MURDER
AND THE DEATH PENALTY IN MASSACHUSETTS

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To Lisa and Nora, with love

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

pace of court-ordered executions slowed in the 1790s and came to a temporary halt in the 1830s.[1]

This is not to say that every murder case that came before the Massachusetts Supreme Judicial Court (SJC) gave rise to innovative procedures that spared the life of a capital defendant. There were many capital trials in which the facts presented by the prosecution easily and justly overcame the defense. For that reason, among others, the approach taken here does not embrace every capital trial but focuses instead on those trials that highlight the court's commitment to protecting individual rights or that introduced a significant change in capital procedure. I argue that the SJC saw its role as one of extending greater protection of individual rights, setting in motion a long evolutionary process on which current capital defendants' rights are built. Finally, acting as a bulwark of liberty made the court a key player in the development of republicanism.

Established in 1780 by the Massachusetts Constitution, the SJC had both original and appellate jurisdiction for all capital crimes. The court's five judges, including a chief justice, were appointed by the governor with the advice and consent of the Council, an advisory body chosen from among members of the Senate by joint ballot of the House of Representatives and the Senate. The constitution established judicial independence by providing that "judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well." The court's mandate was to preserve the "life, liberty, property, and character" of the commonwealth's citizens by "an impartial interpretation of the laws, and administration of justice." A 1782 statute created a path to change, empowering the court to make "all Rules respecting Modes of Trial and the Conduct of Business."[2]

Before the Revolution, Massachusetts clergy played the major part in rationalizing capital punishment. Although there was some disagreement over particular cases, ministers' gallows sermons routinely denounced murder as a sin and justified the state's execution of the condemned as necessary to maintain a godly commonwealth. Rev. Samuel Checkly, for example, told a Boston audience in 1733 that both the "Laws of God" and the "Safety of Mankind" justified "Vengeance on Murderers." After 1780, the clergy's primacy slowly gave way to lawyers and judges, who manifested a heightened concern for the preservation of liberty and the idea that an individual ought not to be punished except after a legal procedure in which the accused had every opportunity to establish innocence. Most citizens cheered the new standards, although a handful argued that regardless of the court's legal safeguards, executions—especially public executions—were contrary to republican ideals.[3]

The Massachusetts Declaration of Rights was the starting point for the articulation of a republican due process and for the idea that the punishment of death was different. Article 12 spells out a defendant's right to a full explanation of the charges, a prohibition against self-incrimination, a right to confront the state's witnesses, a right to legal counsel, and the right to trial by jury. Article 26 forbids a magistrate or court of law from inflicting "cruel or unusual punishment," and Article 29 holds out to every citizen the right "to be tried by judges as free, impartial and independent as the lot of humanity will admit." Elaborating on these constitutional mandates, the SJC took the lead in protecting and expanding a capital defendant's rights. Over the next several decades, therefore, due process became instrumentalist—the authority of customary rules was subordinated in favor of rules that reflected republican principles—and the rash of court-ordered executions during the commonwealth's first two decades was followed by a remarkable change in the criminal law's purpose and practice. By the early nineteenth century the notion that the law's chief function was to be the guardian of liberty was firmly in place. Lawyers routinely placed a specific plea for their client within an argument about the importance of liberty. Judges responded in kind. James Neale, for example, urged Attorney General Robert Treat Paine to determine "points of liberty and justice" with an eye to the rights of all men, and in 1805 the SJC vowed to act "with that anxious regard for personal liberty and to prevent vexatious oppression." A capital trial heightened the law's concern for liberty, a commitment most clearly manifested by the precedent setting capital trials involving African American defendants. Specifically, capital procedure was based on the presumption that death was different, that extraordinary safeguards must be in place when a human life was at stake. A handful of critics went further. They argued that capital punishment was contrary to American republicanism, that it was British, brutish, and beyond the powers delegated to the state by the Massachusetts Constitution.[4]

Contemporaries and historians searching for the causes of an increase in the rate of crime and murder in postwar Massachusetts identified the decline of civic virtue and the emergence of liberal capitalism. Rev. Aaron

Bancroft, for example, told a crowd gathered to witness the hanging of the convicted murderer Samuel Frost in 1793 that the morals of youth were linked to the promise of the new nation. "Moral virtues are of the highest importance to the interests of civil society. We are told," Bancroft stated, "that they are more especially necessary to the support of a government like ours." Bancroft attributed Massachusetts's rising crime rate to a decline in social morality rather than to man's inherent wickedness. He believed education was the key to ending "impious, cruel and barbarous" behavior. George Minot, writing in 1788, highlighted new attitudes about wealth as the root cause of instability. "An emulation prevailed among men of fortune to exceed each other in the full display of their riches," he said. "This was imitated among the less opulent classes of citizens and drew them off from those principles of diligence and economy, which constitute the best support of all government." In a 1786 address to the people of the commonwealth, the Massachusetts legislature also emphasized the dark side of Boston's new prosperity: "Habits of luxury have exceedingly increased and we have indulged ourselves in fantastical and expensive fashions [and] the virtue which is necessary to support a Republic has declined." Justice Nathaniel Sargeant's assessment was more pointed. He charged that "vicious persons" were "roving about the countryside disturbing peoples rest and preying upon their property."[5]

