Vol. 29 2022 ISSN 1041-5440

DIO

Murder!

Table of Contents

We thank Christine Bomba for assistance with this volume.

‡1 John Adams on Murder

A Criminal Lawyer John Adams

A1 Today, for most US citizens, the image of John Adams (1735-1826) is probably that of a dyspeptic old man, though the most historically minded among them may recall that Adams was with varying degrees of success a revolutionary leader, diplomat, and 2nd President[1] of the United States 1797-1801. But before he was any of these, he was a successful lawyer. Moreover, his handling of 4 murder trials in one 4y period (1769-1773) mark him as one of the ablest criminal lawyers that this country has produced.

A2 One difficulty in evaluating his criminal-lawyer career is the dearth of trial transcripts. There is an existing transcript for only one of the 4 trials, and that transcript is inaccurate. Nevertheless, industrious scholars have cobbled together a fair picture of what happened during the trials, from contemporary reports, reminiscences, and more importantly Adams' legal papers.

B Impressment

B1 In the 18th century, impressment — the forceable seizure of civilians for service as mariners in the Royal Navy — is what kept British warships manned. The most important legal precedent was established in the case of Alexander Broadfoot in 1743. The case was tried before that century's greatest English criminal court judge, Michael Foster. The captain of a naval vessel had an admiralty warrant authorizing him to impress potential mariners. However, the warrant could only be executed by a commissioned officer.

B2 A press gang, without an officer, boarded the ship that Broadfoot was serving on. He warned the sailors to keep back. They did, but they did not retire. Broadfoot, apparently a shipyard lawyer, asked the press gang where the lieutenant was. The reply that he was "not far off" was adjudged unsatisfactory, and Broadfoot fired his blunderbuss, killing one member of the press gang and wounding one or two others. Broadfoot was charged with murder.

B3 Judge Foster ruled that because the press gang was acting beyond the terms of the warrant, Broadfoot could be guilty of no more than manslaughter (guilt depending on whether excessive force was used). Less importantly for Broadfoot, but more importantly for naval authorities, Foster decided to rule on the legality of impressment.

B4 The result does nothing to enhance Foster's legal reputation. He recognized that impressment caused men to endure "Hardships inconsistent with the Temper and Genius of a free Government." Nonetheless, he thought that both law and policy required that "private Mischiefs" must be "borne with the Patience for preventing a National Calamity." M.Foster, *Crown Cases* 155-159 (1762).

B5 The truth was that either Britain could keep impressment or provide better pay and improved living conditions for the Navy. The Government never considered the alternative. Impressment was continued, but it was unpopular everywhere and nowhere more so than in the American colonies.

[1] Publisher's note, appended 2022/6/26.
Adams was the 1st US president to follow the Constitution by leaving office after merely losing an election, premiering a noble tradition presently much in the news.

C Boarding the *Pit Packet*

C1 On 1769 April 22, Lieutenant Henry Panton of the *HMS Rose* led a boarding party onto the brig *Pit Packet*. Panton ordered all of the seamen forward. Their response was forthright: "They would die in the Hold before they would suffer themselves to be impressed." L.Wroth & H.Zobel, 2 *Legal Papers of John Adams 294* (1962). Neither side would yield and in the ensuing melee, one of the sailors, Michael Corbit, stabbed Panton in the throat, and he bled to death. While Corbit was wounded by a pistol shot. *idem* p.303

C2 Corbit and 3 others were charged with murder. Because the encounter occurred on the high seas, jurisdiction was conferred by the statutes punishing piracy. The seamen were defended by Adams and James Otis who was by turns brilliant and mad. The 1st question was a procedural one of great significance — were the defendants entitled to a jury trial? A jury might be reasonably expected to be more sympathetic than a court composed of Royal officials.

C3 Otis was "sanguine", reasoning simply (and simplistically) that jury trials were routine for piracy trials held in England and therefore this case should be tried before a jury. Adams was less optimistic, thinking this was an instance "among many thus" involving partial Distinctions made between British subjects at Home and abroad. *idem* p.287

C4 Adams's foreboding was well-founded and the court ruled that the defendant must be tried before the Admiralty Court without the benefit of a jury. This ruling was a significant setback for the defense, but the ruling was legally correct.

C5 Before 1536, jurisdiction of piracy cases was vested solely in the admiralty courts applying "civil" law, which did not provide for trial by jury. In 1536, a statute made the common law applicable to these proceedings. In his *Commentaries*, William Blackstone generously attributed the enactment of the statute to "it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgement of his peers . . . ." W.Blackstone 4 *Commentaries* at 70 (15th ed. 1809). William Hawkins offered an alternative explanation for the 1536 statute in his treatise on crown law. "But this proving very inconvenient, because by that Law [admiralty] no offender shall have Judgement of Death, without his own confession, or direct Proof by Eye Witnesses . . . ." W.Hawkins, 1 *Pleas at the Crown* 98 (4th ed. 1761).

C6 Whatever the motivation for the statute, its reach was limited by a 1700 statute that was enacted as a temporary provision but subsequently made permanent. It gave jurisdiction in piracy cases to the admiralty courts when tried "in any of His Majesty's islands or Plantations." So there was, as Adams feared, a disparity between defendants tried in England and defendants tried in the colonies.

C7 The defendants would be judged by Royal officials. Nevertheless, Adams prepared to argue the unfairness of the position that the sailor had been placed in. Even unsympathetic judges might be swayed by the unpopularity of impressment and the political effect convictions would have in an already turbulent Boston.

C8 Adams also had a legal argument. Earlier in the century, a statute had been enacted which prohibited impressment in North America. A number of prominent English counsel had concluded that the statute was an emergency wartime measure which no longer applied. However, no court had ruled on the question.

C9 Adams went to court armed with popular dissatisfaction with impressment, political unrest, mitigating facts, and a plausible legal argument. Although the court listened only briefly to arguments before retiring, one interesting issue was raised. One of the judges, Sir Francis Bernard, noted that in admiralty law, manslaughter did not exist. He asked if this meant that if the defendants were guilty of anything, they must be guilty of murder.

C10 Adams first responded that his client had acted in self-defense. He continued, "But it may not be amiss to consider the observation of Sir Francis, in order to remove the clouds from his [Bernard's] Brain." *Legal Papers*, *supra* at 333. Adams relied on Foster's *Crown Law* for the proposition that under admiralty law, if the facts supported manslaughter but not murder, the defendant must be acquitted. The court found the defendants not guilty.

C11 In a letter written in 1816, Adams fondly remembered the case. He wrote that the "secret" of his success was "FEAR". The court, he believed, "dreaded" public consideration of the issue of whether impressment was legal in North America. C.Adams (ed.) 1 *The Works of John Adams* 226n (Rept. 1992).

C12 One of the judges Thomas Hutchinson, had a different memory of the case. He recalled that the acquittal resulted from a lack of evidence that Panton or his superiors had a warrant from the lords of the admiralty. Moreover, the killing did not amount to manslaughter at common law. *Legal Papers supra* at 280. In at least one respect, Hutchinson was confused. As Adams had correctly argued, under admiralty law, if the defendant was not guilty of murder, he was guilty of nothing.

C13 There is probably some truth in both recollections. When the facts and law were considered in the context of the era's politics, the court found it easy to conclude that not guilty was the most prudent verdict.

D How Entrusting Civil Peace to Warriors Worked Out

D1 In the 18th century, the British government frequently used the army to assist in keeping the peace in civilian communities. The results were invariably bad.

> there is no doubt that the army often behaved extremely badly in its off-duty dealings with the public: the frequent mention of soldiers in the criminal records is only one proof of this. Equally it is clear that soldier-baiting was a common form of sport. T.Hayler, *The Army and the Crowd in mid-Georgian England* 21 (1978).

The soldiers were in an unenviable position: tormented by civilians, prodded by officers to keep order, the soldiers were amenable to civilian courts for whatever force they used.

> But as things are the soldier has all the responsibilities while, at the same time, no precise power is confided to him, no line of conduct defined for his guidance. C.Napier, *Remarks on Military Law* 47 (1837).

D2 When units of the British army were moved to Boston in 1768, it was merely a question of how long before serious trouble erupted. On 1770 March 5, a group of men became involved in a dispute with a British sentry. He called for help, and Captain Thomas Preston arrived with a corporal and 6 soldiers to protect the sentry. Crispus Attucks was one of the civilians involved and perhaps the leader of the crowd. He was said to be a mulatto who was a freed or escaped slave. He was said to be a large man "whose looks was enough to terrify a person." J.Bowman (ed.) *The Cambridge Dictionary of American Biography* 26 (1995). Although the evidence is contradictory, it seems likely that the civilians substantially outnumbered the soldiers whom they taunted, pelted with ice, and threatened (perhaps assaulted) with sticks. Ultimately, shots were fired, and 5 civilians, including Attucks, were killed. The soldiers were charged with murder.

D3 There was a great public outcry against the soldiers, led by — among others — John Adams's cousin Samuel Adams. Although John Adams was associated with the dissident colonists, he agreed to defend the soldiers. Additional counsel was provided by a passionate young lawyer named Josiah Quincey and a distinguished loyalist (who would relocate to England in 1776), Robert Auchmuty.

D4 Thomas Gage, the British commander in the American colonies, was pessimistic about the likely outcome of the trial.

> I must commiserate the situation of Captain Preston and the unfortunate soldiers concerned with him. It is next to impossible they can have a fair tryal

> for their lives, and escape condemnation whether they deserve it by the law or not.

Gloomier still, Gage wrote, "I am in great hopes some orders will arrive to postpone executions, . . ." H.Peckham (ed.) 1 *Sources of American Independence* 74 (1978).

D5 Preston's trial was severed from the trial of his soldiers. If Preston did not give the order to fire, he could not be convicted. The soldiers might, however, as part of their defense, argue that they were only obeying Preston's order when they fired.

D6 Notwithstanding Gage's prognostication, Preston's trial was not much of an ordeal for the defense. The defense was in the unusual position of facing a sympathetic prosecutor and court. The 1st victory came in jury selection when the defense was able to empanel some known loyalists. Equally important was the unresolved doubt as to whether Preston had ordered the troops to fire. *Legal Papers supra* at vol.3 17-19, 23. The case of the soldiers was more difficult. The acquittal of Preston put pressure on the parties. The vocal public insistence that someone must pay for the deaths compelled the prosecution lawyers to demonstrate that they were actually trying to convict the defendants. The jury too could be expected to resist a conclusion that the 5 deaths should go completely unpunished.

D7 Jury selection again favored the defense, although less obviously so. None of the jurors selected was a resident of Boston. *Idem* at 100. The evidence provided an ample basis for concluding that the crowd was (§D2) unruly and dangerous.

D8 At the start of the argument for the defense, Adams quoted Caesare Beccari:

> If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind. *Idem* at 242.

This is an interesting antidote to the passion for blood that Adams feared. The use of the quotation is also an indication of Adams's awareness of the increasing tempo of legal enlightenment in the 18th century. Beccari had 1st published his attack on harsh penal laws in Italian in 1764. His book, *An Essay on Crimes & Punishments*, was translated into English with a commentary by Voltaire in 1768. Adams's reference to Beccari's consolation must be one of the earliest in a British court.

D9 Adams next gave an extensive and knowledgeable lecture on the law of homicide. He chose to face the vengeance-for-innocent-blood problem directly. According to Adams, a potential juror had said that Preston was innocent but innocent blood had been shed, and therefore, somebody ought to hang for it. *Idem* 255. Adams used hypotheticals to expose the weakness of this argument. Did it mean that when soldiers kill during wartime that somebody must be hanged because the soldiers did their duty? Did it require the execution of a father who accidently shot and killed his son during a hunting trip?

D10 Adams also combined a provocative legal argument with a continuing effort to distance the jury from the victims. The soldiers would be innocent of any wrongdoing if, for example, "the Mulatto man was the person who made the assault" and the soldiers "endeavoring to defend themselves" accidentally killed an innocent civilian. *Idem* at 256. This reasoning has the positive effect of lessening the impact of the fact that 5 men died. Perhaps, after all, the soldiers were only trying to shoot one bad and dangerous man and the remaining deaths should be regarded merely as accidents. The argument fails to explain why so many shots were fired in defense of a squad of soldiers against one villain. The emphasis on the possibility that the villain was the "Mulatto man" seems a somewhat cynical use of race to divert the jury's sympathy. Ironically, Attucks was a hero to many in Boston and a statue was erected in his honor in Boston Common in 1882.

D11 After reiterating the desperate circumstances of the soldiers — overmatched by the club-wielding crowd — Adams made his boldest and most controversial argument:

> We have been entertained with a great variety of phrases to avoid calling this sort of people a mob — some call them shavers, some call them geniuses — The plain English is gentleman, most probably a motley rabble of saucy boys, negroes and mulattos, Irish leagues and outlandish jack-tars — And why should we scruple to call such a set of people a mob, I can't conceive, unless the name is too respectable for them. —- The sun is not about to set or go out, nor the rivers to dry up because there was a mob in Boston on the 5th of March that attacked a party of soldiers.

D12 It must be remembered that the colonialists, which included Adams, opposing the British government, had made the "mob" into heroes. Indeed, this "attack" on a party of soldiers had been dubbed the "Boston Massacre." Adams was in effect attacking his political comrades. This, together with the fact of his representation of the British soldiers, meant that some men would never forgive or trust Adams. The "mob" speech was also bold because it would offend any juror closely associated with members of the mob. This risk was probably acceptable only because none (§D7) of the jurors lived in Boston. It would have been interesting to have seen how Adams would have handled this issue if he had faced a jury of Boston residents.

D13 The jury was persuaded. All of the soldiers were acquitted except 2 who were convicted of manslaughter, who were branded on the thumb and discharged. Adams could be proud: he had done as well as he could have expected. The soldiers had not been completely vindicated, but no serious damage had been done to them. Adams had enhanced his professional reputation, upheld the honor of colonial justice — and surprised the British!

E Murderer or Survivor?

E1 Adams's 4th and final murder case involved a classic murder mystery. On 1772 November 14, Ancell Nickerson was aboard a small fishing schooner as a passenger. The boat was captained by Nickerson's cousin and crewed by 2 other men and a 13y-old boy. The next morning the boat was found flying a distress signal. Nickerson was the only person aboard, and "he appeared to be in great fright" *Legal Papers*, *supra* at vol.2 336.

E2 Nickerson told a horrific story. At about 2 o'clock in the morning, the schooner had been stopped by another vessel which sent boat loads of armed men to board the schooner. Fearing impressment, Nickerson had climbed over the stern of the vessel and clung to its side. While Nickerson was performing these gymnastics, everyone else aboard the schooner except the boy had been killed. The murderers kept the boy alive to "make Punch for them." *Ibid* at 337. Although initially the authorities set Nickerson free, they subsequently thought better of it. They arrested him and charged him with piracy. In the meantime, a warship was sent out to look for the pirates described by Nickerson but found nothing.

E3 Adams and Josiah Quincey defended Nickerson. The prosecutor, Samuel Fitch, 1st noted that although Nickerson was charged with piracy not murder, murder in the course of taking possession of the boat constituted piracy. *Ibid* 344-345. Adams's notes are all that remain of Fitch's argument. It must be hoped that the argument was more coherent than the notes suggest.

E4 Nevertheless, Fitch made 3 telling points. The flying of the distress signal was not accounted for; provisions were unaccounted for; and Nickerson's account of events was so improbable, so incredible that it amounted to Nickerson incriminating himself.

E5 Quincey's response was the the evidence was all circumstantial, and there were insufficient links between the facts proved and the conclusions the prosecution asked the court to draw. This was not entirely accurate. Nickerson's statements were implausible and thus tended to support the prosecution's case. Adams countered by arguing that if the statements were incriminatory they must be treated like extra-judicial confessions. The method by which magistrates were regulated by statute and the failure to comply with the statutory requirements meant that they could not be used in court.

E6 Adams was right as to the law, but he glibly glossed over some problems. An improbable rendition of events might incriminate, but it was not a confession. In addition, not all of Nickerson's statements were made to magistrates. Nevertheless, Adams insisted that the taking of improper extra-judicial concessions meant that

> We must therefore throw all his Confessions and Examinations into the fire and consider the Case without them. *Idem* at 351.

The judgememt of the courthouse fires were well kindled:

> The Court have considered of your Offence, and they do not think that the Evidence offered to them is sufficient to support the Charge alleged against you in the Information — and therefore adjudge you NOT GUILTY. *Idem* at 339.

One contemporary newspaper thought that this was "the most surprising Event, which has happened in this, and perhaps any other Age of the World." *idem*.

E7 Was the verdict justified? The most significant evidence against Nickerson was the fact that he was found alone and unharmed at the crime scene. The distress signal is perplexing but not necessarily indicative of guilt. It could have been raised near the start of the "attack" or subsequently by Nickerson. The absence of any other evidence of pirates in the area is suggestive but inconclusive. Pirates were ever in agile motion since they had an interest in avoiding detection. Moreover, unexplained disappearance of vessels was common throughout the sailing ship era. Nickerson's version of events was unconvincing but disbelief of the defendant is not a basis for finding him guilty.

E8 In Nickerson's defense is the lack of a plausible motive. The only imaginable motive is robbery but for Nickerson to have committed a robbery where it was certain he would be left alone unable to make a getaway seems unlikely. Taken together, the circumstances were suspicious, but to use modern terminology, guilt was not proved beyond a reasonable doubt.

E9 Late in life, Adams recalled this case.

> This was, and remains still, a mysterious transaction. I know not, to this day, what judgment to form of his [Nickerson's] guilt or innocence; and this doubt, I presume, [was] the principle of acquittal. *Works, supra* at vol.1 224n.

E10 The indefatigable Hutchinson had a different recollection. He said that the court had had jurisdiction over piracy and other felonies except for murder. The judges had split 4-to-4 over whether the court had jurisdiction in a case where piracy was charged but proved only by establishing murder. A contemporary newspaper had reported that the acquittal resulted from an equal division of the court. *Legal Papers, supra* at vol.2 339-340. Nevertheless, Hutchinson's claim is implausible — piracy could be established by proof of the murder of a ship's crew at sea. Indeed, few piracies are proved without involving murder. Whatever the judges discussed, it is hard not to believe that the lack of evidence was the primary factor in the acquittal.

F Skill and Courage

F1 Adams was capable of good case preparation, cross-examination, and argument. But none of these skills alone or together account for his remarkable success. The root of that success was his flexibility and understanding of what was necessary to persuade a particular court or jury. He understood that a jurisdictional issue that a court preferred not to address might help it decide a close case in his clients' favor on the facts. He also understood that a jury might put aside its political bias when faced with mob action by rowdy social misfits. Adams succeeded by carefully tailoring his defense to the particular circumstances both in and out of court in each case.

F2 Adams also possessed the moral courage to forcefully defend unpopular clients. His response to the request to defend Captain Preston is revealing. "if he thinks he cannot have a fair trial of that issue without my assistance, he shall have it without hesitation." P.Smith 1 *John Adams* 121 (1962). Nothing Adams would ever do would surpass his skillful and courageous rescue of obscure men from the hangman.

G Appendix on Evolution of Law in the Time of John Adams

G1 By the time Adams began practicing law , the criminal law (called "crown law") was fairly well-developed, with numerous treatises and published cases.

G2 Most colonies enacted provisions that effectively adopted English law as it was in 1776. The adoption was not always as easy as it might appear. See *State vs Pope* (1979).

G3 William Russell *Treatises on Crimes and Misdeameanors* was probably the most useful of English treatises. First published in 1824, it was reissued in an improved 2nd edition in 1826 (2 volumes): Olenall Russell *Treatise on Crimes*. The *Treatise* was also republished in the US (Boston 1824) with a US Editor, Daniel Davis. The republished book's annotations gave it a US slant. The need for a volume with a US slant demonstrated how England&US were drifting apart in the area of criminal law.

G4 Michael Foster's book *Pleas of the Crown* constituted the best collection of criminal trials published in 18th century England. As a master of Crown Law, 2nd only to the great Scottish jurist, Baron Hume, Foster was also known as "just". See M.Dodson *Life of Michael Foster* (1811). His letter to Adams and others attempted to temper the harshness of law.

H Appendix on Law Regarding Piracy & Mutiny

H1 A typical piracy case would be the seizure of a merchant ship by crew members. If someone was killed, there were 4 basic charges. And the pirates could of course be charged with murder. To clinch a charge of murder would require proof that a pirate actually killed someone or was an accomplice to the murder. Piracy required less: if it was proved that one of the culprits participated in the seizure of the ship he would be guilty of piracy. Finally, there was mutiny. That was easiest to prove: the prosecution need only establish that a crew member was present and failed to try his utmost to stop the mutiny. Thus, prosecutors could convict on any of these crimes.

H2 An example of trying to unentangle a case of murder and multiple cases of piracy is provided by the prosecution of John Winn Montague. The *Old Bailey Chronicle* Volume 2 §89 (1783). See also *Last Dying Words and Confession of John alias Capt. Power*, and Irving Maxwell, *The Marrnhan*? 2 vols (1808).

‡2 Exportability of National Law

Indian Revenge Murders

A Blackstone & Cornwallis

A1 William Blackstone wrote an outline of the history of the laws which had through "gradual progress . . . risen to the perfection they now enjoy . . . ." W.Blackstone, *4 Commenaries 443* (15th ed. 1809). The law was not perfect in Blackstone's day nor is it perfect today. Nevertheless, Blackstone had a point. The law that emerged in England and later in the United States has been subject to constant revision and, in large measure, reflects the values of the people it governs.

A2 The question arises as to whether the law that has evolved in one society can be transplanted readily to another society with different beliefs and traditions. The issue is important because of the present influence of the United States in the world and the desire to have other nations accept, willingly or no, US concepts of law.

A3 No area of the law better reflects a society's values than its criminal law. A large-scale unintentional experiment as to the feasibility of transplanting criminal law to an alien society was conducted in the expansion of criminal law throughout the Indian subcontinent, which proceeded first under the British East India Company and later under the British government. In general, British power in India flowed from the coasts to the interior and then northward.

A4 Charles Cornwallis had failed in his attempt to pacify the US south during the American Revolution, but he was, nevertheless, given the opportunity to try to bring peace and tranquillity to India.

A5 Cornwallis discovered what he regarded as "shocking abuses" in the administration of justice and in 1790, he wrote the Court of Directors of the East India Company,

> I am so strongly incited by the motives of humanity, as well as of regard to the public interest, to establish as early as possible an improved system for the administration of criminal justice, . . . C.Ross (ed.) *2 Correspondence of Charles, First Marquis Cornwallis* 500-501 (1859).

The experiment to be launched required British notions of justice to be applied to diverse groups with different beliefs&customs. The ultimate authority rested with British officials largely unfamiliar with the mores of the people they were blessing with a new system of criminal justice.

B Caste, Vengeance, & Framing for Murder

B1 Over a half-century later, John Bruce Norton, an experienced barrister, reviewed the progress of the system of justice in southern India. One problem he noted was the caliber of judges who were usually inexperienced or mediocre officials, without legal training. They learned from experience on the bench "which is as if a Surgeon should learn dissection upon the living body; . . . ." J.Norton, *The Administration of Justice in Southern India 8* (1853).

B2 Norton buttressed his assessment with references to numerous reported cases. For example, in one case, 3 men were charged with murder. One defendant had ordered the others to kill the deceased which they did with "kicks and blows."

> Mr.Anderson who tried the case convinced them all only of *culpable homicide*, because "as water was thrown on the deceased in order to revive her, it does not appear they *intended* to kill her." *Idem* at 43.

In another case, a judge found the "attack on the deceased most unprovoked" but also concurred with the view of another judge that the crime was "*culpable homicide without* aggravating circumstances." *Idem* at 49. A defendant who was only charged with culpable homicide was found guilty of the higher offense of murder because the judge thought the defendant "should *have been charged with murder*." *Idem* at 81.

B3 A separate problem that arose in the cases analyzed by Norton was to baffle even the ablest of judges, that being the use of criminal proceedings as a means of revenge. Chinnatambi Nadan carried on an "illicit" relationship with Meenatchee for some years. One evening, they were observed entering her house together — the next morning she was dead, having been killed by a wound to her throat. Nadan was found in a "fainting state" caused by "a severe wound on his private parts, the organs of generation having been severed from his body."

B4 A witness testified that she had heard the victim call out that Nadan "was cutting her neck." The door of the house was locked and had to be broken open the following morning. A bloody bill-hook was found and a village blacksmith said that he made the bill-hook for the defendant a short time before the murder.

B5 When he could speak, the defendant said that the attacks had been perpetrated by persons concealed in the loft where the bill-hook was found. He said that the attacks occurred because relatives of the victim were outraged because she was cohabiting with a man from a lower caste. He also said that he had locked the door after he had been wounded to prevent the return of the assailants. Although at trial several witnesses admitted that relatives of the victim had previously beaten the defendant, he was found guilty of murder. His conviction was affirmed on appeal and he was sentenced to death because of the "cruel and deliberate" nature of the crime.

B6 Before the defendant was executed, the Head of Police, who had investigated the murder, admitted there was good reason to think that the defendant was innocent and that the guilty parties were members of the victim's caste.

B7 The case was reopened, and it becane apparent that the defendant's story was true. In a remarkable *volte face*, the court decided that rather than being a callous criminal, the defendant was a victim of criminals.

> the charge preferred against the prisoner was the result of a conspiracy on the part of the principal inhabitants of the village in which the murder was committed to rid themselves of an obnoxious relative, whom they considered to have disgraced them, and revenge themselves on the author of their disgrace by acts of most savage and revolting to humanity that had ever come under the observation of the Court. *Ibid* at App. No. II at xx-xxv.

B8 This type of misuse of criminal proceeding was to continue to be a disturbing trend in the administration of justice in India. Edmund Cox, who served as an officer of the Bombay Police, wrote with a mixture of outrage and resignation of the consequences of this attitude toward the law. Cox lamented the "everlasting false cases, the accusations of offences that have never been committed, the detailed accounts of events which never occurred, the ceaseless ingenuity expended in trying to make one thing appear to be something else" meant that one must "look for the very opposite of the circumstances which are first reported in any particular case." E.Cox, *Police and Crime in India* 259 (1911).

> To inflict wounds on the corpse of a person who has died a natural death and place it near the dwelling of an enemy, so that its discovery may induce suspicion of foul play against him, is by no means an uncommon proceeding. Not only this, but many murders have been committed with a view to get some one or other into trouble. *Idem* at 269.

C Factions & Human Sacrifice

C1 One of the most striking cases related by Cox involves the conduct of an entire village. The village was divided into 2 bitterly hostile factions: the Mithas and the Wullis. In the course of a dispute between the 2 factions. one of the Wulli partisans was sufficiently injured to require hospitalization. The leader of the opposition decided on a counter strike: the mother of one of their followers agreed to have her head broken if the other faction could be blamed. Unsatisfied, the Mitha faction decided to poison the woman and blame the Wullis. This ploy so enraged the leader of the Wullis that he promptly killed his sister with an axe after which he violently hit his own head against a wall so that the Mithas could be charged with murder and assault. In response, a Mitha adherent volunteered to take his own life — but his mother insisted that she take his place. She was killed but before she died, she made a dying declaration that she was injured by the rival group.

C2 The police investigation eventually turned up the facts and led to the judicial conclusion that the evidence showed,

> that there were two factions in the village, and that murders have been committed on each side, not, as would naturally be expected, by member of one faction on a member of the other, but by members of one faction on a helpless female of their own, so as to throw either for the guilt of blood or the blame of the crime on the other party. Such a state of things is hardly credible, but this is an instance of truth being stranger than fiction. *Ibid* at 269-273.

D Father & Daughter

D1 For the criminal law to work, there must be a consensus accepting that the purpose of the law is to punish wrongdoing and that the oath (taken seriously) is fundamental to the successful operation of judicial proceedings. Among the best documented cases showing lack of such a consensus were the proceedings involving Muluk Chand.

D2 Chand was a village watchman who was charged with the murder of his 9^{y}-old daughter. The case seemed straightforward. Chand's 7^{y}-old daughter, Golak, testified that she had awakened in the night and had seen her father kill her older sister Nekjan. Golok said that her father had first put his foot on Nakjan's throat and then had stabbed her in the abdomen with a spear. Golok had reported this to her mother when her mother returned home. Her mother, Barahti, said that she had confronted her husband with the accusation and that they had quarreled. She did not report this to the police the next day because they had not questioned her.

D3 A medical witness who examined the body said that there were "signs of strangulation" but that he did not suspect strangulation. He thought that the wound to the abdomen was the cause of death although there was no sign of external bleeding. There was some evidence of internal bleeding. Another medical witness testified that the lack of external bleeding could be explained by the fact that death resulted from a "mixed cause" — "suffocation and the [spear] thrust." Chand told witnesses that he thought his daughter was the victim of a snake bite. In court, Chand said he had not killed her.

D4 The trial judge instructed the jury that the prosecutor need not establish motive but that the motive may have been a desire to bring a criminal charge against an enemy, Kadam Ali Fakir, with whom the defendant was involved in legal disputes.

D5 The judge also told the jury that it was improbable that a father would kill his child; however, it was even more improbable that his daughter and others would perjure themselves toward the result that Chand would be executed. The judge also said that snakes don't leave holes in the skin where they bite. Chand was convicted and sentenced to death.

E Ghose

E1 Manomahan Ghose now entered the case. Ghose had become the 1^{st} Indian barrister. [**At the late date of 1867**.] He was later to write the report of the proceedings in the case. M. Ghose, *A Romance of Criminal Administration in Bengal* (1888).
[Findings sampled below at §§E7-E9.]

E2 In a capital case, the High Court of Calcutta was authorized to "disturb the verdict of a Jury even on questions of fact." Ghose made the most of this authority. He contended there was no motive shown because Chand had not accused anyone. Moreover, he argued that the wound could not have caused the death because the absence of any external bleeding proved that it must have been inflicted after death. He suggested that the death was accidental and that the wound was inflicted to fabricate a snake-bite. Otherwise, the murderer would have "thrusted" the spear in creating a deeper wound. Ghose also argued that the failure to make the accusation during the initial police investigation undercut the credibility of both mother and daughter as witnesses.

E3 In its judgement, the court noted that the defendant had been undefended in the 1^{st} trial, and as a result there was almost no cross-examination of witnessss. The court found considerable problems with the judge's instructions (§§D4&D5) which it concluded were too favorable to the prosecution. He was wrong to suggest a motive for which there was no evidence. The court further criticized the judge's tendency to offer the jury 2 alternates, e.g., the father is a killer or the daughter is a perjurer, the father is the murderer or some intruder is the murderer, from which the jury must find one or the other. The jury, not the judge, was to determine the facts and the judge had no basis for proposing that there could only be 2 alternatives. The High Court concluded that justice required a new trial.

E4 Ghose defended Chand at the 2nd trial. He offered new medical testimony that it was inconceivable that the spear wound could have been inflicted while the child was alive without causing some external bleeding. Moreover, there was nothing inconsistent with the child having been bitten by a snake and the wound enlarged after death.

E5 At the 2nd trial, Golak testified that after killing her sister, her father had said, "lay the blame on the Faqir Kadam Ali." The head constable testified that during his initial investigation, he had examined the wound which appeared to be only skin deep. Bystanders thought the death was caused by a snake. Chand's wife said she did not know how the child died. The floor where Nekjan was found was dug up; and snake holes, but no snakes, were found.

E6 The judge's instructions were favorable to the defense. He noted that the evidence of murder was inconclusive. The wife had been initially questioned and had not said that her daughter claimed to have seen the murder. Aside from technical discrepancies, the problem with Golak's testimony was that, for the 1st time, she claimed (§E5) her father had said to blame an enemy for the murder. She had never made the claim before, and Chand had never claimed that the child's death was anything but an accident; thus, her new claim undermined her credibility. The jury reached a verdict of not guilty in less than a minute.

E7 The indefatigable Ghose wanted to know the whole truth. He interviewed Golak and her mother. Golak said she had been asleep and saw nothing. A constable threatened her if she did not inculpate her father. He also told her that her father would be released. After Chand had been sentenced to be hanged, Golak's mother told her that she would be punished if she changed her story.

E8 Finally, Chand taxed Chand for the truth. Chand said a stray bull had been troubling him, and he therefore kept a heavy piece of wood by his pillow. He woke and heard footsteps and thought it was the bull. He threw the piece of wood where he thought the bull was — only to discover than he had hit his daughter (who had gotten up and walked off) in the back just below the neck. She was dead. His first impulse was to commit suicide, but he decided to consult his brother-in-law who said it would be best to fake a snake bite.

E9 Afterwards, a police inspector had told Chand that unless he paid the inspector 30 rupees, he would be in trouble. Chand could only raise 6 rupees. The argument with his wife had been a result of her suspicion that Chand was guilty of "undue familiarity" with the wife of Kadam Ali Fakir.

F Napier

F1 Perhaps the best postscript for this case was provided by something Ghose told the High Court of Calcutta.

> Anyone who has any experience of criminal trials in Bengal knows that in the vast majority of cases, probably more than 90 per cent, neither the prosecution nor the defence discloses the whole truth.

F2 The British advanced into the northwest part of India (today partially Pakistan) in the middle of the 19th century. Charles Napier led the conquest of the Sind and became 1st governor. Napier was intelligent, eccentric, and opinionated. He was also determined to end the practice of stoning to death unfaithful wives. To this end, a proclamation was issued stating that the punishment of death would be imposed on those guilty of stoning wives to death.

F3 One result of this seemingly laudable program was described by an officer who had served in the Sind as a magistrate.

> The result of this was as extraordinary as it was unlooked-for. In different parts of the country, women were found hanged from trees; and, from inquiries made, it was found that they and their husbands had had altercations; this led to the suspicion that they had been hanged by their husbands, instead of stoned as heretofore. Upon this finding, a second proclamation was issued to the effect that the Governor was resolved to find out the culprits, and with this object that [each] husband and his whole family, together with the village authorities, should be imprisoned until the author of the crime was found. Still many women were found killed in this way; and although every possible investigation was [launched], by means of experienced foot trackers and police, no case could be established against [any] husband. The women were of a passionate, vindictive nature, and we were forced to the conclusion that they had recourse to hanging themselves to bring their husbands into trouble. T.Stewart *Reminiscences* 101-102 (190).

G Retaliation and Revenge

G1 Northwest India remained turbulent, and the misuse of the criminal law continued. In one case, a man, embittered by his financial ruin, murdered a girl, wounded himself, and charged the entire village with *dacoity* (robbery by a gang of 5 of more persons) and murder. E.Kitts, *Serious Crime in an Indian Province* 14 (1900).

G2 George Elsmie spend his entire career in the British Service in the Punjab. While he was serving as a judge, he published *Notes on Crime and Criminals in the Peshwar Division of the Punjab* (1884). Elsmie was engaged in administering justice to the Pathans, who were described with colorful overstatement by a British official: the "true Pathan" is bloodthirsty, cruel, and vindictive in the highest degree; he does not know what truth or faith is, . . " The Pathans adhered to a code of honor which required them to provide shelter and hospitality to all who asked for it and to revenge wrongs by retaliation. P.Bonarjee, *A Handbook of the Fighting Races of India* 11 (1899).

G3 It was revenge that most troubled Elsmie. Murder was the "principal crime" and ferreting out the guilty was the chief problem.

> The mind of the Judge who had to try Pathan criminals is daily tortured by the dread of being induced by false evidence either to convict the innocent or to acquit the guilty. *Notes* (*supra* at §G2).

Even in cases where there was a crime and criminal, the tendency of victims to use the opportunity to identify any enemy, involved or not, as a perpetrator, complicated prosecutions. Shahdad Kahn was stabbed in his village's small mosque in July 1875. In his dying declaration, he claimed to have identified 5 assassins in the mosque and 7 outside it. As Elsmie put the matter, "Any more palpably false statement could hardly be conceived." Other witnesses produced lists of assassins which they freely amended. The confusion inevitably resulting ensured that no one was convicted. "By the wicked extravagance of their statements, it must surely be admitted that the Khan's family have forfeited all their right to obtain justice in our Courts." *Idem* at 71-80.

G4 The British sought to impose their concept of law on Indians. In reality, many Indians simply adapted the foreign law to their traditional way of conducting affairs. Thus, laws that were intended to stamp out private revenge became an instrument of revenge. Once the proceedings were seen as a means of retaliation, the oath became meaningless. Indeed, as a frustrated Elsmie thought that permitting tribal elders to handle some cases — even though they could only punish by fining — was more effective in stemming the number of murders than was the British justice system. *Idem* at 3.

G5 The British experience in India suggests that the law, particularly the criminal law, cannot easily be imposed successfully by one society upon an alien society. It must be developed by a society consistent with the values and traditions of that society. This point was well made by Roscoe Pound lecturing at the University of Calcutta in 1948, a year after India achieved her independence. He told his listeners that their task was to create law out of the mix of English law and Indian traditions and morals.

> But it must be a home-made law of India, even if made, largely at least, from the received English materials, as American law had to be. As Mr. Justice Holmes said, historical continuity is not a duty, but it is a necessity. R.Pound, *The Ideal Element in Law* 284 (1958).

DIO

DIO: The International Journal of Scientific History [www.dioi.org] is published by

DIO, Box 19935, Baltimore, MD 21211-0935, USA.
Telephone (answering machine always on): 410-889-1414.

Research & university libraries may request permanent free subscription to *DIO*.
Each issue of *DIO* will be printed on paper which is certified acid-free. The ink isn't.

Editor: Robert M. Bryce, beeabo@gmail.com
Publisher: Dennis Rawlins (DR), address above.

DIO is primarily a journal of scientific history & principle. However, high scholarship and/or original analytical writing (not necessarily scientific or historical), from any quarter or faction, will be gladly received and considered for publication. Each author has final editorial say over his own article. If non-DR refereeing occurs, the usual handsome-journal anonymity will not, unless in reverse. No page charges.

The circumstance that most *DIO* articles are written by scholars of international repute need not discourage other potential authors, since one of *DIO*'s purposes is the discovery & launching of fresh scholarly talent. Except for equity&charity reply-space material, submissions will be evaluated without regard to the writer's status or identity. We welcome papers too original, intelligent, and/or blunt for certain handsome journals. (Dissent & controversy are *per se* obviously no bar to consideration for *DIO* publication; but, please: spare us the creationist-level junk. I.e., non-establishment cranks need not apply.)

Most unattributed text is DR's.

Other journals may reprint excerpts (edited or no) from any issue of *DIO* to date, whether for enlightenment or criticism or both. Indeed, excepting *DIO* vols.3&5, other journals may entirely republish *DIO* articles (preferably after open, nonanonymous refereeing), so long as *DIO*'s name, address, & phone # are printed adjacent to the published material — and to all comments thereon (then *or later*), noting that said commentary may well be first replied to (if reply occurs at all) in *DIO*'s pages, not the quoting journal's.

DIO invites communication of readers' comments, analyses, attacks, and/or advice.

Written contributions are especially encouraged for the columns: Unpublished Letters, Referees Refereed, and regular Correspondence (incl. free errtime for opponents). Contributor-anonymity granted on request. Deftly or daftly crafted reports, on apt candidates for recognition in our occasional satirical *J. for Hysterical Astronomy*, will of course also be considered for publication.

Free spirits will presumably be pleased (and certain archons will not be surprised) to learn that: at *DIO*, there is not the slightest fixed standard for writing style.

Contributors should send (expendable photocopies of) papers to one of the following *DIO* referees — and then inquire of him by phone in 40 days:

Robert Headland [polar research & exploration], Scott Polar Research Institute, University of Cambridge, Lensfield Road, Cambridge CB2 1ER, UK; tel (44) 1223-336540.

E. Myles Standish [positional & dynamical astronomy], Jet Propulsion Laboratory 301-150, Cal Tech, 4800 Oak Grove Drive, Pasadena, CA 91109-8099. Ret. