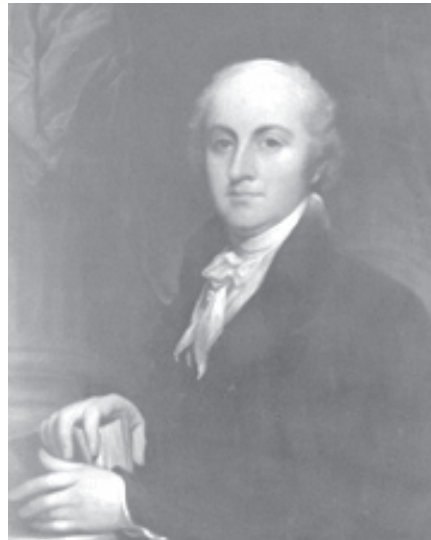


**State Prosecutor Attorney  
General James Sullivan**

Sullivan served on the Supreme Judicial Court from 1776 to 1782. From 1790 to 1807, he was the Republican attorney general of Massachusetts. He served as governor between 1807 and 1808 but died in office on December 10, 1808, aged sixty-four.

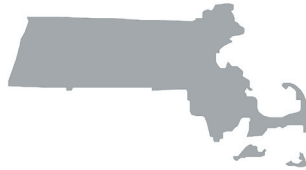
**Defense Attorney Christopher  
Gore**

A member of the Massachusetts Constitutional Convention, Gore served as a representative in the General Court from 1788-89, before being named U.S. Attorney for the District of Massachusetts (1789-1796). He served as Commissioner to England (1796-1803). Upon his return he served again in the Massachusetts House and Senate before winning a one-year term as governor in 1809.



# Politics, Honor, and Self-Defense in Post-Revolutionary Boston: The 1806 Manslaughter Trial of Thomas Selfridge

JACK TAGER



**Editor's Introduction:** *In 1806 Boston a political dispute between a Federalist lawyer and a prominent Democratic Republican leader degenerated into a question of an affront to personal honor, resulting in a bloody confrontation at one of the town's busiest commercial streets. The manslaughter trial that followed set a far-reaching standard of legal principle in murder and manslaughter cases relating to the self-defense plea. This case was cited well into the late nineteenth century. Besides its obvious political implications, the trial became a mirror of the times. It illustrates the legacy and cultural traditions of the American Revolution relating to the notion of the right to bear arms and the frontier expression of individuality and personal honor. Dr. Tager is Emeritus Professor of American History at the University of Massachusetts at Amherst.*

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The killing of Charles Austin on August 4, 1806, in Boston resulted from a political quarrel between his father, Benjamin, a Democratic Republican, and a Federalist lawyer, Thomas Selfridge. Noted legal scholar John D. Lawson argues that the shooting:

caused such excitement and passion among [Boston] citizens as few homicides have since done either in this country or in Europe. The men belonged to different political parties; the killing was the result of political temper and the victim was an innocent one, for it was the alleged sins of the father, which in this case were visited upon the son.<sup>1</sup>

This groundbreaking case, fully detailed in the trial record, became the legal authority for the plea of self-defense and was cited well into the late nineteenth century.<sup>2</sup> The political and cultural milieu in which the trial occurred, specifically the legacy of the American Revolution and popular notions of honor, had a direct bearing on the case.

In the first decade of the nineteenth century, the town of Boston underwent dynamic physical improvements and flourishing commercial growth. The focus of expansion was no longer in the waterfront areas but in the newly developing Tremont/Park Square/Beacon Hill section. A heady population growth of 25,000 in 1800, up from 18,000 in 1790, put severe pressure on living and commercial space. New commercial structures and magisterial architectural designs by architects such as Charles Bulfinch transformed the landscape. Bulfinch built mansions for the rich, such as Federalist leader Harrison Gray Otis, and warehouses and retail buildings for other merchants, in addition to completing the new state house in 1798. Nonetheless, Boston was still a pedestrian town. Somewhat isolated from the mainland on a narrow peninsula into Boston Harbor, it was shaped, wrote historian Thomas H. O'Connor, like a "small, half-inflated balloon."<sup>3</sup> It was in this cramped community, in which every person of means knew or was acquainted with everyone else of the same class, that a feud arose that ended in violence.

Benjamin Austin, a well-to-do lawyer and merchant, chairman of the Democratic Republican Party of Boston, gave a political dinner on July 4. When the bill was delivered from the caterer, a tavern keeper, Austin

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<sup>1</sup> John D. Lawson, *American State Trials: A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to 1920*, (Wilmington, Delaware, 1972), p. 544.

<sup>2</sup> *Trial of Thomas O. Selfridge, attorney at law, before the Hon. Isaac Parker, Esquire, for killing Charles Austin, on the public exchange in Boston, August 4<sup>th</sup>, 1806* (Boston, 1806), hereafter *Selfridge*. This trial record is on a poor microform with many pages impossible to read. When necessary I have used the full transcribed version of the trial in Lawson, *American State Trials*.

<sup>3</sup> Thomas H. O'Connor, *The Hub: Boston Past and Present* (Boston: Northeastern University Press, 2001), p. 74; See also, Lawrence W. Kennedy, *Planning the City Upon a Hill: Boston Since 1630* (Amherst, MA: University of Massachusetts Press, 1992).

thought it too high and refused to pay it. The caterer hired lawyer Thomas Selfridge, a Federalist from the rival political party, to bring suit against the Democrats, but subsequently settled his dispute with Austin without Selfridge's knowledge. This placed Selfridge in an awkward position, especially when friends alleged that Austin was circulating a story that Selfridge had sought out the caterer and "instigated" the lawsuit for the sole purpose of embarrassing the Democratic Party. Selfridge felt this was a smear on his honor and professional reputation. He wrote a letter to Austin, delivered by his friend Thomas Welsh, asking that this statement be publicly retracted. Austin denied ever making such a statement, though he said an unnamed lawyer told him about the charge. Selfridge "was not content" with Austin's reply, and sent Welsh back to Austin to demand a published retraction.<sup>4</sup> Austin refused this and a subsequent demand.

