indulged and idle life" since a childhood smallpox inoculation gone awry robbed him of the strength in his right arm. When it became apparent that the boy's physical condition made him unfit for farm work, his anxious parents sent him to Wrentham Academy, hoping that a liberal education might lead to a professional career. But academic work also proved too difficult for Fairbanks. Headaches, a fever, and hemorrhages–the signs of tuberculosis—ravaged his body. After a short stay at school, he returned home to Dedham, to a life as a sickly, small-town dilettante of literature and music. He also cultivated a romantic relationship with his eighteen-year-old neighbor, Betsy Fales.[42]

Jason's brother Ebenezer described Betsy Fales as "not strikingly beautiful," but "engaging," "enthusiastic," "healthy," and "self-taught." Jason, nearly six feet tall, slender, with a light complexion and dark hair, also had "downcast eyes" and was "weakly, sedentary, conciliating, and pacific." Yet, "in the deepest sentiment of their hearts," Ebenezer claimed, "they were equally united and invariable." He believed Betsy and Jason were in love, opposites passionately attracted to each other. Marriage was out of the question, however. Jason's poor health at once sapped his strength and his financial prospects. His clouded future also may have fostered an impertinent attitude Betsy's family found unacceptable. Jason was not welcome at the Fales home. For this reason, Betsy and Jason had been meeting secretly for more than a year. Just eleven days before Betsy's death, according to Jason's niece "Sukey," the two young people met at her parents' home. At trial, "Sukey" testified that Betsy and Jason were alone together from about 9:00 P.M. until near sunrise.[43]

Those hours of intimacy may have prodded Jason to act, to attempt to bring his relationship with Betsy to fruition. On May 17, the day before Betsy and Jason's final, tragic meeting, Jason asked "Sukey" to create a marriage certificate and to fill in his and Betsy's names in the appropriate blanks. The next day Jason told his friend Reuben Farrington he planned to meet Betsy "in order to have the matter settled." He "either intended to violate her chastity or carry her to Wrentham to be married," he boasted. A few hours later when the two boys met again, Reuben asked what Jason would do after he and Betsy were married. Jason replied, "Sometimes I will go and lay with her; and sometimes she shall come and lay with me." He promised to share with his friend the outcome of his meeting with

Betsy. But Jason knew it was not likely Betsy would agree to his marriage proposal, because of his fragile health and his inability to provide for her. To get over this hurdle, he apparently planned to suggest to Betsy an arrangement that stopped short of marriage but permitted a sexual relationship. The fake marriage certificate Jason carried to his secret meeting with Betsy was the key to this plan. He also carried a penknife he had borrowed from one of his father's farm workers.[44]

Betsy spent the morning helping with household chores. At noon she walked to a neighbor's house, where she spent some time reading *Julia Mandeville*, a popular English novel in which two star-crossed lovers die, Henry in a duel undertaken because he mistakenly believed Julia had been unfaithful to him and Julia of a broken heart. Sometime after one o'clock Betsy left her friend's home for Mason's pasture to join Jason. At about three o'clock, two friends heard her call out "O Dear! O Dear," but the girls were unable to decide whether Betsy was laughing or crying out for help. Within a few minutes they learned she was dead.[45]

Jason brought the grim news to the Faleses. He staggered down the road toward their home, bleeding profusely from more than fourteen wounds, including a long gash across his neck. "Betsy," he gasped, "has killed herself." Still holding the bloody knife, Jason added, "And I have killed myself too." Betsy's father and uncle ran to Mason's pasture, where they found Betsy lying on the ground. Her throat was cut. There were stab wounds in her breast and arms, and one in her back. She was conscious but unable to speak and within a few moments she died in her father's arms. Near his daughter's body her father found the forged marriage certificate torn to pieces and Jason's overcoat and purse.[46]

A coroner's jury convened in the Faleses' home the day following Betsy's death. Jason lay near death in another room in the same house. Two days later, the "greatest funeral procession" longtime Dedham residents recalled ever witnessing slowly followed Betsy's body to the burial ground. On May 21 Jason was charged with Betsy's murder and carried in a litter from the Fales home to jail. A grand jury heard the case about two weeks later and returned a murder indictment against Fairbanks that was written in the same legal language used 165 years earlier when Dedham was founded. "Not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil with a certain knife of

the value of ten cents, the said Jason Fairbanks did feloniously, wilfully and of his malice aforethought did strike, stab, thrust" and murder Elizabeth Fales.[47]

Trial began Thursday, August 6, 1801, at eight o'clock in the morning before the SJC sitting in Dedham. Chief Justice Francis Dana presided, flanked by Justices Robert Treat Paine, Thomas Dawes, and Simeon Strong. A 1762 graduate of Harvard College, Dana read the law with Edmund Trowbridge and was admitted to the Suffolk County bar five years later. Dana served in the Massachusetts Provincial Congress, the Continental Congress, and the U.S. Congress, before Governor John Hancock appointed him to the SJC in 1785. He succeeded Cushing as chief justice in 1791. Attorney General James Sullivan represented the commonwealth at the Fairbanks trial. A Revolutionary War veteran, an outspoken republican, and a prolific writer who earlier may have expressed opposition to capital punishment, Sullivan had served as the state's chief law enforcement officer for more than a decade. The court appointed two prominent attorneys to represent Fairbanks. Harrison Gray Otis and John Lowell were Boston Federalists with more than three decades of trial experience between them when they stood alongside the shackled defendant.[48]

