

a functional look at law

political crises, values and case volume in puritan law, 1671-1680

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Most authorities who write about Anglo-American legal history view property or civil law as disinterested. By disinterested, they mean simply that the civil cases which come to court are of interest only for their claims on others. Such cases have little immediate social importance.¹ Yet, a look at the case volume in the Suffolk County Court for the years 1671-1680 reveals an erratic pattern that suggests some social cause (Graph 1). This strange pattern demands explanation. Functional theory can supply an explanation while the reassertion of disinterestedness in civil law cannot.²

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At its best, functional theory provides for the interplay between values in a community and collective behavior. It asserts that general behavioral patterns tend to support and maintain structures and values in communities. My thesis here is that a functional analysis of religious, political and military history during the decade of the 1670's reveals a plausible functional connection between the corporate values of Puritan culture and the fluctuation of case volume in the Suffolk County Court. Events in sequence and changes in the volume of cases make me think that, by means of legal participation, civil litigants collectively and unconsciously supported corporate values.

Before I go any further, I must say that my intention is not to refight the battle of functional theory. Functionalism provides for differences between internal and external stress in and on communities, for behavioral or functional substitutes when a community is under stress,

and for behavioral changes which seem to follow certain patterns or values.³ All of these elements are important parts of my explanation because they exist in the history and in the legal behavior. Functional theory merely provides a format through which possible connections can be posed.⁴

Of course, my thesis is not verifiable in any conventional sense. There are no documents in the civil case records which say that John Smith "felt" moved to support authority or other corporate values by initiating a suit. There are only the several historical crises which drew from leadership authoritative value statements, the cases themselves which appear fairly routine, and the reasonable theoretical assumption that in a small community, like Massachusetts Bay, religious, political and social values were important. Theology provided a collective behavioral imperative as well as a satisfying explanation of a social world based on both status and contract. We know that the Puritans were legalistic, that they emphasized contract theory as a social explanation of themselves and that they believed in social or corporate cohesiveness.

On the other hand, my thesis is testable and therefore falsifiable. If a more conventional history of the decade can account equally well for the history, the values and the erratic case volume, I would withdraw my thesis. As I make clear below, I see no cohesive explanation which can account for this history. Moreover, in current scholarship I see support for my viewpoint that, especially among the Puritans, values and specific behavior were somehow interrelated.⁵ I think I see one such interrelationship.

A statement on Puritan values is necessary to this treatment of events and behavior, but their set of values are so well known that the statement can be brief. Leadership and authority, corporate duty to the Puritan state, territorial integrity under theocratic sponsorship—this set of corporate values was, as the Puritans saw it, under attack during the religious, military and political crises of the 1670's. In response to these attacks the Puritans brought into play another set of values: the importance of legal or proper behavior. Through legislative ritual they reasserted behavioral compacts or contracts between themselves and God, and they passed laws, behavioral contracts, in which behavior was legally specified.

Recent scholarship has suggested that the Puritans successfully integrated these two sets of values.⁶ Students of colonial history have been asked to change their views about values and how they affected this corporate society. I propose to expand our ideas about these known sets of values to include legal behavior. Hence, my thesis involves, to some extent, changing our notions about law in Puritan society. As George Haskins pointed out in his excellent study of Puritan law, the Puritans used the common law tradition of disinterestedness or impartiality toward individual cases.⁷ But I believe that, in addition to the disinterested handling of individual claims, law functioned corpo-

rately by means of the changes in social or collective legal participation, case volume, particularly in times of social or collective stress when the integration of and support for values would have been important.⁸

Data for this study are a compilation of all civil cases, including appeals, from the Suffolk County Court Records.⁹ This court was one of four county courts which the General Court of Massachusetts established in 1644. The Suffolk Court sat at Boston, the seat of government as well as the center of trade in the colony. It drew cases from all geographical areas of Massachusetts Bay, and the cases represented all classes of interest. It was the court most under the direct control of the governor and other prominent assistants, probably the most conservative court and almost certainly the most representative of Puritan legal propriety.

Graph 1 is a display of the cases brought by the population beginning in October, 1671, and running through January, 1679-80 (old style). County courts sat four sessions per year with the division of the year coming in March rather than in January. Months covered are usually October, January, May and July—the months during which the court usually sat. Following Samuel Eliot Morison's organization, I have adopted a cross-calendar plan, October, 1671 to July, 1672, October, 1672 to July, 1673, and so forth. Thus, the cases reported are those cases which proceeded through the legal process, October through July, in the years given. Numbers of cases noted on Graph 1 are exclusive of those cases withdrawn or non-suited.¹⁰

