

The University of New Hampshire Law Review

Volume 6

Number 3 *Pierce Law Review*

Article 9


March 2008

The Death Penalty and Reversible Error in Massachusetts

Alan Rogers

Boston College

Follow this and additional works at: https://scholars.unh.edu/unh_lr

 Part of the [Criminal Procedure Commons](#), and the [Criminology and Criminal Justice Commons](#)

Repository Citation

Alan Rogers, *The Death Penalty and Reversible Error in Massachusetts*, 6 *Pierce L. Rev.* 515 (2008), available at http://scholars.unh.edu/unh_lr/vol6/iss3/9

This Article is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact ellen.phillips@law.unh.edu.

The Death Penalty and Reversible Error in Massachusetts

ALAN ROGERS*

For two hundred years, the Massachusetts Supreme Judicial Court (SJC) held the power of life and death over capital defendants and appellants. From 1805 to 1996, the court heard more than 1200 defendants each argue that during their homicide trial a serious procedural or substantive mistake was made, an error which should cause the court to reverse their guilty verdict.¹ In fact, on average, the court found reversible error in one out of every 6.25 appeals it heard.² This incremental process, together with the transformation of criminal due process initiated by Chief Justice Earl Warren and the emergence of state constitutionalism, expanded the rights of capital defendants and prompted the SJC to abolish capital punishment in Massachusetts in 1980.³

From 1780 to 1891, the SJC had exclusive original jurisdiction of the trial of capital cases. Prior to 1859, when it became possible to take exceptions to the ruling of the trial court, the only methods of review were by motion for a new trial, motion in arrest of judgment, or writ of error.⁴ In 1891, original jurisdiction for homicide trials was shifted from the SJC to the superior court.⁵ For the next forty-eight years, the SJC held the power to reverse the guilty verdict of a trial court in a capital case only on a point of law to which the defendant properly had taken exception. Only the

* Alan Rogers, Professor of History, Boston College; author of *Murder and the Death Penalty in Massachusetts* (2008).

1. The Massachusetts Constitution of 1780 established the SJC and its published reports began in 1805. MASS. CONST. OF 1780, pt. 1, art. 29–30. From 1805 to 1996, 1217 homicide convictions were appealed to the court. This number includes those cases heard by the court more than once. The foregoing, and all subsequent data in this article is compiled from the *Massachusetts Reports* vol. 1–423, inclusive.

2. The SJC found reversible error in 190 cases.

3. For the SJC and state constitutionalism, see Charles H. Baron, *The Supreme Judicial Court in its Fourth Century: Meeting the Challenge of the "New Constitutional Revolution,"* 77 MASS. L. REV. 35 (1992). In *Commonwealth v. O'Neal (O'Neal I)*, 367 Mass. 440 (1975), the SJC abolished the death penalty for rape-murder and in *District Attorney for Suffolk District v. Watson*, 381 Mass. 648 (1980), the court found the death penalty unconstitutionally cruel under Art. 26 of the Declaration of Rights of the Massachusetts Constitution.

4. In 1858, murder was classified in two degrees: the penalty for first degree murder was death; the penalty for second degree murder was life imprisonment. Act of Mar. 27, 1858, ch. 154, §§ 1, 2, 1858 Mass. Acts 126, 126; MASS. GEN. STAT. ch. 160, §§ 1, 2 (1860).

5. 1891 Mass. Acts 966–68 transferred jurisdiction for capital cases to the superior court. See Act of June 6, 1891, ch. 379, §1, 1891 Mass. Acts 966, 966 (transferring jurisdiction of capital trials to the superior courts); Act of Oct. 17, 1859, ch. 282, §1, 1859 Mass. Acts 632, 632 (returning jurisdiction of capital trials to the Massachusetts Supreme Judicial Court).

judge who heard the case had the right to grant a motion for a new trial and, unless he was found to have abused his broad discretionary powers, it was very unlikely his decision would be disturbed by the SJC. In the wake of the bitterly divisive conviction and the executions of Sacco and Vanzetti in 1927, the legislature increased the SJC's powers to order a new trial "if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require."⁶ In 1962, the legislature expanded the SJC's power to review capital cases by allowing it to consider the appellant's degree of guilt.⁷

This article will survey Massachusetts homicide cases from 1805 to 1996 in which the SJC found reversible error. For comparative purposes, the data will be grouped into three periods: from 1805, the year the SJC began to publish its decisions, to 1891, the year original jurisdiction for homicide cases was transferred from the SJC to the Superior Court; 1892 to 1939, the year Massachusetts law allowed the SJC to review the facts as well as the law of capital cases; and from 1940 to 1996, the year Chief Justice Paul Liacos resigned from the court and the importance of state constitutionalism declined. First, the data on reversible error will be situated within its proper legal-historical context and analyzed. Second, using key cases, this article will illustrate some of the major changes in criminal procedure initiated by the court's finding of reversible error. I argue that the sharp increase in the number of homicide cases in which the SJC found reversible error and the resulting transformation of capital procedure was stimulated chiefly by the SJC's commitment to state constitutionalism after Warren's retirement in 1969. For these reasons, from 1970 to 1996 the SJC reversed a greater percentage of capital cases than ever before in its long history. Most importantly, in 1975 the court abolished the mandatory death penalty for murder committed during a rape and in three subsequent opinions found the death penalty violated Articles 12 and 26 of the Massachusetts Declaration of Rights.⁸

6. 1939 Mass. Acts ch. 341 (codified as amended at MASS. GEN. LAWS ch. 278, § 33E (1939)).

7. 1962 Mass. Acts ch. 453 (codified as amended at MASS. GEN. LAWS ch. 278, § 33E (1962)).