Economic prosperity also contributed to Boston's escalating violent crime rate. With the coming of peace thousands of war-weary newcomers poured into Boston, pushing up the town's population from a low of ten thousand in 1780 to nearly twenty-five thousand people by 1800. Boston's black population also declined during the Revolution, but by 1800 rose to about eight hundred people. This remarkable growth spurt brought a building boom and employment opportunities and upward mobility for some. At the same time, prosperity coupled with the demise of a commitment to the common good caused some citizens to worry. Robert Treat Paine, the commonwealth's first attorney general, observed that "the course of the war has thrown property into channels, where before it never was, and has increased little streams to overflowing rivers." The *Massachusetts Centinel* complained about the results of this change. "We daily see men speculating with impunity on the most essential articles of life, and grinding the faces of the poor and laborious as if there were no God."[6]

Capital crimes and executions had pockmarked the prewar history of

Massachusetts. Thirty-seven men and women—sailors, servants, African Americans, pirates, and army deserters—were hanged on the Boston Common during the seven decades prior to the formation of the commonwealth. Excluding the twenty-one men executed for piracy or desertion from the army, seven men and three women were hanged for murder, four men for burglary, and two men were sentenced to death for arson from 1705 to 1778. In the two decades after 1780 a very different pattern emerged: the rate of executions throughout the commonwealth nearly doubled and the crimes for which men and women were put to death changed dramatically. Of the seventeen men and one woman executed in Boston during the last two decades of the eighteenth century, only four were convicted murderers, but nine burglars and five highway robbers were hanged, almost the reverse of the data for the first seven decades of the century.[7]

The sharp jump in the number of postwar executions helped thrust lawyers and jurists to center stage. In February 1785 a "Grand Procession of Court and Bar" celebrated the law's new significance and power by marching from the home of the lawyer Perez Morton down State Street to the courthouse. The *Exchange Advertiser* reported the event:

> Yesterday, about twelve o'clock the procession was begun from the house of Mr. Perez Morton, in State Street, in the following manner: The under sheriffs, constables, etc. with their staffs [led off], Joseph Henderson, Esq. high sheriff, the clerks of the supreme judicial court in their black gowns, their honors the judges in the robes of scarlett, the Hon. Robert Treat Paine, esq. Attorney General, [and] the barristers in their professional dress closed the procession each ranked according to his seniority.[8]

They marched against a backdrop of violence. In 1783 the first execution under the commonwealth's authority took place on the Worcester Common, evoking the ancient ritual manifesting state power. Two young veterans—William Huggins, honorably discharged in the summer of 1782, and John Mansfield, an escapee from a British prison ship—met by chance in Stockbridge. Bored with farm work, Huggins and Mansfield set off for Salem to sign on a privateer. To finance their adventure the two men invaded a farmhouse in Pelham and the following night slipped into an inn, stealing a silver watch, coins, and £4. By the following day they were in Concord, ten miles east of the Harvard inn, but the alarm had been raised.

The Concord sheriff spotted the two drifters and soon discovered that Huggins and Mansfield had the stolen goods in their possession. They were charged with a capital felony—forcibly entering an inhabited house at night for the purpose of theft—found guilty and sentenced to death. On June 18, 1783, Huggins and Mansfield walked from jail to the Worcester Common escorted by a troop of militiamen, the sheriff, and a clergyman. When they reached the gallows, the two condemned men climbed up a ladder, nooses around their necks. At a signal from the sheriff Huggins and Mansfield were "turned off" the ladders. Their bodies dangled for three-quarters of an hour before they were cut down.[9]

One year later Bostonians witnessed three executions: Cassumo Garcelli was hanged for murder and Francis Coven and Derick Grout for burglary. On November 6, 1783, Garcelli, a twenty-three year-old Italian sailor on shore leave, swaggered into a North End pub with several of his shipmates. After a few rounds of drinks and some dancing, one of the Italian sailors began to flirt with a woman patron. She rejected the sailor's amorous advances and when he persisted, she cried out for help. Some local men came to her aid. During the ensuing melee John Johnson was stabbed to death. The Italian sailors fled, but the following day Garcelli was found and identified as Johnson's assailant. At trial, a jury found Garcelli guilty of murder and he was sentenced to death.[10]

