MURDER AND THE DEATH PENALTY IN MASSACHUSETTS

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To Lisa and Nora, with love

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MURDER AND DUE PROCEEDING IN COLONIAL MASSACHUSETTS

Murder and capital punishment were a part of the social and legal landscape of colonial Massachusetts from its founding in 1630. The colony's magistrates had a sworn duty to uncover and punish criminal acts, "More Especially as to ye Sin of Murder," Justice John Cushing told a grand jury in 1746. Perceived as more than an individual violent episode, a homicide was a serious blow to the social order, a manifestation of the failure to achieve a godly commonwealth. At the same time, juries sometimes were reluctant to impose the death penalty, and the court articulated an evolving standard of due process that gradually extended greater legal protection to capital defendants.[1]

Justice within Massachusetts courts in the seventeenth century was shaped by two Puritan beliefs—magistrates ruled in the name of God and residents of the community held common moral values—and was tempered by the reality that because men and women were inherently imperfect they sometimes permitted their passions to lead them to commit murder. Puritans sought to control man's sinful, passionate nature by creating legal and social institutions that would at once rationally distribute punishment, stave off God's wrath, and make it possible for a convicted murderer to achieve redemption from a merciful God. In short, the court and the clergy each had an important role to play in building a hierarchical, law abiding, and moral society. By the second quarter of the eighteenth century this consensual order had become increasingly diverse and fractured, but the legal system still acted on the assumption that its chief function was to punish those who violated agreed-upon moral standards.[2]

Justice Samuel Sewall, whose tenure on the court stretched from 1684 to 1726, said at the opening of the new Boston courthouse in 1713 that the

"Oaths that prescribe our Duty run all upon Truth: God is Truth. Let Him communicat [*sic*] to us His Light and Truth." At the same time, and without apparent contradiction, he added a secular-sounding note. "Remember," he said in his instructions to a grand jury, attorneys "are to advise the Court, as well as plead for their clients." As Sewall's remarks suggest, by the early eighteenth century jurists tended to emphasize the relationship between law and good order, rather than godly order, and to rely on the law rather than divining God's will. Certainly this change marked an important intellectual shift, but a commitment to due process in capital trials remained central in both paradigms.[3]

The rules governing murder trials in Massachusetts—capital procedure—from 1630 through the American Revolution can be traced through the trials of men and women indicted for murdering other adults. The highest court in the colony, the Court of Assistants until 1692, and the Superior Court of Judicature to 1780, tried murder defendants. At trial, capital procedure was framed by Chapter 39 of Magna Charta, which prohibits legal action by the state against an individual without "lawful judgment of his peers" and forbids a defendant from being imprisoned or "put to Death, without being brought in answer by due Process of Law." Colonial magistrates also swore an oath to follow local "laws and useage." Therefore, what founding governor John Winthrop called "due proceeding" was only partially drawn from the English law. A cluster of significant differences distinguished Massachusetts's capital procedure from that of England and other American colonies. Massachusetts capital defendants had to be indicted by a grand jury, and, if indicted, they had the right to read a copy of the indictment, to have legal counsel, to challenge jurors, and to urge a jury to decide issues of law as well as fact. Judges consciously supplemented these rules with "discretionary justice" in an effort to bring man's imperfect laws into conformity with God's perfect and absolute laws and to temper justice with mercy. By no means was this a rational, modern process of development. Until 1805 the courts did not articulate formal rules or record decisions, but relied on memory and tradition. Justice in seventeenth-century Massachusetts was deliberately intertwined with religion and sometimes with magic, and colonial courts had no systemic way to initiate legal reform. Still, the colonial bench and bar struggled to provide equitable criminal justice and to sustain order within a society marked by increasing social and racial diversity.[4]

Just months after Boston's founding, the authorities in Plymouth colony asked for advice about capital procedure. John Billington, one of Plymouth's original settlers, allegedly had shot and killed his neighbor, young John Newcomen. The Massachusetts Court of Assistants told the Plymouth magistrates that Billington should be arrested by a constable with a warrant from a magistrate, indicted by a grand jury, and brought to trial. It was a court's responsibility, the court added, to compile evidence, question the accused as well as any witnesses to the murder, instruct the jury about the law, and sentence the defendant to death if he was found guilty. Following the procedure outlined by the court, a Plymouth court found Billington guilty as charged and he was hanged on September 30, 1630.[5]

Massachusetts had other procedural safeguards in place from an early date. A suspect was ordered before the bar to answer the charge; if the suspect did not appear within one month his or her property was seized and held. A delay in coming forward also meant that at trial the government needed to produce one less than the normal "two or three witnesses" to prove a defendant guilty of murder. A capital defendant could not make bail while awaiting trial. In addition to answering a justice's questions during a preliminary hearing, a defendant was required to answer a range of questions posed by the court at trial. To build a case against a defendant a local magistrate also summoned and interviewed witnesses and made their written statements available to the court. Witnesses to a capital crime were required to testify at trial along with a local magistrate.[6]

Massachusetts Puritans initially were ambivalent about the need for lawyers, but as early as 1648 the legislature extended statutory recognition to legal practitioners. That same year, the colony's Laws and Liberties stipulated that, unlike in England, a Massachusetts capital defendant had a right to an attorney once trial began. According to English procedure, counsel at trial could represent only persons charged with a misdemeanor. New York, Connecticut, and Pennsylvania, among other colonies, followed this English practice. Because Massachusetts allowed lawyers and did not distinguish between felony and misdemeanor, lawyers increasingly dominated the colony's courtrooms. Cotton Mather appears to have recognized this trend in 1710 when he wrote positively about lawyers, encouraging their commitment to "Truth and Right."[7]

Unlike English practice, a pervasive commitment to justice allowed criminal appeals in Massachusetts. If, at the conclusion of a capital trial,

the judges and jury disagreed about the verdict, either party might initiate an appeal to the General Court. Massachusetts law also allowed an avenue for redress unknown to English common law. "Everie man," the Laws and Liberties declared, "shall have libertie to complaine to the General Court of any Injustice done him in any Court of Assistants." Early eighteenth-century appeals of a lower court criminal conviction were straightforward: a denial of the facts charged or a challenge to the evidence used to convict. After the Revolution, convicted murderers commonly appealed an adverse trial verdict to the full Supreme Judicial Court. The range of possible issues on which an appeal might be made was narrow—a motion for a new trial, a motion in arrest of judgment, and a writ of error—but it was significant.[8]

The scanty records available for seventeenth-century murder trials make it difficult to assess precisely the actual process by which a murder defendant was brought to justice. Still, it is possible to glimpse pieces of due process, including the court's sometime contradictory role, both protecting and prosecuting a defendant and a lawyer's advice to a capital defendant. The fact is that until well into the eighteenth century there were only a few criminal lawyers in the colony. David H. Flaherty argues, "The use of defense counsel was well established by the 1720s at the latest." Whether or not a defendant had an attorney, it fell to the court to consider the legal effect of incriminating evidence solicited from witnesses or the defendant. Therefore, the court's rulings were intended to protect both a defendant's rights and the community's peace.[9]

John Williams, a ship's carpenter jailed for theft, escaped from the Boston jail with another inmate, John Hoddy. On their way to Ipswich, the two men apparently quarreled and Williams murdered Hoddy. Suspicious Ipswich men apprehended Williams, a stranger wearing bloody clothes. He stoutly denied having murdered anyone until a local herdsman drawn by the "roaring" of his cows to investigate a pile of stones uncovered Hoddy's naked body. At about the same time, a justice of the peace learned that Williams and Hoddy were escapees. Williams was indicted for murder and stood trial before the Court of Assistants sitting in Boston. Williams confessed to the murder, but the court, cognizant of Williams's right to due proceeding, insisted that a jury hear and evaluate all the evidence before reaching a verdict. At trial, a jury found Williams guilty and

the court sentenced him to death. Williams was hanged September 28, 1637.[10]

A small number of homicide cases that came before the Court of Assistants raised doubts about procedure and the death penalty among some observers. In 1637, for example, William Schooley was tried for the murder of Mary Sholey, a young Newbury woman who had hired Schooley to guide her to a village near Exeter, New Hampshire, but who never arrived. When Schooley returned to his home in Ipswich three days after leaving with Sholey, saying that he had led her to within two miles of her destination and left her there because she would go no farther, the magistrates questioned him but did not charge him with a crime. Several months later an Indian found the decomposed remains of the woman. Her clothing lay in a pile next to her body, suggesting to some that she had been raped before her murder. The following year, Schooley was drafted into an army raised to crush the Pequots. He complained so loudly that he was arrested. At this point, several local people volunteered "what they had heard" about Schooley and the death of Sholey, prompting another official investigation into her disappearance. Schooley was charged with the woman's murder and brought to trial in the summer of 1637.[11]

The evidence introduced against Schooley by the magistrates included information gathered from his neighbors about his past and his current life, as well as specific circumstantial evidence that was meant to convince a jury he had murdered Sholey. Jurors were told that before arriving in Massachusetts in 1636, Schooley, a London wine merchant, had left his wife—"a handsome, neat woman"—and fled from England to the Netherlands after wounding a man in a duel. They were also told that in Ipswich, Schooley continued his profligate ways, living "like an atheist," never attending church, rarely working. The court also implied that because Schooley was desperate for money to sustain his sinful ways, he sought out Sholey and offered to guide her to New Hampshire for seven shillings even though he had no experience as a guide. Schooley's statement to the magistrates about the trip was filled with errors and inconsistencies, according to the court. The spot where Schooley said he crossed the river to bring Sholey to her destination was three miles from the usual path and he placed the village of Hampton on the wrong side of the river. Schooley insisted he left Sholey a few miles from Exeter, because she refused to go

any further. The court asked why he did not feel obligated to stay with her through the night, or why he did not tell anyone in Exeter or Newbury where she was. The court did not find convincing Schooley's answers to these questions or to three other questions put to him. How did he get a blood spot on his hat? How did he come to have a scratch on his nose, the "breadth of a small nail?" And how did he acquire ten shillings? Schooley maintained his innocence.[12]