8. The careers of two SJC chief justices have been probed in depth. See, e.g., LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993); David J. Seipp, *Chief Justice Holmes on the Science and Art (and Politics) of Judging*, 5 MASS. LEGAL HIST. 19 (1999) (especially pages 50–53 on the execution of Luigi Storti). *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992* (Russell K. Osgood ed., 1992) provides valuable insights into the court's long history. Alan Rogers, *Murder in Massachusetts: The Criminal Discovery Rule from Snelling to Rule 14*, 40 AM. J. LEGAL HIST. 438 (1996); Alan Rogers, "A Sacred Duty": *Court Appointed Attorneys in Massachusetts Capital Cases, 1780–1980*, 41 AM. J. LEGAL HIST. 440 (1997), and Alan Rogers, *An Anchor to the Windward: The Right of the Accused to an Impartial Jury in Massachusetts Capital Cases*, 33 SUFFOLK U. L. REV. 35 (1999), focus on changes in Massachusetts criminal proce-

For more than 100 years, the SJC had exclusive jurisdiction over capital crimes. The chief justice and several associate justices presided over a jury trial during which contested points of law were argued fully and immediately ruled on by the court. A post-conviction motion for a new trial on an alleged error in point of law was possible, but such motions were of “rare occurrence” and “if allowable at all,” Chief Justice Lemuel Shaw stated in *Commonwealth v. York*,⁹ “on occasions of real difficulty and importance.”¹⁰ At the conclusion of that murder trial, Shaw allowed a motion by defense attorney Richard Henry Dana, Jr. to be heard by the entire court. Dana argued that Shaw had erroneously instructed the trial jury when he said that given the circumstances surrounding Peter York’s late night murder of a young Irishman, malice—the existence of which distinguishes murder from manslaughter—could be implied.¹¹ For that reason, the law, and not the jury, determined that York had committed murder. The full court upheld Shaw’s trial court ruling and York was sentenced to death.¹²

Long after the SJC ceased to be a trial court for capital cases, the cautious approach to the appeals process outlined by Shaw in *York* shaped the SJC’s relationship with the trial courts and dramatically slowed the pace of change in criminal procedure. Because the SJC ordinarily deferred to the trial court’s ruling on the law, its review of a homicide case rarely yielded a change in procedure or led to an expansion of the defendant’s rights. In 1937, for example, Harvard law Professors Sam Bass Warner and Henry B. Cabot wrote convincingly about the legal procedure of an 1873 murder case as if it were contemporary.¹³ Their point was to demonstrate how little Massachusetts criminal procedure had changed in more than a half century.¹⁴ As late as 1957, recently retired Chief Justice Stanley E. Qua echoed the same sentiment when he told the *Boston Bar Journal* that he

dure. Although James M. Rosenthal’s organization of the data on reversible error is idiosyncratic, his work is invaluable. See James M. Rosenthal, *Reversible Error in Homicide Cases in Massachusetts*, MASS. L.Q., May 1928, at 106 (referencing cases from 1805–1927); James M. Rosenthal, *Reversible Error in Homicide Cases in Massachusetts, 1927–1949*, MASS. L.Q., Oct. 1949, at 45. For the SJC’s foray into state constitutionalism, see *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984); *Watson*, 381 Mass. 648; *Opinion of the Justices*, 372 Mass. 912 (1977); *Commonwealth v. O’Neal (O’Neal II)*, 359 Mass. 242 (1975); *O’Neal I*, 367 Mass. 440; Henry Clay, *Human Freedom and State Constitutional Law; Part One, The Renaissance*, 70 MASS. L. REV. 161 (1985); Henry Clay, *Human Freedom and State Constitutional Law; Part Two, the Process*, 71 MASS. L. REV. 12 (1986).

9. 50 Mass. (9 Met.) 93 (1845).

10. *Id.* at 100.

11. *Id.* at 96–97.

12. *Id.* at 125.

13. Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 584–85 (1937).

14. *Id.* at 585.

avored “an old fashioned stand pat attitude,” adhering to established principles and deferring to the legislature if changes in the law were needed.¹⁵

The data on reversible error in homicide cases substantiates the characterization of the SJC as reluctant to promote change prior to 1970. From 1805 to 1891, the population of Massachusetts increased nearly five times, from 400,000 people who lived chiefly in rural villages to about 2.5 million, eighty-six percent of whom lived in urban areas. During this period, the court heard seventy-five homicide cases. Twenty-eight of those cases were heard before the enactment of an 1858 law classifying murder into two degrees. From 1858 to 1891, the court heard fourteen cases in which the defendant was found guilty of first-degree murder and sentenced to death and six cases in which the defendant was declared guilty of murder in the second degree that carried a sentence of life. There were twenty-one manslaughter convictions, the penalty for which varied from a fine up to twenty years in prison. Three defendants were charged with being an accessory to a murder; the cases of three others involved the issue of insanity and one defendant was found not guilty. The court found reversible error in eight cases, or 10.65% of all homicide cases. One murder case was reversed along with seven manslaughter convictions. The percentage of reversals in all murder cases was 1.33%.¹⁶

*Commonwealth v. Hardy*¹⁷ was the first death sentence reversed by the court. Although defense counsel had not objected to the procedure until after the jury’s guilty verdict, the court determined that it had violated an 1805 statute that provided that all indictments of capital cases should be heard before three or more justices of the SJC.¹⁸ A single justice had received William Hardy’s plea of not guilty of the murder of an infant; therefore, the full court reversed his death sentence and ordered a new trial.¹⁹ Chief Justice Theophilus Parsons, who throughout his tenure on the bench encouraged close and logical arguments efficiently delivered, conceded: “If even quibbling is at any time justifiable, certainly a man may quibble for his life.”²⁰ Hardy was acquitted at his second trial.²¹

The most important change in criminal procedure made by the court during the period 1805–1891 was not brought to the court on a motion of error. Rather, it was Chief Justice Lemuel Shaw’s instructions to the jury

15. Stanley E. Qua, *A Few Reflections from the Experience of Twenty-Two Years*, 1 BOSTON B.J. 9 (1957). Qua served on the SJC from 1934 to 1956, the last nine years as Chief Justice.

16. See HISTORICAL ATLAS OF MASSACHUSETTS 27, 35 (Richard W. Wilkie & Jack Tager eds., 1991) (providing census data).

17. 2 Mass. (1 Tyng) 303 (1807).