Although Garcelli was Catholic, his published confession conformed to a Boston Protestant model. He praised his parents' morality and regretted that he had rebuffed their efforts "to check the natural viciousness of [his] disposition." Without parental guidance, Garcelli fell in with "lewd, ill-moral'd Fellows" with whom he led a dissolute sailor's life. Finally, he confessed to murdering Johnson, as well as two other men in similar brawls in foreign ports. On January 15, 1784, Garcelli was hanged at a gallows "on Boston neck." The *Spy* reported that he "behaved in a manner suitable to his unhappy situation."[11]

Nine months after Garcelli's execution, Francis Coven and Derick Grout slowly walked to the gallows on Boston Common, each man convicted separately of capital burglary. Coven and Grout were two of forty men and women indicted for criminal acts in the SJC's two Suffolk County trial sessions in 1784, a number nearly three times higher than that of the previous year. Coven was a twenty-two-year-old Frenchman who came to Boston as a member of the French expeditionary forces in 1782.

Shortly after his arrival he was convicted of robbing a Roxbury house and of assaulting a Boston man. Finding him guilty, the court fixed Coven's punishment at thirty lashes laid on his bare back and six months in jail. Undeterred, Coven was back in court in August 1784 for theft and burglary. He pleaded not guilty to both charges and went to trial. Two separate Suffolk County juries found Coven guilty on both counts and he was sentenced to death on the burglary conviction. At the same court session, Derick Grout, a native New Yorker and Revolutionary War veteran, was found guilty of several counts of burglary. Evidence was presented at trial showing that on March 24 Grout broke into Gilbert Warner's house, carrying off a set of silver spoons, an overcoat, and nine pairs of stockings. On the next day he entered Elizabeth Elliott's home and took a silver watch, a clock, and twenty pounds of salt pork. A few days later Grout broke into a Roxbury hat shop. Found guilty of the Elliott burglary, Grout confessed to his crime spree. According to the *Massachusetts Spy* both men "behaved very penitent in their last moments."[12]

John Dixon was a first-time offender when he received a sentence of death on November 11, 1784. In the summer of that year he broke into his neighbor's shop and carried off dozens of items. Because the shop owner lived upstairs, Dixon was charged with nocturnal burglary of an inhabited dwelling, a capital offense. Seven days later he was executed in Taunton. "It is worthy of remark," the *Massachusetts Spy* wrote in its story covering Dixon's hanging, "that the various culprits that have been executed, and are now under sentence of death within this commonwealth since the revolution, have been chiefly foreigners. Out of 16 that have suffered, but four of them were Americans, and but two belonged to this state." While there was truth to the *Spy*'s claim, its self-serving argument failed to recognize the sweeping social changes brought about by the Revolution, especially the economic attractiveness of bustling postwar urban centers.[13]

The *Spy*'s argument also was undercut by the hanging of two American-born thieves. Two laborers, William Cott, alias Scott, and Thomas Archibald, broke into James Lovell's Boston home in late November 1784. An old friend of John and Abigail Adams and a staunch patriot, Lovell served as Continental tax commissioner for Massachusetts. Once inside Lovell's house, Scott and Archibald found a trunk-sized metal strongbox and carried it away to their hideout. When they broke it open they discovered $25,000 in negotiable notes, gold and silver coins, and paper

currency. For several months the two thieves spent only their ill-gotten cash and, therefore, went undetected. But when Scott tried to pass a negotiable note drawn on a Boston bank, the two men were arrested, tried, and convicted. Chief Justice William Cushing sentenced Scott and Archibald to be hanged. While the two men waited in the Boston jail for their death sentence to be carried out, they apparently had a raucous good time. The *Massachusetts Spy* worried that their behavior might be undermining public confidence in the death penalty. Following their execution, however, the paper reported with a seeming sigh of relief that Scott and Archibald had initially "behaved in a manner unbecoming their unhappy condition" but that on the morning of their execution "they appeared penitent and suitably affected with their situations." In short, because the two men turned solemn and repentant at the last moment, the *Spy* believed their executions had served their purpose of deterring potential criminals.[14]

According to the *Massachusetts Gazette*, the trial of a poor transient Indian for the murder of his wife, Sage, was of little public interest, but it highlighted the commonwealth's commitment to a republican due process. Isaac Coombs's court-appointed lawyer made every effort to save his life and to see he had a fair trial. Court records reveal that for years Coombs and his wife had scratched out an existence by peddling handmade brooms and brushes door-to-door throughout eastern Massachusetts. On May 22, 1786, the couple worked their way along the road from Marblehead to Salem, stopping only at nightfall when they camped in the Great Pasture not far from Salem. Sometime during the night the couple had an argument that turned violent. Isaac bludgeoned his wife to death. He dragged her body through the tall grass to a nearby swamp and then fled through the night toward Andover. Before sunup the following morning, two duck hunters happened across the Coombses' campsite. They noticed signs of a struggle, a pile of bloody women's clothing, and a rude trail leading from the campsite through the tall grass. Following the trail, the hunters found Sage's body face down in the swamp. She was recognized as the wife of the Indian peddler who had recently passed through town. An alarm was raised and Coombs was captured in Andover.[15]