The court seemed to be aggressively prosecuting Schooley, rather than protecting his right to due process. In fact, by allowing hearsay evidence to be introduced about Schooley's non-Puritan ways, the court meant to help the jury weigh the truthfulness of his claim to innocence. The evidence suggested that because he had sinned in the past and had not mended his ways while residing in Ipswich, he was more likely to lie about the young woman's death. If, as seems likely, the court commented favorably on testimony damaging to Schooley, its action not only fit with Puritan beliefs shared by the court and the jury about how one sin could easily lead down a slippery slope ending in murder but also conformed to current legal practice. Under English common law hearsay evidence was admissible in most cases and a judge had the power to comment on the evidence to guide a jury to its factual conclusion. In other words, a lawyer probably would have been unable to prevent the court's aggressive condemnation of Schooley.[13]

A jury convicted Schooley and he was sentenced to death. He refused to confess, although the court and the clergy hoped otherwise. At his execution he was contrite, acknowledging "he had made many lies to excuse himself, but denied that he had killed or ravished [Sholey]." Governor Winthrop insisted the court had acted properly, because Schooley had left the woman in the wilderness, "in such a place as he knew she needs perish." But neither the evidence presented in court nor Winthrop's subsequent rationalization satisfied everyone. Was a cowardly or irresponsible act leading to a death the same as murder? "Some ministers and others" apparently thought not, arguing that the "evidence [was] not sufficient to take away his life." Schooley's death sentence was carried out, nevertheless.[14]

About one year later, Dorothy Talbye became the first woman executed in Massachusetts. The Talbye family, which included Dorothy, her husband, John, and four children, scratched out a meager existence on a small farm. Initially a member in good standing of the Salem church, Dorothy Talbye rebelled against her hard life. She stopped attending church and frequently and publicly quarreled with clergymen, her neighbors, and her husband. Another manifestation of her deepening rage came when she gave birth to a daughter. She named the child "Difficult," and her aggressive behavior toward her family and friends grew worse. She physically assaulted her husband and on at least one occasion tried to murder him, offenses for which she was punished in the Court of Common Pleas. But the admonitions of authority figures had no effect. She refused to cook, sew, or clean house, insisting that she was acting on God's command. She also stopped eating meat, an act Winthrop linked to what he termed her increasingly irrational behavior. Unable or unwilling to check her anger, she was excommunicated by the church and whipped by civil authorities for neglecting her duties as a wife and mother. According to Winthrop the punishment had a "reforming effect," and for a short time Talbye behaved acceptably. But by the fall of 1638, Winthrop noted, she "was so possessed with Satan that he persuaded her (by his delusions which she listened to as revelation from God) to break the neck of her own child so that she might be free of misery."[15]

Charged with the murder of three-year-old Difficult, Talbye unhesitatingly confessed. She made no mention of Satan or revelations but pathetically told the investigating magistrate she simply wanted to save the child from a life of poverty. Because the common law assumed that a defendant's guilt should not be "wrung out of himself," the Court of Assistants refused to accept into evidence the confession Talbye made under interrogation. At her arraignment, however, the court may have warned her that the truth could not be hidden from God and she was urged to plead guilty. At that point, Talbye became belligerent. She stood mute, refusing to enter a plea until the court threatened to hold her in contempt and subject her to the torture of *peine forte et dure* (placing heavy stones on the prisoner's chest until he or she agreed to enter a plea)—a practice sanctioned by English and Massachusetts law—if she did not speak. Talbye's resolve collapsed and she pleaded guilty. Speaking for the court (John Endicott, Richard Saltonstall, and Simon Bradstreet), Governor Winthrop sentenced Talbye to death. She refused to repent or to remove a scarf from her face or to

stand, "but as she was forced." Talbye was equally defiant on the day of her hanging, refusing the advice of clergymen and taunting the crowd gathered on Boston Common.[16]

Marmaduke Percy's trials for murder in 1639 stirred up more controversy about due proceeding and the death penalty. A Salem grand jury indicted Percy for the murder of his apprentice, a young man whom a grand jury found had died from a beating Percy gave him. The first trial ended in a hung jury. At the second trial, the sophisticated defense strategy suggests that legal counsel represented Percy. The defense argued that the boy's dying statements about his beating were inconsistent. On one occasion the boy said that he had been hit with a measuring stick, while on another that Percy used a broomstick. A neighbor testified that the boy told him he had split open his head as the result of a fall. The defense also attacked the boy's behavior, claiming that he had not been a good servant and implying that he deserved to be punished. At the conclusion of the trial, the "jury of life and death could not agree." At least two jurors insisted that Percy was guilty of murder, as charged. But after several more hours of deliberation, and, perhaps, a conversation with the court's judges, the "two [jurors] agreed to be silent, and so the verdict [of not guilty] was received." Winthrop, who was one of the judges, rationalized the verdict by noting that the boy was "ill disposed and his master gave him unreasonable correction," a category that did not exist in law but that fit Winthrop's belief that judges should not be bound by a rigid code of laws.[17]

The struggle between magistrates who demanded a measure of discretionary authority and a faction within the colony who believed that an explicit code of laws should govern the courts divided Massachusetts in the 1640s. Although the larger issue at stake was the distribution of power within the colony, the debate focused on how crimes ought to be punished and the legislature took an uncompromising position in favor of capital punishment. Deputies in the Massachusetts house loudly opposed the court's position as being too lenient and too likely to lead to arbitrary government. They demanded a written code of laws with specific penalties for each crime, arguing that discretionary justice would increase crime by encouraging repeat offenders. God, the deputies pointed out, made death the certain punishment for murder and Massachusetts lawmakers should follow suit.[18]

Winthrop spoke in favor of the idea of Christian equity. Judges were

to emulate God, applying wisdom and mercy to achieve justice. Permitting judges to "proportion their severall sentences, accordinge to the severall natures and degrees of their [defendants] offenses" made for a more just and humane system, he argued in the fall of 1644. He suggested, for example, that magistrates routinely distinguished between first and repeat offenders in sentencing and penalized gentlemen more severely than defendants from lower social classes. "Prescript penaltyes," Winthrop claimed, would take away a judge's flexibility to craft a punishment that fit the specific circumstances of the crime. The same held true for murder, Winthrop insisted, taking on the lawmakers' most powerful argument. The Bible was filled with examples in which murderers were not punished by death. God "variethe the punishment according to the measure and nature of the offense." Finally, Winthrop reminded the deputies of their place in the political structure and concluded, "It is yourselves who have called us to this office, and being called by you, we hath our authority from God."[19]

Winthrop's arguments were not unreasonable, but they were completely unsatisfactory to the deputies. If judges were allowed to make law by precedent not subject to public deliberation, the deputies asked, might not the people find themselves bound in the chains of slavery? There must be a law code to protect the people's liberties. Therefore, in 1645–46, the legislature appointed "severall persons out of each county . . . to drawe up a body of lawes, so we may have recourse to any of them upon all occasions, whereby we may manifest our utter disaffection to arbitrary government." While no record exists of the law's formal adoption by the legislature, the General Court ordered the code printed in March 1648 and distributed it throughout the colony.[20]

The legislature's hard line on capital punishment ended whatever possibility may have existed to reform the death penalty. To some degree, the deputies' political identity was now tied to their support for the death penalty. Their triumph over Winthrop and the court had solidified their argument that the Bible allows no flexibility when it comes to punishment for murder. For lawmakers, discretionary justice was simply another word for arbitrary government and they rejected it. Therefore, the Laws and Liberties of Massachusetts stipulated that "if any person shall commit any wilfull MURTHER, which is Man slaughter, committed upon premeditate malice, hatred, or cruelties not in a mans necessary and just defense, nor by meer casualty against his will, he shall be put to death."[21]

Although the law and penalty for murder was fixed in 1648, murder trials continued to stir up controversy over who would control the courtroom. Judges and juries struggled to differentiate their roles in the legal process. Juries wanted to be free to say what the law meant or to mingle law with fact in arriving at their decision. Judges insisted it was their function to say what the law was and that jurors should be limited to determining the facts. A murder trial heard by the Court of Assistants in the spring of 1653, for example, led to an open clash between judges and jurors and to the first appeal of a murder conviction in the colony's history.[22]

John Betts, a Cambridge farmer, was indicted for the "horrible and wicked" murder of his servant Robert Knight, who died August 28, 1652, allegedly from blows delivered by Betts and from neglect during his subsequent "sickness." Several witnesses told Judge Increase Nowell, one of the founders of the Bay colony and an elder of the First Church of Boston, who gathered testimony in the case, that Betts abused Knight. Thomas Pierce, a man about sixty years of age, testified that he saw Betts hit Knight, knocking him to the ground. A twenty-seven-year-old carter, Richard French, told Judge Nowell that on another occasion he saw Betts strike Knight with a stick he "held in both hands and with all his force as hard as he could . . . he gave him at least six blowes so that Robert began to cry out." Richard's father, William, verified his son's testimony, adding that Betts had said that he beat Knight because he was lazy. And Renew Andrews stated that Betts, whom she described as a "furious man," had punished Knight by tying him to a board in an upright position, where he left him for several hours after Knight complained that his back hurt. While Knight was "trussed up," Betts pushed excrement into the servant's mouth and punched him in the face. In his deposition, Dr. George Alcock said that at Goodwife Betts's request, he examined Knight and found that he had a dislocated vertebra. Alcock advised Knight not to do any heavy work. On a follow-up visit, Alcock found Knight lying without food or drink in a small, unheated room. He was partially paralyzed.

Captain Daniel Gookin, a Cambridge magistrate, and Justice Robert Bridge visited Knight before his death. They warned him that the Lord would punish him if he were faking. Weak and grimacing with pain, the young man talked freely and convincingly, giving details about how and when Betts had beaten him. Knight died two days later and Betts was charged with murder.

At trial, other witnesses told a different story. Thomas Abbott, another of Betts's young workmen, told Judge Nowell that Knight was lazy, that he had no interest in farming, and that he often feigned illness. Abbott also insisted that the blows Betts gave Knight were harmless. Likewise, testimony from two other workers, Goulding Moore and William Manning, cast doubt on the prosecution's case.