18. *Id.* at 314–16.

19. *Id.* at 317.

20. *Id.* at 316.

21. *Id.* at 317.

on the criminal law of insanity that transformed the law. In *Commonwealth v. Rogers*,²² Shaw told the jury that it should apply a dual test. Giving “great weight” to expert opinion, Shaw stressed both the cognitive and volitional elements.²³ To be criminally responsible, a person must have “capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment.”²⁴ But, Shaw added, even if a person knows the difference between right and wrong, his homicidal act may have been the result of “an irresistible and uncontrollable impulse,” and “not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.”²⁵

Shaw’s ruling formed the basis for the modern law of insanity in criminal cases, but neither the courts nor psychiatrists were entirely pleased with the test. First, the rule often was difficult to apply because it failed to encompass the mentally ill defendants who came before the court. Defendants who were mentally ill and pleaded not guilty by reason of insanity, but who were said to be able to differentiate right from wrong and able to resist sudden violent impulses ordinarily were declared sane by prosecution psychiatrists. Indeed, according to Massachusetts psychiatrist L. Vernon Briggs’s review of the pre-1920 court records, not a single defendant declared sane by psychiatrists applying the Shaw test were able successfully to establish insanity in a Massachusetts court.²⁶ In vain, psychiatrists argued that the proper test for criminal responsibility should require a determination as to whether the crime was the “product of mental disease or mental defect.”²⁷ Second, testimony by psychiatrists often confused or alienated jurors and the court. As late as 1926, Chief Justice Rugg articulated a common bias when he said that a trial judge could form a common-sense judgment about the defendant’s criminal responsibility that was better “than the refined distinctions and technical niceties of alienists and experts in psychopathic inferiority.”²⁸

22. 48 Mass. (7 Met.) 500 (1844).

23. *Id.* at 501–02, 505.

24. *Id.* at 501–02.

25. *Id.* at 502.

26. SAM BASS WARNER & HENRY B. CABOT, *Judges and Law Reform*, 4 HARV. L. SCH., SURVEY OF CRIME AND CRIMINAL JUSTICE IN BOSTON 90 (1936). Briggs was the author of a 1922 law mandating neutral, state-administered psychiatric exams, Mass. Acts and Resolves, 1921, ch. 415.

27. *Durham v. United States*, 214 F.2d 862, 875, 876 (D.C. Cir. 1954); *see also* *State v. Pike*, 49 N.H. 399 (1870) (New Hampshire Chief Justice Charles Doe formulating the “product rule”). Although hailed as an advance, no other state court adopted Doe’s insanity test, but U.S. district court Judge David Bazelon applied it in *Durham*. 214 F.2d at 876.

28. *Commonwealth v. Devereaux*, 257 Mass. 391, 395 (1926).

Although a handful of murder cases in which the defendant pleaded not guilty by reason of insanity commanded public attention in the century following Shaw's ruling in *Rogers*, the actual number of cases involving insanity was a small percentage of the total number of murder indictments. From 1844 to 1899, there were 578 indictments for murder, only forty-four, or 7.6% of which involved the issue of insanity. Of the forty-four, twenty-three persons were judged insane before trial and sent to an asylum. At trial, twenty-one defendants pleaded not guilty by reason of insanity: juries found seven of the twenty-one not guilty by reason of insanity and the court committed the defendants to an asylum; three were found guilty of murder in the first degree and sentenced to death; and eleven were found guilty of murder in the second degree and sentenced to life imprisonment.²⁹

During the period from 1900 to 1940—from the presidency of William McKinley to Franklin D. Roosevelt's election to a third term—there were 1253 indictments for murder in Massachusetts. Forty-nine defendants (3.9%) raised the issue of insanity: thirty-four were determined to be insane before trial began and were committed by the court to an asylum; twenty-five were found not guilty by reason of insanity. Quite in contrast to the earlier period, where only one-third of defendants who pleaded not guilty by reason of insanity were found not guilty, not a single defendant who pleaded not guilty by reason of insanity before 1940 was found guilty.³⁰

Comparing the treatment of male defendants charged with murdering their wives who raised the issue of insanity reveals an even more striking difference between the nineteenth and early twentieth century. In the period 1844–1899, thirteen (29.5%) of the forty-four defendants who raised the issue of insanity were men who were indicted for murdering their wives. The thirteen cases were disposed of as follows: nine were sent by the court to an asylum; one was found guilty of murder in the first degree and sentenced to death; a jury returned a verdict of guilty of murder in the second degree for one defendant who pleaded insanity; and two men who pleaded not guilty by reason of insanity were found not guilty. By contrast, in the period 1900–1940, thirty-one (63.2%) of the forty-nine defendants who raised the issue of insanity were men indicted for murdering their wives. Of the thirty-one, eighteen were determined to be insane before trial and were committed to an asylum and thirteen were found not guilty by reason of insanity. In short, the defense of not guilty by reason of

29. This data is compiled from the ANNUAL REPORT OF THE ATTORNEY GENERAL (Boston 1844–1899).

30. *Id.* The attorney general ended the practice of compiling detailed annual homicide data in 1942. ANNUAL REPORT OF THE ATTORNEY GENERAL FOR THE YEAR ENDING 1942, at 6–7 (1943).

insanity was a remarkably successful defense for a man charged with the murder of his wife. Of course, the facts were different in each homicide case in which the question of criminal responsibility played a part, but one common thread cannot be ignored: an all male jury heard every one of these cases.³¹

The SJC reversed three first-degree murder convictions and two manslaughter convictions during the period 1892–1939, in which the court heard 108 homicide cases. Of that total, sixty-two had been found guilty of first-degree murder, twenty-two of murder in the second degree, fifteen were convicted of manslaughter, one was found not guilty by reason of insanity; and three were found guilty on the charge of being an accessory before the fact to murder in the first degree. In all homicide cases the percentage of reversals was 4.6%; in all murder cases, 4.6%.³²