At his trial, held in an Ipswich home where the SJC traditionally held court when its annual circuit took it to Essex County, a jury found Coombs guilty of the murder of his wife. Before Chief Justice Cushing sentenced Coombs to death, however, the defense attorney, William Pynchon, argued

that the jury's guilty verdict was tainted because the jurors "did separate and go at large without being attended by the proper officer and did converse with diverse people concerning the verdict." The jury's deliberations had taken place in a tavern near the home in which the trial took place. After arriving at a verdict, but before they returned to the house where the court sat, jurors wandered among the tavern's patrons talking about the case. Pynchon summarized his argument and the court's ruling in his diary.[16]

> At 4 o'clock A.M. the Jury agree in a verdict of guilty as to Coomes [*sic*] and being tired and in want of air and rest, some of them walked out of the door to take the air, and went among people in other rooms in the tavern, and talked with some persons they had met about the power and duty of the Jury as to verdicts, of manslaughter, and of murder and inquired people's opinions out of doors; and this was objected by counsel before verdict, and, at the Court's instance, done in writing, signed by counsel; but the verdict was given in and affirmed.[17]

The court ruled the jurors had reached their verdict before they had talked with other men in the tavern. Therefore the guilty verdict stood and Chief Justice Cushing sentenced Coombs to death. While the condemned man stood on the gallows, Rev. Joshua Spalding preached the execution sermon. Coombs stood mute, offering no apology for his crime and showing no apparent concern for his own soul. Suggesting the clergy's loss of mastery over the execution ceremony, Spalding publicly lamented that Coombs did not seem "to be a true penitent." The small crowd fringing Salem Common December 21, 1786, also seemed unmoved by Coombs's execution, according to Spalding's postexecution pamphlet.[18]

Within weeks after Coombs's execution the state was engulfed by political violence. Early in January 1787 about two thousand armed western Massachusetts farmers led by Captain Daniel Shays marched on the Springfield arsenal. Believing the regular troops stationed there would not fire on their countrymen, Shays ignored all warnings and ordered his rebels within a hundred yards of the arsenal. The arsenal's commanding general ordered his artillerymen to open fire. Shays's troops broke ranks and fled, leaving three of their men dead. Massachusetts troops hit the rebels again about a month later and the rebellion collapsed. The legitimacy of the commonwealth had been vindicated.[19]

In the aftermath of the rebellion, the victorious "friends of Massachusetts government" were divided about whether the insurgency's leaders should be executed for treason. A letter-writer who signed himself "A Plenty of Hemp" wrote in the *Independent Chronicle* that hanging the rebels "would certainly cause terror to evildoers and would have a direct tendency to promote good order in the community." It seemed that was the state's strategy. At Northampton on June 21, 1787, two convicted rebels, Jason Parmenter, aged fifty-three, and Henry McCulloch, aged thirty-six, walked to the gallows surrounded by more than one hundred militiamen. The "death parade" paused long enough to listen to a sermon preached by Rev. Moses Baldwin before stopping at the gallows. Wearing nooses around their necks, Parmenter and McCulloch climbed the scaffold as the huge crowd stood silent. At the last moment Sheriff Elisha Porter read a reprieve, sparing the lives of the two men.[20]

Attorney James Sullivan was responsible for saving the men's lives. He had argued for clemency before the council. "Peace and tranquility could be restored without sanguinary examples," he told the councilors. "Even Britain," Sullivan said, "whose sanguinary disposition daily gluts the grave with legal consignments," offered clemency in such cases. "Honestus," writing in the *Massachusetts Centinel*, agreed. Merciful treatment of the Shaysites would be a "more eligible mode to restore our public tranquility than a severity of punishment." Samuel Adams thought differently. "In monarchies," he wrote, "the crime of treason and rebellion may admit of being pardoned or lightly punished; but the man who dares to rebel against the laws of a republic ought to suffer death." By using its ultimate power, he concluded, the state would reestablish civic virtue and buttress order in a fragile republic.[21]

