SEVEN

Equal Rights and Unequal People

All Men are by Nature Equal
But differ greatly in the sequel.
—*Nathaniel Ames*, An Astronomical Diary: or,
Almanack for the Year of Our Lord Christ, 1762 . . . , *1761*

I am an aristocrat. I love liberty, I hate equality.
—*John Randolph of Roanoke, Virginia, to Nathan Loughborough, n.d.*

The picture that American society presents is . . .
covered with a democratic finish, beneath which . . .
one sees the old colors of aristocracy showing through.
—*Alexis de Tocqueville*, Democracy in America, *1835–40*

Americans have a long-standing romance with the myth that the American Revolution bequeathed the promise of a classless society; yet the facts, they know, are otherwise. Birth mattered then and for succeeding generations. Even though Karl Marx's economic determinism and analysis of social classes have lost favor, most recognize that where one begins life contributes significantly to where one arrives. We doubt that birth and family determine social rank entirely, but hereditary advantages, like wealth and family status, or natural physical attributes, belie the notion that we enter the world equal. Tradition tells us we are equal in the eyes of God, but from a contemporary American perspective—perhaps a second Gilded Age—our equality may exist only in God's eyes.

Yet because social stratification in the United States has been dynamic, the power of the myth and the idea of equal rights have played major roles

in shaping American society. Arguably, equal rights doctrine has tilted the United States toward social equality. By rejecting hereditary titles and some statutory privileges, all thirteen states and the U.S. Constitution created a more competitive stratification than Europeans knew. Nevertheless, from the beginning Americans enshrined one profoundly important hereditary privilege in constitutions and laws: private property. They called it a right, not a privilege; but however labeled, the heritability of property ensured a class structure resembling Britain. Except for master and slave—a momentous exception—Americans dispensed with hereditary titles, yet they maintained the structure of hereditary advantages exemplified by slavery and routinely practiced whenever property passed to heirs. As in Britain and Continental Europe, American society was divided between those with property and those without. Just as coverture survived the Revolution to shape gender rights, so did a property relations system that would shape social classes. But in contrast to coverture's erasure of married women's rights, American codes protected legal personhood and civic responsibility for free men. Moreover being propertyless was not a fixed condition; free men could acquire land and chattels. Consequently domestic and foreign observers were struck by American differences from the Old World class system. The vocabulary of republicanism combined with the language and practice of democracy to promote the mythology of a single class of free American people.

Given the realities of 1776 and 1787 this mythology was misleading. First, American law and custom severely curtailed the rights of people of color and women. In addition men had to own property to qualify as voters. Yet because reformers ended this class privilege by 1830, the mythology of classless America gained acceptance. Poor, uneducated, recently arrived immigrants could vote, so the United States was seen as the most democratic of nations. Yet scholars have seldom questioned an aspect of class privilege in American penal codes that challenged the mythology. Class ruled the dual system of punishment for convicts who could and could not discharge debts and pay fines. As with property-based suffrage, reformers abolished imprisonment for debt in the early decades of the nineteenth century. They also ended corporal punishments that had often been based on class: pain-

ful humiliation—often whipping—for the poor who could not pay fines or restitution. As with suffrage, post-Revolutionary reforms reinforced the classless idea. The Revolution and its "contagion of liberty" apparently propelled American society toward its democratic ideal.

Alexis de Tocqueville recognized a different reality in 1830, soon after Presidents Adams and Jefferson went to their graves. Tocqueville pointed to the Anglo-American practice of imprisonment or bail payment. "Such legislation," he recognized, "is directed against the poor and favors only the rich." Though ostensibly even-handed, Tocqueville objected that "the poor man does not always find bail, even in civil matters, and if he is constrained to go await justice in prison, his forced inaction soon reduces him to misery." The French aristocrat criticized this system because "the rich man . . . always succeeds in escaping imprisonment in civil matters," while in criminal cases he "easily escapes punishment," since "having furnished bail, he disappears." Tocqueville concluded: "All penalties that the law inflicts on him are reduced to fines." "What," he asked, "is more aristocratic than this?"[1] Because punishments differed based on money, American practice was plutocratic, not aristocratic, but certainly not egalitarian. Tocqueville, keenly aware of class distinctions in post-Revolutionary France, was quick to recognize ancien régime survivals in Jacksonian America.

To Americans, however, abolishing class privilege in voting rights overshadowed persistent class advantages in the justice system. The franchise made common men players in public affairs, courted by political parties. Voting also qualified men as jurors, so continuing class advantages in criminal justice and the bail system could be overlooked. Political parties courted voters, not poverty-stricken convicts, so public rhetoric neglected this disparity.

I

Egalitarian democracy was not the Revolution's legacy. Although American colonists possessed wider access to voting than Britons, every colony required land ownership. This requirement was deeply embedded in Revolutionaries' Whig ideology, a theory constructed around the inseparable

bond between individual security and private property.[2] Colonists mobilized to resist Parliament and king because they believed that parliamentary taxation threatened private property, bulwark of their liberty. In theory, only men possessing independent means to provide for their households possessed liberty. If one's bread depended on the will of others, then subjects became dependents or "slaves." Only the procedure of consent could authorize government to take property, to tax. This reasoning sustained colonial voting requirements, usually the English standard: owning real estate earning at least forty shillings annually.

After 1776 the new state constitutions generally retained property requirements. John Adams explained the Revolutionary leadership's view on suffrage when he warned, "It is dangerous to open So fruitfull a Source of Controversy and Altercation, as would be opened by attempting to alter the Qualification of Voters." If voting rights became a matter of public debate, Adams feared, "every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State." This, Adams and others schooled in Lockean principles believed would doom the United States to the vices of democracy—demagogy and disorder. Most delegates to the Massachusetts Constitutional Convention in 1779–80 shared this opinion, and when they addressed their "Friends and Countrymen" in the summer of 1780 they gave the reasons for restricting voting rights: "Persons who are Twenty one Years of age, and have no Property are either those who live upon a part of a Paternal estate, expecting the Fee [inheritance] thereof, who are but just entering into business, or *Those whose Idleness of Life and profligacy of manners will forever bar them from acquiring and possessing Property.*" The first group, they argued, would "think it safer for them to have their right of Voting . . . suspended for [a] small space of Time, than forever hereafter to have their Priviledges liable to the *control of Men, who will pay less regard to the Rights of Property because they have nothing to lose.*"[3] Men without property, the Massachusetts delegates explained, could not be trusted.

But not everyone hewed so closely to Whig theory, and some Massachusetts inhabitants complained bitterly. Reacting against the proposed Constitution, one town complained that young men, "neither profligate nor idle," would for years be barred from voting and that other "sensible, honest, and maturely industrious men" who "by numberless misfortunes never acquire

and possess [sufficient] property" would also be kept "in some degree [of] slavery."[4] Another town, in a response drafted by the Revolutionary lawyer Joseph Hawley, one-time ally of Samuel and John Adams, argued that the suffrage restrictions were "absolutely repugnant to the genuine sense of the first article of the [Massachusetts] Declaration of Rights [where] . . . all men are declared 'to be born free and equal.'" The restriction meant that although adult men were counted for apportionment, "like brute beasts" they would be denied actual representation. Hawley, writing for Northampton, went further: "Shall these poor adult persons who are always to be taxed as high as our men of property . . . who have gone for us into the greatest perils and undergone infinite fatigues in the present war to preserve us from slavery, . . . some of them leaving at home their poor families, to endure the sufferings of hunger and nakedness, shall they now be treated like villains or African slaves? God forbid!"[5] The fact that Massachusetts's new constitution privileged propertied men for voting and officeholding was misguided according to citizens of Petersham, a later stronghold of Shays' Rebellion: "Riches and Dignity neither make the head wiser nor the heart better." The idle and profligate did not pose the gravest threat facing the new Republic; it was "the overgrown Rich we consider the most dangerous to the Liberties of a free State."[6] Such beliefs led some towns to reject the Massachusetts Constitution of 1780, but these towns were in a minority. As in almost every state, the constitution joined power and property.

The exception was Pennsylvania where, when the Revolutionary government tried to recruit soldiers, "every Man who has not a Farthing" demanded an equal voice in government. Later in many new states militiamen reasoned that if they were citizens to fight, they were citizens to vote. When it came to voting rights, representation, taxation and credit policies, and also public land policies, Americans divided according to interests. As James Madison explained in the *Federalist Papers*, "The most common and durable source of factions has been the various and unequal distribution of property."[7] And representation was the most fundamental right because it would determine who decided policy on every subject.

The role of common householders, "the people," was central. Nearly all leaders before 1820—men who favored the Constitution and those who opposed it, and later Federalists and Jeffersonian Republicans—believed

"the people" ought to have the good sense to elect men as guides whose station provided the learning and knowledge of the world, as well as leisure, to conduct public business wisely. But other voices rejected prescribing deference for common men. In the year of independence a New Hampshire pamphlet, *The People the Best Governors; or, A Plan of Government Founded on the Just Principles of Natural Freedom*, laid out a more egalitarian view.

The premise was simple: "*God gave mankind freedom by nature, [and] made every man equal to his neighbor.*" Athenian democracy, not republican Rome, was the proper model: "*Tent makers, cobblers and common tradesmen composed the legislature at Athens,*" and so should "the *honest farmer and citizen*" govern the United States. It was "*the people,*" after all, who "*best know their own wants and necessities*" and so "*are best able to rule themselves.*" Admittedly, "the common people, and consequently their representatives, may not happen to be so learned and knowing as some others," but that did not disqualify from rule. Common men and their representatives might "chuse a council" of more learned men, but only to "advise, and prepare matters for the consideration of the people," not to exercise a veto. Even this learned council would be broadly representative because it would consist of "400 persons."[8]

According to *The People the Best Governors*, the franchise would be almost egalitarian according to 1776 standards. "The freemen of each incorporated town" would vote without regard to the property they owned or taxes they paid. Any requirement above freeman status would "make an inequality among the people, and set up a number of lords over the rest." The same principles applied to representatives. "Social virtue and knowledge," not wealth or lineage, were "the best, and only necessary qualifications." A property requirement for representatives would "root out virtue."[9] *The People the Best Governors* envisioned a yeoman republic according to democratic principles.

Americans understood social class as the division between the few, whose wealth or professions supported them, and the many, whose physical labor supplied their needs. Though this class division sometimes chafed, Americans accepted inequalities of wealth because they were committed to the pursuit of opportunity and the accumulation of property. Few questioned

the heritability of wealth or sought its redistribution. Instead they pursued equal opportunity to prosper; they pursued social *in*equality, not leveling.[10] Sometimes there were calls to limit disparities between the few and the many, as when an early version of the Pennsylvania Declaration of Rights warned in 1776 "that an enormous Proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness, of Mankind." But Pennsylvania's legislature dropped this language and did nothing to equalize property.[11] Later, in the 1780s, when conflicts between debtors and creditors erupted, friction between the few and the many flared from North Carolina to Maine, resulting in Shays' Rebellion in Massachusetts. Farmers and tradesmen complained when states raised taxes from the many to enrich the few who invested—or speculated—in public debt. Even after the ratification of the U.S. Constitution in 1788 extreme disparities of wealth could be seen as challenging the Republic's health.

Nor was this concern limited to radicals like Thomas Paine. Congressman James Madison, the Virginia planter who shaped the Constitution and steered the Bill of Rights through Congress in 1789, believed that great concentrations of wealth endangered the United States. Madison ranked high among the learned few, but he argued that "a political equality" must be established among all "interests" in "political society." The nation must have no privileged classes. Practically speaking, this meant that government must never award "*unnecessary* opportunities . . . to increase the inequality of property" or support "an immoderate, and especially an unmerited, accumulation of riches." Instead laws should "reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort." Madison was no leveler: this aim must be pursued "without violating the rights of property." But Madison, like Jefferson and others, believed that Treasury secretary Alexander Hamilton's proposal to consolidate state and Continental Revolutionary War debts in a national debt would "favor one interest"—debt speculators—"at the expense of another"—every taxpaying landowner.[12]

In the states conflicts pitting the few against the many could be sharp. In Connecticut, where a majority were farmers, mechanics complained that the "faculty tax," a head tax laid on them for their skills because they seldom paid taxes on land, violated "the natural and equal rights of man."