Each of the three capital murder defendants whose convictions were reversed by the court was retried. The results were mixed. James Trefethen, a young Boston salesman convicted for the murder of Deltena Davis, a twenty-six year old Charlestown shopkeeper, was one of the first capital defendants to be tried in the superior court, instead of the SJC. On appeal, the SJC ruled that it was erroneous to exclude the testimony of a defense witness to whom the deceased had said, the day before her death, that she intended to commit suicide if her lover did not agree to marriage.³³ The statement should have been admitted because it was evidence of the young woman's state of mind just before her death.³⁴ Following the reversal, Trefethen was acquitted at his second trial. Neither Anton Retkovitz nor Celestino Medeiros was as fortunate. On retrial, both defendants (the latter of who some said was responsible for the murders for which Sacco and Vanzetti were executed) were convicted of murder in the first degree and subsequently executed.³⁵

The initial reversal won by Medeiros was one of only a baker's dozen of homicide cases reversed by the SJC from 1805 to 1939. During the period 1940–1996, however, the number of homicide appeals and reversals soared. For most of the SJC's history, homicide appeals were a small part

31. *Id.* Women were permitted to serve as jurors in Massachusetts as of 1950. 1949 Mass. Acts ch. 347. The law allowed women an automatic exception if they had children at home or if they might be embarrassed by testimony at trial, a provision that was eliminated in 1979. 1978 Mass. Acts. ch. 41; see also Alan Rogers, "Finish the fight": *The Struggle for Women's Jury Service in Massachusetts, 1920–1994*, 2 MASS. HIST. REV. 27 (2000).

32. MASSACHUSETTS REPORTS vols. 157–301.

33. *Commonwealth v. Trefethen*, 157 Mass. 180, 182 (1892).

34. *Id.* at 183.

35. See *Commonwealth v. Medeiros*, 255 Mass. 304 (1926); *Commonwealth v. Retkovitz*, 222 Mass. 245 (1915); Herbert B. Ehrmann, *Sacco and Vanzetti: The Magnetic Point and the Morelli Evidence*, 79 HARV. L. REV. 571, 581 (1966).

of its work. From 1930 through 1960 the court's homicide caseload remained about the same, rarely numbering more than two or three cases per year. A sharp increase in the number of murders—from 1.0 per 100,000 Massachusetts residents in 1950 to 4.1 per 100,000 people in 1980—together with the transformation in criminal justice initiated by the Warren Court and sustained after 1969 by the SJC's embrace of state constitutionalism caused the number of homicide appeals made to the SJC to bolt upward.³⁶

From 1940 to 1996, the SJC heard 1033 homicide cases, nearly ten times more than were before the court from 1892 to 1939, a roughly comparable time span. Of the total number, 729 were appeals made by defendants convicted of murder in the first degree; 229 were appealing a second-degree murder conviction; and the court heard arguments from seventy-three defendants convicted of manslaughter. The court found grounds for reversal in 181 cases, or 17.5% of all homicide cases. One hundred twenty-six first degree murder convictions were reversed; along with the cases of thirty-two defendants convicted of second degree murder; twenty-three manslaughter convictions; one case of not guilty by reason of insanity was reversed; and one murder case was sent to juvenile court. The percentage of all murder cases reversed was 16.4%. The percentage of homicide reversals—nearly four times greater than the period from 1892 to 1939—is striking evidence of the constitutional revolution that swept through the courts generally after 1954, and specifically impacted the SJC after 1970.³⁷

A number of the homicide defendants who appealed to the SJC during this period called upon the court to exercise its “extraordinary power” to review questions of fact as well as law granted to it by a 1939 statute.³⁸ The Judicial Council, an appointive advisory group formed in 1924, first promoted this reform in 1927.³⁹ In the tumultuous wake of the *Sacco-Vanzetti* case, the council called for legislation that would permit the SJC to “pass upon the whole [capital] case,” and “to order a new trial upon any

36. U.S. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 52 (1981) (reporting for the year 1980); U.S. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 90 (1951) (reporting for the year 1950). See, e.g., Baron, *supra* note 3 (discussing constitutional revolution sweeping courts in this period).

37. Data compiled from *Massachusetts Reports* vols. 305–423.

38. See *Commonwealth v. Gricus*, 317 Mass. 403, 407 (1944) (referring to the “extraordinary power”).

39. “An Act Providing for the Establishment of a Judicial Council.” 1924 Mass. Acts. ch. 244. The Judicial Council was composed of representatives, one each nominated by the chief justice of the SJC, the chief justice of the superior court, the judge of the land court, one judge of a probate court, one justice of a district court, and not more than four members of the bar appointed by the governor. The appointments were not to exceed four years. See *Third Report of the Judicial Council of Massachusetts*, MASS. L.Q., Nov. 1927, at 37.

ground if the interests of justice appear to require it.”⁴⁰ The council was especially critical of a single trial judge’s power to pass on “mixed questions of law and fact arising on motions for a new trial.”⁴¹ Because such decisions involve questions of life and death, “we think the responsibility too great to be thrown upon one man,” the councilors argued.⁴² Even if the trial judge is right, “there is no tribunal to establish the fact that he is right.”⁴³ “It is vital that our Courts do justice,” the council’s report concluded, “it is also vital that people know that they do justice.”⁴⁴ A handful of legislators took up the council’s recommendation. A great number of lawyers, including prosecutors throughout the state, lobbied against the bill. Allowing the SJC to review the facts of a capital case would be tantamount to holding a new trial and that would be unconstitutional. Although Governor Alvan T. Fuller weakly supported the reform, the Massachusetts House of Representatives easily defeated the bill.⁴⁵

Twelve years later—when the passion aroused by *Sacco-Vanzetti* had cooled somewhat—the legislature enacted the reform.⁴⁶ The court was not altogether pleased with its new power, however. In *Commonwealth v. Gricus*,⁴⁷ and *Commonwealth v. Bellino*,⁴⁸ Justices Henry T. Lummus and Stanley E. Qua interpreted the 1939 law as narrowly as possible.⁴⁹ While the statute allows the court to consider the facts as well as the law, “[i]t does not, however, convert this court into a second jury, which must be convinced beyond a reasonable doubt of the guilt of a defendant by reading the reported evidence, without the advantage of seeing and hearing the witnesses,” grumbled the court in *Gricus*.⁵⁰ As Justice Lummus saw it, the 1939 law put the court in a position analogous to that of a trial judge dealing with a motion for a new trial. Like the trial judge, the SJC must determine that the verdict was “so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to careful consideration of the evidence, but that it was the product of bias, misapprehen-

40. *Third Report*, *supra* note 39, at 37–38.