After discussing the matter with Welsh, Selfridge concluded he had three courses of action: "prosecution, chastisement or posting." The first choice, a lawsuit, would take years and few would remember the circumstances. Personal chastisement was out of the question "on account of his age and infirmity." Posting was the only choice.<sup>5</sup> Selfridge's ad in the *Boston Gazette* read:

Benjamin Austin, loan officer, having acknowledged that he has circulated an infamous falsehood concerning my professional conduct in a certain cause, and having refused to give the satisfaction due to a gentleman in similar cases. I hereby publish said Austin as a coward, a liar, and a scoundrel, and if said Austin has the effrontery to deny any part of the charge, he shall be silenced by the most irrefragable proofs.<sup>6</sup>

A furious Austin replied with his own posting, dubbing it "insolent" and "false," asking anyone who wanted to know the facts of the case to address him.

On the morning of August 4, Selfridge was in his office when his friend Henry Cabot informed him that Austin had hired someone to thrash him. Around one o'clock, Selfridge, with a pistol in his pocket, proceeded down State Street toward the area called the Public Exchange. Charles Austin, Benjamin Austin's eighteen-year-old son, confronted him on the street carrying a heavy cane. What happened next was the subject of the

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<sup>4</sup> Lawson, pp. 544-6.

<sup>5</sup> *Ibid.*, p. 546.

<sup>6</sup> *Boston Gazette*, August 4, 1806.

trial. Selfridge maintained that young Austin struck him with the cane, and he fired in self-defense. Many eyewitnesses observed the scene, but there was disagreement over whether Selfridge shot first or after being hit by the cane. Was it self-defense or manslaughter? The trial would determine this crucial point.

The Grand Jury indicted Selfridge on December 2, 1806. The manslaughter bill charged that Selfridge “being moved and seduced by the devil . . . did feloniously, willfully, and of the fury of his mind, did kill and slay” Austin by shooting him with a pistol.<sup>7</sup> Selfridge pleaded not guilty and posted a \$2,000 bail bond. The trial began on December 23, with four justices opening the proceedings: Chief Justice Theophilus Parsons, and judges Theodore Sedgewick, Samuel Sewall, and Isaac Parker. Judge Parsons explained to the jury the difference between murder and manslaughter:

A man may repel force by force, in defense of his person, against anyone who manifestly intends . . . to kill him . . . and if he kills him in so doing, it is *justifiable self-defense*. But a bare fear . . . unaccompanied by an open act, indicative of such an intention, will not warrant him in killing. There must be actual danger at the time . . . otherwise the killing of the assailant will not be *justifiable homicide*.<sup>8</sup>

In addition, he explained that if one believes the attacking person wants to kill you, but afterwards it turns out you were mistaken, it is not murder, but either manslaughter or “*excusable homicide*.”

Another important consideration of the difference between first-degree murder and manslaughter is that the latter is done without malice aforethought or premeditation. It is usually the result of some sort of sudden passion occasioned by strong provocation.<sup>9</sup> Because Selfridge’s was a manslaughter case and not a first-degree murder trial, and because of the press of other legal business, three of the justices excused themselves and only Judge Parker presided over the proceedings.<sup>10</sup>

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<sup>7</sup> *Selfridge*, p. 8.

<sup>8</sup> *Ibid.*, p. 8.

<sup>9</sup> *Ibid.*, pp. 6-7.

<sup>10</sup> The number of presiding justices varied over the years: five in 1782, seven in 1800, five in 1804, five in 1857, four in 1840, five in 1848, six in 1862, and finally seven in 1873 until the present. Alan J. Dimond, “Transfer of Cases from the Superior Judicial Court to the Superior Court,” *Massachusetts Legal History* Vol. 6 (2000): pp. 87-97. In 1892, because of its rising caseloads, the Massachusetts

Justice Isaac Parker, at age thirty-eight, was the youngest judge of the Supreme Judicial Court. Born in Boston on June 17, 1768, Isaac Parker aspired to a law career from an early age. He went to Harvard in 1786, was admitted to the bar in 1789, and entered politics while maintaining a law practice. He became a Massachusetts state representative from 1791 to 1795, and represented the Commonwealth in the US Congress from 1797 to 1799.<sup>11</sup> In the memorial on his death in 1830, Chief Justice Lemuel Shaw specifically noted Parker's deft handling of the Selfridge case, which:

presented many very delicate points in the law of homicide... and the parties held high station in society, and a prominent rank in the opposite political parties, and the prejudices and passions, connected with the prosecution were not a little inflamed by the highly excited party politics of the day.<sup>12</sup>

Shaw was correct. Parker played a central role in helping courts define the parameters of the self-defense plea.

After the reading of the indictment, Parker's first action was to impanel the jury. Paul Revere was seventy-two in 1806 when chosen as the first juror in the Thomas Selfridge manslaughter trial. No longer the indefatigable warrior who warned the Revolutionaries of the coming of the Red Coats in 1775, he was, in 1806, a prosperous businessman and metal manufacturer. Still, he carried his experiences in the American Revolution with him to his

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Supreme Judicial Court transferred all civil and criminal trials to Superior and District courts. For the origins of the Massachusetts Supreme Judicial Court see, Edgar Bellfontaine and R. Constantine Newman, "The Early History of the Massachusetts Supreme Judicial Court," *Supreme Judicial Court Historical Society Journal* Vol. 2 (1996): pp. 95-121.

<sup>11</sup> For a jurist who served as leader of the Commonwealth's highest court for fourteen years, there is surprisingly little written. There is no biography, and even the most recent biographical compilation of noteworthy Americans omits him. The *American National Biography* of 1999 includes Isaac C. Parker, a district court judge from Arkansas dubbed the "hanging judge," but Chief Justice Parker of Massachusetts is not to be found. Governor Caleb Strong appointed Parker to the Massachusetts Supreme Judicial Court as an associate justice in 1806. Because of his reputation for impartiality and his fame from the Selfridge case, he became chief justice in 1814. In 1816 he became the first Royall Professor of Law at Harvard, where he was credited for establishing the law school. He lectured there while attending to his judicial duties. He died on May 26, 1830. For biographical information see William T. Davis, *Bench and Bar of the Commonwealth of Massachusetts, 1822-1907* (New York: Da Capo Reprint 1974), I, p. 244. *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1934), Vol. 14, pp. 224-5.

<sup>12</sup> A Sketch of the Life and Character of the Hon. Isaac Parker, Late Chief Justice of this Court, *An Address delivered before the Bar of Berkshire, by Lemuel Shaw, C. J., September term 1830, at Lenox* ([www.massreports.com/memorials/26ma576.htm](http://www.massreports.com/memorials/26ma576.htm)), p. 8. Shaw also provided a detailed biography of Parker.

juror's seat, including views about the right to bear arms. No information is available as to the make up of the other eleven men chosen as jurors, yet it is reasonable to assume that the impact of the American Revolution still weighed heavily in their thoughts. Any forty-year-old on the jury was a boy of ten at the time of the Revolution, old enough to be fully indoctrinated as to its worthiness. Any fifty-year-old probably served in some capacity either as fighter or on the home front during the long war years. The Selfridge trial raised both political and personal issues for these jury members, which affected their verdict.

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The nation had divided into two political parties after the end of George Washington's presidency in 1797. John Adams of Massachusetts, who succeeded Washington as President, and his colleague Alexander Hamilton, forged a national party, the Federalist Party, which drew its strength from business, financial, and manufacturing interests. Thomas Jefferson challenged the Federalists by creating a party, called the Democratic Republicans that appealed to farmers, artisans, workingmen, and small merchants.

After brutal political infighting, Jefferson emerged victorious in 1800, wresting the presidency from Adams. Jefferson's victory on the national level did little to challenge Federalist strength in New England. They were particularly strong in Massachusetts until after the War of 1812.<sup>13</sup> The death of Democratic Republican Charles Austin at the hands of Federalist Thomas Selfridge exacerbated tensions between the two parties. The judge, the prosecution, and the defense all worried that political bias would affect the jury's decision and worked hard during the trial to curb partisan tendencies.

The prevailing ethos also affected the mindset of the jurors. The citizens of the new nation had a history of resorting to violence to uphold their honor or to defend their political beliefs. This pre-industrial value of preserving and defending one's family name, or heritage, or personal status from insult was part of the growth of a frontier nation. The nation's

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<sup>13</sup> The best single account is Ronald P. Formisano, *The Transformation of Political Culture: Massachusetts Parties, 1790's-1840's* (New York: Oxford University Press, 1983). See also, Matthew Crocker, *The Magic of the Many: Josiah Quincy and the Rise of Mass politics in Boston, 1800-1830* (Amherst, MA: University of Massachusetts Press, 1999); Conrad Vedick Wright and Kathryn Viens, eds., *Entrepreneurs: The Boston Business Community, 1700-1850* (Boston: Massachusetts Historical Society, 1997).



first recorded duel took place in Plymouth, Massachusetts, in 1621 and, nearly two centuries later, recourse to violence in response to a perceived affront was so commonplace that both George Washington and John Adams issued presidential statements condemning the practice.

Efforts to promote societal stability by making dueling socially inappropriate proved futile when the former vice president of the United States, Aaron Burr, shot and killed the former secretary of the Treasury, Alexander Hamilton. This famous duel took place in July 1804, just two years prior to the Selfridge manslaughter trial, and jurors no doubt vividly recalled it. Dueling was officially illegal in Massachusetts by 1806; negative public opinion resulted in the decline of the practice in the North, while it was not unheard of in the South. Dueling continued however, in the South well into the nineteenth century.<sup>14</sup> The Selfridge trial took place in a new, relatively raw nation, forged from a bloody war for independence. Political beliefs were worth fighting for and defense of personal honor symbolized an individual's place in society. The Selfridge manslaughter trial, its participants, and the public at large could hardly ignore the pervasive values of the young republic.

