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"SUCCESS—AT LONG LAST": THE ABOLITION OF THE DEATH PENALTY IN MASSACHUSETTS, 1928–1984

ALAN ROGERS*

Abstract: The national debate regarding the death penalty has raged for decades, consistently attracting a high degree of media, political, and legal attention. The effort to abolish the death penalty in Massachusetts was no different; the movement was a decades-long struggle that ensnared politicians, activists, falsely accused defendants, and the Supreme Judicial Court. This Article traces the contours of the anti-death penalty movement through the work of Sara Ehrmann, head of the Massachusetts Council Against the Death Penalty (MCADP), the numerous governors who had to confront this politically vexing issue, and the Supreme Judicial Court, which drove the final nail into the death penalty coffin in Massachusetts. This Article illustrates that the death penalty met its demise in Massachusetts because of tireless activists like Ehrmann, steadfast governors, and principled Supreme Judicial Court judges who used the law to invalidate the ultimate penalty.

Introduction

At a noon rally on May 10, 1947, Massachusetts Governor Robert F. Bradford, who had vaulted into the governor's office after winning a national reputation as a tough-on-crime Middlesex County district attorney, told a cheering crowd on Boston Common that providing

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subsidies for veterans' housing was his top priority. Later in the day, the Governor spoke to reporters about his proposed sales tax. Neither Bradford nor the reporters following the Governor that late spring day said anything about the executions of Philip Bellino and Edward Gertson. The two men had been electrocuted at the Massachusetts State Prison shortly after midnight for the murder of nineteen-year-old Robert "Tex" Williams, a former United States Marine.¹

In a little more than two decades, the public lost the callous indifference manifested by the public silence following Bellino and Gertson's executions. A loud and vigorous debate about capital punishment eventually led to a temporary national halt in executions and to the death penalty's abolition in Massachusetts. Bellino and Gertson were two of 153 persons executed in the United States in 1947² and the sixty-fourth and sixty-fifth—and last—persons to be executed in Massachusetts.³ Although the signs of change were not then apparent, Bellino and Gertson's executions came on the cusp of a social and legal transformation of attitudes and practices regarding the death penalty, a cause which Massachusetts abolitionists had been working on for two decades. During the 1950s the number of executions began to decline throughout the United States, falling steadily until they were stopped altogether from 1968 through 1977.⁴ Among other factors leading to this moratorium, between 1961 and 1969, the United States Supreme Court applied virtually all the procedural guarantees of the Bill of Rights to the states' administration of criminal justice. Capital defendants' increasing access to post-conviction review by federal courts accelerated the downward spiral of executions. This downward spiral led to the Supreme Court's 1972 decision Furman v.

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which held that capital punishment as then practiced was unconstitutional.⁵

The Court's per curiam opinion in Furman summarily reversed the death sentences, but not the convictions, of 118 prisoners on death row. By the time state courts applied the decision to all death sentenced prisoners not mentioned in the per curiam holding, the number of death sentences vacated rose to 631. Massachusetts, for example, commuted the sentences of twenty-two men from death to life imprisonment.⁶ Justice Stewart, in dicta in his concurring opinion in Furman, suggested that Massachusetts' mandatory death penalty for felony murder-rape might satisfy constitutional requirements. At the time two men—both African-Americans—were under death sentences for that crime. Although hailed by optimistic abolitionists, Furman did not signify the end of executions in the United States. Many state legislatures, including the Massachusetts Great and General Court, immediately set to work to repair the procedural flaws in death penalty statutes that the Court identified. Four years later, in Gregg v. Georgia, the Supreme Court upheld the constitutionality of the reformed capital punishment statutes.⁷ The Court's decision did not

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⁵ See Furman v. Georgia, 408 U.S. 238, 240 (1972); Bowers, supra note 2, at 46; Haines, supra note 4, at 12, 21, 40. An enormous amount has been written about the death penalty in America, and the following brief list is suggestive rather than exhaustive. See generally Charles L. Black, Jr., Capital Punishment: The Inevitability of Caprice and Mistake (1974); Bowers, supra note 2; Haines, supra note 4; Welsh S. White, The Death Penalty in the Nineties (1991); The Death Penalty in America (Hugo Adam Bedau ed., 3d ed. 1982).

⁶ Furman, 408 U.S. at 329–30; Neil Vidmar & Phoebe Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 245, 1245 (1974). Following the per curiam statement in Furman, there were nine separate opinions, comprising 243 pages, the longest in Court history. The four dissenters were more uniform in their critiques than the majority. All of the dissenters expressed the view that the Court was treading on legislative turf and that Americans had not regulated the death penalty. Chief Justice Burger's opinion raised the possibility that states might rewrite their death statutes to meet the Court's objectives.

⁷ See 428 U.S. 153, 153–54 (1976). In Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976), a plurality of the Court rejected the abolitionists' argument that capital punishment per se was unconstitutional and mandated bifurcated proceedings and guided discretion standards for sentences and appellate review. However, the Court invalidated North Carolina's death penalty statute which imposed a mandatory death sentence for certain crimes in a companion case to Gregg, Woodson v. North Carolina. See 428 U.S. 280, 301 (1976). The Court found that 'North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.' Id. Further, in the final Gregg companion case, Roberts v. Louisiana, the Court invalidated Louisiana's statute despite the fact that
The state's mandatory death sentence provision applied to a narrower range of defendants than the statute in Woodson, 428 U.S. 325, 336 (1976).

the death penalty. This Article explores the historical roots of that extraordinary legal change.¹⁹

I. THE FIRST PHASE: FROM OBSCURITY IN 1928 TO PARTIAL VICTORY IN 1951

The Massachusetts Council Against the Death Penalty (MCADP), the only active state organization dedicated to abolition from 1928 through 1950, was founded in the aftermath of Sacco and Vanzetti's executions.¹⁰ The MCADP, which had a grudging paper relationship with the American League to Abolish Capital Punishment (ALACP), acted independently from that New York-based national organization, distinguishing itself from the left-wing politics that drove both the ALACP and the Sacco-Vanzetti Defense Committee.¹¹ Directed initially by a Quaker activist, in 1928 the MCADP turned to Sara Rosenfeld Ehrmann, a thirty-three-year-old Brookline housewife and mother of two young children, whose husband Herbert had been on the Sacco-Vanzetti defense team.

⁹ See generally Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984); O'Neal I, 327 N.E.2d 662; Commonwealth v. Gallo, 175 N.E. 718 (Mass. 1931); Commonwealth v. Cero, 162 N.E. 349 (Mass. 1928). The Commonwealth is currently one of a dozen states (plus the District of Columbia) without capital punishment. The Northeastern University Library Archives are home to Sara R. Ehrmann's manuscript collection that includes the activities of the MCADP as well as materials covering the death penalty movement in Massachusetts. Throughout this article, citation to materials housed in the Northeastern Archives in Boston, Massachusetts will conform to the citation format suggested by the archives. Papers, 1845–1993, Sara R. Ehrmann (M39) University Libraries, Archives and Special Collections Department, Northeastern University, Boston, Massachusetts [hereinafter Ehrmann Papers]. Alternative sentencing, or the mercy law, allowed a jury to make a binding recommendation to a court that a defendant found guilty of first-degree murder be sentenced to life imprisonment rather than to death. For the mercy law, see 1951 Mass. Acts 203 (currently codified at Mass. Gen. Laws ch. 265, § 2 (2000)). For information regarding different states' treatment of the death penalty, see The Death Penalty in American Current Controversies 9 (Hugo Adam Bedau ed., 1997).

¹⁰ The Sacco-Vanzetti case began in 1921 as a simple trial for murder-robbery. It ended six years later as an international cause in which many people believed that Massachusetts had executed two innocent men because they held radical views. See generally Francis Russell, Tragedy in Dedham (1962).

¹¹ For the relationship between the ALACP and the MCADP, see Letter from Vivian Pierce to Glendower Evans, Sept. 29, 1927, Box 17, Folder 18, Ehrmann Papers, supra note 9. The ALACP began in 1925 and included among its founders Clarence Darrow. Vivian Pierce served as ALACP's Executive Secretary until the group's collapse and absorption by the MCADP in 1949. The mercy bill was a staple of the MCADP's campaign against capital punishment and was introduced each year from 1928 to 1951. When the ALACP collapsed, its papers were transferred to the MCADP and are now included in the Ehrmann Papers. Boxes 32–33, All Folders, Ehrmann Papers, supra note 9.
A. The Sara Ehrmann Story

Sara Ehrmann was born in Bowling Green, Kentucky in 1895 to parents Abram and Helen. The family moved to Rochester, New York when Sara was three years old. Because Abram was a liquor salesman who spent a great deal of time on the road, Sara’s mother assumed major responsibility for raising Sara and her two brothers. Helen taught the children the fundamentals of Judaism, but she also encouraged a belief in a home-spun universal religion, in pacifism, and in the Democratic politics of William Jennings Bryant. Sara enrolled at the University of Rochester in 1912. While in Rochester, Sara prepared herself for a career as a reform worker, drawing political inspiration from her mother as well as from professor and, later, Democrat Congressman Meyer Jacobstein.12

The summer following her freshman year, Sara joined her family on their annual visit to their Kentucky relatives. At her cousin’s home, Sara met young Herbert Ehrmann, who had just completed his first year at Harvard Law School. They talked and went on a hayride with friends, but they made no plans to meet again. At the end of the summer, when Sara returned to Rochester, she temporarily left her college studies to work for the women’s suffrage movement. She loved the work, especially her first job chauffeuring Eleanor Garrison, a prominent Massachusetts suffragist, on a speaking tour of New York State. At each stop Ehrmann, a petite, brown-eyed teenager, jumped on the hood of the car shouting, trying to attract attention, and trading barbs with hecklers until a crowd gathered. I “was never a rebel,” she later recalled, but thought it only “fair and right” that women should vote. As this comment suggests, Ehrmann was—and remained—a “social feminist,” a term historian William O’Neill coined to describe women whose primary concern was service to others and to society, as contrasted with feminists whose goal was the achievement of individual opportunities.13

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12 William Ewing was the first executive director of MCADP. See generally Michael Sussman, The Movement Against Capital Punishment in Massachusetts: Origins and Lesson, Box 37, Folders 27–28, Ehrmann Papers, supra note 9. Details about Sara Ehrmann’s early life are drawn largely from drafts of an unpublished biography by Michael Sussman. See generally id. Jacobstein served in the U.S. House of Representatives from 1923–1929. This Article focuses only on Ehrmann’s activity with MCADP, but she also served in dozens of volunteer groups including the League of Women Voters, Women’s City Club, United Prison Association, Norfolk Lifer’s Group, and the American Jewish Committee. See generally Boxes 32–37, All Folders, Ehrmann Papers, supra note 9.

On a fall 1914 visit with friends at Wellesley College, Herbert and Sara met again. For the next three years, Sara and Herbert shuttled back and forth between Rochester and Boston where Herbert worked as a Legal Aid lawyer. They were married in Rochester in 1917 shortly after Sara graduated from the University of Rochester and just about a month after the United States entered World War I. Sara gave birth to Bruce, their first son, in Boston the following June. A few months later, Herbert left for Washington, D.C. to accept a position as staff attorney with the Government Shipping Board. The war ended by the time Sara and Bruce moved to a rented farmhouse in North Chevy Chase, Maryland to be with Herbert. Rather than returning directly to Boston, the Ehrmanns moved to Ohio, where Herbert became part of a team of young progressive lawyers recruited by Harvard Law School professor Felix Frankfurter to study Cleveland’s criminal justice system. The team shared the belief that urban crime might be ameliorated through improved training of local police, more efficient courts, and the elimination of political corruption. Their work resulted in a landmark study, Criminal Justice in Cleveland.14

Sara welcomed the temporary move to Cleveland. Like many college-educated young women of her generation, Sara found the housewife’s traditional role unfulfilling. As a result, she seized the opportunity to help compile the Cleveland criminal justice data. Upon moving back to Boston, Sara took courses at Radcliffe College, volunteered at an immigrant aid agency, and put her new research skills to good use. Herbert, who was working pro bono with Sacco-Vanzetti’s appellate attorney William Thompson, became convinced that a Providence, Rhode Island gang was responsible for the robbery and murders for which Sacco and Vanzetti were convicted. Sara unearthed data from federal court records to bolster Herbert’s theory. Of course, neither Herbert Ehrmann’s alternate scenario or defense motions raising serious due process questions stopped the executions of Sacco and Vanzetti on August 23, 1927.15 Many years later, Sara privately commented:


I saw the details of the Sacco-Vanzetti case close up, including the judicial hesitancy to explore exculpatory routes, the media's hysteria, the emotional outcry for their lives. I knew there was something wrong with the death penalty because there were too many questions unresolved when the men were executed. Their deaths signified a finality inappropriate in terms of the finality one could feel with respect to the evidence.16

B. Ehrmann and MCADP: The Beginnings of a Strategy

Sara Ehrmann's public silence about Sacco-Vanzetti, her proven legal research skills, and her commitment to social reform led Harvard Law School professor and MCADP board member Zechariah Chafee to offer Ehrmann the position of executive director of MCADP. In 1928, Ehrmann accepted and agreed to a salary of $1200 per year, a contractual arrangement that "melted away" at the onset of the Great Depression. It is hard to imagine a more inauspicious time to assume a leadership role in an unpopular cause. In addition to Sacco-Vanzetti, a string of highly publicized murders captured national attention during the 1920s and 1930s and bolstered public support for the death penalty. Nathan Leopold and Richard Loeb's "thrill murder" of young Bobby Franks, Al Capone's Chicago gangland killings, and the Lindbergh kidnap-murder, among other sensational homicides, led national magazines and newspapers to conclude that a "crime wave" was pounding the United States.

Author Richard W. Child asserted in the *Saturday Evening Post* that an overly indulgent criminal justice system allowed most murderers to escape punishment. In fact, the opposite seemed true. From 1930 to 1940, states executed nearly 1800 death row inmates nationwide,17 including eighteen in Massachusetts.18 At no time during this gruesome decade did a significant number of the Massachusetts citizens, the legislature, or the SJC speak out against capital punishment. Although death penalty opponents conducted vociferous public rallies for some men condemned to death, the rallies were often sparsely attended. Likewise, until 1951 when Governor Paul Dever signed a mercy bill and set in motion a twenty-four year period in which the

16 See generally Sussman, supra note 12.
17 HAINES, supra note 4, at 12.
18 See BOWERS, supra note 2, at 449.
death penalty was still legal but no prisoner was put to death.\textsuperscript{19} Massachusetts’ governors and the Executive Council supported the death penalty and routinely denied clemency appeals. The SJC rejected dozens of motions for new trials brought by men convicted of capital murder. Under Chief Justice Arthur P. Rugg, who came to the court in 1906, moved to the center seat in 1911, and served until 1938, Massachusetts’ criminal due process changed very little from nineteenth century practice. The court offered the accused little protection and a bare handful of options for post-conviction appeals. During Rugg’s long tenure, the SJC reversed only two capital convictions, and on retrial both of those men were found guilty and subsequently executed.\textsuperscript{20}

While lawyers hammered at the court’s constricted view of criminal due process, the MCADP forged a three-pronged strategy to overcome legislative support for capital punishment. First, rather than campaign around an abstract—for or against capital punishment—referendum question as advised by the ALACP, Ehrmann focused on the Massachusetts legislature. Ehrmann inundated legislators with data about capital punishment and sought to make it as easy as possible for lawmakers to embrace some manifestation of opposition to the death penalty. Specifically, she and others she recruited appeared each year before the Joint House-Senate Judiciary Committee. These annual appeals urged lawmakers to enact a bill abolishing the death penalty, a law permitting jurors to recommend


a law permitting jurors to recommend mercy, and a resolution establishing a commission to study capital punishment.

The second prong of the MCADP's strategy focused on specific capital cases to illustrate to legislators and to fix public attention on the glaring imperfections of murder investigations and capital procedure. Of course, Ehrmann also wanted to bring as many people as possible into the abolition campaign, but she was interested chiefly in recruiting political, religious, and civic leaders, men and women whose names flanked the MCADP's letterhead. Third, Ehrmann brought pressure to bear on sitting governors not to sign execution orders.

The MCADP left efforts to change capital procedure to the lawyers. Working separately from Ehrmann, Zechariah Chafee and a handful of attorneys repeatedly asked the Boston Bar Association to study the question of capital punishment. He and Francis Russell, who was working on a book about Sacco-Vanzetti, also urged the Judicial Council—an appointed advisory group—to recommend to the legislature a law permitting the SJC to review matters of fact as well as questions of law as part of a capital appeal.²¹

1. The First Prong: Persuading the Legislature

With a burst of energy she sustained for almost four decades, Ehrmann plunged into her work in 1928. Her long campaign against capital punishment began with the simple act of hosting a public dinner-speech by E. Roy Calvert, an English criminologist and author. Calvert told his Boston listeners that the "problem of capital punishment must be approached in a scientific manner unbiased by any sentimental reasoning." He produced data that showed the death penalty was not a deterrent to homicide. Meeting privately with Ehrmann,

²¹ Letter from Sara Ehrmann to Glendower Evans, Feb. 12, 1931, Box 17, Folder 18, Ehrmann Papers, supra note 9; Letter from Glendower Evans to Vivian Pierce, Sept. 29, 1927, Box 17, Folder 18, Ehrmann Papers, supra note 9. Sara Ehrmann advocated for a study of capital punishment, but opposed a popular referendum. Letter from Sara Ehrmann to Editor Klaus, BOSTON TRANSCRIPT, Feb. 16, 1932, Ehrmann Papers, supra note 9. For information on recommendations to the Judicial Council, see Letter from Francis Russell to Governor Saltonstall, Dec. 21, 1938, Box 19, Folder 24, Ehrmann Papers, supra note 9. The legislature formed the Judicial Council in 1924. It was composed of representatives, one each nominated by the Chief Justice of the SJC, the Chief Justice of the Superior Court, one judge of the land court, one judge of a probate court, one judge of a district court, and not more than four members of the bar appointed by the governor. The appointments were not to exceed four years. Third Report of the Judicial Council, reprinted in 13 Mass. L. Q. 7, 37-43 (1927).
Calvert suggested effective ways to administer the campaign. A short time after Calvert’s appearance, Ehrmann issued a press release noting that Republican State Senator Angier Goodwin’s bill to abolish the death penalty had the support of a number of locally prominent people.

