting there from but in their wisdoms shall seem mete.”⁶¹ The committee methodically poured over the information, and took over a year to submit a draft to the court.

In the end, two codes were presented to the court for consideration: one by Cotton and the other by Nathaniel Ward. Cotton’s version represented the hard-line Puritan jurisprudence available in his previous attempt. Ward’s version, meanwhile, was significantly different. “Ward’s code, the second attempt at codification, was a rather lengthy bill of rights which sought to limit the arbitrary power of the magistrates in Massachusetts and thus meet the needs of the infant colony.”⁶² The court, obviously torn

⁶⁰Colonial Records, 12 March 1638, 222.

⁶¹Colonial Records, 12 March 1639, 222.

⁶² Isabel Calder, “Moses his Judicials,” Publication of the Colonial Society of Massachusetts, 128 (1935), 89.

between the basic judicial needs of the colonists and their own Puritan vision, combined the two proposals. They used the scriptural elements of Cotton's Puritan jurisprudence and Ward's bill of rights. The end result was a text known as the Body of Liberties. It was informally accepted by the General Court in November of 1641. Though the code was never officially published, nor was it declared to be the official code of the colony, some copies were sent to the county courts for informal application.

Basically, the Body of Liberties was used as a temporary working text until more work could be done. Regardless, it proved to be a vital step in the process of developing a distinct jurisprudence for the colony. In terms of a struggle, the Body of Liberties represented a compromise between the harsh laws outlined by Cotton and the bill of rights envisioned by Ward. Ultimately, however, it seems that the concept of rights won out in the code. Not only was this expressed by the list of freedoms, it was also reiterated by the language. "We hould [sic] therefore our duty and safety. Whilst we are about the further establishing of this Government to collect and express all such freedoms as for present we forsee may concern us, and our posterities after us."⁶³ This language, and the many liberties listed, may be viewed as a radical departure from previous expressions of Puritan jurisprudence. There are, however, elements within this code that tend to re-emphasize the mosaic law to the colonists.

The Puritan element of the Body of Liberties of 1641 also appeared in a host of titles that cemented the position of the church and reiterated the place of God in the laws. An often overlooked aspect of the code that neatly counter-balanced the many rights is Title 65. Essentially, Title 65 reiterated the place of God in the system of justice. "No custom or prescription shall ever prevail amongst us in any moral cause, our meaning is

⁶³Nathaniel Ward, "Body of Liberties," in William H. Whitmore, A Biographical Sketch of the Laws of the Massachusetts Colony (Boston: Rockwell and Churchill, 1890), 33. [Hereafter cited to as Body of Liberties]

to maintain anything that can be proved to be moral sinful by the word of God.”⁶⁴ No other title so adamantly emphasized the jurists dependence on the Bible for inspiration. More importantly, this title also revealed the guide that the colonial leaders would turn to in times of difficulty. Cotton’s influence, it would seem, was not completely overshadowed by Ward’s work.

The Body of Liberties also protected the position of the church in the colony. Title 95 contains eleven articles that specifically outline the liberties of the Puritan church. These eleven articles served to remind everyone that the congregation was the supreme authority in the settlement. “Every Church hath full liberty to exercise all the ordinances of God, according to the rules of scripture [thus the law], . . . all churches have liberty to deal with any of their members in a church way that are in the hand of Justice. . . .”⁶⁵ Not only did these articles reiterate the perceived view of the church in the colony they also reaffirmed the direct power of the church in judicial affairs. These articles clearly placed the church at the forefront of colonial affairs. “Every church hath liberty to deal with any magistrate, Deputy of Court or other officer what soever that is a member in a church way in case of apparent and just offence given in their places, so it be done with due observance and respect.”⁶⁶ Because every magistrate or court official was required to be a freeman—thus a member of some congregation—the church held a considerable weight over the processes of justice. The church also had the ability to admit or dismiss members. Under Article 4 the church was presented with the liberty of effectively controlling the political and judicial life of its members. This power is especially significant when it is remembered that church membership was an essential qualification for the franchise in the colony. Within these eleven articles, combined with a host of

⁶⁴Body of Libertie, 47.

⁶⁵*Ibid.*, 57.

⁶⁶*Ibid.*, 57.

other titles, the strength of Puritan jurisprudence was confirmed within Ward's liberties.

One of the most interesting aspects of the Body of Liberties was the extensive list of capital offences. Ward's list of capital crimes included idolatry, witchcraft, blasphemy, murder, manslaughter, poisoning, bestiality, sodomy, adultery, man-stealing, false witness, and treason.⁶⁷ The list was significantly reduced to twelve distinct offences from Cotton's twenty four in *Moses his Judicials*. The first capital law in both codes, for example, deals with the worship of another God. "If any man after legal conviction shall have or worship any other God, but the Lord God, he shall be put to death. - Exod. 22.20, Deut. 13.6,10, Deut 17.2.6"⁶⁸ The list continued in both codes to include a list of offences which were all scripturally justified. The only exception to this was the crime of rape. It was included in the edition of 1648, despite the lack of scriptural references.⁶⁹

The link to scripture was more than just an interpretation. Indeed, the colonial leaders and the Puritan ministers borrowed so heavily from scripture that there was little need for interpretation. Consider the aforementioned law against worshipping another God and its scriptural footnotes. The scriptural passages from the book of Exodus and Deuteronomy are very similar to those words found in the codes. "He that sacrificeth unto *any* god, save unto the LORD only, he shall be utterly destroyed."⁷⁰ The passage from the book of Deuteronomy is much more descriptive.

If thy brother, the son of thy mother, or thy son, or thy daughter, or the

⁶⁷Ibid., 55.

⁶⁸Ibid., 55 and Book of General Laws and Liberties, 5.

⁶⁹See Powers, Crime and Punishment in Early Massachusetts: 1620-1692, 82. Rape was added to the list of capital offences after a series of public protests that decried the lack of a suitable punishment for this particular crime. Powers offers a clear account of the cases that are cited as initiating the protests.

⁷⁰The Bible: King James Version, Exodus 22.20.

wife if thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying Let us go and serve other gods, which thou hast not known, thou, nor thy fathers; Namely, of the Gods of the people which are around you, nigh unto thee, or far off from thee, from one end of the earth even unto the other end of the earth; Thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him; But thou shalt surely kill him; thine hand shall be first upon him to put him to death, and afterwards the hand of all the people. And thou shalt stone him with stones, that he die; because he hath sought to thrust thee away from the LORD thy God, which brought thee out of the land of Egypt, from the house of bondage.⁷¹

Not only does this passage provide for the sanction of the offence, but it also offers the justification and the manner of carrying out the punishment.

Despite the fact that every offence was scripturally justified, colonial jurists did not use every law prescribed by Cotton or the Bible. Instead, they only used those that suited their situation. Because the list of crimes was significantly reduced the colonial leaders seemed to be recognizing both the Puritan vision of justice and the practicality of enforcing and applying justice in a largely non-Puritan setting. This should not necessarily imply, however, that the Puritan jurists were entirely aware of the common problems within the society they were looking to control. None of the laws presented any attempt to deal with colonial issues directly as all of the laws were scripturally justified. If they had attempted to include known offences, other non-biblical crimes may have been included. "The crime of rape, for example, Ward had omitted from the capital list, presumably because there was no warrant for it in scripture."⁷² This omission

⁷¹Ibid. Deuteronomy 13.6-13.10

⁷²Powers, Crime and Punishment in Early Massachusetts, 264.

may point to a fundamental flaw of the code and of Puritan jurisprudence in general. That is, it lacked the necessary flexibility to adapt to the setting in which it was being applied. Neither the Body of Liberties nor Puritan jurisprudence could possibly adapt to the changing nature of the colony. This is not to say that colonial leaders were blind to the changes that were occurring. “As people increased, so sin abounded, and especially the sin of uncleanness, and still the providence of God found them out.”⁷³ Winthrop, and others, tended to believe that it was not the code that had to adapt, but those existing under the law who needed to change. Both ends of this issue of adaptability played out in the final stage of legal development.

The Book of the General Laws and Liberties accepted by the General Court in 1648 represented the apogee of legal development on the Massachusetts Bay Colony. “For this and about nine years since we used the help of some of the Elders of our churches to compose a model of the judicial laws of Moses with such order as might be referred to them, with intent to make use of them in composing our own. . . .”⁷⁴ Because The Body of Liberties was never formally recognized as an official code, only used as one, the colonial lawmakers were able to patiently develop an appropriate set of laws. The General Book of Laws and Liberties both leaned on Puritan jurisprudence and the result of nine years of judicial experience. Overall, the book represents a refined form of Puritan jurisprudence that was willing to impose a theological order on the colony. “This hath been no small privilege, and advantage to us in New England that our churches, and

⁷³Winthrop, Model of Christian Charity, 56.

⁷⁴The Book of the General Laws and Liberties Concerning the Inhabitants of the Massachusetts (Cambridge, Mass.: Printed according to order of the General Court, 1648), A2. [Hereafter referred to as Laws and Liberties]

civil state have been planted , and grown up (like two twinnes) together like that of Israel in the wilderness by which we were put in mind (and had opportunity put into our hands) not only to gather our churches, and set up ordinances of Jesus Christ in them according to the Apostolick pattern by such light as the Lord graciously afforded us.”⁷⁵ The willingness of the colonial leaders to impose such an outlook on the colonists was directly tied to their view of their relationship with God. This preamble presents one of the clearest expressions of the Puritan’s attempt at demonstrating that the word of God (scripture) was useful in the governing of people. Not only did the authors present many scriptural references that justified this avenue of legal development, they also present clear statements of their use of scripture in the development of these laws. But the authors also present some other interesting allusions. First, this statement confirms the relationship between church and state that was already established in the colony. Second, the Puritan colonists viewed themselves as being just like the Israelites in the Bible, with the same communal obligation of the covenant.

Another responsibility of the colonial leaders was to impose a theological vision on a largely non-Puritan society. In many respects, the Puritans who drafted the codes expected that the entire population simply abide by the terms of justice set to them. On this score the Puritans state that the non-Puritan element of colony had no option but to comply.

If one sort of you viz: non-freemen should object that you had no hand in calling us to this work, and therefore think yourselves not bound to obedience, we answer that a subsequent, or implicit consent is of like force in this case . . . for putting your persons and estates into the protection and way of subsistence held forth and exercised within this jurisdiction, you do tacitly submit to this government and to all the whole some laws thereof. . . .⁷⁶

⁷⁵Laws and Liberties, preamble.

⁷⁶ *Ibid.*, A2.

This warning proclaimed the basic justification for the colonial leaders. More importantly, it tends to set a stern tone for the rest of the document. The colonial leaders proclaimed that anyone enjoying the comforts of life in the colony were also forced to comply to the laws. They also thought that these laws, when viewed as a guide to Godly living, would work to convince non-puritans of the virtue and comfort of both the legal codes and a Puritan way of life.

The document also represented the height of legal development because it clarified many issues only previously mentioned in other records and then collected them under one document. One issue in particular serves to highlight this feature—the qualifications for freemanship. While the court ordered specific standards for being admitted to the colony as a freeman there was no mention of it in any of the previous codes. *Laws and Liberties* remedies this problem. “That no person being a member of any church which shall be gathered without appropriation of the magistrates and the said churches shall be admitted to the freedom of this commonwealth.”⁷⁷ The link between church membership and the franchise cannot be overstated. With the addition of this standard the colonial leaders can be seen to be building a comprehensive code that was intended to deal with a variety of outstanding issues. This one example, coupled with the reaffirmation of the position of the church and the distillation of capital offences, render the Laws and Liberties a be-all, end-all document for the colonial leaders.

A new addition to the legal codes that appeared in Laws and Liberties was the presence of procedural rules. The document offers procedures for a host of judicial actions from the arrest of a criminal to the execution of sentence. Though a later discussion will expand on the rules provided in the *Laws and Liberties*, it is important to note that their mere presence represents concrete progress in terms of legal development. Furthermore, it only strengthens the collection of laws by providing some rules for

⁷⁷Ibid., 18.

applying them. The colonial lawmakers must have been aware of a problem implementing their own jurisprudence. In these terms, Laws and Liberties demonstrates an air of flexibility.

The inherent flexibility is also evident with the revised list of capital offences. The list presented in 1648 was again altered from the list offered in 1641. The twelve capital offences presented by Ward were left intact, but after nine years the jurists added three more capital offences: rape, rebelliousness of children, and children smiting their parents.⁷⁸ The appearance of rape as a capital crime represented the adaptive nature of this code. Though not scripturally justifiable, the presence of this offence was directly attributable to colonial experiences. After a series of particularly serious rape crimes, public clamour forced colonial lawmakers to adopt some type of sanction, regardless of any scriptural basis. "From the citizenry of Salem and Boston came angry murmurings that the gallows alone would be sufficient atonement for these crimes."⁷⁹ This shift indicated the willingness of the General Court to stray from scripture in order to justify laws that resolved social problems. Furthermore, it tends to indicate that the Puritan leaders, when forced, were able to adopt positive laws that protected specific social or demographic groups. The inclusion of rape and procedural rules are both directly attributable to the knowledge gained from the experience of living in the colony.

Another interesting issue raised in Laws and Liberties is the confirmation of jurisdictional boundaries and responsibilities. "For the better administration of justice and easing the country of unnecessary charge and travels: it is ordered by this court and authorities therefore; That there shall be four quarter courts of assistants yearly. . . ."⁸⁰

⁷⁸Ibid., 6.

⁷⁹Powers, Crime and Punishment in Early Massachusetts, 265.

⁸⁰Laws and Liberties, 14. - The Court of Assistants, which acted as the major court of appeals in the colony, was to meet four times a year. The reference to 'quarter courts'

With this the lawmakers clearly spelled out what institutions of justice were available to the colonists. It also served to recognize the evolution of judicial structures that had occurred in the colony.

With the ratification of the Book of General Laws and Liberties in 1648 the evolution of a colonial system of justice had come to an end. Though the code was amended in 1664 and again in 1672, the content remained essentially the same. This development did not occur without struggle. Quite the contrary, struggle is the underlying theme of this particular development. The budding sense of a Puritan brand of jurisprudence continually came up against the influence of previous English experiences. The Puritan ethos demanded an often strict lifestyle. This strictness, which was translated into law through Puritan attempts at legal codification, was based on a variety of scriptural, theological, and philosophical premises. As the Puritan leaders worked to mould the colony and its inhabitants into a utopian community they drew from those examples and ideas provided to them by John Calvin, William Ames, and the Bible. Furthermore, the colonial leaders turned to those ecclesiastical men in the settlement who could interpret these examples to help in drafting the laws that would govern the colony. These laws, and the sources they derived from, proved to offer a worthy challenge to those English experiences that also had a hand in forming legal institutions within the colony. The result was a mixed system of justice, which used English courts and Puritan jurisprudence in order to bring about the Puritan haven that the colonial leaders had envisioned. This marriage of experiences and belief was not easy, nor was it comfortable. There were often challenges issued that contested the direction of the colony. One need simply to consider the Robert Child affair, the Watertown protest, and the constitutional upheaval in 1636 to understand that there was a constant struggle in the settlement over judicial affairs. The procedures used in the colony, as will be discussed next, worked to

was a direct link to the quarter courts that met in England.

bridge the gap between the common English experiences of the settlers and the Puritan vision of the leaders.

CHAPTER VI
CRIMINAL PROCEDURE IN MASSACHUSETTS

Any discussion of criminal procedure in the Massachusetts Bay colony must begin with an acknowledgement of the legal foundations on which the colonial processes were based. As was previously discussed in Chapter IV, there was a tension at work in the colony between the English and Puritan influences on the law. In structural terms the English influence was more persuasive and the courts in the colony adopted a structure that was similar (in appearance and function) to what was outlined in the Charter of 1629. Substantively, however, the Puritan outlook was more influential and the laws in the colony reflected a largely Puritan view of how a community ought to operate.

In procedural terms it is very difficult to pinpoint how much the jurists in the colony wished to implement their English legal heritage as opposed their Puritan vision. The procedures adopted in the colony definitely carried a great similarity to procedures used in England, but any differences may be viewed to have been shaped by other considerations. "In seventeenth century Massachusetts the influence of the common law seems to have been less significant than other elements, such as local custom."¹ This is not to say that the colonists deliberately ignored or disregarded their legal heritage, but rather that they turned to those aspects of their heritage that were most useful to them. As Julius Goebel remarks, "we are not dealing with an exact duplication of a definite model, but with a crude imitation of inaccurately remembered things."² Colonial courts, then, administered law in a form that was unique to the Massachusetts Bay.

¹ George L. Haskins, "Reception of the Common Law in Seventeenth century Massachusetts: A Case Study," in *Colonial America* eds. Lefler, H.T. and Barck O.T. (New York: MacMillan, 1958), 26.