Walter Brewster, a shoemaker in Canterbury, tried to rally "Brother Mechanics" in 1791 by denouncing the privileges of men of learning, attorneys especially, written into law. These men, the shoemaker argued, "should be assessed for their faculty to make money faster than mechanics; while they live like gentlemen of leisure." Brewster declared that such propertied men and their sons with "classic education" seldom became mechanics. He did not call learned men parasites, but he railed at their "redundancy." "Priests, Lawyers and Doctors," he complained, "are thick enough to ride two upon a horse." Because of the faculty tax, Brewster protested that men joined the "idle herd of speculating drones, who practice every art on the unsuspecting Peasant." Governor Samuel Huntington and Connecticut legislators deserved blame for taxing mechanics. They showed that "*Might* generally overcomes *Right*." Connecticut was following the "universal tendency of all laws, in all countries, to assist those who have property and power, against those who have none."[13]

Brewster's analysis of Connecticut politics reflected Madison's observation, "Knowledge will forever govern ignorance," leading to the shoemaker's discouraging conclusion:

> This law was made because . . . mechanics in general are poor and illiterate; therefore cannot get the suffrages of the people to sit in the general court [legislature], and this law is calculated forever to keep him out of that office which would enable him to represent himself, and his poor brother mechanics: but should he obtain a seat, it is ten to one if he dare speak, for he is illiterate. But the attorney has language to cloath his ideas in communicative terms, to prepossess the heart through the medium of the ear, and is sure to represent himself and get every thing done which may be to his advantage; and thus we see almost every post of honor and profit filled by attornies.[14]

Brewster called on his "Brother Mechanics" to serve as legislators. In every town they should elect "one mechanic . . . who is a man of reason, and durst advocate his right before the general court." He recognized this remedy was

impossible because although "you are all strong enough, and have property enough to bear assessing" for the faculty tax, you cannot vote because "you are not all freemen, you have not the requisite property"—the forty-shilling freehold. Brewster, the disillusioned shoemaker, signed his open letter to cooper-turned-lawyer Governor Huntington, "A Mechanic, not yet a Free-Man."[15]

Barred from voting by the property requirement, Walter Brewster and fellow mechanics could not repeal the poll tax, but they found allies who labored with their hands and shared their views. Soon after Brewster's complaint a farmer, "A Freeman of the State," made common cause with the 1,400 mechanics from twenty towns protesting a tax that did not give "equal justice to every Class of People." The legislators had "taken care to clear themselves from the poll-tax" and all state officials, clergymen, and Yale faculty and students—"so that this burthen falls principally on the farmer and the mechanic." According to the colonial era law, the man who sent his son to Yale paid no tax for that son since the boy was not earning, whereas artisans and farmers paid tax for sons sixteen years and older, as did laborers and apprentices.[16] These exemptions smacked of privilege. Nevertheless, despite the mechanics and farmers' challenge, the law stood. Aggrieved mechanics and other unfranchised white men won relief only when Connecticut adopted a new constitution in 1818. Now voters were required to be men and citizens of the United States eligible for militia service or taxpaying men of color.[17]

But even though the privileges of property survived, egalitarian ideas and mythology flourished. In 1793, before the Jacobin guillotine came to terrify elite Americans, the New Jersey lawyer and congressman Elias Boudinot extolled American equality with utopian enthusiasm. Celebrating American independence before his state's hereditary Society of the Cincinnati, he proclaimed, "The road to honors, riches, usefulness and fame, in this happy country, is open equally to all." Unlike monarchies with their privileged aristocrats, "the meanest citizen of America, educates his beloved child with a well founded hope, that . . . he may rationally aspire to the command of our armies, a place in the cabinet, or even to the filling of the presidential chair." According to the Philadelphia-born grandson of a

Huguenot immigrant, "he stands on equal ground . . . with the richest of his fellow citizens." In Boudinot's mythical United States "the child of the poorest laborer, by enjoying the means of education (afforded in almost every corner of this happy land) is trained up for, and is encouraged to look forward to a share in legislation." Ironically, in New Jersey the meanest white citizens and laborers could not vote until 1807, and in Connecticut and Massachusetts, the states where poor men could most often provide children with tax-supported education, such citizens would not vote for a generation. Boudinot, who also declared "the Rights of Women . . . are now heard as familiar terms in every part of the United States," pictured an egalitarian ideal, not reality.[18]

One wonders how widely that ideal was shared. That common men shared some egalitarian beliefs is suggested by the 1,400 Connecticut mechanics who petitioned against the poll tax in 1792. But nothing in their petitions suggests that they wanted to extend voting rights to the very poorest people, women, or men of color. Expressions of political ideas from the lower social tiers are rare, but the Shays and Pennsylvania Whiskey Rebellion insurgents, as well as the landlord-tenant battles of the Hudson Valley and Maine frontier, supply convincing evidence that some common men, often possessing little or no property, were convinced that government did not fairly represent them.

But critics' beliefs regarding equal rights were mixed. In the late 1790s William Manning, a middling farmer and owner of 137 Massachusetts acres, saw society as divided between "the few," championed by Federalists, who pursued "monarchy or aristocracy," and "the many," defended by Republicans. Manning shared the widespread hostility to lawyers as "most dangerous to liberty and the least to be trusted of any profession." But in spite of his strong identification with the "many" whose "bodily labors" produced "food, clothing, shelter," he acknowledged that even without physical labor "the merchant, the physician, lawyer and divine, the philosopher and schoolmaster, the judicial and executive officers, and many others" earned their livelihoods "honestly and for the benefit of the community." He was convinced that "one-third part of those [few] that live without labor are true republicans and friends to the rights and liberties of the Many."[19] Though

the United States was divided between the few and the many, the separation was far from complete.

Like the author of *The People the Best Rulers*, Manning complained that superior learning enabled the few to exploit "the ignorance and superstition of . . . the Many." They magnified their power by organizing themselves in "Chambers of Commerce," "medical societies," and ministerial and bar associations, while the "turbulent and changing" many were unorganized. Their ignorance made the many vulnerable to manipulation by the learned few. Yet Manning also boasted, "We are the most knowing and the best acquainted with the true principles of liberty and a free government of any people on earth." And although he railed against the disproportionate wealth and power of the few, he admitted that compared with Europe, "we are on an equality as to property."[20] Manning and critics like him did not share Boudinot's inflated mythology of American equal rights and opportunities, but their criticisms expressed their aspiration for its fulfillment.

In time, as states revised their constitutions, equal voting rights became widespread for white men. Although as of 1790 only Pennsylvania and the new state of Vermont (admitted in 1791) had no property requirements, thereafter every new state, from Kentucky (1792), Tennessee (1796), and Ohio (1803) onward did the same. But race restrictions multiplied as, from Ohio onward, every new state barred nonwhites from voting. Congress enacted this new consensus in 1808, ending its 1787 Northwest Territory voting requirement of fifty acres and instead enfranchising all taxpaying free white men—*citizens and aliens alike*. Among the original states, however, property requirements lasted to 1821 in New York and Massachusetts and until 1850 in Virginia. Meanwhile Connecticut (1818), New York (1821), North Carolina (1835), and Pennsylvania (1838) erected racial barriers. So far as white men were concerned, vestiges of privilege touching residency and citizenship remained in few jurisdictions. By the 1840s and 1850s midwestern states, following the territories, enfranchised white aliens even if they were resident for just a single year. Among white men, only "paupers" and felons were widely excluded.[21] By this time, because exclusion of women and people of color now needed defense, voting was often defined as a "social" rather than a "natural" right and sometimes connected to bearing arms

to defend the state. By enfranchising white men, slave states reinforced race solidarity in the event of slave uprisings like those of South Carolina's Denmark Vesey in 1822 and Virginia's Nat Turner in 1831. Westerners believed that a generous franchise attracted settlers and raised land values. Democrats saw these opportunities first, but Whigs followed.[22]

Since the 1770s voting rights had been controversial; but for white men movement had been in the direction of equal rights for three generations. But by the middle of the nineteenth century advocacy for blacks, women, immigrants, laborers, and factory workers was generating a backlash. In the Northeast voting "expansionists" faced opposition from "restrictionists who claimed that black, poor, urban, and immigrant voters corrupted democracy. In 1855 and 1857 Connecticut and Massachusetts introduced new requirements aimed at recent, chiefly Irish Catholic, immigrants. Now voters had to be able to read the Constitution and sign their names, though men who had previously voted or were over age 60 were exempted. In addition, though nativists failed to add a fourteen-year waiting period before naturalized citizens could vote, these states introduced a two-year delay following the five-year naturalization process. This new waiting period, fueled by the anti-Catholic nativism of the 1850s, was rescinded in the 1860s as both Republicans and Democrats appealed to new citizens, but the literacy test remained—a device many states would later use to exclude black voters.[23]

The most significant moments in the movement toward equal rights came when the great post–Civil War amendments—the Thirteenth, abolishing slavery; the Fourteenth, requiring equal protection of the laws; and the Fifteenth, stating that "the right of citizens . . . to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude"—won approval in 1865, 1868, and 1870. It is hard to exaggerate their importance. By abolishing slavery without compensation the Thirteenth Amendment terminated a two-centuries-old hereditary class system and erased property rights defended by the Constitution for three generations. And the Fourteenth Amendment, by recognizing the citizenship, national *and* state, of everyone born or naturalized in the United States, explicitly reversed the Dred Scott decision denying negro citizenship. Even more remarkable, and unexpected because black enfran-

chisement in states had so generally failed, the Fifteenth Amendment prohibited race-based suffrage. The historian Alexander Keyssar reported that a majority of Democrats joined with a minority of Republicans between 1863 and 1870 to defeat black suffrage "in more than fifteen northern states and territories," and during this decade just one state reversed its old policy by enfranchising black men. That was Iowa, which acted by referendum in 1868.[24]

Two years later the Republicans, seeking to assure victories in the South, adopted Iowa's barrier to racial voting tests. By enacting the Fifteenth Amendment the Republican Congress and president created a new Constitutional standard. In exchange for controlling Congress, Republicans accepted white backlash. In 1872 their military hero Ulysses Grant won reelection and Congress remained Republican, but in 1874 Democrats—friendly to immigrants and hostile to people of color—gained control of the House of Representatives, winning majorities of both houses in 1878. Equal rights for *white* men commanded far more support than equal rights for *all* men—or for women. Yet considering the inequalities prevailing in 1776, this movement toward equal voting rights was momentous and provided a foundation for future equal rights measures.

II

The significance of equalization of men's voting rights is striking compared to the uneven history of debtor-creditor relations and, as Tocqueville noted, policies concerning imprisonment for debt. Historically, English and colonial law placed the onus of debt squarely on the debtor. Because debt payment was understood to be a matter of personal honor, the law presumed that delinquent debtors were vicious or fraudulent. By the mid-eighteenth century, however, in Britain and its colonies merchants and lawyers recognized that commercial culture was supplanting honor culture in the marketplace. Investments and trade operated according to calculations of profit and loss more than personal honor. The Milanese reformer Beccaria, whose treatise *On Crimes and Punishments* swept the Atlantic world in the 1760s and 1770s, called imprisonment of honest debtors "barbarous," and

some argued that withholding forgiveness from debtors was "unchristian." But the law, sustained by creditor support, possessed a powerful inertia. In England and in several colonies judicial rulings and reformist legislation produced only fleeting alterations of policies that presumed debtor guilt.[25]

Revolutionary economic and political upheavals generated substantial attempts to enable creditors to coerce debtors by threatening imprisonment. At the national level the Treaty of 1783 enabled American debtors to escape paying debts to British merchants because, though the treaty stipulated that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts," British creditors could pursue claims against American debtors only in state courts where debtors held sway. In effect, the treaty erased prewar debts, especially for Chesapeake planters.[26]

In states where merchants were influential, New York and Pennsylvania, reformers actively sought to relieve debtors. A 1784 New York law briefly offered full bankruptcy relief for currently imprisoned debtors, regardless of occupation or size of debt. This law was replaced in 1786 by an act favoring small debtors (those who owed less than £15). They were released from jail, whereas those owing greater sums remained incarcerated. Three years later this prodebtor law was partially reversed: debtors under £10 could be freed only after thirty days in jail, and anyone owing £10 to £200 could not be released unless they assigned their property to creditors, who had to agree to their release. Wealthy debtors disliked assigning their property, because then it could no longer earn needed cash. If the debt was more than £200, the debtor remained in jail. After the number of imprisoned debtors grew, in 1791 the legislature tightened its release policy, raising the barrier to release from £200 to £1,000. By this time, as speculations multiplied the numbers of honest debtor inmates, debtors' benevolent societies formed in New York and Philadelphia to donate food, clothing, and fuel to relieve jailhouse suffering.[27] Reformers also worked to create debtor jails, separate from those for common criminals. Friends of debtors tried to soften the law's impact.

By the time Shays' Rebellion erupted in Massachusetts in 1786 there was no escaping the debtor-creditor conflict. The Massachusetts struggle was in some ways the same clash between the few and the many that played out

more peacefully elsewhere; yet Massachusetts insurgents did not repudiate their debts or challenge unequal distribution of property by leveling. Instead they aimed to delay legal proceedings to gain time to pay creditors. The many accepted the legitimacy of debts they owed. Common farmers and artisans were used to living in a web of credit and debt where they were simultaneously lenders and borrowers with neighbors, relying on book credit from merchants. To deny their debts was as alien to their moral economy as being thrown off their land because they could not make timely payment. What was new and disturbing was the extent to which commercial and real estate speculations now put long chains of borrowers and creditors at risk. When someone at the top could not pay his debts, a cascade of defaults spread among merchants and speculators who then wreaked havoc involuntarily by calling in the debts of farmers and tradesmen.

In this marketplace economy unfamiliar principles and priorities ruled. And the contest between debtor and creditor was as likely to be among the wealthy few as between those few and the many. The great speculations of the 1790s, which landed a score of prominent leaders in debtor's prison, led to fresh efforts to change American policy on debt. Recognizing the importance of credit relations for the national economy, the drafters of the Constitution had empowered Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[28] So when, as historian Bruce Mann explains, an "epidemic" of business failures overtook speculators in commercial paper and land, with Philadelphia, the nation's capital, seeing "150 failures in six weeks," and sixty-seven new debtors imprisoned in a two-week period, action seemed imperative.[29] Once the speculative bubble burst, virtually every major speculator went to jail. As of January 1798, Thomas Jefferson, no friend to commercial adventurers but personally familiar with debt, remarked, "The prison is full of the most reputable merchants."[30] Speculation by gentlemen had become so legitimate that insolvency was seen as a business miscalculation, not a moral failure akin to criminal fraud.