Next, Ehrmann and a small, energetic band of young MCADP members spoke face-to-face with each member of the Judiciary Committee. Every legislator received a flyer listing ten reasons for abolishing capital punishment that had the personal endorsement of the current Massachusetts Commissioner of Corrections, Dr. Warren A. Stearns. Stearns stated, “I am unalterably opposed to capital punishment. It does more harm than good.” About a month later, Ehrmann and a dozen other opponents of capital punishment testified before the Judiciary Committee in favor of Goodwin’s bill. She stressed two arguments. One, society may feel safe sentencing murderers to life imprisonment. “There is no danger that Life Prisoners are wantonly pardoned,” or that those few who are pardoned will murder again. For emphasis Ehrmann added that “no life prisoner has ever murdered a guard in Massachusetts,” and “no life prisoner had ever escaped.” Second, she pointed out that those states and countries that had abolished capital punishment had lower homicide rates.22

Suffolk Law School Dean Gleason Archer bluntly spoke for proponents of the death penalty. Without the death penalty, Archer contended, the “criminal element” would seize control of society. To support this frightening assertion, he cited the general chaos—though there were no reported homicides—accompanying the 1919 Boston police strike. Life imprisonment was not an acceptable alternative because imprisonment did not crush the killer’s spirit. “Lifers are rosy with the hope” they might be paroled or pardoned, Archer claimed. They were also likely to escape and become “beasts of prey” again. Executing a murderer rid the world of a “human mad-dog,” Archer told the legislators. In 1931, the Judiciary Committee rejected Good-

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22 For information on Calvert’s visit to Boston, see BOSTON HERALD, Sept. 29, 1929 and Sussman, supra note 12. Ehrmann’s press release was sent to Boston newspapers on January 8, 1930, and included the leaflet sent to legislators of which Dr. Stearns’ statement was a part. Leaflet, Box 36, Folder 11, Ehrmann Papers, supra note 9. For reports on Ehrmann’s desire to drive out the “old people,” see Letter from Miriam Van Waters to Vivian Pierce, May 10, 1939, Box 19, Folder 71, Ehrmann Papers, supra note 9.
win's abolition bill eleven to five, a margin that remained unchanged for the next decade.\textsuperscript{23}

2. The Second Prong: Using Cases to Highlight the Death Penalty's Fallibility

In addition to articulating the arguments against capital punishment to the legislature, Ehrmann focused on a controversial murder case, the first in a long string of accused and convicted murderers she sought to save from death. The case against Gangi Cero seemed slight, but before justice had run its course, Cero was tried twice for murder and came within hours of being executed for a crime he did not commit. For many years afterwards, Ehrmann would cite the Cero case as evidence of a flawed criminal justice system and to argue that capital punishment should be abolished lest the State execute the wrong person.\textsuperscript{24}

On June 11, 1927, Joseph Fantasia was shot in the back at close range as he walked along a crowded street in Boston's North End. Guided by two eyewitnesses, the police arrested Cero, a Brooklyn, New York native who six weeks earlier had moved to Boston to work for Samuel Gallo, a clothing salesman. At trial, an eyewitness testified that he saw Cero drop "something" as he ran from the murder scene. Another witness stated that he saw an unidentified man fire the fatal shot, toss away the revolver, and slowly walk away from the chaotic scene. Under oath, Cero denied murdering Fantasia and claimed that he had accidentally dropped nothing more sinister than his hat as he pushed his way through the panic-stricken crowd. Despite Cero's statement and other contradictory evidence, the jury found Cero guilty of first-degree murder on November 17, 1927. Judge Louis S. Cox denied three defense motions for a new trial. Cero appealed the rulings.\textsuperscript{25}

William R. Scharton, one of the best criminal lawyers in Boston, represented Cero before the SJC. In the spring of 1928, Scharton ar-

\textsuperscript{23} For Archer's argument, see National Civic Federation, Jan. 15, 1931, Box 36, Folder 35, Ehrmann Papers, \textit{supra} note 9.

\textsuperscript{24} Among other reasons for abolishing capital punishment listed in MCADP leaflets, was the possibility of an "irrevocable miscarriage of justice." MCADP Leaflets, 1931, 1934, 1936, Box 36, Folder 11, Ehrmann Papers, \textit{supra} note 9. Gangi Cero's case was the accompanying example. \textit{Id.} Zechariah Chafee also testified, arguing that juries had difficulty determining the dividing line between the several degrees of murder. \textit{Id.}

\textsuperscript{25} Commonwealth v. Cero, 162 N.E. 349, 350, 351 (Mass. 1928); \textit{Boston Globe}, Nov. 16, 1927.
gued, as he had before trial began, that the entire jury empanelled to hear Cero's case was tainted. Scharton explained that police officers had interviewed potential jurors listed for the November 1927 sitting of the criminal court and forwarded the results to the Suffolk County district attorney. At trial, Judge Cox had refused to allow Cero to ask each potential juror about police questioning. The judge ruled that potential jurors were to be asked only the statutory questions during voir dire. 26

Justice Edward P. Pierce, appointed to the SJC in 1914, spoke for a unanimous court in rejecting the defendant's appeal for a more far-ranging round of questions during voir dire. "There is not a word, not a phrase, in the statement of counsel for the defendant, which, if proved, would have the slightest evidential value in establishing that the list of jurors was not prepared according to law or that the jurors were not legally drawn," wrote Pierce, gruffly missing the point. 27 Further, Pierce found nothing improper with the questionnaire that the police required potential jurors to complete. The questionnaire asked potential jurors and their family members about their "life style," their "politics," their "affiliations," and if they were related to any "former Boston officer" who had abandoned duty during the 1919 police strike, 28 among other questions. But, because the questionnaire "was prepared . . . for general use . . . [and] was not directed to the case at bar," Pierce was "unable to see how such an investigation, properly conducted, can be interpreted, as the defendant contends, to be an 'attempt to influence the jurors in favor of the com-

26 Statutory questions asked jurors during voir dire include the following: Was the juror related to the prisoner or to the deceased? Did the potential juror have any interest in the case? Was he conscious of any bias about the case? Did the potential juror hold an opinion that would preclude him from finding the defendant guilty of an offense punishable by death if the evidence satisfied him beyond a reasonable doubt? Scharton established that police officers who questioned potential Suffolk County jurors were following orders issued by Boston Police Commissioner Herbert Wilson, but Scharton was not able to convince Judge Cox that he should be permitted to question jurors about the police visit. Motion for New Trial at 10–18, 20–34, 115–16, Commonwealth v. Cero, 162 N.E. 349 (Mass. 1927) (on file at Massachusetts SJC Archives).

27 Cero, 162 N.E. at 351.

28 Organized by the American Federation of Labor in the wake of World War I, more than 900 Boston policemen struck for higher wages and improved working conditions on September 9, 1919. Governor Calvin Coolidge called out the National Guard to restore order. Not a single one of the striking policemen was ever rehired by the City of Boston. THOMAS H. O'CONNOR, THE BOSTON IRISH 191–93 (1995).
Pierce concluded that Cero had an impartial and indifferent jury. Having brushed aside Cero's constitutional challenges, Pierce also upheld Judge Cox's denial of the defendant's motion for a new trial on the basis of recently discovered evidence. Specifically, the SJC ruled that Cox was not obligated to hear evidence that another person had murdered Fantasia. Following the SJC's ruling, Judge Cox sentenced Cero to be executed during the week of November 4, 1928. Authorities moved Cero into a death row cell at Charlestown prison.

About a month before Cero's scheduled execution, police arrested Samuel Gallo, Cero's former employer, and charged him with contempt of court for offering a bribe to a crucial government witness if he would change his testimony about Cero. Gallo was found guilty and sentenced to two years at Charlestown, the same prison housing Cero. Gallo befriended Cero, providing him with money, cigarettes, and food. But on Columbus Day 1928, Cero plunged a kitchen knife into Gallo's chest as the two men walked in the prison exercise yard. After his violent act, Cero told prison authorities that if he was to die for murder, then Gallo should as well. Cero stopped short of proclaiming his own innocence or of accusing Gallo of murdering Fantasia.

As his execution day drew closer, however, Cero had second thoughts about maintaining his silence. Just two days before his scheduled execution, his older brother Cosimo arrived at Charlestown prison from New York. After several hours of emotional conversation, Cosimo pried from his brother the names of several people who could save him. Cosimo bolted from the prison and ran through Boston’s North End shouting, “Help me! Help me!” On the second day of his search, just nine hours before Cero was to be executed, Cosimo met Phelomina Romano, a young woman who said she saw Gallo fire the shot that killed Fantasia. Cosimo grabbed Romano's hand and the two rushed through the North End's crowded streets to the Mas-

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29 Cero, 162 N.E. at 353, 354.
31 BOSTON HERALD, Jan. 10, 1929.
32 Cero, 162 N.E. at 354. A MCADP member told Ehrmann that Cero was offered a five-year sentence if he would plead guilty to manslaughter, but he refused. Letter from Glendower Evans to Sara Ehrmann, Jan. 30, 1931, Box 17, Folder 18, Ehrmann Papers, supra note 9.
33 N.Y. TIMES, Oct. 11, 1931.
sachusetts statehouse where Governor Alvan Fuller sat in vigil, as he did prior to all executions. After hearing Romano’s story shifting guilt from Cero to Gallo, the Governor brought Judge Cox into the discussion. In addition to repeating her eyewitness account, Romano added details that supplied the missing motive for Fantasia’s murder: She had been Gallo’s mistress until she fell in love with Fantasia. To show his scorn for Gallo, Fantasia ordered Romano to slash Gallo’s cheeks. It now seemed possible that Gallo murdered Fantasia in order to revenge the humiliation he had suffered at the hand of Fantasia. Fuller and Cox agreed that Cero’s execution must be stopped. A grand jury returned a murder indictment against Gallo.34

At this point the MCADP became directly involved in Cero’s defense. The group raised money to provide Cero with additional legal help and an investigator to aid in building a case against Gallo. The investigator’s first job was to find Phelomina Romano who, since Gallo’s arrest, had repudiated her statement exonerating Cero and then disappeared. At trial, Romano—who was found a few days before trial and held in the Charles Street jail—and Cero testified that Gallo murdered Fantasia. Gallo denounced Cero and Romano as liars and claimed he was in East Boston at the time of the murder. After about seven hours of deliberation, the jury announced that it had found Gallo guilty of murder in the first degree.35

This finding meant two men, each alone and independently of the other, had been charged with the murder of the same man by separate indictments and had been separately convicted and sentenced to death. Arguing that this bizarre result was untenable and unconscionable, Cero’s counsel explored the possibility of a gubernatorial pardon. He then filed a motion with Judge Cox, who had presided over both trials, to dismiss the guilty verdict against Cero. At that motion hearing late in March 1929, Ehrmann served as the MCADP’s eyes and ears, and she found Judge Cox “exceedingly hostile” and openly doubtful of Cero’s innocence. In the witness box, Cero explained that he had initially not named Gallo as the murderer because, “I don’t want to be a stool pigeon.” When asked by Judge Cox to define the term, Cero said, “one who tells on another.” Whether this convinced Cox or not, he did set aside both guilty verdicts and ordered a new trial for Cero and Gallo.36

35 Boston Herald, Mar. 1, 1929.
36 See generally Sussman, supra note 12.
While Cero's attorneys prepared for a fall trial, Ehrmann and Zechariah Chafee worked behind the scenes to have the district attorney drop the charge against Cero. In the summer of 1930, Ehrmann went to see Frank Brooks, Chairman of the Parole Board and a friend of Suffolk County Assistant District Attorney F. M. Sheehan, to urge Brooks to intervene on Cero's behalf. But Brooks refused, telling Ehrmann there was good reason—though no concrete evidence—to believe that Cero and Gallo were accomplices in the murder of Fantasia. Dismayed, Ehrmann turned her attention to Cero, who once again resided on death row. In the month before the trial, Ehrmann visited Cero two or three times a week.37

In the fall of 1930, the State tried Cero and Gallo together on the original separate murder indictments. This curious decision by the prosecution was one of several unusual procedures that distinguished their trials. The Commonwealth insisted that both men were guilty as charged, arguing that each man acted independently to produce a single criminal result, the murder of Fantasia. The State relied upon Cero's testimony—"a murderer and a confessed perjurer," as Gallo's defense counsel labeled him—to convict Gallo. However, the State failed to get Gallo to accuse Cero of murdering Fantasia because Gallo insisted that he was elsewhere at the time of the murder.

Assistant District Attorney Sheehan suffered from another handicap—the second disappearance of his star witness, Phelomina Romano. In her absence, Sheehan read from the transcript of her testimony at Cero's second trial in which she accused Gallo of murdering Fantasia. Given these obstacles, the Boston press saw it as a foregone conclusion that Sheehan would fail to convict both Cero and Gallo. The MCADP was especially critical of Sheehan's closing argument. Cero's defense attorney, Thomas Breshahan, for example, claimed that Sheehan too often used language intended to prove conspiracy or joint motive rather than adhering to argument designed to show that each man acted separately to effect the murder of Fantasia. The jury managed to sort out the facts despite the confusing procedure: They acquitted Cero and found Gallo guilty of first-degree murder.38

Cero returned to Italy a free man, and Gallo appealed his conviction to the SJC. In the spring of 1931, Gallo argued that the trial court had erred in denying his two motions for a new trial. First, Gallo con-

37 See generally id.
tended that the trial court’s rejection of his motion for a separate trial violated his right to due process guaranteed by Article 12 of the Massachusetts Declaration of Rights and the Fourteenth Amendment of the U. S. Constitution. Second, Gallo argued that his trial violated the right to “to meet the witnesses against him face to face” because when Romano could not be found, the court allowed the district attorney to read from Romano’s damning testimony given against him at a previous trial.39

Writing for a unanimous court, Chief Justice Rugg rejected Gallo’s bid for a new trial. In doing so Rugg revealed the SJC’s general thoughts about criminal procedure as well as the court’s specific view of the relationship between due process and justice. Rugg’s formalist approach emphasized stare decisis and the discovery of underlying legal principles. He routinely deferred to the trial judge’s discretionary powers and rejected defense arguments he found contrary to “our system of criminal procedure as disclosed in the decisions of this court.”40 He paid lip-service to social and political change, but he supported without question traditional law enforcement techniques and rules of evidence that placed a criminal defendant at a severe disadvantage. As he saw it, contemporary government’s formal commitment to safeguarding the rights of a criminal defendant had rendered meaningless the “traditional tenderness for persons accused of crime,”41 a sentiment with roots in arbitrary government. For this reason, he saw little reason to explore the relationship between procedural and substantive rights.42

Gallo demanded that the SJC allow him to be tried separately from Cero. He argued quite reasonably that there was an enormous temptation for co-defendant Cero to perjure himself by testifying that Gallo was the sole perpetrator of the murder. Rugg cast Gallo’s argument for a separate trial as old fashioned and not as a procedural right to which the defendant had a legitimate constitutional claim. In the opinion, Rugg explained, “The tendency in recent years . . . has been away from formalities in the conduct of criminal trials.”43 To substantiate that generalization, Rugg pointed to the simplification of criminal indictments, a reform enacted by Massachusetts in 1876. For Rugg, Gallo’s argument about due process was nothing but a quibble

40 Gallo, 175 N.E. at 721.
41 Id.
42 Id.
43 Id.
harking back to a rigid system of common law rules. Therefore, the prosecution’s decision to try both men at the same time on separate indictments and the trial judge’s compliance with this procedure did not violate basic fairness or a substantive right. Rugg closed this issue by articulating a general rule: A criminal defendant had no “vested rights in matters merely procedural, bearing no vital connection with a real defense.” 44 In short, although the procedural system might be flawed, the court would not seriously entertain a challenge unless a capital defendant demonstrated that a specific and egregious due process violation had led directly to an erroneous finding of guilt. 45

Gallo also tried to argue for a new trial because of the oft­disappearing Romano. Although the defense argued that Gallo’s second trial introduced new issues and questions not covered by Romano’s earlier testimony, Rugg brushed aside that contention. The court affirmed Gallo’s conviction, and he was sentenced to death. 46

Rugg’s long tenure on the SJC ended just as the U. S. Supreme Court began to take a more expansive view of the relationship between the Bill of Rights and criminal procedure; he, perhaps, should not be faulted for not embracing that doctrine in the 1920s and 1930s. But it is also true that Rugg never publicly worried about executing an innocent person, or found that the police had abused their power, or that a defendant’s confession had been anything other than voluntary and admissible. As he made clear in Gallo, Rugg generally presumed that the legal principles discovered and applied by modern courts had ended any threat to criminal defendants from an arbitrary and powerful government. 47

Although Ehrmann and the MCADP had helped shift blame for Fantasia’s murder from Cero to Gallo, as soon as the court sentenced Gallo to death, Ehrmann lobbied Democrat Governor Joseph Ely to commute Gallo’s sentence to life imprisonment. Because of Ehrmann’s lobbying, Ely’s occasional abolitionist tendencies, and the length of the ordeal, Ely decided to commute Gallo’s sentence. Flush with its first victories, the MCADP held a celebratory public meeting.

44 Id.
46 Gallo, 175 N.E. at 721, 724.
47 Justice Stone’s famous footnote in United States v. Carolene Products Co. proposed that the Court should impose higher standards of review in areas of civil liberties and civil rights. See 304 U.S. 144, 152 n.4 (1938). For a collection of Rugg’s public speeches, see generally Arthur Prentice Rugg, A Memorial (1939).
Although all of the speakers were generally upbeat, including Cero’s attorneys who praised the justice system for ultimately exonerating their client, Ehrmann highlighted the flaws inherent in a system that had brought Cero within a few hours of being wrongfully executed. “Have there been others not so fortunate as Cero Gangi,” she asked. “Who can say. This case seemed in no respect unusual until the appearance of the Romano girl.” In a follow-up pamphlet intended for state legislators, Ehrmann emphasized the system’s fallibility: “It should be clearly understood that the last minute affidavit that stayed the execution was secured through no effort of the government nor of Cero’s attorneys. The evidence was obtained by Cosimo Gangi.” Her point was plain: The legal system did not save Cero’s life; the investigative work and intervention of a rank amateur did.48

In the decades following the Cero and Gallo cases, Ehrmann worked to win passage of a law abolishing or weakening capital punishment, while Chafee sought to change criminal procedure by providing a greater degree of legal protection for capital defendants. Each year, carrying an armload of pamphlets and data meant to answer any and all questions about abolition, Ehrmann personally lobbied everyone from rank and file members of the legislature to the governor, while Chafee worked behind the scenes to influence members of the Massachusetts bar.

Ehrmann rarely antagonized someone with whom she disagreed. Still, Ehrmann and her colleagues faced a difficult challenge punctuated by developments they could not control. Ehrmann and Chafee contended with widespread public support for capital punishment. A 1936 Gallop Poll, for example, found sixty-two percent of Americans in favor of the death penalty for murder.49 In addition, national and world events, including Prohibition, the Great Depression, crime waves, and World War II, overshadowed their single issue. Early in 1941, for example, a friendly legislator told Ehrmann that she should “transfer her drive and energy to one of the organizations providing aid for Great Britain” and, near the war’s conclusion, some MCADP members criticized Ehrmann for continuing to advocate abolition when Nazi war criminals were to be executed. The Rosenbergs’ execu-

48 For Governor Ely’s commutation of Gallo’s death sentence, see BOSTON GLOBE, Oct. 13, 1931. For Ehrmann’s remarks, see generally Sussman, supra note 12.
tions in June, 1953 further divided the nation.\textsuperscript{50} Despite these obstacles and opinions, Ehrmann doggedly pursued the goal of abolition.\textsuperscript{51}

In the spring of 1934, while Ehrmann prepared MCADP testimony to support Governor Ely’s modest proposal to limit capital punishment to those convicted of first-degree murder, several murders seized the public’s attention. In December 1933, an employee of a Fitchburg sporting goods store was murdered during a botched hold-up; on January 2, 1934, two men shot and killed a Lynn movie theatre worker and fled with about $200; and during a bank robbery in Needham a month later, a man wielding a machine gun murdered a police officer and a firefighter. Three days after the Lynn robbery-murder, police arrested two Boston cab drivers, Clement Molway and Louis Berrett, and charged them with the murder. At trial, no fewer than eight eyewitnesses identified the two men as the assailants. Each defendant took the witness stand on his own behalf. Berrett insisted he spent the morning of the crime aimlessly looking for his business partner, and Molway told the jury he cruised around Boston looking for fares without success.