41. *Id.* at 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. CORNELIUS DALTON ET AL., *LEADING THE WAY: A HISTORY OF THE MASSACHUSETTS GENERAL COURT 1629–1980*, at 269–70 (Cornelius Dalton ed., 1984).

46. 1939 Mass. Acts 402–03.

47. 317 Mass. 403 (1944).

48. 320 Mass. 635 (1947).

49. *Id.* at 418; *Gricus*, 317 Mass. at 407. Lummus served as associate justice from 1932–1955. Massachusetts Supreme Judicial Court, Justices of the Supreme Judicial Court, <http://www.massreports.com/justices/alljustices.htm> (last visited Jan. 16, 2008). Qua was an associate justice from 1934–1956 and chief justice from 1947–1956. *Id.*

50. 317 Mass. at 406.

sion or prejudice.”⁵¹ Only in such “rare instances” would the SJC grant a new trial.⁵² In *Bellino*, the court made the eye of the needle through which the defendant had to pass to win a new trial even smaller: the “statute . . . does not require us to review all questions of evidence and of procedure at the trial to which exceptions have not been duly saved.”⁵³

The court’s clarity in regard to procedural rules did not extend to the issue of determining the criminal responsibility of the insane. “[T]his troublesome field,” as Justice Arthur Whittemore termed the court’s effort to establish guidelines in criminal-insanity cases, was before the SJC in 1967.⁵⁴ James McHoul, Jr., a patient at Boston State Hospital for the criminally insane, raped a female nurse. At trial, a psychiatrist testified for the prosecution that, “according to the M’Naghten rule [McHoul] was legally sane;” he knew the difference between right and wrong.⁵⁵ Defense counsel objected and the trial judge struck out the part about the M’Naghten rule, allowing the last part of the doctor’s statement to stand. The defendant accepted.⁵⁶ On appeal, the SJC reversed McHoul’s guilty verdict, concluding that the judge’s ruling left the jury with an erroneous opinion about McHoul’s sanity.⁵⁷

The court might have stopped there, but it took a step toward acknowledging changes made by modern psychiatry and the idea that insanity was not an “either or” proposition. It made the American Law Institute’s (ALI) draft code on mental disease and criminal responsibility part of its decision, terming it an “evolutionary restatement” of Shaw’s 1844 ruling.⁵⁸ There were key differences, however. The *Rogers* rule spoke of one who has the “capacity . . . to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment.”⁵⁹ By contrast, the ALI rule referred to the defendant’s “substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to con-

51. *Id.*

52. *Id.*

53. 320 Mass. at 646.

54. *Commonwealth v. McHoul*, 352 Mass. 544, 548 (1967).

55. *Id.* at 545.

56. *Id.* at 545–46.

57. *Id.* at 546, 555. M’Naughten pleaded not guilty by reason of insanity to murdering Sir Robert Peel’s secretary, mistaking him for Peel. *Id.* at 547. M’Naughten’s acquittal in 1843 led the English House of Lords to pose a number of questions to the court. *See* M’Naghten’s Case, (1843) 8 Eng. Rep. 718, 722–23 (H.L.). The literature on the modern insanity defense is enormous. *See, e.g.*, NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW (1995) (arguing for inclusion of ordinary citizens’ views of just and fair).

58. *McHoul*, 352 Mass. at 546–47.

59. *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501–02 (1844).

form his conduct to the requirements of the law.”⁶⁰ The *McHoul* rule also rejected the concept of the “irresistible impulse” in favor of full expert testimony about “all that was relevant to the defendant’s mental illness,” and the “nature and extent of impairment” of the defendant’s mental faculties.⁶¹

The court’s hope that its new criteria for determining criminal responsibility would minimize misunderstanding proved ill founded. Of the twenty-two murder-insanity appeals heard by the court from 1967 (*McHoul*) to 1996, twelve were reversed. Moreover, four of the twelve reversals made significant changes in the procedural guidelines governing criminal responsibility. In *Gilday v. Commonwealth*,⁶² the court upheld an order from the trial court that the defendant disclose his intent to put forward an insanity defense. Six years later, in *Blaisdell v. Commonwealth*,⁶³ the court tackled the problem of whether this rule violated the defendant’s right against self-incrimination. Justice Liacos acknowledged that a court ordered psychiatric exam abridged a defendant’s constitutional right against self-incrimination, but he argued that the court could order a defendant to submit to an examination if the defendant knowingly and intelligently waived his privilege against self-incrimination.⁶⁴ In *Commonwealth v. Grey*, the court seemed to take a controversial step down the slippery slope of diminished capacity by ruling that although a defendant’s mental impairment fell short of the *McHoul* test, the jury should consider his ability to form a specific intent on the day the homicide was committed.⁶⁵ Finally, the court’s best efforts to bring reason and order to the issue of criminal responsibility failed to satisfy public and political critics of Kenneth Seguin’s plea of not guilty by reason of insanity for the murder of his wife and two children.⁶⁶

The drive to reform capital procedure in cases where criminal responsibility or mental impairment was not in question led to a statute making it possible for a jury to find a defendant guilty of first-degree murder, but not to impose a sentence of death.⁶⁷ Enacted in 1951, the law was the fruition of a crusade to abolish capital punishment begun in 1927 by Sara Ehr-

60. *McHoul*, 352 Mass. at 546–47 (citing MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962)).

61. *Id.* at 550, 553.

62. 360 Mass. 170 (1971).