The state prosecutor in the trial was Attorney General James Sullivan, a Democratic Republican and a former Revolutionary War leader. Sullivan served on the Supreme Judicial Court from 1776 to 1782, was appointed attorney general in 1790, and became governor of the Commonwealth in 1807.<sup>15</sup> Also assisting for the state was the Solicitor General, Daniel Davis, another Democratic Republican, who had served in state government.<sup>16</sup> Making up the defense were Federalists Christopher Gore, a former federal district attorney and future governor and U.S. Senator; and Samuel Dexter, a former U.S. representative and senator, secretary of war, and secretary of the Treasury.<sup>17</sup>

The state began its case with Solicitor General Davis defining for the jury the difference between murder, manslaughter, and self-defense. He read at length from authorities of English Common Law, William Blackstone

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<sup>14</sup> The major work on dueling and honor is Joanne Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2001). For other important studies see Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vintage, 2002); Thomas Fleming, *Duel: Alexander Hamilton, Aaron Burr and the Future of America* (New York: Basic Books, 2000); Roger G. Kennedy, *Burr, Hamilton and Jefferson: A Study in Character* (New York: Oxford University Press, 2000); Dick Steward, *Duels and the Roots of Violence in Missouri* (Columbia: University of Missouri Press, 2000).

<sup>15</sup> *National Cyclopedia of American Biography* (New York: J. T. White, 1898-1984), Vol. I, p. 110.

<sup>16</sup> Davis, *Bench and Bar*, Vol. I, p. 244.

<sup>17</sup> *National Cyclopedia*, Vol. I, p. 112 and Vol. II, p. 6.



and Edward Coke, to buttress his explanation. Davis noted that Selfridge “deliberately” loaded the pistol in his office. He then walked down State Street “with his hands in his pockets or behind him, with probably, an intent to conceal the instrument he had in his pocket.” Davis suggested that Selfridge “was in possession of his mind,” had concocted the quarrel for political reasons, and was not defending himself but was purposely prepared to kill Benjamin Austin or his intermediary. His narration of events had Selfridge shooting young Austin before any blows fell upon him.

The state’s first witness was a doctor who certified the death of young Austin. The second witness, James Richardson, an acquaintance of the accused, was called to bring into evidence the substance of the controversy between Selfridge and the Austins.

Under the prodding of the prosecution, Richardson said Selfridge told him about the controversy on the morning of August 4. Richardson detailed the facts about the quarrel, including the subsequent postings in the newspapers. Furthermore, Richardson testified:

Mr. Selfridge appeared to have some intimation that he should be attacked. He observed that he did not expect old Mr. Austin would attack him, but some bully employed by him . . . that every man who knew him, knew he [Selfridge] was no man for bullying or fisticuffs.<sup>18</sup>

On cross-examination, the defense took the opportunity to bring up Selfridge’s fragile health, a point repeated throughout the trial. “He was my classmate at College,” said Richardson. “He never was robust or hearty, and he didn’t mix in manly or athletic exercises.”<sup>19</sup> The defense intimated that Selfridge’s impaired physical condition justified the carrying of a pistol for self-protection.

The state then produced four witnesses who swore that Selfridge fired his pistol before being struck by Austin’s cane. The next witness was an acquaintance of Selfridge, who also saw him in his office on that fateful day. Ben Whitman said he and the accused discussed the controversy, and Selfridge said words to the effect: “I understand he has hired or procured some one or some bully to attack or to flog me.” Whitman told the court that he then left the office and walked up the street:

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<sup>18</sup> Witness Richardson, *Selfridge*, pp. 10-14; Lawson, *American State Trials*, p. 569.

<sup>19</sup> *Ibid.*

I heard the report of a pistol. Turning myself instantly round, I saw a person in the act of striking a blow with a cane. The cane was elevated, but whether striking, or recovering from a blow struck, [I] cannot say positively . . . Saw a number of blows struck at him [Selfridge] with a cane; I think as many as four. They grew fainter in succession. Saw the deceased fall.

He said he encountered Selfridge two hours later with a wound on his head, and another on his arm, and his hat “was fractured in the front part.”<sup>20</sup>

State Street shopkeeper John M. Lane swore he witnessed the entire event while standing in front of his store. Selfridge fired first at Austin, said Lane, and Austin “turned round instantly, and gave the defendant several strokes before he fell.” He claimed to have seen “the defendant throw the pistol at the deceased, while he was striking.”<sup>21</sup> Another bystander, Edward Home, corroborated Lane’s testimony, as did the state’s final witness, Ichabod Frost, who was positioned across the street from the previous two observers. On cross-examination, however, Frost admitted that he did not see either party before he heard the shot:

I turned toward them. The blows with the stick and the throwing or striking with the pistol seemed to be at the same instant. . . . When I first saw the defendant, after the report of the pistol, his arm was lifted and aiming a blow with the pistol at the deceased, who was striking with his stick at the same moment.<sup>22</sup>

At this point the state rested, and the defense began its opening. Christopher Gore, the defense attorney, began by alluding to the notoriety of the case and stated feeling “apprehensive” when:

I call to mind the cruel, justifiable and illegal conduct which has been resorted to through the newspapers, to influence the judgment, to inflame the passions, and cause such an agitation through the whole community, that its effect might be felt even

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<sup>20</sup> Witness Whitman, *Selfridge*, p. 34; Lawson, p. 569.

<sup>21</sup> Lawson, p. 570.

