MURDER
AND THE DEATH PENALTY IN MASSACHUSETTS

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To Lisa and Nora, with love

during jury deliberations, ending the traditional practice of allowing jurors in search of food and drink to mingle with spectators. Capital defendants were encouraged by the court to force the state to prove its case. If the prosecution sought to use a defendant's own words as evidence of guilt, the court insisted the confession must have been obtained without force or favor. By rule a capital defendant also had the right to introduce evidence of good character. Most important, a capital defendant had the right to "quibble," to raise questions about procedure on appeal in the hope of winning a reversal and a new trial. Although these rule changes extended greater protection to capital defendants, procedural changes alone could not eliminate anxiety about executing an innocent person, nor silence critics of public executions.

The rule of law generally and capital procedure specifically also was influenced by the development of a postrevolutionary civic religion. Capital trials were framed by religion, but a new understanding of the nature of truth shaped the trial. Well into the nineteenth century, a murder trial began with an indictment charging a defendant with "not having the fear of God before his eyes," and "may God have mercy on your soul" were the last words pronounced by the court to a guilty capital defendant. However, the trial itself reflected a profound shift in the way people perceived the truth. The law's new republican formulation replaced the moral certainty that had characterized colonial-era trials. Gone was the presumption that jurors should accept without question the testimony of sworn witnesses. Rather, jurors were told by the court to weigh each person's testimony and to reach a conclusion whose validity was beyond a reasonable doubt. For these reasons, a jury's verdict was said to reflect "the mythical will of the whole people." The author of a pamphlet written in the wake of Jason Fairbanks's execution put it this way: "In a free State, where the laws are mild, [they are] in a great degree dependent for their salutary energy on the cooperation of public opinion."[83]

While this republican formulation was celebrated for protecting a capital defendant's rights and for enhancing the power of ordinary citizens, the fact that it rested on a cluster of rules subject to reinterpretation encouraged a debate about the death penalty. Defense lawyers urged the court to adopt tighter procedural rules and reformers focused on the moral and political objections to the death penalty. In the 1830s lawyers and reformers launched an all-out assault against the death penalty.

THREE

"UNDER SENTENCE OF DEATH"

THE FIRST EFFORT TO ABOLISH THE DEATH PENALTY

The decades from 1830 to the eve of the Civil War were a time of intense activity for opponents of the death penalty. The efforts of a cluster of determined reformers to abolish the death penalty stimulated public debate, legislative action, and a long string of jury nullifications. At the same time, three spotlighted capital trials, two of which led to executions, captured the public's attention and brought about important legal changes. The chief justice of the Supreme Judicial Court, Lemuel Shaw, furthered the transformation of capital procedure begun by the court in the aftermath of the American Revolution. Shaw's brilliant charge to an 1850 capital jury unified a constellation of concepts expressing the protection afforded by the common law against conviction of an innocent person. The effort to abolish the death penalty in Massachusetts once again ended in failure, however. This time, the effort was sapped by the coming of the Civil War.

On the morning of October 27, 1845, a fireman rushing into a smoke-filled room in a house of prostitution near Boston's fashionable Beacon Hill neighborhood stumbled over a woman's body. The charred corpse later was identified as Maria Bickford, a young married woman from Maine. She apparently had been murdered, "her throat cut nearly from ear to ear." Two days later, a coroner's jury determined that her lover, Albert Terrill, a twenty-two-year-old married man from a respectable middle-class family in Weymouth, had murdered Bickford. Terrill eventually was arrested near New Orleans, Louisiana, and brought back to Boston. Rufus Choate, a brilliant and flamboyant criminal lawyer, agreed to defend him; a veteran prosecutor, Samuel D. Parker, represented the commonwealth.

Trial was set for March 26, 1846, in the Supreme Judicial Court. After four days of conflicting testimony and the prosecution's presentation of a considerable amount of circumstantial evidence, the jury found Terrill not guilty of murder.[1]

On each of those four days hundreds of people shoved their way into the courtroom or gathered outside hoping to catch a glimpse of Terrill. The city's newspapers provided extensive coverage of the affair, and a novel published anonymously that year used the courtroom drama to explore the meaning of the "fallen woman's" death. Reformers opposed to the death penalty—who during the 1830s and 1840s had pushed for legislation, petitioned the governor, established a newspaper, published books and articles, and founded the Massachusetts Society for the Abolition of Capital Punishment—took the opportunity to press their views.[2]

The driving force behind the movement to abolish capital punishment in Massachusetts was Robert Rantoul Jr. Born in Beverly, the son of one of the town's political leaders, Rantoul graduated from Harvard College in 1826 and read the law with John Pickering in Salem before he was admitted to the Essex County bar in 1829. The following year, Rantoul helped to defend his close friends Joseph and Francis Knapp, who had been accused of murdering Joseph White, a wealthy Salem businessman. Before trial, Joseph Knapp confessed but denied that his brother had played any part in the crime. Nonetheless, eighteen-year-old Francis, known as Frank, also was tried for murder, and although the evidence against him was circumstantial, he was convicted and hanged. Rantoul bitterly vowed to end the unjust and barbaric rite of execution, a stand that alienated him from many of the people of Salem. Without hope of establishing a law practice in the port city, Rantoul moved first to South Reading and then, in 1833, to Gloucester.[3]

Rantoul quickly established himself in his new home. Running as a Democrat, he was elected to the Massachusetts House of Representatives in 1834 by the people of Gloucester. Although there were only a handful of Democrats in the legislature, Rantoul emerged as a leader by creating a coalition with the "country Whigs." He attacked corporations, worked to revise and codify the state's statute laws, opened up admission to the bar, and during the first two weeks of his term, introduced a measure to abolish capital punishment. The legislature voted to publish and distribute Rantoul's report against the death penalty, but after a weeklong debate, the bill was defeated in March 1835.[4]

When the House reconvened in January 1836, however, Governor Edward Everett, a moderate Whig, recommended that the legislature reconsider its decision. "An increasing tenderness for human life," the governor stated, "is one of the most decided characteristics of the civilization of the day." Within a month, Rantoul submitted a lengthy report and a bill proposing that arson, armed burglary, armed robbery, and treason be punished with life imprisonment rather than death. Individuals convicted of rape or murder would receive, in addition to their life sentences, a penalty Rantoul called "civil death," whereby the criminal's marriage would be dissolved and his property distributed according to his will.[5]