Essex County District Attorney Hugh A. Cregg sharply cross-examined the two defendants, exposing holes and inconsistencies in their alibis. After two weeks of trial, a juror later reported, it seemed likely that the jury would find the two men guilty. But, on February 27, in a special evening session at the old Salem courthouse, a “tired looking” Cregg asked Judge Thomas F. Hammond to allow a review of the evidence against the two men. “Shamefacedly, but manfully,” each of the eight eyewitnesses acknowledged they had mistakenly identified Molway and Berrett as the murderers. Calling it an “act of Provi-

\textsuperscript{50} Julius and Ethel Rosenberg were tried in 1951 for conspiracy to commit wartime espionage, namely passing secret information about the United States’ atomic bomb to the Soviet Union. Found guilty, Julius and Ethel were executed at sundown on June 19, 1953. See \textsc{Robert Meeropol \& Michael Meeropol, We Are Your Sons}, at xxx, xxxii (1986).

\textsuperscript{51} For a good summary of Massachusetts politics during the 1930s and 1940s, see \textsc{Barbrook, supra note 1}, at 35–78. For an outline of Chafee’s work for MCADP, see Letter from Zechariah Chafee to Sara Ehrmann, Mar. 1, 1933, Box 16, Folder 69, Ehrmann Papers, \textit{supra} note 9 and Letter from Raynor Gardiner to Sara Ehrmann, Apr. 11, 1941, Box 4, Folder 18, Ehrmann Papers, \textit{supra} note 9. For women’s mobilization during World War II, see \textsc{Degler, supra note 15}, at 418–35. Long-time MCADP member and professor Sheldon Glueck asked Ehrmann if she found it “embarrassing” to agitate for abolition “when the fate of the Nazi butchers will soon be at stake?” Letter from Sara Ehrmann to Sheldon Glueck, Feb. 2, 1945, Box 17, Folder 53, Ehrmann Papers, \textit{supra} note 9. For information on the Rosenbergs, see Letter from Vivian Pierce to Sara Ehrmann, Mar. 6, 1953, Box 18, Folder 96 and Sara Ehrmann to Vivian Pierce, Mar. 16, 1953, Box 18, Folder 96, Ehrmann Papers, \textit{supra} note 9.
dence," Cregg apologized to Molway and Berrett, and Judge Hammond set them free. Cregg explained to the jury that the three men apprehended for the Needham bank robbery had also confessed to two other crimes, including the Lynn murder.52

The Christian Science Monitor called the defendants' last minute reversal of fortune a "dramatic victory for justice," and Ehrmann worked the case into her presentation to the Judiciary Committee. She emphasized how close Molway and Berrett had come to wrongful convictions and death sentences. However, in the immediate aftermath of the Needham bank robbery and murder, Ehrmann's argument against capital punishment lost much of its power.53

3. The Third Prong: MCADP Forges Ahead to the Governor's Office

In addition to emphasizing the possibility of a fatal mistake, Ehrmann eagerly enlisted leading Massachusetts politicians, including a host of governors, in the campaign to abolish capital punishment. It was a strategy filled with disappointments. Early in her tenure at MCADP she was surprised and delighted, for example, when Boston's four-term mayor, the legendary James Michael Curley, accepted an invitation to serve as vice-chairman of the MCADP. However, every time Ehrmann asked him to speak in favor of abolition, Curley danced away. After many disappointments, Ehrmann wrote a terse letter to Curley. "Enclosed you will please find a membership blank which you may fill out and return with your check" if you wish to remain in MCADP. Ehrmann eventually received a letter instructing her to remove Curley's name from the masthead of the organization. Six years later, during Curley's one term as Massachusetts governor, he signed death warrants for four men, including the Needham bank robbers.54

52 Ehrmann sometimes wrote speeches for Governor Ely. See, e.g., Governor Joseph Ely, Address of His Excellency Joseph B. Ely to the Two Branches of the Legislature of Massachusetts (Jan. 5, 1933), Box 17, Folder 16, Ehrmann Papers, supra note 9; Governor Joseph Ely, Massachusetts Should Abolish Capital Punishment (Dec. 1931), Box 17, Folder 16, Ehrmann Papers, supra note 9. For information on Molway and Berrett's ordeal, see BOSTON GLOBE, Feb. 27, 1934.

53 CHRISTIAN SCI. MONITOR, Mar. 1, 1934. For Ehrmann's thank you to Berrett for testifying before the Judiciary Committee, see Letter from Sara Ehrmann to Louis Berrett, Mar. 27, 1941, Box 23, Folder 57, Ehrmann Papers, supra note 9.

54 Letter from Henry F. Brennan, Secretary of James Michael Curley, to Executive Secretary, MCADP, Feb. 9, 1928, Box 16, Folder 88; Letter from James Michael Curley to Sara Ehrmann, Feb. 4, 1929, Box 16, Folder 88; Letter from Curley to Ehrmann, Apr. 16, 1929, Box 16, Folder 88; Letter from Curley to Ehrmann, May 14, 1929, Box 16, Folder 88; Let-
Ehrmann soon found herself a staunch, if moderate, new ally in the legislature: Representative Christian Herter. Herter, a Beacon Hill Republican, volunteered to steer MCADP’s mercy bill through the House in 1932. However, Herter’s freshman status and the nationwide furor over the Lindbergh kidnapping caused the Massachusetts mercy bill to go down to defeat. Herter felt responsible for the loss and apologized to Ehrmann. “You must feel I have been a very weak reed to lean on. I feel I mishandled things badly,” he wrote. Ehrmann, touched by his apology, wrote to tell Herter that the bill’s defeat was due to “deep seated prejudice and ignorance” and politicians’ “fear of being recorded on a controversial measure.” Next time, she promised, they would be better organized. Herter and Ehrmann continued to talk amicably and to work together constructively during the next two decades as Herter moved up the political ladder. Perhaps for this reason, when Herter became governor in 1952, he refused to sign death warrants for convicted murderers for whom a jury did not recommend life imprisonment as the mercy law allowed.55

Although the death penalty touched many lives within the Commonwealth, the governors of Massachusetts each put their own unique, public stamp on the issue. Governor Joseph B. Ely, one of the first governors to confront abolition, befriended Ehrmann in 1932. Ely was a Yankee Democrat from Hampden County where he built a lucrative legal practice and served as district attorney before he was elected governor in 1930. Using speeches written by Ehrmann, Governor Ely introduced bills to study the usefulness of capital punishment and to except men and women “blinded by sudden passion” from first-degree murder charges. Capital punishment did not deter emotional murderers nor hardened criminals, Ely told the legislature. He cited the example of convicted murderer Joseph Belanski, who when sentenced to death said, “What of it,” adding, “electricity isn’t such a bad way to die.” The Governor also used statistics to make his point: From 1920 to 1930, there were ninety-one murders in Suffolk

55 Letter from Christian Herter to Sara Ehrmann, May 10, 1932, Box 17, Folder 77; Letter from Ehrmann to Herter, May 11, 1932, Box 17, Folder 77; Letter from Herter to Ehrmann, Dec. 13, 1938, Box 17, Folder 77; Letter from Ehrmann to Herter, Nov. 19, 1940, Box 17, Folder 77, Ehrmann Papers, supra note 9.
County leading to 122 indictments. However, the state only executed two men during this time. The conclusion was obvious: Capital punishment "leads to bargaining with guilty men." Despite Ehrmann's powerful data and the Governor's persuasive speech, the legislature looked askance at both bills. In part, legislators were eager to distance themselves from the Governor's widely criticized use of the pardoning power. The *Boston Herald*, for example, pointed out that in three years the Governor had issued an unprecedented 127 pardons, including pardons for twelve men convicted of first-degree murder. "The penologists, not the people, are getting the benefit of the doubt," the *Herald* fumed. Ely chose not to run for re-election in 1934.

Leverett Saltonstall, a Republican patrician with a "South Boston face" who occupied the governor's corner office for three terms from 1939 to 1944, seemed open to Ehrmann's arguments for enacting a mercy law. As early as 1933, during his tenth term in the Massachusetts House, Saltonstall suggested that his views regarding capital punishment were changing, and he promised Ehrmann he would support a death penalty study. In addition, during the 1935 House debate on a mercy bill, Saltonstall left the Speaker's chair, freeing his Republican colleagues to vote their consciences. When he took office as governor in 1939, one of the first meetings he held was with a Chafee-led lawyers' committee lobbying for a mercy bill. Then, just a few months later, Saltonstall confronted the grim reality of putting someone to death. He rejected a petition to commute the death sentences of two young men convicted of murdering a Somerville shopkeeper from whom they took $3.50. The State originally planned to electrocute Wallace W. Green and Walter St. Sauveur in May 1939. However, the State's official executioner reported that the chair was not functional; the needed repairs took four months to complete.

On August 1, Governor Saltonstall rejected a plea for clemency, stating that there were "no mitigating circumstances presented to me sufficient to alter the operation of the statutes of the Commonwealth as expressed through the jury's findings of fact and the court's ruling of law." With that formulaic pronouncement, the State of Massachu-

56 See Governor Joseph Ely, Massachusetts Should Abolish Capital Punishment, Address Before the Massachusetts Legislature (Dec. 1931), Box 17, Folder 16, Ehrmann Papers, supra note 9.

setts set in motion the machinery of death. The two men moved into separate death cells at Charlestown State Prison, received religious counseling, and consumed "hearty last meals." At one minute after midnight, two guards handcuffed Green and led him from his cell to the execution chamber singing the hymn "Jesus Saves." Five shocks of electricity surged through Green's body. The electrodes were removed from his body and replaced on three occasions. Green was pronounced dead at 12:23 a.m. St. Sauveur followed. The Reverend Ralph Farrell heard St. Sauveur's confession before the condemned man was strapped into the chair. Three shocks of electricity—1800 volts, then 1500 volts, and finally 2100 volts—charged through St. Sauveur's body. After fifteen minutes, he was pronounced dead. The men's prolonged agony caused the official witnesses to writhe and the chaplains to flee the room. In the grim aftermath, angry officials and editorials condemned the "hideous bungling" of the executions and called for an end to the barbarous use of the electric chair.58 Publicly, Ehrmann said nothing specific about the brutal executions. As usual, she carefully prepared for the next legislative session, firmly believing she had Saltonstall's support for death penalty reform. During his campaign for a second term as governor, Saltonstall told Ehrmann that capital punishment was a matter for the people's representatives. "If I am [re-elected] Governor and a [mercy] bill reaches my desk," he told her, "I shall expect to approve it."59 She reminded him of his pledge the following year, but like many other measures, the outbreak of war in Europe sidetracked the mercy bill. In the winter of 1943, however, Ehrmann's intense effort seemed likely to pay off. Governor Saltonstall sent a mercy bill to the legislature. Ehrmann then sent every member of the upper chamber a letter in which several former district attorneys called the Governor's proposal "a very moderate and reasonable one." She galvanized a long and eclectic list of supporters.

58 Letter from Zechariah Chafee to Sara Ehrmann, Mar. 1, 1933, Box 16, Folder 69, Ehrmann Papers, supra note 9; Letter from Francis Russell & Zechariah Chafee to Sara Ehrmann, Dec. 22, 1939, Ehrmann Papers, supra note 9; Notes on 1935 Legislative Session, Sara Ehrmann, Box 5, Folder 10, Ehrmann Papers, supra note 9. For the trial of Green and St. Sauveur, see BOSTON HERALD, Oct. 5, 1938. After the two men were sentenced, Green cynically congratulated the prosecutor for his "personal victory," and St. Sauveur denounced Green as "too rotten and yellow to square me." BOSTON HERALD, Oct. 5, 1938. For Saltonstall's statement rejecting clemency, see BOSTON GLOBE, Aug. 1, 1939. For details about the execution, see BOSTON GLOBE, Aug. 2, 1939. State Senator Charles Lane called use of the electric chair "barbaric and inhumane" and filed a bill substituting a gas chamber for the electric chair. BOSTON GLOBE, Aug. 3, 1939.

59 Letter from Sara Ehrmann to Leverett Saltonstall, Feb. 19, 1941, Box 19, Folder 24, Ehrmann Papers, supra note 9.
She asked Charles Sprague, member of the Republican State Committee, to write to Republicans on the Judiciary Committee, and she urged a cluster of sympathetic Boston lawyers to write key Democrats. Ehrmann also organized a parade of witnesses to speak in favor of the bill before the Judiciary Committee.

Initially, it looked as though the mercy bill would sail through the legislature. Instead, the Judiciary Committee divided over whether the bill should allow jurors or the judge to make the sentencing decision. Late in May, Ehrmann wrote Governor Saltonstall urging him to intervene. The “Senate situation is serious,” she wrote, and the senators on the Judiciary Committee to whom she spoke “are under the impression that you don’t really care if the Bill is defeated.” This rumor, she felt, encouraged the opponents of change. “Only word from you will save the Bill,” she wrote following a “stormy session.” The Governor said nothing, but a bill permitting a trial judge to sentence a capital defendant found guilty of first-degree murder to life imprisonment squeaked through the Senate and passed the House by a vote of 113 to 94.60

Although Ehrmann and the MCADP stood on the threshold of success, Saltonstall, unexpectedly and without explanation, killed the bill with a pocket veto.61 It seems likely that his cautious, general support for liberal ideas, two narrow electoral victories, and his hope to be elected to the U. S. Senate, caused Saltonstall to back away from the controversial bill. Ehrmann felt betrayed.62

As promising, but ultimately deeply disappointing as her relationship was with Saltonstall, Ehrmann knew from the outset that Re-

60 Letter from Sara Ehrmann to Leverett Saltonstall, May 28, 1943, Box 19, Folder 24, Ehrmann Papers, supra note 9.

61 A governor triggers a pocket veto by failing to sign a bill before the legislative session ends.

62 Letter from Sara Ehrmann to Leverett Saltonstall, Feb. 19, 1941, Box 19, Folder 24, Ehrmann Papers, supra note 9; Letter from Sara Ehrmann to “Dear Governor” Saltonstall, May 28, 1943, Box 19, Folder 24, Ehrmann Papers, supra note 9; Letter from Charles Sprague to Sara Ehrmann, Mar. 9, 1943, Box 19, Folder 47, Ehrmann Papers, supra note 9 (stating that he had written in support of mercy bill). Sprague later agreed to become treasurer of MCADP, a position he held until 1951. Letter from Sara Ehrmann to Leverett Saltonstall, May 28, 1943, Box 19, Folder 24, Ehrmann Papers, supra note 9; Letter from Alford Rudnick to Edward Rowe, May 12, 1943, Box 19, Folder 19, Ehrmann Papers, supra note 9; Letter from Charles Sprague to Sara Ehrmann, Nov. 2, 1951, Box 19, Folder 47, Ehrmann Papers, supra note 9. For letters about the Governor’s pocket veto, see Letter from Herbert Ehrmann to Leverett Saltonstall, Dec. 28, 1944, Box 19, Folder 24, Ehrmann Papers, supra note 9. For a source attributing the defeat to the murder of a Newburyport woman, see Miriam Van Waters, The Impact of the War on Our Youth, Address (Apr. 30, 1943), Box 19, Folder 70, Ehrmann Papers, supra note 9.
publican Governor Robert Bradford would be unlikely to embrace abolition. As Middlesex County District Attorney, Bradford successfully prosecuted two young men for a murder committed during a gas station hold-up. According to defense attorney Henry Avery, the trial judge agreed to a plea bargain that would have permitted James Nickerson and Paul Giacomazza, neither of whom had a prior criminal record, to plead guilty to second-degree murder. Bradford insisted on first-degree murder and the death penalty. The two youths were convicted, sentenced to death, and executed on June 30, 1942. Seventeen-year-old Giacomazza was the first person in the history of the Commonwealth under the age of eighteen to be executed for murder.

A few years later, Philip Bellino and Edward Gertson committed the murder that ultimately resulted in the last executions in Massachusetts. The murder that placed Bellino and Gertson in the electric chair was not especially gruesome, nor did the Boston press give the story much coverage when it occurred on August 7, 1945. Tex Williams was shot in the back of the head and his body left in an ocean marsh not far from the main road connecting Boston to a string of north shore suburbs. Four days earlier, Williams had led Bellino, Gertson and Charles Mantia to a New Hampshire summer camp to rob an illegal dice game at gunpoint. Williams had promised a haul of at least $10,000, but when the gang met to divide up the loot, there was only a few hundred dollars. Angry and fearful that Williams would "squeal" to the police, Bellino, Gertson, and Mantia took Williams for a "ride." Just before midnight the four men crowded into a taxi, stopping at an isolated spot along the road. Mantia remained with the cab driver while the three others walked out toward the ocean. Only Gertson and Bellino returned. When Mantia asked where Williams was, Gertson said he decided to "stay with his girl." A few days after the

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63 Letter from Robert Bradford to Sara Ehrmann, Feb. 11, 1941, Box 16, Folder 46, Ehrmann Papers, supra note 9.

64 Letter from Robert Bradford to Sara Ehrmann, Apr. 2, 1940, Box 16, Folder 46, Ehrmann Papers, supra note 9; Letter from Sara Ehrmann to MCADP Board, May 16, 1940; Letter from Sara Ehrmann to Robert Bradford, Feb. 6, 1941, Box 16, Folder 46; Letter from Bradford to Ehrmann, Feb. 11, 1941, Box 16, Folder 46, Ehrmann Papers, supra note 9. Avery told Ehrmann he believed public criticism of Bradford's prosecution of young Giacomazzo caused Bradford to actively oppose any modification of capital punishment from that time forward. Letter from Herbert Avery to Sara Ehrmann, Apr. 26, 1948, Box 16, Folder 46, Ehrmann Papers, supra note 9.
At trial, Mantia and taxi driver James Salah served as District Attorney Hugh Clegg's star witnesses. Gertson and Bellino testified in their own defense. The jury found both Gertson and Bellino guilty of first-degree murder after deliberating less than six hours on June 18, 1946. Judge Joseph L. Hurley sentenced the two men to death.