Several months after the lives of the two treasonous rebels were spared, a death sentence for burglary stirred public discussion. John Sheehan had followed his older brother from Ireland to Boston, arriving on November 11, 1786. Despite a building boom, Sheehan was unable to find work and he enlisted in the American army for a four-month stint. By making good use of his military connections following his honorable discharge, he found work in Boston as a laborer. On a summer day off, according to his story, he took a walk down a country road outside Boston, where he met two men who offered to sell him a cache of silverware at a very modest price. Although he suspected it was stolen, Sheehan bought the silverware hoping to turn a quick profit by reselling it. He eventually offered his purchase to a Providence, Rhode Island, silversmith. The silversmith became suspicious, however, when he noticed the marks identifying the silverware maker had been damaged deliberately and sent his apprentice for the sheriff, who arrested Sheehan for burglary. Sheehan denied the charge, insisting that he bought the silverware from two strangers. But at trial, the prosecution showed that Sheehan was in Boston the day the silverware was stolen from one of the town's well-to-do residents. Sheehan was convicted and sentenced to death. Because the damning evidence against him was flimsy, an army officer under whom Sheehan had served made an attempt to win a pardon for the young Irishman. The effort failed, and Sheehan's "last words and dying speech" were published on a broadside meant "to satisfy the curious Publick" that was widely distributed on November 22, 1787, when he was hanged on Boston Common. The *Massachusetts Centinel* hinted that Sheehan may well have been innocent of the burglary and that the jury and the court should have given him the benefit of the doubt.[22]

Where there may have been doubt about Sheehan's guilt, there was no expressed sympathy for a gang of highwaymen operating on the roads linking Boston to the nearby towns. The gang pounced on Nathaniel Cunningham as he walked from Boston to Cambridge on the evening of November 6. Armed with pistols and knives, four assailants threatened to murder Cunningham if he did not given them his money and valuables. As the muggers fled on foot, Cunningham's shouts for help roused the night watchmen and he gave chase. The watchman grabbed two suspects and before long they stood before the bar of justice charged with the capital crime of highway robbery. The trial occurred only a few days after delegates—including several members of the SJC—had ratified the U.S. Constitution. The defendants, two brothers, Archibald and Joseph Taylor—the former from Philadelphia and the latter from Ireland—were found guilty. Under a tough new law the two men were sentenced to death and on May 8, 1788, hanged near the spot where they assaulted and robbed Cunningham. Interestingly, there were no printed last words from either of these unrepentant professionals, nor a sermon justifying the state's action.[23]

The silence that greeted the Taylors' execution may have been a reflection of some public doubt about the efficacy and severity of the law. Despite harsh punishment and a string of executions, both criminal cases

and capital crimes soared far above pre-commonwealth levels. During the SJC's two Suffolk County sessions in 1789, for example, fifty-three criminal indictments were brought before the court, four times more than in 1781. Likewise, during the commonwealth's first decade twenty-five persons were executed, twenty for robbery and burglary, five times more than in the previous seven decades. Still, the republic seemed unable to turn back the crime wave.[24]

In 1789 three more persons were executed for highway robbery, including Rachel Wall. Like the Taylors before them, William Smith and William Denoffee, alias "Donogan," received little public notice for their brazen armed assaults on Boston citizens. During a single summer evening Smith and Denoffee attacked and robbed three men as they walked Boston's streets, taking from their victims a jacket, a silk handkerchief, and silver shoe buckles, among other items. The two were quickly captured, convicted of highway robbery, and sentenced to death by the SJC. Smith and Denoffee waited more than a month in jail before they joined on the gallows Rachel Wall, a twenty-nine-year-old woman also sentenced to death for highway robbery.[25]

Wall's route to the gallows was circuitous but not unusual. Born in rural Carlisle, Pennsylvania, in 1760 to a hardworking farmer and his pious wife, Wall was pulled to Boston by her husband, whom she married at a young age against her parents' advice. The couple lived together only a short time before he "went off." Left without resources, Rachel lived productively and happily until her husband unexpectedly and briefly returned to her. According to Rachel, before he disappeared again he entwined her in the sticky web of crime. Beginning in 1785, she claimed a string of successful robberies and but two unsuccessful criminal forays. Wall and another woman pleaded guilty in the summer of 1785 to stealing goods from the home of Perez Morton Esq., one of Boston's most prominent lawyers. The SJC sentenced Wall to pay triple damages of £18, to have fifteen lashes laid on her bare back, and to pay court costs. Because she was unable to make payment, the court stipulated that her labor might be purchased for three years. Three years later to the day, Wall was back before the SJC. Together with two accomplices Wall had been arrested for housebreaking and theft. She pleaded guilty and the court sentenced her to pay Lemuel Ludden £24 for the goods stolen, to sit on the gallows for one hour with a noose around her neck, and to be publicly whipped. Again, because Wall was penniless, the court announced that someone might purchase her labor for three years in exchange for paying her fine.[26]