<sup>22</sup> *Ibid.*, p. 571.

here, where the rights of all require that justice assisted by the calmest deliberation, should alone preside.<sup>23</sup>

The main point for the jury to consider, and the heart of the defense, was the principle that “every individual has not only the right, but is in duty bound to defend his own life at every hazard and expense of whom assaults it . . . It follows therefore that society acknowledges and admits, that every man is bound and ordered to protect his own life, when the government cannot do it for him.” As an example, he extolled the jury to remember that it has always been the case that men have the right to take “the life of another who shall attempt to enter his house at night.” Gore argued it was evident that one had the right to kill when protecting one’s own life.<sup>24</sup>

Gore then discoursed at great length on the right to bear arms so recently enshrined in the Bill of Rights. He also maintained that carrying a weapon in and of itself had no bearing on unlawful acts or intentions. “There is no law written or unwritten, no part of the statute or common law of our country which denies to a man the right of possessing or wearing any kind of arms.” Gore tried to preempt the entire question of why Selfridge was armed through posing the hypothetical case of an armed man on his way to fight an unlawful duel. On his way to the appointed place, he is attacked and kills his assailant. Under the law, it does not matter that he carried a weapon for the unlawful act of dueling. All that matters is that he defended himself from attack and, hence, the killing of his aggressor is justifiable:

If then you shall be satisfied that the homicide committed was either justifiable, or excusable self defense, all presumptions which may arise from Mr. Selfridge’s having a pistol with him, are totally destroyed, for presumptions are resorted to only in the absence of express testimony.<sup>25</sup>

To bolster his interpretation, Gore then cited several legal authorities. After this lengthy legal peroration, the defense called its witnesses.

The defense brought forward twenty witnesses, many of whom were present at the shooting. John Bailey, a shopkeeper’s assistant, saw young Austin standing in front of the shop with a friend, “a stick in his hand of

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<sup>23</sup> Defense opening quoted in Lawson, p. 572.

<sup>24</sup> Lawson, pp. 574-5.

<sup>25</sup> *Ibid.*, pp. 578-9.

an unusual size.” Bailey remarked to a person in the shop “we shall have a caper”. He described Selfridge approaching from down the street; as he came closer,

Austin turned and went towards the defendant with his cane raised up.... The cane was uplifted, and actually descending to give a blow at the time the pistol was discharged. The blow was not struck till after the pistol was fired; the first blow was a long blow, which staggered the defendant. The deceased struck four or five blows after the first.<sup>26</sup>

Facing a flurry of blows, Selfridge tried to strike back with his pistol.

Zadock French told of walking up State Street when he “heard a person say there was to be a scuffle.” [He] “recollected the piece in the newspaper, and stopped . . . Austin struck the defendant a blow on the head, and the pistol was fired at the same instant.”<sup>27</sup> Another witness, Richard Edwards, also standing on State Street claimed, “At the instant the pistol was discharged, I saw the cane elevated, but am not able to say whether it was descending to strike a blow, or recovering from striking one. After the pistol was discharged, the deceased struck several blows with the cane.”<sup>28</sup> Another witness saw only the aftermath of the events.

The next witness, William Fales, was a close friend of Austin and was with him at the exact moment of the confrontation. He acknowledged, however, “I am not able to say whether a blow was actually given before the pistol was discharged or not.” He testified to Austin’s intentions of that morning and said he could do nothing to avenge his father while he was a student at college but would do so when he graduated. Fales swore he “did not hear him in the morning express any expectations of an encounter.”<sup>29</sup> In this instance the defense made use of one of Austin’s friends, who would not be kindly towards the accused, to plant the notion that no one could tell for sure what happened first.

Another friend of Austin’s, Horatio Bass, corroborated Fales’s testimony: “Selfridge took out his pistol and shot at Austin - at the same instant Austin was striking at Selfridge with his cane. Which was first, the blow from the cane or the discharge of the pistol, is impossible for me

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<sup>26</sup> Ibid., p. 586.

<sup>27</sup> Ibid., p. 587.

<sup>28</sup> Ibid, p. 588.

<sup>29</sup> Ibid, p. 589.

to say.” Witness John Irving agreed: “The first blow and the firing of the pistol seemed to be at the same instant.”<sup>30</sup>

The defense then shifted tactics and presented Austin as the aggressor. A cane maker - from whom Austin purchased walking sticks weekly - testified that in the morning Austin bought a heavy cane from him, asking if it was a strong one. Austin usually bought smaller, lighter staffs. Lewis Glover testified that he heard rumors that there was to be an altercation that morning and went to the area to witness the event. Glover was the most important witness for the defense because he claimed that Austin struck the first blow:

When the deceased came up to Mr. Selfridge he struck him on his hat . . . [W]hile he was aiming his second blow, Selfridge took his hands from behind him, presented a pistol and fired it . . . am confident there was one blow before the pistol was discharged, and that it was a violent one, sufficient to knock a man down that had no hat on.<sup>31</sup>

Judge Parker intervened and asked Glover if he was positive the blow was struck before the pistol fired, and the witness reiterated this declaration. Other witnesses followed testifying to Selfridge’s character, health, and the reasons for the quarrel. With no more witnesses, the defense commenced its closing arguments.

Defense attorney Gore told the jury: “This case will depend on the law of justifiable homicide.”<sup>32</sup> He went on to cite legal precedent from several past cases. He exhorted the jurors on the issue of intent: “If you are of opinion that there was no felonious intent on the part of Mr. Selfridge, at that time, then you cannot find him guilty of manslaughter, because manslaughter must be committed with felonious intent.”<sup>33</sup> He impeached the state’s witnesses arguing the defense proved that the accused fired after he was struck. Selfridge defended himself from “a person attacking like a wild beast,” who would have been killed had he not fired.<sup>34</sup> Gore reminded jurors that Selfridge did not run away after the deed, but stood his ground and readily admitted what he had done. Defense witnesses proved that Selfridge had legal business on State Street that day, and that

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<sup>30</sup> Ibid, p. 589.

<sup>31</sup> Ibid, p. 590.

<sup>32</sup> Gore’s closing for the defense, in *Selfridge*, p. 101.

<sup>33</sup> Ibid., p. 105.