In a pretrial motion, Otis and Lowell asked the court to admit into evidence an alleged confession made by Fairbanks. In his statement—later published under the title *Solemn Declaration*—Fairbanks denied he murdered Betsy or that they had made a murder-suicide pact before they met at Mason's pasture. According to Fairbanks, Betsy impulsively took her own life because of a rash but honest remark he made to her. They were talking about their love for one another and their desire to marry, when Fairbanks showed the forged marriage certificate to Betsy, saying he "believed this brought us as near the marriage state as would ever be our lot together." Then, according to Jason's statement, he tore up the fake certificate and Betsy blurted out that Jason did not love her. Of course he loved her, Fairbanks shot back. Hadn't he "already possessed her person and received the pledge of her most tender attachment!" Betsy then demanded, "if [he] had ever told any one of our connection?" Jason answered he had shared their secret with his friends Reuben and Isaac. "Oh, you are a monster," she exclaimed, grabbing the knife from Fairbanks's hand and plunging it repeatedly into her breast while he looked on frozen by surprise. When he

saw she had cut her throat, he finally took the knife from her and turned it on himself "only leaving off when I had finished cutting my own throat, and when I believed all was over with me!"[49]

Sullivan opposed the admission of Fairbanks's alleged confession, arguing, "as he had not used the Prisoner's confession against him," the defense "had no right to use it for him." The court agreed with Sullivan. "The story of a prisoner is never given in evidence in his own favor, unless some part of the same story is given in evidence by the government against him," Chief Justice Dana ruled. If the defendant's own story were admitted, Dana added, "men might commit the most atrocious crimes, and by a well formed tale escape with impunity." Once the court ruled Fairbanks's confession inadmissible, the process of selecting a jury got under way. Exercising his right to challenge peremptorily jurors he suspected of bias, Fairbanks struck several potential jurors before agreeing to a panel of Norfolk County farmers and tradesmen. The *Columbian Centinel* reported the first day of the trial "was attended at the opening by so numerous a concourse of people of both sexes that the Court found it necessary to adjourn from the Court to the Meeting House."[50]

Sullivan opened the second day of the trial by sketching out the known facts and the prosecution's case against Fairbanks. The state's case, Sullivan acknowledged, rested largely on circumstantial evidence, but he assured the jury that "a fair and natural deduction from facts proved to exist [would] leave the mind without a reasonable doubt." Sullivan concluded by asserting "the Prisoner and the deceased were together when she was murdered and that her death was caused by knife wounds made by the Prisoner." Defense counsel argued that Betsy's heightened sense of romantic passion together with her melancholy despair created a potent psychological combination that caused her to take her own life.[51]

The prosecution called more than thirty witnesses, beginning with Dr. Nathaniel Ames, who had examined Betsy's body and attended to Fairbanks while he lay near death from his self-inflicted wounds. The attorney general's direct questions and defense counsel's cross-examination of Ames sought to resolve the key issue of whether Betsy's wounds were the result of a murderous assault or self-inflicted. To that end, Sullivan focused on a wound in Betsy's back, just below the shoulder blade, arguing that only a slashing attack by Fairbanks could account for such a wound.

But, when defense counsel asked Ames whether that wound might have been self-inflicted, the doctor answered yes. Other witnesses offered contradictory evidence about the nature of the relationship between Betsy and Jason and about several threats allegedly made by Fairbanks against Betsy and her parents. The defense put in very little evidence, relying instead on undermining the state's case by cross-examining its witnesses and by suggesting that Jason's general frailty and his crippled arm in particular made it impossible for him to overpower Betsy had he wanted to do so.[52]

After all the witnesses had been heard, the lawyers delivered their closing arguments. Otis and Lowell talked for six hours and Attorney General Sullivan completed his two-hour argument at nine o'clock Friday night. Because the defense had neither the law nor the facts on its side, Otis and Lowell spun out a romantic tale of star-crossed lovers who agreed to kill themselves out of despair that their love could not be consummated. The *Boston Gazette* described the defense lawyers' plea as a "torrent of eloquence with all that ingenuity, sagacity and learning which the genius and wisdom of man could invent." Sullivan's nineteenth-century biographer characterized his closing argument as one of "unrivalled eloquence."[53]

This case, Otis began, was "without exaggeration, without the aid of fancy, one of the most awful catastrophes ever exhibited in real life, in any age, country, or sketched by the most eccentric imagination, or the most melancholly poet." Since Fairbanks's arrest he had been the target of prejudice, rumor, exaggeration, and "self-created courts, have, without trial, and without a knowledge of the facts, pronounced him guilty." But, Otis added quickly, he trusted this American jury to "discard all previous impressions and to repress the effects which external prejudices may have excited" and to spare the life of a defendant "while any one man of his twelve judges entertains a reasonable doubt of his guilt." Otis urged the jurors to be especially careful, because their decision would turn on problematic circumstantial evidence.[54]

Boilerplate in place, Otis concentrated on creating a picture of a young woman and a sickly, weak "young man of irreproachable character at the unripe age of twenty years," who were in love. Betsy's head and heart were "filled with melancholly and romantic tales, which adverse circumstances forbade the gratification of, [who] had in a moment of phrenzy, put a period to her own existence." The alternate scenario—that Fairbanks murdered the woman he loved—was impossible to believe, according to Otis.

To believe Fairbanks murdered Betsy, the jury would have to conclude he acted "without provocation, without passion, without motive, without even those ordinary inducements which prompt hardened villains, practiced in iniquity, to commit the smallest offenses." "This is a simple tale," Otis argued. "Is it impossible? Has disappointed love never produced despair? Has despair never induced suicide? Has the softer sex been peculiarly exempt from these feelings and these results? No—Every novel writer will establish the assertion, that no passion has so often terminated fatally as love."[55]

Otis concluded his argument with an appeal to the jurors' provincialism, their patriotism and their compassion. Jurors should consider the "exemplary virtues," of Jason's parents, the "virtuous preceptors" of Dedham village, and the character of the American nation. A boy raised in France may be "taught butchery," or an English adolescent become "inured to carnage and plunder under the tutors of the Old Bailey," but American values would not permit such a "sanguinary taste." Finally, Otis begged the jury to consider the consequences of their decision and not to be afraid to act on their doubts about Fairbanks's guilt. "If you condemn him, you sentence a whole family to inevitable distress, perhaps to ruin, and a miserable being, perhaps INNOCENT, to certain death."[56]

The attorney general's closing statement explored some of the same themes Otis had touched on, but Sullivan also pounded the facts. Following the briefest introduction, Sullivan asserted that "the evidence is conclusive," that Betsy was murdered "with a knife which is proved to have been in the possession of the prisoner. He, and he alone, was with her when the deed was consummated. The deduction is consequently irresistible that she either destroyed herself or that he was guilty of her murder." Sullivan left no doubt about his choice of these alternate scenarios. First, the attorney general flatly rejected the defense argument that Betsy's romantic passion drove her to suicide. "To say that she could be provoked to commit suicide because the object of her affection was not a better man, or in better circumstances, is a supposition too unnatural to be allowed any serious consideration." *If* she did love him, she had options other than death. Second, Betsy's wounds were not self-inflicted. "It is altogether impossible that that [wound] in her back, directly in, should have been made by her own arm." If she had wished to die, she would not have slashed her arms and hands and plunged the knife painfully, but ineffectively into her

breast. In fact, Betsy was fighting for her life, he said, fighting to save her honor. When she ripped up the forged marriage certificate and rebuffed his scheme to win sexual license, Jason became infuriated and attacked her with the knife he had brought along. He jabbed the knife toward her throat. She turned away to avoid the cut and he plunged the knife into her back. He tried again to slash her throat. She warded off his attacks with her hands and arms. Her flesh was torn open. Finally, she weakened, and he "gave the fatal wound in the throat."[57]

To prove the validity of the circumstantial scenario he had sketched for the jury, Sullivan now linked it tightly to the facts. The cadence of his speech was measured by the phrase "there is evidence." "There is evidence" Fairbanks sought revenge against Betsy's parents. "There is evidence" he planned "*their* ruin by ruining her." "There is evidence" he intended to engage Betsy "in an unlawful marriage." "There is evidence" he intended "to violate her chastity by force." And a thunderous beat: "There can be no doubt he intended to effect her dishonor by violence, unless she would consent to her own ruin by a clandestine marriage, or by a conduct far more disgraceful."

Sullivan might have stopped at this point but, sounding more like a preacher than a lawyer, he spoke to larger themes aimed at an audience outside the courtroom. He chastised parents who failed to instruct their children properly. "False fondness and misapplied tenderness" too often characterize the relationship between parents and children. Parents must be firm and watchful to prevent a child from becoming wayward. They must also encourage their children to cultivate steady work habits; work is an indication of self-discipline and of commitment to the community. "Idleness is a rebellion against the mode of our existence," he said, and inevitably leads a child to "cultivate unlawful desires."

Sullivan's rhetoric and his known accomplishments lent power and legitimacy to his argument. But Sullivan's presence provided the most compelling proof of his familiar argument that discipline, hard work, and the assumption of social responsibility are the necessary prerequisites for one's success as a person and for a stable, virtuous republic. As Sullivan stood before the jurors, perhaps limping slowly from where they were seated to the defense table, his twisted, shriveled leg—the result of a childhood accident—was painfully evident to jurors and spectators, reminding them that he had overcome a handicap and gone on to play a significant

part in the Revolutionary War effort and rise to the post of attorney general in the postwar republic. Sullivan himself provided the perfect counterexample to the picture he drew of Fairbanks and the choices he had made that led him to murder.

When Sullivan had completed his argument, each of the four justices instructed the jury about the law. In summarizing the evidence the judges highlighted Fairbanks's "expressed intentions toward the deceased on the day she was murdered and the improbability of her giving the wounds in her breast, side, and arms, even if she had intended to destroy her own life." One of the judges adopted the attorney general's aggressive argument: if Fairbanks "induced [Betsy] to commit murder on her own person, he was a principal in the felony" and still culpable under the indictment, "as if he gave the wounds with his own hand."[58]

About ten o'clock Friday night the jury began its deliberations, but after an hour the foreman informed the court it was unable to agree. The court adjourned until eight o'clock Saturday morning. At that time, the jurors filed into court. When asked by the clerk, the jury foreman stated they had found the prisoner guilty of murder. The jurors were polled and each one affirmed the guilty verdict. Fairbanks faced Chief Justice Dana, who described in "strong and glowing colors" the "very barbarous manner" in which Fairbanks had murdered Betsy Fales. Fairbanks, the *Boston Gazette* noted, seemed to be "the only person in the whole assembly who was not affected at the ceremony of the scene." Dana stated his belief that Fairbanks had received a fair trial and "during his few short remaining hours" the chief justice urged the condemned man to reflect on his "future state." But Fairbanks was not ready for thoughtful reflection; he tried to say something about the testimony of several witnesses, but Dana cut him off and pronounced the death sentence. Jason Fairbanks, you are to "be carried from hence to the gaol from whence you came, and from thence to the place of execution, and there to be hanged by the neck until you are DEAD, and may God Almighty have mercy on your soul."[59]

Ten days later, a daring late-night assault on the jail freed Fairbanks and two other prisoners. The Dedham resident and former congressman Fisher Ames was outraged. He and other Federalists blamed Republican party activists for assisting with the jailbreak. To clear themselves of blame and to publicly display their patriotism, Dedham Federalists volunteered to allow their homes to be searched and to account for their whereabouts

during the jailbreak. Republicans denied the Federalists' charge, touting the results of an independent investigation that concluded "not more than two or three were actors in this horrid labor of setting a murderer free." In a rush to distance their party from Fairbanks' escape, both Republicans and Federalists publicly contributed to a $1,000 reward for the fugitive's capture. In the meantime, equipped with money and horses, Fairbanks and his accomplice fled across Massachusetts, rode over Hoosac Mountain, and spurred their horses north toward Bennington, Vermont. The two fugitives intended to cross into Canada, but they were captured at the head of Lake Champlain, just short of their goal.[60]

Brought back to Boston, Fairbanks was held under guard until September 10, when he was taken from jail by a writ of habeas corpus and delivered to the Norfolk County sheriff. A troop of cavalry bolstered by a guard of 250 Dedham volunteers escorted Fairbanks to the Dedham jail and to a gallows erected on the Common. Rev. Thomas Thacher, a Dedham clergyman who frequently had visited Fairbanks in the Boston jail, walked along side the condemned man. A crowd estimated at ten thousand persons—more than five times the population of Dedham—lined the short route from the jail and circled the gallows. Fairbanks refused an opportunity to speak. He stood silent and apparently emotionless. He was blindfolded and the rope was put around his neck. The sheriff gave him a handkerchief to hold in his hand, telling him to drop it as a signal when he was ready to be executed. Fairbanks dropped it almost immediately.[61]

Following Fairbanks's execution several accounts of the case were published, including a satirical broadside issued by the "Pandamonium Press," Fairbanks's alleged confession, titled *Solemn Declaration*, and Thacher's postexecution sermon. The broadside lampooned the supposed relationship between God's plan and man's execution of a sinner-murderer. At the hour the hanging was scheduled to take place, the day's bright sun disappeared on cue, giving way to "watery clouds," "forked lightening," and "thunder with tremendous claps." At that moment, God's wrath and earthly punishment came together and the condemned man was "launched into eternity." But, the broadside made clear, if the gruesome spectacle was meant to warn spectators to avoid the temptations of sin, the lesson was lost on the crowd attending the execution. The men, women, and children packed around the gallows were laughing and playing, leading a hypothetical foreign visitor to think he was observing a celebratory national festival. The "surmise would have been just," the broadside concluded.[62]

Although Ames had played an ambivalent role at Fairbanks's trial, he was outraged by the publication of *Solemn Declaration*. "It is a great perversion of the truth," Ames wrote in his diary. The alleged confession, he said, glossed over the question of how Betsy wounded herself, exaggerated Jason's positive traits, and unfairly criticized the court and jury. Although Ames acknowledged the Fairbanks family would profit from the sales of pamphlet, he claimed it "disgusts almost everybody!" Thomas B. Adams, for example, bought and read a copy, but he remained convinced Fairbanks "suffered a righteous punishment."[63]

On the Sunday following Fairbanks's execution, Thacher delivered a dispassionate and reflective sermon that booksellers—perhaps hoping for a prolonged and profitable debate about Fairbanks's guilt or innocence—offered free to purchasers of the *Solemn Declaration*.[64] Thacher began by offering the usual moral advice, urging his listeners to see the "tragical event" as a warning signal from God, encouraging sinners to reform. Punishing the "wicked in the present world is one of the loudest admonitions which can be given to sinners," Thacher said. He also believed that the Fales and Fairbanks families deserved "sympathy and condolences."[65]

Thacher told his congregation he had visited Fairbanks in the Dedham and Boston jails. At Dedham they merely chatted, avoiding talk about the murder, because Fairbanks—probably on advice of counsel—was concerned any conversation "might affect him at his trial." Thacher urged Fairbanks to repent, but Jason was too angry. He talked only about those witnesses whom he accused of testifying falsely. After the escape and recapture, Thacher visited Fairbanks in the Boston jail. He no longer complained about the fairness of his trial, but Thacher noted that a "want of candor and a reserve" still prevented Fairbanks from acknowledging his sinful status or confessing to Betsy's murder. Thacher made no judgment based on his conversations with Fairbanks. He equivocated on the question of Fairbanks's guilt and pointed out that not everyone in Fairbanks's situation reacted the same way.