As real as the crisis was for some gentlemen, it was less urgent for wealthy debtors because, unlike poor debtors, they were rarely crowded in dirty prisons with criminals. They had alternatives. One was to "keep close" at home

where they could not be served with a "bill of attachment" for property. Because writs could not be served on the Sabbath, this mild house arrest allowed debtors to go for religious services or recreation on Sundays. If the debtor was not fearful that his creditors would seize and hold him overnight to serve papers on Monday, he might visit and exercise outdoors. This was the experience of the nation's most prominent debtor, Robert Morris—signer of the Declaration of Independence, Articles of Confederation, and Constitution—who had been superintendent of finance for the Continental Congress and U.S. senator from Pennsylvania. But after avoiding arrest for months on his suburban estate, Morris was finally seized and locked up in Philadelphia's Prune Street jail.

Initially Morris suffered: "I sleep in another persons bed. I occupy other peoples rooms." Having no space assigned to him, he complained that he could not think or write without interruption. But after a week's discomfort he rented the jail's best room and furnished it with a bed, a trunk of clothes, mirrors, writing desks, eight chairs, a settee, and a mahogany table, as well as office equipment, account books, and correspondence, including twenty years' accumulation of papers. In jail Morris could work to straighten out his affairs, and to ease his suffering, his friends sent cases of wine. George Washington visited, and Morris even entertained the former president at dinner in the Prune Street jail room where he dwelled for over two years.[31]

Privileges purchased by wealthy debtors generated resentment visible in newspaper stories about how gentlemen lived in jail. A Philadelphia paper claimed that "a few capital bankrupts" in New York dwelled in apartments "furnished and decorated in a manner that vies with any drawing room." An astonished European discovered that men who "speculated wildly," losing not only their own money but "that of others," now lived "sumptuously" in jail, diverted by visitors and such "pleasures" as music and gaming. "Their whole punishment," he groaned, "consists in not being able to leave the prison."[32]

Conditions were ripe for reform, but divisions among the few and between the few and the many persisted. In Pennsylvania—where much distress centered—legislators allowed their state's bankruptcy law to lapse in 1793, anticipating passage of a uniform national law. But although congress-

men drafted bills, they were repeatedly tabled. Predictably the radical Democratic-Republican journalist Benjamin Bache denounced speculators, taking pleasure in their troubles, and many who rejected Bache's politics also believed that speculators should suffer pain. The Massachusetts high Federalist and Speaker of the House Theodore Sedgwick, a friend of Washington and some jailed investors, declared that "he was not sorry that the bubble of speculation has burst." People like Sedgwick opposed legislative relief for all debtors, rich or poor. And those who, like Bache, wanted to relieve poor debtors, "men who produce by their industry," were unwilling to give a free pass to the few who got rich "by their *art* and *cunning*."[33]

The jailing of Morris and such notables as Supreme Court Justice James Wilson concentrated Federalist minds wonderfully, enabling them to stumble, haltingly, toward a law. During 1798 Congress debated a bankruptcy bill to relieve large commercial debtors. But though most Federalists supported it, the bill lost narrowly in the House because some southerners opposed. Consequently Federalists introduced a new bill at the beginning of 1800.[34]

The partisan and sectional cauldron in which Congress created the Bankruptcy Act of 1800 ignored poor debtors. Instead debates revolved around expansion of national power and the conflicting interests of southern landed gentlemen and northern businessmen. Federalists wanted the bankruptcy law to enhance the national government and judiciary, but they needed to accommodate landed southern Federalists, who defended state barriers to the seizure of debtors' land, as well as New Englanders who feared the act would weaken state laws for attaching debtors' property. No one represented poor debtors when Sedgwick worked out a compromise. Landed property would lose protection by closing a loophole that allowed debtors to protect assets by shifting them into land; however, bankruptcy judgments could be made by local juries, instead of a federal judge. Moreover the law would be temporary, expiring after five years.

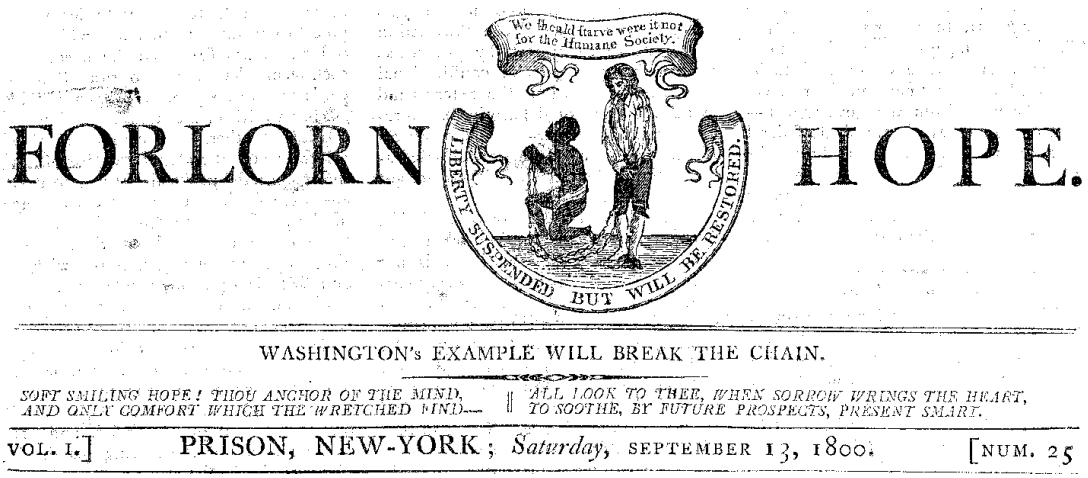
Even after these accommodations, opponents who defeated the previous bankruptcy bill almost won. Speaker Sedgwick brought the Bankruptcy Act to vote when several opponents were absent but still lost his majority when eleven Federalists voted with the Republicans. Acting to break a tie, Sedgwick's vote carried the bill in the House. In the Senate, with difficulty,

it also passed. Consequently traders, merchants, and brokers and who owed at least a thousand dollars could be forced into bankruptcy proceedings. Practically speaking, bankers and businessmen in Boston, New York, and Philadelphia could now collect from their counterparts in states like Kentucky and Tennessee.[35] The few enacted a bankruptcy bill for the few. The many would have to wait.

Indeed a durable national policy on bankruptcy would wait a full century. For even the temporary act of 1800 proved so unpopular that the Republican majority promptly repealed it. No bankruptcy law would again pass Congress until 1841, when Whigs controlled government.[36] That legislation proved even more ephemeral, being repealed in a year. In the states debtor-creditor politics were so interwoven with other issues that no national policy could succeed.

The plight of poor debtors remained bleak; improvement came slowly. Imprisoned New York City debtors celebrated the bankruptcy law of 1800, but it did nothing for them. Within the prison William Keteltas, a lawyer jailed for debt, briefly published a newspaper, the *Forlorn Hope*, giving voice to poor debtors. Keteltas argued that debtors were treated more harshly than criminals, who were fed and clothed, sometimes taught trades, and served fixed sentences; debtors, by contrast, were held for uncertain periods and required to pay for food and clothing. "Misfortune," it was said, "was no crime," yet a March 1800 jailhouse visitor found "eleven persons, confined in one room . . . who declared they had been four days without a morsel to eat." Lacking money for food, "nor friends to procure, even the means of food," they might have starved but for the intervention of the prison keeper and the Humane Society. For in New York, unlike some states, a creditor who jailed his debtor was not required "to pay a small pittance for his [the debtor's] support." Yet according to the *Forlorn Hope*, in New York "the unfeeling creditor may famish him [the debtor] to death."[37]

The New York prisoners had offered a July 4, 1799, toast wishing that "imprisonment for debt and personal slavery, solecisms [errors] in the chapter of American rights and privileges," would be no more. But no single law or court decision ended imprisonment for debt in the United States. Amelioration was a gradual process, propelled in part by creditors' and courts'



Forlorn Hope, a newspaper briefly published out of the New York City debtors' prison, sought reforms by appealing to the humane feelings of prosperous New Yorkers. Courtesy, American Antiquarian Society.

recognition that imprisonment for debt was expensive and ineffective. Nevertheless as Tocqueville observed, the system persisted. By the twentieth century American courts no longer imprisoned private debtors to satisfy private creditors, but they continued to imprison people who could not pay public fines or penalties—a practice that continues in spite of Supreme Court rulings in 1970, 1971, and 1983 declaring that imprisonment in lieu of paying a fine or court costs when a person cannot pay violates the equal protection clause of the Fourteenth Amendment.[38]

III

Given the British legal heritage and the primacy of property rights for Americans, one might expect wealth and social status to shape criminal law as well as debtor-creditor policies in the early Republic. Paradoxically, however, monarchy's defenders had long boasted that regardless of social rank every British subject was equal before the law, especially in criminal matters. The hanging of Lord Ferrers in 1760 for murdering his steward reinforced this mythology, as did the 1777 execution for forgery of William

Dodd, chaplain to King George III and tutor to the Earl of Chesterfield. In spite of Dodd's high clerical rank and aristocratic connections, and notwithstanding an unprecedented petitioning campaign in which twenty-three thousand Englishmen petitioned to save the fashionable clergyman, a crowd of thousands watched Dodd's ignominious hanging at Tyburn. Just as the occasional execution of an aristocrat in the seventeenth century fed the notion that no man was above the law in English justice, Dodd's punishment propelled the myth for later generations.[39] Ironically, forty years before Dodd's hanging, his friend Samuel Johnson penned ironic lines on the courtroom disparity between rich and poor: "All crimes are safe, but hated Poverty. This, only this, the rigid Law pursues."[40] Less genteel folk

David Claypool Johnston's sketch of a poor mother being turned away heartlessly suggests the boundary between the poor and the prosperous in Boston in the 1830s. Courtesy, American Antiquarian Society.

used ballads and newspaper satire to rail against the advantages wealth and rank enjoyed at the bar of justice.

In the United States poverty was more often understood as a temporary condition than in Britain, and the poor constituted a smaller proportion of free people. Moreover the distance between the wealthy and middle-class farmers and artisans was narrower. The boundary between the few and the many was substantial in the new Republic, but it was blurred and porous. Consequently Americans widely accepted the myth that theirs was a land of equal justice. American courts regularly supplied poor defendants with prominent attorneys in capital cases, and occasionally governors and legislatures reversed convictions of the poor or pardoned them. Yet no one claimed that American criminal courts *always* meted out equal justice, so the question of impartial justice was always present.

One cannot determine how often American criminal courts dispensed justice fairly, providing equal rights to defendants. Comparisons among criminal cases cannot be exact because circumstances were too various—the facts and their contexts, the defendant(s), the witnesses, evidence, the law, and court officials, including judges, prosecutors, defense attorneys, and jurors. Nevertheless criminal trials are instructive for assessing whether different classes of people possessed equal rights. Capital cases can be especially revealing because their gravity demanded the most from court officials and commanded public scrutiny. Though precise assessments are beyond reach, considering when courts operated impartially and when they did not is instructive.

When respectable white men faced accusations of murdering members of their own class they could not expect preferred treatment. Public opinion no less than duty demanded rigorous prosecutions. Like poor men, respectable defendants could expect prominent attorneys to defend them. Consequently, just as the prosecutor tried the defendant's character, defense attorneys challenged the victim's character. In the 1801 case of twenty-one-year-old Jason Fairbanks, convicted for murdering his eighteen-year-old girlfriend, Elizabeth Fales, both belonged to respected families. The prosecutor, Massachusetts attorney general James Sullivan, could not disparage Fairbanks's social rank because he came from the property-owning class of the jurors—but he could assign to Fairbanks the stereotypical faults of

privileged youth, idleness and dissipation. Fairbanks's chief defender, the prominent Boston attorney Harrison Gray Otis, had just returned from Congress. Like Sullivan, he could not criticize the victim's origins because she enjoyed a reputation for virtue in the same social class. So Otis used romantic novels to diminish her character. Elizabeth was, he claimed, so disappointed by her romance with Fairbanks that she took her own life. Casting doubt on this suicide narrative were the nine or more fatal wounds to her chest, arms, back, throat, and thumb—all inflicted with the dull two-and-a-half-inch blade of Fairbanks's penknife. Fairbanks himself suffered multiple wounds from that knife due to what he said was his own suicide attempt.[41]

The jury spent all night weighing the attorneys' eloquence and the evidence. Fairbanks's defender, Otis, constructed his defense based on class, portraying the young man as a tragic victim. "The piety and exemplary virtues of his parents . . . his early education under virtuous preceptors—the habits and character of the village—his own character without a stain—even the character of *the nation*" argued against the guilt of "this stripling." Convicting Jason would condemn not only the "*unhappy* youth" but his family and community. Responding, prosecutor Sullivan stripped away class and community, describing Jason as "a person of great depravity of morals. . . . He had a heart void of social duty, and [he was] fatally bent on mischief." The justices were silent regarding the defendant's class and character when they charged the jury, but they declared it impossible for the victim to wound herself in the back "in place and form as described by the witnesses." Perhaps this last fact—not class or character—was decisive. After nightlong deliberations, the jury delivered a unanimous guilty verdict.[42] Though the prisoner's defenders invoked class solidarity for their client, they failed. The victim was equally respectable and truly virtuous. Thirty years later in a similar New Jersey case, a master stonemason, twenty-nine-year-old Joel Clough, was convicted for the fatal stabbing of a virtuous twenty-eight-year-old widow, Mary Hamilton, after she spurned his marriage proposal. Like Fairbanks and Fales, Clough and Hamilton were both respectable, so the fact that Clough possessed genteel manners did not make his insanity defense persuasive, though after the verdict the judge told Clough that

jurors, his social equals, "most ardently and fervently desired to find you innocent."[43]

Even-handed justice seemed especially prized when perpetrator and victim shared elevated status. Such cases commanded the closest public scrutiny, putting the criminal justice system itself on trial. One notorious example was the 1830 murder trial of men from leading families in Salem, Massachusetts, a seaport of fourteen thousand residents. Two defendants were twenty-six-year-old Richard Jr. ("Dick") and twenty-four-year-old George, sons of Richard Crowninshield and born at the apex of Salem's merchant aristocracy. As nephews of deceased Congressman Jacob Crowninshield and his brothers Benjamin and George, one a member of Congress and former secretary of the navy, the other a shipping magnate, Dick and George Crowninshield were Salem aristocrats. Their father, Richard, youngest of these Crowninshield brothers, was a woolen manufacturer who married an Irish hotel maid. According to his clergyman, William Bentley, who boarded in another Crowninshield household, Richard Crowninshield was a one-time bankrupt involved in a "fraudulent conveyance." When one of Richard's daughters eloped "with two Irishmen," the clergyman was appalled. The Crowninshields were distinguished and wealthy, but Bentley believed that "this family exhibit something yet unknown in this part of the country for want of domestic economy, education of children, management of affairs & conduct among their servants and neighbors."[44] Less than a dozen years after Bentley's observation the next generation was at the center of a shocking murder mystery.