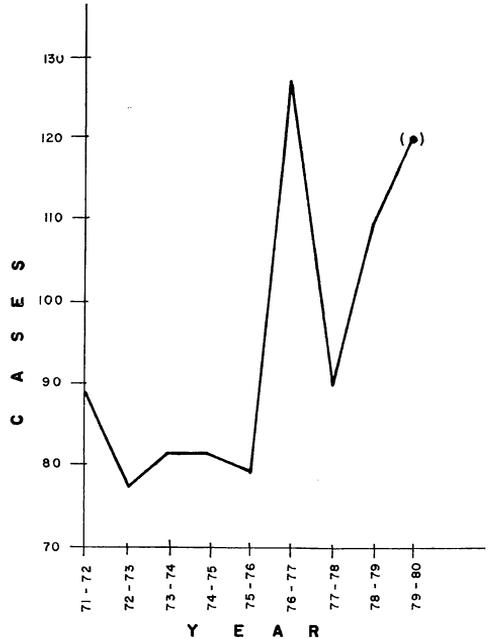
For the terms 1671-72, the number of cases through the court was 89. The following year it was down to 77, and for the next three years it remained fairly constant, changing by an increase of only three cases for the 1673-74 terms, the same for the 1674-75 terms and decreasing by three, back to seventy-seven, for the 1675-76 terms. A sudden erratic rise and almost equally sharp drop and rise again during the next few years is obviously an odd pattern for a court which represented continuity in the government and community. In 1676-77, case volume shows a sudden increase of 49 cases. In 1676-77, a volume of cases declined steeply by 38. Following the decline was a second increase in 1678-79 of 20 cases. If the graph were continued, a projection for 1679-80 would show another increase of 11.

During these years social and political pressure came from three well-known episodes of Massachusetts history—the quarrel about the Half-Way Covenant, King Philip's War and Edward Randolph's attack on the Massachusetts government. In the Half-Way quarrel the Puritans faced an internal crisis which involved their religion and their politics. Presentation of the values involved requires a rather intricate rehearsal of the political events. Values such as authority, corporate duty and support of the state were at issue. Both of the other two crises were external, and for these a brief retelling is sufficient to understand the involvement of values. In these two external crises the Puritans believed that outside

forces were attacking their foundations: leadership, territorial integrity and thus their contract with God, corporate duty and religious exclusiveness. In all three episodes the central concern of the Puritans was authority, their most important legitimating principle. Each crisis precedes a sudden change in the volume of cases.

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Controversy about the Half-Way Covenant involved religious and political values as well as political action. Church membership, office-holding and the franchise were tied together by law. Members of churches were the elect, and they ran the government. Those who supported the Half-Way Covenant avoided naming the elect. Instead they sought to give half-way membership to people whose parents had not been among the elect and who were not automatically qualified for baptism. Anyone who led an upright life was thus fit for recognition by the church even though he



Graph 1. Cases per year, Suffolk County Court.

had not yet experienced the “quickenings” of the spirit.¹¹ Between 1648, when the new covenant was proposed, and 1667, when questions about its controversial provision created a political crisis, the full political implications of the half-way principle were usually ignored.

In 1667 John Wilson died leaving the First Church of Boston without a minister. First Church was one of the “conservative” churches where the half-way principle had been slowly eased into the church polity. It had never been formally adopted by the congregation. After Wilson’s death the members of the church met and voted to call John Davenport of New Haven, a famous opponent of the new covenant. Davenport had a vision of the original New Israel in the wilderness, a vision of the church and state much like the one John Winthrop had brought from England. Davenport was acquainted with prominent members of the First Church, and he was most eager to accept this invitation to the most powerful church in New England. Robert Pope notes that Davenport planned to use the First Church to bring the New England congregations back to the reformist covenant which they had first adopted.¹²

Although a majority faction of Boston's First Church agreed on Davenport, a large minority faction disagreed. His ideas about baptism excluded any softening of the original prohibition against baptising or acknowledging the children of non-members. Beyond these basic ingredients for a disagreement in Boston was the broader issue of Davenport's release from New Haven. The congregation there was willing to loan Davenport to Boston, but not to release him. He arrived on loan in the spring of 1668. Finally, Davenport did produce a letter of release and in December, 1668, was ordained. After a period of internal strife the minority faction called a council and, under censure from First Church, created a new congregation, Third Church.

During spring, 1669, Nicholas Street, representing the New Haven congregation, was in Boston to close affairs between New Haven and Davenport. Street discovered that the letter of release was a forgery. Anthony Stoddard and John Leverett, prominent political men and members of First Church, Boston, expressed shock over the forgery, but Davenport explained it away. He called it an effort on the part of the elders to avoid further discontent with the transfer. Although the congregation voted to accept his explanation, other ministers in the colony could not accept it. Sympathy lay with the members of the new Third Church.

In May, 1669, when Governor Bellingham, one of Davenport's supporters, delayed construction of a Third Church meeting house, he brought out the political issues in the quarrel.¹³ Third Church was forced to apply to the General Court for permission to build, and a majority of the ministers found themselves allied with the new congregation against the powerful, authoritative and conservative forces of Governor Bellingham and First Church. The congregation won permission to build and thus won for the ministers the initial political battle over the half-way issue.