Boston's booming economy and acute labor shortage seems once again to have helped Wall. Someone paid Wall's court-ordered fine and by spring 1789 she was in service to a Boston employer when allegedly she committed another crime. About suppertime on March 27, seventeen-year-old Margaret Bender was walking along a busy Boston street to a friend's home. A woman, who may have entered the street from an intersecting alley, walked rapidly after Bender. From behind, the assailant tried to grab Bender's bonnet from her head but failing to do so, hit the young woman in the face and stuffed a handkerchief into her mouth. Bender cried out for help. Colonel Thomas Dawes, a prominent patriot whose son practiced law, and his neighbor Charles Berry rushed into the street to help. While Dawes helped Bender stem the blood flowing from her mouth, Berry chased after the assailant shouting, "Stop that woman!" When he caught up with Wall, whom he believed to be the bonnet thief, Berry took hold of her. He brought Wall to Bender, who said, "She appeared to be the same person" who attacked her. Wall was arrested and hurried off to Boston jail.[27]

By any measure, the crime that sent Wall to the gallows was trivial, the attempted robbery of a bonnet. Unlike in her prior court appearances, Wall pleaded not guilty, a claim of innocence with some credibility since she had pleaded guilty to her earlier noncapital offenses. Attorney General Paine prosecuted the case vigorously. He put nine witnesses on the stand, all of whom testified to the bloody aftermath of the assault on Bender and to Wall's capture. Only Berry positively identified Wall as the robber-assailant, because he claimed he saw her running away from the scene of the crime. Wall's two distinguished court-appointed attorneys, James Hughes and Christopher Gore, who had a combined seventeen years of trial experience, argued that since the bonnet was not found in Wall's possession when she was apprehended, the most the prosecution might show was attempted robbery, a noncapital offense. The jury was not swayed by this defense argument or by the fact that no Massachusetts woman ever had been put to death for highway robbery, and it found Wall guilty. In one of his last official acts before he left the SJC for the Supreme Court of

the United States, Chief Justice Cushing sentenced Wall—the last woman executed in Massachusetts for any crime—to be hanged by the neck until dead.[28]

As well as a reaction to escalating postwar violence, Wall's conviction illustrates the complex and gendered message that emerged from the Revolution. Although women had played an important role in making and sustaining the Revolution, they were subordinated economically and politically in its aftermath. In regard to the criminal law, however, the court hedged a bit. No official distinction was made between men and women who stood before the bar of justice, but the court routinely exercised its discretionary authority by sentencing women convicted of noncapital crimes to lesser sentences than men convicted of the same crime. Rachel Wall appears to have forfeited the court's protective shield, however, because her assault on a young upper-class woman crossed a clear class line and came at the peak of lawlessness. Therefore, by finding her guilty of highway robbery, rather than a lesser, noncapital offense, the jury seemed to be giving expression to its anxiety about the new republic's fragile social order and, ironically, treating Wall as equal to a man.[29]

On October 10, 1789, four days before President George Washington made a triumphant visit to Boston, William Smith, William Denoffee, and Rachel Wall were hanged on Boston Common. The woodcut illustration appearing on the broadside reporting Walls's *Last Words* shows a portable gallows, a houselike structure on wheels with a cross beam on top on which hangs three bodies. The trio was the last executed in Massachusetts for highway robbery. Six years later the legislature took the crime of highway robbery carried out by an unarmed person off the capital list. From 1805 to 1836 conviction for highway robbery was punishable by life imprisonment. In 1836 a revised law permitted the trial judge to impose whatever prison sentence he saw fit.[30]

Even when crime was at its peak during the bloody 1780s, doubts about the death penalty were plentiful. Without an explicit biblical provision for executing burglars, Massachusetts preachers struggled to find justification for capital punishment. In 1784, Rev. Peter Forbes confronted convicted burglar John Dixon's angry neighbors. They "manifested their doubts and dissatisfaction concerning the lawfulness of the intended execution" and criticized the "judges and jury, the sheriff and state's-attorney, the prosecutor and the preacher." Surprisingly, Forbes told his listeners they

could not expect a body of religious laws made for a vastly different people and time "to bind us, or any other nation on earth, at this day." In place of biblical law, Forbes sketched out a pragmatic economic argument to justify Dixon's execution: the commonwealth's new prosperity demanded tougher sanctions against property crimes than earlier periods. The execution took place without further incident, but the depth of the people's skepticism about capital punishment was clear.[31]

Other critics of the death penalty branded it ineffective, inhuman, and antirepublican. "It must give every man of fealing [*sic*] the most sensible pain when he observes how insufficient our penal laws are to answer the end they were designed to," one critic wrote to the *Massachusetts Centinel* on October 16, 1784. Others contrasted the alleged barbarity of a monarchical society with enlightened republicanism. The *Centinel*'s editor agreed, noting, in the same issue, that laws mandating the death penalty were "no more a check to simple robbery [than] they are to getting money honestly." But, he added, the alternative of "taking a man's life for every trifling theft, as is done in England, is a disgrace to a civilized nation. Humanity recoils from the idea."[32]