The other two respectable gentlemen, twenty-seven-year-old Joseph Jenkins Knapp Jr. and his twenty-year-old brother John Francis ("Frank") Knapp, came from lower in the same social circle. Their father, a ship captain and merchant of modest pedigree, sent Joseph Jr. to sea as a teenager before making him, at age twenty, master of a ship. He became such an accomplished mariner that at age twenty-two Joseph Jr. was admitted into Salem's East-India Marine Society, which normally required mastering a ship from Salem to the Indies. Now he sailed for one of Salem's wealthiest merchants, old Captain Joseph White. White had employed his father, Joseph Sr., loaned him money, and sold the father his old house. But in 1827

when Joseph Knapp Jr. married White's grandniece, Mary Beckford, the old captain pronounced him a fortune hunter, vowing to cut the Beckfords out of his will.[45] It would be Captain White's fortune—made partly in the slave trade after Massachusetts outlawed slaving in 1788—that led to murder.[46]

Joseph's younger brother, Frank, was friendly with the Crowninshield brothers, Dick and George. In 1827 they encouraged Frank, then seventeen, to steal three hundred dollars from his father to finance a vacation to New York City. After spending that money, the three young gentlemen tried theft, but they were arrested and jailed.[47] Evidently their fathers, Crowninshield and Knapp, secured their release—demonstrating privilege at work. The three then separated, but by 1830 Frank, Dick, and George had returned to Salem and neighboring Danvers, and none had found a career. Now Captain Joseph Knapp's business was sliding into bankruptcy, and Captain White owned his mortgage.[48] So when Joseph Jr. learned that White's new will cut off his Beckford in-laws, he determined to steal and destroy that will. Captain White's death would then erase his father's debt and make his mother-in-law and wife rich. So after pilfering and destroying a copy of the will, Joseph Jr. enlisted Frank in a plot to murder the captain. But the Knapp brothers hesitated to do the killing; White was their neighbor and kinsman, and their family lived in his former house. Yet they felt no fondness for White—decades earlier the Reverend Bentley had called him a "horrid" man—and so they offered the Crowninshield brothers a thousand dollars to do the deed.[49] The Crowninshields had no association with Captain White and no motive to attack him. They would not be suspected.

On April 6, 1830, eighty-two-year-old Captain Joseph White was bludgeoned and stabbed to death in his bed. No arrests were made. But a week later a letter arrived accusing the Crowninshields, who were promptly jailed. Later still Joseph Knapp Sr. received a blackmail letter touching his sons, and because his son Joseph Jr. dismissed it, the trusting father handed it over to the authorities. When the blackmailer was later identified and questioned, he testified that he had overheard the Crowninshields discussing the Knapps' plan to murder White. Now the Knapp brothers joined the Crowninshields in the Salem jail.[50]

The trials that followed—two for Frank Knapp and one each for Joseph Knapp Jr. and George Crowninshield, represented the state's effort to con-

vict Captain White's murderers notwithstanding a variety of legal tangles created by the four-part conspiracy wherein one principal, Dick Crowninshield, committed suicide in jail, and another, Joseph Knapp Jr., confessed to a clergyman in exchange for a doubtful offer of immunity from prosecution—a confession he retracted. So eager was the seventy-nine-year-old Massachusetts attorney general Perez Morton to win convictions that he accepted the offer of Captain White's nephew and heir, Stephen White, to pay Senator Daniel Webster a thousand dollars to lead the prosecution. Earlier that year Webster had famously proclaimed in Congress: "Liberty and Union, now and forever, one and inseparable!" Webster was at the height of his oratorical powers, and his summary speech at the trial gained lasting fame among lawyers.[51]

The trials occupied summer and fall in 1830, commanding extensive newspaper coverage in New England and the nation. The Salem courtroom was packed, and crowds surrounded the courthouse. Reportedly, Webster "literally sent a thrill through the veins of those who heard him."[52] But as murder details emerged, the clamor for guilty verdicts clashed with legal procedures. So when Frank Knapp's trial ended in a hung jury on Friday, August 13, some demanded the names of jurors who voted to acquit. Lawyers, too, were targeted because they argued technicalities so "that a rogue should entirely escape." Consequently, when the defense asked to postpone the retrial, the judges denied the request, ordering Frank Knapp to stand trial again the next day.[53]

Few were surprised when Frank Knapp's weeklong second trial led to conviction and a death sentence. That his brother testified, "Frank told me two or three times that I had better let the business alone," counted for naught. Knapp's defense attorney argued that "the community was against" his client, and a Massachusetts newspaper reported that "judicious professional men, . . . witnesses of the state of feeling in Salem," believed that "*street discussion* of the evidence" shaped the verdict. So if strict legal standards were the measure of a fair trial, Knapp's rights were sacrificed. Public opinion decided that fastidious adherence to legal rules would allow a gentleman to get away with murder.[54]

After Frank Knapp's conviction, his older brother's condemnation was almost certain, since the evidence against him was even stronger. When

the judges ruled that Joseph Jr.'s jailhouse confessions could be entered as evidence, his defense collapsed. A Boston newspaper commented: "There is, of course, no chance for the prisoner—and there certainly appears to be no sympathy for him." As with Frank, the jury found him guilty, and the public was satisfied.[55] The state had now sent two sons of a ship master and merchant—brothers of a Harvard-educated lawyer—to the gallows. And one from the distinguished Crowninshield family had, as Daniel Webster put it, confessed his guilt by committing suicide.[56]

Immediately after Joseph Knapp Jr.'s conviction, the fourth member of the gentlemen's quartet, George Crowninshield, came to trial. Like Frank Knapp, George was tried twice, but he escaped death. He came to trial right after Joseph's sentencing, seven months after Captain White's murder, five months since Dick's suicide, and seven weeks after Frank Knapp's execution. Public excitement had moderated, and the case against George depended on a single disreputable witness, the Knapps' blackmailer, a convict who had served two years in Maine for breaking and entering. Since even he could not place the George near the murder scene and several witnesses swore that the prisoner had been elsewhere the night of the crime, the jury doubted that George Crowninshield was an accessory to murder. His acquittal was greeted "by the cheering of a portion of the spectators."[57]

Still Attorney General Morton pursued George, immediately charging the congressman's nephew with "misprision of Felony, or concealment of the knowledge, before and after the fact with a wicked and malicious purpose." At this point Crowninshield's elite status won the preferred treatment Tocqueville criticized: he was released on his own recognizance on a five-hundred-dollar bond his father guaranteed. George's bail "excited great astonishment among many people" because it was "too low, [and made] for the very purpose of enabling him to clear the coast."[58] And if the Crowninshields were not confident of a second acquittal, perhaps George would have fled rather than face prison. But George did not flee. Two weeks later he stood trial for the lesser offense of misprision, and the jury took just thirty minutes to find him "NOT GUILTY."[59] Passions had cooled, and George Crowninshield's class status arguably helped keep him out of prison.

But perhaps, as the jury determined, it was impossible to *prove* him guilty since his brother was dead. In his final jail-cell letter to George, the guilty

Richard not only asked forgiveness for "what I have caused you" but prayed that his younger brother's "innocence" would keep him "safe through this trial!" One observer remarked, "All knew he [George] had been led astray by Richard who had acquired absolute control over him from his youth." Some concluded that George was merely a follower and that since three perpetrators had already died he did not require further punishment. Less than a year later his neighbor Nathaniel Hawthorne reported, "George Crowninshield still lives at his father's and seems not at all cast down by what has taken place. I saw him walk by our house, arm-in-arm with a girl."[60]

Twenty years later an even more sensational elite murder fascinated a national audience. The jurisdiction was again Massachusetts, and the site was Boston, the nation's third largest city with 137,000 inhabitants. The victim was the hugely wealthy fifty-four-year-old bachelor Dr. George Parkman, an austere, thrifty workaholic. Parkman, a Harvard graduate, did medical training in Europe, where he studied mental illness. After serving as a surgeon during the War of 1812, Parkman persuaded Bostonians to create a mental hospital under his supervision. But when the Massachusetts General Hospital took over his asylum, it let Parkman go.[61] Then after his father died, making him executor of a vast estate, Parkman managed real estate investments and moneylending, chiefly mortgages. An active philanthropist, Parkman assisted the poor and the sick and donated land for Harvard's medical school. A fellow physician, Dr. Oliver Wendell Holmes, dean of Harvard Medical College, said of Parkman, "He abstained while others indulged, he walked while others rode, he worked while others slept." Master of a "princely fortune," Parkman lived modestly in his grand, four-story family mansion.[62]

One of Parkman's borrowers was his old friend fifty-nine-year-old Dr. John White Webster, like Parkman a physician and Harvard College graduate. In 1837 Parkman had recommended Webster's appointment as professor of chemistry and mineralogy at Harvard Medical College. Webster, too, came from a wealthy Boston family, although the fortune was more recent and smaller than Parkman's. And unlike Parkman, Webster lived extravagantly, building a Cambridge mansion after inheriting fifty thousand dollars in 1834. Although successfully employed as a professor and physician, Webster lost his mansion to creditors and by the 1840s was renting a house

and borrowing to pay the bills. With a wife who gave expensive parties and three unmarried daughters to present in Boston society, Webster lived way beyond his means.[63]

Webster might have continued on had Parkman not learned early in November 1849 that the mineral collection Webster pledged to him as collateral for a loan was already pledged to support another loan. This fraudulent double-pledging outraged Parkman, and, old friend or not, he demanded immediate payment of his overdue loan. So when Webster asked Parkman to meet him at his medical college laboratory on Friday, November 23, 1849, the professor faced a strong-willed, righteous benefactor and creditor. According to Webster, Parkman demanded full payment and promised that otherwise he would use his influence to sack the professor. Parkman threatened to ruin Webster professionally, crushing him and his family socially and financially.[64]

Webster answered Parkman's demands with a two-foot piece of wood, clubbing his head so hard that Parkman fell bleeding and lifeless. When Webster realized that he had killed Parkman, he locked his laboratory door and, cutting the corpse apart, disposed of the remains in his laboratory. Then he returned to Cambridge and a party at another professor's house.[65] The next day, Saturday, Parkman's family called for a search. That evening, Webster read of Parkman's disappearance, so, conscious that several people knew he had met with Parkman, he covered his tracks by telling police the next day that after their meeting Parkman had said he was going to Cambridge. The following day a Parkman kinsman offered a three-thousand-dollar reward for anyone who could find Parkman alive. Because he was last seen at the medical college, Boston police concentrated on the college building and its neighborhood, where the missing man had many poor Irish tenants who might have killed their rent-collecting landlord.[66]

That week police visited Webster's laboratory twice, coming away suspicious, though lacking evidence. But the janitor, Ephraim Littlefield, was even more suspicious. He had seen Parkman enter the building and had earlier heard the two men arguing. So when, five days after Parkman's disappearance, Littlefield saw one of the twenty-eight thousand reward notices promising a thousand dollars "for information that leads to the recovery of

his body," the janitor turned sleuth. Two days later, having chiseled through five layers of brick, he found major body parts in Webster's privy. Consequently the police arrested Webster who, after asking if they had found "the *whole* of the body," went on to exclaim, "I am a ruined man!" before swallowing a strychnine pill.[67] After collecting additional evidence, the attorney general brought a murder indictment to a grand jury that unanimously voted Webster must stand trial.

According to twenty-first-century standards Dr. Webster could not have received a fair trial anywhere near Boston. Parkman's murder, like Captain Joseph White's, demanded redress for an assault on respectable Massachusetts. And with extensive newspaper coverage and local gossip broadcasting grisly facts and rumors to eager audiences, the public rushed to judgment. As scraps of information accumulated, enterprising printers kept the public abreast of the case.

Early in 1850 one pamphleteer issued a pretrial verdict on Webster, *The Boston Tragedy! An Expose of the Evidence in the Case of the Parkman Murder!* Based chiefly on leaks from the coroner's and grand juries, it presented significant evidence against Webster and attacked his character. Webster failed to honor provisions in his father's will directing an annual payment of $50 to an orphaned "near relative" who was receiving public support in the almshouse—an $800 cumulative default—though Webster's $1,900 Harvard salary was supplemented by payments from his father's estate. Moreover his religious beliefs were offensive: "Webster is a professed materialist—believing only in human existence, and, at death, annihilation of the soul." The great lawyer Rufus Choate, it was said, refused the professor's defense because he "thought Webster's a desperate case." And Senator Daniel Webster had reportedly declined a $2,000 defense fee. Moreover, though the pamphleteer did not know it, Charles Francis Adams and Charles Sumner also refused to defend Webster, as did Congressman Benjamin Curtis, soon to be appointed to the U.S. Supreme Court where he would dissent from Taney in *Dred Scott*. According to the pamphlet, Massachusetts governor George Briggs, a lawyer and twelve-year congressman, had asserted that "he could come to no other conclusion than that Webster was a guilty man." Webster had friends, and the New York *Herald* called Massachusetts's proceedings

"star-chamber-like" and Boston's police "stupid, foolish and imbecile." But the *Expose* concluded that "the facts . . . will startle everybody, and the confessions of Mr. Webster at the time he was arrested, will convince the jury and the world that he is guilty."[68] Given this local judgment, convincing jurors of Webster's innocence would prove an enormous challenge.

To defend Webster the Massachusetts Supreme Judicial Court, which tried all capital cases, appointed Pliny Merrick, a fifty-five-year-old former judge who would soon join their bench, and Edward D. Sohier, like Merrick an experienced Harvard graduate. Given the assertions that their client was the last person to see Parkman alive and that body parts were discovered in Webster's laboratory, Merrick and Sohier did not deny all possibility that Webster killed Parkman; instead, they cast doubt on that conclusion. The human remains in the laboratory might not be Parkman's, and they brought witnesses who testified that they saw Parkman *after* he left Webster's laboratory. The prosecution's evidence, they argued, was merely circumstantial and inconclusive. Their blue-ribbon witnesses swore that Webster's character and temperament could not be murderous.[69]

But recognizing the facts that Attorney General John H. Clifford would present, including evidence emphasizing Webster's motives, and the implausible, inconsistent, and self-serving portions of the professor's account, Merrick and Sohier presented a "fallback" argument of possible manslaughter to save Webster's life. If the jury concluded that Webster killed Parkman in an angry outburst, without malicious intent, his crime was manslaughter, not murder, and jurors could imprison instead of hanging him. Webster seemed confident of acquittal; but his lawyers were duty-bound to present arguments enabling jurors, mostly tradesmen, to convict Webster merely of homicide, not murder. With anti-death-penalty sentiment powerful in Massachusetts, this was prudent. One prosecutor was ambivalent about executions, and one juror explicitly opposed capital punishment though, when questioned, "did not think his opinions would interfere with his doing his duty as a juror."[70]

The trial lasted eleven days, and so many people wanted to watch it that the sheriff issued tickets allowing tens of thousands of men and women a ten-minute glimpse of the proceedings.[71] Prosecution lasted seven days and

presented dozens of witnesses. Though the defense challenged some circumstantial evidence effectively—the body parts might not be Parkman's—the quantity and specificity of prosecution testimony put Webster's lawyers at a grave disadvantage. Their witness list was much shorter, and though they brought eminent men to testify for Webster's character and temperament, they depended more on rhetoric than on evidence during their two-day defense.

When the jury found Webster guilty after only a couple of hours, criticism of the trial came quickly—especially from New York and Philadelphia. A New York City lawyer argued that the defense attorneys tried to curry favor with the court and Boston's bar instead of freeing their client. They blundered by introducing manslaughter instead of denying Webster's role in the homicide. They should have played up social class by pointing suspicion at the janitor who had access to Webster's laboratory. In Massachusetts the anti-capital-punishment crusader Lysander Spooner attacked the court's exclusion of three death penalty opponents from the jury. The court thus "packed" the jury against Webster, denying his right to a jury selected from the community that included capital punishment opponents. For like-minded people this argument, though contrary to standard policy and majority opinion, was decisive.

More telling was lawyers' criticism of Chief Justice Shaw's treatment of "reasonable doubt" and the distinction between manslaughter and murder in his charge to the jury. Prosecutors and judges routinely explained that "reasonable doubt" did not mean all possible doubt. But Shaw emphasized circumstantial evidence—telling the jurors that if a consistent chain of evidence led to "a reasonable and moral certainty," they could convict. Critics charged that there was no consistent chain of evidence.[72]

Chief Justice Shaw's explanation of murder was not new. Lacking contrary evidence, he explained, English precedent and his own ruling five years earlier, said that malicious intent could be implied from a defendant's motives and actions before, during, and after the assault. But according to Harvard Law School professor Joel Parker, this reasoning reversed the sacred standard of presumed innocence, because instead of requiring the prosecution to prove malice, the defendant would need to prove its absence.

In addition the example Shaw gave—the use of chloroform—was heavily criticized. Shaw appeared to suggest that Webster used chloroform; though Shaw may have preferred to avoid illustrating his point by repeating the prosecution's argument of murder with a wooden club. Chief Justice Shaw had come to prominence in the rough, argumentative world of politics and law, but rarely had his pronouncements met with such sharp criticism.[73]

Following Webster's conviction, sympathy for the condemned man surged, and 2,200 men and women petitioned to commute his sentence, including 1,476 New York State opponents of the death penalty and others as distant as Michigan. Critics in New York and Philadelphia denounced the proceedings as reminders of Puritan persecution of witches and Quakers. The rising Harvard Law graduate Stephen H. Phillips wrote in the *Massachusetts Monthly Law Reporter* that because Webster was so prominent, "it was very easy to raise a cry against the Court if any unusual leniency should be shown to him." Public opinion, Phillips claimed, "forced the Court into THE OPPOSITE EXTREME." Public order required authorities to solve the crime quickly with "a verdict as would correspond with public opinion." Consequently "the intensity of public excitement prevented a fair trial." One commentator claimed that justice "had been seriously prejudiced by his [Webster's] social position": the desire "not so show him any undue favor on account of it, has unconsciously operated to deprive" Webster of the sympathy given to "criminals of a different rank."[74]

Contemporary critics properly argued that the trial was flawed. But Webster's confession after his conviction, when he hoped for a pardon, left no doubt that he committed homicide if not murder and tried to hide it. Social class raised the public profile of the case. The victim's high status led to aggressive prosecution, while the defendant's comparable stature cut two ways. Because Webster was well born, wealthy, and an accomplished insider in Boston, he enjoyed support from prominent friends at the trial, including Harvard's president. Afterwards a dozen or more Boston notables petitioned to save his life. Simultaneously the popular demand for "equal justice" prohibited the appearance of favoritism for the Harvard professor. Yet had circumstances been otherwise and Parkman's killer been one of his poor Irish-born tenants, as was briefly rumored, "Paddy's" conviction

and execution would never have generated comparable public attention, sympathy, or clemency petitions. Criminal trials could be sites for the expression of equal rights, but whether they were that—or occasions for class privilege and political advocacy—depended on the case, the crime and its locality, the participants, and the trial jurisdiction.

An 1827 homicide in Pierstown, New York, a hamlet near Cooperstown, illustrates how justice could operate when a farm and sawmill owner, Levi Kelley, killed his tenant. Kelley, a nephew of town founder William Cooper and first cousin of novelist James Fenimore Cooper, was a "reputable" forty-seven-year-old "in easy circumstances" who owned a sawmill, a house and barn, woodland, and meadow as well as horses, cows, hogs and sheep. Kelley's father, an Irish immigrant to Philadelphia, had married William Cooper's sister Ann, but his death left her with three sons in 1787, the oldest being seven-year-old Levi. Assisted by Squire Cooper, the family moved to Cooperstown, where in 1802 Levi purchased a village lot from his uncle for fifty dollars. Trained as a cabinetmaker and joiner, the ambitious Kelley bought a half-interest in a saw mill for five hundred dollars in 1810. By 1816 he prospered sufficiently to buy a half-interest in another saw mill on seventy acres in neighboring Middlefield for two thousand dollars. By the 1820s Levi, married but without children, achieved modest success. His household included emblems of gentility—a high-post bed, a secretary desk, a tall clock, and a "Library of Books." Kelley also owned a gun.[75]

His victim, Abraham Spafard, was a forty-eight-year-old Connecticut native. With his wife, Sally, Spafard had lived with fifteen different families before moving into a room in Kelley's house with their children in April 1827.[76] After a few months the short-tempered Kelley was finding fault with his tenant—a tree cut down to repair a wagon, damage to a wooden gate, a two-dollar debt, and, most explosively, Spafard's unloading oats in the "wrong" part of Kelley's barn. Spafard explained he had not known where Kelley wanted the oats, but Kelley responded, "It is your business to come and ask me—I'm at the helm, remember, and you must do to please me." After Spafard apologized, Kelley made other complaints, shaking his fists. Spafard then cautioned Kelley not to "get in such a passion." Kelley's retort: "There is no harm in it as long as I don't touch you." But Spafard worried:

"I fear you will get so angry as to bring out your gun: you brought it out the other night to shoot my brother, I fear you will now bring it out to shoot me." Yet the conflict appeared finished.

Soon after Spafard went into his room for dinner, Kelley entered asking for John Clark, the twenty-year-old who that day worked for Spafard. Then Spafard's daughter "came running in" to report that Kelley was scuffling with Clark. "Father," she exclaimed, "Kelley will kill John: do go in and part them." So Spafard left dinner, entering Kelley's part of the house saying, "Stop, stop! let go of John." Kelley replied, "I won't. What! do you come into my house, d——n you?" Then, as Kelley held Clark "by the throat . . . up against the chimney," Spafard repeated, "Let go of him; you must not hurt him; he has been working for me, and I will not see him abused." When Kelley refused, Spafard grabbed Kelley "and took his hands from John's throat." Kelley then ordered Spafard "out of my house." As Spafard was leaving Kelley grabbed him by the collar and pushed him. A scrap ensued and Spafard, the stronger man, pinned Kelley, who had his hand on Spafard's throat. Now Mrs. Spafard persuaded her husband to release Kelley, and Spafard, freeing himself, returned to his room with his wife. Moments later Kelley burst in: "You think I an't a going to protect my own house, don't you, d——n you?" As Spafard faced the intruder, Kelley pointed the muzzle a foot from Spafard's chest and shot him—fatally.[77]

Ten weeks later Levi Kelley was tried for murder in Cooperstown before a special court of oyer and terminer. Kelley's attorneys, leaders of the county bar, agreed that Kelley had committed homicide but argued that his crime was only manslaughter because their client had responded to Spafard's "assault . . . with circumstances of indignity." Kelley had "resented [it] immediately and [acted] in the heat of blood." Trial testimony revealed that Kelley spoke to Spafard as a superior to an inferior; Spafard's confrontational responses enraged Kelley because the tenant refused him due deference. But thirty-five-year-old Judge Samuel Nelson, later appointed to the U.S. Supreme Court, told the jury that if after provocation "there was an interval of reflection, a reasonable time for the blood to cool," then "the crime would be murder." Two hours later they declared Kelley guilty. Spafard entered

Kelley's rooms only to stop the attack on John Clark, exonerating Spafard for his "assault" on Kelley. Because Spafard left Kelley after their "scuffle," and Kelley then fetched his gun, entered Spafard's room, and shot him, manslaughter did not fit the facts.[78] Spafard, the tenant, had stood up to the landlord Kelley, but in this trial Kelley's rank did not add to his rights.

Indeed when Judge Nelson—who thirty years later would side with Chief Justice Taney against Dred Scott—sentenced Kelley, he admonished that his transgression was increased because he enjoyed social advantages. Like Jason Fairbanks and the Knapp brothers, Kelley "had been born and educated in a well informed and christian community." He was part of "respectable society," and Nelson believed, erroneously, that Kelley could not claim "ignorance, nor want of early and paternal care in preparing you for life." Kelley possessed "reasonable abundance," a "beloved family," and "all the comforts and enjoyments of domestic happiness." Yet he abused his power and provoked conflicts. "You causelessly and violently attacked a boy" who was under Spafard's "care and protection." And Spafard had "as a citizen, and in humanity as a man," properly intervened. Nelson declared the tenant morally superior to the landlord. Whereas Spafard displayed "many amiable and estimable qualities . . . [and] christian virtues," Kelley's "irascible and impetuous passions, unreasonable and unfeeling conduct, assailed him [Spafard] in every mode your relative situation permitted." According to one newspaper, "The deceased sustained a fair character, was about fifty years of age, and has left a wife and a large family of children, destitute of property."[79] In this trial of character Levi Kelley, "respectable" nephew of Cooperstown's founder, ranked below the poor tenant.

IV

One must not conclude from trials like those of Fairbanks, the Knapps, Webster, and Kelley that when it came to social class "equal justice before the law" ruled American courts. Because when upper-class, well-connected men committed crimes against lower-class men they sometimes escaped punishment. And when men of any class assaulted or even murdered women

of doubtful morals, trials might also end in acquittal. Verdicts rested on respectable white men deliberating on juries, men whose prejudices, with popular opinion, shaped their understanding of fairness and justice.

Class privilege emerged conspicuously in the highly publicized murder trial of Congressman Philemon T. Herbert. Public responses to this 1856 killing were shaped by the tinderbox election year—when warfare raged between proslavery and antislavery forces in Kansas and Free-Soil Republicans ran their first presidential candidate. The defendant, an anti-immigrant, anti-Catholic, Know-Nothing California Democrat, was an Alabama native and university graduate who would die fighting for the Confederacy. Two weeks before South Carolina congressman Preston Brooks beat antislavery Massachusetts senator Charles Sumner senseless at his Senate desk, Herbert fatally shot Thomas Keating.

The violence was brief. On May 8, 1856, at 11:30 a.m., Herbert entered the Willard Hotel dining room for breakfast, demanding, "Let us have it damned quick." His waiter, Jerry Riordan, brought part of the breakfast, explaining at that hour "it would be necessary . . . to get an order from the office to have an order sent up from the kitchen." Witnesses gave conflicting accounts of the fracas that followed. Apparently Herbert insulted Riordan and head waiter Thomas Keating, addressing each as "you damned Irish son-of-a-bitch," before brandishing his loaded revolver, walking up to Keating, and having words with him. Then Herbert struck Keating from behind with his fist. In the following melee Thomas Keating's brother, Patrick, and other waiters clashed with Herbert and his friends. Plates, chairs, and fists flew until Herbert shot Thomas Keating in the chest at close range, killing him. After Keating fell, waiters attacked Herbert before his friends extricated him. Then, with Keating dead on the floor, Herbert and his companions left to report the incident to a justice of the peace, who ordered Herbert's arrest.[80]

Herbert's trials—there were two—provided competing narratives. The prosecution witnesses, chiefly Keating's coworkers, testified that the arrogant and abusive Herbert struck first in word and deed. By punching Keating and threatening him with a loaded gun Herbert showed malicious intent before shooting. Herbert's defense argued that the congressman used

his pistol in defense after he was attacked and feared for his life. One newspaper reported, "Mr. Herbert fired only when it became evident that it was the design of the waiters to kill him."[81] The jury's decision, however, rested on more than courtroom evidence and arguments. Herbert's trials tested equal justice under law, an ideal enshrined a century earlier in Lord Ferrers's London trial.

The challenge to equal justice began at Herbert's arraignment before Judge Thomas Hartley Crawford, a Pennsylvania ex-congressman and, like Herbert, a Democrat. Judge Crawford determined that "*a conviction for murder shall not take place.*" He declared the appropriate charge to be manslaughter, though the grand jury actually charged Herbert with "*murder.*" Still, the congressman could be optimistic: the prosecutor, Philip Barton Key, a personal friend and nephew of Chief Justice Taney, would be criticized for his gentle prosecution. During his trial Herbert was "surrounded by numerous personal and political friends," including congressmen and senators. When Crawford charged the jury he virtually directed acquittal by explaining that though the defendant might not face "imminent peril of life," if he reasonably believed that he "was in danger of death or of serious bodily harm from which he could not safely escape, he was justified in taking life." If jurors had "reasonable doubts . . . they must give the benefit to the defendant." Crawford remarked in "informal conversation . . . sufficiently loud to be heard all around . . . 'That for his part he looked upon the act [Herbert's homicide] as a clear case of self-defence." After lengthy deliberation the jury deadlocked. The grand jurors had voted a murder indictment, but no trial juror voted for murder: five decided that Herbert was guilty of manslaughter while seven preferred acquittal. It was a mistrial. So the prosecution called for a new trial.[82]

In Herbert's second trial the jurymen were new, but other participants were much as before. The chief difference was William P. Preston of Baltimore, the prominent anti-Know-Nothing Roman Catholic attorney who, experienced in criminal cases, joined the prosecution.[83] The new jury pool included seventy-nine men, but even after seventy-one were dismissed, two of those impaneled admitted that they had "formed or expressed opinions on the subject." One had even visited Herbert in jail. Nevertheless Judge

Crawford dismissed objections: they could render "an impartial verdict" because each man said he would "not be swayed by any bias." In the completed jury none bore a recognizably Irish surname.[84]

The evidence and arguments of the second trial mostly repeated the first. But the fresh prosecution attorney, Preston, introduced the theme of class. Likening Congressman Herbert's shooting of Keating to Lord Ferrers's shooting of his servant, Preston extolled England's "rigid observance of the rules of impartial justice." Though Ferrers was among "the most distinguished noblemen," English judges rejected his petition to be executed as befitted his rank, so "he died by the common hangman upon the gallows." Herbert was not Lord Ferrers, but, Preston argued, he was "a gentleman, a member of *Congress*' and his act "blots the American name, and imprints a stain upon the page of Congressional history." Herbert "struck down to death this poor, humble, toiling servant," making "the poor man's hearthstone desolate." The congressman "robbed a wife of her husband, and left her children fatherless." Though Herbert's defense claimed that Ferrers's case was irrelevant, Preston rejoined, "Even in aristocratic England, the descendant of the noble Earl of Essex, could not with impunity take the life of his servant."[85] In the democratic United States, he proclaimed, regardless of class, equal justice should be even more certain.

Preston wove class themes into his summary of the crime. Herbert, he said, called Keating "a damned Irish son of a b——" before approaching him, loaded pistol in hand. Keating might only be a "humble waiter," Preston admitted, "but he was still a man." So after Herbert addressed him with a "grossness and rudeness . . . so unsuited to the lips of a gentleman," Keating's reply, though less than genteel, was appropriate. Nothing in the dining room warranted display of a gun or justified its use. Preston expressed compassion for Herbert, "the unfortunate accused," but jurors must "do your duty to your country and God." Though sympathetic to the congressman, they must not, as Daniel Webster explained prosecuting Joseph Knapp, "'suffer the guilty to escape.'" If they freed Herbert "'they make themselves answerable for the augmented danger of the innocent.'"[86]

Many believed that Preston's performance was brilliant, and it was published for lawyers to study. The jury, however, was not convinced and

promptly acquitted the congressman. Public responses divided according to political and ethnic allegiances. Herbert, the Know-Nothing Democrat, known to California opponents as "the Mariposa gambler," was reportedly supported by Democrats and President James Buchanan. During his trial "leading and distinguished Senators and Representatives were seen in the Court . . . extending their sympathy and countenance." In the House, Democratic colleagues defeated an attempted Republican inquiry into the shooting that could have ousted Herbert from Congress.[87] Though he was not a hero like South Carolina's Preston Brooks, southerners exonerated Herbert. As the *Charleston Standard* put it, so what if Herbert had irritated the waiters? His was "at the most a provocation of words, and such a provocation as a servant should not have the right to resent." As "menials" the waiters' duty was to accept their roles "quietly." According to an Alabama newspaper, because Herbert was "attacked by a mob of the waiters . . . there is no doubt he acted in self-defence." Herbert taught the waiters that "they are servants and not 'gentlemen' in disguise."[88]

But others condemned Herbert. Two thousand of his California constituents believed that he "deeply injured the fair fame of the State of California" and asked him to quit their state.[89] In Washington, D.C., one paper condemned his acquittal. This decision provided "much less than justice" because "social position" and "political connections" shielded Herbert.[90] The Republican press spoke bluntly. Judge Crawford's "partiality" had been "very glaring," according to Horace Greeley's *New York Tribune*; Herbert was "the culprit" in "a perfectly plain case of murder." The class bias of acquittal showed how the "Slave Power" regarded "free white laboring people of the country." Had the situations been reversed so that "the Irish waiter . . . killed Herbert, or any other person in Herbert's social position, the act would have been held to be murder, and the Irish waiter would have been hung for it." Likening Keating's death to the recent killing of a teacher by his wealthy Kentucky student—also tried and acquitted—the *Tribune* declared that it was now "a settled point in the slaveholding States that no 'gentleman,' that is to say no rich man, shall ever be held . . . to have committed a murder." Writing sarcastically under the headline "A Murderer Acquitted!" a western Pennsylvania newspaper declared, "It would be the most absurd

thing imaginable to suppose that an *Honorable* member of Congress would be punished for murdering an humble individual like *Tom Keating*, a poor Irish servant." Comparing Herbert to Preston Brooks, the paper wondered whether Know-Nothings would present "the blood stained Herbert . . . with a *pistol*," just as "Brooks deserved the presentation of a *cane* for his assault on Sumner." Sarcastically the editor concluded, "Surely Herbert is entitled to a reward of merit equally appropriate."[91]

Congressman Herbert's exoneration involved more than class privilege—political partisanship, the sectional conflict over slavery, and Irish ethnicity all mattered—but it was Herbert's stature as a gentleman assailed by servants that rendered his respectable witnesses more credible than servant witnesses, giving his defense story credible veneer. Though the law prescribed equal rights, actual court proceedings could favor upper-class defendants over lower-class victims. This may have been especially characteristic of the South because of the elite's commitment to maintaining slave subordination, but elite privilege operated nationally. Certainly the common man's demand for equal justice was widespread and figured explicitly in the convictions of the Knapps and Webster, but these gentlemen's victims were the wealthiest of gentlemen. When victims were poor or disreputable, equal justice was never assured. And if the victim was a disreputable woman or person of color, white privilege and male privilege magnified class privilege. The murder trials and acquittals of the Reverend Ephraim Avery in 1833, Richard Robinson in 1836, and Albert Tirrell in 1845 were archetypal. Indeed, the miscarriage of justice in Robinson's trial for the murder of Helen Jewett remained notorious for a generation.[92]

With gender and sexual stereotypes influencing all-male court personnel, prosecutors faced difficult odds in trying to prove the guilt of "respectable men." Though the gentleman's story might be far-fetched, in an era when capital punishment was under attack jurors could embrace "reasonable doubt." Moreover when a woman's testimony conflicted with a respectable man's, hers might be dismissed. If the victim was a "fallen woman" and prosecutors relied on her associates for evidence, conviction was a longshot. Women were understood to be inherently flighty and fickle—unreliable compared to men.

When the Methodist clergyman Ephraim K. Avery, a married man with three children, was tried for murdering Sarah Cornell, a Fall River "factory girl," his motive was said to be ending their illicit relationship, which had left her pregnant. Cornell's corpse was found hanging from a post in Tiverton, Rhode Island, before Christmas, 1832. According to Attorney General Albert C. Greene, Avery strangled Cornell with a cord, tied her to the post to simulate suicide, and finally inflicted fatal wounds to her body. As with the Knapps and Professor Webster, murder evidence was circumstantial. In proceedings covered extensively by the press—two coroner's inquests, a grand jury indictment, and published trial testimony of nearly two hundred witnesses, as well as incriminating letters between Avery and Cornell—Avery appeared to be guilty.[93]

After a twenty-seven-day trial and seventeen hours' deliberation, however, the jury acquitted Avery.[94] They found reasonable doubt as to whether Sarah Cornell had committed suicide or died by an unknown assailant. Avery's attorneys, led by former U.S. senator Jeremiah Mason, whose five-hundred-dollar fee was paid by Methodists, succeeded for two reasons primarily.[95] First, the defense brought six expert medical witnesses to testify that although Cornell's corpse could have been disfigured by violence, postmortem natural causes could also explain its appearance. The four matrons who described "bruising" and "prints of fingers" on Cornell were mistaken. Even midwives and women who regularly prepared corpses could not usefully appraise the victim's body. Such "ignorant persons" could not distinguish marks of violence from routine posthumous changes. As one expert physician put it, "Women are not good judges."[96] Testimony that Cornell had spoken of suicide supported the idea her death was, as the first coroner's inquest concluded, suicide.[97]