<sup>34</sup> Ibid., p. 110.

he walked in his normal manner with his hands behind him, and not in his pockets. “According to the number of witnesses, you can have no doubt that the defendant, instead of going to meet an affray, was going down to [Ex]‘Change on special business.”<sup>35</sup>

He also reminded jurors that Lewis Glover saw Charles Austin hit the defendant before the shot was fired, and that another witness saw the cane descending upon Selfridge and then the pistol was fired. “You cannot reject” this testimony, said Gore. “There is corroboration as strong as possible of this fact, that a blow was given before the discharge of the pistol.” Even the state’s witness and a friend of the deceased, William Fales, told you “candidly that he cannot tell which was first, the blow, or the firing of the pistol.”<sup>36</sup>

Gore then turned the jury’s attention to the notion of self-defense. He informed the jury that it was important to consider that Selfridge did not know Charles Austin would attack him, only that someone had been hired to beat him:

He had it not then in his power to avail himself of the protection of the law by taking security, for he did not know by whom he was to be assailed. It became then, as the laws of his country could not afford him protection, a duty in him to protect his own life by all means in his power.

Hit by a hard blow to the head, he was saved by his hat and proceeded to protect himself: “This is the defense we make of the charge against Mr. Selfridge. This we contend to be the legal and proper one, of justifiable homicide to preserve his own life . . . This, Gentlemen, is I believe the whole of our story.”<sup>37</sup>

It might have been better if it *had* been the entire tale. Defense attorney Samuel Dexter rose to continue the argument for the defendant, broaching ideas that had to do more with community values than with evidence presented in the case. At the time of the trial, Dexter was fifty-five and a very successful lawyer. He exhorted the jury to avoid any partisan political considerations in their deliberations. He warned that “when every man among us belongs to one party or the other,” it is important to “examine your hearts, and ascertain that you do not come here with partial minds.”<sup>38</sup>

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<sup>35</sup> Gore’s closing in Lawson, in *American State Trials*, p. 627.

<sup>36</sup> *Ibid.*, pp. 629-631.

<sup>37</sup> *Ibid.*, pp. 633-35.

<sup>38</sup> Dexter’s closing for the defense, Lawson, *American State Trials*, pp. 637.

Dexter's final argument for the defense became the most controversial because it overrode the law itself. Paying tribute to the unwritten values of his society, Dexter asked the jury to hearken to the law of nature. The right of self-defense was not the product of civil society. "It is founded on the law of nature, which is of higher authority than any human institution," said Dexter, as he invoked divine and natural law. In his view, these superseded man-made laws and undergirded Western Civilization and were imbedded in the Puritan founding of the Massachusetts Bay Colony. By contrast, common law emanated out of mankind's attempt to understand God's or nature's way to best rule themselves. Later this notion of a "higher law" became the credo of the abolitionists who declared the Constitution unlawful because it condoned slavery, which was against God's law. Dexter fed into the commonly held beliefs of the jurors, so recently ascribed to in the Declaration of Independence, which declared man's "unalienable rights" given by God and not Parliament. One of these rights was, Dexter said, to protect one's honor.

When a man's standing in society is subject to insult, Dexter said, "he is bound to meet it like a man, to summon all the energies of the soul, rise above ordinary maxims, poise himself on his own magnanimity, and hold himself responsible only to his God." Of course, we must respect the laws of this country, "yet should I ever be driven to that impassable point, where degradation and disgrace begin, may this arm shrink palsied from its socket, if I fail to defend my own honor." He then called on jurors to remember the Golden Rule. "I call on you then to do to him, as in similar circumstances, you would expect others to do to you; change situations for a moment, and ask yourselves, what you would have done, if attacked as he was."<sup>39</sup> Personal honor was at stake: "by beating me he must disgrace me. This alone destroys all my prospects, all my happiness and all my usefulness. Where shall I fly when thus rendered contemptible?"<sup>40</sup> With this rhetorical flourish, Dexter closed for the defense.

Attorney General James Sullivan rebuked the defense for ignoring the obvious and attempted to get the jury to consider improper and irrelevant factors. He warned the jury against being affected by the pleas of the defense to "divert your attention from the justness of the case by an appeal to the feebleness of his [Selfridge's] health and the weakness of his person."<sup>41</sup> This harping on the defendant's physical debilitation counted for nothing in the face of the shooting of Austin. Sullivan treated with contempt the

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<sup>39</sup> *Ibid.*, p. 652.

<sup>40</sup> *Ibid.*, p. 653.

<sup>41</sup> Sullivan closing for the Commonwealth in Lawson, p. 655.



defense attempt to bulwark its case by resorting to the credo of Selfridge defending his honor.

Sullivan cautioned jurors not to imagine themselves in Selfridge's position. Honor was not a plea accepted by the principles of law, and he forcefully rejected the concept of the "higher law." No one was above the law, he argued. "All men are bound to surrender their natural rights upon entering civil society, and the laws become the guardians of the equal rights of all men. Why are duels criminal if the men who engage in them have this privilege of maintaining their own honor?" Sullivan lampooned defense attorney Dexter's metaphor of his palsied arm falling off if he did not defend his honor. "I would rather that he should retain the use of his limbs." The misguided defense notion of protecting one's honor no matter what, "would countenance all the duels that have been fought in the world, and render unavailing all the laws."<sup>42</sup>

Then he downplayed Selfridge's so-called insult to his honor. Even if the prisoner's character and reputation were injured, did he have some special privileges that allowed him to go beyond the law to redress his grievances? Just because he was a lawyer he possessed no more rights than any other person. "If it should appear that the defendant went out armed with a deadly weapon, with the expectation of meeting the elder Mr. Austin, and did thereupon kill the son, it would be such malice as to constitute the crime of manslaughter at least."<sup>43</sup>