The jury found Betts not guilty, apparently because they did not think an explicit link between the blows Betts gave Knight and the servant's death had been established. Because the jury's verdict was contrary to the judge's instructions on the law, the court refused the verdict and appealed the case to the General Court. It seems unlikely that Betts's guilt or innocence alone motivated the court to take this unusual step. At issue was the popular belief that a criminal jury had the right to decide matters of law and fact. This perception clashed with the court's argument that a judge had the sole right to decide the law and a jury the right to determine the facts and to receive the law from the court. There were two arguments implicit in the court's position. First, if a jury ignored the judge's instructions about the law, a defendant's right to due process was violated. Allowing juries to determine the law meant its meaning would fluctuate from case to case and a defendant would have no solid basis on which to make an appeal. Second, the court insisted only judges had the skill and the experience to clarify questions of law.[23]

The context within which the General Court heard the Court of Assistants' appeal in Betts was the struggle over discretionary justice that had divided the court and lawmakers in 1648, five years earlier. Not surprisingly, therefore, the legislature sided with the jury, finding Betts not guilty of murder. At the same time, the General Court did conclude that there was a "strong presumption and great probabilities of his guilt of so bloody a fact." Therefore, the lawmakers sentenced Betts to stand for one hour on the gallows wearing a rope around his neck, to be whipped, to pay court costs, and to be on probation for one year.[24]

In the two decades following the controversial Betts decision, the court heard seven murder cases, all of which brought to trial young, rootless workingmen, several of whom seemed to be angry about their low social status. Gregory Cassell, a sailor, felt bullied by the master of a fishing boat on which he worked. While ashore in the fall of 1657, Cassell hit the captain in the head with a hammer, killing him. No one saw the fatal fight,

but Cassell's shipmates placed him at the scene of the crime and a grand jury indicted him. At his trial, Cassell argued what seems to have been his wish—that he and Captain Matthew Kinnage were "loving friends," not merely master and servant. Therefore, it seems the young sailor was especially aggrieved by Kinnage's alleged rough treatment of him.[25]

Robert Driver and William Favor also stood trial for murdering their master, Robert Williams, a fisherman, whose position of power they resented. Both pleaded not guilty and neither exercised his right to object to any of the jurors who were summoned to hear the case. Despite their protestations of innocence, juries found both men guilty in 1674 and the court sentenced each to be hanged. According to custom, a condemned culprit was brought to the meetinghouse to be made the subject of a clerical discourse. Following his sermon, Rev. Cotton Mather walked with the men to the gallows. Along the way, each man confessed to committing murder. Favor told Mather that he knew now that pride was the cause of his downfall. While he worked for Williams, Favor told Mather, he vainly had thought to himself: "*I am Flesh and Blood as well as my Master, and therefore, I know no Reason why my Master should not obey me, as well as I obey him.*" Driver added that his first step toward the gallows was not industriously following his calling as a servant, a confession Mather and the magistrates welcomed as affirming the necessity of a hierarchical social structure.[26]

The blood and thunder of King Philip's War and the Glorious Revolution made murder a political as well as a social problem and in the process contributed to a significant increase in the number of murders committed in 1675 and 1676 and in 1688 and 1689. Although the court was under enormous pressure during these times to abandon procedures guaranteeing individual rights, the justices held firm to due process guarantees protecting the accused. During King Philip's War, a large aggressive faction hostile to all Indians pushed the court to do its hateful bidding. In August 1675, for example, Captain Samuel Mosely, a popular and successful army officer, dragged before the court thirteen Indians who he charged had murdered William Flagg, a soldier in Marlborough. John Indian, Joseph Spoonhaut, Little John Indian, and ten others were indicted and tried for murder. At trial, however, Judge Daniel Gookin, who also served as superintendent of the Praying Indians, and Justice Thomas Danforth spoke critically of Mosely's evidence against the Indians. His testimony and that

of some Marlborough residents, the court observed, was filled with a general hatred for Indians but contained few facts linking the Indians arrested to Flagg's murder. A jury found all but Little John Indian not guilty. Aware of the hostility with which their verdict would be greeted, the court moved cautiously. Those Indians found not guilty were released under cover of darkness, just hours before a mob intending to lynch the Indians arrived at the courthouse. Disappointed at not finding their prey, at least some in the crowd threatened to hunt down the justices of the court.[27]

In the summer of 1676 the court and Captain Mosely clashed again. Sometime the previous fall the government had placed a group of Indians under the personal supervision of John Hoar, a lawyer who came to Concord in 1660. He built a house for the Indians in which they worked during the day and were locked up at night. Some local people who resented this arrangement asked Mosely to come to Concord. He and his soldiers arrived on a Sunday and went to the meetinghouse, where Mosely harangued the congregation, urging them to follow him to the Indian workhouse. He had no warrant or commission to justify his actions, but at the workhouse Mosely took charge, bullying Hoar and denying his authority to protect the Indians. In the morning, Mosely seized the Indians and marched them to Boston, from where they were sent to Deer Island, an open-air prison that turned into a death pen the following winter. Mosely had seized the Indians living peacefully in Concord without warrant and they were imprisoned without criminal cause or a trial. Yet, no advocate stepped forward to protect the Indians and the court watched silently.[28]

Although this incident makes clear the limitations of the court's power in the face of popular hostility, hatred did not completely undermine the colony's legal system. A few months after Mosely's highhanded action, Stephen and Daniel Gobble, who lived south of Walden woods, Nathaniel Wilde, and Daniel Hoar, John's son, were arrested for the murder of three Indian women and three children who were camped at Whortleberry Hill in nearby Lincoln. The men were indicted by a grand jury, tried before the court, found guilty by a jury, and sentenced to death in September 1676. Only the Gobble brothers were executed. Stephen walked to the gallows on a raw, cold day in late September. Five days later, Daniel was "drawn in a cart upon bed-clothes to [his] execution."[29]

On the same day Daniel Gobble was executed, four Indians were hanged on the Boston Common, bringing to fifteen the total number that

were put to death during the bloody summer of 1676. Two other Indians were executed October 12. Those Indians who survived the war lost their independence and autonomy. By law, all Indians who were not family servants were required to live in one of four towns, where they would be under constant observation. White guardians replaced Indian magistrates as chief judicial officers in the villages. In the decades after King Philip's War, when wartime passions had cooled, Indians who came before the court were treated fairly.[30]

Thirteen years after King Philip's War the people of Boston ousted the colony's royal governor during the Glorious Revolution. Eager to restore law and order, the magistrates took aim at the gangs of pirates operating against local shipping. Among other outlaws, Captain Thomas Pound, a crew of thirteen men, and the ship's sailing master, Thomas Hawkins, were after quick, if prosaic, profits. On August 8, 1689, Pound's pirate band forcibly boarded the ketch *Mary* at anchor in Boston harbor and seized its cargo of fish valued at £60. About a week later, they assaulted the *Merrimack* while she lay at Homes Hole, Martha's Vineyard, and seized the sloop *Good Speed*. Satisfied with his plunder, Hawkins went ashore at Cape Cod while his mates sailed for the Elizabeth Islands and the possibility of more plunder. On September 30, the governor and council commissioned Captain Samuel Pease to put to sea at once in an armed sloop with a crew of twenty to capture the pirates. Four days later, Captain Pease discovered the pirates in Vineyard Sound. During the fight that followed, Captain Pease was shot and killed. Eventually, however, the superior firepower of the colony's warship caused the pirates to surrender. Hawkins and thirteen crewmen, including Thomas Johnston, a seaman identified as Pease's assailant, were brought to Boston and indicted for murder and piracy, both capital offenses.[31]

Johnston was tried separately from his shipmates, who were arraigned and tried in two groups. A jury, basing its decision on sworn testimony from Johnston's captors and his shipmates, found Johnston guilty of murder. Of the first five men tried for Pease's murder, four were found guilty and one, Edward Browne, was set free. At an arraignment for Pound, Hawkins and the remaining seven crewmen, all but William Coward pleaded not guilty to the charge of murder. Coward refused to take the oath required of witnesses or to plead to the indictment. He was sent back to prison and warned that he would be held in contempt if he did not comply with the

court's order. When Coward refused a second time to cooperate, the court entered a guilty plea for him and ordered the trial to proceed. A jury found all seven men guilty as charged and they were sentenced to death, bringing the total number to be hanged on Boston Common to fourteen.[32]

In fact, only Johnston was hanged. The other convicted men successfully petitioned Governor Sir William Phips for clemency, a decision that caused Justice Samuel Sewall considerable anxiety. Sewall had visited the men in jail, "prayed with them," and signed a petition arguing a point of law for at least one of the convicted pirate-murderers. Still, he confided to his diary he felt pushed into the decision by one of his colleagues on the bench, Justice Wait Winthrop. "Some" on the court, Sewall wrote in January 1690, "thought Hawkins, because he got out of the Combination before Pease was kill'd, might live as well as Coward; so I rashly signed." The governor's reprieve was delivered to Hawkins just before he was "to be turn'd off . . . , which gave great disgust to the People," Sewall added.[33]

It would appear that Governor Phips distinguished piracy (at least when carried out by local men) from murder and determined to punish only the latter crime, for which Johnston was found solely responsible. Phips also may have been swayed by the court's postconviction argument for reversing the murder convictions of Hawkins and Coward. Although a bit murky, this process sheds light on several aspects of colonial criminal procedure and on how the court arrived at its decisions. First, in a search for the truth the criminal justice system relied heavily on oaths. It was assumed that God-fearing witnesses under oath told the truth and, likewise, that it made no sense for criminal defendants to be sworn because they would lie if guilty. Aided by the fact there was no rule to encourage jurors to weigh the credibility of witnesses, the pirate-witnesses who testified against Johnston may well have been motivated primarily by self-interest. It was to their benefit to name Johnston as the sole gunman responsible for murdering Pease. At the same time, the pirate-witnesses gained nothing by naming Coward. It seems reasonable to assume these same witnesses did not implicate Coward either in the murder or in the piracy and, therefore, the court overturned his conviction. Since the court might have ordered Coward to be pressed for refusing to plea, his standing mute was a risky—though ultimately successful—strategy. Second, it seems clear that at least Hawkins received invaluable and sophisticated legal advice. Hawkins's alibi that he was ashore on Cape Cod—that he had "withdrawn from the