Rantoul's argument against capital punishment pursued four lines. First, he asserted, the government has no right to take a person's life, because "*the whole object of government is negative.*" That is, government is established for the protection of life, liberty, and property, and "not for the destruction of any of those rights." The chief purpose of government, he said, is to ensure that no one appropriate the property of another or restrain the liberty of another or "injure the person, or shorten the life of another." We surrender to government only as much liberty as is necessary to preserve our natural rights, Rantoul argued. Any act extending beyond that limit—even "by the division of a hair"—is thus "tyrannical." It would be an "obvious absurdity" to claim that if and when men enter into a social compact they give "unlimited powers for all purposes to its government." Individuals do not agree "to hold their lives as conditional grant from the State." No one specifically surrenders the right to life, nor can one. Using governmental power to take a life therefore violates the basic principle of limited government, well defined in both the U.S. Constitution and the fundamental law of Massachusetts.[6]

The second line of argument proceeded from the Enlightenment belief that man can change the society in which he lives, that the "power of improvement" can affect the "general progress of society." According to Rantoul's historical analysis, the era "when darkness covered the earth" and ordinary people were powerless was now distant; civilization had been bathed by the revolutionary light of the eighteenth century. Citizens were now free to use "knowledge, reason and reflection" to change any

law, including that "remnant of feudal barbarity," the death penalty. Within an enlightened society every individual can and should be reformed. "Felons," Rantoul concluded, "still are men, and have the better title to commiseration the more deeply they are sunk in guilt."

Rantoul's third line of reasoning was practical rather than theoretical or moral. He hoped to convince the legislature that the death penalty does not work. Crimes against property that are punishable by death—arson, armed burglary, and highway robbery—are more likely to involve murder, Rantoul claimed. On one hand, since the law already subjects him to the death penalty, the criminal is tempted to kill the witness to conceal his crime. On the other hand, if no murder has been committed in those crimes against property, a jury is unlikely to convict the accused because the penalty is so absolute. In other words, "the severity of the law totally defeats its object." Moreover, no evidence has been amassed to show that the death penalty reduces the number of crimes against property. In fact, Rantoul pointed out, when highway robbery was removed from Massachusetts's list of capital offenses during the years 1805 to 1819 there was no increase in the number of armed robberies.

Capital punishment neither deterred murderers nor offered the best protection for society. It was an "awful perversion of all moral reasoning" to argue that killing a person would reform others. In fact, the death penalty had the opposite effect, Rantoul insisted. It diminished the "natural sensibility of man for the sufferings of his fellow man" and generally promoted "cruelty and a disregard of life." Even explicit knowledge of the death penalty was unlikely to prevent a murder. A recent survey, Rantoul noted, found that of 167 convicts under sentence of death, 164 had attended a public execution before they had committed their own crimes.

Finally, Rantoul addressed the religious arguments for and against capital punishment. He acknowledged that the Old Testament justified the death penalty. But, he asked, should the brutal practices of "a peculiar people, under the most peculiar circumstances" govern "a polished and humane people . . . under circumstances essentially opposite theirs?" Rather than basing the state's legal code on the ancient laws of revenge, the commonwealth should embrace the command that lies at the heart of the universal spirit of Christianity—"Thou shalt not kill."

Opponents of Rantoul's bill scoffed at his "visionary ideals of theoretical good" and declared that if fear of the death penalty prevented just

one murder, the law should remain. Rantoul replied with statistics showing that wherever a crime was removed from the capital punishment list, fewer such crimes were committed. After three days of debate, the House amended Rantoul's bill, eliminating the provision for "civil death" in case of rape and retaining the death penalty for arson and murder. This bill passed 237 to 171, but the Senate rejected it. Three years later, however, both the House and Senate overwhelmingly approved a bill that eliminated the death penalty for armed burglary and armed robbery.[7]

In 1840, Governor Marcus Morton, a Democrat elected by a narrow margin after a bitter campaign, recommended eliminating the death penalty in most cases in a speech that essentially summarized Rantoul's arguments. But Rantoul was no longer a member of the House, and for the next several years the legislature was too divided to act on the issue. To organize public support for their initiative and to bring pressure to bear on elected officials, Rantoul and Charles Spear, together with a handful of other Boston reformers, founded the Massachusetts Society for the Abolition of Capital Punishment in 1845.[8]

Spear, a Boston Universalist minister, who earlier in the year had published *Essays on the Punishment of Death*, had decided in 1841 to "labour for humanity." He traveled widely, delivered scores of lectures, sold copies of his books, and organized petition campaigns to save the lives of convicted murderers. Spear believed in the benevolence of God, freedom of the will, and the salvation of all men. He rejected the Calvinist idea of eternal punishment, arguing a just and loving God would save mankind. These principles, Spear insisted, would overcome every existing evil. All criminals, including murderers, could, and should, be reformed.[9]

On January 1, 1845, Spear began publishing a weekly newspaper devoted to the abolition of the death penalty. "Our principle aim," he wrote in the *Hangman*, "will be to show the entire inutility of the gallows." The paper was filled with essays against the death penalty, announcements of society meetings, news about the plight of convicted murderers, and calls to action. "Let all those who do not desire" to have a man hung "make great exertions to save his life by circulating petitions immediately asking for a commutation of punishment," Spear pleaded. In May 1845, he boasted that the paper had over two thousand subscribers and that his *Essays* on capital punishment had sold five thousand copies.[10]

The *Hangman* thoroughly covered the story of Bickford's murder. In

addition to its own accounts of the crime, the paper reprinted a long profile of the "misguided" Mrs. Bickford that originally had appeared in the *Boston Herald*. When Terrill was arrested and jailed in New Orleans in December 1845, the paper reported that it "was feared that he would commit suicide and therefore was watched constantly." But the following issue carried a letter from Terrill, who scoffed at the report. "I am not gloomy, nor contemplating suicide," he wrote, adding that he felt certain of "an acquittal by a jury of my countrymen."[11]

A month before Terrill was returned to Massachusetts, Governor George Briggs, a devout Baptist and a Whig, called on the legislature to reform capital punishment. Briggs privately supported the death penalty but wanted to appear sympathetic to public opinion. He had two concerns about the public's current attitude toward the death penalty: first, convictions were nearly impossible to obtain; and second, if someone were convicted of a capital offense, the governor was subjected to intense pressure to pardon the criminal or to commute his sentence to life imprisonment. Briggs suggested that the law against murder should recognize degrees of guilt. "The penalty of death shall remain against the willful and deliberate murderer," but, he added, "murder in the second degree, committed under circumstances of mitigation should be punished by confinement in the State Prison during life."[12]

Rantoul seized the opportunity to push for abolition of the death penalty. Early in February 1846, he wrote a series of letters that were published in the *Boston Times* and the *Prisoner's Friend*. The heart of Rantoul's argument was that the death penalty does not prevent crime; indeed, data proved the opposite. In his fourth letter, for example, Rantoul noted that between 1780 and 1845 there had been twenty-three executions for murder in Massachusetts, yet there had been no decrease in the rate of murder. By comparison, in England abolishing the death penalty for certain crimes had sharply reduced the frequency with which those particular crimes were committed. The results were decisive, he wrote; no one in England wanted "to restore the bloody rubric from which the present generation has escaped." Rantoul concluded his series by noting that in 1835 he had made a principled argument against capital punishment, but "experience now confirms what then was called theory."[13]