² Julius Goebel, "King's Law and Local Customs in Seventeenth Century New England," *Essays in the history of Early American Law*, ed. David Flaherty (Chapel Hill, N.C.: University of North Carolina Press, 1969), 104.

The emphasis on processes that were unique to the colony is also reinforced by the preponderance of lay judges. Any attempt to replicate English procedure in the colony would have required a great number of highly trained lawyers. “ But these were not generally found in the colonies during the seventeenth century, and even far down into the eighteenth we shall find that the legal administration was in the hands of laymen in many provinces.”³ As a result law and procedures in the colony were formed through practice and by what memories these lay judges had of old English procedure. “ Although colonial law makers adopted in various ways the functions of the English courts of “equity”, here, as in courts of law, procedure was simplified and relief made more accessible than in the English Court of Chancery.”⁴ As we begin to outline the procedures at work in the colony it is vital to take these considerations into account. Just as was the case with the colonists themselves, we will not completely disregard possible English influences, but we will take them into account as they arise in our discussion.⁵

The task of uncovering the exact procedures used in Massachusetts is much more

³Paul Samuel Reinsch, “The English Common Law in the Early American Colonies” Select Essays in Anglo-American History ed. Association of American Law Schools (Boston: Little, Brown and Company, 1909) , 369-370.

⁴Peter James Hoffer, Law and People in Colonial America (Baltimore, MD.: The Johns Hopkins University Press, 1992) , 34.

⁵Though our study tends to avoid an interpretation of English criminal procedure in the early-mid seventeenth century, this is not due to a lack of available literature on the subject. See Cynthia Herrup The Common Peace: Participation and the Criminal Law in Seventeenth Century England (Cambridge: Cambridge University Press, 1974); Christopher Hill, Change and Continuity in Seventeenth Century England (London: Weidenfeld and Nicolson, 1974); J.A. Sharpe, Crime in Early Modern England (London: Weaston Press, 1984); Joseph H. Smith, The English Legal System: Carryover to the Colonies (Los Angeles, CA.: University of Berkely Press, 1975); J.S. Cockburn, “A Trial by the Book? Fact and Theory in the Criminal Process: 1580-1625,” in Legal Historians ed J.H. Baker (London: Royal Historical Society, 1978); J.M. Beatty, Crime and Courts in England (Princeton N.J.: Princeton University Press, 1986); Micheal Dalton, Countray Justice, ed William Rowley and Samuel Roycroft (London: 1690). Other studies have undertaken to understand the transferall of English laws and procedure to the colonies such as”G.B. Warden, “Law Reform in England and New England” in William and Mary Quarterly 35 (1978) : 668-90; Allen, In English Ways.

difficult than our previous discussion of French processes. Not only is the path towards understanding colonial processes fraught with the usual pitfalls of historical interpretation but there also are a number of problems unique to our situation that further obstruct our attempts at clarifying the state of criminal procedure in the Massachusetts Bay Colony. First, there is the problem of a lack of procedural consistency from court to court. Recognizing that the courts were filled with mostly an untrained corps of officials it is difficult to conceive of a formal system of procedures that were consistently applied in every jurisdiction. As a result, the procedure used by William Pynchon in Springfield were likely different—in some form—from the procedures followed by Bellingham in the Suffolk County court. Both magistrates, though trained to some degree in the law, likely only used procedures as they remembered them from England. The task of discovering a consistent set of procedures throughout the entire colony becomes quite difficult in light of this fact. But this problem does not entirely negate our efforts. Rather, it points to one of the important features of the system of criminal procedure in the Bay colony—that of flexibility. There may have been a prescribed *form* to the procedures in the colony but the particular steps taken in each court depended on both the court and the bench presiding over the court.

Another significant problem has to do with the lack of descriptive procedures in Massachusetts. Where the court records do present a criminal case, the information contained therein is rarely thorough enough to picture how a typical case might have proceeded.⁶ The typical criminal case, as mentioned in court records, is often just a statement that included the names of the parties involved, the charge before the court, the judgement, and the prescribed sentence. With such little information it can be very difficult to understand how the case was

⁶As Zechariah Chafee Jr. notes in the introduction to the Suffolk County Court Records, there was a preponderance of civil cases litigated as compared to criminal cases. Furthermore, the average criminal entry is rarely longer than a half dozen lines. Records of the Suffolk County Court, 1671-1680, vol.1, Zechariah Chafee Jr. (Boston, Mass.: Publications of the Colonial Society of Massachusetts, 1933) , xxxviii. [Hereafter referred to as Suffolk County Court Records]

brought to trial, whether the accused was summoned to appear or was forced to appear by a warrant, what evidence was presented, what defence may have been offered, or how the decision was made. All of these pieces of information are vital to understanding the various steps taken in the prosecution of a criminal case.

The lack of documented proceedings, however, may be used to indicate a number of possible extra-judicial situations. First, the lack of documented procedure may indicate that the litigants were so familiar with the processes of justice that there was little need to record every aspect of a case. Second, the problem may point to an unwillingness of the administrators of justice to reveal all of the possible procedural avenues in order to maintain some level of efficiency in prosecuting cases, while at the same time protecting their own position of authority. Third, there may have been few formal procedures for the court to record. Fourth, the lack of records tends to emphasize strongly the oral nature of the average case. Considering our current dilemma, and our previous discussions, it is conceivable that all of these factors may have been at work. It may be safe to assume that the application of a Puritan jurisprudence within a series of English-like courts, for the benefit of an isolated populace, by a company of relatively untrained magistrates has created special problems for historians of criminal procedure.

These two obstacles do not necessarily render our endeavour impossible, but they need to be acknowledged and understood in order to complete as accurate a picture as possible of the judicial procedures used in prosecuting crime in the Massachusetts Bay. Furthermore, they do not necessarily indicate that there were no guarantees of some form of process available to the settlers of the Massachusetts Bay. It can certainly be acknowledged that the General Court spent a great deal of time establishing laws and jurisdictions but rarely focussed on procedural affairs. Even the codes developed and accepted by the court tend to follow a similar trend by focussing more on laws than on procedures. This neglect may have been intentional. "Perhaps such neglect was beneficial in that it permitted each court to shape

its procedure, to some degree with its own circumstances.”⁷ Despite allowing for some variation of procedure the General Court was still careful to codify a guarantee that procedures, no matter their particular flavour, were used in prosecuting cases. With the informal adoption of the Body of Liberties of 1641, and with the ratification of the Book of General Laws and Liberties in 1648, the court provided a very clear declaration of a procedural guarantee. “No man’s life shall be taken away, no man’s honour or good name shall be stained, no man’s person shall be arrested, restrained, banished, dismembered, nor any ways punished . . . unless it be done by virtue or equity of some express law of the country warranting the same. . . .”⁸ The court presents a statement here that provided the settlers of the colony some measure of protection against summary prosecution. In more severe cases it provided an additional guarantee that cases where the sentence could involve life or death were to be decided by the General Court.⁹ These two guarantees, taken together, can be interpreted as an important provision for criminal procedure in the colony. The variety of inferior courts were thus forced to follow procedures when prosecuting cases. These two statements are vital to the historian because they offer a clear indication of the existence of some standard of procedure in the colony. Furthermore, the Book of General Laws and Liberties and the Body of Liberties provide some particular procedures to be followed in the prosecution of cases. The task ahead entails incorporating these few provisions with a range of court records and secondary sources in order to build some semblance of the criminal procedures at work in the Massachusetts Bay Colony.

⁷Joseph H. Smith, Colonial Justice in Western Massachusetts, 1639-1702: The Pyncheon Court Record. An Original Jude’s Diary of the Administration of Justice in the Springfield Courts in the Massachusetts Bay Colony (Cambridge, Mass.: Harvard University Press, 1961) , 129. [Hereafter referred to as the Pyncheon Court Record.]

⁸Body of Liberties, Article I. See also the Book of the General laws and Liberties 1648 for a similar statement.

⁹Body of Liberties, Art I.

A case was normally initiated when the court was made aware of a criminal offence. This could be achieved in at least three distinct ways: complaint by a private person, complaint by a constable (this includes those offenders caught in the act), or by an inquest into an untimely or unnatural death. "While it received little recognition in the laws, the most widely used device for initiating judicial action in criminal offences during the period covered was the complaint made to the court by a private person."¹⁰ Normally, the private complainant was the person who was injured or aggrieved by the words or actions of the accused. When presenting the complaint to the court the complainant had the option of submitting a written or oral complaint. "No requirement appears that such complaints be made in writing or in any particular form and most complaints probably were made orally."¹¹ The oral form of this phase, which was similar to the rest of the process, was familiar to the colonists. Anyone who was a member of a congregation had experienced this type of process when they testified to their own conversion experience before the entire congregation. Furthermore, they were often required to answer questions on the spot before being admitted as a member. It would seem that this feature of colonial processes was common to many other aspects of a Puritan existence.

A town constable could also present complaints based on witnessing an offence or apprehending an offender in the midst of committing a criminal act. Ultimately, the constable was given broad powers to apprehend a variety of offenders without a warrant. "It is ordered by the authority of this court, that every constable within our jurisdiction shall henceforth have full power to make, sign, & put forth pursuits, hues and cries after murders, manslaughterers, peace breakers, thieves, robbers, burglars and other capital offenders, where no magistrate is near to hand. . . ."¹² These extensive powers, which were considerably less libertarian than

¹⁰Pyncheon Court Record, 130.

¹¹Ibid., 130.

¹²Laws and Liberties, 23.

similar provisions in England, were necessary in jurisdictions where there were few justices available and the constable was responsible for 'policing' a large area with little support. These constables also had the ability of imprisoning offenders until their case could be heard by a judge. According to this code, constables were required "to apprehend and keep in safe custody [the accused], till opportunity serve to bring them before one of the next magistrates."¹³ For those caught in the act, then, the charges were likely clear and there was no need for the court to decide whether or not to issue a warrant to bring them before the court. "In those cases in which the constable, or perhaps the watch, apprehended offenders without warrant the initial step of appearing in court in Record was the examination of the offender by the court."¹⁴ A case initiated in this fashion obviously skips the step of issuing a warrant or summons. Furthermore, there seems to be no discernable difference for the defendant as to how the rest of the case proceeded, except that the constable was keenly attached to the case and may have served as a key witness.

Charges could also be brought to the court's attention by an informer. Informers were typically town and church officials appointed to seek out offences and bring them to the court's attention. Selectmen and tithing men are clear examples of this. A key function of these officials was to act as the moral wardens of a community. This, as was noted earlier, placed them in a position of great power. These officials kept a keen eye out for irregularities in the town. Their responsibilities allowed them to actively seek out sin and crime, thus allowing them to participate in legal affairs as informers.

The final manner in which a case may be brought before the court was through an inquest into an untimely or unnatural death. A provision was offered in the Book of General Laws and Liberties that permits for a jury to investigate such situations. "It is ordered by this court and authority thereof; that whenever any person shall come to any very sudden,

¹³Ibid., 23.

¹⁴Pynchon Court Record, 132.

untimely, or unnatural death, some assistants or the constable of that town shall forthwith summon a jury of twelve discreet men to inquire of the cause and manner of their death, . . .¹⁵ The intent of this type of jury seems simply to be to investigate suspicious deaths but the results of their inquest carry the implication that charges could result from their investigations.

In those cases where a complaint was made (either by a private citizen, informer, or inquest) the magistrate received a statement and any available evidence. This information was eventually to be used in the case against the accused, and was likely to have also helped the magistrate determine the severity of the next step of the process. If the charges were severe, and the evidence was sound, the court may have issued a warrant for the arrest of the accused. If, on the contrary, the case was not so severe the accused might simply have been summoned to appear before the court.

Of the two measures available to the court the warrant was more severe. More than a simple request to appear, a warrant issued authority to a constable to bring an accused before the court.¹⁶ It is interesting to note that neither the Body of Liberties nor the Book of General Laws and Liberties make any mention of the form of warrants. The clearest use of the word is in relation to the ability of a constable to arrest a suspect without a warrant.¹⁷ Taken within this context it is assumed that warrants issued by the court consisted simply of an order, verbal or written, that prescribed the arrest. Summons, however, were precisely documented in the codes of 1641 and 1648. Often known as a writ, a summons contained the basic facts of the case. “ _____, carpenter, of ____ you are required to appear at the next court, holden at ____ on the ____ day of the ____ month next on sitting; to answer the complaint of _____ for with-holding a debt of ____ due upon a bona or billis: _____ or for two _____”

¹⁵ Laws and Liberties, 16.

¹⁶ Pynchon Court Record, 140.

¹⁷ Laws and Liberties, 23.

heifers. . . .”¹⁸ This form, written into the code of 1648, was used as the example of a proper summons. Served by the constable, the recipient had to receive the summons at least six days before the court’s sitting. “In all cases where the first summons are not served six days before the court, and the cause briefly stated in the warrant, where appearance is to be made by the party summoned, it shall be at his liberty wether he will appear or no. . . .”¹⁹ This condition, established in 1641, appears to have been in effect by 1648 because it was not replaced in that code.²⁰ The effect is clear. Not only was the accused given appropriate time to appear, they were also supplied with the basic facts of the charge against them. Ultimately, these two conditions allowed the defendant an opportunity to prepare a case and possibly acquire a lawyer.

With the summons or warrant served the process moved into the next phase—presentment at court. In this phase the accused was formally called to answer to the court and the charges levelled against them. This was not the beginning of a trial, but rather the court decided on the validity of the charges and whether the case would proceed further. It has to be noted that though this was a task largely performed by grand juries, these groups did not always exist at lower courts. Instead, the magistrate took the information, and any statements by the accused, and formulated a decision. In the county courts and in higher courts, Grand Juries were impaneled at the beginning of the court’s session and then decided on all of the presentments during that session. The first use of a Grand Jury was reported in September of 1635. “At this General Court was the first Grand Jury, who presented above one hundred offences, and, among others, some magistrates.”²¹ This event, recorded by Winthrop in his

¹⁸*Ibid.*, 55.

¹⁹Body of Liberties, Art. 21.

²⁰The disclaimer at the beginning of that document that states that all laws not mentioned, but already in effect, are still standing. See Laws and Liberties, I.

²¹James K. Hosmer, Winthrop’s Journal History of New England 1630-1649 (New

diary, demonstrates the importance of this judicial institution and harkens the use of an old English institution in the colony. Members of the Grand Jury for a court were chosen from freemen of each town. "It is also ordered by the authority aforesaid that there shall be Grand Juries summoned every year, in each jurisdiction, . . ." ²² The Suffolk County court records indicate that the Grand Jurors did not serve a full year term but were replaced regularly. Once selected to serve on a Grand Jury freemen had no choice but to appear and fulfill their obligation. Any neglect to appear was a serious offence. "William Richards of Wexmouth not appearing to serve on the grand Jury to summons was fined thirteen shillings and four pence in money to the court." ²³ This fine not only served as a severe punishment for avoiding jury duty, but it was also likely that the punishment served as a deterrent for others considering a similar action. Grand Jury duty, therefore, was an important aspect of a process, and the participation of freemen was, in turn, needed for the process to be effective. For those who did appear their duties were immediately clear to them when they were sworn in. The oath sworn by these jury members clearly outlines their task.

You swear by the living God, that you will diligently inquire, & faithfully present to this court, whatsoever you know to be a breach of any law established in this jurisdiction according to the mind of God; and what ever criminal offences you apprehend fit to be hence presented; rule some necessary and religiously of conscience, truly grounded upon the word of God bind you to surety. And whatsoever shall be legally committed by this court to your judgement you will return a true and just verdict therein, according to the evidence given you unto the laws established amongst us. So help you God. ²⁴

This oath indicates that the Grand Jury's primary concern was to decide upon the charges at hand. Though no source can indicate what evidence was given to the jury, it seems to follow

York: 1908), 157.

²²Laws and Liberties, 32.

²³Suffolk County Court Records, 28 October 1673, 327.

²⁴ Laws and Liberties, 58.

that they were provided with all of the information contained in the complaint as well as any statements made by the accused at court. With this information the Grand Jury worked to arrive at a decision.

In order for the Grand Jury to present a decision it was necessary for the accused to be present at court. If the defendant failed to appear the court issued a warrant for their appearance. "Richard Hall & Martha his wife presented for fornication. The court was informed they were gone to havarelle [sic] & ordered a special warrant to be issued for their appearance at the next court."²⁵ Their appearance before the court was necessary for a number of reasons. First, by appearing, the defendants demonstrated an obedience to the authority of the court. Second, by appearing, the defendants may have had an opportunity to explain their actions and any mitigating evidence that may have prevented a trial. Finally, the defendants may have been given the opportunity to confess to their crimes, and thus also avoid a trial. If, for example, the defendants pled guilty they were likely sentenced on the spot. "Richard Barnum presented for disorders in his house & reflective speeches to the constable that made inquiry about it, ye said Barnum appeared & owned & acknowledged his evil & presented a humble petition to the court all which being considered the court sentenced him to be admonished & pay fees of the court."²⁶ By confessing, Richard Barnum avoided the rest of the trial process and the case was closed. In this particular case justice seems quite swift. The accused may have also presented mitigating circumstances that explained his or her actions. "Paul Hall presented for living from his wife who is in England, he appeared in court & declared that he was informed that his wife is dead the court ordered him to repair to the last place of her abode or bring certificate that she is dead & pay fees of court."²⁷ Though the court could have prosecuted with a trial, they instead took his declaration and gave him an

²⁵Suffolk County Court Records, 31 October 1671, 23.

²⁶*Ibid.*, 31 October 1671, 22.

²⁷*Ibid.*, 31 October 1671, 23.

opportunity to prove his claim. This example should not be construed as a type of special verdict because no sentence was declared. Instead, it indicates the apparent discretion of the court in dealing with cases.

If the accused seemed to plead not guilty or continued to avow their innocence the court moved to carry the case over to trial. “Elizabeth Smith presented for selling strong liquors without licence the court orders that she be put in bond of good behavior according to law or be committed to prison.”²⁸ This particular excerpt is typical of most entries in that it indicated that a case was to continue on to trial. Because no indication of the defendant’s plea is supplied nor declaration of a sentence imposed, it is to be inferred that they pronounced themselves not guilty and that they were to be tried at a later date. This particular example also raises the issue of bail. The Body of Liberties of 1641 provided that every defendant had the opportunity of posting bail, or a bond, instead of imprisonment. “No man’s person shall be restrained or imprisoned by any authority whatsoever before the law hath sentenced him thereto, If he can put in sufficient security, bail or mainprise, for his appearance, and good behaviour in the mean time, unless it be in Crimes Capital, and in contempt in open court. . . .”²⁹ Thus, Elizabeth Smith, mentioned above, was put in bond according to the rules outlined in the Body of Liberties. This provision for the availability of bail clearly correlates to our aforementioned example.

Another example of bail being imposed comes from the proceedings of the General Court. “John Ellford hath bound himself in C mks [sic], & roger Connant & John Woodbury hath bound themselves in 40^l a piece, John Ellford’s personal appearance at the first court to be holden in November next, to answer for the death of Thomas Puckett.”³⁰ Here the court acknowledged that other parties could post the defendant’s bail. More importantly, they

²⁸Ibid., 31 October 1671, 22

²⁹Body of Liberties, Art. 18.

³⁰Colonial Records, 1 March 1631, 83.

expressly state that the accused was being bound over for trial to be held in November 1631. It seems as though the court states this date at this time because the court is absolutely certain when the next session was going to be held. At the lower court levels no mention is ever made of when the trial will be held because the court may not have been certain when it was to sit next. The implication, however, of both bail sentences is that a trial was the next phase of the process.

The appearance of the accused at the presentment phase is clearly essential. There are cases, however, where the defendant did not appear yet no warrant was issued. "Christopher Wheaton and Martha his wife presented for fornication. The court being informed that the man was at sea respited his presentment till the next court."³¹ In this particular case the court simply delayed the presentment phase until the accused was available to appear before the court. This exemption from punishment seems based on the fact that the accused left before a summons was issued. As a result, the husband was never actually served with a summons or warrant. The court obviously accounted for this and did not order a special warrant for his appearance as was done in other cases. Though circumstances varied from case to case, the court's major concern at this phase was to ensure that the accused answered the charges.

This discussion of the presentment phase has focused thus far on those cases where the grand jury or the court found that the charges were valid. This was not the only possibility. It was also possible for the court to decide that the charges did not warrant a trial. "William Kent presented for selling wine and strong beer contrary to law the presentment not being proved fell."³² Here, and in other cases with similar entries, there appears to have been a lack of evidence to warrant a trial. As a result, the charges against Mr. Kent were dropped. The courts, based on these types of entries, did not seem bent on convicting every defendant presented to them. Quite the contrary, every avenue was provided to the accused so that they

³¹Suffolk County Court Records, 1 October 1671, 23.

³²*Ibid.*, 28 January 1673, 227.

could prove their innocence. In some cases, just as in the previous example, the trial ended in favour of the accused at that point. A great many of these cases, and corresponding verdicts, depended entirely on the information at hand, thus reinforcing the importance of a presentment hearing.

There were also special cases that allowed for unique resolutions before trial. "Sarah Carpenter, presented upon strong suspicion of being with child, the court ordered she should be searched by Mrs. Parker, Mrs. Williams, & Mrs. Sands who made return with Goodwife Taylor, a mid-wife, that she was not with child."³³ In this particular case the court took a step that resolved the case immediately in a manner uniquely tailored to the case at hand. Furthermore, this specific example may represent one example of a procedure that was not necessarily in use across the colony.

In still other cases the courts demonstrated that they were cognizant of their jurisdiction and ability to try a case, and not simply bent on trying everything before them. "The court refers the complaint of John Parmitter against Seth Perry, constable to the determination of the Magistrates at Boston."³⁴ Though the contents of the complaint are not known, they must have contained some factor that prevented the court from presenting the accused.

All of these examples of possible outcomes of the presentment phase of a criminal process clearly emphasize the importance of the accused appearing before the court to answer to the complaint at hand. The colonial court, contrary to the impression left by the range of extreme laws in the colony, did not seem bent on punishing every defendant before them. Considering the examples offered in the court records, the court was more concerned with being able to obtain a confession or obtaining truth that would support a conviction. Obtaining a confession from a defendant was a sign of moral reformation on behalf of the

³³Ibid., 30 January 1672, 91

³⁴Ibid., 28 January 1673, 226.

offender who demonstrated a willingness to be corrected. If the evidence was supportive, the grand jury, or the presiding magistrate, recommended that a trial be held. The aforementioned presentments also indicate that the possible outcomes were effected, to a large degree, by the type of charge at hand. Those charges which may have been difficult to prove were dropped; those that were easy to prove were pursued; and those cases that could be resolved were taken care of immediately. The primary features of this phase are clearly the flexibility of the bench to deal with a variety of complaints, and the judiciousness of the court not to necessarily convict every defendant. It has to be noted that these characteristics were not that different from those traits that characterized a similar phase in the English process. This judiciousness and flexibility continued into the next phase of the trial.

The trial phase of this process was commonly referred to as a hearing or examination. It is important to note that the site of the trial was not determined by either party; it was mandated in the Book of General Laws and Liberties: "all other actions shall be tried within that jurisdiction where the cause doth arise."³⁵ This declaration worked to resolve issues of jurisdiction by giving the court of first instance the ability to try the offender. Once the site of the trial was determined the court had an obligation to ensure that the accused was given a speedy trial. "It is ordered by this court & authority thereof that every man is to answer for any criminal cause, whether he be in prison or under bail his cause shall be heard and determined at the next court that proper cognizance thereof and may be done without prejudice of justice."³⁶ Just as was the case in England, an effort was made to ensure that the defendants awaiting trial did not have to wait an inordinate amount of time.

Upon the opening of a trial the parties had the option of being tried by either a jury or by the bench. "It is ordered by this court declared, that in all actions of law it shall be the liberty of the plaintiff and defendant by mutual consent to choose whether they will be tried

³⁵Laws and Liberties, 1.

³⁶Ibid., 16.

by the bench or a jury, unless it be where the law upon just reason hath otherwise determined. The like liberty shall be granted to all persons in any criminal cases.”³⁷ This feature seems to be a uniquely colonial innovation. For criminal cases, then, this privilege fell to the defendant to choose. Because of the infrequency of jury trials in criminal matters it is usually very clear in the court records when a defendant has opted for a trial by jury. “Alice Thomas being accused of several shameful notorious crimes & high misdemeanors, she put herself upon trial of a jury who brought their verdict. . . .”³⁸ That this defendant opted for a trial by jury is of some note. Jury trials, despite being a relatively uncommon occurrence in non-capital cases, were a guaranteed procedure for those charged with a capital offense. “[N]o trial shall pass upon any, for life or banishment, but by a jury so summoned or by the General Court.”³⁹ For every other cause, however, a trial by jury was merely an option. The records suggest this option was rarely used. According to John Murrin, there were very few non-capital jury trials. “Assuming, then, that the records mean what they say, I have found only four jury trials for non-capital crimes in Massachusetts before 1660. . . .”⁴⁰ The implication of this lack of jury trials is that defendants seemed to prefer to place their fate in the hands of the magistrate instead of in the hands of their fellow citizens. Whether a defendant trusted a supposedly disinterested magistrate more than a jury of their peers cannot be precisely known. However, it is likely that defendants were fearful of the possible reprisals arising from jurors offended by the complaints leveled at the accused.

Another important decision for the defendant at this stage of the process was whether

³⁷Ibid., 51.

³⁸Suffolk County Court Records, 30 January 1672, 82.

³⁹Laws and Liberties, 1.

⁴⁰John M. Murrin, “Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in the 17th century New England”, in Saints and Revolutionaries: Essays on Early American History eds. David D. Hall, John M.Murrin, and Thad W.Tate (New York: W.W. Norton & Company, 1984) , 163.

or not to obtain legal representation. The ability to have a lawyer represent an accused at court was expressly permitted in the Bay Colony. “Every man that findeth himself unfit to plead his own cause in court shall have liberty to employ any man against whom the court doth not except, to help him, provided he give him no fee or reward for his pains.”⁴¹ This direct statement against the payment for legal services was an attempt by the court to curtail the actions of professional lawyers who, like Thomas Lechford, might have tried to subvert the system in order to gain a victory for his client.⁴² Defendants could still engage a lawyer to advise them in a case, but could not pay them for their work.

Once it was clear that a jury trial was to be undertaken, the defendant and his or her lawyer could challenge the suitability of jurors chosen to judge the case. “It shall be the liberty of both plaintiff and defendants, and likewise every delinquent (to be judged by a jury) to challenge any of the jurors. And if his challenge be found just and reasonable by the bench, or the rest of the jury, as the challenger choose it shall be allowed him, and *tales de circumstantibus* impaneled in their room.”⁴³ (*Tales de circumstantibus* refers to the motion that another juror shall be selected from those present in the court.⁴⁴) Unlike the English system, where a defendant could challenge jurors peremptorily, defendants in the colony had to present cause for their challenge. By restricting challenges the colonial criminal procedures reflected two important facts of life in the Massachusetts Bay. First, because of the small size of most communities, it was unlikely that the court had an unending supply of jurors at their disposal. Second, it also points to the trust that Puritans placed in one another to be honest in

⁴¹Body of Liberties, Art. 26 .

⁴²The infamous Thomas Lechford was prohibited from practicing law, except in his own defense, in 1639. This is none of the most famous cases in the legal history of colonial Massachusetts. See Colonial Records, 3 September 1639, 270.

⁴³Body of Liberties, Art. 30.

⁴⁴Pynchon Court Record, 144.

the face of serious legal matters.

The court records, as they reveal little about juries in general, do not offer any clues as to what qualifies as a worthy challenge. One could infer, however, that the defendant would have had to present some significant bias that a juror held that might impede their ability to hear a case objectively. This provision likely protected an accused from facing a jury filled with people who had close ties to the victim. In relatively small communities bound by religious ties, however, it was unlikely that a defendant would encounter an entire jury of men and women whom he did not know. This, in turn, presents one of the soundest explanations for the preponderance of bench trials. Anyone accused of a severe offense would have had a difficult time obtaining a fair jury trial due to the small population and the likely notoriety of the accused.

Once the business of selecting a jury or bench trial was disposed of, the court began to receive evidence related to the case. Again, however, it is difficult to ascertain any of the specific forms of this phase from the court records. There are some cases that demonstrate that witnesses were used to support charges. “John Hathaway being accused of adultery with Margaret Seale, wife of Edward Seale, James Penn and Samuell Coles testified that hee confessed it to them. . . .”⁴⁵ As with the process in England, these courts turned to witnesses as the core to most cases. In fact, the Book of General Laws and Liberties calls for the use of at least two witnesses in order to convict in some cases. “It is ordered, by decree, and by this court declared, that no man shall be put to death without the testimony of two or three witnesses, or that which is equivalent thereunto.”⁴⁶ Though this standard explicitly refers to death penalty cases, there is no evidence to suggest that any less of a standard was applied in most other cases. Furthermore, almost anyone living in the colony was qualified to give testimony in a case. The law provided “that any one magistrate or commissioner authorized

⁴⁵Colonial Records, 6 June 1637, 198.

⁴⁶Laws and Liberties, 54.

thereunto by the General Court may take the testimony of any person of fourteen years of age, or above, of sound understanding and reputation in any case civil or criminal. . . .”⁴⁷ How the court determined sound understanding and reputation is unclear, but it may have meant that as long as the witness understood the nature of the situation at hand, and did not have a reputation for lying, they likely qualified. Judgements of capability were likely a carryover from England as that system used a similar standard of age for young witnesses.

The testimony of witnesses could be presented in court in either oral or written form. In order to ease the burden on witnesses who lived more than ten miles away the court accepted their testimony in a written form.⁴⁸ This provision indicates that the court recognized that many witnesses may have been literate; this in turn points to the high rates of literacy in the colony.⁴⁹ This form of testimony, however, could only be used in non-capital cases. For capital cases the witnesses were required to appear. “[It is p]rovided also, that in all capital cases all witnesses shall be present wherever they dwell.”⁵⁰ Because the court records lack any mention of any other type of evidence, and the codes of 1641 and 1648 only mention witnesses, it could be inferred that witnesses constituted the bulk of evidence against an accused. Despite the dependence on witnesses as the core of a criminal case, the accused was not necessarily allowed to cross examine them. The codes only mention that the magistrate was the only person to have any contact with the witness during the trial. This was a substantial departure from the basic accusatorial form. In fact, this deviation away from the traditional accusatorial form was probably due to Puritan confidence in the magistrate and his moral and religious character. A key function of this position was receiving the oath-

⁴⁷Ibid., 54.

⁴⁸Ibid., 54 .

⁴⁹Kenneth Lockridge, Literacy in Colonial New England: An Inquiry into the Social Context of Literacy in the Early Modern West (New York : W.W. Norton, 1974).

⁵⁰Laws and Liberties, 54.

bound statements of a witness, and judging their merit. The potential need for cross examination was reduced in the face of such authority.

As witness testimony constituted the bulk of a case the court (or jury) used this information to arrive at a verdict. Though the scope of information may have been limited to the testimony of available witnesses, it does not necessarily follow that the jury always had an easy decision to make. A wide range of discrepancies may have been present in the evidence provided to them. The drafters of the Book of General Laws and Liberties anticipated this potential problem by providing the jury with a means of gaining more information if needed. “And it is further ordered that whensoever a jury of trials, or jurors are not clear in their judgement or consciences, concerning any case wherein they are to give their verdict, they shall have liberty, in open court to advise with any man they shall think fit to resolve or direct them, before they give in their verdict.”⁵¹ This provision serves to provide extensive powers to the jury to consult. It is difficult, however, to see how this was done by the court records. Considering the preponderance of bench trials in criminal cases it is likely that this provision was used more often by juries in civil trials where matters may have been confused.⁵² According to the courts records, it seems that the questions before the jury in criminal cases were simple, and rooted in terms of whether or not the accused had committed the act stated in the charge. In those cases where even this question was in dispute, and the jury delivered a verdict that was different from the one prepared by the bench, the case was passed along to another court for review. “And if the bench and jurors shall be different anytime about their verdict that either of them cannot proved with peace of conscience, the case shall be referred to the General Court who shall take the question from both and determine it.”⁵³ This

⁵¹Ibid., 32.

⁵²Bench trials were cases tried by a panel of magistrates, or just one magistrate. These officials were entrusted to render a decision without the aid of a jury.

⁵³Laws and Liberties, 32.

provision explains the appearance of simple cases on the General Court Record. Cases involving slander, idleness, adultery, stubbornness, theft, burglary, and libel all appear on the General Court Records. These cases, wide-ranging in their seriousness, were well within the jurisdictions of lower courts. It is possible that they were heard by the General Court because of this provision.

If the jury felt that the evidence offered to them was dubious, yet there existed a preponderance of guilt, they had the option of providing a special verdict. "In all cases wherein evidence is so obscure or defective that the jury cannot clearly or safely give a positive verdict, whether it be Grand or Petty Jury, it shall have the liberty to give a non-liquet or a special verdict, in which last, that is a special verdict the judgement of the cause shall be left unto the bench. . . ."⁵⁴ What constituted a special verdict is again unclear. Yet it is important to note that the final decision in the matter was left to the bench. Presumably, it was thought that the bench could arrive at a decision due to their expertise in deciding such matters.

When the decision was made by a jury they presented their verdict. It is important to note that there existed no provision that required either the jury or the bench to provide any rationale for their decision. The verdict was simply handed down. In one of the few criminal cases decided by a jury the verdict was outlined in five points. Whether this was due to the multitude of charges leveled against the defendant - Alice Thomas - or whether the jury felt it necessary to declare a verdict on every point is unclear. Nevertheless the verdict deserves detailed mention.

1. That if breaking open warehouses and vessels in the night so stealing goods hence be by law burglary then the said Alice Thomas is guilty of abetting accessory in burglary. However she is guilty of abetting and accessory in felonious theft and receiving buying and concealing several goods stolen out of the Thomas Beards barque and Mr. Hull's and Mr. Pincheons warehouses.
2. That she is guilty of frequent secret and unseasonable entertainment in her

⁵⁴Ibid., 32.

house to lewd lascivious and notorious persons of both sexes, giving them opportunity to commit carnal wickedness, and that by common fame she is a common baud. 3. That she is guilty of selling wine and strong waters without licence 4. That she is guilty of entertaining servants and children from their masters and Parent's families. 5. That she is guilty of the profanation of the Lord's day by selling drink and entertaining idle persons and paying money in a way of trade upon that day.⁵⁵

The jury in this case found Alice Thomas guilty on five separate charges of acts that clearly flew in the face of both the moral and legal establishments of the colony. The nature of the offences are so severe that the jury takes the time to label her a "common baud" after pronouncing her guilty on the charge of "giving frequent secret and unreasonable entertainment." This label was likely due to the witnesses who testified at the trial as to her character. It is also noteworthy that the decision is separated into five separate verdicts, each one specific to a different charge. The judgement handed down in this case (which will be discussed shortly) reflects the severity of the offenses. Not all records of jury verdicts were so descriptive, however. In a record of a case before the Court of Assistants in 1630, the jury handed down a verdict of not guilty that merely mentions the decision. "The jury finds Walter Palmer not guilty of manslaughter, where he stood indicted, so the court acquits him."⁵⁶ From this decision it is conceivable that the verdict was handed down quickly and the matter was disposed of in a matter of minutes. By today's standards it lacks all of formality and length witnessed in modern trials.

The judgement handed down by the bench was often just as curt. It is interesting to note, however, that the judgments detailed in the record frequently mentioned the confession of the accused to the charges. "William Thorn [stands] convicted by his own confession in

⁵⁵Suffolk County Court Records, 30 January 1672, 83.

⁵⁶Colonial Records, 9 November 1630, 81. This record is typical of the vast majority of cases contained in the records. The entire record of the case simply contains: "A jury impaneled for the trial of Walter Palmer, concerning the death of Austin Bratcher" thereafter follows a list of jurors and the verdict. As a result it is difficult to accurately know the nature and form of the trial, evidence, and witnesses used in the case.

court of giving strong liquors to Henry Jackson. . . .⁵⁷ In this example, and many others like it, it is clear that the trial was before the bench, and that the magistrates were successful in extracting a confession. This is very different from trials by jury, where the defendant seemed defiant to the very end. It may be inferred, then, that the court preferred a confession from the defendant when judging a case by bench. How this confession was extracted is unknown, but it is possible that the magistrates used their position of authority to intimidate the accused so as to obtain a confession. The confession of a defendant may have been one of the most favorable outcomes to a trial in Puritan Massachusetts. From a spiritual perspective the confession was key as it was a formal acknowledgment by the offender of their sins and demonstrated that they were willing to open their heart to regeneration. The preponderance of confessions, then, may be one of the clearest signs of a Puritan influence on criminal procedure in the colony.

Once the verdict or judgement had been presented the court immediately imposed a sentence. Within the Bay Colony only capital offenses carried a specific penalty—usually death. This penalty, usually handed down by the Court of Assistants and the General Court due to jurisdictional rules, was predetermined by provisions in the legal codes of 1641 and 1648.⁵⁸ The sentence handed down in these cases often prescribed specific acts to be committed before the execution of the prisoner. “That you shall return from this place (the bar) to the place from whence you came & from thence to the place of execution & there hang till you be dead. And that the mare you abused before your execution in your sight shall be knocked on the head.”⁵⁹ This particular sentence, handed down in a case involving bestiality, presented specific instructions for the executioner. Such practice was common in

⁵⁷Suffolk County Court Records, 28 Jan 1672-73, 235.

⁵⁸Body of Liberties, Art.1, and Laws and Liberties, 1.

⁵⁹Records of the Court of Assistants, (Boston: Published by the County of Suffolk, 1901), 11.

England as well and seems to have been transferred to the colony. Of particular note to most sentences prescribing death is a condition of time between the judgement and the execution. "No man condemned to die shall be put to death within four days next after his condemnation, unless the court see special cause to the contrary, or in case of martial law, nor shall the body of any man so put to death be unburied 12 hours, unless it be in case of anatomy."⁶⁰ This provision of four days was likely instituted to allow the condemned an opportunity to appeal the case. It is interesting to note that this particular example also allows for immediate executions in times of martial law. Clearly, the General Court was thoughtful enough to protect their authority in troubled times. Furthermore, this clause seems to negate the prevailing sense that the laws of the colony were outwardly vicious as demonstrated in the list of capital crimes punishable by death. Though the laws were aimed at providing severe punishments for a variety of offenses (religious or political), the procedures tended to mitigate the severity of these sanctions by allowing the convict time to appeal the judgement .

Unlike the sentences handed down for capital offenses, there were no mandatory guidelines for sentencing non-capital offenders. In fact, sentencing was left entirely to the discretion of the magistrate. This judicial discretion was a feature that was unique to the Massachusetts Bay Colony. ⁶¹As a result of this discretionary feature the sentences varied from case to case. In the case of Alice Thomas, convicted on five separate charges, the bench handed down a particularly harsh sentence which included:

to restore to John Pincheon Junior forty pounds fifteen shillings and three pence to Thomas Beard thirteen pounds seven shillings and eight pence to Captain John Hall twelve pounds, all in money being the proportion to three fold restitution the law requireth also to pay fifty pounds fine in money to the

⁶⁰Body of Liberties, Art. 44.

⁶¹ For a more thorough discussion of judicial discretion in the colony see Mark D. Cahn, "Punishment, Discretion, and the codification of Prescribed Penalties in Colonial Massachusetts," American Journal of Legal History 33 (1989) : 101-36; Carol F. Lee, "Discretionary Justice in Early Massachusetts," Essex Institute Historical Collections (1975) : 120-39.

County and fees of court and prison. Also to be carried from prison to the Gallows, and there stand one hour with a rope about her neck, one end fastened to the said Gallows, and thence to be returned to prison, & also to be carried from the prison to her house and brought out of the gate or fore door stripped to the waist, & there tied to a carts tail, and so whipped through the streets to the prison with not under thirty nine strips, & there in prison to remain during the pleasure of the court.⁶²

Though this type of sentence was not common it does offer a gamut of punishments at the court's disposal. Furthermore, this sentence presents possibly the most severe punishment, short of death, offered in the records. Most importantly, it raises several issues related to sentencing.

The first part of Alice Thomas' sentence prescribed that she pay the offended parties over sixty-seven pounds, collectively, in damages. This rather large sum of money constituted triple the value of goods stolen. This calculation by the court was, according to Joseph Smith, a common punishment in cases of theft.⁶³ There exists no reference in the legal codes that prescribes such a penalty. As such, the standard for damages was likely derived from precedent. This, in turn, indicates an important feature of varying procedures in the Bay Colony. Because many procedures unique to a court may not have been established throughout the entire colony, courts likely turned to precedent for particular processes.

She was also ordered to pay the fees of the court and the prison. Just as in seventeenth century England, the offender in the Massachusetts Bay colony had to pay the costs of their own imprisonment. The convicted "person may be arrested and imprisoned where he shall be kept at his own charge."⁶⁴ As she was sentenced to be imprisoned for an undetermined length of time this could have been an extremely burdensome fee. Her sentence of imprisonment on its own was quite rare. This rare aspect of her punishment may indicate

⁶²Suffolk County Court Records, 30 January 1672, 83.

⁶³Pynchon Court records, 145.

⁶⁴Body of Liberties, Art. 33.

the severity of her offence in the eyes of the court delivering the sentence. It may also point to the willingness of the court to protect the rest of the community from being 'infected' by her wicked actions. The congregation, as was previously noted, was constantly on guard against evil influences, and the act of imprisonment may be viewed in this context.

Another condition of her sentence was to stand in the Gallows for one hour with a rope around her neck. This punishment, committed publicly, tended to be more exemplary than punitive. Not only was the convict publicly humiliated by the display, but it also provided a substantial symbolic value as well. To stand with a rope around the neck was to symbolize a mock execution.

A final aspect of this sentence was the public whipping. Under the law in the colony Alice received one stripe less than the maximum number of stripes. "No man shall be beaten with above forty stripes. . . ."⁶⁵ Any number of stripes above this number was considered to be cruel and barbarous, and this too was outlawed in the Body of Liberties.⁶⁶ The court, then, could only administer such a punishment to a limit. It is often found, however, that the court ordered that these stripes be 'severely' laid on the convict. In one particularly nasty sentencing the convict was not only ordered to be whipped, but also to be branded as well. "It is therefore ordered, that the said Scarlett shall be severely whipped and branded in the forehead with a T."⁶⁷ Branding as a punishment was available to the court for use on repeat offenders, though the records indicate few cases of its occurrence. Not only did branding allow future judicial officials to recognize the convict as a repeat offender, it subjected the convict to continual shame and humiliation as well. Furthermore, a brand of this type could effectively exclude the convict from ever joining a congregation in the future because the

⁶⁵Ibid., Art. 13.

⁶⁶Ibid., Art. 46.

⁶⁷Colonial Records, 6 October 1635, 163. The Letter T was a symbol of the offender's crime—theft.

mark was a symbol of not living a 'clean' life.

All of these sentences prescribe some form of humiliating, financial, or physical sanction. Indeed, in the seventeenth century there were few other alternatives available to the court that served the punitive and exemplary needs of justice. All of these sentences provided the court with the opportunity to exact retribution upon the convict while at the same time provide a moral example of the consequences of criminal activities. Ultimately, the objectives of punishment within this system of justice varied from case to case. Retribution, rehabilitation, and regeneration were all present in sentencing in varying degrees. In other cases the court may have resorted to severe admonishments or a form of verbal reprisal.⁶⁸ In another interesting example for the court records, the General court ordered a convict to seek counseling. "Mr. Ambrose Martin, for calling the church covenant a stinking carrion and a human invention, & saying he wondered at God's patience, feared it would end in sharpe, & said the ministers did dethrone Christ, & set up themselves; he was fined 10^l, & counseled to go to Mr. Mather to be instructed by him."⁶⁹ Mr. Martin was punished because he uttered blasphemous remarks against the established religious order and was in need of rehabilitation. In other cases the court did much more than admonish or counsel a convict. They imposed a punishment made famous by Nathaniel Hawthorne; convicted criminals were forced to wear some symbol of their offence on their body. "John Davies, for grosse offences in attempting lewdness with diverse women, was censured to be severely whipped, both here and at Ipswich, & to wear the letter V upon his breast upon his uppermost garment until the court do discharge him."⁷⁰ This sanction likely carried a more lasting effect on the convict than did the pain of the stripes. More importantly, it reminded all around him of his offence, thus initiating the powerful effect of exclusion from social activity in the colony. In this respect,

⁶⁸Suffolk County Court Records, 28 January 1673, 222.

⁶⁹Colonial Records, 13 March 1639, 252.

⁷⁰Ibid., 4 December 1638, 248.

Hawthorne's depiction of social ignominy was likely very accurate. Perhaps the rarest of all punishments was enslavement. "John Haslewood, being found guilty of several thefts, & breaking into several houses, was censured to be severely whipped, & delivered up a slave to whom the court shall appoint."⁷¹ This rare sentence does not indicate who the man would serve or for how long the enslavement would last. What exact service this punishment would serve is unclear, but the punitive aspect seems lasting and severe.

The harshest sentence that could be imposed besides death was banishment. Not only did the order to be banished force the offender out of the colony, it also brought with it all of the hardships of moving away from familiar ground. Perhaps the most famous case of banishment involved Anne Hutchinson. After the lengthy antinomian trial, she and her followers were banished from the colony, with the observation "that she should be delivered from the court ruined, and with their posterity, & thereupon was banished. . . ."⁷² The result of her sentence, now famous, was not necessarily common to all sentenced in this manner. Those who were banished were either forced to return to England, or attempt to survive on their own in the vast wilderness.

The discussion of the sentences imposed in the Bay Colony courts could absorb an entire volume, and it is not our intention here to outline every possible sanction used by the courts in the colony. What the sentences should demonstrate is that the court was not simply intent on punishing without purpose. Rather, the sentences imposed by the courts point to several important issues. First, though there were no strict guidelines for sentencing, there were some rules that were established out of precedent. The discretionary power of the magistrates was an important departure from English procedure, which outline specific punishments depending on the severity of the offense. As Carol Lee argued, colonial leaders like Winthrop wished to protect this feature despite the long list of liberties in the legal codes

⁷¹Ibid., 4 December 1638, 246.

⁷²Ibid., 2 November 1637, 207.

of the colony. The promotion of discretionary justice may have been due to both the isolated nature of the colony and the preponderance of lay justices in the area. Second, the range of punishments indicates a desire of the court that sentences serve an exemplary function. That is, the punishment of a convict was to warn others of the consequences of illegal activity. Finally, not every sentence was entirely punitive. Rather, the courts may have used punishments for other purposes. "Bound by a strict covenant with the Lord, they knew they had a sacred duty to 'discover' and punish sin, and, it was hoped, reclaim the sinner."⁷³ These are all vital aspects of sentencing and punishment in the Massachusetts Bay colony. For the convict destined to suffer, the only possible avenue of escape that remained was appeal.

The opportunity to appeal a sentence or a judgement was available to anyone. "It shall be in the liberty of every man cast condemned or sentenced in any cause in any inferior court, to make their appeal to the court of Assistants, provided they tender their appeals and put in security to prosecute it before the court be ended wherein they were condemned. . . ."⁷⁴ This may seem to be a very small window of opportunity but colonial jurists may have anticipated that court dockets would be quite large. This is reinforced by the court records, which indicate that criminal matters were dealt with before civil matters. Because civil cases could be quite long (as many of the records seem to indicate) the appellant may have been given ample time to submit an appeal. Though both codes provide for the possibility of appeal for every convict, they do not prescribe how the cause was to be pursued.

The only clue we may have in order to understand how appeals were conducted comes for the Records of the Court of Assistants. Unfortunately, these records are as unrevealing as the rest. Every case mentioned in these records fails to mention the intra-process proceedings that might indicate what occurred between sentencing and hearing a case on appeal. According to Joseph H. Smith, a provision concerning appeals was instituted in

⁷³Murrin, "Magistrates, Sinners, and a Precarious Liberty," 164.

⁷⁴Body of Liberties, Art. 36, and Laws and Liberties, 2.

1651 that required the appellant to supply reasons for the appeal to the court. “The party appealing should briefly in writing ‘without reflecting on the court or parties, by provoking language’ give in to the clerk of the court from which he appealed the grounds and reasons of appeal six days before the beginning of the court to which the appeal was made. . . .”⁷⁵ If Smith is taken to be correct, then the process between trials was simply a time for the appellant to prepare their case. The court records do not mention such a provision but our experience here has demonstrated that the provision was not likely to have been raised. For those cases tried on appeal, the court simply mentions that the case was brought to their attention due to an appeal. For example, one such appeal simply begins: “Thomas Sevy plaintiff against Henry Deering defendant in a action of appeal from the judgement of the last county court in Portsmouth. . . .”⁷⁶

The process of an appeal was very similar to a regular process. The major difference, however, was that the reasons for appeal were read to the jury along with the proceedings of the original trial. “Paul Batt was called to answer for his reflections declared in his reasons of appeal. The said Paul Batt presenting his petition declaring his hopes for the future to be better advised the court passed his offence by ordering him to be admonished, which was done. . . .”⁷⁷ Though the records of this court are not terribly revealing it seems as though the primary function of the court was to ensure that no miscarriage of justice was imposed on the appellant. Any appellant who felt that this court had somehow wronged them had the option of complaining to the General Court.⁷⁸ Though this did not necessarily constitute an appeal, it was still an option for the convict. Unfortunately, there is no record that such a complaint was

⁷⁵Pynchon Court Record, 155.

⁷⁶Records of the Court of Assistants, 6 June 1674, 18.

⁷⁷Records of the Court of Assistants, 7 August 1674, 31.

⁷⁸Body of Liberties, Art. 36.

ever considered by the court. Those who decided to abide by the judgement of the Court of Assistants simply submitted themselves to the imposed punishment and the case was concluded.