Combination"—before Captain Pease was murdered certainly saved his life. Third, to arrive at its decision the justices engaged in a spirited internal postconviction debate about the law. There is no reason to think other controversial or complex cases did not provoke similar discussion within the court. Fourth, the fact that Justice Sewall grumbled, but joined in the decision, suggests that the court believed in consensus as a means of enhancing its power. Finally, it is plain the court treated the death penalty with great care, tempering the severity of the law with mercy whenever uncertainty crept into the procedure.[34]

Trial juries provided another source of flexibility in the criminal justice system. Grand juries normally brought an indictment for homicide whenever they considered a nonaccidental death, leaving it to the trial jury to determine whether the crime was homicide, manslaughter, or "misadventure." For this reason, all of the prosecutions for homicide that came before the court from 1630 to 1692 were by grand jury indictment. In addition to the fourteen Indians who were illegally dragged before the court by Captain Mosely, and the fourteen pirates, thirty-two other men and three women were indicted for murder during this period, bringing the total to sixty-three. Seven men and women who were charged with murder eventually were convicted of a lesser offense, usually manslaughter, thirteen were convicted, and sixteen were acquitted, not including the fourteen Indians. Of the thirteen persons found guilty of homicide, all were men and all but one—Lodwick Fowler, whose 1673 murder conviction was overturned by the General Court—were hanged. Nearly three times as many men (twenty-three) as women (eight) were homicide victims.[35]

One-third of the English men and women indicted for murder worked with the person they were accused of killing. Masters who were accused of murdering their servants were without exception acquitted, but servants indicted for murdering their masters were hanged for the crime. Sailors seemed especially prone to violence, lending support to the popular belief that young, rootless men were likely to be undisciplined. In peacetime, cross-cultural conflict was not an important cause of violence in seventeenth-century Massachusetts. With the exception of the three Indian women and their children who were massacred by young white men during King Philip's War, there was only one case in which a white man was tried for the murder of an Indian. He was found not guilty. On two occasions, Indian men were tried for murdering other Indians and they

too were found not guilty. The charge of murder brought against Robin, an African American slave accused of killing a white man in 1689, was reduced to manslaughter.[36]

These data sustain two conclusions about homicide trials in seventeenth-century Massachusetts. First, juries were not quick to convict homicide defendants. Men and women, Indians and African Americans all seem to have received fair trials according to contemporary due process. Due process included a grand jury indictment that was made available to the defendant, legal representation, a jury trial, the right to challenge potential jurors, the right to confront witnesses, the right to have evidence presented, and the right of appeal. Second, from 1677 to 1692 juries tended increasingly to return a verdict of manslaughter rather than murder. Only four men were convicted of homicide and hanged during the last fifteen years of the Court of Assistants' existence.[37]

The Salem witch trials, of course, spilled plenty of blood. Before the colony's new charter authorized the creation of the Superior Court of Judicature (SCJ), a special Court of Oyer and Terminer had sent twenty-two people convicted of witchcraft to the gallows. While there is no question that the justices appointed to the SCJ believed in witchcraft, they eventually stopped the craze and worked to restore credibility to the colony's legal system. In particular, Justice Thomas Danforth, who joined Justices John Richards, Wait Winthrop, Samuel Sewall, and Chief Justice William Stoughton on the new court, was known to "utterly condemn" the witchcraft court proceedings. By the spring of 1693, Justice Danforth's condemnation and Justice Sewall's doubts ended prosecution for witchcraft. During the Superior Court of Judicature's initial session in Suffolk County, for example, Captain John Alden, who had been in hiding, was discharged from "suspition of Witchcraft," and a month later in Ipswich, five women indicted for witchcraft were tried and found not guilty.[38]

The justices of the new SCJ were old friends who usually rode together on circuit. Each term they held court in Boston, York, Portsmouth, Cambridge, Worcester, Plymouth, and Barnstable. Judges and lawyers often lodged at the same inn or at the home of friends. At the end of a long ride or a day in court, they ate, drank, and talked with comfortable familiarity. In December 1693, for example, Justice Sewall rode from his home in Boston with Justice Danforth and Chief Justice Stoughton to attend court in Salem. Arriving around eight o'clock in the evening, the three ate supper

at the Blue Bell Tavern before retiring. The court cleared its docket the following day, but a "great Storm of Rain" kept the justices in Salem another day. That night, Judge Sewall and his colleagues, together with the attorney general, the sheriff of Essex County, and attorney Thomas Newton, among others, had dinner at Stephen Sewall's home.[39]

With but small variations, the court's life while on circuit remained the same until the American Revolution. Each term a small ceremony honoring the court was repeated as it moved throughout the province. As the justices approached a town in which they were to hold court, the sheriff and other local magistrates rode out to escort the justices to the courthouse. On Sunday, the justices would attend church, adding a bit of pomp to a town's life, and sometimes winning praise from a country clergyman. In York, Rev. Samuel Moody said that of the "present four justices of our Court, that we had not in America a Court more accomplished." When the court completed a circuit and returned to Boston, Chief Justice Benjamin Lynde added the custom of "treating" the other justices. On January 26, 1732, for example, the court gathered at the Orange Tree Tavern in Boston to enjoy "ale, cakes, cheese and brandy punch."[40]

Above all, however, a commitment to the "right discharge of duty in Court where the lives, libertys and estates of [the people] are ultimately determined" bound together the justices, the law, and the people. A capital trial revealed how important that relationship was. There was no greater responsibility than to "Judge in the solemn and awful tryal of a capital crime," Chief Justice Lynde instructed a jury. He urged the jurors to "discover by sufficient evidence the horrid fact and circumstances as to satisfy your consciences of the truth of the indictment." If the jurors' verdict was guilty, their private deliberation was played out in a grim public drama.[41]

Executions in Massachusetts followed a strict pattern, with the convicted, the clergy, and the crowd each playing an important part. After the court passed a sentence of death, ministers would visit the condemned prisoners and encourage them to see the error of their ways, to seek God's forgiveness, and to make a public confession. On the Sunday prior to the execution, a sermon was preached in the meetinghouse closest to the jail, the condemned sitting in the front row for all to see and to judge. Some prisoners rode from the jail to the gallows in a cart, others chose to walk. A clergyman accompanied the condemned, initiating a dialogue about the possibility of salvation. Ideally, the condemned read their confessions from

the gallows, emphasizing how they had slid from sin to murder. James Morgan, for example, blamed his habits of "Sabbath-breaking, Lying, Drunkenness, and despising the Word of God" for leading him to murder a man during a drunken brawl. But not everyone was penitent. As we learned earlier, Dorothy Talbye refused to ask for forgiveness for murdering her daughter and took off the "cloth which should have covered her face, and put [it] between the rope and her neck."[42]

For the people who gathered to watch an execution, these, or other, gestures of defiance or conciliation made by the condemned were the most important part of the ritual. But whatever was said or done, the ceremony was powerful and sometimes attracted thousands of people. Justice Sewall was astonished by the size of the crowd that came to the Common to see seven pirates hanged in 1704. Because the execution took place on the Boston side of the Charles River flats, "the River was cover'd with People," packed into more than 150 boats. "When the Scaffold was let sink," Sewall wrote, "there was such a Screech of the Women that my wife heard it . . . a full mile from the place." Several months later, Sewall confided to his diary: "Last night I had a very sad Dream that held me a great while. I was condemn'd and to be executed."[43]

However carefully the court administered a trial, the jury, popular opinion, and the court did not always agree about whether the death penalty was just. During a Council meeting in 1709, for example, Justice Sewall told the governor the court had sentenced two Indian men to death. A jury found Josias guilty of murdering his wife and six months later Joseph Tanqua was sentenced to death for killing his co-worker. Colonel Samuel Vetch overheard Sewall's conversation with the governor, and to Sewall's chagrin, Vetch insisted the men had been condemned unjustly because there was no malice aforethought. And, when Eliza Ames and her son were found not guilty of murdering his wife, Justice Benjamin Lynde Jr. complained to his diary that the verdict was "against the mind of three in four of us Judges." But the justices had to be content with private grumbling whenever they disagreed with a verdict, because the 1692 charter no longer allowed the court to appeal a jury verdict.[44]

Disagreement about the court's verdicts suggests that reason and law were only a part of the fabric of everyday life in seventeenth- and eighteenth-century Massachusetts. The law colored how jurors, judges, and lawyers perceived the world, but there existed for each a tension between a rational

legal culture and what David Hall has called the "world of wonders." Laymen and judges alike believed that supernatural forces seeped into daily life. For example, the court used the folk belief of "murder will out"—that God knew all their secret crimes and by supernatural intervention could bring the guilty person to state the truth—when a homicide suspect would not confess his or her guilt. The suspect was ordered to touch the corpse on the belief that blood would flow from a dead body touched by a guilty person. When a Weymouth woman suspected of murdering her husband approached his body "he bled abundantly," John Winthrop reported in 1644. And, as late as 1735, the test was used in Falmouth, Maine. Patience Boston, a black woman servant who in 1733 was acquitted in the death of her own child, initially confessed to murdering her master's eight-year-old grandson, then, during the inquest, had second thoughts. However, "when the jury sat on the Body, I was ordered to touch it," she later wrote. "This terrified me, lest the Blood should come forth . . . and I resolved in my Heart that I would be Witness against my self and never deny Guilt." Based on her confession, Boston was tried, found guilty, and hanged.[45]

The homely wisdom on which this test rested did not replace due process. The court carefully limited the use of this folk belief. Although the Weymouth woman was said to have failed the touch test during a pretrial hearing in 1644, she did not confess and a grand jury chose not to indict her for lack of substantive evidence. The prospect of taking the test did frighten Boston into confessing, even though the court did not view the results as proof of guilt or innocence. It does seem clear, however, that failing the test established probable cause, leading to an aggressive investigation and perhaps greater pressure on the defendant to confess. In these ways the court balanced magic and reason to protect an individual's rights.[46]