As the political implications of the quarrel became more open, Davenport moved into an offensive position. A famous and now very prominent man, he had been asked to preach the election sermon in May, 1669. In the sermon he attacked the gathering of Third Church and attacked the Half-Way Covenant, claiming it led to a decline in congregational vigor. Davenport warned the political leaders of the colony that New England would have to return to the original covenant or else God would disown the Puritans.¹⁴ The deputies or representatives had asked Davenport to give the sermon, and the invitation shadowed a political alliance between his conservative friends and the representatives of outlying townships.

After the sermon the deputies voted to thank Davenport for his effort and to print the sermon. Members of the upper house, the assistants, refused to agree to either vote and sent back to the deputies a mild admonition which told them to stay out of church politics. Battle over religious and political ideals had broken into the open among the members of a divided government. Lt. Governor Francis Willoughby

and seven other assistants were protecting and shepherding Third Church in its fight with Davenport and the deputies. Governor Bellingham and five assistants stood allied with First Church and Davenport.

John Leverett asked Third Church to delay Peter Thacher's ordination as minister. Davenport seized the opportunity to ally his following with Leverett who only hoped to avoid schism. In a masterful political move, Davenport turned the issue away from baptism toward congregational autonomy by blaming the general council for the crisis. Third church, he said, had been encouraged to divide from its true congregation, a clear violation of congregational principle. This accusation allowed Davenport and his political allies to draw into a focused position the more conservative-minded membership of churches throughout the colony. These churchmen, allied with the deputies, found themselves divided from a majority of the ministers. The fight had come down to conservatives against liberals, purists against innovators, among political and religious leaders. Religious and political authority, usually allied in Massachusetts, were split, and corporate values were under pressure as people were forced to choose sides.

Samuel Danforth in his now famous sermon, *A Brief Recognition of New England's Errand Into the Wilderness*, delivered before the General Court in 1670, laid before the political conservatives the objections of the clergy. He condemned the laity of the churches, blaming them for the schism which was developing in the colony.¹⁵ In contrast, when the deputies answered a petition from the church at Hadley, they blamed the clergy for controversy and decline. As contention increased, concern increased among the assistants. Finally, turning to a time-honored practice in the colony, the assistants asked the ministers to consider the issue and to return a suggestion for healing the political schism.¹⁶

But the ministers were not content to consider the problem. Instead, they entered an active campaign against the anti-clerical conservatives among the deputies. By means of the election in 1671, the ministers brought to Massachusetts Bay a sharp change in the old, slow-moving pattern of electoral representation. Sixteen deputies were defeated. Eight towns which usually failed to send deputies did so in 1671. Five, rather than their usual lone representative, sent their allotted two.

This reform election reached into Boston, too. Five members of Third Church were selected to represent outlying towns. Thomas Clarke, Jr., a member of First Church and a prominent merchant, was replaced by Thomas Savage of Third Church. In the upper house John Leverett replaced Lt. Governor Willoughby, deceased, and William Stoughton took Leverett's place among the assistants. The balance of power in the upper house remained the same, seven in favor of Third Church and the new covenant, five in favor of First Church and the old way, but the liberal elements triumphed when they placed so many men in the lower house.¹⁷

Massachusetts clergymen, seemingly so successful in their political

efforts, were successful as well in their attempt to have the deputies' charges against them dismissed. They presented a long defense of the Half-Way Covenant which was, they said, no innovation but a continuation of true reformation. Moreover, they charged that by barring children from membership in the church, the deputies were undermining the churches of the colony. After this presentation, the deputies rescinded their former charges against the clergy (even though at the same time they petulantly asserted their right to free debate).¹⁸

A religious/political crisis was ended, but it continued to rankle.¹⁹ In their post-crisis sermons the ministers identified three factions which had arisen during the quarrel—the conservative laity who were duly submissive after the clerical victory, the reasonable laity who were always allied with the clergy and its “continuing reformation,” and the “civil men” who were delighted to see the religious factions quarreling at the expense of religious power and prestige.²⁰ By identifying these groups, the ministers took full advantage of their position, but they also kept politics before their congregations. The value issue remained important even though the power issue had been met and settled.

Until this internal crisis, authority had been unified and was viewed as a positive aspect of Puritan society by both sources of legitimacy and power—political leadership and the clergy. Corporate duty had been fairly clear and, as a value, was easily translated into support for the Puritan state. After the ministers' intrusion into active politics, an active political culture existed. Within this new political arena of subtly altered values, politics had to function.²¹ Hence, there was a new avenue of support for values.