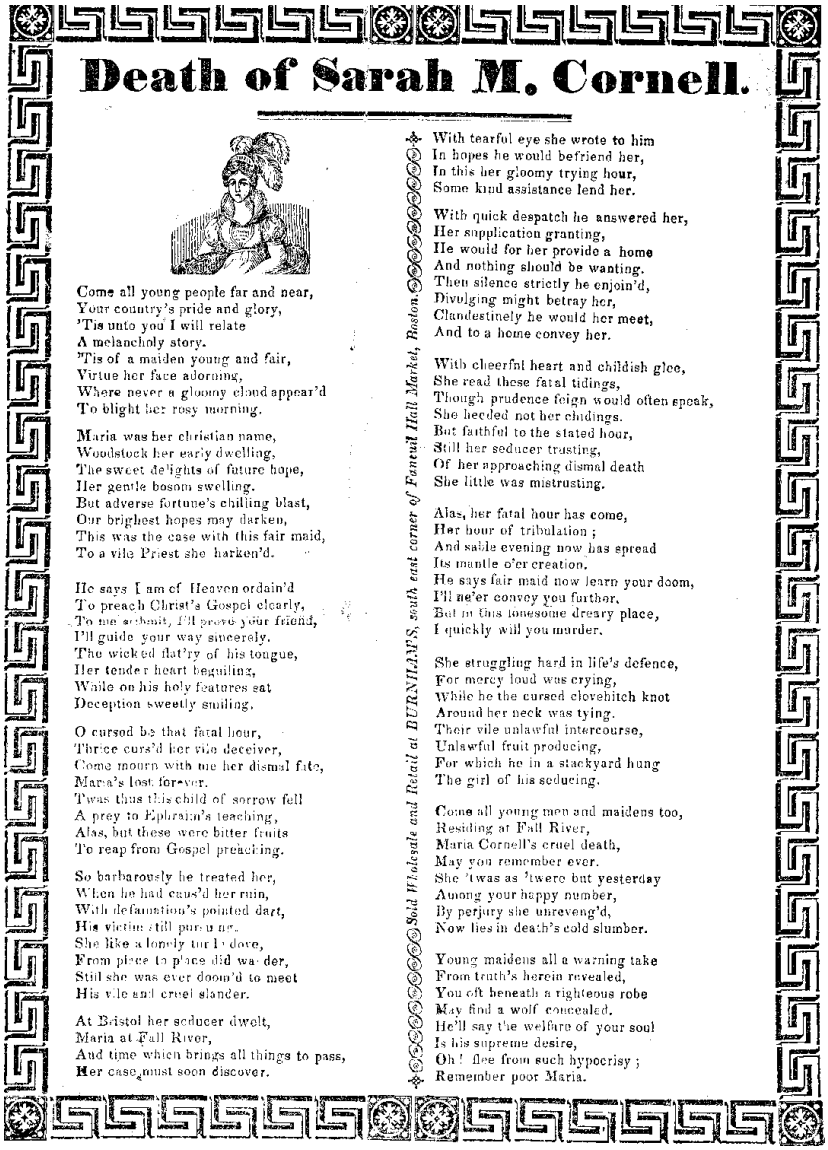
Even more telling was the defense attack on Cornell's character. Unlike Elizabeth Fales and Mary Hamilton, Cornell was no paragon of female virtue. Physicians from Lowell testified that they had treated her for gonorrhea and questioned her mental stability. Mill girls swore that Cornell had confessed to "a lewd life ever since she was 15 years old," having admitted behaving "improperly" with four men and "lying." They claimed she was angry at the reverend because, after she admitted sinning, he tried to

separate her from the Methodists.[98] According to Avery's defenders Cornell was notorious, and mill girls, artisans, businessmen, professionals, and clerics all commended Avery's character.

To counter this disparaging portrait, Attorney General Greene, former Speaker of Rhode Island's legislature and future U.S. senator, defended Cornell and her class. He acknowledged that Cornell was once "a strange, wayward being, sinning and repenting, repenting and sinning," but she was never so depraved as to plot to blame Avery for her suicide. The story that Avery sought to dismiss her from Methodism was false; actually, he had signed a religious certificate for her. Moreover, for the past two years in Lowell "her character and conduct were irreproachable." Cornell was certainly "a Factory girl," part of "that class of women and children . . . usefully and honorably employed in the 130 Cotton Mills of this State." That class included seven thousand workers "indispensable to the industry" of Rhode Island. Her "rights" and their "rights" must be protected, "and their wrongs avenged.

The prosecution failed in the Rhode Island Supreme Judicial Court, but in the court of public opinion it succeeded. Wide newspaper coverage and twenty trial reports, narratives, and broadsides led most to conclude that Avery was guilty. Jurors were divided over suicide or murder. Though at first they leaned toward a guilty verdict, they finally decided that acquittal was better than deadlock and retrial. The Newport *Republican* paper claimed that the outcome "struck almost *every* one with astonishment." The law might have been served, but "*justice* [was] entirely withheld." Many believed that Avery's acquittal was technically legitimate; still, the *Republican* claimed that "nineteen twentieths of the public, find him guilty of the crime." With so many uncertainties, the distinction between "reasonable doubt" and "all possible doubt" was murky. The jurors' reluctance to hang Avery, a respectable clergyman, husband, and father, was understandable. Avery, the public recognized, was not the first guilty man acquitted in court.[99]

For New England Methodists the case did not end there. They had come to the embattled clergyman's aid, raising funds to defend him, testifying for him, and providing for his family. After the verdict the church promptly rehabilitated Avery with a twelve-page *Report of a Committee of the New*



Death of Sarah M. Cornell.

Come all young people far and near,
Your country's pride and glory,
'Tis unto you I will relate
A melancholy story.
'Tis of a maiden young and fair,
Virtue her face adorning,
Where never a gloomy cloud appear'd
To blight her rosy morning.

Maria was her christian name,
Woodstock her early dwelling,
The sweet delights of future hope,
Her gentle bosom swelling.
But adverse fortune's chilling blast,
Our brighest hopes may darken,
This was the case with this fair maid,
To a vile Priest she harken'd.

He says I am of Heaven ordain'd
To preach Christ's Gospel clearly,
To me submit, I'll prove your friend,
I'll guide your way sincerely.
The wicked flat'ry of his tongue,
Her tender heart beguiling,
While on his holy features sat
Deception sweetly smiling.

O cursed be that fatal hour,
Thrice curs'd her vile deceiver,
Come mourn with me her dismal fate,
Maria's lost forever.
Twas thus this child of sorrow fell
A prey to Ephrain's teaching,
Alas, but these were bitter fruits
To reap from Gospel preaching.

So barbarously he treated her,
When he had caus'd her ruin,
With defamation's pointed dart,
His victim still pursu'ed.
She like a lonely turtle dove,
From place to place did wander,
Still she was ever doom'd to meet
His vile and cruel slander.

At Bristol her seducer dwelt,
Maria at Fall River,
And time which brings all things to pass,
Her case must soon discover.

With tearful eye she wrote to him
In hopes he would befriend her,
In this her gloomy trying hour,
Some kind assistance lend her.

With quick despatch he answered her,
Her supplication granting,
He would for her provide a home
And nothing should be wanting.
Then silence strictly he enjoin'd,
Divulging might betray her,
Clandestinely he would her meet,
And to a home convey her.

With cheerful heart and childish glee,
She read these fatal tidings,
Though prudence feign would often speak,
She heeded not her chidings.
But faithful to the stated hour,
Still her seducer trusting,
Of her approaching dismal death
She little was mistrusting.

Alas, her fatal hour has come,
Her hour of tribulation;
And sable evening now has spread
Its mantle o'er creation.
He says fair maid now learn your doom,
I'll ne'er convey you further,
But in this lonesome dreary place,
I quickly will you murder.

She struggling hard in life's defence,
For mercy loud was crying,
While he the cursed clovehitch knot
Around her neck was tying.
Their vile unlawful intercourse,
Unlawful fruit producing,
For which he in a stackyard hung
The girl of his seducing.

Come all young men and maidens too,
Residing at Fall River,
Maria Cornell's cruel death,
May you remember ever.
She 'twas as 'twere but yesterday
Among your happy number,
By perjury she unreveng'd,
Now lies in death's cold slumber.

Young maidens all a warning take
From truth's herein revealed,
You oft beneath a righteous robe
May find a wolf concealed.
He'll say the welfare of your soul
Is his supreme desire,
Oh! flee from such hypocrisy;
Remember poor Maria.

Sold Wholesale and Retail at BURNHAM'S, south east corner of Faneuil Hall Market, Boston.

The sentimental verse on Sarah Cornell's demise, and the genteel image of her, elevated the mill girl to a plane of equality with the accused clergyman. Courtesy, American Antiquarian Society.

England Conference of the M. E. Church, on the Case of Rev. E. K. Avery, a Member of Said Conference. Avery's acquittal, they claimed, provided "clear evidence of innocence," regarding the murder as well as reports of "illicit intercourse." Believing that prejudice against their church propelled Avery's prosecution, they claimed his acquittal as victory.[100]

The public remained skeptical. In "the tribunal of the people," a Pawtucket editor wrote, the "verdict is against him." The Methodists had used "unprecedented efforts," including "false testimony." When Avery returned to Lowell to preach, "he was hung and burned in effigy," with "great numbers ready to mob him." The Lowell paper declared that Americans believed Avery to be guilty, so "guilty or not" he should not claim to be "an innocent and injured man" and try "to brow beat" public opinion. Though there was "reasonable doubt of his guilt," Avery escaped hanging only "by the skin of his teeth."[101] According to popular judgment this clerical gentleman had gotten away with murdering a mill girl: that might be the law, but it was not justice.

This perception that courts favored "gentlemen" in contests with "fallen" women was accurate. One infamous example—the murder of Helen Jewett—happened in New York City in 1836. Jewett, a polished twenty-three-year-old prostitute, had come from Maine and became entangled in a quasi-romantic relationship with a customer, Richard P. Robinson, a well-born nineteen-year-old clerk from Connecticut. When Jewett's corpse was found at Rosina Townshend's elegant brothel, there were three wounds to Jewett's head, apparently inflicted by a hatchet, and her room had been set ablaze. After police questioned Jewett's madam and coworkers, they connected Robinson to her death: he had visited Jewett that night, and police found a hatchet and cape associated with him in the backyard.

Robinson's trial reportedly "excited nearly as much attention, as did the trial of E. K. Avery."[102] The prosecutor, relying on physical and circumstantial evidence supplied largely by prostitutes, did not vigorously press the case, winning praise because he "went not a step further than . . . required by considerations of duty." In contrast, Robinson's defense, led by Ogden Hoffman—son of a New York Superior Court judge and himself a recent district attorney of New York County—called on respectable clerks, their employers, and professionals. His client was "scarcely beyond the age of boyhood"—a youth gone astray—still "in the eye of the law an infant," who lived "respectably" with his employer, a relative "who stood . . . in the relation of a father." The defense claimed that brothel-keeper Rosina Townshend was the likely murderer because she had recently increased her fire

insurance. Her testimony and that of the other prostitutes must be dismissed because prostitutes were equivalent to "convicted felons" who ought not be regarded as "competent." Having "no conscience," they readily testified falsely.[103]

Circumstantial evidence pointed overwhelmingly to Robinson's guilt, but because a jury of fathers and businessmen determined the outcome, his exoneration was, according to the press, "anticipated." Robinson's talented and zealous defense overmatched the prosecutor. Judge Ogden Edwards—a grandson of Jonathan Edwards—charged the jury by declaring class prejudice the proper standard for evaluating testimony. Like Robinson's defenders, Judge Edwards told jurors that prostitutes' words were "not entitled to credit" without corroboration from "better sources," so whenever "the testimony of the dissolute females . . . came in collision with reputable witnesses" their statements "should be set aside and disregarded." When the trial ended past midnight on the fifth day, jurors asked the court to remain while they deliberated. After less than fifteen minutes' deliberation they acquitted Robinson—a verdict greeted by "a simultaneous burst of cheers from the spectators." The defendant, hitherto self-contained, "sank overpowered by his feelings, upon the neck of his venerable father, and wept like a child."[104]

In contrast to courtroom spectators, broader public responses were critical. Though the *New York Herald*, a merchants' paper, praised the verdict initially, most New York papers and those around the country condemned the outcome. Even the *Herald* switched when evidence of Robinson's bad character emerged. Ultimately the public concluded that class privilege and male privilege had defeated justice. That a horrific murder and a tainted trial in the 1830s should have been recognized as violating equal rights doctrine indicated the vitality of the Revolutionary legacy as well as the growing movement for women's rights.[105]

In Connecticut, near Robinson's family home, a "gentleman too elevated to be motivated by unworthy reasons," concluded that Judge Edwards "improperly" ruled out the prostitutes' testimony. Because Robinson consorted with prostitutes they were "good witnesses against *him*." Their testimony might be doubted in some circumstances, but because Robinson

voluntarily associated with them, and "rogues" routinely testified for the prosecution, their testimony should be accepted. If all testimony from disreputable people was ruled out, then "shocking crimes must very often go unpunished." Men who patronized brothels lost any claim to gender and class privilege. The Connecticut gentleman partially recognized such privilege but argued that if Judge Edwards's principles ruled, "every crime committed in such a place is almost sure to escape the law," as with Helen Jewett's murder.[106]

Ten years later a Boston murder demonstrated that privileges of class and gender remained potent. Again the victim was a Maine prostitute, twenty-three-year-old Maria Bickford, and again a gentleman was charged. The weapon was a razor, not a hatchet, but again the bed was set afire to conceal the crime. The accused, Albert J. Tirrell, was a twenty-one-year-old married father of two children who left his family to live with Bickford, whom he had met in a brothel. She, having left her husband, joined Tirrell in Boston, where they lived as husband and wife. Nevertheless Bickford continued as a prostitute, and Tirrell, jealous and angry, killed her. He fled to Montreal, hoping to escape to England. But weather thwarted his plan, so he sailed to New York and New Orleans before being arrested and returned to Boston for trial.[107]

Tirrell's wealthy family hired Rufus Choate, the brilliant attorney who later chose not to defend Dr. Webster. The facts pointed to the young man as the murderer even more surely than they had for Robinson, Avery, and Webster, though again the evidence was circumstantial. Because the facts were so incriminating, Choate invented a novel defense: if Tirrell did kill Bickford, the homicide was not murder because Tirell suffered from somnambulism—sleepwalking—and thus might have killed her and set the fire unconsciously. As with temporary insanity, the somnambulist could not be accountable for actions during sleep. This line of argument was novel; however, the dean of Harvard Medical College and the head of the Massachusetts Lunatic Asylum testified to somnambulism as a mental disorder. Choate's inventive defense won praise, but Tirrell's case hinged on stereotypes of gender and class privilege that freed other killers of fallen women.[108]