At age seventy-four, Chief Justice Sewall, who was the last justice to bridge the world of legal realism and of magic, made his final eastern circuit in 1726, setting out in April when "the swallows unanimously and cheerfully proclaim the Spring" and returning home to Boston in late May. Justice Benjamin Lynde, the first professionally trained lawyer to be appointed to the court in 1712, accompanied Sewall and in 1728 succeeded him as chief justice. Born in Salem in 1666, Lynde graduated from Harvard College in 1686 and studied law in the Middle Temple, London, from 1692 to 1697 before beginning the practice of law in Massachusetts. A capital case was included in the last group of trials heard by Sewall and

Lynde. In York, Joseph Quasson, an Indian from Cape Cod serving with a Massachusetts infantry regiment in Maine, was indicted for murdering a fellow soldier during an argument. After hearing the evidence, a jury found Quasson guilty and Sewall read the sentence of the court: "the said Joseph Quasson shall suffer the pain of death." On his first circuit as chief justice, Lynde also heard a homicide case. John Richardson, a Marblehead fisherman, was indicted for the murder of Peter Green, who was shot "through the trunk of the body" with a musket. Following a day-long trial, the jury returned a verdict of not guilty. With two exceptions, the Lynde court heard at least one homicide case each year he served as chief justice, from 1728 until his retirement in 1745. Of the twenty-six indictments for murder brought before the Superior Court of Judicature between 1728 and 1744, juries convicted six homicide defendants, one of who was reprieved by the governor.[47]

The majority of murder trials heard by the Lynde court, like those of the preceding Sewall court, were ordinary cases involving Indians or African American slaves or men who murdered their wives or a fellow worker. Chief Justice Lynde sentenced to death Joseph Fuller, who ran a ferry between Falmouth and Martha's Vineyard, for murdering his wife in 1730 and three years later, Julian Indian, a runaway Braintree slave, for stabbing to death John Rogers, who had hoped to claim a reward for capturing the slave. Based on circumstantial evidence, to which neighbors alerted authorities, Amaziah Harding was convicted in 1734 of murdering his wife, Hanna. Amaziah insisted his wife of twenty years died of natural causes while asleep in her bed. But a neighbor woman whom he summoned to prepare Hanna's body for burial knew he had been an abusive husband and noticed bruises and other signs of a potentially fatal beating. She refused to do anything until the coroner examined the body. Harding coldly remarked he was "well satisfied" his wife was dead, adding, "She had been a plague to him." The coroner concluded that Hanna died from a severe beating and a jury concurred. Lynde sentenced Harding to death. Likewise, a Barnstable jury found Robert Nason, a Nantucket Indian, guilty of killing his wife in 1736 and he was hanged on July 14, 1736. Edmund Browne was hanged on August 7, 1740, for the axe murder of David Bryant, another laborer with whom he fought during a raucous, hard-drinking party. In the fall of 1744 Edward Fitzpatrick, an agricultural laborer, was hanged in Worcester for murdering and robbing his employer.[48]

A handful of homicide cases heard by the Lynde court during the second quarter of the eighteenth century either challenged existing law or introduced changes in criminal procedure. John Ormsby's counsel, for example, argued that his client was not criminally responsible for the murder for which he was charged. Ormsby pleaded not guilty by reason of insanity. His counsel contended that merely reciting the circumstances leading to the murder indictment against Ormsby showed he was not rational. Jailed in the fall of 1733 for using a fork to randomly assault people walking past his Boston barbershop, Ormsby used a pewter chamber pot to beat to death his cellmate, Thomas Bell. Chief Justice Lynde's instructions to the jury at the conclusion of the trial would have included the seventeenth-century English jurist Sir Matthew Hale's definition of legal insanity. For a defendant to be exempted from punishment on the grounds of insanity, he must be "totally deprived of his understanding and memory and doth not know what he is doing, nor more than an infant, than a brute or a wild beast." Ormsby's jury decided his lucid behavior before and after his violent acts showed he was "not wholly destitute of the use of reason" and found him guilty of murder. Lynde sentenced him to death. Over the court's vigorous protest, however, Governor Jonathan Belcher reprieved Ormsby.[49]

The first recorded use in Massachusetts of the English doctrine of benefit of clergy occurred during William Wheeler's murder trial in 1732. Originally a privilege a clergyman might claim once, the plea became a means by which the court showed mercy for certain crimes punishable by death other than treason or murder if the defendant could read or recite a verse from the Bible. When a jury found Wheeler guilty of manslaughter, though he had been indicted for murder, he sought and received benefit of clergy. Within a week, the Council sent to the House a bill removing benefit of clergy. The House refused to pass the bill, however, and benefit of clergy won acceptance in Massachusetts. Among other lawyers, James Otis promptly put the new motion to use for his client Jeremiah Ralph. Ralph pleaded not guilty to the charge of murder in May 1733, and a jury returned a verdict of guilty of manslaughter. After the verdict was recorded, "the prisoner (by Mr. James Otis his attorney) moved that he might be admitted for the benefit of Clergy, which was granted him by this Court." Ralph was then "marked with the Letter T on the brawn of his left Thumb.'" The burning served as punishment and as permanent evidence that the convicted person had received his one-time privilege. At least five more persons successfully pleaded benefit of clergy during the next six years.[50]

The first successful use of the motion in arrest of judgment in a capital case came in 1745 in a case involving two Englishmen, John Fowles and John Warren, who were part of a press gang. Under the authority of a warrant issued by the Suffolk County sheriff, they hoped to impress fifteen men. Roaming the streets of Boston, the press gang tangled with a group of local sailors. During the struggle, two Boston sailors were killed. A grand jury indicted Fowles and Warren and they were brought to trial on February 18, 1745. After a jury trial lasting more than ten hours, the two men were found guilty of murder and sentenced to death. Their attorney moved in arrest of judgment, arguing that the indictment did not specify the day on which the murder occurred or specifically charge Fowles or Warren with the blows that killed the sailors. The court heard arguments for and against granting the motion for two full days before deciding to arrest judgment.[51]

While Lynde served as chief justice, he also heard three homicide cases that exposed the ugliness of New England slavery. In October 1736, Captain Jonathan Barnes was tried before a special admiralty court, of which Lynde was a member. The story presented to the court by William Shirley, advocate general of the Admiralty Court, was simple and brutal. En route from Guinea to Boston with a ship packed with slaves, Captain Barnes determined that water had to be rationed. One black slave repeatedly called out "watro," and after other methods to silence the man failed, Barnes murdered him. John Bowles, the captain's lawyer, argued that Barnes's brutality was not motivated by malice but by his concern for the well-being of his entire ship. The "negro boy Bawman's" cries for water might well cause unrest and anger among the other slaves. If Bowles's first argument was covered with a thin hypocritical veil of humanity, his second was stripped of pretense. He contended that a slave was mere cargo, and as master of the cargo, Captain Barnes "might do what he would with him, even to taking away his life." The court rejected both arguments and found Captain Barnes guilty of homicide.[52]

Two additional cases of racial violence came before the SCJ in 1737 and 1741. Captain Samuel Rhodes was ordered by the court to answer questions about the death of a "Negro man named Aava," whom the captain

had ordered tied "to a Gun and whipt by four other Negroes." Within an hour after he was cut loose, Aava died. Although Captain Rhodes defended his actions as nothing more than normal discipline, the court ordered him to post a bond and to appear before the Massachusetts Vice-Admiralty Court. Four Boston men—Benjamin Eaton, a hatter; Samuel and Benjamin Sumner, laborers; and Ambrose Searle, a saddler—were indicted in 1741 for the murder of London, a slave belonging to Rev. John Walley. The circumstances and cause of London's death were argued "all day till sundown." The following day, the jury found the men guilty of homicide "by misadventure." The court's sentence was lenient. Each man was required to post a bond for future good behavior.[53]

Despite these and other episodes of racial violence, the people of Boston were shocked and fearful in 1755 when two black slaves were charged with petit treason for the murder of their master, the Charlestown merchant John Codman. It was believed that Mark and Phillis, the accused slaves, were neither overworked nor ill-treated. Like many other New England slaves, both had been educated and had considerable freedom of movement, Mark frequenting the taverns of Charlestown and Phillis crossing the Charles River to visit friends in Boston. Yet, early public information about the crime suggested that Mark and numerous other slaves hated all whites, giving rise to the fear that Codman's murder was one episode in a widespread conspiracy to murder whites generally. Hoping to head off lawless popular revenge against black slaves generally as had occurred in New York City a decade earlier, Attorney General Edmund Trowbridge conducted a careful investigation.[54]

Codman owned several slaves, employing them as laborers, artisans, and house servants. Mark chafed under Codman's discipline and planned to murder him, thinking that a new master would allow him more freedom. Mark searched the Bible for a method of murdering his master without inducing guilt. He concluded that no sin would be committed if the murder were carried out without bloodshed. This erroneous interpretation Mark folded in with a bit of misinformation—that sometime earlier a Boston slave had used poison to murder his master and had escaped detection—and concocted a scheme to poison Codman. To carry out his plan, Mark sought the help of several other slaves.

For the poison he wanted, Mark eventually went to Robin, the slave of William Clarke, an apothecary, to obtain arsenic, and to Essex, a black

servant who had access to "black lead," or graphite, used by Charlestown potters, which Mark believed would, like the arsenic, be fatal if ingested. To administer the poison, Mark recruited Phillis. She made a solution using arsenic and black lead and mixed it into Codman's food and drink. Codman died on July 1, 1755. A coroner's jury found that Codman had died from arsenic poisoning and an official investigation was launched immediately.

Mark was questioned but released. It seems clear, however, that the attorney general suspected Mark and set about to build a case against him. On July 12, a slave named Quaco, "the nominal husband" of Phoebe, a friend of Phillis's, was interrogated. Quaco told Justice of the Peace William Stoddard that when he learned Mark wanted Phoebe to join in the murderous plot, he told his wife not to take part. While Quaco was being questioned, Robin was arrested and jailed. He apparently also provided specific information implicating Mark and Phillis. Ten days later, the two slaves were questioned, first Phillis and then Mark.