Terrill was secretly arraigned before the chief justice of the Supreme Judicial Court, Lemuel Shaw, on February 25, 1846. The accused murderer

was described as "a handsome young man, full six feet in height" with hazel eyes and fair skin. In the brief time he spent before Judge Shaw, Terrill conducted himself "with dignity and utmost coolness," the *Prisoner's Friend* reported. "We hope the people of this Commonwealth will not hang this man, Spear wrote. "We hope they will never hang another man."[14]

In the interval between Terrill's arraignment and his trial in March, the *North American Review* published a long review essay on the death penalty. In addition to Spear's *Essays on the Punishment of Death*, the unnamed reviewer considered John L. O'Sullivan's *Report in Favor of the Abolition of the Punishment of Death by Law* and Rev. George Cheever's argument for the death penalty. The reviewer's sympathies were readily apparent. He brushed aside Cheever's argument that Christianity justifies the death penalty, pointing out that the argument denied the "precepts of Christ and the spirit of Christianity" and was merely an opinion unsubstantiated by "any experience of its usefulness or proof of its necessity." The reviewer then hammered home the point that the death penalty "has never been sure or equal." However conscientious the jury, the law simply cannot be applied fairly. Given the probability of circumstantial evidence forming the basis of conviction, the fallibility of human judgment, and the "sway of prejudice, ignorance and excitement," the accused person is "doomed." Therefore, by attempting to punish the murderer, the legal system "has been the slayer of the innocent." The likelihood of committing judicial murder, the reviewer concluded, is an inherent, and unacceptable, liability of the system.[15]

When Terrill's trial finally began on March 26, 1846, it had the "appearance of a Camp Meeting." Prosecutor Samuel Parker opened the proceedings by outlining the long, adulterous relationship between Bickford and Terrill, which Parker argued culminated in a murder of passion and jealousy. Terrill met Bickford in the summer of 1844 at a tavern in New Bedford where she worked as a prostitute, having fled from her husband in Bangor, Maine. Terrill and Bickford traveled to New York, Baltimore, and Philadelphia as man and wife, and in 1845 they lived together under assumed names in various Boston locations. Early in October, Terrill was arrested and indicted for adultery, but his wife, mother, and friends secured his release on a promise of good behavior.[16]

Immediately upon gaining his freedom, however, Terrill went straight to Bickford, who was living in a house of prostitution near Charles Street.

The two were together on the night of October 26, according to the manager of the house, Joel Lawrence. He testified that early in the morning he had awakened to a loud noise coming from Bickford's room; he then heard a person walking down the stairs and unlocking the front door. Shortly after, two other residents of the house smelled smoke and saw fire coming from Bickford's room. A fireman who lived nearby found Bickford's body when he entered the room to put out the fire. At about the same time, a man walked into Fulham's stable, mumbled that he had had a quarrel with his girlfriend, and asked to be driven to Weymouth. During the trial, William Fulham identified that man as Albert Terrill. Fulham also testified that Terrill had said something about a house fire.[17]

In his summation, Parker, who had been Suffolk County district attorney since 1830, admitted that Bickford was "an unblushing harlot and an undisguised adulteress," but he reminded the jury that the law protected the "life of everyone, high and low, rich and poor, virtuous and depraved." The jurors were also asked to remember that Terrill was an immoral man who had disgraced his family and broken his pledge to the court. Parker contended that because Terrill was obsessed with this young, beautiful woman, his judgment had been overwhelmed by his passion. These facts, Parker argued, spun into a web of circumstantial evidence that tied Terrill to the scene of the crime, left no doubt that he had murdered Bickford.

Finally, Parker appealed to the jurors "to stand firmly on the principle" that the law must protect the "safety of human life." To achieve that goal, the commonwealth demanded the death penalty in the case of premeditated, cold-blooded murder. Speaking directly to the campaign against capital punishment that had engulfed Massachusetts for more than a decade, Parker urged the jurors "not to be terrified by the talk about judicial murder," a term thrown about by reformers opposed to the death penalty. The commonwealth had presented convincing evidence to show that a murder had taken place and that Terrill had committed it. If the jury believed that the commonwealth had proved its case beyond a reasonable doubt, Terrill should be convicted and executed.[18]

Rufus Choate, Terrill's defense attorney, was the most prominent criminal lawyer in Boston. Born in Ipswich, Massachusetts, in 1799, Choate graduated from Dartmouth College in 1819, briefly attended Harvard Law School, and read the law with U.S. Attorney General William Wirt in

Washington, D.C., before being admitted to the Essex County bar in 1823. While practicing in Salem, Choate had been elected to the Massachusetts House of Representatives and the state Senate. After serving one term in the U.S. Congress as a representative of Essex County, Choate moved to Boston in 1834, to build his law practice. But in 1840, Choate gave in to pressure from his old friend Daniel Webster and consented to stand for election to the U.S. Senate.[19]

Choate served five years in the Senate, departing with the vow, "to my profession, *totis virbus*, I am now dedicated." Within a few years he was handling nearly seventy cases a year, an unusually large number of which were criminal. He tried cases of murder, fraud, arson, abortion, embezzlement, insurance claims, assault, and slander. Some critics charged that the methods he used to defend clients accused of criminal acts "struck down the fair fabric of public virtue and public integrity." Even Choate's friends conceded that he would "stretch the law to the utmost limit" and that "from his lips fatal sweetness flowed," but they also argued that his "erudition was wide-ranging and his commitment to the majesty of the law unflagging.[20]

Choate's co-counsel in the Terrill case, Annis Merrill, who had been admitted to the practice just two years earlier, made the opening statement and presented most of the witnesses for the defense. Choate elaborated on the defense's argument during an eight-hour summation speech. Merrill began by cautioning the jury not to judge Terrill by the "shocking and exaggerated accounts" the city's newspapers had "poured over the country" or by the "polluted sources" the prosecution had called as its chief witnesses. Merrill contended Parker had failed to provide a convincing motive for the murder of which Terrill was accused. The duty of a jury, Merrill urged, was to provide "the best earthly hope" in a process that would determine the "eternal destiny of a man like ourselves." "Until the Deity shall proclaim himself implacable and unforgiving," he continued, "let no man assume to smother the feelings of compassion in his bosom." Even if the government presented a "perfect case" and there was "no valid defense," it would be the responsibility of each juror, Merrill insisted, "to look tenderly upon the defendant and not to render a verdict in the spirit of retaliation and revenge."[21]