This represented the end of the official criminal process in the Massachusetts Bay. Having just discussed the most likely processes for a criminal trial it may be appropriate to present some general observations regarding the application of Puritan jurisprudence within a set of English-like courts. First, it is vital to remember that the English roots of criminal procedure played a predominant role in Massachusetts. Except for a few procedural differences, the form of the criminal process in the colony can be closely tied to the form of criminal processes in England. This is not to say that the colonial jurists replicated the old system when creating the new system. But the old system did provide a clear guide which the magistrate used in creating their own system. Many of the subtle procedural alterations in the colony can be attributed to the social and political climate in which the magistrates found themselves. This raises our second observation. The criminal procedure, as it has just been presented, demonstrates a mediative function between the strict religious laws enacted in the settlements and the responsibility of the colonial system of justice to provide justice to all colonists. These English colonists had a right as Englishmen to seek justice whenever they pleased. As such, the criminal procedure formed in the colony afforded colonists the opportunity to do so by presenting clear processes by which they could gain access to the courts. On the other hand, the colonial government also used the criminal procedure to impose their Puritan ethos on the settlers. In this view, the criminal process served as a conduit for both groups in their judicial actions.

As this system of procedure allowed the colonial leaders to impose their religious beliefs on the settlers, it does not follow that this intention drastically altered the processes to the point where they did not resemble English practices. Quite the contrary, the same loose rules of evidence, for example, that existed in England were also in place in the Bay Colony. Witnesses still served as the core to most cases. Hearsay was still permissible in the colony, as

it was in England. The major change that occurred in the colony, however, can be attributed to the remote nature of the settlement and to the religious authorities in the Massachusetts Bay. Where the English system was predominantly adversarial, the colonial process seems to lack this quality. In many respects this system adopted an inquisitorial flavour within the accusatorial structure. This is best demonstrated by the role of a plaintiff in the criminal process. It will be remembered that once a complaint was received the Court took action to summon the accused and began a criminal process. Though the plaintiff, or aggrieved party, may still have served as a witness, the thrust of the prosecution was supplied by the court. No longer were the parties involved in some type of judicial struggle. This shift may be attributed to the authoritative position of the magistrate as an envoy of God in the colony. Furthermore, the possibility of a constable bringing forth a complaint also helped this change to come about. In those instances, the constable initiated the process before the victim had the opportunity to do so. As a civic official, with likely ties to the local congregation,⁷⁹ the constable (and other officials for that matter) had an obligation to report what they saw as sinful and thus unlawful. In these terms the criminal process especially served as a mediator between religion and society. The importance of criminal procedure should be abundantly clear. More than a simple set of rules that regulated the application of justice, criminal procedure served a series of vital social and political functions.

⁷⁹See an earlier discussion of the relationship between town and congregational officials.

In an attempt to fully uncover the criminal process at work in the Massachusetts Bay Colony we have presented more than just the relevant procedure. We have also presented the development of a Puritan system of justice and elements of colonial life that directly related to the administration of the settlement. It should be abundantly clear by this point that there existed a constant struggle for the colonial leaders between their Puritan vision of how a settlement ought to have been administered and their English roots that offered them the basic institutions for administering a settlement.

In terms of government in the colony the colonial leaders were faced with ensuring the success of individual communities that were scattered about the vast wilderness. Town leaders emerged to create well-organized communities settled in isolation. A key element of this organization was the unique marriage of religious and civil authority. Though the political leaders were certainly responsible for the administration of the day to day affairs, the congregational officials still managed to carve out a great deal of power for themselves. Though colonial laws prevented the direct involvement of church officials in civic affairs, the power of the congregations was based in their ability to restrict delinquent townspeople from gaining church membership. The result of such an action carried serious political implications. Not having church membership essentially meant not having the ability to participate in the political affairs of the town. This power can be traced back to a move by the General Court in 1631 to tie colonial 'freemanship' to church membership. Though the struggle in this area may not have been obvious, it was still present. For inhabitants of the communities there may not have been much difference between the secular and congregational authorities. For the historian, however, it should be clear that these two institutions were rooted in very different concepts and as a result were intended to carry on very separate duties. Furthermore, the colonial and town leaders were likely aware of this vast difference as they set out to develop the colony in the Massachusetts Bay.

We have discussed the development of some of the communities, and it was clear that those who migrated across the Atlantic to lead these towns drew upon their experiences with English town life in order to help found their new home in the new world. This is not to say that they replicated every aspect of life in old England, but the similarities between the two cannot be overlooked. Only when towns were firmly established, land distributed, and farming initiated were congregations organized. The congregation represented the organization of some inhabitants into a core of Puritan believers. As the Puritan faith was the driving force behind the settlement of the colony it was the Puritan followers who constituted the bulk of the population. In fact, those who were not Puritans before they arrived in Massachusetts likely tried to join a congregation in order to solidify their position in a community. Non-membership in the congregation ensured social and political isolation. The power of the congregation was great enough to exclude all other faiths in the colony. The towns that arose out of the wilderness, then, were organized around basic English experiences and institutions. These structures, in turn, were infused with a new Puritan purpose bent on ensuring social and religious conformity.

In judicial affairs the struggle was more pronounced. Though the Puritan leadership desired to establish a system of justice that secured their power and leaned on Puritan jurisprudence, they still had an obligation to the colonists to provide a system of justice in the colony that was useable. In order to be useable it is conceivable that any system of justice in the colony had to be somewhat familiar to the colonists. In fact, the colonists were entitled to a system of justice that followed an English example due to a range of provisions in their charter. As a result, when the colonial leaders strayed too far from this established form of justice the colonists reminded them of their limits, as is exemplified in the Watertown protest and the Robert Child affair. Because of these two significant protests the General Court was forced to concede to a hierarchy of courts that represented a simplified form of the English system of justice. Though the colonial

leaders may have failed in their bid to sequester power within the General Court, they persisted in drafting a series of laws that were religiously based. The emergence of a Puritan jurisprudence in the Massachusetts Bay colony allowed the Puritan leadership to impose a strict standard of moral and social conduct on the colonists. Settlers were forced to abide by the strict rules of congregational leadership because it was these leaders who, directly or indirectly, had a hand in drafting the laws in the colony. The struggle emerged, then when the colonists realized that they may have been able to seek judicial redress within a system of justice that was familiar to them but the terms of this redress were dictated to them by the Puritan jurisprudence forwarded by the jurists in the colony. That is, the settlers may have succeeded in persuading the General Court to maintain an English system of justice but the Puritan leadership was also successful in creating a set of laws rooted in Puritan theology.

The purpose of discussing the social climate and the judicial structures has been to present as broad a picture as possible of the setting in which criminal procedure functioned. It has been stated that criminal procedure was much more than a simple set of rules that governed the application of justice. These rules, however, tended to provide an essential link between a system of justice and the populace it was intended to serve. Within the Bay Colony criminal procedure fulfilled this role of mediator very well. As has been previously discussed there was a chasm between the English experiences of the colonists and the religious mission of the colonial leadership. This chasm, manifested in town life and in judicial structures, was bridged by criminal procedure. Criminal procedure achieved this because of the Puritan obsession of ensuring social conformity through legal means. By maintaining many of the basic processes common to the accusatorial form used in England, while at the same time allowing local courts to adopt procedures useful to each jurisdiction, a unique criminal process evolved. As was previously discussed, there was no consistent set of procedures used across the entire colony. This may have been a result of a lack of legal manuals that directed the magistrates

in the formal procedures of English law. It is likely more plausible that the slight inconsistencies from jurisdiction to jurisdiction were attributable to the individual experiences of the magistrates of each court.

The procedures that evolved from these jurisdictions held some common characteristics. On the whole these procedures were oral in nature. Testimony, evidence, complaints, and verdicts were predominantly oral. This allowed virtually anyone who could speak to bring a case to court. Every party had the option to have a case tried by either a jury or a bench. The predominance of bench trials, however, indicates that most litigants preferred to leave their cause in the trusted hands of a magistrate. This trend, coupled with an extraordinary rate of conviction, indicates another interesting characteristic of the procedure, that the unique position of the magistrate allowed them the opportunity to elicit a confession from many defendants. The position of the magistrate in these cases tends to reflect an inquisitorial flavour within the accusatorial form. That is, the magistrate was the driving force behind most prosecutions instead of the plaintiff. Furthermore, witnesses before the court were questioned by the magistrate, any summons or warrants were issued based on the judgement of a magistrate, and any sentence handed down by the court was presented by a magistrate. All key points of the criminal process, then, hinged on the actions of a magistrate. This role is clearly similar to the role of a magistrate in an inquisitorial process.

In light of our investigation it should be clear that the unique system of criminal procedure developed in the colony was much more than a simple set of rules. Rather, it allowed the colonists and the religious leaders an opportunity to prosecute the evils determined by their laws within a system of English courts. As a result these criminal procedures carried essential English characteristics linked to the system of courts, and essential religious characteristics linked to the Puritan outlook of the colonial leaders.

CHAPTER VII COMPARATIVE CONCLUSIONS

The task of fully understanding criminal procedure demands more than just a focus on systems. Criminal procedure, as we have seen through the social contexts of *ancien régime* France and Puritan Massachusetts, is much more than a simple set of rules that regulate the application of the law. By acknowledging the social function of a system of justice this study recognizes the basic axiom that laws and systems of justice, above and beyond the goals of peace and order, are often tools employed by powerful social and political groups that enable them to advance their views and maintain their position within society.

Acknowledging the broad social contexts of criminal procedure, it is possible to ascribe three basic functions to criminal procedure. First, criminal procedure provides the basic rules that guide the application of laws. No organized legal system could operate consistently for long without procedures for the application of laws. This statement, though seemingly trite and self-evident, is vital because it highlights the basic function of criminal procedure. To support a system of justice without criminal procedure is to deny the original intent of laws. What is, after all, the point of establishing a mechanism to maintain peace and order without any means of applying it? A second function of criminal procedure is that it acts as a meeting place between laws and the persons subject to them: it translates laws to the members of society; it also translates the character of the society into forms suitable for legal remedy and mediation. A system of criminal processes, as both a product of its environment and as a set of basic rules, reflects the relationships between the institutions maintaining order and those persons subject to those institutions. Finally, within the rules, and as a link between the social and judicial

“worlds”, criminal procedure allows for instances of compromise and dominance whereby interested constituents are able to maintain their position and advance their views as to how people should interact. Clearly, these major functions do not exist independent of one another. Having examined the systems at work in the Massachusetts Bay Colony and *ancien régime* France, it is clear that all three of these roles are inextricably intertwined.

These three basic functions have been linked to criminal procedure as a result of the examination of two social and procedural systems. Despite the common form of these roles they did not necessarily operate in the same manner in both seventeenth-century France and colonial Massachusetts. Quite the contrary, the form of these roles was dependent on differing social, political, religious, and geographic conditions present in both societies. Differences of detail, however, do not detract from the fact that criminal procedure served these functions. In fact, one of the most effective means of supporting our thesis is to demonstrate, through a comparison, that these roles were common to both systems of prosecuting crime. As we compare systems of criminal procedure, one inquisitorial and the other accusatorial, it will be seen that these three functions present many variations in the application of the law, and as a result, highlight the many differences between the two systems. This comparison will also demonstrate that these two systems, and maybe all systems of justice, use criminal procedure in the same basic manner.

As we undertake the study of criminal procedure it is essential to realize that the research, and corresponding analysis, are generally formed by the available sources. Despite the great variety of possible information, there were times when the evidence was not as clear, nor as available as would be liked. But this condition suggests other possibilities of analysis. In uncovering the criminal procedures in France there is a great deal of information available in the form of criminal ordinances and jurists' commentaries. It is relatively straightforward for an historian to piece together the basic form of a criminal prosecution. This ease of explanation is due, in large part, to the

French procedure's extensive use of written documents in order to build a case, and prosecute it to its conclusion. By contrast, the task of presenting the processes followed by the courts of the Massachusetts Bay Colony is made difficult by a lack of sources devoted to criminal procedure.¹ In this context the historian is forced to turn to alternative sources and attempt to piece together the basic processes. This relative lack of specific information may be due to the oral nature of the procedures used in Puritan Massachusetts. The availability of sources in France, and the lack thereof in Massachusetts, reflects the vastly different forms of procedure used in each context. Clearly, a set of procedures dependent on the written word has a tendency to leave more clues for an historian than a set of procedures that relied on the spoken word.

The varying availability of sources in both *ancien régime* France and in Puritan Massachusetts is also due to the differing objectives of each system. Though both processes sought to discover the root of a criminal case, both systems went about prosecuting these cases in very different manners. Ultimately, the French magistrate was interested in investigating a series of events and evaluating the evidence in order to arrive at the truth. The truth seeking motive was also at work within the different procedures used in the Massachusetts Bay Colony. Though more consumed with religious implications, the Puritan magistrate also sought the truth in order to decide a case. Unlike his French counterpart, however, the Puritan magistrate did not undertake an investigation. Rather, he judged the evidence before him without initiating an investigation of his own. In this light, the colonists adapted the accusatorial processes they inherited from England to suit their religious outlook. The shift away from English influences occurred in that the colonial jurists devised a process, wittingly or not, to expose and punish criminals for religious and moral reasons as well as legal ones. The colonial leaders only partially

¹ As was previously emphasized, our focus was completely on the procedures at work in the colony, and not on the English procedures that may have been rooted in the minds of some Colonial Jurists.

borrowed from English roots in order to create a system of procedures and infused their processes with a Puritan ethos.

Whether a system of procedures was dependent on the written or oral form may seem to be a minor consideration. But this particular characteristic is so vitally important that it tended to affect both the ability of the common person to access the system of justice, and at the same time, the range of steps that were taken within an average process. The French system, characterized by a mass of written forms and documents, worked to restrict the ability of any illiterate citizen to partake successfully in judicial affairs. In a relatively illiterate society this meant that only those with an education were likely to be able to gauge the full significance of the judicial events occurring around them. In this light, the royal procedural system used in France favoured the privileged few who belonged to the first and second estates. The oral nature of colonial procedures used in the Massachusetts Bay were, by contrast, much more democratic and less shaped by orders and ranks. Anyone who could communicate orally was easily able to participate in a judicial process. Literacy, in this case, was not a qualification that limited a defendant's ability to work within the system of justice. This dichotomy presents an interesting social commentary that merits comparison. Ironically, the French system, and its use of the written document, was applied to an illiterate populace, whereas the Puritan system, and its use of oral processes, was applied to a society which was quite literate.

Our previous discussion of the social climates in both situations reinforces this dichotomy because they demonstrate the vast chasm in the area of literacy. The systems of criminal procedure in both cases were clearly the result of their social environment. The society of orders, which worked to classify the French based on a series of qualifications rooted in blood, title, and land, was clearly controlled by the powerful elite—the nobility and the clergy. These groups used this system of social classification to protect their position in all areas of life. Naturally, then, the system of justice favoured these groups. Life in Puritan Massachusetts, however, was not centered on social classification but

rather on religious doctrine and devotion. As was previously discussed, the Puritan ethos touched almost every aspect of a settler's life. Among the most powerful tenets of this faith was the interpretation of the word of God. This required that all persons read the Bible for themselves, which in turn promoted high literacy rates. Furthermore, social authority was removed from the titled and the merely wealthy, and placed in the hands of religious leaders and communicants. In this situation everyone was potentially judged on an equal footing because everyone was to glorify God as a consequence of faith in God's free and equal election of those to be saved. This concept was, in turn, translated to the system of justice which employed magistrates who judged defendants based on their violation of laws derived from the word of God. Clearly, both systems of justice evolved out of the social climate in which they were created.

The difference between the oral and written form also affected criminal procedure in a rather simple manner. There were more phases to a trial using written documents than there were in a trial that was predominantly oral. This may seem to be of minor importance, but if criminal procedure is seen to serve the basic function of providing rules that regulated the application of justice it is important to understand that some systems were more complex and required more rules. The Royal system of justice presented a need for more rules in order to deal with the complex social and jurisdictional conditions in France at the time. Furthermore, written procedure also demanded more rules to ensure that the processes were correctly used. The colonial system of justice in the Massachusetts Bay seemed to present less need for rules because of its smaller population, and the relative simplicity of the oral form of procedure. This may be made more evident by comparing a selection of these rules.