Phillis freely spelled out to Trowbridge and Thaddeus Mason, Esq., the details of the plot to murder Codman. She said it was Mark who got the potter's lead from Essex and Mark to whom Robin brought the poison and Mark who gave Phoebe a vial of arsenic that she delivered to Phillis. She and Phoebe mixed the deadly potion, hiding the vial in the kitchen until Codman called for drink. Although she said she felt "ugly" doing it, Phillis took responsibility for mixing poison into Codman's oatmeal and chocolate drink. Phillis added that after Codman's death, Robin came to Charlestown to talk with Mark.

Armed with this information, Trowbridge questioned Mark again. Mark denied he had masterminded the plot to murder Codman, claiming he had learned of the murder only after Codman was dead. Mark admitted he had carried poison from Robin to Phoebe, but he insisted he had not known that she and Phillis intended to use it to murder Codman. Yes, he told Trowbridge, he had asked Essex for some potter's lead, but his purpose was wholly innocent. He merely wanted to learn if it would melt in a fire. Finally, Mark gave the attorney general a piece of information clearly meant to deflect suspicion from him. The day before Codman died, he told Trowbridge, Phillis "got to dancing and mocking master and shaking herself and acting as master did in the Bed."

Trowbridge was not fooled, and on the first Tuesday in August 1755, a

grand jury indicted Mark and Phillis for petit treason, defined as a breach of private or domestic faith or allegiance between a wife and husband or a servant and master. A man convicted of petit treason was to be hanged in chains and his body displayed on a specially built iron gibbet; a woman was to be burned at the stake. Chief Justice Stephen Sewall presided at the trial at which Quaco and Phoebe testified for the prosecution. On advice of counsel, Mark and Phillis pleaded not guilty, but the evidence presented by Attorney General Trowbridge was overwhelming and a jury found the two slaves guilty. Sewall sentenced Mark and Phillis to death.

The *Boston Evening Post* printed an account of their executions:

> Thursday last, in the Afternoon, Mark, a Negro Man, and Phillis, a Negro Woman, both servants of the late Capt. John Codman, of Charlestown, were executed at Cambridge, for poisoning their said Master. The Fellow was hanged, and the Woman burned at the Stake about Ten Yards distant from the Gallows. They both confessed themselves guilty of the Crime for which they suffered, acknowledged the Justice of their Sentences, and died very penitent. After execution the Body of Mark was brought down to Charlestown Common, and hanged in chains, on a Gibbet erected there for that Purpose.[55]

The gruesome public punishment meted out to Mark and Phillis neither prevented similar crimes nor undermined New England slaveholders' naive belief that they were able to understand and control the black people they enslaved. Just eight years after Mark's and Phillis's executions, a sixteen-year-old black slave named Bristol murdered Elizabeth McKinstry, a Connecticut clergyman's daughter living with her brother and sister-in-law in Taunton. Early on the morning of June 4, 1763, the McKinstry's daughter discovered Elizabeth lying in a pool of blood. Her head was split open and one side of her face was horribly burned. She was still alive but unconscious. She "languished till the Evening of the next Day without the least Appearance of Reason and then died," the *Boston Evening Post* reported. By chance, Robert Treat Paine, a lawyer and family friend, arrived in Taunton just as news of the crime became public. He went immediately to the McKinstry home, which he found "full of curious Spectators, Confusion, Anxiety and distress."[56]

After assaulting McKinstry, Bristol fled to Newport, Rhode Island, "riding off on his master's horse on a full Gallop." Late that afternoon he was

captured and brought back to Taunton. At the coroner's request, Paine took charge of the inquest. Paine knew Bristol, describing him in a newspaper story as "an exceeding good Servant, remarkable for his obsequious Behavior." During questioning at the inquest, Bristol, "appear'd sullen and denied the fact," but "strong evidence" led a grand jury to indict him for McKinstry's murder. About twelve hours later he confessed privately to Paine, saying an older slave had threatened to kill him unless he murdered McKinstry.[57]

Paine represented Bristol at trial held October 13. The McKinstry's young daughter testified that she, Elizabeth, and Bristol were the only persons awake in the house when she put some flat irons in the fire. While the irons heated she went upstairs to gather the clothing she intended to press. Returning to the kitchen she noticed one of the irons missing and the other lying on its side. At the same moment she heard a "bitter Groan," walked toward the parlor, and found a trail of blood that led to Elizabeth's body at the bottom of the basement stairs. Other witnesses testified they saw Bristol racing away from the McKinstry house shortly before the alarm was sounded. A jury found Bristol guilty of murder and Chief Justice Thomas Hutchinson pronounced a sentence of death. Bristol was "to hang by ye neck till you be dead." Paine asked for, and won a brief postponement of the execution date, although he was unhappy that Bristol showed no emotion when he was sentenced to death. Standing on the gallows, however, Bristol apologized to the McKinstry family, acknowledged his guilt, and admonished "those of his own Colour" to obey their masters. He recited the Lord's Prayer and was "turn'd off."[58]

Following Bristol's execution Paine wrote an introduction to a sermon preached on the occasion by his friend, Rev. Sylanus Conant. Paine's analysis of the murder was free of racism, but he did sound a warning about the treatment of slaves. He began by describing the context within which murder occurred, highlighting the "alarming frailities of human Nature," and expressing how much "Horror, Pity and Indignation" this "tragic scene aroused." Bristol was brought to New England from Africa when he was about eight years old and, according to Paine, he "was treated with all the Tenderness and Instruction that could be desired, and he always appeared happy in his Situation." For this reason, Bristol's murder of Elizabeth "fills us with Astonishment." It is a "striking Instance of the Weakness of human Nature." Although Paine did not distinguish Bristol from other sinful men,

he argued that slaves needed to be treated differently. "Those who have the Care of Negroes," he said, "[must] be very vigilant in removing the Prejudices of their barbarous Disposition by Instruction." And we must prevent "their companying together," because slave groups are the "grand Source of all the Evils that have arisen so frequently from this Nation."[59]

Just one year after Bristol's execution Paine represented another murder defendant and in doing so effected a change in the rules of criminal procedure. Bail normally was prohibited in a capital case, but in 1764 Paine petitioned Chief Justice Thomas Hutchinson to allow an indicted murderer, Jonathan Shepardson, to remain free until his trial. Paine argued the murder indictment against Shepardson would not be sustained at trial and, therefore, to hold him until the court's next circuit would violate the defendant's right to due process. Shepardson was an Attleboro resident whose rumored sexual misconduct came under attack by his neighbors. Late in October, a group of men in blackface and disguise surrounded Shepardson as he worked in his field. The men intended to force Shepardson to "ride Skimmington," a wooden horse on which they planned to parade him through town. Shepardson had been warned, however, and he was armed with a knife. During the scuffle that followed, Shepardson killed Benjamin Ide, one of his taunters. Under the circumstances, Paine asked that his client be granted bail and the chief justice agreed, allowing Shepardson to remain free until his trial in October 1765. At trial, Paine argued that Shepardson acted in self-defense and he was acquitted. The *Boston Gazette* concluded: "These Schimeton Frolicks have been too frequent in many Parts of the Country; but it is hoped that this unhappy man's Fate of whom it may be said, that *as a Fool dieth, so died he*, it will be a Caution to others, not to take it upon them in this lawless Manner to punish their Neighbours for any supposed or real Misbehaviour, but have them to the due Course of Law."[60]

Within days following Shepardson's acquittal, Paine and Hutchinson, who had cooperated to create new criminal procedure, were on opposite sides of a political controversy that would eventually lead to Hutchinson's exile and Paine's selection as attorney general of the newly independent Commonwealth of Massachusetts. Paine's diary entry for November 1, 1765 reads: "The Dawn was overcast with Dark destructive Fogs and nature seem'd to Mourn the Arrival of this ill boded dreaded never to be forgotten first of Nov. NB Stamp Act takes place this day." The stamp tax,

designed by Parliament to raise a revenue in the colonies to help support imperial administration, stimulated riots, demonstrations, and resolutions against the law beginning in July and August. Among other militant acts meant to defeat the Stamp Act, Hutchinson's Boston home was destroyed by a mob from which he barely escaped. The following May, Paine was at Plymouth for a session of the SCJ when news arrived that the Stamp Act had been repealed. "The day was spent in rejoicing for the repeal," he wrote.[61]

Other colonial taxes followed, however, and to enforce their acceptance, British troops arrived in Boston in 1768. For nearly a year and a half after the troops' landing Massachusetts was relatively peaceful, but on the night of March 5, 1770, groups of soldiers nursing a grudge from an earlier scuffle with townsmen left their barracks looking to settle the old score. Soon knots of Bostonians gathered in the streets around the Custom House, where a single sentry stood guard. When a handful of soldiers commanded by Captain Thomas Preston were sent to support the sentry the crowd pelted them with chunks of ice, shouted taunts, and menacingly swung clubs. Fearful, angry, and acting without Preston's command, the soldiers—first one, then another—fired into the crowd, killing five civilians. Preston ran along the line of soldiers pushing the musket barrels with his arm. "Stop firing!" he shouted. He then marched his men to military headquarters. When word of the shooting reached Chief Justice Hutchinson, he rushed from his home to the state house and, stepping onto the balcony, shouted to the crowd below, "Murder will not go unpunished. The law shall have its course!"[62]

Solicitor General Jonathan Sewall drew up the indictments against Captain Preston and the eight British soldiers. Each man's indictment used the law's ancient formulaic language: "Not having the Fear of God before their eyes, but being moved and seduced by the Instigation of the devil and their own wicked hearts . . . did with force and arms feloniously, willfully and of their malice aforethought assault one Crispus Attucks." A grand jury took testimony from dozens of witnesses and on March 26 declared there was sufficient evidence to bring Preston and the eight soldiers to trial for murder. At the last moment the trials of Preston and the soldiers were separated.[63]

John Adams and Robert Auchmuty represented Preston and at a separate trial Adams and Josiah Quincy Jr. were counsel for Private William

Weems and the other seven soldiers. The court appointed Samuel Quincy
special prosecutor and Robert Treat Paine was chosen by the Boston se-
lectmen to assist him at the soldiers' trial. After months of delay, Preston
stood in the prisoner's dock. With an eye toward eliminating from the
jury Bostonians who he believed were likely to be antagonistic to a British
military officer, Preston challenged fifteen of the twenty-two men in the
initial jury pool. The remaining five seats were filled with men thought to
be sympathetic to the Crown. Because the prosecution was not permitted
to challenge jurors, the result was a jury packed in the officer's favor. The
trial lasted six days, the first colonial homicide trial to take more than one
day; and, therefore, the first time a Massachusetts jury was sequestered.[64]