When weighing the importance of compassion in a capital case, jurors

should remember that the legal system neither has been, nor can be, perfect. There are, Merrill argued, "numerous accounts of cases in which people have been convicted upon circumstantial evidence and put to death, who afterwards have been proved innocent." To buttress his argument, Merrill began to read from Spear's *Essays on the Punishment of Death*. Parker objected. Choate argued that the cases in which innocent persons had been put to death might be "read as an illustration without insisting that these accounts are actually true." But the court upheld the objection, ruling that only "books of authority" might be read in court.[22]

By raising the issue of capital punishment at the outset to frame their strategy within the courtroom, Merrill and Choate also played to the controversy swirling around the issue outside the courtroom. Choate's intent was revealed when he called the former dean of the Harvard Medical School, Dr. Walter Channing, to testify. Channing was a popular spokesman and secretary of the Society for the Abolition of Capital Punishment. He told the jury that Bickford could have slit her own throat and still had enough "muscular energy" to throw herself from the bed where the fatal blow had been inflicted to a spot on the floor several feet away. He also commented on anecdotal evidence presented by Terrill's relatives that the accused was known to sleepwalk. A somnambulist, Channing confirmed, could rise from his bed, get dressed, commit murder, set a fire, and run into the street with no memory of having done so. The doctor's testimony may have lent some legitimacy to the defense's alternative hypotheses about the events of the previous October, but his most important role was to remind jurors of the campaign to abolish the death penalty.[23]

Choate's long closing statement to the jury also was framed by opposition to the death penalty. He began by reminding the jury that the life of a fellow human being was at stake. They must abandon the "delusive dream" that the governor would commute a death sentence; it was for them to decide whether the life of a man should be "violently cut off." Choate's final sentence transformed his argument against capital punishment from an issue advocated by reformers to one that was at the heart of civic patriotism and republicanism. "Under the iron law of old Rome," Choate told the jury, "it was the custom to bestow a civic wreath on him who should save the life of a citizen. Do your duty this day, gentlemen, and you too, will deserve the civic crown."[24]

Surprise and disagreement greeted the verdict when Terrill was acquit-

ted, but conservatives and reformers alike agreed that the jury's aversion to the death penalty had played a significant role in their decision. A letter to the *Prisoner's Friend*, probably written by Harvard College president Edward Everett, contended that when the jurors were confronted with the issue of capital punishment, they said simply, "Away with the punishment of death." Everett added that the money spent by the commonwealth to stage the trial should have been used "to educate some wretched children, to give a little bread or shelter to persons driven to crime by want." An earlier editorial in the *Boston Courier* expressed the same sentiments. "From the result of this trial," the editorial ran, "we infer that no person will hereafter be convicted of murder in the courts of Massachusetts. There is prevalent in society such a feeling of horror" about executions, particularly "the possibility that the sufferer may be innocent that jurors will not hesitate to acquit."[25]

The reformer Lydia Maria Child maintained that the jurors had found Choate's controversial hypothesis about somnambulism a convenient hook on which to hang their opposition to the death penalty. "This is another indication," she wrote, "of the extreme unwillingness to convict in capital cases." Although the *Boston Evening Transcript* viewed the verdict from a perspective favoring the death penalty, the paper shared Child's conclusion, calling somnambulism "shallow humbug." Somehow Boston must find enough jurors who will impose the "highest penalty," the paper grumbled, or the "stigma now resting upon her character" will remain.[26]

Although Choate would continue to be criticized for his tactics, hostility did not deter him from again making use of the somnambulism defense, this time in January 1847 when Terrill was tried for arson, also a capital offense. Like his trial for murder, Terrill's arson trial received extensive newspaper coverage. The *Prisoner's Friend* reported that the courtroom was "densely crowded during the whole of the eight days" of the proceedings. Once again, Choate and Merrill used a two-pronged defense: they argued that if Terrill set fire to the house of prostitution where he and Bickford were living, he did so while somnambulate, and they attacked capital punishment.[27]

When Terrill was found not guilty of arson, there were groans from those who favored capital punishment. In response to the verdict, Governor Briggs compromised his opposition to the abolition of the death penalty. He feared that sentimental jurors would dissolve the connection

between penalties and crimes, that the link between law and order would be broken. In a thinly veiled allusion to Terrill, Briggs acknowledged that a "strong current of public sentiment" against capital punishment had produced "a good deal of embarrassment in the criminal proceedings in our courts of justice, manifesting itself in the acquittal of persons charged with capital offense, when they would probably have been convicted, if the penalty, following conviction, had been less severe." Briggs therefore proposed doing away with the death penalty for all capital crimes except murder. He calculated that by reducing the number of crimes punishable by death, he would undermine the popular movement against the death penalty.[28]

In fact, the movement was in disarray. Wendell Phillips, Boston's foremost agitator for reform and an officer in the Society to Abolish Capital Punishment, blasted Choate's tactics, especially the somnambulism defense, arguing that the lawyer had made it "safe to murder." Other members of the society were more circumspect but no less eager to be counted among the advocates of law and order. While implicitly acknowledging widespread dissatisfaction with the verdict, Charles Spear was cheered by one development. "We find that many persons who have formerly been in favor of Capital Punishment, are now convinced," Spear wrote a few days after Terrill's acquittal for arson, "that it is better to substitute some other punishment which will be more certain than the death penalty."[29]

Just eighteen months after Terrill was acquitted for arson, Washington Goode, a twenty-nine-year-old black mariner, was accused of murdering Thomas Harding, also a black mariner. The two men were rivals for the affections of Mary Ann Williams. On January 1, 1849, Goode was put on trial for his life. Although there were clear differences between the two cases—race and class most obviously—the public's anger about the verdicts rendered in Terrill's cases undoubtedly helped undermine Goode's chances for escaping the gallows.