The list of major procedural differences begins with the ways of initiating a trial. Though both procedures were begun with a simple complaint to the authorities, how the complaints were received was completely different. The French procedure required that the complaint be officially recorded by a magistrate or his clerk and signed by the

complainant.² All of this was done in private with only the magistrate, his clerk, and the complainant present. The Puritan procedures made no provisions for ultimate secrecy. Though it is likely that the information was received in private, and the information was recorded, there were no legal provisions requiring the court to ensure that privacy be recognized or maintained. Unlike in France, there was even a provision that allowed a case to be initiated publicly.³ The secrecy of a case in France was designed to achieve the same ends as the element of publicity in the Bay colony. Both features were practised to ensure fairness. The inquisitorial form used secrecy as a tool to ensure that depositions (and all forms of evidence for that matter) were supplied without prejudice and free from outside influence. That is, because everyone was deposed in secret they were able to supply evidence without fear of retribution outside of the courtroom. The accused, meanwhile, were deprived of any information about the case against them so that the court could judge their initial reaction to the evidence as it was presented. Ultimately, the accused ideally had nothing to fear if they were innocent. The inquisitorial system promoted fairness by ensuring that an accused was protected from evidence that was influenced by social relationships outside the courtroom. On the whole, this feature of the inquisitorial form was supposed to help magistrates determine the truth in a case more easily. The publicity of a trial in the accusatorial system also promoted fairness. Within the contexts of accusatorial procedure everyone was able to provide information. This worked, according to an accusatorial outlook, to prevent a miscarriage of justice because everything was out in the open. Theoretically, this protected the accused from being convicted summarily, or with very little evidence.

In both systems, a case could be initiated by an officer of the court who had caught an offender in the act of a crime. In France the officers that were most likely to have made

²Ordinance of 1670, Tit. III, Art I.

³An inquest into an untimely death presents such an opportunity.

such an arrest were the *maréchaussée*. As part of their many responsibilities, these men were also able to arrest offenders “in the act” (*en flagrant délit*).⁴ In some cases these officials might have dealt with the matter immediately, but for these offences outside of their jurisdiction, the *maréchaussée* usually delivered the offender to the appropriate court. The colonial counterpart of the *maréchaussée*, the constable, was endowed with similar although slightly wider powers of arrest.⁵ This should not imply that they judged those that they arrested like their French counterparts. Rather, they held no such authority to judge. The *maréchaussée*, however, also had judicial power that allowed them to judge “on the spot” certain persons. Effectively, persons of respectable social status, while subject to arrest within the jurisdiction of the *maréchaussée*, were usually tried in the appropriate courts. The constable in Massachusetts, while lacking the ability to judge, was also called upon to imprison the offender until a court date was available. In order to do this he was empowered “to apprehend and keep in safe custody, [anyone they arrest] till opportunity serve to bring them before one of the next magistrates.”⁶ Keeping the peace, it would seem, was often accomplished in similar ways in both places.

Once a complaint had been submitted, and the trial process set in motion, both courts set out to decide on the next phase. For the French magistrate this was a rather lengthy process, known as *l’information*, where he undertook an investigation of the charges before him. His colonial counterpart undertook no such investigation but only received depositions and evaluated the complaint before quickly proceeding to bring the defendant before the court to answer to the charges. Both magistrates could choose to forcibly bring the defendant before the court or to issue a more polite request to appear. In

⁴See Chapter 2 of this thesis on French judicial structures for a thorough discussion of their duties.

⁵Laws and Liberties, 23.

⁶Laws and Liberties, 23.

either system the decision was based on the charge at hand. The Ordinance of 1670 mandated that the decision as to how the accused was to be brought before the court be based on the type of offence in question, the quality of the evidence, and the accused to be examined.⁷ The French magistrate contemplated this evidence carefully, and probably considered the status of the accused. Any attempt to arrest a local noble, for example, might have entailed a struggle to bring them before the court and affront to the honour of the noble. This was not an attractive option to a magistrate with limited resources and a sensitivity to social status. As a result, courts were given alternatives so as to coax a local noble to come to court. The procedure in the Massachusetts Bay offers no similar accommodations because all were equal before the eyes of the law as they were presumed to be before God.

There is a major difference in complexity at this stage. The French process was significantly more complex due to the inherent complexity of the entire process and the underlying social organization of France. In an attempt to accommodate the principles of the society of orders, French magistrates had to consider much more than the facts of a case when deciding how to bring an offender before the court. The influence of this system of social organization forced judicial officials to consider the status of the accused as well. Within the processes used in France it was clear that everyone was to receive justice. In order to administer the law in a fair manner it was thought necessary that there be inequalities in the eyes of the law. To judge a noble on the same level as a peasant would be to remove the noble from their social context, and thus promote an unfair situation for the noble accused. The simplicity of the situation in the Bay colony was also related to the social climate. Colonists were not arranged by a complex system of social organization, but rather according to the principles of the Puritan faith. As a result, the concept of equality of souls (sanctioned and reflected in the term “visible saints”) dictated

⁷Ordinance of 1670, Tit. X. Art 2.

that everyone would be treated equally before the courts. Colonial magistrates, then, only needed to consider the facts of a case when deciding how to bring a defendant before the court.

The process of bringing an accused before the court leads to another interesting comparison. Defendants brought before a Massachusetts Court were to answer to the charges. This phase, known as the presentment, was an opportunity for the court to decide if the charges were provable. This decision was made by a grand jury, based on the information in the complaint. If the grand jury felt that the information was insufficient the charges 'fell' and the accused was released. If, however, they felt that there was enough information the accused was indicted and handed over until the next session of the court. The indictment stands as an example of the judicial recognition of a formal charge. Interestingly, there was no such recognition of a charge in the French process. There are no instances where the accused is formally charged with a crime. The *conclusions* of the *procureur* may be tantamount to a charge, as the court acted on his recommendation. Logically, there is no real place for a charge in any inquisitorial process. This system simply inquires into an event. This inquisition was initiated by a complaint, and not a charge. Though we have already recognized that the processes in Massachusetts Bay were not wholly accusatorial, they did keep this element of the English process. The indictment in the colony serves as the point in a process where both the court and the accused became formally aware of a charge. In effect, the charge became the focus of the court's interest. Any confession or denial at this stage was based on the indictment.

It is also interesting to note that these two systems depended on very different structures for arriving at this phase. The French court used a phase of the process called the *information* to collect evidence so as to allow the *procureur* to decide if the case should continue. Here, any source of information was exploited to ensure that every piece of available information was explored, including doctor's reports, witness's depositions, and reports from the investigating magistrate. The court also took advantage of the local

priest in order to seek out information from parishioners. The *monitoire* was an order by the court that required priests to threaten the withholding of sacraments from those who might have something to add to a case.⁸ The relationship between the court and the parish, though tenuous at times, should be clear. Through the *monitoire*, the court recognized the power of the church to influence villagers. In fact, the local parish may have been the only institution to rival the court in their respective abilities to control villagers.

The courts of the Massachusetts Bay seemed to place similar emphasis on the congregations within their jurisdictions. Congregational officials, for example, had the ability of bringing complaints to the court's attention, and could serve as important witnesses in any case. Their direct influence, however, was restricted to these roles and played no formal part in the court's decision to prosecute an offender. The major colonial institution that decided on a charge was the grand jury. This group of jurors was given the responsibility to decide whether or not the evidence at hand was sufficient to transform the complaint into a formal charge. Unlike the French magistrate, the grand jury did not investigate, but they simply made a decision.

The difference should be clear: the French system used every process available to accumulate information in order to build a case (or drop the matter entirely), whereas the grand juries in the Massachusetts Bay worked to decide if there was sufficient information to prosecute a case or not. The different approaches to bringing a case to trial reflect the inherent difference in the two systems. The *information* was a method of investigation that explored the facts in a case and gathered information. This reflects the basic qualities of an inquisitorial process. The grand jury, on the other hand, only decided on the information provided to them. They did not undertake an investigation but merely judged the facts of a case. The role of a grand jury reflects the basic form of an

⁸As was previously noted in chapter 3 of this study, the *monitoire* was in decreasing use because of a reluctance on behalf of the clergy to barter the sacraments for information.

accusatorial process.

Though both processes tended to undergo similar phases in a trial, there were some instances where each process had a phase that was not found in the other. The French process, for example, followed a series of phases aimed at prosecuting accused in *absentia*. A trial by *contumace* referred to such a situation. When an accused did not respond to the court's warrants the court effectively paused the process in order to give the accused an opportunity to appear. Only after going to great lengths to notify the accused did the trial continue.⁹ Being in the state of *contumace* did not imply any real difference in a trial, and the process continued as if they were present. The unique aspect of a trial for *contumace* was the penalties associated with being absent. The court could fine the absent accused, thus emphasizing the importance of responding to the orders of the court. The ability of the court to continue a process without an accused demonstrates that Royal Justice was enthusiastic in its pursuit of justice; it stopped for no one. Justice in Massachusetts was just as concerned with actually punishing the accused and seeking some form of inward and outward recognition by the convict and the public of the importance of repentance and regeneration. Despite the importance of this objective, they did not pursue a case without a defendant. As a result there were no provisions for prosecuting without an accused.

A unique feature of the process in the Massachusetts Bay was the availability of a trial by jury. Though the occurrence of a jury trial for non-capital crimes was relatively rare, the option was still available to the accused. The availability of this institution was directly attributable to the English processes from which the colonists borrowed. As was seen in an earlier discussion, trial by jury was a fundamental aspect of English processes. It is logical, then, that colonists expected its availability in the new world. If a jury trial was chosen the defendant had the ability to challenge the suitability of jurors based on

⁹Refer to chapter 3 of this thesis on the steps taken by the court.

familiarity with each party.¹⁰ The process in the colony seems to present every opportunity for the defendant to obtain a fair trial. The infrequency of jury trials, however, is one indication that the system of jury trials was difficult to institute objectively because of the small size of communities. An unbiased jury who had no ties to either party may have been difficult to find. Furthermore, in the fiercely religious climate of the colony it may have been difficult to find an objective jury who was not disturbed by the sinful conduct attributed to the defendant. Those accused of a severe offence likely felt more comfortable in the hands of a judge than in the hands of his or her peers. The possibility of a jury trial emphasizes the non-investigative aspect of this accusatorial form of prosecution. Obviously there were no similar options for an accused in the Royal system of justice in France. Instead, the jury was discounted due to the investigative role of the magistrate.

Another glaring difference between the two systems was the number of rules related to witnesses. The Royal process presented a wide range of rules that guided the reception of evidence from a witness. When taking a deposition, the magistrate was required to follow many rules. The majority of these rules were intended to preserve the integrity of the information arising out of the interview. It was important to determine whether or not the witness had any interest in the case due to a relationship with either the accused or the victim. “Serant enquis de laws noms, sumoms, âges, qualitez, et demeurs . . . s'ils sont serviteurs ou domestiques, parens ou alliez des parties, et en quel degré.”¹¹ By knowing this the court could effectively weigh the value of the testimony. Not only was this a practical move by the court, but it also reflects their cognizance of social relationships outside the courtroom. The deposition of an ally or of a person closely related to either party was probably accorded less value than a deposition supplied by a disinterested witness. Considerations such as this were evaluated in a much different

¹⁰ Body of Liberties, Art.30.

¹¹ Camus, Stile Universel, 32-33.

fashion in Massachusetts. The colonial process made no specific provision for the evaluation of a witness. In fact, anyone was allowed to give a deposition, regardless of any ties to the parties involved. The courts even allowed for hearsay to be accepted as evidence. “Jno. Woodbury’s man said that Edward Be. Mr. Connant’s Man WM. Wellman a boy did hear Tobias Hill say that he had enough of his wife now, that he could spare his wife to anyone in the Towne for the 3 or 4 days.”¹² This third party account of what the defendant may have said was perfectly acceptable in the colonial courts. The lack of defined rules regulating the testimony of witnesses may be attributed to the role of either the magistrate or jury. As witnesses gave their testimony neither the magistrate nor the jury necessarily considered the qualification of the witness. The credibility of the witness was simply evaluated along with the evidence they provided. This meant that some witnesses, such as a church or civic official, may have been given more credibility than a sojourner. There were no formal rules intended to guide the judge or jury in their evaluation of the witness and their statements. Evaluating the evidence in relation to the parties involved was an important part of the role of both the magistrate and the jury in a criminal case.

This major difference may be directly linked to the varying conceptions of proof associated with each system. The Royal system did not simply trust the discretion of the magistrate to arrive at a suitable verdict. The French magistrates were instead bound by a system of calculating proofs in order to arrive at a verdict. This system of statutory proofs classified evidence into categories of complete proofs, proximate presumptions, and remote presumptions.¹³ As evidence was received by the court it was classified according to these categories and then became part of the cold calculation. The courts of the Bay

¹²George F. Dow, ed., Records and Files of the Quarterly Courts of Essex County Massachusetts (Salem, Mass.: Essex Institute, 1911-1921), 31 January 1630, 23.

¹³Esmein, A History of Continental Criminal Procedure, 258.

Colony presented no comparable alternative to this system. Rather, the jury or the bench simply decided the case based on their judgement of the evidence supplied by the witnesses. The only discernable standard was related to cases determining life and death. In those cases the verdict had to be supported by the testimony of at least two witnesses to the crime.¹⁴ Two witnesses, it should be remembered, also constituted one full proof in the French system. Even the colonial procedures, it would seem, recognized basic standards of proof for imposing severe sentences. The major difference between the two systems in the area of witnesses and proof is, therefore, attributed to the basic form of each process. Where the inquisitorial form required that a magistrate determine a verdict based on a calculation of facts that he discovered, the judge in an accusatorial process had, in most cases, only to judge the validity of the facts presented to him.

One of the strongest proofs in the French process was a confession. A confession from an accused constituted one full proof. This form of proof was ideal in almost every case, especially when the court had enough evidence to warrant suspicion but not enough to convict. The court pursued confessions so rigorously that they often turned to torture to extract a statement from an accused. It could be safely said that a confession simplified matters in a case. Confessions were predominant in the colonial procedure as well. In Massachusetts, however, the confession was used to purify, though not to exonerate offenders, and represented the willingness of defendants to open their hearts to regeneration. Clearly, both procedures valued confession. One viewed confession as a means to simplify; the other viewed confession as a means to reformation.

The procedural phase that bore greatest similarities in both systems was the punitive phase. French and Massachusetts procedures held the exemplary and punitive aspects of sentencing very high. Though neither system proposed specific sanctions for particular acts, both presented examples of sentences that emphasized a punitive

¹⁴Laws and Liberties, 54.

component along with an exemplary aspect of most corporal sentences. The French procedure, in its typically detailed form, clearly outlined each sentence as it was handed down. The ceremony of an execution here included the spiritual confession of the accused and the exact actions of the executioner that comprised the sentence. The spiritual aspect was quite important in these executions. Not only were the accused allowed access to a priest up to the gallows, but they were often required to wear nothing but a simple white shirt which symbolized humility before God. The punitive aspect of a sentence was quite clear as the convict was forced to suffer some type of painful corporal punishment. The exemplary function of sentencing, however, could be served in a variety of ways. First, as most punishments were inflicted in public it was possible for the rest of the community to plainly see the consequences of criminal activity. Second, it could be exemplary if the sentence included the infliction of some type of permanent mark (ear cropping, branding, etc.) That reminded anyone who encountered the convict of the court's ability to punish and inflicted permanent shame and social isolation on the convict.¹⁵

The philosophy of punishment seems to have been quite similar in Massachusetts. The sentences provided in the court records clearly emphasize both the punitive and exemplary aspects. One might reconsider the plight of poor Alice Thomas who was convicted of a range of offences.¹⁶ Not only was she ordered to make restitution for offences, but she was also sentenced to endure two separate punishments—one was a severe and public whipping and the other was to stand on the gallows with a rope around her neck.¹⁷ While the whipping may have carried both a punitive and exemplary function, the court deemed her offences severe enough to warrant a separate sentence that was

¹⁵Marks such as these also served as a means of identifying repeat offenders in other trials.

¹⁶Suffolk County Court Records, 30 June 1672, 83.

¹⁷*Ibid.*

thoroughly exemplary. The humiliation of standing in the gallows with a rope around her neck was clearly intended to warn others of the consequences of similar offences and to demonstrate the iniquity of her actions. It also indicates a difference in religious influence. The Puritan faith did not promote sacramental atonement as a means of achieving spiritual salvation. Such acts were irrelevant for Puritans who saw salvation dependent on God's "grace" and their own piety. The Catholic influence in France, by contrast, promoted confession and atonement as essential components of salvation. The influence of religion on procedures was just as prevalent in France as it was in the Bay Colony.