On the day of Fairbanks' scheduled execution, Thacher—who previously had not witnessed an execution—accompanied Fairbanks from Boston to Dedham and walked alongside him to the gallows on Dedham

Common. After Fairbanks gave the signal he was ready to be hanged, something went wrong and the "dreadful apparatus of a public execution assumed added horrors." But, the incident—perhaps the rope was too long or not strong enough or not tight enough to effectively suffocate the condemned man—was only one reason Thacher criticized public executions. In fact, he told his congregation, he had concluded public executions were "pernicious in their influence on the minds and manners of the community." Although many men and women had brought along their children, thinking "their minds may be impressed with a horror of vice by witnessing its terrible effects," Thacher said, he was convinced the grim spectacle had the opposite effect on everyone in attendance. Watching a person be put to death "naturally hardens the heart and renders it callous to those mild and delicate situations which are our guards of virtue." For this reason, public executions undermine public virtue and do nothing to deter would-be criminals.

Thacher also argued that public executions were unnecessarily brutal for the condemned person. To "expose their last agonies before thousands of spectators" was "Gothic savageness" or worse, "cannibalism." Admitting for argument's sake that fear was a necessary means of social control, would it not make sense if the condemned were executed behind prison walls? Would not such a process, Thacher asked his listeners, "impress more fear and terror on the multitude than if they every day beheld wretches expiring under the protracted torments of a despot?"

Thacher's conclusion was unmistakable: no religious or moral good came from public executions and they should be abolished.

To be sure, there were romantic and sentimental themes running through the Fairbanks trial, but the case also highlighted Massachusetts's capital procedure and stimulated criticism of public executions. Whatever cultural spin lawyers put on their closing arguments in subsequent trials, the rules of capital procedure remained the bedrock on which justice for capital defendants was built. Capital procedure was neutral and transparent and characterized by the attitude that death was different. For these reasons, a capital trial was governed by clearly articulated rules of evidence manipulated by skilled lawyers and interpreted by respected jurists, and the verdict was placed in the hands of a jury of disinterested citizens who weighed the evidence to determine a defendant's guilt or innocence. These basic safeguards ensured a fair trial for capital defendants. At the same time, critics outside the courtroom kept up a drumbeat against public executions, an argument that eroded support for executions generally. Thacher's criticism of the circuslike atmosphere attending the Fairbanks execution, for example, signaled the beginning of the end of religious support for public executions and may have prompted the legislature to take steps to bring the punishment of criminals into closer conformity with republican ideals.

Just a short time after Fairbanks's execution a Massachusetts Senate committee reported that the capital law against burglary "is so severe that many offenders escape punishment," because juries will not convict. Governor Caleb Strong, a Federalist, responded positively to the legislature, stating he would pardon unarmed burglars sentenced to death. The governor's motive was not strictly humanitarian. Rather, he feared putting to death unarmed burglars "would only excite compassion for the delinquent" and undermine support for capital punishment. The year following the governor's 1802 speech, Massachusetts lawmakers took burglary off the capital list and invested in an alternative means of punishment, Charlestown prison. At the same time the legislature reduced the list of crimes punishable by death and eliminated the stocks, the pillory, whipping, and mutilation.[66]

The legislature also opened the judicial system by requiring the governor to appoint a reporter to record and publish the SJC's decisions. Published court reports would serve many purposes. They would help to create a permanent system of common law, satisfy the demand of a growing number of lawyers for legal guidelines, and highlight publicly that Massachusetts was a government of laws. Dudley Tyng, reporter for volumes two through seventeen of SJC *Reports*, added that publishing the court's decisions would buttress republicanism by allowing the people of Massachusetts to pay close attention to the "import and extent" of their constitutional rights.[67]

In the first published volume of *Massachusetts Reports* the court used a potentially explosive capital case involving rape and murder to elaborate on a rule that prohibited the admissibility of a confession obtained by "promises, persuasions, or hopes of pardon." John Battis, a nineteen-year-old African American, was charged with the rape and murder of a white teenager, Salome Talbot, to whom he had spoken on two or three prior occasions. According to evidence introduced at trial, on a hot summer

day, she walked along a path near where he was working hilling corn on the south side of Blue Hill. "An unpremeditated thought, an uncherished impulse," caused him to follow her into a "gloomy thicket." There, "deaf to her struggles," he raped her. While she lay motionless on the ground, Battis grabbed a heavy rock and repeatedly crashed it against her head. He then dragged Salome to a nearby pond and held her bloody, lifeless body below water.[68]

Battis fled south toward Providence, but he was captured in Attleborough, ten miles short of his goal. Questioned by a justice of the peace, he "readily confessed" to the rape and murder of Talbot. He was arraigned and jailed in Dedham, awaiting trial. During the next several weeks a number of "respectable gentlemen from Boston and other neighboring towns" visited him. He also shared his life story with a Dedham newspaper editor, telling him he had been born in Boston to an interracial couple and that shortly after his fifth birthday his father abandoned the family, leaving his mother to care for him alone. She taught him to read and write and apprenticed him to a good master. But "youthful foibles" led young Battis to crime and ultimately to murder.[69]