After nearly ninety witnesses had paraded before the jury, the two de-
fense lawyers gave their closing arguments, first Adams and then senior
counsel Auchmuty. Adams constructed a brilliant legal argument that
would lead the jury to only one conclusion—not guilty. First, Adams re-
minded the jurors they held a man's life in their hands. Therefore, if there
were doubts, they must acquit. He quoted the English jurist Sir Matthew
Hale to reinforce his point: "It is better five guilty persons should es-
cape unpunished than one innocent person should die." Second, Adams
extolled the law. "No passion can disturb" the law, he told the jury. The
law was "deaf, inexorable, inflexible" and certain in its application to the
facts. Irrefutable evidence had shown that an angry, club-wielding mob,
shouting threats, charged toward Preston and his men. Therefore, Preston
lawfully acted in self-defense. Auchmuty added little to Adams's spirited
closing and, speaking for the Crown, Paine plodded through the conflict-
ing evidence with little enthusiasm.[65]

Following the usual practice, each of the court's judges instructed the
jury in reverse order of seniority. The most junior member of the Supe-
rior Court of Judicature, Judge Edmund Trowbridge, spoke first. The
only trained lawyer on the bench, Trowbridge began his charge to the jury
with an appeal to common sense. Neither the crowd nor the soldiers had
a "concerted plan," he said, but against the background of animosity and
insults, "any little spark would inkindle a great fire—and five lives were
sacrificed to a squabble." He urged the jurors to decide whether Preston
had ordered the soldiers to load and fire. "If it remains only doubtful in
your minds, you can't charge him with doing it." If Preston did order his

men to load their muskets, did he do so because of the danger presented
by the crowd? If the sentry was threatened and assaulted and Preston and
his men came to assist him, "it was doubtless excusable homicide." Every-
one has a right to self-defense, he told the jurors.[66]

Having articulated a legal analysis of the case, Trowbridge spelled out
a rule to guide the jurors in evaluating the evidence. They should, he told
them in the first recorded use of the phrase in Anglo-American jurispru-
dence, be certain of their verdict "beyond a reasonable doubt." Finally,
he cautioned the jury. "'Whoso sheddeth man's blood, by man shall his
blood be shed' is a general rule with many exceptions to it." On October
30, at eight o'clock in the morning, the jury reported its verdict of not
guilty. Captain Preston quickly left Boston for the safety of Castle Island
and his troops.[67]

A month later a jury was selected to hear the case against the soldiers.
Not one of the jurors who were charged by the clerk to "enquire whether
[the defendants] or either of them be guilty of the felony and murder
whereof they stand indicted, or not guilty" was from Boston. Even with
a politically moderate jury, however, Preston's acquittal made the sol-
diers' defense more difficult. At the captain's trial the prosecution had
failed to convince the jury Preston gave an order for his men to shoot. To
some observers, that meant the men had fired on their own initiative and
were murderers. To counter that argument, Adams had to convince the
jury the men fired in self-defense. James Bailey, a sailor who witnessed
the shooting, helped Adams make his point. Bailey testified under cross-
examination that a mob numbering more than fifty hurled chunks of ice
at the soldiers and that one of the soldiers had been struck with a heavy
stick and knocked to the ground. In his closing remarks to the jury, nine
months to the day after the massacre on King Street, Adams electrified the
spectators. "I am for the prisoners at the bar, and shall apologize for it only
in the words of the Marquis Beccaria: 'If I can but be the instrument of
preserving one life, his blessing and tears of transport, shall be sufficient
consolation to me for the contempt of all mankind.'" Adams was the first
American lawyer to quote the Italian nobleman's enormously influential
anti-capital punishment *Essay on Crimes and Punishment*. Finally, Adams
told the jury, "It's of more importance to [the] community that innocence
should be protected than it is that guilt should be punished." Late in the

afternoon, the jury returned its verdicts. Six of the defendants were acquitted and the remaining two were found guilty of manslaughter. Adams invoked benefit of clergy and the two were branded and set free.[68]

Eight years after the Boston Massacre, when America and Great Britain were at war, two British redcoats, a Continental soldier, and an American woman stood trial for murder, the first held under the auspices of an independent Massachusetts government. Bathsheba Spooner, the reportedly beautiful thirty-two-year old daughter of an exiled Loyalist, Timothy Ruggles, urged the three soldiers to do the dirty work. The victim was Bathsheba's husband, Joshua. On March 1, 1778, James Buchanan and William Brooks, escaped prisoners of war, and Ezra Ross, a seventeen-year-old Continental soldier and Bathsheba's lover, crouched in the darkness outside the door to the Spooners' Brookfield home. When Joshua swung open the gate and stepped into his yard, Brooks delivered a solid blow and then choked Spooner into unconsciousness. The three men then hurriedly stripped off Spooner's clothing and hurled his body headfirst down a well. A few minutes later they joined Bathsheba in the sitting room. She tossed her husband's bloody clothing into the fireplace and just as casually and callously split up among the three men the cash from Joshua's strong box. Buchanan, Brooks, and Ross fled toward Worcester, arriving at a tavern there about four o'clock in the morning. Joshua's body was discovered a few hours later and brought into the Spooner house. Bathsheba muttered, "Poor little man," and touched Joshua's forehead, but there was no rush of blood to suggest her guilt.[69]

A hue and cry was raised throughout the countryside and the Worcester sheriff was alerted to the presence of a suspicious trio at Sarah Walker's tavern. Under questioning by the sheriff, the two former British soldiers failed to explain satisfactorily why they had so much money or how they came to possess a watch and silver shoe buckles marked with Joshua Spooner's monogram. Ross was discovered upstairs in the tavern, cowering behind a chimney. The three men freely confessed to the murder and implicated Bathsheba. She was brought to Worcester from Brookfield. Weeping as she spoke, Bathsheba admitted her part in the murder, but she did not make a formal confession. All four were arrested and confined in the Worcester jail.[70]

Seven weeks later, a Worcester County grand jury returned murder indictments against Buchanan, Brooks, Ross, and Bathsheba. Robert Treat

Paine, who had signed the Declaration of Independence six years after acting as prosecutor at the Boston Massacre trials, now held the post of attorney general of Massachusetts. Paine quickly shaped a trial strategy using Bathsheba's servants who were privy to her murderous plan as the state's key witnesses. Following its standard procedure, the court appointed two Worcester County attorneys to defend the prisoners, senior counsel John Sprague and young Levi Lincoln. A graduate of Harvard College in 1765, Sprague was one of only two lawyers in Worcester County following the Loyalists' flight from Massachusetts in 1775. For this reason, Lincoln, following his graduation from Harvard in 1772, headed west to read the law with Joseph Hawley, John Adams's Northampton mentor. Admitted to the bar shortly after the clash between British troops and American militia in Concord, Lincoln had not previously tried a capital case, but his notes indicate he prepared carefully and conducted a vigorous defense. The accused were arraigned and pleaded not guilty. Three days later a jury of twelve local residents was impaneled. When Chief Justice William Cushing called the court to order at eight o'clock in the morning on April 24, Worcester's Old South meetinghouse was packed with spectators.[71]

Whether people were drawn to the trial by the prospect of political revenge or simply for titillation is not known. On the surface it would seem a trial held during the Revolution involving two British soldiers and the daughter of a local Loyalist who seduced a youthful American soldier while she was planning to have her husband murdered would have been conducted in a politically charged atmosphere. That a young American soldier was inseparably linked to the murder made it impossible, however, for partisan observers to wish the whole lot guilty. Furthermore, Worcester County was not a hotbed of revolutionary zeal and there is no evidence to suggest the men in the jury pool were chosen with regard to their politics. Also, not a single prosecution witness manifested political animus toward the defendants, nor did newspaper accounts published after the trial report any bias during the trial, or revel in the fate of the convicted murderers. Deep into the *Massachusetts Spy*'s story about the trial, for example, Brooks and Buchanan were identified as British soldiers, but the lengthy account of the trial made no mention of Bathsheba's Loyalist father.[72]

Curiosity rather than politics probably attracted a throng to the courtroom. It had been nearly thirty years since the last person was executed for murder in Worcester and more than a century since a Massachusetts

woman had been sentenced to death for murdering her husband. Women rarely murdered another adult and no Massachusetts woman ever had hired a killer to murder her husband. It also was extremely rare for a person of high social status to be facing the death penalty. Finally, Bathsheba's public and private conduct had mocked the existing consensual moral code. In short, the residents of Worcester County had plenty to be curious about on that spring day in 1778 when Bathsheba Spooner's trial began.[73]

Defense attorney Lincoln appealed to the jurors' pride. Addressing them as an "American jury," he called attention to the fact that this was the "first case of bloodshed, the first capital trial since the establishment of [an independent Massachusetts] government." He reminded the jurors they were "to consider it as the trial of A&B, banishing all prejudices, contracted by reports—all indignation [about] the enormity of the offense—all opinions from hearsay—from their country—profession, connexions [*sic*], political sentiments." Clearly, Lincoln's statement was at once a bit of due process boilerplate and an attempt to undercut whatever political prejudice may have existed among the jurors.[74]

Potential bias was only one of the formidable hurdles confronting Lincoln. First, under existing rules parts of the voluntary confessions made by Buchanan, Brooks, and Ross were used against them in court. The same rule permitting the prosecution to use the defendants' confessions, however, also forced the state to prove its case with evidence other than the confessions and allowed Lincoln to raise doubts in the juror's minds about the confessions' worth. Lincoln argued, for example, that an accused person often was motivated to confess because of fear or "the misdirected hopes of mercy." Second, the limitations of eighteenth-century due process forced Lincoln to defend all four prisoners simultaneously even though Buchanan, Brooks, and Ross were charged as "principals," or perpetrators of the crime and Bathsheba as an "accessory before the fact" to murder. Lincoln foresaw this problem and played a wild card. He filed a pretrial motion attempting to sever the trial of Buchanan and Brooks from that of Ross and Bathsheba. Following the four defendants' arraignment, Lincoln argued that the British soldiers should be tried by a so-called jury of aliens, or Englishmen. The court rejected Lincoln's motion, and, therefore, at trial his only option was to convince the jury it should judge Buchanan and Brooks differently than Bathsheba and Ross. He instructed the jury that it "will be necessary that you keep in your minds the evidence

against each one separate and distinct." Senior attorney Sprague made a similar point in his closing statement. He argued the evidence against Ross should lead to the conclusion the young defendant was an accessory after the fact, not a murderer.[75]

"Every thing that is proved respecting Ross," Lincoln told the jury, mixing law and fact, "is perfectly innocent in reference to the crime charged in the indictment. I am sure the circumstances taken all together don't afford proof presumption, probability, or even suspicion of there being a design in R[oss] to hurt Mr. Spooner." In other words, Lincoln claimed Ross did not agree to join the scheme to murder Spooner, until a few hours before the crime and then only "to keep on terms" with Bathsheba. "There must be an evil design with respect to the crime committed," Lincoln told the jurors. "Merely being in the company with others without a design" does not tie the defendant to murder. Ross did not participate in the murder. Spooner was dead when Ross helped carry the body to the well. Therefore, Ross was neither an accessory before the fact nor a principal in the murder of Spooner. Ross was guilty of nothing more than concealing a felony, a crime for which the penalty was a short jail sentence.[76]

In defense of Bathsheba, Lincoln argued the facts showed she was a "distracted person" and, therefore, not responsible for her actions. If she hated her husband, as was testified, a rational person would have "separated," or "gone to her father." Likewise, she did not have an escape plan or an alibi, nor did she act as though she was going to get away with the crime. "What end could it serve" if she had succeeded in escaping punishment for the murder of her husband, Lincoln asked. Murdering Joshua Spooner widowed Bathsheba, orphaned her children, and "instead of enjoying the whole, could enjoy but one third of an Estate." Bathsheba's confusion was characteristic of a "disordered mind," he concluded.[77]

Despite Lincoln's arguments, however clever and convincing, the wealth of evidence given at trial against the defendants was damning and damaging. Lincoln worked hardest to save the lives of Ross and Spooner, but the arresting sheriff testified Ross had confessed to the murder of Bathsheba's husband and the servants sullied the boy's reputation by hinting that he and Bathsheba had an intimate relationship. Ross also manifested a consciousness of guilt by fleeing with Buchanan and Brooks, and like those two men, he was caught with money and articles of clothing belonging to Joshua Spooner. There also was plenty of evidence of

Bathsheba's involvement in the murder and testimony about her contempt for her husband and for the social norms governing a lady's behavior. Within the servants' hearing she referred to her husband with a derogatory nickname, "Old Bogus," and insisted that Brooks and Buchanan be served as though they were her social equals. While neighbors looked on, Bathsheba also drank and laughed with the two soldiers in a public tavern. And, of course, she hired these men as killers to murder her husband. It was clear Bathsheba had grossly and flagrantly violated the moral code of the community.[78]

The jury found Bathsheba and the soldiers guilty of murder. "Gentlemen of the jury," the clerk of the court asked, are you all agreed in your verdict? "Yes," they said. One by one the clerk of the court asked each defendant to stand and to hold up his or her right hand. Turning to the jury, the clerk intoned, "Gentlemen of the jury, look upon the prisoner. How say you," is the defendant guilty or not guilty of murder as charged? "Guilty!" the foreman said. "Harken to your verdict as the Court hath recorded it. You upon your oaths do say, that [the prisoner] is guilty; and so say you all." Chief Justice Cushing then sentenced Buchanan, Brooks, Ross, and Spooner to be hanged by the neck until dead.[79]

After the prisoners won a short reprieve so they might better prepare themselves for their deaths, Ross and Bathsheba separately appealed to the Massachusetts Revolutionary Council, a part of the interim government that bridged the gulf between colony and independent state. On May 26 the parents of Ezra Ross petitioned the council, asking it to spare the life of their son. Jabez and Johana Ross began by pointing out how much they had already sacrificed. Five of their six sons had responded to their country's call to fight for independence, four had fought at Bunker Hill, and three, including their youngest son, Ezra, had marched south with Washington. After a year with Washington's army, Ross was on his way home to Ipswich when he fell ill and by chance met Bathsheba. She nursed him to health and a few months later he marched to Ticonderoga. When he returned to the Spooners' in the spring, as his parents put it, "with a mind thus prepared and thus irresistibly prepossessed by her addresses, kindness, on his tender years," he was "seduced both from virtue, and prudence, a child as he was, by a lewd artful woman." For this reason, too, he "gradually erred until he arrived at the violent act of wickedness." Finally, Ross's parents asked the council to restore their son "to his country, to himself, his sympathizing friends, to his aging, drooping parents." The council was silent. Ross's life would not be spared.[80]

When the prisoners' initial petition asking for a short reprieve was brought to the council, Rev. Thaddeus McCarty appended a note to it about Bathsheba. "The unhappy woman declares she is several months advanced in her pregnancy," McCarty wrote, "for which reason she humbly desires that her execution may be respited till she have brought forth." The council responded to Bathsheba's request by directing the Worcester sheriff to create a jury of two male and twelve female midwives to "certify the truth whether she be quick with child or not." On June 16 the matron's jury sent a sworn statement to the council declaring Bathsheba was not pregnant. She protested, adding her pathetic plea to the matron's blunt conclusion. "I must HUMBLY desire your honors, notwithstanding my great unworthiness, to take my deplorable case into your compassionate consideration," she wrote. "What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God has begun to give it." The council rejected her petition, but a new examination took place about a week later and by a count of four to two this matrons' jury stated they believed Bathsheba to be pregnant. The council was silent.[81]

On July 2, 1778, Brooks, Buchanan, and Ross, each wearing a noose around his neck and surrounded by nearly a hundred militiamen, walked from the jail to the Worcester Common where the gallows had been erected. Bathsheba was "exceedingly unwell" and rode in McCarty's buggy. The *Massachusetts Spy* reported that she "heard the warrant read with as much calmness as she would the most indifferent matter." After mounting the scaffold Ross made an "audible and very affectionate prayer" while Buchanan and Brooks appeared to pray silently. Bathsheba spoke to the sheriff as he tied her legs and slipped the rope around her neck. Each of the four was then "turned off."[82]

A postexecution autopsy revealed Bathsheba pregnant with a five-month-old male fetus.[83]

From 1630 to 1780 fewer than forty adults were executed for murdering another adult. For that reason alone key elements of Massachusetts's capital due process changed slowly. Still, the fact is capital defendants had greater protection on the eve of the enactment of the Massachusetts Constitution than at any earlier time. The increasing presence of trained

lawyers was the most important single factor stimulating change in the conduct of capital trials. Lawyers imposed greater regularity on the conduct of capital trials, restricting the court's use of discretionary justice and bringing rational authority to bear on procedural questions. Lawyers, for example, transformed the use to which confessions were put in a capital trial. Whereas the confession had been the end-all in the seventeenth century, eighteenth-century lawyers challenged the use of confessions at trial. Lincoln, for example, encouraged the Spooner jurors to consider the circumstances that would cause a defendant to confess and asked them to integrate that knowledge with other evidence before they reached a verdict. In short, lawyers encouraged the jury to regard confessions as problematic rather than absolutely trustworthy. Defense lawyers—but not prosecutors—used the ancient right to peremptorily challenge jurors to shape the composition of a jury. Lawyers also began to use pretrial motions to limit the state's case and to invoke benefit of clergy to save the life of a client. Finally, lawyers' closing argument to the jury tying the law to community norms had a powerful effect.

Still, progress toward greater legal protection for capital defendants was limited. Until the early nineteenth century, due process was part of an oral culture, relying on memory and tradition rather than written rules. When Lincoln asked for a jury of aliens to try Brooks and Buchanan, one of the judges remembered a seventeenth-century case involving a mixed jury of Native Americans and English settlers but did not find that a binding precedent. The law's oral culture also severely limited a defendant's ability to appeal a death sentence. Indeed, John Betts's 1653 appeal to the legislature was the last time a death sentence was challenged until after the Revolution. For the most part, lawyers did not raise questions about the validity and worth of capital punishment until after the American Revolution. But, as we saw, Lincoln and Adams—two young lawyers subsequently committed to the American Revolution—invoked Beccaria's argument against capital punishment.[84]

In the turbulent decades following the Revolution, Massachusetts lawyers and jurists eagerly aligned the criminal justice system with the American Revolution's newly articulated republican principals to transform colonial Massachusetts' due process.

TWO
"HIDEOUS CONSEQUENCES" AND THE DECLARATION OF RIGHTS

Massachusetts imposed the death penalty on more convicted felons in the two decades following the enactment of its constitution than in any other twenty-year period in its history. Between 1780 and the election of Thomas Jefferson to the presidency of the United States, seventeen men and one woman were legally executed in Boston and an additional sixteen men were put to death elsewhere in the commonwealth. The vast majority of immediate postwar hangings were in response to a sharp rise in the number of burglaries and highway robberies and to widespread fear that the bonds meant to hold society together were not strong enough nor the people virtuous enough to sustain a republic. Some people were convinced the new government had to use its power to execute criminals in order to deter those tempted to commit criminal acts and to build an orderly, virtuous society.

At the same time, the commonwealth extended greater protection to criminal defendants. The state, of course, must protect its citizens, but harsh laws and overly aggressive prosecutors would sacrifice individual liberty to the demands of political and legal order and, as a result, Massachusetts would fail to fulfill the republican promise of equality before the law and justice for all. Although they clearly disagreed about the precise relationship between law and the shape of the new society, both groups assumed law was at the center of republicanism. By 1820, therefore, the state's commitment to a rule of law that reflected republican values stimulated changes in capital procedure that won praise from prosecutors, judges, and defense attorneys as a bulwark protecting individual liberty and social order. A popular dialogue about capital punishment and public executions also occurred outside the courtroom. For these reasons, the