Sullivan surprisingly conceded that there was conflicting eyewitness testimony to what occurred and remarked, "I shall not . . . insist that the pistol was fired before the assault was made." The main issue, however, was the nature of the attack. A man is allowed to defend himself by killing his attacker if he faced a "felonious," potentially deadly assault, but not if he faced a "simple" assault. If someone attacked a man with a stick that was not likely to kill him, the law does not allow the use of deadly force. "Laying aside every suspicion which may arise from these circumstances, yet must we inquire, whether it was lawful for him to be there with a loaded pistol concealed in his pocket?"<sup>44</sup>

Sullivan asked jurors to consider the problem of how to deal with an attack they knew was coming. He argued that one would not ordinarily conceal a weapon, but expose it to ward off attackers. "You would carry it openly in your hand and by such manly, open conduct, would preserve yourselves from any assault." Contrarily, Selfridge prepared himself

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<sup>42</sup> Ibid., p. 665.

<sup>43</sup> Ibid., p. 669.

<sup>44</sup> Ibid., p. 675.

beforehand, concealing the weapon in order to shoot anybody who might assault him. “It is apparent that he was determined on shooting any person who might assault him in any manner, however lightly, on the Exchange.” Moreover, Sullivan queried, “ought not the defendant in this case to have made some attempt to retreat, or have called for help before he employed his deadly weapon in shooting the deceased? . . . By this it appears clearly that the defendant expected to be attacked with a whip or a cane, and that he had determined to kill anyone who assaulted him in any manner.”<sup>45</sup> He must have known, particularly as a lawyer, that a whipping or beating did not constitute a felonious assault. Thus he had no reason to fear a deadly attack. Adding to the prisoner’s culpability was the fact that he provoked the quarrel in the first place.

Selfridge, according to Sullivan, knowingly provoked the quarrel by publicly calling Benjamin Austin a liar, scoundrel, and coward. “Why was it necessary to use the epithet coward, unless he meant to provoke him up to an act of violence, that he might have the pretext to kill him?” “In this case Selfridge had the whole state to protect him, even in a quarrel he provoked himself.” He ended “it is your duty and you are bound by your oath to return a verdict that he is guilty.”<sup>46</sup> With that, the state rested its case, and Justice Parker charged the jury.

The notoriety of this case, and Parker’s handling of the proceedings, enhanced his reputation and did much to help him become chief justice in 1814. In his charge, Parker confided to the jury that manslaughter “is not defined by our statute, but its punishment is by it provided for.” That is, the concept comes from common law and the various “approved” legal authorities that commented on it. Parker defined it for the jury: “The crime of manslaughter, according to these authorities, consists in the unlawful and willful killing of a reasonable being, without malice express or implied, and without any justification or excuse.” However, killing of a person under some circumstances “is not only excusable, but justifiable, is proved by the very terms of this definition.” The jury was told that though Biblical and religious codes forbade killing, there is a “common understanding” among mankind, based on the principle of self-preservation, that supplied “exceptions” to these codes.<sup>47</sup> Killing without malice “caused by a sudden passion and heat of blood” is manslaughter, but is excusable and justifiable in defense of one’s life, in the cause of public justice, and by obedience to laws.

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<sup>45</sup> Sullivan, Lawson, p. 677.

<sup>46</sup> Sullivan, Lawson, pp. 679, 680, 683.

<sup>47</sup> Judge Parker’s charge to the jury in Lawson, p. 688.

After noting British precedents, Parker cited American usage, specifically the 1770 Boston Massacre case, which laid down the principles of excusable homicide. English soldiers in Boston fired on a crowd that had hurled objects at them. John Adams and James Otis defended the soldiers and the colonial Boston jury acquitted all but one of the defendants. Judge Parker recited the principles derived from this case to the jury. A man attacked and thinking his life in harm may kill his attackers, providing he did everything he could to retreat or disable the attackers first. If the attack was sudden and violent, and retreat would increase a man's risk, he has the right to kill without retreating. Finally, if it is reasonable to assume an attack was life threatening, or someone would "commit a felony upon his person," the killing is excusable homicide "although it should afterwards appear that no felony was intended." On the last principle, it is up to a jury "who try the cause [who] are to decide upon the grounds of apprehension."<sup>48</sup>

To sharpen the juror's understanding, the judge provided a hypothetical example. B attacks A with a pistol. A hits B with his club, and B is killed. Afterwards, it is discovered that B only wished to frighten A and had powder and no bullet in his pistol. A, however, did not have the time to ascertain how the pistol was loaded, so the "apprehension" of the attack is excusable. Otherwise, his right of self-defense would be vitiated. Again, he advised the jury that they needed to judge "the reasonable grounds of apprehension" and that they should consider "the points of fact on which the cause may turn." These "may tend to establish or disprove those points [and] give you some rules by which you are to weigh testimony."<sup>49</sup>

There was no doubt as to the killing, he said, thus it was up to the jury to weigh the facts presented by both sides to determine whether Selfridge's act was justifiable. In narrating the evidence, Parker took the position that the blow to the head and the firing of the shot took place "at one and the same instant." Because "the scene was a shocking one," the witnesses were all "exceedingly agitated, which explains the differing testimony of the eyewitnesses."<sup>50</sup> One witness for the defense, Lewis Glover, testified that he was certain that Austin struck first, and only when raising his arm to strike again did Selfridge shoot him. "If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances proved by other witnesses which may corroborate or weaken the testimony of

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<sup>48</sup> Ibid., p. 691.