If civil cases had been supplying support for values before the Half-Way crisis, one could reasonably expect a decrease in the number of cases because the necessary support would move through another channel. A decrease in the number of cases does occur, from 89 cases in 1671-72 to 77 in 1672-73. As the display on Graph 1 makes clear, this change is not as dramatic as the later changes in case volume. Nevertheless, it does provide an indication that civil law cases may have functioned at the social or collective level in Puritan society. They may have provided a level of necessary functional support for the overall integration of values and power. I suggest that in this instance the level of support fell as a consequence of a functional alternative—politics.

iii

Thomas Hutchinson in his *History of Massachusetts Bay* notes the single disturbance during the three years between 1672 and 1675. It was the Anglo-Dutch War of 1672. During the war the Dutch briefly reconquered New Amsterdam. Massachusetts declared war on the Dutch and raised troops which never moved out of the colony. In a footnote Hutchinson says that the Puritans subscribed £1,895.02.09 for rebuilding Harvard College.²²

Data for these quiet years suggest that politics as a functional substitute was at least partially maintained. Moreover, the level of activity for the year of King Philip's War supports the idea that a level of civil cases was functionally important in this corporate society. If the level represented a strict disinterestedness, one could reasonably expect a steep decline in legal business during this year for the sufficient cause that so many among the population were engaged in the war. A reduction of only three cases is amazing when one considers that the colony was fighting a war on its own territory.

King Philip's War brought external pressures to bear on the corporate society, pressures which could not be handled by changing the internal political system. New England had some indication that Indian trouble was possible. Leaders in New Plymouth had required King Philip of the Wampanoags to sign a treaty of alliance.²³ Despite this treaty, Philip and several Narraganset leaders were scheming to bring together a force of some 4,000 Indians of various tribes. Overall, their plan was to make war on the English and to drive them out of the territory.²⁴ Rumors about such a plan had circulated in the towns between 1673 and 1675, but, prepared at all times for defense, the people of Massachusetts remained unconcerned until the village of Swansea in New Plymouth was attacked by the Wampanoag Indians on June 20, 1675.

Massachusetts immediately raised troops, but they failed to stop Philip. The Indians attacked more vigorously. Nipmucks assaulted Mendon, Massachusetts, killing five people. Next, the Nipmucks attacked Brookfield, about 20 miles west of Mendon. They then joined forces with Philip and the Wampanoags in a swamp near Brookfield. Fighting was concentrated in the Connecticut Valley at the Massachusetts frontier—Deerfield, Hatfield, Hadley, Northampton, Springfield—with battles at Bloody Brook and Hopewell Swamp hard by the Connecticut River and some 50 miles north of the Massachusetts-Connecticut border.²⁵

In November, recognizing that the war was spreading and that the colonials were losing, the General Court swung into action, taking up the New England ritual as it had so often during periods of social stress. It passed 20 articles of war, some of which were merely necessary in the face of general war and some of which were reaffirmations of the old contractual and corporate faith. For example, the first was, "Let no man presume to blaspheme the holy and blessed trinity, . . ." and the third was a reaffirmation of the law requiring inhabitants to attend public worship. Articles eight, nine, and ten were assertions of authority, requiring complete submission to officials both civil and military. Twelve, thirteen, fourteen, and fifteen dealt with behavioral offenses: drunkenness in officers, rape and "unnatural abuses," fornication and "other dissolute lasciviousness," and theft. Eighteen required any soldiers "sinfully playing away their arms at dice or cards" to be kept as scavengers until they could rearm themselves.²⁶

At this session, the assembled leaders of the colony also listed the “provoking evils” of the inhabitants—failure to discipline children, the tendency to wear long hair, excesses in apparel, and the toleration of Quakers who were bringing into the colony their “damnable heresies, abominable idolatries.” Worshipers in the meeting houses were turning from meeting before the blessing was pronounced, thereby “profaning” worship. The General Court passed laws to stop these practices. At the same court the legislators provided for the supervision of young men, made swearing illegal (as it already was) and made failure to report swearing a like offense to the act itself. They struck at the “woeful” breach of the fifth commandment, “contempt of authority, civil ecclesiastical, and domestical,” noting that such contempt “is a severe trial” to God and that in the past it had “provoked” him into punishing civil states.

To these social, religious and political demands and prohibitions the Puritan leadership added a directive which was disobeyed by many: inhabitants of towns under attack were to remain in their towns or forfeit lands and goods. Later, during the session of May, 1676, the General Court provided care for the “distracted,” the psychological casualties of the Indian War.²⁷ Religious and political values such as authority, central power, stability were obviously the concerns of the government.

Clearly, the Puritans were undergoing a period of great tension. Yet, this tension was quite unlike that of the Half-Way crisis. This crisis was precipitated not from within the religious center of the organized community, but from outside. It influenced elements of the political environment in ways that threatened loss of control. Controlled territory was shrinking. Controlled religion had already changed. Social organization and control, supposedly based on religion, were failing in western areas and were shaky in Boston.