63. 372 Mass. 753 (1977).

64. *Id.* at 754, 757, 764.

65. 399 Mass. 469, 471 (1987).

66. *Commonwealth v. Seguin*, 421 Mass. 243, 245 (1995). For newspaper columnists critical of the insanity plea, see Howie Carr, *State’s Victim of Decade Having a Whine Old Time*, BOSTON HERALD, Sept. 13, 1995, at 8; Bella English, *Shameless for the Defense*, BOSTON GLOBE, Jan. 18, 1993, at 17; Bella English, *True Insanity—and False*, BOSTON GLOBE, Mar. 30, 1994, at 19.

67. MASS. GEN. LAWS ch. 265, § 2 (1951).

mann, executive secretary of the Massachusetts Council Against the Death Penalty.⁶⁸ From 1951 to 1972, the year the U.S. Supreme Court held unconstitutional capital punishment as then practiced, Massachusetts jurors recommended life imprisonment for 100 out of 132 convicted murderers.⁶⁹

Chief Justice Raymond Wilkins led the SJC during most of this period. He was determined to steer the court in a familiar conservative direction, contrary to the course set by U.S. Supreme Court Chief Justice Earl Warren. In 1958, Wilkins joined with nine other state supreme court chief justices to publicly decry the Supreme Court for “adopting the role of policy maker and failing to exercise proper judicial restraint.”⁷⁰ The conference of state court chief justices also bemoaned the Supreme Court’s alleged abandonment of *stare decisis* and its “unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution.”⁷¹

The Wilkins court, however tough its talk, reversed eighteen of ninety-three homicide cases, more than twice as many cases as had been reversed in the previous decade. It would be a mistake to attribute this increase solely to changes in criminal procedure imposed on state court criminal procedure by the Warren Court. Two other factors were more significant: the Wilkins court heard a greater number of appeals simply because the Massachusetts murder rate jumped from 1.0 per 100,000 inhabitants in 1950 to 3.5 in 1970, the year Wilkins retired; and, in 1962, the legislature expanded the court’s power to review capital cases by allowing it to consider the appellant’s degree of guilt.⁷² Under the new law, the court could reduce a convicted murderer’s degree of guilt if it believed there had been

68. *Id.* The law required jurors to agree unanimously on the punishment. 1951 Mass. Acts 203. The vote in the Massachusetts Senate was twenty to nineteen. JOURNAL OF THE MASSACHUSETTES SENATE 608–12, 647–48 (1951). For information on Sarah Ehrmann, see *Biography of Ehrmann*, in SARA EHRMANN PAPERS 33 (on file with Northeastern University).

69. Opinion of the Justices, 372 Mass. 912, 919 (1977). From 1963 to 1975 Suffolk County juries recommended the death penalty not be imposed in thirty-nine of fifty-five first-degree murder trials. Commonwealth v. O’Neal (*O’Neal II*), 369 Mass. 242, 261 n.19 (1975). Additionally, between 1947 and 1973, forty-three original death sentences were commuted or reduced by executive action. District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648, 662 (1980). On appeal, the SJC heard fifty-nine capital cases between 1951 and 1973, it reversed five in which the jury had sentenced the defendant to death and four in which the jury had not recommended the death penalty. See, e.g., MASSACHUSETTS REPORTS vols. 328–408; see also *Furman v. Georgia*, 408 U.S. 238 (1972) (stating that the death sentences of twenty-four Massachusetts men were commuted to life imprisonment).

70. Raymond Sanger Wilkins, “Memorial,” 361 Mass. 912, 914 (1972). The report of the Committee on Federal-State Relations, of which Wilkins was a member, was entitled *The Constitutional Principle of Judicial Self-Control—A Challenge to Balanced Professional Thinking*, MASS. L.Q., Oct. 1958, at 77.

71. The Conference of Chief Justices adopted a milder version of the committee’s report by a vote of thirty-six to eight. See *The Constitutional Principle of Judicial Self-Control—A Challenge to Balanced Professional Thinking*, *supra* note 70, at 88, 89.

72. 1962 Mass. Acts ch. 260.

a miscarriage of justice in convicting the defendant of the greater charge.⁷³ This legislative provision accounted for four of the eighteen cases reversed by the Wilkins court. Only three cases were reversed to bring the court into conformity with the Supreme Court's rulings affecting a homicide suspect's constitutional rights.⁷⁴ Whatever ambivalence the SJC may have harbored about the Warren Court was put aside in favor of the rule of law and deference to the high court. In *McKenna*, for example, the SJC found that Boston police had not adhered to *Miranda* guidelines and, therefore, the first-degree murder convictions of McKenna and his partner were set aside.⁷⁵

We end this opinion with the observation that the speed and skill shown by the police in gathering evidence of a direct or circumstantial nature merit commendation. Where the evidence relied upon, however, consists of self-incriminating statements made by the accused while in custody under interrogation by the police, the procedures prescribed by the *Miranda* case must be observed in order that the statements be admissible. Those procedures have been developed, formulated, and promulgated by the Supreme Court of the United States and have been given constitutional standing by that court. They are part of the law of the land and must be obeyed.⁷⁶

To some observers, it seemed as if G. Joseph Tauro, who was appointed chief justice of the SJC in 1970 by Republican Governor Francis Sargent, was as out of step with the constitutional revolution as Justice Wilkins earlier had professed to be. The *Boston Globe* denounced Tauro personally and professionally. Tauro's "most distinguished feature in the legal world," the *Globe* charged, "has been his pompous, self-important manner. He is also known for his vindictive attitude toward his critics."⁷⁷ To drive home the point, the *Globe* added: "The state's high court needs new blood, new talent, new thinking, new force. The Tauro appointment

73. *Id.* According to the amendment, if the court found that the verdict was against the weight of the evidence, or for any other reason justice may require, it could order a new trial, or direct the entry of a lesser degree of guilt and remand the case to the superior court for sentencing. See, e.g., *Commonwealth v. McCauley*, 355 Mass. 554 (1969); *Commonwealth v. White*, 353 Mass. 409 (1967); *Commonwealth v. Kendrick*, 351 Mass. 203 (1966); *Commonwealth v. Baker*, 346 Mass. 107, 109 (1963).