As with Cornell and Jewett, Bickford's character was easily vilified, and Tirrell's attorneys mercilessly maligned the dead prostitute. In contrast, defense witnesses for Robinson and Tirrell testified to their virtues as young men who sadly fell victim to vicious women. The deaths of women need not be seen as murder when they might be suicide—an argument used in the cases of the upstanding Elizabeth Fales as well as Sarah Cornell and now Maria Bickford. Finally, the claim that prostitutes and brothel-keepers could not be trusted to tell the truth, Judge Edwards's argument in Robinson's case, possessed broad appeal. The Connecticut gentleman warned that without such testimony "shocking crimes must very often go unpunished," but as a juror who acquitted Tirrell explained: "We couldn't believe the testimony of them abandoned women. Now, could we?"[109]

In trials like those of Avery, Robinson, and Tirrell, gender and class privilege operated simultaneously, reinforcing each other. But as with Congressman Herbert's killing of the Irish waiter, class privilege alone could suffice to shield a defendant from equal justice. The same was true for gender privilege. When a man killed a woman of his own class he might be convicted, as Jason Fairbanks had been condemned for murdering Elizabeth Fales, but if the woman victim was impure, male juries commonly acquitted their own sex. The 1816 case of the sailor George Coombs, charged with murdering his companion Maria Henry (also called Maria Coombs) in Boston, shows how male privilege worked at the lowest social level.[110]

Coombs, was a War of 1812 veteran who served on the U.S.S. *Constitution*, and neither he nor his New Hampshire–bred victim was "respectable." The couple lived in Boston's North End in the meanest of dwellings, a "ten-foot building" divided in half to share with others, in this case prostitutes. There, on June 15, 1816, a household argument became an "affray." Afterward witnesses found George with Maria, who lay on their bed dying from internal bleeding. Witnesses overheard the conflict and viewed it through "a crack and a gimblet [sic] hole" in the partition, as well as from a window. Their reports led to Coombs's arrest and murder indictment.[111]

At trial, defense witnesses said that Maria Henry Coombs "was sometimes in liquor, and sometimes fractious and quarrelsome." Worse, she had

a "furious temper," and one witness "heard her utter profane, and even filthy language." The defense attorney, John Gallison, claimed that Maria was intoxicated during the "affray." Admitting that George might have struck Maria, Gallison claimed without proof that "[blows] came as well from her, as from him." The fall that caused her fatal injury, he argued, probably resulted from her drunkenness, not action by George Coombs. The prosecution presented a very different account. Attorney General Perez Morton presented six witnesses who saw and heard how "Mrs. Coombs" received her injuries. They came from George, who knocked her down. One said, "Coombs kicked her on the left side," and another, "Coombs lifted his foot and kicked her, and she thereby fell out the back door." A third, who claimed that she "belonged to a different [higher] class of people," said that after Maria was down, he "stamped upon her twice." Three reported that during and after the fight Maria cried out to George, "You have killed me" and "George has killed me." When Gallison objected to this hearsay evidence, the court ruled it out as not "necessary" or "expedient," because witnesses said Coombs was the author of the assault.[112]

As the trial progressed it became apparent that the prosecution might fail because key witnesses could be discredited as belonging—in the arch phrase of one witness—"to the *Cyprian Family*" of dissolute women, as had, reputedly, the dead victim. Because the credibility of prostitutes as witnesses was unsettled in American courts during the period, even apart from jurors' prejudices, the case against George Coombs was doubtful, though the public believed in his guilt. In the Reverend Avery's trial the testimony of debauched women was challenged, and though a Connecticut gentleman gave a qualified defense of prostitutes' evidence, Judge Edwards in New York had dismissed their testimony in Robinson's case. Long before any of those proceedings, a Boston newspaper reported that Chief Justice Isaac Parker chose Coombs's trial for "establishing a new principle of evidence" in Massachusetts.[113]

When Parker charged the jury he claimed that "it has not been usual to inquire into the mode of life, or immoral habits of a witness, except only in point of veracity"—the witnesses' reputation for telling the truth. In this case Parker allowed defense attorney Gallison "to go into this enquiry." Though

new, Parker said, "it may hereafter be a principle of our criminal law." Stopping short of Ogden Edwards's later requirement of reputable corroboration of prostitute testimony, Parker advised that "the Jury are not bound to disbelieve them" because of their immorality. He doubted that "they would be willing to perjure themselves" in a capital case, but added the caveat that "if they are contradicted by *honest people*," their testimony would carry "little credit." He directed the jury that only "if they stand uncontradicted, and if no motive can be assigned why they should tell a falsehood," could they be believed. Jurors should judge the prostitutes' credibility.[114]

Parker concluded with a summary favoring the prosecution's narrative. Coombs, he said, was guilty of "murder" if the jurors "believe these witnesses." Even if they did not believe all witnesses, it was "evident the deceased received great violence." Reminding them of the testimony, he asked: "Was she complaining? And complaining of the prisoner?" If Maria had fallen and if George caused the fall, he said, because it was not proved that "she made any attack on him, at least the offence would be manslaughter." The murder charge could be reasonably doubted, but the judge implied that the evidence warranted at least a manslaughter verdict.[115]

Yet after an hour's deliberation the jury returned an acquittal. The defense pathway Parker opened by allowing Gallison to call the victim an "abandoned woman," and then to impeach witnesses by stressing "their appearance and behaviour," had consequences. By challenging the witnesses' "regard for truth when every other moral attribute has failed," and by declaring that they lacked the "purity of mind which is necessary for a sacred regard to truth . . . [and] every principle of morality and honor," Gallison convinced the jurors that they must not convict Coombs.[116] Whether or not the jurors had personal experience with the truthfulness of prostitutes, they shared common prejudices. So they saved their fellow man, George Coombs, from hanging. Unlike the woman-killers Avery, Robinson, and Tirrell, Coombs was from the lowest class and "a stranger." Though onboard the *Constitution* he was "an orderly, peaceable man," as an officer testified, afterward Coombs took up with "an abandoned woman."[117] But because she and her witnesses possessed no moral standing, he enjoyed male privilege and so could abuse her—lethally—with impunity. In contrast, in

the same year in Middletown, Connecticut, a drunken husband was convicted and executed for fatally battering his wife.[118] Unlike Coombs's case, however, the sexual morality of the victim and witnesses was not an issue in the Connecticut case, so male privilege did not operate.

V

In American courts the motto was equality before the law, and the favored emblem was the blindfolded goddess Justitia holding the scales of justice in one hand and the sword of punishment in the other. But in 1776 when American Revolutionaries proclaimed that "all men are created equal" and declared that all mankind was "endowed with certain unalienable rights," they spoke abstractly, without closely considering the ultimate consequences of their expansive rhetoric. So it is not surprising that when the exalted principle of equal rights collided with dominant assumptions about social class and gender (not to mention color), principle often yielded to power and to prejudice. Often, but not always. When it came to voting, the necessities of political and military mobilization combined with Revolutionary ideas to propel the realization of equal rights. The drive to eliminate property barriers for suffrage began with American independence. Still, equal voting rights for white men remained two generations in the future. And for free men of color access to equal rights generally was severely limited, inconsistent, a matter for state-by-state determination according to shifting tides of white sentiment. Almost a century after the Declaration of Independence the Fifteenth Amendment created an equal national standard for all *men* in 1870, but states could exercise voting practices so as to deny suffrage where most people of color lived—sometimes blocking poor white voters as well. Regarding women, whatever promise the Declaration made for them was readily challenged; so women's access to equal rights was barred by statute and court judgments, regardless of a woman's social station. As with race, access to equal rights for women was less a matter of class than one of prevailing beliefs about natural attributes.

The principle of equal rights to justice was tested repeatedly in American courtrooms in thousands of jurisdictions during the decades between the

Declaration and the Civil War. And in a criminal justice system based on laws made by representative legislatures and intended to reflect public opinion through juries, prevailing beliefs and prejudices influenced decisions. Courtroom trials, after all, were popular theater—where prosecutors, advocates, and judges played starring roles and jurors could become centers of interest. In this system ideal, objective justice could never be realized, and social class—like race and gender—could never be erased from the minds of court officials. Yet under certain conditions judges and juries strove to meet the ideal of equal rights. Their reliance on time-tested procedures deriving from British jurisprudence created a significant barrier against judgments springing merely from popular sentiment. In an 1815 North Carolina case where a poor white man was tried for murdering a slave, the jury convicted the defendant and the judge sentenced him to hang. Procedure ruled. But an outpouring of more than a thousand white petitioners persuaded the governor to issue a pardon.[119] Here, as elsewhere, the tension between professional standards and procedural rules was reflected in the tension between courtroom justice and true justice out-of-doors. Popular criticism of lawyers, judges, and legal technicalities sometimes led the public to verdicts different from the courtroom. Yet when defendant and victim came from the same social class, and even when their social classes differed, courts often appeared to render equal justice.

Nevertheless the fact that courts sometimes played favorites, conspicuously in the cases of Richard Robinson, Albert Tirrell, and Philemon Herbert, was highly significant. In the first two cases, where the testimony of "fallen women" was effectively dismissed, enabling juries to acquit murderers, the operation of the sexual double-standard was blatant. When women fell from chastity their sworn testimony became, ipso facto, worthless, whereas the oaths of unchaste men remained valid. Congressman Zephaniah Swift had laid down the double standard rule in his 1795 treatise on Connecticut law: "when a female once breaks over the bounds of decency and virtue, and becomes abandoned, she is capable of going all lengths in iniquity," and the result was "total depravity." Men were different: "There are frequent instances of men," Swift declared, "who disregard the principles of chastity, but in other respects conduct [themselves] with propriety."[120] This

tradition enabled lawyers for Robinson and Tirrell to annihilate the female victim's legitimacy, making her life worthless compared to the respectable, well-dressed man seated before the court. Even a disreputable defendant like Coombs who "married" a prostitute won juror sympathy. Juries were reluctant to send a man to death, or even to prison, for the sake of a worthless, vicious woman.

Similarly, class and connections could provide equivalent protection. Though in Philemon Herbert's trial for killing Michael Keating ethnicity surely entered the jurors' consciousness, Herbert's self-defense argument was based on the illegitimacy of a servant challenging a superior. For those committed to preserving slavery the need to punish insolence in a waiter was akin to the necessity of punishing every form of slave resistance—a matter of practical necessity and honor. To northerners who aimed to halt the spread of slavery or even abolish it, Herbert's expectation of "servile" behavior on the part of waiters was an attack on democratic principles and characteristic of southerners' movement to make their class system national. In the North, Americans recognized and accepted class divisions between gentlemen and their families and laboring men and their families—as well as a host of finer distinctions—but paradoxically this acceptance coexisted with a democratic belief in equality and equal rights. Just as Americans in the North and West rejected the hereditary aristocracy of Europe's social order, they also rejected the rigid, impermeable, and stark inequality of the slavery system.

Ironically, three years after Herbert killed Keating another Democratic congressman, Daniel E. Sickles of New York was charged with murder and acquitted after killing Philip Barton Key, the Washington district attorney who had prosecuted Herbert. Here, in a case involving men of the same class, honor—a variant of male privilege—secured the acquittal. Dueling had been fashionable among gentlemen at the beginning of the century, but after Vice President Aaron Burr killed Alexander Hamilton in an 1804 duel in New Jersey, in the Northeast the practice became scandalous. But in the South and Southwest dueling remained honorable. Before Andrew Jackson became president he killed a man in a duel; Senator Henry Clay of

Kentucky fought a duel; and after a Kentucky congressman killed another from Maine in an 1838 duel, Congress outlawed dueling in the District of Columbia. Yet as late as 1853 a California senator dueled with a former congressman; and in 1859 Sickles, a protégé of President Buchanan, shot Key because he was having an affair with Sickles's wife. This was no duel, but for a District of Columbia jury Sickles's defense of his honor overrode evidence of premeditated murder. Opinions were divided. Though Sickles's repeated, point-blank shots at the unarmed Key indicated murder, the jury accepted a temporary insanity defense. And Sickles' rough justice won applause for ridding the nation's capital of a notorious rake. Congressman Sickles's honor defense epitomized the sexual double standard because he was himself a notorious philanderer. In the 1840s the New York legislature censured him because he brought a known prostitute to its chambers. Later, when Sickles took a government post in London, leaving his pregnant wife at home, he brought this prostitute with him, even introducing her to Queen Victoria.[121] For Sickles "honor" was purely a matter of gender.

Indeed male honor practices appeared so pervasive that there is no reason to suppose that they were bounded by social class. But courtroom evidence suggests that honor was recognized formally only when respectable men defended it. Given the tens of thousands of assault prosecutions in the thousands of American jurisdictions in the decades between American independence and the Civil War there were probably many proceedings against disreputable men who attacked others of their own class to vindicate masculine honor. Such cases garnered little public attention. As Professor John Webster's biographer commented: "Men who occupy the lower walks of life, among whom we often find those who seem to be abandoned by society, are tried, condemned, and executed without exciting much public attention, or absorbing much of the public conversation." When members of the "respectable" classes engaged in violence, however, their behavior could not be ignored and the proceedings attracted publicity; for "when suspicion is directed to those whose position in society is elevated, . . . the case is entirely different."[122] As such the cases of Avery, Tirrell, Herbert, and Sickles accentuated public recognition of class and gender privilege. The

fact that these forms of privilege were widely accepted, even though public sentiment in the North and Northwest called both into question, suggests that Tocqueville captured an important reality when he observed that although American society was "covered with a democratic finish . . . one sees the old colors of aristocracy showing through."