<sup>49</sup> Ibid., p. 692.

<sup>50</sup> Ibid., p. 694.

Mr. Glover.” If the jury finds it difficult to come to a conclusion as to the priority of the blow/shot controversy, they should follow this rule:

A witness who swears positively to the existence of a fact, if of good character, and sufficient intelligence may be believed, although twenty witness, of equally good character, swear that they were present, and did not see the same fact.<sup>51</sup>

For the judge this was not the main point of the case. The most significant point for the jurors to settle, Parker maintained, was whether the rapidity and ferocity of Austin’s attack provided the accused with the possibility of retreat as a means of saving himself:

The point I mean is, whether he could probably have saved himself from death or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him. This is the real stress of the case.

If he could have escaped without killing Austin “the defense set up has failed, and the defendant must be convicted. If you believe his only resort for safety as to take the life of his antagonist, he must be acquitted.” However, the judge sternly told the jury to ignore Dexter’s argument that the killing was justified also because of principles of upholding one’s honor and natural rights. “These are principles which you as jurors and I as a judge cannot recognize.”<sup>52</sup> The defendant must prove that he killed to save his life. If he failed in that, he is guilty.

Judge Parker next raised the issue of “provocation.” The jury was admonished to adhere to the rule concerning provocation in a manslaughter case:

If a man, for the purpose of bringing another into a quarrel, provokes him so an affray is commenced, and the person causing the quarrel is overmatched and to save himself from apparent danger kills his adversary, he would be guilty of manslaughter, if not murder, because the necessity being of his own creating, shall not operate in his excuse.

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<sup>51</sup> *Ibid.*, pp. 695- 696.

<sup>52</sup> *Ibid.*, p. 697.

The jury needed to determine whether the assault on the defendant “was or was not by the procurement of the defendant; if it were he cannot avail himself of the defense now set up by him.”<sup>53</sup> In this vein, Judge Parker chided Selfridge for taking out the ad attacking Benjamin Austin. “To call a man a coward, liar and scoundrel, in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever.” This was clearly “libelous.” Nevertheless, even though that act was ill considered, it did not justify an attack on his person. “No man can take vengeance into his own hands, he can use violence only in defense of his person.”<sup>54</sup> It does not matter how aggravating the libel or the words. Finally, he raised the issue of politics, telling the jury that they must be impartial and not let “party spirit” influence their decision. The verdict was now left to the jury.

Two shorthand experts recorded the trial and the verdict. The last line written was: “The *Jury* retired and returned in a short time with a verdict of NOT GUILTY.”<sup>55</sup> It is impossible to ascertain which factors weighed most heavily in the minds of the jurors. Obviously, they were not convinced beyond a reasonable doubt that Selfridge was guilty of the crime of manslaughter. Too many links in the chain of evidence did not hold together, even though there was no question that the lawyer wielded the gun that killed Austin. In his own account of events written after his acquittal, Selfridge denied that this was a “Federal murder,” and he was not under the control of his party when the quarrel commenced. He insisted that this was a “personal controversy.” He maintained throughout the years that followed, “the killing was an act of justifiable self-defense.”<sup>56</sup> Nonetheless, the quarrel was rooted in a political dispute that arose between two men, one Federalist and the other Democratic Republican. It degenerated into a question of an affront to personal honor. [Much like Washington and Adams, Parker rejected the idea that an insult to one’s honor justified homicide. He insisted instead on clear delineations of what constituted “self defense.”]

Protecting one’s honor was a mainstay value of the early republic. The legacy and traditions of the American Revolution played an important role in the cultural mindset of the jurors, particularly on the subject

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<sup>53</sup> Ibid, p. 698.

<sup>54</sup> Ibid, p. 699.

<sup>55</sup> Lawson, *American State Trials*, p. 702.

<sup>56</sup> *A Correct Statement of the whole preliminary controversy between Tho. O. Selfridge and Benj. Austin; also a brief account of the catastrophe in State Street, Boston on the 4th of August, 1806; with some remarks by Tho.O. Selfridge* (Charlestown, MA: Samuel Etheridge, 1807), Vol. 7, p. 34.

of self-defense. The notion of the right to bear arms harkened back to the days of Lexington and Concord and still plays a prodigious role in contemporary American society. Moreover, the notion of self-defense, both for the individual and the group, was buttressed both by the actions of the Revolutionaries against the oppression of the British and the frontier spirit of early American experience.

The Thomas Selfridge manslaughter trial of 1806 set a far-reaching standard of legal principles in murder and manslaughter cases relating to the self-defense plea. A noted legal scholar, John D. Lawson, included this case in his seventeen-volume tome of the “important and interesting criminal trials” which took place in American history up to 1920. He wrote:

The case is a leading one and the argument of the lawyers and the charge of Mr. Justice Parker were destined to be the text in every subsequent trial for murder for a half a century in every state of the Union where the pleas of self-defense was set up.<sup>57</sup>

Parker’s principles of self-defense included “apprehension” of deadly harm, the impossibility of saving oneself from fatal attack without the resort to violence, and conclusive proof that the accused did not provoke a quarrel with the victim in order to kill him. In other words, to justify a plea of self-defense defendants must prove beyond a reasonable doubt that they killed to save their own life. This cogent legal standard became the pillar for upholding one of the main girders of the modern system of justice.

*HJM*

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<sup>57</sup> Lawson, *American State Trials*, Vol. II, p. xii.