Thus threatened, Puritan leadership grew defensive and reactionary, striking out against those “evils” which their beliefs had already identified. They reaffirmed the legality of their religion, the importance of authority and, finally, of corporate or mutual submission to the ideals which they supported. Lacking any “open” political solution to this crisis, they turned to the old legal solution: reaffirmation of their religious, social and political contracts with God. They acted in reaffirmation of these values, too. Philip of the Wampanoags was killed in August of 1676. By that time courts were in session throughout the colony. At the sessions of October, 1676, and May, 1677, the General Court moved to clear away the remaining business of the war. They supplied men and material for the war in Maine where some military action continued for another year. They refused to allow a group of the displaced to migrate to New York, provided for resettlement of several homeless persons, and heard monetary claims from widows and others who had suffered personal or property damage by the military.²⁸

While the political leadership acted, cases came into the Suffolk Court in increasing numbers. Between October, 1676, and July, 1677, the number of civil cases in the court was 126, an increase of 49 cases over the previous year. People who brought these cases were mostly from Suffolk County, and the cases they brought were the usual cross section of interests. (Only six cases for all the remaining decade were directly related to the war itself.) Cases show that damages and claims arising from such damages do not account for this sudden increase in case volume. Backlog from the war cannot account for the increase because there was no significant reduction during the fighting. Another conventional possibility would be displacement of persons by the war, but displacement is not apparent from an examination of the people and cases. Moreover, as I have already noted, during this period other courts in the colony were in session.²⁹ Hence, out of a set of compelling circumstances, this dramatic increase in case volume supports the idea that civil case volume performed some type of functional support in the Puritan community. The history and the concern with values lead me to the conclusion that in this instance the volume of civil cases represents collective support of corporate values.

Reaction during the second external crisis points to the same general conclusion. As the war progressed, the government leaders steadily informed officials in London about their progress. When their reports were received, they were turned against Massachusetts by enemies who successfully requested an investigation of the Puritan colony. Thus, in June, 1676, the King's emissary, Edward Randolph arrived. He brought not only orders to investigate the colony but also the power to reopen the old Mason and Gorges family claims to New Hampshire and Maine. In August, 1676, the General Court appointed William Stoughton and Peter Bulkley to go to England to answer the charges against their charter.³⁰ Thus, a second external crisis had begun before the government had completely dealt with the war.

Mason and Gorges family claims were based on old land grants which had been made before the Puritans had settled. Massachusetts had been an expansionist state and had moved into the territory which the two families claimed. Hence, Randolph brought with him new threats to the territorial integrity of Massachusetts. In addition he brought less direct threats. His instructions required him to send back the following information: which of their laws were contrary to English law, a census to establish estates (presumably for the purpose of taxation), the number of men mounted and on foot which the colony could field in battle, which forts and munitions they held, a complete map of the boundaries of the colony, which contact they had with the French and with the government of New York, and a list of persons most popular and either in or likely to be elected to the magistracy.³¹

Charles II had confirmed the Puritans' charter in 1661, and, they believed, had also confirmed their administration in Maine. Charles had

given them liberty to show why they should govern the province, and, they reasoned, they had shown sufficient cause.³² When a royal government was established for New Hampshire, leaders in Massachusetts declared that they would no longer exercise jurisdiction there.³³ They believed that they were right, but they knew that the threat to their territory was real.

Late in 1677, when the Puritan leadership received information about Randolph's letters, they realized that they might lose not only territory but also the charter itself. In his first letter of June 17, 1676, Randolph had written:

The governor of this place consists of a governor, 11 magistrates and a secretary all yearly chosen; most of them are inconsiderable mechanics packed by the prevailing party of the factious ministry who have a fellow feeling both in the command and profit. . . .

The clergy are generally inclined to sedition being proud ignorant and imperious, Owen and others—*ejusdem ffarinae*, are in great veneration here, yet there are some civil gentlemen among them that upon all occasions express their duty to his Majesty abominating the hipocracy of their Pharisaical Sanhedrim.³⁴

He later gave a fuller account of the government which, although it was still too sketchy to please the Committee for Trade and Plantations, served to intensify fear in Boston.³⁵

In other correspondence, Randolph answered the directed questions one by one, and his answers accused Massachusetts. He attacked their law:

. . . laws and ordinances made in that colony are no longer observed than as they stand with their convenience. The magistrates not so strictly minding the letter of the law when their public interest is concerned, in all cases more regarding the quality and affection of the persons to their government than the nature of the offense.³⁶

His most telling criticisms were aimed at government and the administration of law, from the perspective of the Puritans, at authority and the political contract. In both he saw disrespect toward the King. But Randolph never reduced his attacks on territorial jurisdiction in Maine. Moreover, he expanded his territorial threat when he proposed that land titles in Massachusetts were illegal, a proposal which understandably caused a flurry of counter activity in Massachusetts.³⁷ From London Stoughton and Bulkley sent further information. Randolph was pressing his critical assessment.