Despite the obvious religious differences, the two procedures still maintained many punitive similarities. One of the consequences of criminal conviction in the Bay Colony was a reaction from the local congregation. The congregation was able to punish offenders by excluding them from the congregation, thus inflicting other severe social and political sanctions that resulted from the actions of the court. Exclusion from a congregation was similar to banishment in France. In both contexts this event was tantamount to the destruction of individual identity because both the colonists and the average French person viewed themselves in relation to their immediate surroundings. Removal from a comfortable social context necessarily brought great hardship and a destruction of everything familiar. Exclusion from a desired membership worked to deny the convict basic social and political privileges that almost everyone else enjoyed. Both systems, therefore, presented specific rules for the execution of sentences that emphasized both a punitive and exemplary aspect of justice. This similarity, it should be noted, can be understood when it is considered that a variety of European systems of justice, with often differing procedures, often used the same concepts of punishment in order to reinforce their power.¹⁸

¹⁸See Peter Spierenburg, The Spectacle Of Suffering: Executions and the Evolution of Repression: From a Pre-Industrial Metropolis to the European Experience (Cambridge,

The difference between the two processes may best be exemplified by the plight of the accused within each process. Characteristically, the accused within the French system had little opportunity to mount a defense. This may be due, on the one hand, to the role of the magistrate who was supposed to watch out for the rights of the accused. The significant inability of an accused to mount a defence, however, was more likely due to the manner in which a trial progressed. Ideally, defendants had no real need to defend themselves if they were innocent. The system would, ideally, uncover the true nature of the offence and liberate the innocent accordingly. If defendants were guilty, the process was designed to prove this and punish them as a result. It is doubtful that the system operated perfectly, and may have sometimes convicted an innocent defendant. Though such tragedies probably occurred in Massachusetts, the major difference was that colonial defendants might have taken advantage of a series of opportunities to defend themselves. First, an accused might enlist the services of an attorney to help him in court. This was a significant service as some offenders may not have been aware of the importance of some procedures. Second, the opportunity to challenge jurors has to be considered a significant defence. Though few took advantage of jury trials, those who did increased the likelihood of a fair trial with this measure. Perhaps the largest difference for the accused in the Massachusetts system was that the entire process was public. The complaint, the witnesses, and even the nature of the evidence were all publicly known. Unlike in France, where the element of secrecy was intended to deprive the accused of any information, the colonial defendant was more able to build a defense because everything was out in the open. This major difference is suggestive of the differing religious outlook in both contexts. In France, the imprint of Catholicism cultivated the element of secrecy. In Massachusetts Puritan concepts of openness encouraged publicity in criminal trials.

Viewing criminal procedure's function as a set of rules that regulated the

U.K.: Cambridge University Press, 1984).

application of law reveals a great many differences between the two processes. Each process contained particular rules and phases that reflected both the unique character of each system and the social climate in which these rules worked. By comparing the processes in this single function it is quickly realized that the two systems of procedure were very different. Rules that were devised to guide the application of the law in France may have seemed foreign to a colonial jurist and, therefore, inapplicable in that system. These major differences tend to reinforce the second function of criminal procedure—that of a link between a system of law and society. In fact, as was previously mentioned, the procedures that were unique to each process tend to strengthen that notion that criminal procedure provided the basic link between society and a set of laws.

Our previous comparison of a selection of rules clearly demonstrated that there are many rules within each process which were unique. The most important issue arising from the previous comparison was that the particular differences were attributable to two basic factors. First, some of the rules were reflective of the basic inquisitorial or accusatorial nature of each system. Second, many of the unique phases were also linked to particular social considerations with which each system was forced to deal. This indicates that criminal procedure performed the basic function of providing a meeting place between the laws and the persons subject to them. While doing so it translates laws to the members of society, and translates the character of the society into forms suitable for legal remedy and mediation.

If it is to be proposed that criminal procedure served as a link between law and society it has to be clear that the gulf between the two in seventeenth-century France was wide enough to warrant the need for some type of link in the first place. The gap between society and law may have also been clouded by the true complexity of the situation. Just as the system of justice was a vast machinery of courts and officials that represented both the King's right to judge his subjects and his legal will, French society was also a complex organism dominated by a juridically recognized system of social classification based on a

web of titles, land, and blood. In order to effectively reach the society it was intended to govern, then, the system of justice had to be able to make use of some type of mechanism that allowed the laws of the King to be applied throughout his kingdom. Criminal procedure can be viewed as the key mechanism available to the system of justice in order to reach society.

The basic goal of the system of justice in *ancien régime* France was to enforce the laws of the King through a hierarchy of courts and officials. Ultimately, however, the system of justice did more than just enforce the will of the ruling monarch.¹⁹ His will had to include concerns of peace and order in his realm “Que la justice soit rendue ‘au nom du roi’ ou ‘au nom du peuple français, les mots important peu et, quelque soit la régime politique, le principe est le même, rendu la justice ne peut être que le fait du souverain.”²⁰ Because maintaining order within the country was a major responsibility of the throne, and because the King’s interest in justice was emblematic of a public interest in justice, Louis XIV instituted a series of judicial reforms that worked to his authority. Over a period of two hundred years, the French monarchy slowly reformed the system of courts in order to create a hierarchy of royal courts. Key to this task was removing many jurisdictions from the hands of the nobility and the clergy. In order to achieve this the royal system of justice simply began to classify crimes as *cas royaux*, thus subjecting them to royal jurisdictions and displacing the judicial authority of non-royal courts in favour of the royal authorities.²¹ As Louis XIV instituted his reforms he made it very clear that justice in *ancien régime* France was the purview of the monarch, irrespective of any claims by certain social orders to the contrary. These reforms had the effect of entrenching certain ideals (like peace and order) in the system of justice at the expense of many social considerations. Ultimately,

¹⁹Pollock, Essays in the Law, 33.

²⁰Lebigre, La Justice du Roi, 14.

²¹Ruff, Crime, Justice and Public Order in Old Regime France, 24.

everyone was to be subject to the authority of the Royal system of justice.

This is not to say that social considerations did not affect the application of law. Quite the contrary, the complex nature of the society of orders worked to form the complex system of procedures at work in this period. The principles of this system of social organization demanded that everyone be classified into orders, and official social status was a major consideration in almost every aspect of French life. The ability of the 'society of orders' to command such power was reinforced by the fact that the social divisions were mandated by law. Relationships among people were all centered on these orders. Furthermore, members of each order lived within the confines of their order as it related to other social groups. Members of the third estate, for example, subsisted under the higher social authority of the nobility and the clergy. The Nobility, meanwhile, enjoyed a great amount of social power and political access, but were often restricted by the honorable qualifications that defined their superiority. As a result, nobles were prohibited from participating in derogating activities that were otherwise lucrative endeavors. The clergy, who occupied the First Estate, enjoyed great power, but members of this order were obviously restricted by their occupation. Each order assumed its position due to its supposed value to society. The clergy, as spiritual representatives, were placed at the top of the society of orders. The nobility were prominent due to their military and land owning responsibilities. The third estate, which included the vast majority of the population, was relegated to the lowest rung because of their dependent relationship on the other two orders. Everyone within this system was in competition for position and power in order to survive.

Though the individual orders certainly competed for position, continually vying for some privilege accorded to another group, their basic position was always relative to those of the other orders. At the highest levels of this system relationships were competitive as groups of citizens sought to consolidate their power and exert influence in order to advance their cause. At the lowest extremes, citizens simply sought to find the

path of least resistance, thus avoiding potential legal, religious, and financial sanctions. This was the fiercely combative climate that justice was intended to govern.

Criminal procedure served as a link between the absolute mandate of royal justice and the complex system of social ordering at work in France in three important ways. First, as a series of rules criminal procedure contained elements that reflect the major divisions between social orders. Second, it served as a link by recognizing that important social distinctions like status were important considerations in the application of justice. Finally, the procedures provided the means by which French people were able to participate in judicial affairs. By conceiving of the relationship in these three ways we can achieve a clearer picture of criminal procedure.

Perhaps the most revealing aspect of criminal procedure in this light, is its ability to reflect common social positions. By instituting a simple rule French jurists acknowledged that particular groups were to be treated differently. Furthermore, it is important to note that though a particular procedure might be construed as an attempt to cater to certain social groups, these same procedures effectively allowed the King to impose laws on those very groups. The ability of criminal procedure to reflect social distinctions was, then, an important component in applying royal justice.

Though there were certain procedures that reflected social position, there is no evidence to suggest that these same procedures were in the main dedicated to the preservation of social structures, rather they imparted a tone of social awareness to the process. When searching for evidence in building a case, for example, the court often turned to one of the leading figures of a community—the parish priest. The *monitoire* was an order by the court enlisting the help of a priest. The intent was to force the priest to call for information related to a case while at the same time threatening to withhold the administration of the sacraments from stubborn informants. Of all the possible sources of investigation available to the courts this is the only one that exclusively and specifically reaches out to the priest in a call for help. This procedure reflects the court's view of the

priest as an important leader in a community. Furthermore, this procedure can also be seen as an attempt to coerce witnesses by threatening them with a spiritual reprisal. The *monitoire* is a link between the judicial system and the society because it recognizes the position of the First Estate and attempts to use the priest in the administration of justice. Moreover, it demonstrates a fundamental relationship between the law and religious morality.

The courts also recognized the position of the nobility within the procedures. Instead of using this order in its investigations, however, the procedures provided clear allowances for the collective position of noble litigants. These allowances were most obvious in the area of jurisdiction. As was previously discussed, the system of courts in *ancien régime* France was hierarchically organized. A key function of the hierarchy was to create points of access for each social group. This, in turn, provided the nobility with access to courts that the lower orders did not enjoy. Whereas members of the third estate could be sentenced by a *prévôté*, or by a *prévôt des maréchaux*, the nobility could not. The lowest court that could hear cases involving a noble was the court of a *baillage*. This was frequently the court of first instance for nobles.²² A noble carrying *lettres de committées*, which exempted them from judgement in lower courts, could even be tried in a *parlement*.²³ This was a considerable privilege when it is remembered that the *parlements* were the highest courts in the land, next to the king himself. Access to these courts by members of the third estate was restricted by cost and status. This jurisdictional allowance was an attempt by the system of justice, through procedure, to provide some privileges that were appropriate to their noble status.

Criminal procedure mandated no privileges to the lowest order. In fact, the lowest

²²Mousnier, *Institutions of France*, 2: 271.

²³Ruff, *Crime, Justice and Public Order in Old Regime France*, 35; and, Olivier-Martin, *Histoire du droit français*, 538.

members of this order were subject to justice that was rendered 'on the spot'. The majority of offences committed by the lowest creatures of society were dealt with by a *prevôt des maréchaux* (or any equivalent officer). Cases within their purview, generally known as *cas prévôtaux*, were essentially crimes of the poor. They included a range of offences like vagabondage and vagrancy. "[F]rom the point of view of the crimes considered *prévôtal* by nature of the offence, the threat to public security was assumed to come from below, and this assumption was made even more explicit by the categories of charges which were *prévôtal* through the nature of the offender."²⁴ Those citizens of the lower orders who were charged with such offences were dealt with summarily. After the briefest of inquiries, then, the accused in this situation was more often punished than freed without consequence. In this instance, criminal procedure reflected the place of the lowest members of society by providing them with few real opportunities of a full trial.

Criminal procedure can be seen as a translator between royal justice and society by its concern with the important social mark of status. The clearest example of this comes during the reception of depositions. When a witness supplied testimony to the court the deposition included some personal information. "Seront enquis de leur noms, ages, qualités, demeurs . . . s'ils sons serviteurs ou domestiques, parens ou alliez des parties, en quel degré."²⁵ This small mention is of major importance. It clearly indicates that the courts, due to procedure, were interested in the status of an individual and any possible relationships they had with the parties involved. In judicial terms this information affected the strength of the statement.

The final manner in which the procedure provided a link to society was by providing basic rules that allowed citizens from all orders to gain access to the system of justice. The simplicity of this proposition should not weaken its importance. Without

²⁴Cameron, Crime and Repression in the Auvergne and the Guyenne, 47.

²⁵Camus, Stile Universel, 32-33.

these rules it was impossible for anyone to gain access to the royal system of justice as it existed in the late seventeenth century. The whole point of creating a hierarchical system of royal courts, as was previously discussed, was to consolidate the royal authority in the country. Without any means of prosecuting crimes within this system the whole process of reform was wasted. It is important to note that the form of these rules, being generally written, tended to represent the existing social system. Any system that advocated written processes to be applied to a largely illiterate society may be perceived as elitist. Just as the society of orders tended to exclude vast numbers of the population from any form of social success, so too did the system of justice that excluded the illiterate from completely understanding the events occurring around them. This exclusive feature of procedure has to be considered as a link between society and justice because it represented and reinforced the elite nature of the society of orders.

The function of criminal procedure as a link between the royal system of justice and the society of orders should be abundantly clear. Not only did the procedures reflect the social relations of the three orders by providing procedures that mirrored their respective place on the social ladder but the procedures also made clear allowances for such social qualifiers as status and title. The ability of criminal procedure to bridge the gap between the royal system of justice and French society, then, was of vital importance to the application of justice.

It could be proposed that criminal processes served a similar function in the Massachusetts Bay Colony. When the Puritan colonists set out for the new world in 1630 they were guided by a firm belief in their mission to establish a model to be imitated of a society based on religious ideals. This faith was best expressed by John Winthrop, the governor of the company and the leader of the colony, in his speech A Model of Christian Charity, delivered as the settlers prepared to land in the Massachusetts Bay. The sermon outlined how a Puritan society could operate in very practical terms. He used the oration

to remind the colonists of the importance of their endeavor.²⁶ Though he acknowledged that their efforts would be closely scrutinized by both opponents and allies, Winthrop and the other colonial leaders still pushed to establish a society that demanded a strict conformity to the Puritan values of their faith. Key to accomplishing this was the creation of a system of justice that imposed strict legal sanctions upon those who refused to conform. Though the Puritan ethos was the dominant intellectual and social force in the colony, the leaders were bound by guidelines laid out in the charter that granted the existence of the colony.

The system of justice created in the colony was based on the pairing of Puritan ideals and English judicial structures. The hierarchy of courts outlined in the Royal Charter of 1629 represented the monarchical interest in justice in the new world. The charter clearly outlined the form of courts that would guarantee peace and order in the colony.²⁷ A critical aspect of maintaining peace and order was the drafting of laws that suited the colonial situation. On this point the colonists were given the ability to create their own laws.²⁸ This freedom, however, was severely limited by a declaration in the charter that stated: "such laws and ordinances be not contrary or repugnant to the laws and statutes of this our realm England."²⁹ This statement made it clear that the colonists were to exist under the same rule of law known in England. Lacking the benefit of time and colonial experience, the colonial leaders turned to the judicial structures in place in England in order to bring about their vision of a Puritan utopia. What ensued over the next ten years was a struggle among colonists over the form of judicial structures. Though the colonial leaders were initially successful in sequestering power in the hands of a few like-

²⁶Winthrop, Model of Christian Charity, 9.

²⁷Kammen, Deputies and Liberties, 118.

²⁸Ibid., 119.

²⁹Ibid.

minded individuals, they were soon confronted with a series of protests that challenged their authority. In the end, the colonists were successful in persuading the leaders of the need to strictly adhere to English judicial structures in the colony. Within a decade of their arrival, colonists had in place a series of English courts that administered colonial justice. These structures were largely the same as those the colonists may have encountered in old England.

Faced with a rapidly growing colony and upon their defeat on structural fronts, the colonial leaders realized a need for a set of laws that codified a lifestyle conducive to a Puritan ethos. Under the watchful eye of Puritan ministers the General Court prepared a set of laws known as the Body of Liberties in 1641. Based on the work of John Cotton and Nathaniel Ward, this legal code instituted a set of laws that were ultimately borrowed from the Bible. This theological jurisprudence made no allowance for any law that was not scripturally justified. “No custom or prescription shall ever prevail amongst us in any moral cause, our meaning is to maintain anything that can be proved to be morally sinful by the word of God.”³⁰ By codifying laws based on this axiom the colonial jurists clearly outlined their position. The laws of the colony, by following the word of God, would prosecute anyone who could not, or would not, conform to the Puritan outlook. The Body of Liberties was never formally accepted by the General Court into law. Nevertheless, a copy of the code was sent out to all of the courts in the colony to be used in their prosecution of offences. The code served as an example for the next attempt at drafting laws in the colony. In 1648 the General Court accepted the Book of General Laws and Liberties as the official set of laws at work in the colony. It represented the apogee of legal development in the colony. Within this code the colonial leaders made it clear that everyone was subject to the laws, whether they were Puritan or not.³¹ More importantly,

³⁰Body of Liberties, 47.

³¹Laws and Liberties, A2.

the colonial jurists solidified the place of Puritan jurisprudence in the laws by maintaining a similar theological standard for crimes as they demonstrated that the word of God would supply the basic rules of conduct in the colony.

The development of Puritan jurisprudence in the colony was the driving force behind the system of justice in the colony. While the colonial leaders submitted to the demands of the colonists and maintained a familiar system of English courts, they also may be seen to have realized the real power of justice lay in the intent of the law. In short, they imposed their vision of law on the colonists by using a system of courts that were acceptable to the colonists. In effect, the Puritan leadership had avoided a barrier that could have obstructed their goal of creating a Puritan society. The result of this maneuvering was a system of justice that combined Puritan jurisprudence with English judicial structures.

The unique character of colonial society in the Massachusetts Bay Colony was due to the combination of differing towns, the influence of congregationalism in these communities, and the direct application of federal theology. Drawing upon the collective experience of Puritans in England, colonial leaders recognized that the Royal charter granting colonization of the Massachusetts Bay in New England presented the best opportunity for establishing a society based on Puritan values. As they moved to the new world, colonial leaders carried with them a clear vision of how their settlement was to be run. Without completely discarding the English institutions familiar to the colonists, John Winthrop and other leaders intended to use Puritan theology as the guiding principle of political and social organization in the colony.