Gertson and Bellino appealed the verdict to the SJC. According to a recently enacted statute, the trial court had empanelled fourteen jurors at the outset of the trial, but dismissed two just prior to submitting the case to the jury. Gertson and Bellino contended this procedure violated their right to trial by jury guaranteed by Article 12 of the Massachusetts Declaration of Rights. The SJC unanimously rejected the argument. "We see nothing in this statute that contravenes the provisions of the Declaration of Rights for the preservation of trial by jury," Moreover, anticipating the defendants' appeal to the U. S. Supreme Court, the SJC added, the Sixth Amendment to the United States Constitution has "never been held to extend so far as to control the action of the States." According to a recently enacted statute, the trial court had empanelled fourteen jurors at the outset of the trial, but dismissed two just prior to submitting the case to the jury. Gertson and Bellino contended this procedure violated their right to trial by jury guaranteed by Article 12 of the Massachusetts Declaration of Rights. The SJC unanimously rejected the argument. "We see nothing in this statute that contravenes the provisions of the Declaration of Rights for the preservation of trial by jury," Moreover, anticipating the defendants' appeal to the U. S. Supreme Court, the SJC added, the Sixth Amendment to the United States Constitution has "never been held to extend so far as to control the action of the States." Moreover, anticipating the defendants' appeal to the U. S. Supreme Court, the SJC added, the Sixth Amendment to the United States Constitution has "never been held to extend so far as to control the action of the States."

Originally scheduled to die February 28, 1947, Governor Bradford stayed the executions of Gertson and Bellino pending their appeal to the Supreme Court challenging the constitutionality of the fourteen-person jury. As the SJC predicted, however, the Supreme Court denied certiorari. Shortly after the Court's refusal to review the convictions, Governor Bradford and the Executive Council granted the two men a reprieve, a gesture that was extended until May 8; they were executed the next day. Despite Governor Bradford's background, including allowing Gertson and Bellino to die in the electric chair, Ehrmann clung to the hope that Bradford would sign a mercy bill passed by the Massachusetts legislature in 1948. The bill allowed a jury finding a defendant guilty of first-degree murder to submit to the court a written statement outlining its reasons for recommending the defendant be sentenced to life imprisonment. Bradford did not re-

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65 BOSTON GLOBE, Aug. 10, 1945. For details about Williams' slaying surfacing during the trial of Gertson and Bellino, see BOSTON GLOBE, June 15, 1946; BOSTON GLOBE, June 14, 1946; BOSTON GLOBE, June 13, 1946; BOSTON GLOBE, June 12, 1946.
66 BOSTON GLOBE, June 15, 1946.
spond directly to Ehrmann, but on April 26, 1948—oddly enough the very day the Supreme Court upheld an 1897 federal law allowing a jury to find a defendant guilty of first-degree murder, but qualify the verdict by adding “without capital punishment”—he vetoed the bill.69 While Bradford acknowledged that “the idea of punishment by death was abhorrent,” he insisted that “all the veneer of civilization had not lessened the savagery, brutality, or frequency of murder” and, therefore, of the need for capital punishment. The existing law divided responsibility, giving to the jury the task of determining the defendant’s guilt or innocence and to the judge the burden of sentencing the convicted. By requiring a jury to determine both a defendant’s guilt or innocence and an appropriate sentence, the mercy bill would “fasten in the jury a far greater share of the total responsibility.”

Bradford was unhappy with the bill’s form and fearful of its possible outcomes. Because the probability of “mitigating circumstances” was high, Bradford believed no jury would support a death sentence. In short, the mercy bill would end the “deterrent effect of the death penalty” and, he predicted, the number of murders would climb. The mercy bill, the Governor concluded, “pays lip-service” to capital punishment, but “effectively destroys it by providing that the penalty should be imposed not by law, but by a jury of twelve men groping in the dark to agree on a reason for choosing between life and death.”70

The public exhibited varying reactions to Bradford’s veto. The New Bedford Standard Times cheered the Governor’s action, adding that Massachusetts should be proud to be one of only five states that did not provide for some kind of alternative capital sentencing. The newspaper noted that Massachusetts should not be influenced by “what some other countries or States have done.” This was the kind of reasoning that Harvard Law School Dean Erwin Griswold found “unfortunate and indicative of the provincialism associated with New England.” Harvard Medical School Professor Alexander Forbes told Ehrmann he agreed with much of Bradford’s legal argument but still felt that the “death penalty is archaic and barbarous.” Forbes questioned MCADP’s strategy and urged Ehrmann to work for outright abolition. The Boston Evening American and the Boston Herald condemned Bradford’s veto. “In his ill-becoming role of defender of legalized killing,” the Boston Evening American editorialized, “Mr. Bradford rejects the

70 Id. The Court pointed out that in only four states “is death the inevitable penalty for murder in the first degree: Connecticut, Massachusetts, North Carolina, and Vermont.” Id. at 757. For Bradford’s veto message, see BOSTON GLOBE, Apr. 26, 1948.
lessons of history which prove beyond any reasonable doubt that the death penalty does not prevent acts of violence, but is more apt to prompt them." The Herald added that the Governor's frightening presumption about a link between the death penalty and rising violent crime rates might well be unfounded. Crime rates "may not bear any relation to the severity of the legal penalty." For her part, Ehrmann wrote, "At this moment I am very tired and cannot think of the next step."\(^{71}\)

In the fall of 1948, however, Ehrmann plunged back into the battle, organizing "Independent Democrats for Dever," the Democratic gubernatorial candidate, writing a League of Women Voters pamphlet explaining the upcoming referendum issues, and helping to save Dr. Miriam Van Water's job as Superintendent of the Massachusetts Reformatory for Women. Democrat Paul Dever's November gubernatorial victory marked a watershed in Massachusetts politics and tilted the balance in the abolitionists' favor. On the campaign trail, Dever loudly promised jobs for veterans and a massive road-building program. He whispered to liberals that he opposed capital punishment and that he would sign a mercy bill into law. To complement Dever's victory, a "fighting fund" directed by Massachusetts Speaker of the House Thomas "Tip" O'Neill (1949–1952) helped the Democrats take control of the House for the first time since before the Civil War. The Democrats also won half the state Senate seats and swept all the statewide offices. The Boston Herald celebrated the Democrats' victories by predicting the abolition of capital punishment was not far off.\(^{72}\)

Just as Ehrmann began to prepare for the MCADP's annual legislative campaign, her long-time ally Van Waters came under attack for her management of the Women's Reformatory. The Commissioner of Corrections, who had been appointed by former Republican Governor Bradford, ousted Van Waters from the superintendency, a position she had held for seventeen years. The Commissioner charged that Van Waters illegally allowed women prisoners to work outside the facility and, more explosively, that she permitted homosexuality to

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\(^{72}\) See Boston Herald, Mar. 23, 1949. See generally Barbrook, \textit{supra} note 1, at 92. The Northeastern University Library collection of the Sara Ehrmann Papers includes materials covering her work with the League of Women Voters and other volunteer activities. See generally Ehrmann Activities, Box 39, All Folders, Ehrmann Papers, \textit{supra} note 9.
flourish inside the prison. Although the Commissioner never publicly accused Van Waters of being a lesbian, his aggressive investigation into her private life helped fuel the rumor that "something queer was going on." Ehrmann immediately came to Van Waters' aid, helping to organize the "Friends of the Framingham Reformatory," lobbying legislators, and encouraging positive stories about Van Waters. A national newsmagazine, The Nation, for example, praised Van Waters' dedicated work at the prison and argued that her progressive political and professional views were the real story behind her firing. By March 1949 a host of volunteers, including Eleanor Roosevelt, succeeded in restoring Van Waters to her position. However, that victory cost Ehrmann dearly.

The mercy bill everyone thought certain to pass was swamped in the wake of the Van Waters' affair. Scurrilous rumors and innuendoes circulated that abolitionists were the "same crowd" who came to Van Waters' defense. Herald columnist "Billy" Mullins acknowledged the damaging link, but he attributed the defeat of the 1949 mercy bill to the Senate Judiciary Committee Chairman John Mackay's "fundamentalist" opposition to "any tampering with the law" and to an "atrocious murder" that caused two Bristol County senators to become "embittered against any relaxation of the capital punishment law." As a result, a mercy bill passed in the House, but lost by a single vote in the Senate.

Neither the Senate defeat nor the political risk of opposing capital punishment shook Governor Dever's commitment to abolition. Although he once stated publicly that he favored the death penalty under certain circumstances, during his two terms in office, Dever commuted every convicted murderer's death sentence to life imprisonment. Among others, Dever acted to save the life of Frederick Pike,

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74 See id. For details of Van Waters' case, see ESTELLE B. FREEDMAN, MATERNAL JUSTICE: MIRIAM VAN WATERS AND THE FEMALE REFORM TRADITION 274–312 (1996). Van Waters served as President of the ALACP from 1938 to 1949 and as such she worked more closely with Vivian Pierce, the long-time Executive Secretary of ALACP, than with Sara Ehrmann. Letter from Miriam Van Waters to Vivian Pierce, Nov. 12, 1938, Box 19, Folder 71, Ehrmann Papers, supra note 9.
75 See WORCESTER TELEGRAM & GAZETTE, Apr. 13, 1949. In a September 23, 1949, column, Mullins worried that recent books about Sacco-Vanzetti would undermine young people's belief in the law. Mullin's reference was to Charles McGarty's murder and rape of his sister's eight-year-old daughter. See Commonwealth v. McGarty, 82 N.E.2d 603, 604 (Mass. 1948). The scandal also caused Van Waters to resign as president of the struggling ALACP; the MCADP assimilated the organization and Ehrmann became director. See BOSTON HERALD, Mar. 30, 1949.
a Charlestown youth sentenced to death for the murder of another boy during a robbery. The Governor also commuted the death sentence of Joseph Galvin. Galvin, a mentally ill Dorchester man, stole a hand bag from a Dorchester woman, beat her to death, and then fled to a New York mental institution. At Ehrmann’s urging, Governor Dever also commuted the death sentence of Edward Lee, an African-American railway cook convicted of murdering a Roxbury pawnbroker. Ehrmann gathered information clearly showing Lee’s court-appointed counsel as exploitative and unprepared. Because of their obvious mitigating factors of youth, mental illness, and the lack of adequate counsel, Pike, Galvin, and Lee were relatively easy decisions for the Governor and the Executive Council. However, Dever also commuted death sentences of more difficult cases, including that of Charles McNeill, convicted of the merciless roadside shooting death of an insurance salesman, and of two men, Charles McGarty and Vincent Dellechiaie, convicted of sexually assaulting and murdering two girls, aged seven and eight.76

Dever’s actions drew praise and sharp criticism from the press. Nevertheless, Dever retained his steadfast commitment to abolition. Billy Mullins cheered Dever’s fairness and commitment to due process. The Governor recognized that Pike’s youth and troubled upbringing cried out for mercy and that inadequate court-appointed attorneys placed poor capital defendants at a severe disadvantage. Other newspapers contended, however, that regardless of the mitigating circumstances, Dever had no right to “thwart the wishes of the courts, the legislature and the people, no one of whom has ever indicated a

desire to eliminate capital punishment." The *Boston Herald* noted that Dever was "nullifying the capital punishment law instead of seeking its repeal." The paper also noted that Dever, who recently had announced plans to run for an additional term, was not likely to suffer in the campaign because many Republicans and Independents silently supported the Governor on the death penalty issue. In fact, neither an abstract commitment to due process nor a political calculus fully explains Dever's motivation. Sitting on a park bench with *Boston Traveler* columnist Clem Norton, Dever revealed his deep personal feelings about the death penalty:

I question whether I or any human has the power to take a life. If I let a person die, I could see his mother crying at the grave, hear the clods of earth as they were shoveled onto the coffin. I woke up a couple of times at night in a sweat when I felt that I had to let a man die, but I am glad that I never did.\(^7\)

Dever's commitment to abolition opened the way to passage of the mercy law in 1951. "Success—At Long Last" proclaimed Ehrmann when the bill breezed through the Democratic House and the Republican-controlled Senate and was signed by Governor Dever on April 3, 1951. With the exception of murder committed in the course of a rape or an attempted rape, the new Massachusetts law stipulated that whoever was guilty of murder in the first degree, "shall suffer the punishment of death, unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend that the sentence of death be not imposed."\(^8\) If the jury determined that death was not an appropriate penalty, the law required that the court sentence the defendant to life imprisonment without the possibility of parole.

Ehrmann publicly praised the "clear thinking and sense of justice" manifested by the majority of legislators and the "enlightened understanding and human sympathy" of Governor Dever. Although some abolitionists believed the law eliminated capital punishment de facto, Ehrmann quickly put the victory into perspective. The statute rid the state of an "archaic mandatory law" and brought Massachusetts into conformity with the vast majority of other states, however, it

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was only a step towards abolition. Therefore, against the advice of some MCADP members who counseled “a considerable interlude” before mounting an abolition effort, Ehrmann immediately launched a campaign to end capital punishment in Massachusetts.\textsuperscript{79}

\section*{II. The Middle Phase: Abolitionists Stand Firm in the 1950s and Early 1960s}

For the next fifteen years, Ehrmann fought against the death penalty using the same tactics that had led to enactment of the mercy bill. Generally speaking, the political landscape she confronted after 1951 gave abolitionists an advantage. Nationally, fewer and fewer people were being put to death.\textsuperscript{80} By 1966 the number of people supporting the death penalty had fallen to forty-two percent, a record low.\textsuperscript{81} At the same time, a growing number of people believed that the steady increase in violent crime called for tougher criminal penalties, including greater use of the death penalty.

Massachusetts politics reflected this mixed trend. On the broad coattails of Dwight Eisenhower in 1952, Bay State Republicans briefly regained control of the House and Senate, and Christian Herter narrowly defeated incumbent Governor Dever. Given Herter’s warm personal relationship with Ehrmann and his sympathy, if not outright support, for abolition, his victory was not a major setback for the campaign to end capital punishment in Massachusetts. But the attorney general’s office went to Republican George Fingold, the first Jew to win statewide office and a crusader “against crime, graft and Communism.” From 1952 to 1958, Attorney General Fingold called for the vigorous use of the death penalty while Herter—and his six successors in the governor’s office—refused to carry out court-ordered death sentences. Massachusetts capital juries used the mercy law to recommend life imprisonment without the possibility of parole in 100 of the 132 convictions for first-degree murder from 1951 to 1972. This rec-


\textsuperscript{80} HAINES, \textit{supra} note 4, at 12.

\textsuperscript{81} Vidmar & Ellsworth, \textit{supra} note 6, at 1249.
ord only slightly lessened the public pressure on Massachusetts governors.82

A. Kenneth Chapin Tests the Commonwealth

In the spring of 1956 Governor Herter and the Executive Council vigorously debated whether to commute to life imprisonment the death sentence of Kenneth Chapin, an eighteen-year-old Springfield youth convicted of murdering fourteen-year-old Lynn Ann Smith and four-year-old Steven Ross Goldberg, one of the two children under Smith’s care on the night of September 25, 1954. There were thirty-eight stab wounds on Lynn Ann’s upper body, and her neck was broken. Steven’s skull was fractured, and he had been stabbed more than twenty times. Police launched a citywide manhunt for a “powerful maniac.” Two weeks after the murders, however, Chapin freely confessed to Springfield police. He said he had no reason for murdering Lynn Ann. When she opened the Goldberg’s door in response to his knock, Chapin was wearing his father’s hat and jacket and holding a knife. “She just screamed and I stabbed her. It was intended as a joke but it back-fired.” he told police. Chapin “went after the boy with the knife because he was afraid the boy, [who awoke during the melee would] recognize him.”83 After the slaying, Chapin ran to his own house just a few doors away where he washed the blood from his shirt and hid the knife in his bedroom. A few days later he acted as one of the pallbearers at Lynn Ann’s funeral.84

The trial, the SJC hearing, and the Executive Council deliberation all focused on Chapin’s sanity. After Hampden County Superior Court Judge Charles Fairhurst rejected repeated defense motions for additional psychiatric testing, a jury convicted Chapin of first-degree murder. Judge Fairhurst sentenced Chapin to death, but deferred execution pending motions for a new trial and an appeal to the state’s

82 See Haines, supra note 4, at 12. See generally Furman v. Georgia, 408 U.S. 238 (1972); Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984); Commonwealth v. O’Neal, 327 N.E.2d 662, 668 (Mass. 1975) (O’Neal I). Although Ehrmann’s work was important after 1951, the mercy law’s success shifted the movement’s focus to the governor’s office. See Vidmar & Ellsworth, supra note 6, at 1249. Herter served as Massachusetts governor from 1953 to 1956 when he accepted an appointment as United States Under-Secretary of State. Massachusetts Republicans held the House and Senate under Herter but not again thereafter. BARBROOK, supra note 1, at 95–100. For Fingold’s comment, see N.Y. TIMES, Sept. 1, 1958. The data on the number of capital jury recommendations of life imprisonment is compiled from Massachusetts Reports.


84 Id.; BOSTON GLOBE, Apr. 28, 1954; BOSTON GLOBE, Apr. 27, 1954.
highest court. Before the SJC, defense counsel contended, among other arguments, that the trial court’s means of determining whether Chapin was criminally responsible were inadequate and erroneous. However, the SJC sustained the jury’s guilty verdict and Chapin’s death sentence.\textsuperscript{85}

Following Chapin’s failed SJC appeal, Governor Herter asked Dr. Jack Ewalt, Massachusetts Commissioner of Mental Health, to examine Chapin. Ewalt’s report found Chapin legally sane, but the doctor concluded he “appeared to be a schizod, isolated, emotionally flattened individual.” On the basis of Ewalt’s report, Herter recommended that the Council commute Chapin’s death sentence to life imprisonment. “There is no rational explanation for the two horrible crimes committed by Chapin,” Herter stated on April 26, 1956, but “society would not be benefited by the execution of Chapin because of his abnormal characteristics and questionable personality condition, as well as his youth and complete lack of prior criminality.” Despite Herter’s decision in Chapin’s case, he was not prepared to abandon the death penalty in general. After a month’s study, the Council rejected Herter’s clemency recommendation. Councilor Endicott “Chub” Peabody declared he could not vote for commutation because Chapin was sane at the time of the murder. A week later, however, the Council granted another six-month respite to allow defense attorneys to pursue an appeal to the Supreme Court.\textsuperscript{86}

While various advocates were trying to save Chapin, Attorney General Fingold aggressively pushed his pro-death penalty agenda. Although Fingold said nothing publicly during the Council’s deliberations, he had made his position clear. Gearing up for a gubernatorial run, he gave a number of speeches about “killers and commutation.” The \textit{New Bedford Standard Times} cheered the Attorney General for calling attention to murderers who escaped the death penalty because of executive clemency. The \textit{Boston Independent Democrat} quoted Fingold as blaming the “current reign of terror” on the fact that Massachusetts was not enforcing the death penalty. He told a Boston audience that the state should “dust away the cobwebs which have grown over the electric chair at Charlestown.” And in a speech to the Beverly Women’s Republican Club, Fingold said, “No one goes to the chair in Massachusetts is becoming the slogan among criminals.” The Attor-

\textsuperscript{85} \textit{Chapin}, 132 N.E.2d at 410, 415.

ney General had forced the issue of capital punishment into the next
governor's race.87

The Supreme Court capped off Fingold's popular demand to
"dust off the chair" and the Council's opposition to commutation
when they denied certiorari on October 8, 1956. Authorities moved
Chapin to Walpole Prison's death house, and scheduled his execution
for December 1. Attorney Sears and Governor Herter asked the
Council to hear testimony from Dr. Frederick Wertham, a distin-
guished New York psychiatrist who had examined Chapin. On
November 28, speaking in heavily German-accented English, Wertham
confidently stated that Chapin "didn't know right from wrong—he
didn't have the capacity to know." To deliberately take the life of a
mentally ill person, Wertham told the Councilors, would "compound
the wrong." Wertham explained that although everyone wants to pre-
vent future murders, "we won't accomplish that end by sending a sick
boy to the electric chair."

The day following Wertham's argument, a group gathered at
Ehrmann's Brookline home to await the Council's decision. Shortly
after 11:30 a.m., attorney Sears called Ehrmann with the good news:
The Council voted six to three in favor of commutation. One angry
Councilor publicly claimed that commuting Chapin's death sentence
"declared open season on children." Surprisingly, Chub Peabody re-
versed his earlier negative vote and approved commutation. The pro-
cess changed Peabody's mind about capital punishment. Peabody,
who later played a more prominent role in the death penalty debate
when he became governor in 1962, credited Ehrmann for his trans-
formation.88

The Boston Herald praised everyone who had worked to save
Chapin and concluded that Massachusetts was the better for their ef-
fort. "What stands out vividly today," the Herald editorialized,

[I]s the fact that Massachusetts has finally decided to keep a
life rather than take one. An unimportant life, too, a warped

87 BEVERLY TIMES, Apr. 7, 1953; BOSTON INDEP. DEMOCRAT, Feb. 11, 1955; NEW BED-
FORD STANDARD TIMES, Apr. 23, 1955.

(1956); BOSTON GLOBE, Nov. 29, 1956; NEW BEDFORD STANDARD TIMES, Apr. 23, 1955.
Many years later, Ehrmann recalled the dramatic events of the Chapin case in the Worcester
expressed his dislike with the Chapin decision. ROCKLAND STANDARD, Nov. 28, 1957.
Chapin's Springfield neighbors were divided over the clemency decision. BOSTON GLOBE,
Nov. 30, 1956.
and crippled life, a life of little value to the boy himself, a life that will now fritter away in the bleak inconsequence of prison existence. But Massachusetts has chosen to keep even such a lesser life, and by that choice has imbued all human life with a special consecration. Even the affront of murder of two children has not moved us to execute. 89

B. A Commission's Conclusion: More Legal and Social Harm Than Good

Governor-elect Foster Furcolo said nothing about Chapin, but during his convincing win over Republican Thomas H. Buckley in 1956, Furcolo had used information supplied by Ehrmann to call for a commission to study the question of capital punishment. An affable, approachable politician, Furcolo worked his way through Yale College and Yale Law School before enlisting in the United States Navy during World War II. When he returned home, he opened a law practice in Springfield and won election to Congress in 1948, only the second Democrat in Bay State history to win a congressional seat from western Massachusetts. He served in the House until 1952 when Governor Dever appointed him Massachusetts State Treasurer. Following an unsuccessful run for the U. S. Senate, Furcolo became the first Italian-American governor in Massachusetts history, garnering 53% of the votes cast. In his 1957 inaugural address, he railed against political corruption and championed the idea of a "Special Commission for Investigating and Studying the Abolition of the Death Penalty in Capital Cases." In April, a House-Senate joint resolution created the fifteen-member Commission that began meeting in the summer of 1957.90

For more than eighteen months, the Commission listened and debated the efficacy and desirability of the death penalty in Massa-

89 BOSTON HERALD, Nov. 30, 1956. The Patriot-Ledger argued that the Council's commutation of Chapin's death sentence to life imprisonment "makes it apparent that the use of capital punishment in Massachusetts has been suspended." PATRIOT-LEDGER, Dec. 1, 1956.

90 BOSTON GLOBE, July 6, 1955; Letter from Tom Ehrlich, Chief of Staff to Governor Furcolo, to Sara Ehrmann, July 25, 1956, Box 17, Folder 43, Ehrmann Papers, supra note 9. See generally REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES H.R. No. 2575 (1959) [hereinafter REPORT ON ABOLITION]. Of the Commission's fifteen members, the President of the Senate appointed three members, the Speaker of the House appointed five members, and the Governor appointed seven members. Id. at title page. Massachusetts Police Chiefs Association members were angry that the Governor did not appoint one of its members. CHRISTIAN SCI. MONITOR, Nov. 21, 1957.
chusetts. The Commission heard dozens of passionate and reasoned arguments from lawyers, law enforcement officials, legislators, lobbyists, religious leaders, and interested citizens. Its report was thoughtful and carefully drafted, but divisive all the same. After sketching out the comparative history of the use of the death penalty in the United States, the report addressed three broad issues: the relationship of the death penalty and its use to the rate of murder in Massachusetts; the effect of the death penalty on the administration of justice; and the moral arguments for and against capital punishment.91

The Commission’s comparative analysis revealed that from 1933 to 1956, Massachusetts executed twenty-four persons. In addition, the Commission discovered that the average per capita murder rate for Massachusetts was low, just 1.5 per 100,000 people.92 By comparison, in southern states where capital punishment was most frequently used, the rates of murder were far higher.93 Still, the Commission acknowledged that comparative data alone could not answer the question of whether abolition of the death penalty would be likely to increase the number of murders generally or specifically increase the danger to police officers.

The Massachusetts police chiefs who testified before the Commission insisted that warning an armed felon that if he killed someone he would “burn” had a deterrent effect.94 However, John A. Murphy, the Providence Chief of Police who hailed from a state where capital punishment had not been practiced since 1852, maintained that public safety was not enhanced by capital punishment. Father Donald Cam­pion, S.J. buttressed this latter point of view with a systematic comparative study. He concluded that there was no “empirical support to the claim that the existence of the death penalty in the statutes of a state provides a greater protection to the police than exists in states where that penalty has been abolished.”95

Conceding, for the sake of argument, the right of the state to take a life, the Commission worried that an innocent person might be put to death. While no systematic study of erroneous executions existed, there was evidence that raised serious doubts about the guilt of

91 See generally Report on Abolition, supra note 90.
92 Id. at 15.
93 Id. According to the Report, the average per capita murder rate for the United States in 1957 was 5.1 per 100,000 people. The rate of murder in the six highest southern states averaged five to twelve times higher than the New England states. Id.
94 Id. at 18.
95 Id. at 15–16, 18, 21.
some persons who had been put to death in other states. No such mistakes were known to have been made in Massachusetts, but the Commission pointed out that innocent men such as Gangi Cero, Louis Berrett, and Clement Molway had come perilously close to being executed and that a handful of men imprisoned for second-degree murder were subsequently exonerated of guilt. Therefore, the Commission concluded that capital punishment was too risky. A sentence of life imprisonment for first-degree murder not only avoided the risk of executing an innocent person, but also, according to available data, raised no risk to the community should the prisoner be pardoned or paroled. The Commission found that of the thirty-five persons convicted of first-degree murder in Massachusetts between 1900 and 1958 who were serving a life sentence either as a result of commutation or jury recommendation, twenty-five were still in prison or had died. Parole or pardon released ten "lifers" after serving an average of twenty-two years in prison. None of the men released was subsequently convicted of any crime.

The Commission also weighed the moral arguments for and against capital punishment. Rabbi Roland B. Gittelsohn and the Reverend Dana Greeley, two religious leaders who sat on the Commission and whom Ehrmann enlisted in the abolitionist cause, argued that "the only moral ground on which the state could conceivably possess the right to destroy human life would be if this was indispensable for the protection and preservation of other lives." "This places the burden of proof," the clergymen insisted, "on those who believe that capital punishment exercises a deterrent effect on the potential criminal. Unless they can establish that the death penalty does, in fact, protect others at the expense of one, there is no moral justification for the State to take a life." The clergymen pointed out that those who support the death penalty by referring to the biblical injunction to take an "eye for an eye" overlook the fact that, "this represented a limitation upon the then existing practice of unlimited vengeance." Rabbi Gittelsohn also recognized that the New Testament expressed a principle that, while not always realized in practice, is a goal worth seeking to attain: "Love your enemies."

96 REPORT ON ABOLITION, supra note 90, at 25-27.
97 Id. at 29-30.
98 Id. at 34-35. Sara Ehrmann and Rabbi Gittelsohn had corresponded at least since Nov. 9, 1955, when Gittelsohn told Ehrmann that he was "deeply interested in this [abolition] work." Letter from Sara Ehrmann to Rabbi Gittelsohn, Nov. 9, 1955, Box 17, Folder 51, Ehrmann Papers, supra note 9. The Reverend Greeley also had a relationship with
A majority of the Commission concluded that capital punishment did not offer the community more protection against murder than life imprisonment and that it did more harm than good to the legal and social order. There was reason to believe that murder trials would be shorter and "conviction more swift and certain, if life imprisonment rather than death were the maximum penalty."99 The Commission pointed out that not only is capital punishment contrary to the ideal goal of individual rehabilitation, but the death penalty tends to cheapen human life and to encourage adults and children to believe that violence is the proper way to resolve problems. For all these reasons, the majority urged enactment of a law providing for a mandatory life sentence without the possibility of parole for murder in the first degree.100

Three Commission members dissented from the majority's call for abolition of the death penalty. State Senator Mary L. Fonseca thought the people should decide whether to abolish the death penalty101 and House member John R. Sennott did not believe the "mere possibility of error . . . can be urged as a reason why the right of the State to inflict the death penalty can be questioned in principle."102 The final and most damaging dissent to the abolitionist cause (because of the Commonwealth's very large and politically powerful Catholic population), came from Monsignor Thomas J. Riley. He spelled out the Catholic Church's orthodox position on capital punishment in absolute terms. The supreme and all-perfect God created man and he is, therefore, capable of self-determined activity during his earthly existence. While man is on earth he operates within God's moral law which establishes Christian society's social parameters. Within that frame, the purpose of the state is to provide for man's temporal needs, a goal that implies divine authorization to take whatever steps are necessary to protect and preserve society. For that reason, the state may "claim the right, in the name of God, to take away human life in circumstances in which this would appear clearly to be in accord with God's own will."103

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99 REPORT ON ABOLITION, supra note 90, at 44.
100 Id. at 44–46.
101 REPORT ON ABOLITION, supra note 90, at 76 (citing the minority view of Senator Mary L. Fonseca of Fall River).
102 REPORT ON ABOLITION, supra note 90, at 72 (citing the minority report).
103 Id. at 65, 72, 74.
Not all Catholic clergy adhered to the orthodox position articulated by Monsignor Riley. In the months preceding and following the Commission’s final report, Ehrmann orchestrated an effort to spotlight Catholics who supported abolition of the death penalty. Shortly after Governor Furcolo’s call for a study commission, the Reverend Edward Hartigan, Chaplain at Norfolk State Prison, published an anti-capital punishment argument in the *Pilot*, the official newspaper of the Boston archdiocese. Hartigan agreed that the state received its authority from God through natural law and that the state was empowered to punish crime, including the taking of human life, if that were necessary to protect society. But, Hartigan emphasized the state’s right to take life was not absolute. If it could be shown that life imprisonment was just as effective a deterrent to murder as capital punishment, then “the State is morally wrong to use the death penalty.” Hartigan left no doubt where he stood on the issue: He thought the deterrent effect of the death penalty was “overestimated” and “very poor.”

The Reverend John Grant, editor of *Ave Maria*, a popular devotional magazine, Father Robert Drinan, S.J., a professor at Boston College Law School, and Reverend Charles E. Sheedy, Dean of the College of Arts and Sciences at Notre Dame, also spoke out against capital punishment. Grant rehearsed the orthodox argument, but insisted that every other means of deterring murder had to be exhausted before the state may resort to capital punishment. According to Grant, if an investigation indicated that life imprisonment was “just as effective as the electric chair for the protection of society, then the State must employ the lesser punishment to attain its end.” Father Drinan took opposition to the death penalty a step further. In a widely circulated leaflet, he argued that the Catholic Church had no official position on the death penalty. “While the Church has never condemned capital punishment,” Drinan wrote in December 1957, “the tendency of the last century in predominately Catholic countries has been to abolish the death penalty.” In short, abolitionism and Catholicism were not necessarily contradictory. Reverend Charles E. Sheedy echoed Drinan’s call for abolition. In a statement to the Massachusetts Judiciary Committee, Sheedy outlined his blunt, passionate views:

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So much slaughter has been done in the name and under the cover of religion that it is time the goodness and mildness of Jesus had their say. The cloak of religion has covered both the just and the unjust. The false priests buzzed about the martyrs; the prison chaplain hears the last confession of the condemned murderer. I can see where a person might hold the view, reluctantly, regretfully, sorrowfully, that the miserable state of society requires the penalty of death for crime. But to put this under God, to connect it up with His will and His law, is intolerable. I think God wants it out.\(^{105}\)

Before the Commission published its majority report calling for the abolition of capital punishment, the Republican Party united behind the gubernatorial candidacy of pro-death penalty advocate Fingold. On Saturday, August 30, 1958, Fingold kicked off his campaign with a rally at the Sons of Italy hall in East Boston. He gave a rousing speech condemning Governor Furcolo. The following morning, while reading the newspaper in his Concord backyard, Fingold suffered a stroke and died instantly. Just two months before the general election, the Republicans were without a gubernatorial candidate. Although tainted by bribery scandals within his administration, the Democratic incumbent Foster Furcolo easily won a second term by defeating his hastily chosen opponent, Charles Gibbons. The Republican candidate for governor chose not to beat the drum for capital punishment nor make an issue of the fact that Furcolo had commuted the death sentences of Domenick L. Bonomi, convicted of murdering his wife, and three men convicted of robbing and murdering a Newton man.\(^{106}\)

Furcolo’s victory and that of other legislators thought to be favorable to abolition led Ehrmann to be optimistic about the chances

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\(^{105}\) *AVE MARIA*, May 4, 1957. Drinan’s testimony before the Commission was summarized in a leaflet and reported in many newspapers, including the *Springfield Union*. *SPRINGFIELD UNION*, Dec. 10, 1957. Sheedy made his statement February 19, 1964; it was reprinted and circulated by MCADP and the ALACP, which Ehrmann also guided. See Capital Punishment Pamphlet, Box 37, Folder 5, Ehrmann Papers, *supra* note 9. For excerpts from Sheedy’s statement, see *BOSTON GLOBE*, Feb. 20, 1964. Richard Cardinal Cushing, Archbishop of Boston, said that his “personal reaction” was “to regret that capital punishment is a law on the books of the Commonwealth.” Richard Cardinal Cushing, *THE MENTOR*, A PENAL PUBLICATION, Mar. 1967, at 1–2.

of ending capital punishment when the legislature met in 1959. "My over-all view," Ehrmann said of the fall election results, "is that although we have lost a few good friends who supported our cause, it looks like we have gained a good deal of support in both houses." The promising results of a questionnaire Ehrmann had sent to every candidate for political office in Massachusetts, coupled with the Commission's report, indicated that an abolition bill had a good chance of passing. In fact, the Judiciary Committee favorably reported a bill and the full Senate embraced it. But, as the session wound down, the House rejected abolition, dashing Ehrmann's hopes once again.107

C. On the Brink of Abolition

At the conclusion of his second term, Governor Furcolo ran for U. S. Senate. As a result, political newcomer Republican John Volpe finished ahead of Joseph Ward, a Fitchburg Democrat, in the wide-open race for the governor's office in 1960. A devout Catholic, Volpe had climbed from a construction laborer to C.E.O. of his own national construction company. The campaign focused on the "elimination of corruption and scandal" and the sales tax. But for the eight years during which Volpe, Chub Peabody, and then Volpe again, held the governor's office, far more sweeping and contentious issues demanded attention. National and international issues forced their way into nearly every political decision made in Massachusetts. The civil rights movement, the Supreme Court's due process revolution, and the decline in the number of executions nationwide complicated the debate over capital punishment. Simultaneously, the Massachusetts murder rate rose, a Boston serial killer ran loose, and the murder of a police officer by a radical political gang created a loud public outcry for use of the death penalty.108
Volpe and Peabody had diverging methods for dealing with the death penalty. During his 1960 campaign for governor, Volpe repeatedly said he believed the question of what to do about capital punishment was a matter for the legislature. "I don't believe the governor should have any more right to determine the outcome of the decision as to whether or not the death penalty should be abolished than any other citizen," he said whenever asked about his position on the topic. Volpe added, however, that unlike the hard-liners, he was not convinced that capital punishment was a deterrent. Acting on the advice of his old friend and executive legal counsel, G. Joseph Tauro, Volpe's strategy was to delay in the hope that the electorate or the legislature would resolve the issue. In the meantime, when a defendant exhausted his appeals, Volpe granted the condemned man a ninety-day "respite" so that his case might be re-studied. Tauro's legal assistant James O'Leary negotiated delays and reprieves with the Executive Council, juggling one then another. By early 1966 there were eight men on death row. However, in 1969, Volpe left the governor's office for an appointment in the Nixon administration having never wielded the state's ultimate power.

Because of Volpe's strong performance during his first term, many Democrats believed his reelection campaign in 1962 was all but certain. Many wrote off Chub Peabody's challenge as the "last hurrah" of the old-stock Yankees. Volpe was a hard-working son of immigrants, a self-made man, who counted Cardinal Richard Cushing as a personal friend. Volpe also had painted the Democrats with the brush of political corruption. Peabody, a Yankee by birth, the son of an Episcopal bishop, and an All-American football player at Harvard, had served on the Governor's Council from 1954 to 1958, but was considered too liberal to be elected. However, Volpe coasted along while Peabody campaigned hard, calling for a graduated income tax, constitutional reform, and an end to the death penalty. As a result, Peabody not only carried the traditional Democratic urban strongholds but ran well in the suburbs. He also benefited from the larger than usual number of voters who turned out to send young Ted Kennedy to the

U. S. Senate. Peabody squeaked into the statehouse, setting the stage for a tumultuous two-year debate about capital punishment.110

For hopeful MCADP members and abolitionists generally, Governor Peabody's initial step toward ending the death penalty hardly seemed promising. Despite their inauspicious beginning because of a quarrel over House leadership, Speaker John "Iron Duke" Thompson and Governor Peabody became allies in drafting an abolition bill. In letters and meetings, Ehrmann and the Governor's legislative aides sketched out a "plan of action." On January 30, 1963, the Governor publicly introduced his bill to end capital punishment in Massachusetts. Although he spoke in his signature wooden style, his announcement turned out to be explosive—even more explosive than it should have been—because the Governor gratuitously added three more charges to his bombshell. First, Peabody stated he had recommended commuting to life imprisonment the death sentence of John Kerrigan, a convicted "cop killer." Second, he declared he intended to recommend clemency for all convicted murderers sentenced to death; and, finally, in response to a reporter's question, the Governor stated he would not sign a death warrant for the "Boston Strangler" if and when he was caught and convicted.111

John Joseph Kerrigan had been sentenced to death September 24, 1961 for the fatal shooting of Cambridge patrolman Lawrence W. Gorman. According to testimony at trial, Kerrigan and an accomplice, Edgar Cook, were trying to break into a Kendall Square restaurant in the early morning of September 3, 1960, when Officer Gorman surprised them. As they ran from the scene, Kerrigan fired three shots,
after deliberating just eighty minutes, a jury found Kerrigan guilty of murder in the first degree. Judge Fairhurst sentenced Kerrigan to die in the electric chair, but stayed the sentence pending appeal. When the clerk asked Kerrigan if he had anything to say, he stood silent for a moment and then said, "I wasn't on Kendall Square that day."  