Even with this new information, the leadership waited and considered their plight. During the session of May, 1678, the General Court delayed any action. Finally, in October, 1678, the government began to bring the colony into compliance with demands from England. First, they

provided an oath of allegiance to the King. First things done, they dispatched a letter to Charles II explaining that the colony had meant no disrespect when it had no oath. Furthermore, in their letter they asserted that they had “proof” that Randolph’s charges against them were false. In another letter to the Solicitor General they set forth their particular meaning for the term “commonwealth” and gave a defense of their laws against Quakers. Still a third letter went to the Attorney General, and in it the Puritan leaders answered the specific complaints which Randolph had made against their laws.³⁸

At the same session the political leaders proved their concern for religious values. They appointed a day of humiliation, a usual act, but this time they appended to it several considerations or supplications to God: to protect their liberties, to grant a spirit of conversion for their children, and to provide a religious union of all the neighboring colonies (thus bringing them into blame and praise for ultimate repudiation or favor).³⁹ These acts were responses to political tension among leadership and people.

At the next session in May, 1679, the General Court passed acts relating to the customs. They provided public accommodation for shipping and punishment for abuse of the customs collectors (Randolph having been appointed chief of customs in the colony). At the same session they approved the following:

In answer to a motion made by some of the reverend elders, that there might be a convening of the elders and messengers of the churches in form of a synod, for the revisal of the platform of discipline agreed upon by the churches, 1647, and what else may appear necessary for the preventing schisms, heresies, prophaness and the establishment of the churches in one faith and order of the gospel, this Court does approve of the said motion and order their assembling for the ends aforesaid. . .⁴⁰

Ministerial and governmental authority thus came together in the famous Reform Synod of 1679, orchestrated by Increase Mather and faithfully reported by his son, Cotton, in the *Magnalia Christi Americana*. The report which the synod sent to government and churches was one long jeremiad, listing the provoking evils in the colony and reiterating the old corporate values of church and state. Although in his *History* Hutchinson noted that there was “no evidence of any extraordinary degeneracy” among the people,⁴¹ the ministers and political leaders believed that there was. Under threat of the critical reports to London, with the knowledge that their territory was shrinking and that their charter was imperiled, the leaders of the colony turned again to their corporate ritual, a ritual which they thought had helped them overcome their enemies in the past.

As the ritual and defensive actions unfolded, cases increased. Case volume rose from 89 in 1677-78 to 109 in 1678-79. There was literally

no attributable cause which could tie this increase to individual or disinterested claims. Moreover, during this year the non-Puritan merchants, who normally used this court at the center of trade, came to court fewer times than in earlier years.⁴² Case volume thus appears to have increased in relation to the defense against a second external attack on values and on the colony itself. Circumstances here are as compelling as those at the end of King Philip's War. They provide further support for the thesis of this study. Together with the other historical incidents and changes in case volume, they create a fairly clear functional pattern in which the volume of civil cases appears to support authority and other corporate and legal values.

iv

What do we learn from and what are the implications of this unusual examination of political crises, values and legal behavior? We know that the broad extent of these crises caused tensions, possibly deep tensions, in the political culture of Puritan Massachusetts. We know from the records that the Puritan leadership, ministers and government alike, regarded these crises as attacks on the sustaining religious and political values of the community. We know from the case volume displayed on Graph 1 that in each instance of crisis, as the community leadership acted to reaffirm the values of the community, an unexplained change occurred in the number of cases coming to the Suffolk County Court. Finally, according to functional theory, we know that if civil litigation were performing a supportive function for community values, it would decrease when the functional substitute created by politics provided a new avenue of support. On the other hand, it would increase when the crisis was external and greater support was necessary for the maintenance of community structures around the core of Puritan values. Such a pattern is evident in the case volume.

My inference is that in Massachusetts, civil litigants came into the court in times of crisis not only to make individual claims but also, unconsciously, through participation in an important public structure, to support the religious and political values of their society. During the Half-Way crisis the proper religious support for values like authority and corporate duty became unclear. Shortly, the political campaign and election provided a new avenue for support, a functional alternative. Case volume went down, not dramatically, but enough to fit a functional pattern. In the latter two crises, when Puritan authority and power were directly challenged from outside the community and when leadership exerted both moral and physical power in defense of the community, case volume went up dramatically.

The impossibility of traditional historical documentation, the lack of complete court records before 1670 and the very unusual perception of civil law prevent more than an inference of support. Yet, if one accepts

a functional analysis as a possibility, the contemporaneous historical crises and authoritative statements about values, as well as acts in support of values, combine to explain the changes in case volume. Together, these three elements—history, values, case volume—form strong evidence that a functional connection existed between the social need for support of values and the numbers in which litigants used the court.

The implication of this study is that our common ideas about civil law are culture-bound. Assuming that further study will strengthen my thesis, I suggest that civil law in society is much more complex than the advocates of individual or disinterested jurisprudence believe. When a latter-day John Smith goes to court to collect a debt, he may be collecting a debt. But he also may be performing a political, social or religious act. Through his participation in the legal process, in a social-psychological sense, he may be assuring himself and others that the latest attacks on political or social values have not destroyed the community. In a literal, psychological sense, he may be acting selflessly. I think that the evidence is strong enough to warrant further investigation.

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footnotes

1. Roscoe Pound, *Social Control Through Law* (New Haven, 1968, 69, is the most emphatic statement of this disinterested concept of law. Floyd James Davis, et al., *Society and the Law: New Meanings for an Old Profession* (Glenco, Ill.: The Free Press, 1962), 55-58, 65-66, provides a different theoretical perspective, but legal historians have been slow to take advantage of the broader cultural theories which have appeared lately. For a general indication of jurisprudential thinking about both concepts of law, see also Robert S. Summers, ed., *Essays in Legal Philosophy* (Berkeley, 1968), 31-34.

2. Talcott Parsons, "Law and Social Control," in William M. Evan, ed., *Law and Sociology: Exploratory Essays* (Glenco, Ill., 1962), 57, for a statement which ties together the jurisprudential idea and functional theory. Parsons is not willing to accept law in the active role of support. On the other hand, Max Weber, *On Law in Economy and Society*, Edward Shils and Max Rheinstein, eds. (New York, 1967), xlvii, notes the configurational concept of continental law and the individual concepts of Anglo-American law, suggesting that continental law is viewed as active because it is designed to act in the culture. As I note below, I am well aware of the negative implications for modern definitions of individual justice or impartiality which accompany my thesis. Especially in those legal systems which have inherited the common law emphasis on individual interest, a tension exists between the individual and the community. It produces a concept of interest which has been decided in favor of the individual, in Anglo-American law, in favor of individual property rights. We rarely realize that by accepting the individualized concept of a market place where claims are adjudicated through the currency of property rights, we accept the "truth" of a whole series of social relationships, especially a relationship between the law and the individual who uses it. An emphasis on disinterested procedure is designed to protect both the individual and a form of law. What I suggest in this study is that social-psychological pressure is possible and that groups do react to such pressure. From such a theoretical perspective I suggest that not all wisdom about human behavior and values is obvious or pragmatic. Some connections must be made artificially and then tested and retested. I believe that we are better off thinking about this possibility than simply assuming an ideology of individualism within the law and disregarding a possible social or collective component in individual claims. I think our orientation supplies only a partial explanation of how people use the law and why.

3. The two best expositions of functional theory are, first, Talcott Parsons, *The Social System* (New York, 1951), and Don Martindale, ed., *Functionalism in the Social Sciences: The Strengths and Limits of Functionalism in Anthropology, Economics, Political Science and Sociology* (Philadelphia, Feb., 1965). In the context of this study see especially Kenneth S. Carlston, *Law and Structures of Social Action* (New York, 1956), 21-23, on the concept of values in pattern maintenance specifically through use of the law. Carlston, like Parsons in

his work, stresses the creation of theory for the sociology of law. He posits collective functional behavior in reaction to the human condition. Such behavior is amenable to classification. Political culture and the flow of influence and power are discussed in David Easton, *A Framework for Political Analysis* (Englewood Cliffs, N.J., 1965). Especially useful for this study has been David E. Apter, "A Comparative Method for the Study of Politics," *American Journal of Sociology*, LXIV, No. 3 (November, 1958), 221-237, where the potential for functional analysis of political system is explained. Kai T. Erikson, *Wayward Puritans; a Study in the Sociology of Deviance* (New York, 1966), depends on the functional thesis that communities demand a certain level of criminal activity through which members define the borders of proper behavior.

4. Easton, *A Framework for Political Analysis*, 32-34, discusses the utility of the theory. Easton takes the common sense approach that where the theory seems to enhance explanation, it is useful and should be employed. Robert K. Merton, *On Theoretical Sociology* (New York, 1952), contains a good statement in favor of the middle-range use of the theory. Merton favors the incorporation of behavioral analysis of the type which this study uses.

5. Erikson, *Wayward Puritans*, is one such study. Others are: John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York, 1970); Kenneth Lockridge, *A New England Town, the First Hundred Years: Dedham, Massachusetts, 1636-1736* (New York, 1970); Michael Zuckerman, *Peaceable Kingdoms: New England Towns in the Eighteenth Century* (New York, 1970).

6. Lockridge, *A New England Town*, 23-30; Zuckerman, *Peaceable Kingdoms*, 5-8, provide the best statements. Heretofore, most views emphasized the legality of Puritanism. For example, the most famous statement of the commercial side of "weaned affections," Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York, 1958). Perry Miller, *The New England Mind: The Seventeenth Century* (Boston, 1939), esp. Book IV, "Sociology," provides an insightful statement on the legal nature of Puritan social thinking. Miller, *The Seventeenth Century*, Chapter XIII, XIV, XV, emphasizes the Puritan dependence on contract and, 375, ties together this emphasis and the disinterestedness of commercial legal contracts.

7. George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (Hamden, Connecticut, 1969), 4-5, 57. Haskins notes that the common law was only part of the New England legal experience and that a strong social component was present in legal development. Although I am not at all certain that Haskins would agree to this functional attempt to understand the social component, the conceptualization of the problem is, in part, his contribution to the study of Puritan law.

8. That the values were important is evident from the authoritative statements in Nathaniel B. Shurtleff, ed., *Records of the Governor and Company of the Colony of Massachusetts Bay in New England* (Boston, 1853-54), IV, ii, 489-494; V, 49-50, 123, 130-131, 133-136, 192-203, 215-216. (Hereafter cited as *Col. Recs.*)

9. Samuel Eliot Morison, ed., *Records of the Suffolk County Court*, in *Publications of the Colonial Society of Massachusetts*, Vol. 29 and 30 (Boston, 1933), provides the most complete accounting of legal records for one major jurisdiction. They may be used in conjunction with the suffolk Files, a multi-volume collection in folio located in the Office of the Clerk of the Supreme Judicial Authority, Suffolk County Court House, Boston. (Hereafter cited as *Suffolk Recs.* and *Suffolk Files.*)

10. Cases withdrawn provide an interesting study in themselves and have been covered, along with other case types, in E. R. Turner, "Law and Political Culture: A Functional Study of the Relation of Theology to Jurisprudence, Political Values and Legal Activity in Colonial Suffolk County, Massachusetts, 1671-1680," unpublished Ph.D. thesis, University of Kansas, 1973, 260-280.

11. Robert G. Pope, *The Half-Way Covenant: Church Membership in Puritan New England* (Princeton, 1969), 8.

12. Pope, *Half-Way Covenant*, 152-155. The story as it unfolds here is taken from Pope's work, Chapter 6, 152-184, which is the best narrative explanation of the political and religious questions involved in the dispute.

13. Pope, *Half-Way Covenant*, 163-164.

14. Pope, *Half-Way Covenant*, 168, for Davenport's sermon in the political context.

15. Samuel Danforth, *A Brief Recognition of New England's Errand into the Wilderness* (Cambridge, Massachusetts, 1671), 6-7, 11-16.

16. Pope, *Half-Way Covenant*, 168-169.

17. Pope, *Half-Way Covenant*, 174, points out that the ministers were the injured party in the case and implies that the assistants were trying to protect them. I suggest that one could as easily read the sermons and records to say that the assistants were acting in accordance with the legal practice and political culture of the colony. See *Col. Recs.*, IV, ii, 490, and Hamilton A. Hill, *History of the Old South Church Boston: 1669-1884*, 2 vols (Cambridge, Massachusetts, 1890), I, 99-101.

18. *Col. Recs.*, IV, ii, 448-449, 484-488, for a comparison of the former and new houses.

19. Thomas Shepard, Jr., *Eye-Salve, or a Watchword from our Lord Jesus Christ unto His Church* (Cambridge, Massachusetts, 1673), and Urian Oakes, *New England Pleaded with and Pressed to Consider the Things Which Concern Her Peace at Least in this Day* (Cam-

bridge, Massachusetts, 1673). These two sermons were models for many of the political statements made during this period.

20. Oakes, *New England Pleaded with*, 8-9, 24-26, 35-37, 58.

21. Thomas Hutchinson, *The History of the Colony and Province of Massachusetts Bay*, 3 vols., Lawrence Shaw Mayo, ed. (Cambridge, Massachusetts, 1936), I, 241.

22. Hutchinson, *History*, I, 240. Complete analysis of data for these years is in Turner, "Law and Political Culture," 228-325 and Appendix 4, Case by Category and Number.

23. Hutchinson, *History*, I, 242.

24. Hutchinson, *History*, I, 245-246.

25. *Col. Recs.*, V, 49-50.

26. *Col. Recs.*, V, 69-131, 59-65, esp. 79-80. Hutchinson, *History*, I, 258

27. Hutchinson, *History*, I, 263-265; Robert N. Toppan, ed., *Edward Randolph's Letters*, 5 vols. (Boston, 1898), II, 196-197. (Hereafter cited as *Randolph Letters*.)

28. A sudden increase in civil cases, of course, cannot be explained by prosecutions under new criminal statutes. Criminal cases seem to have remained fairly constant during the crisis, and I have seen in the *Suffolk Records* no prosecutions brought under these laws except for some Quakers who were arrested and fined.

29. *Suffolk Recs.*, 669-670, 683, 804-806, 903, 1108-116 for these cases; Turner, "Law and Political Culture," 463, for cross references which allow a listing of these litigants.

30. *Col. Recs.*, V, 116.

31. *Randolph Letters*, II, 197-198.

32. Hutchinson, *History*, I, 269-270.

33. *Randolph Letters*, II, 206-207.

34. *Randolph Letters*, II, 226-229.

35. *Randolph Letters*, II, 231.

36. *Randolph Letters*, II, 265-267.

37. *Col. Recs.*, V, 192-201.

38. *Col. Recs.*, V, 196.

39. *Col. Recs.*, V, 215.

40. Cotton Mather, *Magnalia Christi Americana; or, The Ecclestial History of New England* (New York, 1852), 316-338.

41. Hutchinson, *History*, I, 274-275.

42. Turner, "Law and Political Culture," 308-325.