74. The three cases reversed on constitutional error were *Commonwealth v. Carita*, 356 Mass. 132 (1969), *Commonwealth v. McKenna*, 355 Mass. 313 (1969), and *Commonwealth v. McCarthy*, 348 Mass. 7 (1964).

75. *McKenna*, 355 Mass. at 327.

76. *Id.*

77. Tom Long, *G. Joseph Tauro Was Chief Justice of SJC and Superior Court*, BOSTON GLOBE, Oct. 7, 1994, at 88.

brings none of this.”⁷⁸ Born and educated in Lynn, Massachusetts, the son of an immigrant shoemaker and his wife, Tauro attended Boston University Law School. Admitted to the bar in 1927, he returned home and slowly built a prosperous private practice. One of his clients was Volpe Construction, a relationship that eventually led him to Beacon Hill as newly elected Governor John A. Volpe’s legal counsel in 1961. Two years later, Tauro was appointed chief justice of the superior court, a position he held until he was elevated to the SJC.⁷⁹

Almost immediately after assuming his seat on the court, Chief Justice Tauro made it clear how wrong his critics were about his commitment to change. In a heated dissent, he blistered the SJC’s ancient policy of legislative deference: “I do not believe that we should look to the Legislature for change,” he wrote, “[t]o do so is a distortion of the concept of judicial review.”⁸⁰ A year later, Tauro assaulted the court’s “slavish adherence to stare decisis.”⁸¹ In criminal procedure, too, the court swept aside old rules and added new protections for the accused. From 1970 to 1996 the SJC reversed 157 (16.3%) of the 958 homicide cases it heard, including ten homicide cases whose determination rested on the Massachusetts Declaration of Rights.⁸²

With encouragement from Justice William Brennan, among others, Tauro and his successors, Edward Hennessey and Paul Liacos thrust the SJC into the forefront of the movement to supplement federal constitutional rights with state constitutional guarantees.⁸³ Chief Justice Hennessey publicly encouraged lawyers to make greater use of the Massachusetts Declaration of Rights to protect the accused, and in 1980 his colleague Justice Herbert Wilkins exulted: “[T]he Supreme Judicial Court currently appears more outspoken concerning the significance of rights under the

78. *Id.*

79. *Honorable G. Joseph Tauro*, 61 MASS. L.Q. 19 (1976).

80. *Lombardo v. D. F. Frangioso & Co.*, 359 Mass. 529, 536 (1971).

81. *United Factory Outlet, Inc. v. Jay’s Stores, Inc.*, 278 N.E.2d 716, 727 (Mass. 1972).

82. *See Commonwealth v. Lydon*, 413 Mass. 309 (1992); *Commonwealth v. Harris*, 409 Mass. 461 (1991); *Commonwealth v. Kater*, 409 Mass. 433 (1991); *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984); *Commonwealth v. Hodge*, 386 Mass. 165 (1982); *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648 (1980); *Commonwealth v. Funches*, 379 Mass. 283 (1979); *Commonwealth v. Soares*, 377 Mass. 461 (1979); *Commonwealth v. O’Neal (O’Neal II)*, 369 Mass. 242 (1975); *Commonwealth v. O’Neal (O’Neal I)*, 367 Mass. 440 (1975).

83. For Justice Brennan’s remarks lauding the trend toward state activism, see his dissent in *Michigan v. Mosley*, 423 U.S. 96 (1975), in which Brennan pointed out that “[e]ach State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.” *Id.* at 120; *see also* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Edward Hennessey was chief justice from 1976 to 1989 and Paul Liacos was chief justice from 1989 to 1996.

Declaration of Rights than at any other time in its history.”⁸⁴ The SJC often imposed higher state constitutional standards than required by the Supreme Court. Indeed, the SJC’s aggressive use of the state’s constitution opened the door to the abolition of capital punishment in Massachusetts.⁸⁵

In *O’Neal I*, the SJC concluded that the mandatory death penalty for murder committed in the course of rape violated the fundamental right to life protected by the Fourteenth Amendment. Chief Justice Tauro held that “life is a constitutionally protected fundamental right, the infringement upon which triggers strict scrutiny under the compelling state interest and least restrictive means test.”⁸⁶ Therefore, for the state to take a life it must show its action “is the least restrictive means toward furtherance of a compelling governmental end.”⁸⁷ Tauro brushed aside the Commonwealth’s arguments justifying the mandatory death penalty for rape-murder. Specifically, the state had not met its heavy burden of showing that “in pursuing its legitimate objectives, it has chosen means which do not unnecessarily impinge on the fundamental constitutional right to life.”⁸⁸ However, because the Commonwealth had not addressed the issue of whether the death penalty was the least restrictive means toward fulfilling a compelling state interest, Tauro ordered additional arguments be presented in June 1975.⁸⁹

Justices Edward Hennessey, Herbert Wilkins, and Benjamin Kaplan concurred with Tauro’s conclusion, but the three contended that a constitutional analysis of the death penalty had to take into account the prohibition against cruel or unusual punishment in Article 26 of the Massachusetts Declaration of Rights.⁹⁰ Wilkins distinguished Article 26 from the Eighth Amendment. He conceded that at the time of its adoption Article 26 was not intended to abolish capital punishment, but he asserted that its contemporary meaning was shaped by “the evolving standards of decency that

84. Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 890–91 (1980). Herbert is a son of past Chief Justice Raymond Wilkins.

85. See Alan Rogers, *An Anchor to the Windward: The Right of the Accused to an Impartial Jury in Massachusetts Capital Cases*, 33 SUFFOLK U. L. REV. 35 (1999) (citing state constitution court restricted discriminatory use of peremptory challenges).

86. *O’Neal I*, 327 N.E.2d at 668.

87. *Id.* Tauro noted that his analysis rested on the Fourteenth Amendment’s due process clause, but “that fundamental constitutional principles enshrined in our State Constitution dictate an identical result.” *Id.* at 668 n.5.