On the same day the SJC heard Kerrigan's arguments for a new trial, February 4, 1963, the Massachusetts Police Chiefs' Association mailed a letter to every legislator urging them to vote down Governor Peabody's call for abolition of the death penalty. The MCADP also began its lobbying effort. Six weeks later, James Lawton, Governor Peabody's legislative secretary, appeared before the Judiciary Committee to launch the Governor's abolition bill. "Surely no piece of legislation to be considered by the General Court this year," Lawton began, "will evoke more violent or emotional reaction than the matter of capital punishment we consider today." He hoped, however, the Committee might avoid the usual "confused excitement" by focusing on the "relative merits of the law as it now stands." Having paid lip service to the benefits of rational discourse, Lawton then bluntly and threateningly laid out the Governor's position. First, murderers "do not stop to consider the legal consequences before committing murder." Second, Lawton noted that states without the death penalty had not experienced an increase in the number of murders. Third, he argued that the capital justice system can and had made mistakes. Finally, Lawton made it clear that if the legislature did not abolish capital punishment, the Governor would use his power to commute the death sentence of a convicted murderers during his term.  

By early April 1963, the Massachusetts House and Senate debated several slightly different versions of an abolition bill. On April 18, the Senate passed a bill that abolished the death penalty for all convicted first-degree murderers except for someone serving a life sentence who killed a prison guard or for an imprisoned felon who in the course of an escape killed a guard. One week later, at the weary conclusion of an all night session, Ehrmann watched from the gallery as the House passed a similar bill. Speaker Thompson warned that a

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celebration was premature; parliamentary procedure required the House and Senate to take enactment votes. On Friday morning, May 4, Governor Peabody and Speaker Thompson convened a meeting of abolitionists at the Parker House to map strategy and to count House members for Monday’s showdown vote. Because he was suffering from a badly infected knee caused by wartime shrapnel, Thompson was confined to a wheelchair. For that reason, he telephoned House members rather than roam the House corridors in search of votes. Governor Peabody used his influence as well, and publicly vowed “a last-ditch fight” to enact a bill. At the same time, police officers knocked on legislators’ office doors, urging them to hold firm against abolition. When the House vote was tabulated, the abolition bill lost by twelve votes.\footnote{Peabody’s legislative aides brought him the bad news. The Governor walked down to Speaker Thompson’s office and thanked him for his effort. Thompson later issued a statement saying that although the Governor lost the fight for abolition, he “proved to those who were with him that he doesn’t quit on them.” Peabody vowed “the fight will go on.” Not everyone believed him. The Boston Post-Gazette, for example, predicted the Governor would run away from abolition “as fast as his All-American feet can carry him.” In fact, Peabody stayed the course; after John Kerrigan lost his SJC appeal, the Governor bucked public opinion once again and pressured the Council to commute Kerrigan’s death sentence to life imprisonment.\footnote{In the winter of 1963, in the wake of President John F. Kennedy’s assassination, Peabody altered his abolitionist rhetoric, trying to make his position more politically palatable. His opposition to capital punishment had not wavered, he told the Springfield Union, but people should understand he had a constitutional responsibility to carefully study the facts and consult with the Council about commuting a con-

\footnote{For the Senate’s bill, see Lowell Sun, Apr. 18, 1963. For initial House debate, see Springfield Union, Apr. 26, 1963. For the Parker House meeting, see Boston Herald, May 4, 1963. The Boston Advertiser reported that the Governor’s advisors urged him to drop the issue, but Ehrmann insisted the fight go on. Boston Advertiser, May 5, 1963. Herbert Ehrmann blamed the police lobby for the bill’s failure. Herbert Ehrmann, Speech, Box 40, Folder 16, Ehrmann Papers, supra note 9.}

victed murderer's death sentence. He also emphasized that no governor since 1947—Democrat or Republican—had signed a death warrant. Despite Peabody's softer rhetoric, Ehrmann was certain the Governor's controversial position on capital punishment would be the most important campaign issue in November's gubernatorial race against Republican John Volpe, who sought to regain the office he lost in 1962.

In an unprecedented turn of events, Lieutenant Governor Francis Bellotti defeated Peabody in the Democratic primary. Both Bellotti and Volpe opposed the death penalty, but voters did not perceive either as a zealous abolitionist. The candidates differed over whether to impose a sales tax, but whispers about Bellotti's alleged Mafia ties probably made the difference. Although Democrat Lyndon Johnson swept to a huge victory over Republican Barry Goldwater in 1964, in an election that brought nearly 2.4 million Commonwealth voters to the polls, Volpe edged out Bellotti by 23,000 votes.117

D. Charles Tracy Challenges Governor Volpe's Resolve

After taking office in January 1965, Volpe took two public steps intended to push the issue of capital punishment off the front page. First, he announced he would not stand in the way of an execution ordered by the court; and, second, about a year later, he abruptly fired Commissioner of Corrections George F. McGrath. McGrath was an Irish-American who had worked his way up from the streets of South Boston. Governor Furcolo appointed him Commissioner of Corrections, an appointment extended by Peabody and briefly by Volpe. Just one year into his new term, however, Volpe dismissed McGrath because his outspoken stand against capital punishment did not comport with the Governor's sought-after low profile on this issue.118

On the eve of McGrath's dismissal, the Boston Traveler pointed out that although a bill to abolish the death penalty had lost by a scant

117 For Peabody's softer abolitionist position, see Springfield Union, Dec. 2, 1963. During the Democrat primary, Bellotti often raised the question of capital punishment. See, e.g., Springfield Union, Apr. 20, 1964. Ehrmann feared that Bellotti would make Peabody's opposition to the death penalty the central issue; however, in fact, Bellotti's position was very similar to Peabody's. Letter from Sara Ehrmann to Honorable Edward J. McCormack Jr., May 11, 1964, Box 18, Folder 39, Ehrmann Papers, supra note 9. For election results, see Barbrook, supra note 1, at 140-43.

margin two years prior, "today even abolitionists concede such a bill is dead." At the same time, Volpe worked to defuse the death penalty issue. He encouraged adroit legal maneuvering to prevent the eight convicted murderers on death row from being executed, and he pressured the legislature to pass a death penalty moratorium while a commission determined if the death penalty was a deterrent to murder.119

Charles Tracy, a "convicted cop killer," tested Volpe's resolve. In the early morning of May 25, 1962, Tracy, an African-American short-order cook, entered the basement of the Kenmore Square office of the National Shawmut Bank of Boston and set off an alarm. Boston police responded to the call. The officers proceeded to the basement, which was a maze of small rooms connected by two narrow corridors. The officers spread out and slowly searched the area. One shot rang out, followed by three more shots in rapid succession. After running towards the shots, the officers reached an opening to a supply room where they saw Officer John J. Gallagher lying wounded on the floor. When his fellow officers tried to reach Gallagher, they came under fire from a "light-skinned, colored male"120 who was standing wedged between two metal lockers in the supply room. One of the officers shouted, "I am Sergeant Barry of the Boston Police. Put your gun out. Give yourself up. We are only interested in the wounded officer."121 Tracy did not respond. Whenever the police officers tried to reach Gallagher they came under fire. Nearly two hours passed before police officers were able to subdue Tracy and rescue their comrade. Officer Gallagher died at approximately 6 a.m.122

At each of his two trials—the first ended in a hung jury—Tracy took the stand. He testified he did not remember entering the bank, but he did recall squeezing into a locker where he found a loaded revolver and gun belt. At the instant he emerged from the locker, Gallagher called out to drop the gun. Officer Gallagher, according to Tracy, then fired a shot hitting him in the wrist, causing a reflexive movement that discharged a bullet. Tracy also said he could not let go


121 Id. at 19.

122 Id. at 17–19.
of the gun, and he did not hear Sergeant Barry call to him to throw the gun down. Finally, Tracy testified that before he arrived at the bank, he drank a grape-colored soft drink someone at his workplace gave to him, causing him to become “numb” and “blank.” The first jury, in May 1963, could not agree on a verdict; however, seven months later, in an atmosphere charged by the assassination of President John F. Kennedy, the jury found Tracy guilty of murder in the first degree. Because the jury did not recommend mercy, the trial judge sentenced him to death. The SJC upheld the verdict by a split decision, and the Supreme Court declined to accept the case for review. 123

Prior to Tracy’s trial and the imposition of his death sentence, capital punishment and race had not been explicitly linked either as part of a national abolitionist campaign or by the MCADP. Neither the National Association for the Advancement of Colored People (NAACP), nor its legal arm, the Legal Defense Fund (LDF), nor the American Civil Liberties Union (ACLU) had taken a direct stand against capital punishment or launched a litigation campaign before 1963. In that year, Justice Arthur Goldberg circulated a memorandum in advance of the conference at which the Court would decide whether to hear Rudolph v. Alabama. 124 Rudolph was a black man convicted and sentenced to death for the rape of a white woman. Although Goldberg did not specifically question the constitutionality of the death penalty and was silent on the issue of race, his published dissent to the Court’s denial of certiorari changed the legal landscape. 125 It stimulated the LDF and the ACLU to make a commitment to an anti-capital punishment campaign and explicitly make the link with race. 126

In Boston, however, as in many other American cities at this time, the focus of African-Americans and of civil rights groups was school desegregation, not capital punishment. In June 1963, the Boston branch of the NAACP led a one-day school boycott and in early 1965 filed suit in federal court against the Boston School Committee on

123 Id. at 21, 23. A majority of the court rejected Tracy’s argument that the incriminating statements he made when interrogated by a police officer as he lay wounded at the hospital violated his constitutional right to remain silent and to an attorney as stated by the Supreme Court. See id. at 22–23. See generally Escobedo v. Illinois, 378 U.S. 478 (1964).


126 Id.
the grounds that African-American children were being denied equal protection under the Constitution. The issues of desegregation and capital punishment did cross in the spring of 1965. Just four days after Martin Luther King, Jr. led a march from Roxbury to Boston Common to dramatize the issue of school desegregation, a divided SJC upheld Tracy's death sentence. For the next decade and a half, issues of race dominated Boston politics as well as the legal struggle to end capital punishment in Massachusetts and throughout the United States.\textsuperscript{127}

In September 1966, Tracy filed a petition asking Governor Volpe to commute his sentence to life imprisonment. Tracy's appeal first went to the Parole Board, chaired by Joseph F. McCormack.\textsuperscript{128} A Democrat publicly opposed to capital punishment, McCormack figured Tracy would be best served by delaying a decision rather than forcing Governor Volpe to tackle Tracy's commutation request a few weeks before the gubernatorial election, as some Democrats wanted. McCormack feared politicizing the case would jeopardize Tracy's chances of winning the Executive Council's favorable recommendation.

Not all Democrats or Parole Board members agreed with McCormack's strategy. Hoping to convince the Board to push Volpe onto a the political tightrope, George Cronin Jr., a Democrat member of the Executive Council, publicly argued that since Volpe sought the power to make life and death decisions, he must act now. Board member John T. Lane also urged McCormack to get Tracy's case to Volpe as soon as possible. Lane, the only African-American on the Board, wanted Volpe to confront the racial bias of capital punishment. Speaking for the growing number of Boston blacks demanding full civil rights, Lane asserted that racial bias prompted Tracy's sentence as well as the effort to postpone Tracy's hearing. In the end, McCormack prevailed, and Tracy's case was not forwarded to Volpe until after he won a new four-year term.\textsuperscript{129}


\textsuperscript{128} The Parole Board's function was to hold a hearing on a commutation petition and then to make a recommendation to the Governor. If the Board's recommendation was in favor of commutation, the Governor might then submit the issue to the Executive Council. After a hearing, the Council made a recommendation to the Governor who then made the final decision.

\textsuperscript{129} Boston Herald, Sept. 24, 1966. Between 1950 and 1960, Boston lost about 100,000 white people and gained 25,000 black people. Alan Lupo, Liberty's Chosen Home 135,
In the waning days before Tracy’s scheduled execution, during the week beginning December 14, 1966, the Boston Globe, among other newspapers, weighed in against the execution. There “is a substantial possibility that Tracy is NOT guilty of first degree murder.”\(^{130}\) Quoting liberally from Justice Arthur E. Whittemore’s SJC dissent, the Globe argued against the majority’s conclusion that Tracy had committed premeditated murder.\(^{131}\) Tracy entered the bank without tools or a weapon, and he shot Officer Gallagher in the presence of other police officers, a “foolhardy act,” not a planned, thoughtful act. Tracy’s story that he drank a strange concoction and became “numb” “reads like a cock and bull story,” but it must be read with the “officer’s testimony and with the testimony of other witnesses” who said that Tracy “looked, acted and talked ‘funny’” before he walked into the bank.\(^{132}\) The Globe also agreed with the portion of Justice Whittemore’s dissent that determined the police interrogation deprived Tracy of his constitutional rights. For the state to invoke the death penalty against a man who, “may not be guilty of first degree murder and is not even a hardened criminal would be vicious beyond description. It would also have the most grievous consequences for the reputation of Massachusetts in the nation and the world,” the Globe concluded with an eye on the global impact of the civil rights struggle.\(^{133}\)

The MCADP and a substantial number of Boston College (BC) faculty also petitioned Governor Volpe, asking that he and the Executive Council commute Tracy’s death sentence. Prompted by Ehrmann, attorney John G.S. Flym, of Foley, Hoag and Eliot, sent an “urgent” circular letter to Boston-area lawyers asking for their support in the campaign to save Tracy. Two days later, at 9 a.m. on December 7, Father William Kenealy, S.J., a former dean and then BC Law School professor, personally carried a petition signed by eighty-five BC and BC Law School faculty members to Governor Volpe asking him to “extend executive clemency to Charles E. Tracy.” “With profound sorrow and heartfelt sympathy with the family, the friends, and the colleagues of Officer John J. Gallagher,” the BC faculty began, “we believe that the commutation of this death sentence will prevent the compound-

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\(^{147}\) (1978). Volpe easily defeated Democrat Edward McCormack to win the first four-year term for governor in Massachusetts history. BARBROOK, supra note 1, at 152–53.

\(^{130}\) BOSTON GLOBE, Nov. 28, 1966.

\(^{131}\) See Tracy, 207 N.E.2d at 24–25 (Whittemore, J., dissenting).

\(^{132}\) Id. (Whittemore, J., dissenting).

\(^{133}\) Id. (Whittemore, J., dissenting); BOSTON GLOBE, Nov. 28, 1966; see also BEVERLY TIMES, Dec. 2, 1966.
ing of private and personal tragedy, and promote the public interest of the Commonwealth." Like the Globe, the BC faculty sided with Justice Whittemore in finding Tracy's "conduct in this tragedy was unplanned, bewildered, impulsive and irrational, rather than conduct inspired by 'deliberately premeditated malice afore-thought.'" The signers were "appalled" by the omission of this important and critical reference in the trial judge's charge to the jury. Father Kenealy and the others insisted this "critical omission in the charge to the jury constitutes a clear challenge to the conscience of the Executive Department to exercise that merciful clemency which, in our benign jurisprudence, is available to mitigate in particular instances the unforeseen horror of sheer legality."

Volpe acted the day after receiving the BC petition. On the Governor's recommendation, the Executive Council voted six to two for a six-month respite for Tracy. Volpe told the Council he intended to file a bill in the next legislature calling for a death penalty moratorium so that a commission might determine whether capital punishment deterred murder. Allowing Tracy to die before the legislature acts, Volpe declared, would be unfair to Tracy since others on death row would benefit if the legislature instituted a moratorium. The Governor added the usual political caveat: He had not changed his position on the death penalty. "I see it as my clear duty," he said at his weekly news conference on December 8, 1966, "to enforce the laws of the commonwealth, including the death penalty, as they presently exist in as fair and impartial manner as is humanly possible."

In the spring, Volpe threw the political hot potato of capital punishment to the legislature. He asked for a special study commission to determine if the death penalty was a deterrent. The House killed Volpe's bill by nine votes, largely in reaction to the Boston Strangler's escape from the state's hospital for the criminally insane. Volpe made some minor changes and then refiled the bill, but it failed by an even larger margin the second time. On the third attempt in August, Volpe's staff used every weapon in the Governor's arsenal, including a welcome statement from Cardinal Richard Cushing. For the first time since he assumed control of the archdiocese in 1945, the crusty, popular spiritual leader of Boston's Roman Catholic population revealed

134 Tracy, 207 N.E.2d at 25.
135 Petition for Charles E. Tracy from the Boston College Faculty, to Governor Volpe (Dec. 5, 1966) Box 27, Folder 65, Ehrmann Papers, supra note 9; Boston Herald, Aug. 8, 1967.
that he did not believe capital punishment was a deterrent and that he personally regretted capital punishment was the law of the Commonwealth. The bill sailed through the legislature. Although the MCADP opposed it, a referendum on capital punishment was also planned for 1968.\(^{137}\)

On the eve of the scheduled 1968 referendum, following her thirty-eighth consecutive appearance before the Joint Judiciary Committee of the legislature, Sara Ehrmann stepped down as president of the MCADP and of the ALACP. "No matter how anyone feels about capital punishment," wrote Charles W. Bartlett, President of the Boston Bar Association, "he can't have anything but admiration for the one-woman crusade that Mrs. Ehrmann has put on over the years." Bartlett noted that although Ehrmann had garnered plenty of help over the years, it was Ehrmann who "rounded up the speakers for the hearings, sent out the appeals for funds and generally rallied anyone and everyone who might conceivably assist." Bartlett concluded that the MCADP and the ALACP are "high sounding names but pretty largely no more nor less than Sara Ehrmann." When, four years after her "retirement," the Supreme Court held capital punishment as then practiced unconstitutional, Ehrmann told the Boston Record-American, "I feel victorious. I appreciate every ounce of success. I feel triumphant. Yes, I feel triumphant."\(^{138}\)

\(^{137}\) Boston Herald, Aug. 8, 1967. Cushing's statement appeared originally in The Mentor, A Penal Publication and was reprinted by the MCADP along with an interview. Cushing, supra note 105; MCADP reprints, Box 37, Folder 2, Ehrmann Papers, supra note 9. MCADP had long opposed a popular referendum on the question of capital punishment. See, e.g., Worcester Telegram & Gazette, Oct. 24, 1957; Letter from Sara Ehrmann to Attorney General Edward McCormack, Mar. 18, 1959, Box 4, Folder 71, Ehrmann Papers, supra note 9. The MCADP consistently opposed a public referendum on the issue of capital punishment, believing that voters were too likely to be swayed by emotion rather than reason. Springfield Union, Dec. 10, 1957; Letter from Vivian Pierce to Sara Ehrmann, May 5, 1951, Box 18, Folder 96, Ehrmann Papers, supra note 9; Letter from Edward McCormack to Sara Ehrmann, May 18, 1959, Box 4, Folder 71, Ehrmann Papers, supra note 9; Letter from Sara Ehrmann to Summer Kaplan, July 27, 1961, Ehrmann Papers, supra note 9.