The gallows was rolled onto Boston Common three more times before the turn of the century to execute young men convicted of burglary. Nineteen-year-old John Bailey, an African American sailor born in New York City, and Edward V. Brown, a one-time baker, were hanged on October 14, 1790. Bailey was attracted by Boston's economic opportunities. He came ashore to stay in the 1780s, first taking a job with a coachman and then becoming an apprentice to a candle maker. While relaxing with friends one spring evening after work Bailey accepted a dare to break into a house. He proudly showed his friends a handkerchief, a pair of shoe buckles, and a silver napkin ring he had stolen. Bailey's bravado collapsed, however, when he was arrested and charged with the capital offense of night burglary of an inhabited dwelling. Although it was the young man's first offense, a jury found him guilty and the court sentenced him to death. Bailey was hanged alongside Edward Brown, a burglar apprehended with a huge cache of stolen goods.[33]

For a variety of reasons—greater political and economic stability, a declining crime rate and growing opposition to public executions—the pace of executions slowed in the 1790s. From 1780 to 1784 fifty-five people were prosecuted for committing capital crimes, whereas from 1790 to 1794 only

eighteen persons stood before the SJC accused of a capital crime. Likewise, twenty people were executed in the 1780s, but the number fell to ten in the 1790s and dropped even further during the first three decades of the nineteenth century. The declining number of executions at once acted as a spur to reformers eager to abolish capital punishment and to lawyers working to transform criminal procedure.[34]

In the winter of 1793, for example, Boston's *Independent Chronicle* published two articles, on February 7 and 14, that gave voice to the people's antipathy toward the commonwealth's use of capital punishment. The author, "Marcus"—perhaps a pseudonym for Attorney General James Sullivan—wrote a compelling argument against the death penalty. Although capital punishment had been on the books for a long time, "Marcus" began, "I very much doubt the right of any Civil Government to punish a citizen with death for any crime whatever." By definition, a republican government's ability to make laws must not exceed the explicit powers granted to it by the people and no one may delegate to the government a power he does not have himself. Because a citizen does not have the right "to dispose of his own life," he may not give that power to the government. Therefore, "Marcus" continued, the commonwealth has no constitutional right to put someone to death. For the same reason, Massachusetts cannot adhere to the biblical injunctions sanctioning capital punishment nor follow the example of the ancient Jewish state. It was a theocracy; Massachusetts, he pointed out, is a republic created and controlled by the people.

Having denied the constitutional and biblical validity of capital punishment, "Marcus" next blasted the legal and social arguments made by proponents of the death penalty. Proponents claimed that because a person has the right to take the life of someone attempting to murder him, he might grant that right to the government. But, "Marcus" insisted, the right of self-defense is "merely momentary," and, therefore, it is not "transferable" to a republican government. Brushing aside this theoretical argument, advocates for capital punishment insist, he said, that without the death penalty "a long train of hideous consequences" will inevitably result. People's lives and property will not be secure. "But allowing this objection all the force which it is wished to have," "Marcus countered," it is merely an argument for "conveniency, which could never give any kind of right."

In fact, the claims that capital punishment deterred crime or was beneficial for the victim's family and friends were also false, according to "Marcus." First, no one who commits a crime intends to be caught. To the contrary, a "momentary" calculation leads the offender to believe he will get away with the crime. Therefore, it makes no difference what the punishment might be. Second, if the death penalty were a deterrent crime rates would be lower in states where it is imposed than in states that do not use the death penalty. But there are a greater number of convictions for theft per capita in New York than in Massachusetts, he pointed out, although theft is a capital offense in New York and punishable by imprisonment in Massachusetts. Third, in Great Britain, "from whom we learned the idea of Capital Punishments," criminals risk the death penalty by picking the pockets of people even as someone is executed for pick-pocketing. Fourth, placing a murderer in an "iron cage" would be a far more effective deterrent than execution. Exposing the convict to public scrutiny would make people aware of the "monumental pain, shame and disgrace" an offender must suffer for a very long time. Finally, "Marcus" reminded his readers that no one who participates in the process of "launching a soul into the presence of its Maker and Judge" should believe "that what they are doing is RIGHT."[35]

Despite the growing clamor against capital punishment, Irish-born John Stewart was convicted of burglary and hanged on Boston Common in 1797. Banished to America by his family, Stewart landed in Wilmington, Delaware, a sixteen-year-old boy without family or friends. Rootless and desperately poor, he bounced from menial job to menial job until he found work with a Boston carpenter in the 1790s. Stewart fell in with a wild bunch of boys and allegedly turned to crime to pay for his drinking and gambling habits. A short jail term for theft did nothing to change Stewart. As soon as he was released, he and two pals broke into the North End home of Captain Enoch Rust. The armed trio terrorized Rust's family until one of the captain's sons wrestled Stewart to the floor and took his gun. At this, Stewart's accomplices fled from the house and Stewart was dragged off to jail. He came to trial five days later for capital burglary and a jury found him guilty. On April 7, 1797, less than a month after his crime, nineteen-year-old John Stewart was "turned off." The Boston *Gazette* seemed troubled by Stewart's execution, noting that he had "not been guilty of many crimes" before his foolish foray into Captain Rust's house.[36]