Besides the religious tone of the migration, which clearly set the colonization of Massachusetts apart from other colonial endeavors, the character of the settlers also contributed to the uniqueness of the colony. Of the 13,000 people who moved to the Bay

colony between 1630 and 1640, the vast majority moved in family units.³² When the colony received them into society there were few resulting problems because these people all had relatively similar socio-economic backgrounds. Their ability to assimilate into colonial society, then, made it easier for new towns to form because the prospective neighbors often shared a common English background as well as a shared vision of a Puritan community. This demographically stable migrant population was conducive to social conformity because of the presence of traditional forms of familial authority. As parents adhered to Puritan values, they transmitted this outlook to their children.

Migrant families who arrived in the new world soon formed associations with others and worked to establish towns where they could carve out a life in the wilderness. As the towns formed the settlers depended on two important pillars of authority in their town in order to ensure their temporal and spiritual success. The first institution was a local, civic bureaucracy that was burdened with the responsibility of dealing with the day to day problems of a small town. The primary group of men who governed in most towns was the selectmen. These officials regulated the secular activities of townspeople in order to ensure that order was maintained. Selectmen, along with a variety of minor officials, tended to the basic tasks involved with the administration of a town. Because of their ability to assert secular authority over a range of issues these positions rose in importance. The civic institution, though quite important in every town, was not solely responsible for maintaining order. This was a responsibility they shared with the local congregation. Though the two institutions were legally separate, the congregation worked to help form social conformity due to its sway in the towns. Ideally, both institutions held similar interests. "According to the design of our founders and the frame of things laid by them the interests of righteousness in the commonwealth and holiness in the churches are

³²Anderson, To Pass Beyond the Seas, 19.

inseparable.”³³ As this outlook was predominant in most communities, townspeople wasted little time in creating a congregation.³⁴ When a congregation was established it allowed the inhabitants to join together on a religious level. The colonists viewed this organization not only as a means of worship, but also as a valuable source of stability. Admission to the congregation, which required a demonstration of a conversion experience and encouraged social homogeneity, also excluded those people who refused to conform to the strict standards of conduct. It was effective in this role because of the important political privileges that accompanied church membership. In 1631 the General Court even linked the franchise to church membership. Anyone not formally associated with a congregation was effectively denied the ability to participate in the political life of the colony.

The individuals who administrated each congregation held a great deal of influence. The congregation elders were responsible for interviewing potential members prior to being admitted by the whole congregation. As a result, they investigated the moral value and daily conduct of each member before submitting a recommendation to the rest of the congregation. The minister, as the religious leader of the congregation, also assumed a role of great importance. The minister, along with the other church elders, were able by virtue of their position in the congregation to control many aspects of life in a town. Furthermore, these officials acted in concert with civic officials to ensure that social conformity was maintained. In order to accomplish this the town and the congregation often took a pro-active approach by excluding potential settlers who did not completely meet their standards by refusing them the requisite permission to join the town. The close relationship between civic and congregational institutions was formed around

³³Urian Oakes in Wertenbaker, The Puritan Oligarchy, 70.

³⁴Colonial Records, 1: 1635, In an attempt to ensure that no other faith was established in the colony the court had to examine each organization and determine its intent before approving it.

Puritan values and a desire to ensure a conformity to a Puritan way of life. Conformity was achieved because the pairing of civic structures familiar to the colonists with the Puritan faith created a powerful authority in the towns that few could avoid. It also created a sense of community among the settlers who not may have found the Puritan ideas of marriage, family, and equality of souls too attractive. In the end, the efforts of the colonial leaders to force conformity among the settlers created a set of cohesive communities with a shared vision of an ideal society.

We can acknowledge, at this point in our discussion, that the social institutions and the system of justice held similar goals in the Massachusetts Bay Colony. Both the social climate and the administration of justice seem to have been dominated by a concern for enforcing social conformity in the colony and promoting adherence to a way of living dictated by the word of God. And, as was just discussed, both situations witnessed the co-opting of traditionally English structures by the dominant Puritan ideology so as to allow the Puritan leaders to reinforce their ability to force colonists into following them in their goal of establishing a Puritan haven in the new world. The relative closeness between colonial society and the system of justice does not reduce the role of criminal procedure as a link between the two. The criminal process in use in the Massachusetts Bay Colony carried aspects that directly reflected both Puritan and English influences. Those processes reflecting an English character seemed to be in place to render the system of justice more familiar to the colonists, thus making the series of laws more palatable. The procedures which carried Puritan features seem to have worked to reinforce the dominance of Puritanism in the colony.

After our extensive discussion of the processes used in the colony it is unsurprising that the basic character of the colonial criminal procedures was, with few exceptions, English. This may be due to the fact that colonial leaders were persuaded by the colonists to strictly adhere to English structures. Clearly, any attempt to introduce procedure that did not match the existing structures of justice was likely to fail. As a result, colonists

were provided with procedures that were familiar to them because of their previous use in English courts. Among the most obvious processes was the ability of a defendant to choose between a jury or bench trial. Furthermore, settlers facing a capital charge were actually guaranteed a trial by their peers. "That no trial shall pass upon any, for life or banishment, but by a jury so summoned or by the General Court."³⁵ Directly related to the ability of a defendant to choose a trial by jury was the presence of procedure that permitted the defendant to challenge jurors.³⁶ This allowance was substantial as it provided the defendant with an opportunity to weed out jurors who may have been connected to the case in some way. Despite the availability of jury trials, most defendants opted for a trial before a bench. It is difficult to accurately determine the cause. It may be proposed that to be judged by a jury was a risky proposition for a defendant, especially if the offence in question concerned acts that may have offended the Puritan sensibilities of a jury.

Another purely English feature of this process was the grand jury. This group of freemen was charged with the responsibility of deciding upon the initial validity of the charges at hand based on the available evidence. This institution was borrowed directly from the processes used in England, and seemed to fit in the system of courts used in the colony. Furthermore, this feature is consistent with the general form of English procedure as it serves the dual purpose of informing the accused of the case against them, and allowed the courts to drop cases that lacked sufficient evidence.

Perhaps the most significant feature of this process, when in actual use, was its oral form. The importance of the oral nature, however, lay in the fact that the form of prosecuting did not tend to exclude anyone. Because a trial was conducted orally, anyone who could speak was likely to understand the events transpiring around them. This feature

³⁵Laws and Liberties, I.

³⁶Body of Liberties, Art.30.

enabled easier access to the system of justice by the colonists, and allowed the application of justice to be more democratic than if it had been practised with written procedures.

While the aforementioned processes were obviously borrowed from English procedure, and tended to render the colonial system of justice more familiar to the colonists, there were also a few procedures that reflected a Puritan influence. The role of the magistrate in this system, for example, was clearly different from the role of a judge in the English procedure. Furthermore, the court recognized that complaints could be presented by elected officers of the congregation like selectmen and tithingmen. The ability of these officials to bring an offence to the attention of the court clearly linked the judicial process to the congregation by recognizing them as moral wardens.

Under the accusatorial process the magistrate worked as an umpire, of sorts, and refereed a judicial battle between two combatants. The magistrate in the Bay Colony did not officiate a case in the same way. Rather, as the court records demonstrate, the magistrate possessed a great deal of authority. This authority in secular affairs earned him a great deal of respect from those before the court. It was often the case that the magistrate convinced an accused to confess to the crime at the presentment phase of a trial. This impressive power to persuade defendants to confess, and thus preserve their regenerative potential, was due to a Puritan conception of the magistrate derived from ideas expounded by John Calvin; the Puritan jurists recognized that the only real qualification for becoming a judge was to be an upstanding member of a congregation. Training in the law was certainly an ideal, but not a necessary qualification. Jurists like John Cotton realized that trained judges were hard to come by, and settled instead for: "The best that God shall send into country."³⁷ This statement clearly indicates that these jurists felt that the magistrates were to be endowed with the authority to judge citizens as

³⁷John Cotton, An Abstract of the Laws of New England, As they are now established (London: Printed for F. Coules and W. Ley at Paules Chain, 1641), 1.

God's representative in criminal matters. "In short, if they [the magistrates] remember that they are the vice regents of God, it behooves them to watch with all care, earnestness, and diligence."³⁸ As God's vice-regent the magistrate was responsible for administering the laws of the colony. These laws, naturally, promoted the worship of God, loving conduct among men, and general peace and order.

The criminal procedures in the colony also provided a strong link to Puritan society by providing for complaints to be made by civic and congregational officials.³⁹ As was previously mentioned, these officials regularly inspected families to ensure positive relationships. It was sometimes the case that they uncovered irregularities that were offensive to the established Puritan rule of law. This ability tended to reinforce the power of the officials to bring about both a social conformity and a continued devotion to God. Furthermore, it reflects the true power of these officials who were endowed with their authority because of their position in the congregation.

The criminal procedures used in the Bay Colony clearly served as a link between the system of justice and colonial society. This function was fulfilled in two distinct ways. First, because the majority of the processes were borrowed from English processes they were likely familiar to the colonists. Not only was this dependence on English processes necessary considering the character of the courts at work in the colony, but it was a necessary concession made by the colonial leaders in order to make the strict, theologically rooted laws more palatable to the colonists. Criminal procedure worked as a link between the system of justice and colonial society by reflecting relationship of Puritan and English influences in the colony. In this respect, the criminal procedure used in the colony is clearly reflected in a similar partnership.

It should be abundantly clear that criminal procedure worked to bridge the gap

³⁸Calvin, Institutes of Christian Religion, 285.

³⁹Zachariah Chafee Jr., Suffolk County Court Records, xxviii.

between law and those subject to the law in both seventeenth-century France and Puritan Massachusetts. The nature and character of the link in both worlds, however, depended on the character of justice and the nature of society in both situations. The previous discussion of rules demonstrated that there was a wide gulf between both systems of justice. The character of French procedure at the end of the seventeenth century was the result of years of reform, and part of an attempt to solidify the power of the monarchy. Puritan justice, meanwhile, was in the process of being created, and reflected the pattern of English and Puritan ideas working together in order to achieve social and religious conformity. In order for the criminal process to successfully join Puritan ideas with the English experiences of the colonists jurists had to acknowledge the basic form of judicial structures familiar to the settlers and the religious motives that were intended to drive the colony. These legal experts could not ignore the dominant social conditions that characterized colonial society, nor could they attempt to impose structures of justice that were foreign to the colonists.

The French process, then, reflected the gulf between society and royal justice and attempted to bridge it with a series of specific procedures aimed at particular groups. Procedures in the Massachusetts Bay Colony did not have such a wide chasm to bridge. In this particular setting, the system of justice and the dominant social conditions were closely aligned. As a result, the link between the two ends manifests itself by reflecting this close relationship. Furthermore, the colonial procedures also worked to soften the harsh, theologically orientated laws of the colony as outlined in Moses His Judicials (1637), The Body of Liberties (1641), and The Book of General Laws and Liberties (1648) by aligning themselves with the established structures of justice and rendering the system more palatable to the colonists who were not puritan.⁴⁰

⁴⁰ Historical studies have not been able to accurately state the number of puritans and non-puritans in the colony. But, as was previously implied, the majority of the colonists were believed to be non-puritan. The ability of the puritan leadership to impose brand of puritan jurisprudence on the colony is rooted in their view of the uncertainty of

This relationship between justice and society, as provided by criminal procedure, raises the subject of a third function of criminal processes. Namely, the procedures provide an essential opportunity for powerful constituent groups to protect their position in society in the application of justice and advance their views as to how a society should be ruled. This may seem to be an abstract notion of criminal procedure, but, in fact, it is the central role of procedure in any system of regulating conduct. Furthermore, it also raises the importance of criminal procedure generally, because there is the risk of perceiving procedural issues as being primarily within the interests of a lawyer. This function tends to emphasize a social importance for criminal procedure that may not have been considered by historians to date.

The discussion of the society of orders, both as a system of social classification and as an important consideration in the application of justice, has revealed that this juridically recognized institution was able to exert a great deal of force in all areas of life in *ancien régime* France. The different orders within this institution were each accorded a range of privileges that reflects their place on the social ladder. The nobility, though they theoretically occupied the second rung on the social ladder, assumed a very powerful place for themselves in society. Furthermore, they were in a continual struggle with the monarchy over their rights and influence. When the young King Louis XIV reformed the system of justice so as to reflect his position as the absolute ruler of France, he also reinforced the notion that all French subjects were subject to the law. Clearly, this notion was uncomfortable to a group like the nobility. To be judged on the same footing as a peasant was to be equated, in many respects, with the peasant. Furthermore, the concept

salvation in the community. This required that moral authority of the congregation, which was closely aligned with the legal and political authorities, was to be enforced over everyone whether they were puritan or not. This will was also articulated in the preamble to The Book of General Laws and Liberties of 1648. Refer to Chapters IV and V for a more thorough discussion of the relationship between the religious, political, and judicial authorities in the colony.

of a uniform system of justice ignored the corresponding privileges of this order. The criminal procedure that was adopted during this period of reform, however, may have alleviated the fears of the nobility by presenting a range of accommodations for them. In doing so, criminal procedure demonstrated a unique ability to mediate between the conflicting interest of the monarchy and the nobility in the judicial arena.

The criminal procedures also tended to provide an opportunity for members of society to solidify their position. Consider the French magistrate, both in society and in the application of justice. The position of a magistrate necessarily ennobled its office holder. By the end of the seventeenth-century a rising number of justices administered the King's law. As a result, there was a rising number of nobles. This group, known as the *noblesse de robe*, acquired their nobility because of wealth and ability. Consequently, the old nobility were uncomfortable with this group. The *noblesse de robe* were accorded a great deal of authority by criminal procedures that clearly reinforced the place of a magistrate as the King's representative in judicial affairs. This authority was both psychological and practical. For a member of the *noblesse de robe* to be able to regard himself as a magistrate was to recognize his own nobility. To enforce this authority over others was to exercise his power as a noble. This cemented their place in the second order, regardless of any disdain that was expressed by the traditional nobility. Their position as nobles and as judges was due, in large part, to the procedures used by the royal system of justice.

The procedures used in the Bay Colony provided a similar opportunity for the Puritan leaders. As the discussion of Puritan structures of justice demonstrated, the colonial leaders were forced to abandon their attempts to alter judicial structures as part of their plan to create a Puritan haven in the New World. Instead, they focused on drafting laws that punished colonists for failing to conform to their religious and social standards. In order for the laws to be applied to the colonists they had to work within the established strictures of courts and in the colony. These structures, due to the protests of the colonists in 1632 and 1634, were mostly English. Furthermore, the procedures that regulated these

structures were also, by and large, English. The colonial leaders, nevertheless, were able to subtly use them in order to reflect the scripturally derived laws. In this light, criminal procedure provided colonial jurists with an opportunity to solidify the place of Puritan jurisprudence in the colony. This was chiefly achieved by altering the responsibilities of the magistrate. As the major dispenser of justice in the colony, the magistrate effectively promoted Puritan values within the English system of courts.

Conversely, the colonists were successful in solidifying the place of judicial customs that were familiar to them. The colonial processes contained few rules that were completely foreign to the average litigant. Not only did this render the system of justice more comfortable, but it also worked to increase the possibility of a fair trial in the face of strict religiously based laws. This feature may also be seen as an intentional move by the colonial leaders. Having suffered a sound rebuttal on the structural front, they were likely cognizant of the consequences of forcing a wholly Puritan procedures along with the wholly Puritan laws. In order to ensure the success of adopting Puritan laws, the colonial leaders simply altered existing processes derived from England in order to preserve the position of the substantive component of justice—which was Puritan. It is probable, however, that these jurists had no other suitable procedural alternative for their endeavor. Simply put, what other set of processes would they have used but the ones that were supplied to them by England?

Colonial criminal procedure, as witnessed in our discussion, clearly provided the essential context for competing judicial interests to meet. As a result, criminal procedure effectively mediated between the power of Puritan jurisprudence and the influence of English customs. This role was similar to the role of criminal procedure in *ancien régime* France. Furthermore, the mediative function of criminal procedure in both systems was formed around the basis created by the previously mentioned functions. Clearly, the place of criminal procedure in any system of justice is based on the combination of these basic roles. The ability to allow competing interests to express themselves could not be

developed without a clear link between law and society. Nor could it be developed without acknowledging the importance of a series of rules as the building blocks of any systems. These rules, in effect, form the basic character of any system of justice. More importantly, by understanding a function of criminal procedure as the provider of rules, as the essential link between the society and the law, and as a mediator of competing interests it is understood that all three were inextricably intertwined, thus endowing criminal procedure with a vital role in the application of justice.

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