Four months after his capture, he stood before the SJC and pleaded guilty to "that most atrocious crime." But the court insisted he take a "reasonable time to consider" his plea, reminding him that "he was under no legal or moral obligation to plead guilty, that he had a right to deny the several charges and put the government to the proof of them." The court had reason to believe someone had encouraged him to confess and the justices questioned everyone who had visited Battis while he awaited trial. Following its inquiry, the court concluded his confession was voluntary, and, therefore, his guilty plea was admissible. Attorney General Sullivan formally moved for a sentence of death that Chief Justice Dana "delivered in a solemn, affecting and impressive address to the prisoner." Battis was hanged on November 8, 1804.[70]

The court introduced three other important changes in capital procedure shortly after *Battis*. In *Commonwealth v. Hardy* (1807) the SJC officially acknowledged two long-time practices and articulated a new rule permitting testimony about a capital defendant's character. Because the "life of a fellow being" was at stake, the SJC noted it had a responsibility to appoint counsel and to allow its procedural errors to be appealed. In

fact, William Hardy's court-appointed counsel successfully persuaded the court to reverse his client's death sentence, a historic first.[71]

On December 2, 1806, Hardy, an African American laborer, was indicted for the murder of an infant, an illegitimate child born to Elizabeth Whelfry. The indictment charged Hardy had wrapped a small chain around the baby girl's neck and held her under water until she drowned. As he was being led from jail to the courthouse for trial, the *Boston Courier* reported, a skeptical black woman bystander said to Hardy and the prison guard accompanying him, "'Har you Hardy—you no lawyer—you fool! Why you no take 'em down [S]tate street and shoot 'em, den you be clear.'"[72]

At trial, Hardy was found guilty. Before the court sentenced him to death, however, his court-appointed counsel filed a motion in arrest of judgment, claiming the court had erred because a single justice had arraigned Hardy rather than the three or more justices called for in an 1805 statute. The court stayed his sentence of death and scheduled argument on the motion during its 1807 term. Senior defense attorney George Thatcher argued the trial had been illegal and the court "cannot proceed to pass sentence of death on William Hardy," because Hardy was arraigned only before Justice Theodore Sedgwick. Parsing each word in the governing statute and citing a handful of English cases, Thatcher concluded Hardy's 1806 trial was "invalid and erroneous, because in all cases a prisoner ought to be arraigned at the same bar where he is to be tried." He had no desire to "frustrate public justice," Thatcher added, but "in establishing a precedent for trials of capital offenses, the greater caution should be used that it may not be quoted by evil men in future disastrous periods of the commonwealth to abridge the citizens of their rights." Co-counsel George Blake, a thirty-eight-year-old trial lawyer and U.S. attorney for Massachusetts, buttressed Thatcher's death-is-different approach. The "habits and prejudices of the country," he said, linking contemporary social and legal practices, argue for "strict construction" of capital punishment statutes. Attorney General Sullivan rebutted Hardy's argument, but he conceded, "if there is a doubt, the life of the prisoner ought not to be taken."[73]

Chief Justice Theophilus Parsons, who brought to the court a reputation as the "greatest living lawyer" in Massachusetts when he was appointed to the bench in 1806, ruled for the defense. Although Hardy had

not objected to the court's procedural error in a timely fashion and his trial went ahead, "an objection founded in want of jurisdiction, however small, is not in capital cases, taken away by any implied consent. If ever quibbling is at any time justifiable," Parsons wrote, "certainly a man may quibble for his life." Hardy's guilty verdict was set aside. Over the solicitor general's objection, Parsons also ruled that Hardy and capital defendants generally might introduce evidence at trial about their good character. "Whenever the defendant chooses to call witnesses to prove his general character to be good," Parsons added, "the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue." Parsons believed this rule should be extended to all criminal defendants, but Justices Samuel Sewall and Isaac Parker argued the new rule should be limited to capital cases, "in favor of life."[74]

Immediately following the court's ruling reversing Hardy's conviction, Attorney General Sullivan moved for a new trial on the same indictment. The court scheduled a motion hearing. Although Blake and Thatcher did not raise an objection to a new trial, it marked the first time in the court's recorded history that counsel represented a capital defendant other than at trial. In short, by inviting defense counsel to participate in motion hearings the court significantly expanded the protection afforded a capital defendant. Hardy was acquitted at his second trial and immediately freed.[75]

In the decade after Hardy won his freedom on a procedural technicality, several additional changes were made in capital procedure and practices that emphasized the court's perception that death was different. Those changes were manifest in the 1817 murder trial of twenty-five-year-old Henry Phillips, a Welsh sailor whose effort to help a friend culminated in the murder of an Italian man, Gaspar Denegri. Alcohol and bravado prompted the incident leading to Phillips's indictment. According to trial testimony, Phillips stayed at the Roe Buck tavern in the North End whenever one of his trans-Atlantic voyages brought him to Boston. On the evening of December 1, 1816, Denegri, a Boston confectioner's apprentice, was drinking at the Roe Buck with some friends. The young Italian began to tease Nathan Foster, a son of the tavern's owner who was seated in a dark corner reading the Bible quietly by candlelight. Denegri had had a good deal to drink and began showing off for his friends by repeatedly blowing out Foster's candle. As Phillips watched from across the room,

his anger boiled over. He stepped between Denegri and young Foster and warned Denegri to stop. Laughing, Denegri blew out the candle again and the two young men scuffled. Charlotte Foster ordered Denegri and his friends out. About an hour after Foster had closed the tavern for the night, Denegri returned, pounding on the door and loudly demanding to be admitted. Phillips grabbed an iron bar and pulled open the front door, but Denegri had run around to the back door. Phillips and a friend followed him and Phillips knocked him over the head with the bar. Denegri died six days later.[76]