Stephen Smith was the last person hanged on Boston Common for

burglary and, two years later, Samuel Smith achieved the dubious distinction of being the last person hanged for burglary in Massachusetts. For twenty-eight years Stephen Smith had struggled to be free. Born a slave in Virginia, he rebelled by stealing from his master and other white planters. When caught by his master, Smith was shipped to the West Indies to be worked to death on a sugar plantation, but somehow he managed to escape and return to Virginia. He hid in the woods near Norfolk, stealing food and clothing to survive. Caught again, Smith was sent back to the West Indies but once again escaped. This time, he made his way to Nova Scotia and then to Boston, a free man. By this time, however, his criminal ways were deeply ingrained and after just seven months in the "cradle of liberty" Smith stood before the bar of justice. Convicted of two counts of housebreaking and two counts of arson, Smith was sentenced to death.[37]

At 1:45 P.M. on October 12, 1797, Smith walked from the Boston jail to the Common, where a large crowd already had assembled to witness the execution. With staff in hand, the sheriff paraded in front of Smith, and two sheriff's deputies on horseback rode alongside him. Rev. Peter Thatcher also accompanied Smith to the gallows, praying softly. At the bottom of the Common the procession stopped and the sheriff read the execution order. Thatcher briefly prayed aloud and then read a statement said to have been written by Smith. "After a lengthy pause," Smith spoke to the crowd. In what quickly had become a fixed part of the republican ritual of hanging, he assured the crowd that he had received a fair trial and he confessed to the crimes for which he was convicted, as well as several others. A noose was put around Smith's neck and a white hood pulled over his head before he was led to the scaffold and "launched into ETERNITY." After about a half an hour his body was cut down and put into a coffin.[38]

Samuel Smith, according to his gallows speech, turned to crime in 1787 after he abandoned his wife and five children for the vagabond's life. Caught and jailed in Concord, Massachusetts, for stealing sheep, Smith escaped. While he was free he learned how to counterfeit coin, a criminal enterprise that led to some quick and easy profits but also jail, the loss of his right ear, and a fifteen-year prison sentence in 1794. However, on December 20, 1796, Smith joined a band of prisoners who escaped from Castle Island by scaling a wall and running across the frozen channel separating the prison from Boston. Smith did not stop running until he reached Pennsylvania, where he lay low for two years. In the summer of 1799 he

returned to Massachusetts to look for his family. Finding that his wife and children had moved, Smith turned to crime again. He burglarized homes in Sherborn and Natick before he was caught with a bag of stolen goods in Sudbury. Brought before the SJC sitting in Cambridge, Smith was found guilty and sentenced to death. On December 26, 1799, a crowd numbering in the thousands stood shivering in the cold on Concord Common to watch Smith's execution.[39]

A Boston publisher specializing in popular broadsides and pamphlets issued an account of Smith's execution. Although the author did not specifically articulate a position for or against public executions, his graphic description of Smith's hanging clearly was intended to undermine support for public hangings. There was nothing romantic or enlightened about the "heterogeneous, motley assemblage," who paraded to the gallows or the people who came to watch the gruesome spectacle, the author asserted. When the sheriff gave the signal, the condemned person was "suspended by the aid of Hemp from the Gallows, dancing a Spanish Fandango in the air—and screwing up the muscles of his phiz into the most ghastly distortions." After a few minutes the dying man lost control of his bodily functions, and women viewing this sight fainted away, exposing their bodies to the lewd gaze of men when they fell to the ground. In just these few sentences the author made clear the link between brutality and vulgarity and implicitly questioned the impact of public executions on American republican society.[40]

Two years later, following the trial and conviction of Jason Fairbanks for the murder of Elizabeth Fales, a Dedham clergyman also criticized the "dreadful apparatus of a public execution." Although the circumstantial evidence was weighted heavily against the defendant, the trial caused a huge stir throughout New England and some people clung to the belief Fairbanks was innocent. The trial also raised broad cultural issues, including the impact of romantic fiction on youngsters, parents' responsibility for their children's behavior, and competing political visions. All of this was capped by a jailbreak, a chase to Canada's border, and Fairbanks's eventual execution.[41]

The immediate events leading to Fales's death began on a warm, late spring day in 1801. Fairbanks and Fales arranged to meet near a brook in Mason's pasture, not far from Fales's Dedham home. According to Attorney General Sullivan, the twenty-one-year-old Fairbanks had "lived an