\(^{138}\) Charles W. Bartlett, The President's Page, 11 Boston B. J. 1, 3–4 (Feb. 1967). After her "retirement," Ehrmann remained active in the Friends of Prisoners and the Norfolk Lifer's Group until 1988. Boston Globe, Mar. 20, 1993. Sara Ehrmann died March 17, 1993 at the age of ninety-seven. Boston Globe, Mar. 20, 1993. The MCADP's office, at 14 Pearl Street, Brookline, was demolished as part of an urban renewal project in 1968. David Skerry, a Boston College Law School student, worked with Ehrmann in the summer of 1967 to sort through her vast anti-capital punishment collection. She initially thought her collection might be housed at Boston College Law School, but that plan fell through. The collection went to Northeastern University Law School; after several years the collection was moved to Northeastern University. See Boston Rec.-Am., June 30, 1972; Letter from
E. New Voices and a March Towards Court

The Court’s Furman decision signaled what Ehrmann herself had predicted some years earlier: A shift in the abolitionists’ focus away from an effort to enact legislation and toward a focus on the “inadequacies of the law and procedure.”139 For this reason, new faces and tactics dominated the abolitionist effort after 1968. Attorney William Homans, Jr. and Harvard Law School professor Laurence H. Tribe were among those lawyers acting in cooperation with the Massachusetts Civil Liberties Union to pursue abolition in the courts. Likewise, Tufts University philosophy professor Hugh A. Bedau revived the ALACP and produced scores of scholarly publications focusing on the death penalty’s legal and social inequities. In addition, Boston University President John Silber, once active in the Texas abolitionist movement, assumed responsibility for educating the public.140

Despite Ehrmann’s tireless effort and the infusion of new blood into the abolitionist movement, the results of the death penalty referendum in 1968 presented a huge—but not unexpected—disappointment. “Shall the commonwealth of Massachusetts retain capital punishment for crime,” the plebiscite asked voters. There were a total of 1,159,348 “yes” votes, 730,649 “no” votes, and 458,008 blanks.141 Of 351 Massachusetts’ cities, only twelve voted negatively. Within a month after voters expressed their preference for capital punishment, Volpe left the governor’s office for a position as President Richard Nixon’s Secretary of Transportation. Lieutenant Governor Francis W. Sargent served as acting governor before winning a full four-year term in 1970. An affable, lanky, lantern-jawed, low-key Yankee from Cape Cod,


139 Letter from Sara Ehrmann to Charles Sprague, June 19, 1951, Box 19, Folder 47, Ehrmann Papers, supra note 9.

140 Following passage of the mercy bill in 1951, Ehrmann predicted that lawyers “themselves will come to demand abolition of capital punishment.” Letter from Sara Ehrmann to Charles Sprague, June 19, 1951, Box 19, Folder 47, Ehrmann Papers, supra note 9. According to a letter sent to all MCADP members in June 1971, Tribe and Silber testified before the Judiciary Committee in 1970 and 1971. In the same letter, the new president of MCADP also reported that John Flackett, Boston College Law School professor, and Frank Heffron, formerly with the NAACP Legal Defense Fund, had met with Governor Sargent to work out ways to extend the respites due to expire for four men on death row. Letter from Louis L. Brin, President of the MCADP, to Members, June 1971, Ehrmann Papers, supra note 9. For a list of Bedau’s publications on the death penalty, see The Death Penalty, supra note 9, at 474–75.

Sargent had made his name as an environmentalist and as head of the Department of Public Works. Before 1970 he said nothing publicly about the death penalty, but during his campaign for governor, Sargent made it clear he opposed capital punishment. Despite his stated opposition, Sargent tacked on the caveat that he would sign a bill allowing the death penalty for those who murder law enforcement officers.142

The shooting death of Officer Walter A. Schroeder in September 1970 prompted Sargent’s remark. Police charged William “Lefty” Gilday with first-degree murder and two counts of armed robbery stemming from the September 23, 1970 robbery of the State Street Bank in Brighton. The State also indicted Stanley R. Bond, Robert J. Valeri, Susan E. Saxe, and Katherine A. Power. Valeri, Saxe, and Bond, all armed, entered the bank while Gilday, armed with a semiautomatic rifle, remained in a car parked outside the bank to protect the trio during their getaway. Power waited nearby in a “switch” car. The three robbers left the bank with more than $23,000 and sped off in the getaway car. At that moment, Officer Schroeder arrived on the scene. From across the street, Gilday began shooting at Schroeder, fatally wounding the officer. All five members of the gang made their way to Bond’s Beacon Street apartment where, according to a witness, Saxe and Power accused Gilday of being “trigger happy.” Valeri, captured by police within hours, confessed, sending the others running. Gilday fled from Boston, driving to several Massachusetts cities before forcing his way into a Haverhill home and holding a family hostage for nearly twenty-four hours. At gunpoint, he forced two family members to drive him to Worcester, where police later arrested him.143

Gilday and Valeri met while serving time in Walpole State Prison. Bond was the third male member of the “Revolutionary Action Force—East,” as the gang styled itself. Because of their success in a program designed to help inmates further their education, the state paroled Valeri, Bond, and Gilday. Valeri and Gilday then enrolled at Northeastern University, and Bond began attending Brandeis, where he met Susan Saxe and Kathy Power.144

144 Gilday, 327 N.E.2d at 856–57; BOSTON HERALD TRAVELER, May 24, 1972. At Walpole State Prison, Bond killed himself when a bomb he was making exploded. BOSTON HERALD, May 24, 1972.
Fervently opposed to the Vietnam War, Power joined the Brandeis Sanctuary Community and helped organize a refuge for an AWOL army private in 1968. As the war escalated, Power abandoned her non-violent beliefs. In May 1970, when National Guard troops killed four Kent State students, Bond, Power, and Saxe helped organize the National Strike Information Center at Brandeis, a group which promoted student strikes nationwide. When the Strike Information Center needed money, Bond, Power, and Saxe robbed banks in Illinois, Pennsylvania, and California. After the Brighton murder, Bond, Saxe, and Power split up. Police captured Bond in a Colorado motel several days later. Police finally arrested Saxe in Philadelphia in 1975, and Power turned herself in to authorities in 1993. Justice Edward F. Hennessey labeled the entire episode "an odyssey of violence against the background of political revolution, or at least pretensions of revolution."\textsuperscript{145}

After pleading guilty to manslaughter in his own trial, Valeri testified for the prosecution in Gilday's trial. A jury convicted Gilday of first-degree murder and robbery, and sentenced him to death on March 10, 1972. He joined twenty-three other men in Walpole Prison awaiting execution. When the Supreme Court held in 1972 that William Furman's death sentence was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," the Court reversed the judgment in his case and remanded it for further proceedings, namely, resentencing to life imprisonment. In a series of per curiam decisions, the Court also ordered resentencing in 118 other cases from twenty-six different states.\textsuperscript{146} One of the cases the Court summarily reversed was the death sentence of John S. Stewart, who had murdered a Boston policeman in 1971. Three other Massachusetts death sentences pending at the Court were also reversed. All but two of the remaining twenty cases would eventually claim a reversal on the grounds of \textit{Furman} and \textit{Stewart}.\textsuperscript{147} However, dicta in Justice Stewart's concurring opinion in \textit{Furman} suggested that Massachusetts'
mandatory death penalty for felony rape-murder might satisfy constitutional requirements.148

III. THE FINAL PHASE: VICTORY IN THE MASSACHUSETTS COURTS

A. Setting the Stage in the SJC

While Furman gave abolitionists joy for what it delivered and for what it seemed to promise, Justice Stewart's dicta suggesting that mandatory death sentences for defendants convicted of rape-murder could be constitutional gave Massachusetts death penalty proponents reason to celebrate as well. For this reason, over the next decade and a half, the Massachusetts legislature, the governor, and the SJC waged an intense struggle to define the Commonwealth's post-Furman death penalty position. The SJC was the first branch of Massachusetts' government to react to the Court's abolition of the death penalty, followed by the legislature, and then by Governor Frank Sargent. On July 23, 1973, by its ruling in Commonwealth v. LeBlanc, the SJC applied Furman to the death sentence convicts not mentioned in the Court's per curiam holding in Stewart. David LeBlanc had been sentenced to death in the winter of 1971 for the shotgun murder of his stepfather. In a unanimous opinion, the SJC decided that "in the light of the Furman case," LeBlanc's death sentence "may not remain."149 The SJC ordered LeBlanc to be resentenced to life imprisonment.150

Three weeks later, in Commonwealth v. A Juvenile, the SJC ruled that teenaged Alphonso Pickney's death sentence for felony murder-rape must be reversed. The court was receptive to defense counsel Bill Homans' argument. Homans argued that the statute allowed a trial judge unconstitutional discretionary authority and that Pickney's death sentence must be reversed.151


149 LeBlanc, 299 N.E.2d at 726-27.

150 Id.

151 442 MASS. GEN. LAWS ch. 119, § 61 (1973) (repealed 1996); Commonwealth v. A Juvenile, 300 N.E.2d at 439-40; Supplemental Brief for the Defendant at 5 (quoting Furman,
Writing for a unanimous court, Justice Paul C. Reardon agreed. In light of the Supreme Court's finding in *Furman*, the SJC held "that imposition of the death penalty [in Pickney's case] left as it was within the discretion of the judge, is invalid, and that the penalty is therefore limited to life imprisonment."152 The court added, prophetically, that they did not have an opinion on the constitutionality of the law mandating a death sentence for adult perpetrators of murder-rape. In short, the fate of African-American Robert O'Neal, whose February 1973 conviction for murder-rape had led to a mandatory death sentence, was yet to be decided.153

The legislature did not share the SJC's interest in hearing arguments against the mandatory death penalty provision. Well before the *LeBlanc* ruling, House members filed five different death penalty bills. In the spring, the Joint Judiciary Committee held a public hearing. Spokespersons for and against the death penalty gave emotional speeches, but none as grotesque as Representative George Sacco's (D-Medford). Speaking in favor of his bill calling for a mandatory death penalty for the murder of a police or correctional officer, Sacco loudly and proudly proclaimed, "I believe in two chairs and no waiting." Early in August, the Joint Judiciary Committee reported out favorably a mandatory death penalty bill for all first-degree murder convictions, a proposal modeled on the state's pre-1951 statute. After vociferous and divisive debate, the House voted 130 to 89 in favor of the bill. Death penalty opponents slowed final enactment of the bill by asking the SJC for an advisory opinion about its constitutionality.154

On September 25, 1973, Massachusetts Attorney General Robert H. Quinn filed his brief with the SJC. Prepared with the assistance of Harvard Law School professor Lloyd Weinreb and Bill Homans, Quinn's brief argued that the House bill violated the Massachusetts constitutional prohibition against "cruel or unusual punishment."155 The Attorney General defined "cruel" as "excessive in relation to the offense punished, no matter how heinous," an interpretation drawn


152 Commonwealth v. A Juvenile, 300 N.E.2d at 442.

153 Id. at 439–40, 442. See generally O'Neal I, 327 N.E.2d 662.


155 Within this article, the text adheres to the difference between the Massachusetts Constitution and the U.S. Constitution with regard to limiting the scope of punishment; the former cites "cruel or unusual punishments " while the latter references "cruel and unusual punishments." U.S. CONST. amend. VIII; MASS. CONST. Part I, art. 26.
from *Trop v. Dulles*, a 1958 Supreme Court case. A mandatory death penalty, Quinn claimed, demeans "the dignity of man" and causes the "total destruction of the individual’s status in organized society," and therefore is "cruel." Taking a statement from Justice Brennan's concurrence in *Furman* one step further, Quinn concluded that capital punishment "is not merely different in degree of severity but different in kind from every other penal sanction and therefore ‘unusual’ within the meaning of the Eighth Amendment."

As the legislative session drew to a close, the House grew too impatient to wait for the SJC's advisory opinion. On October 1, the House forged ahead and passed the mandatory death penalty bill by a vote of 143 to 82. Before the Senate could take up the bill, two especially brutal murders occurred in Boston. Gangs of African-American youths allegedly burned a young white woman to death in Roxbury, and assaulted and stabbed a white fisherman to death near Columbia Point. Riding this wave of emotion, the Senate passed a slightly different mandatory death penalty bill by a vote of twenty to eleven. After some haggling, a bill specifying the types of criminal homicide subject to a mandatory death sentence passed the Senate and the House just after Thanksgiving, 1973.

Just four days after the legislature passed the bill and three years almost to the day after "Lefty" Gilday gunned down his brother Walter, Detective John D. Schroeder was murdered while investigating a holdup. Amidst the ensuing storm of public outrage, opponents of capital punishment rallied to oppose the mandatory death penalty bill now sitting on Governor Sargent's desk. At a State House news conference, Boston University President John Silber solemnly observed:

> It is difficult to control our instinct to avenge the cruel and senseless murder of detective Schroeder. Capital punishment cannot return to life detective Schroeder or any other victim.

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Tragically, the most we can do for those who are killed is to show our concern for the sanctity of life.\textsuperscript{160}

Silber also presented the Governor's secretary with a MCADP petition signed by 10,000 people urging Sargent to veto the bill. The following day the Massachusetts Police Chiefs Association countered with a letter demanding the Governor sign the bill into law. On December 6, 600 police officers, returning from Detective Schroeder's funeral, marched on the governor's office demanding an interview. Governor Sargent agreed to talk with a small delegation of the officers and during an hour-long meeting punctuated by angry shouting, the police officers urged the Governor to sign the bill.\textsuperscript{161}

The day before the bill would be automatically pocket-vetoed, Sargent told statehouse reporters of his intention. He wanted to help the "cops," he said, but he felt the death penalty was "imagined help." Sargent added, "I'm amazed at the number of people who think the electric chair would end violence. I really don't." The following day, December 10, the Governor issued a somewhat more formal press release outlining his reasons for vetoing the bill. Sargent acknowledged that "we live in times of alarming violence" and bowed to the tough job performed by the police, but he criticized the mandatory death penalty bill as being of "doubtful constitutionality." He also shared his "personal and moral compunctions about the taking of human life by the state" and articulated a political position that seemed to allow the Governor to appease both sides. "I will sign a capital punishment measure that is limited to killers of law enforcement officers," the Governor stated forcibly, hastily adding that before signing such a bill he would "insist it be considered by our Supreme Court on the question of constitutionality."\textsuperscript{162}

Governor Sargent's pocket veto drew criticism from capital punishment opponents and proponents. Opponents felt Sargent had "knuckled under" because he suggested he would sign some sort of death penalty bill. At the same time, the chairman of the Boston Police Patrolmen's Association decried the Governor's decision, labeling it "craven" and "politically motivated." Not surprisingly, therefore, the


\textsuperscript{161} The media reported the Police Chiefs' letter on the same day as Silber's comments. \textit{Boston Globe}, Dec. 4, 1973. For the Governor's meeting with 600 police officers, see \textit{Boston Globe}, Dec. 6, 1973.

abolition battle re-ignited in the spring of 1974. On March 5, the House passed the same death penalty bill the Governor had vetoed the preceding session. This time, however, the legislature figured there would be time to attempt to override Sargent’s expected veto. The Senate also passed the mandatory death penalty bill, though by a narrow margin. As predicted, Governor Sargent vetoed the bill within hours after it reached his desk. The House quickly and easily overrode the veto, but the Senate fell one vote shy of the requisite two-thirds needed to override.163

Capital punishment was a non-issue in the 1974 gubernatorial campaign since Sargent and eventual winner Democrat Michael Dukakis both opposed the death penalty. The youngest son of Greek parents, Dukakis graduated from Swarthmore College and Harvard Law School. Following admission to the bar in 1955 he practiced law, but his chief interest was politics. Elected to the Massachusetts legislature in 1963, he earned a reputation as a “tough, honest maverick,” a label he proudly wore when he took office as governor in January 1975. Just four months later, under intense pressure from citizens angry about rising crime and murder rates, the legislature tested Governor Dukakis’ resolve on capital punishment. A bill mandating capital punishment in nine categories of murder landed on the Governor’s desk April 29, 1975. He had already prepared a veto message. Dukakis told the legislature that he could not “reconcile the willful taking of a human life by the state with his own moral and ethical beliefs.” He added that he had never seen “any convincing evidence that the death penalty is a deterrent to crime,” and that he had “grave doubts about the constitutionality of the legislature’s bill.” Two days later the House voted 156 to 68 to override the governor’s veto, but by a single vote the Senate failed to override the veto, briefly ending political debate on the issue. The death penalty did become a hated and divisive campaign issue in 1988, but in the meantime, the spotlight shifted to the court.164


B. Robert O’Neal’s Ground-Breaking Case

On the morning of March 27, 1972, Robert O’Neal, a nineteen-year-old African American, forced his way into a Roxbury apartment occupied by Gladys Mercadel, a fifty-eight-year-old white woman and her thirty-four year old son, Earl. Once inside the apartment O’Neal drew a gun, grabbed Gladys’ wrist and dragged her toward the rear of the apartment. Earl, who suffered from muscular dystrophy, lay helpless in bed. About twenty minutes later, O’Neal returned to Earl’s room and assaulted him, stabbing him in the neck and stomach with a kitchen knife. When the police arrived they found Earl lying in a pool of blood, seriously injured. Gladys Mercadel had been strangled to death. Her partially clothed body lay on her bed, with a wad of tissue stuffed in her mouth. There was evidence she had been raped before she had been murdered. A jury found O’Neal guilty of rape-murder. Before sentencing O’Neal to death, Judge Allan Dimond stated his belief that Furman “did not annul the Massachusetts statute that makes the death penalty mandatory for murder committed in the commission of rape.” On appeal to the SJC, attorney Bill Homans took aim at this premise.165

During this time, G. Joseph Tauro served as Chief Justice of the Supreme Judicial Court. Born and educated in Lynn, Massachusetts, the son of an immigrant shoemaker, Tauro attended Boston University Law School and earned admission to the bar in 1927. He hung out a shingle in his hometown and slowly built a private practice, attracting Volpe Construction as one of his clients. This representation developed into a professional and personal relationship that led Tauro to Beacon Hill in 1961, when he served as Governor Volpe’s legal counsel. A short time later, Volpe appointed Tauro Chief Justice of the Superior Court, a position he held until Governor Sargent moved him to the SJC’s center seat in 1970. The Boston Globe greeted Tauro’s appointment to the SJC with derision. Tauro’s “most distinguished feature in the legal world,” the Globe wrote, “has been his pompous, self-important manner. He is also known for his vindictive attitude toward his critics.” In case anyone missed the point, the Globe

added: "The state's highest court needs new blood, new talent, new thinking, new force. The Tauro appointment brings none of this." \(^{166}\)

Almost immediately after taking his seat on the court, Chief Justice Tauro began to prove his critics wrong. In a heated dissent, he blasted the SJC's ancient policy of legislative deference. "I do not believe we should look to the legislature for change," he wrote. "To do so is a distortion of the concept of judicial review." \(^{167}\) A year later, Chief Justice Tauro assaulted the court's "slavish adherence to stare decisis." \(^{168}\) In criminal procedure, too, the Tauro court swept aside old rules and added new protections for the accused. \(^{169}\)

Chief Justice Tauro's drive for judicial independence thrust the SJC into the forefront of a post-Warren movement to supplement federal constitutional rights with an expanded interpretation of state constitutional guarantees. During the decade following the 1969 resignation of Supreme Court Chief Justice Earl Warren, the SJC was "more outspoken concerning the significance of rights under the Declaration of Rights than at any time in its history," according to Herbert P. Wilkins, SJC Chief Justice from 1996 through 1999. Tauro's colleagues and successors publicly encouraged lawyers to make greater use of the Massachusetts Declaration of Rights and insisted that "'the duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure.'" For this reason, the SJC's bold and controversial decisions about capital punishment not only had deep roots within Massachusetts' law and culture, but were a manifestation of a new shift toward state constitutionalism as well. \(^{170}\)

It was within this context, in April 1975, that Chief Justice Tauro spoke for a narrow, divided majority in \(O'Neal I\). He rejected both of the defense's major arguments. Homans had argued the statute im-


posing a mandatory death penalty for rape-murder was unconstitutional under *Furman* either because it allowed the jury to have discretion in determining whether the death penalty should be imposed, or because the death penalty itself was cruel and unusual punishment in violation of the Eighth Amendment. The discretion analysis "appears plausible at first glance," Chief Justice Tauro wrote, but "there are serious problems connected with its use." The majority noted that when a jury finds that a murder was committed in the course of a rape, the state automatically imposes the death penalty. Juries, "if properly charged, have no discretion to find mitigating circumstances or a lesser degree of culpability." The SJC admitted that it is possible for a "rogue" jury to disregard evidence that a murder was committed in the course of a rape to avoid subjecting the defendant to the death penalty. However, the majority stated that if this possibility equals unconstitutional jury discretion, then "our entire criminal jury system." would be discredited.