At trial, the SJC appointed George Sullivan and Lemuel Shaw to represent Phillips. A son of former Attorney General James Sullivan, George Sullivan read the law with his father and was admitted to the Suffolk bar in 1804 at age twenty-one. Shaw graduated from Harvard College in 1800, read the law with David Everett, and at age twenty-three was admitted as an attorney by the Court of Common Pleas in Boston. Both men were experienced criminal defense lawyers. The solicitor general, Daniel Davis, had held his office since 1800. Chief Justice Isaac Parker and Justices Charles Jackson and Samuel Putnam sat on the bench. Parker was a Maine native who graduated from Harvard College in 1786, read the law with Boston attorney William Tudor, and three years later started a practice in Castine, Maine. He was appointed to the SJC in 1806 and moved to the center seat in 1814. During his tenure on the court Parker also served as Royall Professor of Law at Harvard Law School.[77]

Following the defense team's successful pretrial motion separating the trials of Phillips and his accomplice and its challenge of a dozen potential jurors, Davis opened for the commonwealth on January 9, 1817. Phillips was a "stranger in this part of the country," Davis began, but he would receive "every protection and assistance" guaranteeing a "perfectly impartial trial." To that end, Davis told the jurors, two distinguished lawyers had been appointed to defend Phillips. Indeed, he said, the "law is so careful of the rights of the accused party in a capital offense that the Court are always to be counsel for the Prisoner." Davis acknowledged that "public sentiment is against the infliction of capital punishment," but he hoped the jury would do its duty if the facts he presented sustained the murder indictment against Phillips.

Beginning with Dr. George Shattuck, Davis called a number of witnesses to prove the facts of the case against Phillips. The doctor testified

that Denegri died from several blows to his head delivered with great force. Sullivan carefully cross-examined Shattuck, suggesting the blows were only a contributing factor to Denegri's death and that greater medical skill might have saved his life. Shattuck cautiously countered that argument. At this point, Sullivan approached the bench and asked that all witnesses be removed from the courtroom so that each one might "testify out of the presence and hearing of the others." The court granted the motion, a ruling revealing the transformation that had occurred in the court's presumption about the veracity of witnesses since the postrevolutionary decline of religion. Colonial courts had assumed witnesses under oath necessarily told the truth, but the SJC realized the search for truth was a more complicated process. Specifically, because the case against Phillips turned on eyewitness accounts certain to vary, Sullivan wanted to insulate the testimony of each eyewitness to prevent the emergence of a detrimental homogenized account and to allow him to exploit differences in their testimony. Later, Sullivan would ask jurors to interpret each witness's testimony and to draw their own conclusion.[78]

The solicitor general's star witness was Mary Davis, a barmaid at the Roe Buck tavern. She testified she was standing near the tavern's locked rear door and saw Phillips hit Denegri from behind as the young man approached the door. The jury foreman asked whether Phillips was intoxicated. "I don't know," she replied. "He appeared as usual." On cross-examination, Sullivan asked Davis whether she knew if Denegri was armed with a knife. Someone inside the tavern had said he was armed, the barmaid answered. Sullivan did not pursue this line of questioning, but in closing he raised the issue again to lend support to his argument that Phillips's act was legally justifiable.

When Davis left the witness chair, it was two o'clock in the afternoon and Chief Justice Parker called a one-hour recess. The common law rule stipulated that jurors were to be deprived of food, drink, light, and fire until they reached a verdict, but a recent change in practice, Parker told the jury, made it possible for the sheriff to provide capital jurors with "moderate refreshment." He cautioned the twelve men they were not allowed "to drink spiritous liquor of any kind" or discuss the case among themselves.[79]

When the jurors returned, Davis concluded his presentation by quoting from legal authorities, including the text most relied upon by American lawyers—Sir William Blackstone's *Commentaries on the Laws of England*. Davis wanted to counter the implied argument about justifiable homicide made by Sullivan just before recess. Malice aforethought distinguishes murder from other homicides. Malevolence, Davis told the jury, is "the dictate of a wicked, depraved, and malignant heart" and, according to Blackstone, may be either expressed or implied. If a person manifests an "evil design" and strikes a blow that causes another person's death, but "did not intend his death, yet he is guilty of murder by express malice." Even without a specific sign of evil intent, when a person deliberately kills another person, the law implies malice. Only a person with an "abandoned heart" would be guilty of killing another person. And, Davis emphasized, "no affront by words, or gestures only is sufficient provocation" for killing another person.[80]

Sullivan opened his defense of Phillips by calling to the stand two clusters of witnesses. Using the *Hardy* rule, the first group of witnesses testified to Phillips's good character. The second group of witnesses offered evidence that Denegri was carrying a knife. Nathan and Charlotte Foster both stated they had known Phillips for several years and that he was a good, hard-working, peaceable man. Phillips's commanding officer testified similarly. More important, Mary Davis and Joseph M'Cann told the court they and others inside the tavern that fatal night suspected Denegri had a knife when he pounded on the door shouting threats and insults.

Sullivan gave the first closing statement for the defense. His elaborate three-hour argument focused on whether Phillips had manifested malice aforethought, the prerequisite for a murder conviction. Phillips's acts that night at the Roe Buck tavern did not fit the criteria for either express or implied malice, Sullivan told the jury. The young sailor had "reasonable ground" to believe Denegri was armed with a knife. Therefore, if he were guilty of anything, it was the lesser charge of manslaughter. It was eight o'clock at night when Sullivan finished his closing argument. Chief Justice Parker ordered the court adjourned for the day. He instructed the court's officers to keep the jury together and sober until court resumed Saturday morning at nine o'clock.

When court reconvened, defense co-counsel Lemuel Shaw, Solicitor General Davis, and Chief Justice Parsons each addressed the jury. Shaw began by confessing how anxious he was about making an argument to save a man's life. He argued Phillips had a legal basis for striking Denegri. The defendant "honestly believed" Denegri was armed and that

he intended to break into the tavern to carry out his threat against Phillips. Shaw concluded his argument by reminding the jury that "any reasonable doubt" must lead them to acquit the defendant. "This is not a mere rhetorical flourish," Shaw told the jury, "but a well established rule." Davis used only about half of the time Shaw had used. Davis repeated the key facts of the case. According to Mary Davis's testimony, he pointed out, no one inside the tavern was in danger, because the doors were locked. Yet, Phillips repeatedly struck Denegri, causing his death. He was guilty of murder. If there was any doubt in the jurors' minds when Davis sat down, Chief Justice Parker's instructions removed it. There was no hint of ambivalence in Parker's interpretation of the evidence. He stated matter-of-factly that Denegri did not have any criminal intent when he returned to the tavern and the entire episode would have ended without harm, except for the "unfortunate suggestion" that he had a knife. The willingness to believe Denegri was armed probably was prompted by the "dread our people have of an Italian," Parker stated. But without proof to sustain that cultural bias, he urged the jury to discount that testimony. On the key question of whether Phillips's behavior manifested malice aforethought, the prerequisite for a murder conviction, Parker was equally blunt. "When a homicide is committed the law implies malice," he said. Specifically, the blow Phillips dealt Denegri was a "sudden transaction" that fulfilled the definition of malice aforethought.

The jury retired at two o'clock in the afternoon to deliberate Phillips's fate and returned in less than an hour with a guilty verdict. On the following day, Solicitor General Davis moved for a sentence of death. Chief Justice Parsons asked Phillips whether he had anything to say before sentence was pronounced. "I was led into it," Phillips blurted out and then stood weeping. Parsons praised the Massachusetts criminal justice system for the protection it provided the defendant during his trial. Without irony, the chief justice told Phillips—whose troubles began when he came to the rescue of a Bible-reading friend—if he had been born and educated in the United States, "where the poorest people have access to the source of light and truth in the Scriptures," he would not now stand convicted of murder. Parsons then pronounced sentence. Phillips was to be hanged by the neck until dead. Sentence was carried out March 13, 1817, before a crowd of twenty thousand people.[81]

Phillips's fate makes it clear that murder defendants had only a slim

chance of winning an acquittal, despite changes made in capital procedure following the enactment of the Massachusetts Constitution. The facts presented by the prosecution and the court's presumption of implied malice were formidable hurdles blocking capital defendants' path to freedom. Still, the four decades following the ratification of the Massachusetts Constitution were a formative period for the extension of rights to capital defendants. Using its constitutional power, the SJC laid down new rules of law that insisted official conduct in capital cases measure up to a republican standard of fairness, impartiality, and equality. Some people believed the new commonwealth could not endure without the deterrent to crime supposedly provided by capital punishment, and in the 1780s there was an orgy of state-sanctioned executions. Within a short time, however, lawyers routinely insisted that arbitrarily imposed capital punishment and a republican form of government were incompatible. Without taking a political position on that question, the court nevertheless transformed capital procedure by putting in place extraordinary safeguards when the life of a fellow being was at stake.

The SJC was especially careful to protect the rights of African American defendants, men and women freed by the ratification of the Massachusetts Constitution. "When the liberty of one man was attacked [it was] tantamount to an attack on the liberties of all," counsel for a slave who brought suit for his freedom in 1781 argued. Two years later at a criminal trial, Chief Justice Cushing emphasized the same ideal. "The people of this Commonwealth have solemnly bound themselves to each other—to declare—that *all men are born free and equal*; and that *every subject is entitled to liberty* and to have it guarded by the laws as well as his life and property."[82] *Battis* and *Hardy* elaborated on this commitment.

In addition to the procedural rights outlined in the Massachusetts Declaration of Rights, the court extended to capital defendants a cluster of rights articulated by rule. Capital defendants had the right to an attorney—one senior and one junior counsel routinely were assigned—and, as in Hardy's trial, appointed counsel also argued motions and represented the defendant before the SJC when it sat as an appeals court. A capital defendant also had the right to a randomly chosen impartial jury. To ensure that the jury was impartial, the defendant (but not the prosecution) had the right to an unlimited number of challenges aimed at potential jurors. The court also ruled that capital jurors must be fed and sequestered

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

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

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

THREE

"UNDER SENTENCE OF DEATH"

THE FIRST EFFORT TO ABOLISH THE DEATH PENALTY

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

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