The evidence used by District Attorney Parker to build his case against Goode was largely circumstantial. No one could positively identify the man who had plunged a knife between Harding's ribs. But Parker contended that Goode had a motive. Goode, said the prosecutor, flew into a drunken, jealous rage when he learned that Harding had given Mary Ann Williams a gift. Witnesses testified that Goode had boasted that he would get even with Harding. Other witnesses for the prosecution told the court that the man who murdered Harding had a voice and clothing and a gait

similar to Goode's. Parker told the jurors they had a responsibility to stem the rising tide of "crimes of violence." Echoing Briggs, he insisted that unless punishment was certain, law and order would collapse.[30]

Two young, distinguished attorneys, William Aspinwall and Edgar Hodges, defended Goode. Aspinwall was born in London, where his father was U.S. Consul, in 1819. He graduated from Harvard College in 1838, attended Harvard Law School, and read the law with George W. Phillips (Wendell's brother). He was admitted to the Suffolk County bar in 1841. Although Hodges was older than his co-counsel, he had practiced in Boston only since 1846.[31]

Aspinwall and Hodges argued that Goode was innocent. They impugned the testimony of the commonwealth's witnesses, and they punched holes in the wall of circumstantial evidence built by Parker. In closing, Aspinwall reminded the jurors of their fearful responsibility. They held in their hands "the life of human being." There were cases, he told the jurors in words reminiscent of Merrill's argument to the Terrill jury, where the accused had been found guilty, hanged, and "afterwards found to have been entirely innocent of the crime for which his life had paid the forfeit." Parker quickly objected and Chief Justice Shaw upheld the prosecutor.[32]

Undeterred, Hodges pressed the point. He reminded the jurors that murder was not always and everywhere punished by death, not the first "murder by the son of our first parents," nor many committed since, even in so-called savage societies. Hodges was about to "discuss the impropriety of capital punishment" in Massachusetts when Parker again objected. Shaw told Hodges that he "was out of order to discuss the expedience or justice of the death penalty." The jury deliberated just thirty-five minutes before finding Goode guilty. On January 15, after lecturing Goode about his abuse of alcohol and his association with "an abandoned married woman," Chief Justice Shaw sentenced him to death. Goode was to be hanged on May 25.[33]

The opponents of the death penalty hoped to save Goode from the gallows, as they had with a number of men during the past fourteen years. The community's opposition to capital punishment was solid and widespread, according to the *Boston Herald*. If anyone doubts this proposition, the paper challenged, let him go to the courthouse when the Supreme Judicial Court is impaneling a capital jury. There he "will find that a great number of summoned jurors are rejected by the Commonwealth because

they are opposed to taking a life for murder." On April 6, Wendell Phillips, among others, spoke to a large audience gathered on behalf of Goode at Tremont Temple. Phillips did not address the general issue of capital punishment; rather, he focused on Goode's case and on the fact that Goode was a black man. If he had committed murder—and there were serious doubts about that—the act was driven by passion and alcohol. Goode was not a hardened criminal but "the victim of the worst social influences." As a black man "the doors were shut against him—he has a separate school, a separate church; other people were ashamed to be associated with him and by law he was ostracized." Goode deserved sympathy and help, not death. Finally, Phillips posed an invidious question: why had Goode been "selected" to be hanged when Terrill who had murdered a woman in "cold blood," was set free?[34]

Phillips's question was addressed in an editorial by the *Herald* and in an article in the *Prisoner's Friend*. The answer was simple: unlike Terrill, Goode was black and poor. "Shall Washington Goode be hanged?" the editorial asked. "Yes, hang him; he is poor and has no friends. Twist, turn, look at the proposition in any manner you please, if a criminal or his friends have plenty of money, there is no law in New England which can reach him."[35]

The *Friend* struck a similar dissonant chord that played on the anger aroused by Terrill:

> Yes, Washington, thou must die! Thou art too vulgar to excite compassion. Hadst thou found thyself at midnight where a wife could not follow, and in thy haste to depart had slain thee partner and set fire to her chamber, mental infirmity might have a kind word to utter and call thee a sleepwalker—or if done into Latin, and given thee out as "somnambulist" there would be little danger for thy neck.[36]

Following the Boston meeting, the Society for the Abolition of Capital Punishment sponsored meetings in a half a dozen other Massachusetts cities and towns. At each meeting petitions were circulated and Spear boasted that more than twenty-three thousand signatures were obtained. One petition, signed by more than one hundred "colored citizens of Boston," urged the governor to consider race as a mitigating factor. Goode, according to an account in the *Prisoner's Friend*, "belongs to a race against whom a cruel prejudice paralyzes his effort for self-improvement, shuts the

halls of the Lyceums against him, and banishes him to separate schools and churches." It seemed especially harsh, the petitioners argued, that a man burdened throughout his life with racial prejudice should be hanged.[37]

Although only a handful of people publicly supported Goode's hanging, there were plenty of supporters of capital punishment. Members of Boston's orthodox clergy argued at a debate held at the Boston Latin School that "the right to inflict Capital Punishment can be proved to spring from a divine source." One Calvinist minister, for example, defended the death penalty as "one of the chief safeguards of society." Evangelical clergymen also denounced opponents of capital punishment for caring nothing for the victims of murder and for wanting to coddle murderers.[38]

Despite the powerful and numerous appeals made to spare Goode's life, Governor Briggs and his Council adamantly refused to commute the black man's death sentence. "A pardon here," Briggs insisted, "would tend toward the utter subversion of the law."[39]

In the evening before his scheduled execution Goode attempted to commit suicide. He swallowed large chunks of tobacco and wads of paper and stuffed a blanket in his mouth so that he might suffocate or drown in his own vomit. Goode also slashed his arm at the elbow with a piece of glass. By the time the prison guards entered his cell, he had lost a considerable amount of blood. The prison doctor stopped the flow of blood, saving Goode's life so that he could undergo "a more terrible death in the morning."[40]

Unlike the executions that took place in Suffolk County before 1849, Goode's hanging occurred within the walls of the Leverett Street jail. The public execution ritual at the center of capital punishment for more than two hundred years was dropped quietly in 1835. There was evidence that postrevolutionary crowds were more boisterous and less attentive to the all-important religious message than their Puritan ancestors had been. As early as 1801 Rev. Thomas Thacher had blasted public executions for undermining the virtue of on-lookers and hardening their hearts. After he gave his sermon following the execution of Jason Fairbanks, fewer and fewer execution sermons were given and the practice disappeared by about 1825. A decade later, Robert Rantoul's widely circulated pamphlet contained data demonstrating that public executions did not deter murderers. More generally, mobs and riots occurred throughout northeastern cities in the 1830s. Boston was "shaken to its foundations" in the summer

of 1834 when a mob of Protestant laborers burned the Ursuline Convent in Charlestown. The next year the legislature strengthened the riot act and moved executions inside prison walls, joining Pennsylvania, New Jersey, and New York in ending public executions.[41]

Because Goode was weak from loss of blood, prison guards strapped him into a chair and carried him to the gallows built in a corner of the prison yard. Despite a heavy rain, a large crowd stood outside the walls, straining to catch a glimpse of the gruesome event. The *Herald* angrily suggested that "Briggs and his Council, or the deluded priests who are clamoring for the wretch's blood, be compelled to perform the duties of gallows builders and hangmen." At 9:45 A.M. Goode was placed on the platform, and at a signal the trap door on which he stood sprang open and Goode's body, still bound to the chair, plunged several feet. Twenty-five minutes later doctors pronounced Goode dead. The *Prisoner's Friend* claimed that more than one thousand people paraded through a North End tenement where Goode's body was sent after the execution, a testament to their continued support for the abolition of capital punishment in Massachusetts. The movement's opponents also made a statement: "Goode is hung," one Boston newspaper wrote. "We hope Spear and his gang will howl no longer."[42]

Although twenty-one men were tried for murder between 1835 and 1849, by the time of Goode's execution only two had been hanged. Eight murder defendants were acquitted and eight found guilty of the lesser crime of manslaughter. Five men were convicted and sentenced to death, but three had their sentences commuted to life in prison. The two men put to death were unsympathetic characters. Benjamin Cummings, a public drunk who beat his wife on numerous occasions and had served time in the state prison, stabbed to death the New Bedford constable's son when he caught Cummings vandalizing his father's home. Thomas Barrett, a poor Irish immigrant, was convicted of two capital crimes, the rape and murder of a seventy-year-old woman. When the opponents of capital punishment petitioned Governor Briggs to commute Barrett's death sentence, they were told that his "extraordinary turpitude and abandoned depravity" put him beyond redemption or mercy. Barrett was sent to the gallows on January 5, 1845.[43]

Terrill's trials and Goode's execution marked a turning point in the early nineteenth-century campaign to abolish the death penalty in Massachusetts. Goode seems to have been the victim of racism and a social backlash. Fearful that the reckless defense tactics used by Choate and Merrill threatened order and that widespread opposition to the death penalty undermined the law, the advocates of capital punishment insisted that neither sentimentality nor circumstances peculiar to any individual should disturb the rigid equation between the death penalty and murder. Opponents of the death penalty were at once embarrassed and angry, and their cause was weakened by the cynical means used to win Terrill's freedom and by the state's refusal to heed the voice of the people and spare the life of poor, black, friendless Washington Goode.

Just seven months after Goode's execution another murder captured Boston's imagination, blurring the distinction between opponents and advocates of capital punishment, splitting the legal community, and turning Boston society upside down. The murder occurred at the Boston Medical School and involved Boston Brahmin families and members of the Harvard elite. Shortly before noon on November 23, 1849, Dr. George Parkman, a wealthy real estate speculator and philanthropist, left his Beacon Hill home for a prearranged meeting with John White Webster, a Harvard chemistry professor. Parkman had come to collect money Webster owed him. According to Webster's subsequent confession, when he told Parkman he did not have the money, Parkman insulted him and shouted that he would have him fired from his professorship. Unable to endure Parkman's "threats and invectives," Webster grabbed a heavy piece of wood and killed Parkman with a single powerful blow. "I stooped down over him," Webster later recalled, "and he seemed to be lifeless." After bolting the laboratory's doors, he tried to revive Parkman. When that effort failed, Webster instantly made a fatal decision. "I saw nothing," he wrote, "but the alternative of a successful removal and concealment of the body, on the one hand, and of infamy and destruction on the other." He dragged Parkman's body from the lecture hall into an adjoining room equipped with a sink and butchered it. The head and viscera he burned in a furnace, the thorax and a part of a thigh he hid in a trunk, and the pelvis and some of the other limbs he threw down a laboratory privy. At six o'clock he left the college for his Cambridge home. Later that evening Webster played cards with a friend.[44]

When Parkman's family publicized his disappearance, the college janitor, Ephraim Littlefield, who lived in a basement apartment next to

Webster's laboratory, became suspicious and began an investigation that ended in his discovery of fresh human remains. On November 30, Webster was arrested. Trial before the Supreme Judicial Court was set for March 19, 1850.[45]

Webster, aware of Rufus Choate's successful defense of Albert Terrill, hoped to employ him for his defense. But Choate refused. Two other skilled criminal defense lawyers were approached, but they also refused, claiming that as members of the Harvard Corporation they had a conflict of interest. According to long practice and an 1820 statute, therefore, the court appointed two attorneys to defend Webster: Pliny Merrick, a fifty-six-year-old former prosecutor with more than three decades of trial experience, and Edward D. Sohier, a Harvard-educated commercial lawyer described as "full of resources, forceful in argument, and sharp in repartee." Attorney General John H. Clifford, who had been appointed the commonwealth's top legal officer in 1849 following nearly two decades of private practice, and George Bemis, a forty-one-year-old attorney who struggled to balance his religious convictions with his distaste for capital punishment, represented the commonwealth. "In searching my own heart," Bemis wrote in his diary, "perhaps I feel too ready to see justice—stern justice, if it be so called—enforced against an offender and take pride, shall I say, in shutting my eyes to the dreadful character of the consequences to him."[46]

"Notwithstanding the severe storm of rain and snow," hundreds of people lined up to gain entrance to Webster's trial. Tickets were issued and the courtroom audience was changed every ten minutes, allowing sixty thousand people to glimpse some part of the eleven days of legal proceedings. Promptly at 8:45 A.M. Chief Justice Shaw and Associate Justices Charles Dewey, Theron Metcalf, and Samuel Wilde took their seats at the bench and the process of impaneling a jury began. Shaw put the "usual interrogatories" to each potential juror, including a question to ascertain whether a would-be juror had "conscientious scruples, or such opinions on the subject of capital punishment, as to preclude [him] from finding a defendant guilty." One potential juror, Benjamin Greene, said that "he was opposed to capital punishment; but that he did not think that his opinions would interfere with his doing his duty as a juror." Greene was sworn. The court subsequently challenged for cause three other would-be jurors, because they were unequivocally opposed to participating in a process that might lead to the imposition of the death penalty. After the entire panel had been

completed, Greene asked to be excluded. Shaw refused, saying Greene's scruples "did not come within the statute."[47]

The challenge to the state was to prove that a murder had occurred without showing the *corpus delicti*, or proof of the murder. To overcome this missing evidence, Clifford paraded a string of medical experts before the jury who testified that the remains discovered in Webster's laboratory were those of Parkman. Dr. Nathan C. Keep, Parkman's dentist, gave the most compelling and convincing testimony. He recognized the human teeth found in Webster's laboratory as the ones he had made for Parkman years before and repaired the day before his disappearance. Littlefield, the suspicious janitor, established the connection between the experts' identification of Parkman's remains and their presence in Webster's lab. He testified that on November 23, he saw Parkman enter Webster's lab but never saw him leave. Later that afternoon, he found Webster's laboratory door bolted from the inside, heard water running, and felt the heat of the furnace. After consulting with college authorities, Littlefield broke through the wall into the privy beneath Webster's laboratory and discovered the butchered remains of a man's pelvis and a leg. "I knew that it was no place for these things," he said. Clifford had made his case and he called no additional witnesses.[48]

Defense attorney Sohier did the best with what little he had. First, he stressed the difference between direct and circumstantial evidence and suggested the latter created plenty of reasonable doubt. Given human fallibility, mistakes occurred in the "inferences and conclusions" drawn from circumstances, with the result that innocent people were convicted erroneously, he warned. Second, Sohier stretched the definition of alibi. He introduced witnesses who claimed to have spotted Parkman alive in the days following his disappearance. Third, Jared Sparks, the president of Harvard, and a host of other prominent Bostonians testified that Webster was a peaceful man without malice who was incapable of committing murder.[49]

Following closing statements by Merrick and Clifford, Chief Justice Shaw instructed the jury. During his three-hour charge Shaw focused briefly on whether a juror who manifested scruples in regard to capital punishment should be kept off a murder jury and spoke at length about circumstantial evidence and reasonable doubt. The jury deliberated just over two and a half hours and returned a verdict of guilty. According to the

Boston Evening Transcript, Webster "sank gradually into his chair," and his "whole frame shook" for a full minute "during which there was dead silence in the court and every eye was turned upon him."[50]

While Webster awaited execution, a fierce debate raged within the legal community over jury selection and Shaw's charge to the jury on the issue of malice. The contentious points focused on the constitutionality of the death penalty and the maxim that a murder defendant is innocent until proved guilty. Following Webster's conviction, Lysander Spooner, a lawyer and social reformer from central Massachusetts, published a widely circulated pamphlet arguing that the Massachusetts statute requiring the elimination of would-be jurors who opposed capital punishment was an unconstitutional exercise of governmental power. The jury that convicted Webster was "*packed* by the court, either with a view to a more easy conviction than could otherwise be obtained, or with a view to a conviction which otherwise could not be obtained at all." Excluding people opposed to the death penalty was contrary to the Sixth Amendment of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights, because such a procedure "*destroyed the trial by jury itself.*" Only a jury made up of a true cross-section of the community—a sample that included both jurors who opposed and jurors who favored capital punishment—could be defined as impartial and, therefore, properly fulfill the requirement that a death sentence could be imposed only with a unanimous verdict. By excluding those would-be jurors who manifest a greater sensibility about the death penalty, the government established a "standard of sensibility" that biased the outcome and deprived the defendant of a trial by a jury representing "all the degrees of sensibility which prevail among the people at large." Spooner's plan, together with the fact that at the time Massachusetts prosecutors did not have peremptory strikes—the ability to remove potential jurors without stating a reason—might well have ended the use of capital punishment had he prevailed. But his argument explicitly linking jury selection to the abolition of capital punishment did not gain legitimacy for more than a hundred years.[51]

Shaw's post-*Webster* critics also focused on his interpretation of the law of homicide, proof of malice. His charge to the jury, according to an unnamed lawyer, made a "farce and a mockery" of trial by jury and provided the basis for "judicial murder." Boston's *Monthly Law Reporter* declared that the "whole community shudders at the law of malicious homicide

as expounded by the learned Chief Justice." Harvard law professor Joel Parker's damning conclusion to an article on the trial was that Shaw's jury instructions had violated a "cherished tradition of Anglo-American criminal justice: every man is presumed to be innocent until he is proved guilty."[52]

The chief accusation Shaw's critics made was that he implied the existence of malice as a matter of law and, therefore, shifted the burden of proof from the prosecution to the accused. Actually he did no such thing. He began, in *Webster*, by distinguishing manslaughter and murder, identifying manslaughter as the "unlawful killing of another without malice" and murder as "the killing of any person with malice aforethought, either expressed or implied." In law, he said, malice means a guilty mind, knowledge by the person that an act is wrong. Because the existence of malice distinguishes murder from manslaughter, it is necessary, Shaw wrote, "to ascertain with some precision the nature of legal malice, and what evidence is requisite to establish its existence." If facts presented by the defendant show "justification, excuse, or palliation" the crime may be defined as manslaughter. But, if the fact of the killing is established by solid evidence and there are no such circumstances, "there is nothing to rebut the natural presumption of malice." This rule, Shaw explained, is founded on the principle that a person "must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts."[53]

Specifically, in Webster's case there was evidence showing Parkman was murdered in Webster's laboratory. Webster pleaded innocent, claiming that Parkman had left the college alive. But the evidence was overwhelming that an intentional homicide had occurred for which Webster's innocent plea obviously provided no excuses or mitigation. Therefore, according to Shaw, "there is nothing to rebut the natural presumption of malice."[54]

Shaw's charge to the Webster jury divided the responsibility for determining a verdict into two interdependent parts: the court had the right to decide the law and the jury the power to weigh the facts and reach a verdict. Specifically, the jury was to determine whether Parkman's death was caused "by an act of violence and human agency" and "whether the act was committed" by Webster, as the prosecution charged. Shaw acknowledged that the proof offered by Attorney General Clifford that Webster murdered Parkman with malice aforethought was entirely circumstantial,

but he assured the jurors that, used properly, circumstantial evidence was "safe and reliable." Shaw articulated three rules the jury should apply to test the worth of circumstantial evidence: the basic facts of the crime must be carefully tested; they all must be consistent with each other; and all of the circumstances must lead to a "connection between the known and proved facts and the fact sought to be proved," specifically whether the accused committed the murder as charged. It is not adequate that a chain of circumstantial evidence supports a strong probability that the defendant is guilty. The circumstantial evidence must produce a "morality certainty, that the accused, and no one else" committed the murder, and that conclusion must be proved beyond a reasonable doubt. "What is reasonable doubt?" Shaw asked.[55]

> It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.[56]

Shaw's *Webster* charge did not originate the principles of "reasonable doubt," the "presumption of innocence," the prosecutor's "burden of proof," and "moral certainty," but it did pull together those principles

into a legal concept designed to protect the innocent against conviction. Repeated thousands of times since 1850, Shaw's charge made it possible for a criminal jury to understand that while they must not convict the innocent, neither must they be absolutely certain of the defendant's guilt to return a verdict of guilty. The concept of "moral certainty" harmonized these conflicting requirements and modernized Massachusetts's criminal jurisprudence.[57]

Colonial justice, to repeat, operated on a somewhat different basis. Technically, seventeenth-century Massachusetts courts required either the testimony of two witnesses to the alleged murder or the defendant's confession. A conviction, therefore, could not be based on circumstantial evidence alone, however strong. The court sidestepped the obvious theoretical problems first by providing a defendant with a considerable degree of legal protection whenever it tried a defendant on circumstantial evidence and then by hoping he or she would confess before the execution. In a religious age this practical solution worked most of the time, but when the Massachusetts Constitution and courts assumed responsibility for protecting individual liberty there was a need for a new standard of proof. Beginning with John Adams, American lawyers looked to the eighteenth-century Enlightenment figure Cesare Beccaria. His opposition to torture and harsh punishments led him to denounce the need for absolute certainty in favor of moral certainty, which he defined as "a probability that is called certainty."[58]

In the wake of the Revolution, American reformers referred to Beccaria's opposition to capital punishment, but Shaw was the first jurist to combine Beccaria's principle of moral certainty and due process as the core of a new jurisprudence. Shaw buttressed the concept of moral certainty with the ancient common law principles acknowledging the presumption of innocence and laying the burden of proof on the prosecutor. In this way, the court's commitment to due process and its imposition of the moral certainty guideline were intended to dovetail and provide greater protection against the conviction of an innocent person. Because the guidelines for weighing the evidence and reaching a conclusion rested on a probability, however, there was a risk of fatal error in death penalty cases. For this reason, the debate over capital punishment did not disappear in the aftermath of Webster's execution.[59]

In fact, in 1852 Charles Spear and the antigallows activists managed

to push two reform bills through the Massachusetts legislature. One bill ended the death penalty for rape, arson, and treason and the other postponed a convicted murderer's execution for a year and at the end of that term required the governor to sign a warrant directing the execution. "What governor," Spear asked, "would have the hardihood or the folly to order an execution after the culprit had been kept one year at hard work in the State Prison?" The answer was not long in coming. In late 1853, Governor John Clifford, who had vaulted into the governor's chair following his successful prosecution of Webster, issued a death warrant ordering the execution of James Clough on April 28, 1854. Clough had been found guilty of the shooting death of a Fall River police officer. Reformers made a last-ditch effort to save Clough's life by attempting to enact a bill abolishing the death penalty before Clough's scheduled execution date. A joint special legislative committee was appointed to hold public hearings on the proposed law.[60]

Dr. Walter Channing was the first of a dozen witnesses for and against capital punishment to testify during three days of hearings. A founder of the Society of the Abolition of Capital Punishment and an expert witness at the Terrill trial, Channing began his argument against the death penalty with the Bible and concluded with a contemporary plea for mercy. He acknowledged that Mosaic law calls for the death of all "shedders of blood," but he also noted that there were "cities of refuge where the life of the murderer was sacred." More important, Channing argued that the spirit of contemporary Christianity was opposed to the death penalty. Abolishing such a cruel punishment, he concluded, would be the "best means of carrying forward civilization."[61]

Two other witnesses, Rev. Lyman Beecher, recently retired as president of the Lane Theological Seminary in Cincinnati, and Rev. Alonzo A. Miner, a Boston Universalist and antislavery reformer, differed over the effectiveness of capital punishment. Laws are not effective, Beecher insisted, unless they produce fear and the greatest fear of all is death. Therefore, the death penalty deters murderers. Miner disagreed, arguing that felons certain they will escape any punishment commit some murders and other murders are committed in a "moment of passion, and would not be prevented if penalties were piled as high as heaven and as deep as hell." And, although all murderers are conscious of punishment in a "future world," he added, they commit the barbarous act anyway. Finally, Miner recalled Washington Goode. His hanging had not deterred murders.

After a Sunday respite, Wendell Phillips made a long speech combining secular and religious reasons why the death penalty should be abolished. He had no "morbid sympathy" for criminals, he began; but like other reformers he believed there was a global trend toward the development of "milder and more humane treatment of criminals." Bucking that trend does not protect society. Rather the opposite is true: "the welfare and safety of society demands its abolition."

The idea of punishment has no legitimate place in human government, Phillips asserted. Punishment is a response to sin and belongs to God. "Man cannot estimate the ignorance of the transgressor, the weakness of his moral nature, or the amount of temptation resisted—all which enter into the estimate of sin." Therefore, it is the task of human government simply to protect the community, and "it is the wisest statesman who contrives to do this most thoroughly with the least amount of suffering."

There are two methods of protecting the community, Phillips argued, executions and imprisonment. Because this government is based on a social compact, he added, it has no right to kill its citizens. Likewise, Genesis 9:6 is ambiguous and applies only to ancient Hebrew clans; furthermore, times have changed. "The half-barbarous and uncertain condition of things among the Jews," Phillips said, "may have been a reason for punishing murderers with death. But we, whose condition is different, and who have every facility for keeping the murderer securely imprisoned, cannot urge this reason for hanging men."

Finally, Phillips rejected the argument that the death penalty is a deterrent. If hanging deterred some would-be murderers, why not torture, why not impale the murderer? When "you take refuge in simple hanging," Phillips contended, "or seek to invent the easiest method of taking life instead of accumulating all the horrors you can, you in fact confess that something less than the most frightful death will suffice to protect society. If you may thus retreat one step, why not risk another," and rely on imprisonment?

Other speakers for and against capital punishment followed Phillips before the legislative committee, but none matched his power or eloquence. Although the committee members favored abolition, they apparently knew

the full legislature would not pass such a bill. For that reason, the committee submitted a bill modifying the law that mandated a yearlong wait before a convicted murderer could be executed. The committee's proposal made it discretionary with the governor to issue the death warrant. In this way, the committee hoped abolitionists would be able to prevent the governor from acting. The House did not debate the measure and the Senate defeated it by a vote of 19 to 9.[62]

James Clough was executed on schedule and so too over the next decade were five other convicted murderers. The Massachusetts campaign to abolish the death penalty collapsed shortly after its failure to save Clough, in part because it had failed to achieve its goal, but, more important, because the movement to abolish the death penalty was swept up in the fight against slavery and the rush to war. Just a few months after Clough's execution, Boston was convulsed by the struggle to resist the draconian Fugitive Slave Act of 1850 and particularly by an unsuccessful attempt to prevent Anthony Burns from being returned to slavery. The founders of the campaign to abolish capital punishment—Rantoul, Spear, and Phillips, among others—turned their full attention to the effort to abolish slavery and to save the union. As one death penalty opponent told Phillips, "I am quietly resting on my oars waiting for the American conflict to cease that I may resume my labors. It is useless to talk of saving life when we are killing by thousands."[63]

The respite lasted much longer than anti–death penalty activists imagined it would. In Massachusetts, Governor John A. Andrew, who had been an officer in the Society for the Abolition of Capital Punishment and who had won praise for his Herculean efforts on behalf of the Union, was not able to block the execution of a convicted murderer. Likewise, the hanging of Lincoln's assassination conspirators created little controversy and few complaints were heard when President James A. Garfield's assassin was executed in 1882.[64]

When the Massachusetts movement to abolish the death penalty was reinvented at the turn of the century, the memory of what had been accomplished in the 1830s and 1840s had faded into obscurity. The Supreme Judicial Court's rules protecting the rights of the accused remained, of course. But as the next chapter shows, that turned out to be a double-edged legacy. Well into the twentieth century the court gloried in its past

accomplishments but resisted any substantial changes in capital procedure. And finally, although capital defendants benefited from the Supreme Judicial Court's commitment to the moral certainty standard, the risks of an erroneous conviction and execution in a system predicated on the possibility of error were obvious.