88. *Commonwealth v. O’Neal (O’Neal II)*, 339 N.E.2d 676, 688 (Mass. 1975).

89. *O’Neal I*, 367 Mass. at 450.

90. *Id.* at 451 (Wilkins, J., concurring).

mark the progress of a maturing society.”⁹¹ For that reason, Article 26 set higher standards than the Eighth Amendment.⁹²

Three days before Christmas, a bitterly divided court announced its decision in *O’Neal II*.⁹³ The five to two ruling held the mandatory death sentence for rape-murder violated the Massachusetts constitutional guarantee of due process and the prohibition against cruel or unusual punishment.⁹⁴ The decision left the state with no capital punishment for murder, because in *Furman v. Georgia*, the U.S. Supreme Court struck down capital punishment under the cruel and unusual punishments clause of the Eighth Amendment.⁹⁵ O’Neal’s case was remanded to the superior court where he was re-sentenced to life imprisonment. The chief justice pointed out that the SJC’s interpretation of the state constitution is final and cannot be challenged in the federal courts.⁹⁶ In concurring opinions, Justices Wilkins and Kaplan questioned whether any death penalty statute could be enacted that would not violate the Declarations of Rights prohibition against cruel or unusual punishment.⁹⁷

A state budget crisis and an increasingly loud clamor for reinstating the death penalty in Massachusetts following the Supreme Court’s reaffirmation of the death penalty in *Gregg v. Georgia*⁹⁸ led to Governor Michael Dukakis’s defeat in 1978 by his conservative Democrat rival Edward J. King. The legislature quickly passed a death penalty law that King signed in the winter of 1980.⁹⁹ District Attorney of Suffolk County Newman Flanagan immediately forced a test of its constitutionality.¹⁰⁰ The court concluded the law was contrary to Article 26. Its rejection of the district attorney’s complaint was based on two grounds: “[T]he death penalty [was] unacceptably cruel under contemporary standards of decency;” and “the death penalty [was] administered with unconstitutional arbitrariness and discrimination.”¹⁰¹

91. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

92. *Id.*

93. 369 Mass. 242 (1975).

94. *Id.* at 263–64. In *O’Neal II*, Tauro abandoned his least restrictive means test argument. He sharply attacked Justices Braucher and Reardon. *Id.* at 263–73. Richard F. McCarthy, co-editor of the *Massachusetts Law Quarterly*, noted Tauro’s “very pointed and acerbic rebuttal” and wondered, “if the limits of judicial restraint were not overstepped by the Chief Justice.” *Constitutional Law—Mandatory Death Penalty*, 61 MASS. L.Q. 46, 47 (1976).

95. 408 U.S. 238, 239–40 (1972).

96. *O’Neal II*, 369 Mass. at 267.

97. *Id.* at 276, 278.

98. 428 U.S. 153 (1976).

99. 1979 Mass. Acts 502–03.

100. District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648 (1980).

101. *Id.* at 649.

In 1984, the SJC was confronted once again with a capital punishment statute and once again found it unconstitutional.¹⁰² This time the court could not rely upon Article 26. On November 2, 1982, Massachusetts voters had rejected the court's Article 26 argument by adding the following language:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.¹⁰³

This constitutional amendment was adopted by the legislature and lame-duck Governor Edward King signed a new death penalty statute into law.¹⁰⁴ Two months after the law took effect, three assailants shot thirty-six year-old state trooper George Hanna to death in the parking lot of J&S Liquors on Route 20 in Auburn. At pretrial hearings, the Commonwealth asked that the constitutionality of the death penalty statute be ruled upon before the case came to trial.¹⁰⁵

Speaking for a slim four to three majority, Justice Liacos acknowledged that the amendment "now prevents this court from construing any provision of the Massachusetts Constitution, including art. 26 itself, as forbidding the imposition of the punishment of death."¹⁰⁶ But Liacos quickly added: "We do not, however, see anything in the new language of art. 26 which prevents us from invalidating a particular death penalty statute under the Massachusetts Constitution on a ground other than that the imposition of the punishment of death is forbidden."¹⁰⁷ In fact, the court found the 1982 death penalty statute violated Article 12 of the Declaration of Rights of the Massachusetts Constitution, because it provided that only those defendants who pleaded not guilty and demanded a jury trial were at risk of being put to death.¹⁰⁸ Those who pleaded guilty avoided the death penalty. "The inevitable consequence," wrote Justice Liacos, "is that de-

102. See *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984) (holding that the death penalty statute impermissibly burdens state constitutional rights against self-incrimination and jury trial).

103. MASS. CONST. pt. I, art. 26; amend. art. 116.

104. 1982 Mass. Acts. ch. 554, § 8.

105. *Colon-Cruz*, 393 Mass. at 152–53.

106. *Id.* at 158.

107. *Id.*

108. *Id.* at 163.

defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury.”¹⁰⁹

For more than two centuries the Massachusetts Supreme Judicial Court reviewed and occasionally reversed murder convictions, because it was committed to the ideal that it was the court’s duty to permit a person “to quibble for his life.”¹¹⁰ Two hundred years after its constitutional establishment, the court concluded that however carefully tailored, capital jurisprudence could not guarantee justice. Measured by the Declaration of Rights the death penalty was not constitutionally tolerable. The death penalty is impermissibly cruel and repugnant to contemporary standards of decency.

109. *Id.* Liacos cited *Letters v. Commonwealth*, 346 Mass. 403 (1963), in which the court found trial judge Paul Reardon—who now sat on the SJC—had unconstitutionally coerced two defendants into pleading guilty. *Colon-Cruz*, 393 Mass. at 168. Chief Justice Hennessey cited *United States v. Jackson*, 390 U.S. 570 (1968), in which the Supreme Court had found unconstitutional a similar statute. *Colon-Cruz*, 393 Mass. at 173 (Hennessey, C.J., concurring).

110. THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT 258 (Boston, Ticknor & Fields 1861).