Alternatively, Homans argued the death penalty violated the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights, which prohibits cruel or unusual punishment. Although Chief Justice Tauro noted the immense quantity of judicial and scholarly literature on this issue, he ultimately found the material inconclusive. Having rejected both of Homans' arguments, the SJC chose another route. Specifically, the Chief Justice argued that the due process clause of the Fourteenth Amendment—and he added in a footnote, the "fundamental constitutional principles enshrined in our State constitution dictate an identical result"—protected a fundamental right to life. "Life is a constitutionally protected fundamental right," he asserted. Therefore, an infringement of that right "triggers strict scrutiny under the compelling State interest and least restrictive means test." For this reason, in order to take a life by statute, the state must show that "such action is the least restrictive means" to achieve a "compelling government end." Chief Justice Tauro then

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171 *O'Neal*, 327 N.E.2d at 665.
172 *Id.*
173 *Id.*
174 *Id.* at 667 n.5.
175 *Id.* at 668.
176 *O'Neal*, 327 N.E.2d at 668.
177 *Id.*
ordered the Commonwealth and O'Neal to respond to the court's argument in thirty days.\textsuperscript{178}

Justices Wilkins, Hennessey, and Kaplan concurred with the Chief Justice, but Justices Reardon, Quirico, and Braucher dissented. Wilkins and Kaplan were dubious about Chief Justice Tauro's due process-compelling state interest argument, but they agreed with the need for additional argument. Wilkins urged that "particular attention should be paid to art. 26."\textsuperscript{179} After noting the Supreme Court's decision to view the Eighth Amendment based upon "evolving standards of decency that mark the progress of a maturing society," he then suggested that the "appropriate standards applicable in the Commonwealth may be higher under art. 26 than the standards applicable under the Eighth Amendment."\textsuperscript{180} Without foreclosing the validity of either Chief Justice Tauro or Justice Wilkins' position, Justice Hennessey invited a wide-ranging argument, including the idea that "new standards of compassion have made the death penalty unconstitutional."\textsuperscript{181}

The Commonwealth's supplemental brief, signed by the district attorneys of Suffolk, Middlesex, and Bristol counties, argued that capital punishment was a deterrent to rape-murder and that the state had a compelling interest in protecting its citizens from this heinous offense. First, the Commonwealth argued that life imprisonment was an insufficient punishment to deter a rape-murderer. In fact, absent the death penalty there would be an incentive for the rapist to murder his victim in order to improve his chances of "escaping apprehension while not substantially increasing his penalty if he were caught." To buttress this argument, the Commonwealth cited economist Isaac Ehrlich's 1975 study of the deterrent effect of capital punishment. Using multiple regression analysis, Ehrlich concluded that one execution might have resulted in seven or eight fewer murders. Finally, the Commonwealth reminded the court of women's "desperate need" for protection and the people's call for capital punishment.\textsuperscript{182}

\textsuperscript{178} Id. at 667 n.5, 668.
\textsuperscript{179} Id. at 669 (Wilkins, J., concurring).
\textsuperscript{180} Id. (Wilkins, J., concurring); Trop, 356 U.S. at 101.
\textsuperscript{181} O'Neal I, 327 N.E.2d at 670 (Hennessey, J., concurring). See generally Trop, 356 U.S. 86.
Homans' supplemental brief asserted that "the punishment of death operates to preclude regular, predictable, evenhanded application of capital punishment and there can be no compelling governmental interest which cannot be served by means less drastic than the killing of an inevitably small number of convicted, incarcerated felony rape-murderers." Homans noted that in order to justify the infringement upon the fundamental right of life the government must show the death penalty was "necessary to promote a compelling governmental interest" and that death is "precisely tailored" to achieve this interest. Homans conceded that some murderers might be deterred by the death penalty, but since the overwhelming majority of crimes committed were not the result of rational choice, death was not a deterrent. Finally, Homans concluded that life imprisonment for rape-murder would properly satisfy the community's need for safety and justice.183

The SJC, three days before Christmas, 1975, found the state's mandatory death sentence for murder committed in the course of a rape or attempted rape unconstitutional in O'Neal II.184 In his concurring opinion, Chief Justice Tauro broadly hinted that no death penalty statute would pass constitutional muster. He relied primarily on the Massachusetts Constitution, letting his Fourteenth Amendment argument slip into a footnote. He focused on the question of whether capital punishment was cruel or unusual punishment, because he wanted to resolve the question of the "constitutionality of capital punishment under the cruel or unusual test."185 The Chief Justice merged two state constitutional strands, a due process argument based on Articles 1, 10, and 12 of the Massachusetts Declaration of Rights, and an analysis of Article 26's prohibition against cruel or unusual punishment.186

Chief Justice Tauro rejected the state's argument that capital punishment was a better deterrent to murder than life imprisonment. He noted that two special commissions of the Massachusetts legislature and virtually every contemporary criminologist had concluded

184 See generally 339 N.E.2d 676 (Mass. 1975). The paragraph-long majority opinion of the court was followed by concurring opinions from each of the majority members: Tauro, Hennessey, Wilkins, Kaplan, and Braucher (who concurred only in the result of the court); Justices Reardon and Quirico dissented. See id. at 677.
185 Id. at 679 n.3 (Tauro, C.J., concurring).
186 Id. at 677 n.1, 679 n.3, 677 (Tauro, C.J., concurring).
that capital punishment does not deter murder. Chief Justice Tauro explained that studies comparing homicide rates in states without capital punishment to similar contiguous states with the ultimate penalty indicated that homicide rates "are conditioned by other factors than the death penalty." He further noted that scientific studies also indicate that a mandatory death penalty was not a greater deterrent to homicide than discretionary use of capital punishment. "My review of the available studies," Chief Justice Tauro stated, "reveals no firm indication that capital punishment acts as a superior deterrent to homicide than other available punishments." Therefore, the Commonwealth had not demonstrated that its compelling interest in deterrence could not adequately be served by other less restrictive means of punishment, nor did it demonstrate that the need to hold together the "social compact" required serious crimes to be punished by death.

Based on these arguments, the Chief Justice concluded the Commonwealth had not met its heavy burden of demonstrating that in pursuing its compelling interest of protecting citizens from rape-murder, it had chosen means that did not "unnecessarily impinge on the fundamental constitutional right to life." For this reason, the mandatory death penalty for murder committed in the course of rape violated the due process clause and the cruel or unusual punishment clause of the Massachusetts Constitution. In footnote twenty-three, Chief Justice Tauro planted a time bomb. The footnote extended the analysis beyond murder-rape. The footnote indicated that any new statutes authorizing the death penalty must meet the "compelling State interest" test. Justices Hennessey and Wilkins, in their concurring opinions, stressed Massachusetts' "unique" past and recent death penalty history and the importance of Article 26.

His argument completed, the Chief Justice lashed out at Justices Braucher and Reardon for disagreeing with him. Given that Tauro retired before the end of the court's session, perhaps the attack was a parting shot in a long festering quarrel. Perhaps he heightened his rhetoric because of the importance of the death penalty issue. Whatever the reason, his verbal assault on two men with whom he had

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187 *Id.* at 685 (Tauro, C.J., concurring).
188 *Id.* at 685, 687, 682-86 (Tauro, C.J., concurring).
189 *O'Neal II*, 339 N.E.2d at 688 (Tauro, C.J., concurring).
190 *Id.* at 688 n.23 (Tauro, C.J., concurring).
191 *Id.* (Tauro, C.J., concurring).
192 *Id.* at 688 n.23, 688 (Tauro, C.J., concurring).
served nearly his entire tenure on the bench was personal and gratuitous. He accused Braucher of trying to avoid the important constitutional issues by resorting to "doubtful" and "strained" statutory construction and of violating his constitutional obligation as a judge. The Chief Justice next savaged Reardon's "novel suggestion" that the SJC "refrain from construction and application of our State Constitution" and wait for the Supreme Court to offer guidance. Tauro's point was "utterly without merit," declared Tauro. He added that the SJC, "not the Federal courts—bears ultimate responsibility for construction of our State Constitution." Tauro further expounded that "[o]ur interpretation of the State Constitution is final and cannot be challenged in the Federal courts." Finally, Tauro fired back at the charge that he allowed his personal views rather than the law to shape his opinion. On the contrary, Tauro retorted, he was motivated by the need to uphold the Constitution and to maintain the SJC's "independence and impartiality."

Overlooking Tauro's jabs, Governor Dukakis hailed the majority decision as "the crowning achievement of his judicial career" and a "brilliant work of exposition." In an editorial headlined Ending the Death Penalty, the Globe sang the praises of an evolving constitution. "Standards of human justice have changed—for the better, we think—and both [the United States Constitution and the Massachusetts Constitution] were intended to serve more as general guides than as hard and fast rules." The SJC's second O'Neal decision, concluded the Globe, brought the law into conformity with contemporary Massachusetts' values. The Globe's assessment of popular beliefs about the constitutionality of the death penalty was far too optimistic. In fact, although Massachusetts' citizens were somewhat more ambivalent than Americans generally, a 1974 Gallop Poll showed roughly two-thirds of all Americans favored the death penalty for murder. Over the next decade the Massachusetts House reflected this sentiment by voting for new death penalty laws by wide margins.

195 Id. at 690 (Tauro, C.J., concurring).
194 O'Neal II, 339 N.E.2d at 690 (Tauro, C.J., concurring).
195 Id. (Tauro, C.J., concurring).
C. The SJC Drives the Final Nail

The celebration over *O'Neal II* was short-lived. In 1976, the Supreme Court in *Gregg* held that the new Georgia death sentencing statute was constitutionally permissible, opening the door for states across the country to craft similar statutes. In the wake of the Supreme Court’s decision, the Massachusetts legislature asked the SJC for an advisory opinion on the constitutionality of a proposed death penalty bill. Shaped by the Supreme Court’s decision in *Gregg*, the Massachusetts bill provided for two phases: A jury would first determine a defendant’s guilt or innocence; if found guilty, the jury would then vote separately on punishment. To arrive at a sentence, the jury would take into account mitigating as well as aggravating circumstances, and the SJC would automatically review all death sentences. In its advisory opinion, the SJC told the legislature that its view of the constitutionality of the death penalty had not changed since *O'Neal II*. The House bill might meet the standard set by the Supreme Court, but “it does not meet the *O'Neal* objection, namely, that capital punishment” violated Article 26 of the Declaration of Rights. The state also failed to show the death penalty’s “peculiar efficacy in comparison with other punishment.” In short, the SJC held firm to its state constitutional analysis.

A deepening fiscal crisis and an increasingly loud clamor for reinstating the death penalty led to Dukakis’ defeat in the 1978 Democratic primary by his conservative Democrat rival Edward J. King. The legislature quickly passed a new death penalty bill, Governor King signed it in the winter of 1980, and Newman Flanagan, the Suffolk County District Attorney, immediately forced a test of the law’s constitutionality. Flanagan announced he would seek the imposition of the death penalty for James Watson, an African-American teenager accused of the shooting death of a white Boston cab driver.

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199 See id. at 153, 160–61.
201 Id. at 186.
202 Id. at 188.
203 *Gregg*, 428 U.S. at 153, 160–61, 186, 188; Opinion of the Justices, 364 N.E.2d at 186, 188. The opinion was signed by five of the SJC’s seven justices. See id.
In the 1980 case of *District Attorney v. Watson*, the SJC concluded the new death penalty statute violated Article 26. Chief Justice Hennessey bolstered the SJC’s state constitutional argument with two examples. Chief Justice Hennessey, writing for the majority, first noted that, “what a society does in actuality is a much more compelling indicator of the acceptability of the death penalty than the responses citizens may give upon questioning.”205 The Chief Justice noted that no one had been executed in Massachusetts since 1947 and then argued that the lack of executions spoke much louder than opinion polls and passionate rhetoric.206 Successive governors “who bore the responsibility for administering the death penalty,” found it “unacceptable.”207 Second, Chief Justice Hennessey wrote that “it is the inevitable that the death penalty will be applied arbitrarily... [and] will fall discriminatorily upon minorities, particularly black” persons.208 The Chief Justice noted that data on death sentences imposed in Florida, Georgia, Texas, and Ohio under statutes upheld by the Supreme Court in 1976 made this argument abundantly clear.209 Moreover, Chief Justice Hennessey pointedly added, “the existence of racial prejudice in some persons in the Commonwealth of Massachusetts is a fact of which we take notice.”210

In a concurring opinion, Justice Paul J. Liacos, who Governor Dukakis appointed to the court in 1976 and who once described the death penalty as “torture in the guise of civilized business,” passionately amplified the court’s reasons for finding the death penalty “impermissibly cruel when judged by contemporary standards of decency.”211 Justice Liacos wrote movingly of how the imposition of the death penalty was “disguised by the language and technique of abstraction,” how a “ritual language, reduced to stereotyped phrases” masked our shame and the “degrading” business of deliberately putting someone to death.212 Indeed, the clear purpose of the prohibition against cruel or unusual punishment, Justice Liacos argued, “is to guarantee a measure of human dignity even to the wrongdoers of our society” and to preserve the dignity of government. Capital punish-

205 *Watson*, 411 N.E.2d at 1282.
206 *Id.*
207 *Id.*
208 *Id.* at 1283.
209 *Id.* at 1285–86.
210 *Watson*, 411 N.E.2d at 1282, 1283, 1285–86.
211 *Id.* at 1289 (Liacos, J., concurring).
212 *Id.* at 1289–90 (Liacos, J., concurring).
ment, Justice Liacos concluded, was "antithetical to the spiritual freedom that underlies the democratic mind."\textsuperscript{213}

In 1984 the SJC confronted another capital punishment statute and again found it unconstitutional. This time the court could not rely upon Article 26. On November 2, 1982, Massachusetts' voters gutted Watson by adding the following language to Article 26:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.\textsuperscript{214}

On the heels of that constitutional amendment, the legislature adopted a new statute allowing juries to apply the death penalty in certain first-degree murder cases. Governor King, a lame duck after losing to Dukakis in the 1982 gubernatorial race, signed the bill into law. Two months later, three assailants shot and killed State Trooper George L. Hanna during a routine traffic stop. At pretrial hearings, the Commonwealth asked that the constitutionality of the death penalty statute be ruled upon before the case went to trial.\textsuperscript{215}

Speaking for a slim four to three majority in Colon-Cruz, Justice Liacos acknowledged that the amendment "now prevents this court from construing any provision of the Massachusetts Constitution, including art. 26 itself, as forbidding the imposition of the punishment of death."\textsuperscript{216} But Justice Liacos quickly added: "We do not, however, see anything in the new language of art. 26 which prevents us from invalidating a particular death penalty statute under the Massachusetts Constitution on a ground other than that the imposition of the punishment of death is forbidden."\textsuperscript{217} In fact, the SJC found the 1982 death penalty statute violated Article 12 of the Declaration of Rights, because it provided that only those defendants who pleaded not guilty and demanded a jury trial were at risk of being put to death. Those who pleaded guilty could avoid the death penalty. "The inevitable consequence," wrote Justice Liacos, "is that defendants are discour-

\textsuperscript{213}Id. at 1289, 1289–90, 1294 (Liacos, J., concurring); BOSTON GLOBE, May 8, 1999.
\textsuperscript{214}MASS. CONST. Part I, art. 26; Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 118 (Mass. 1984).
\textsuperscript{215}Colon-Cruz, 470 N.E.2d at 118.
\textsuperscript{216}Id. at 121.
\textsuperscript{217}Id.
aged from asserting their right not to plead guilty and their right to demand a trial by jury." The SJC's opinion ended legal controversy over the death penalty in Massachusetts.²¹⁸

CONCLUSION

The executions of Sacco and Vanzetti spurred a young Jewish woman to work to reverse a centuries-old tradition of state-sanctioned vengeance. For the next forty years, in the face of repeated disappointments, Ehrmann reasoned with the proponents of capital punishment. With carefully collected and analyzed data buttressing her belief that Massachusetts gained nothing and lost a great deal by putting convicted murderers to death, she fought for abolition of the death penalty. When she and the MCADP achieved partial success in 1951, others with less dedication counseled a respite, even retirement. However, Ehrmann was no fonder of inactivity than she was of injustice; she kept the faith. At the same time, a unique succession of governors—some with noble motives, others driven by political opportunism—refused to execute condemned men waiting on death row. When the law took center stage in the latter part of the struggle, three remarkable justices led the SJC to assert a commitment to the protections of life rooted in the Massachusetts Constitution.

The perseverance, commitment, and courage of a dozen women and men ended the use of capital punishment in Massachusetts. More than a half-century has passed since that spring day in 1947 when Massachusetts quietly executed Bellino and Gertson, and nearly two decades have passed since the SJC last deliberated the constitutionality of the death penalty. Spurred by a brutal murder, the public's fear of violence, or a politician's opportunism, the debate has raged anew nearly every year since 1984.²¹⁹ For the moment, Massachusetts holds true to the belief that a civilized people will not tolerate the state putting a human being to death. The issue, however, remains volatile, and the struggle is not over.

²¹⁸ Id. at 121, 124, 128. Chief Justice Hennessey cited United States v. Jackson, 390 U.S. 570, 581 (1968), in which the Court found a similar statute unconstitutional. Id. at 130 (Hennessey, C.J., concurring).

²¹⁹ Following the murder of ten-year-old Jeffrey Curley in October 1997, acting Governor Paul Cellucci sought to have the death penalty reinstated, but the bill was defeated in the House by a single vote. BOSTON GLOBE, Nov. 8, 1997; BOSTON GLOBE, Nov. 7, 1997.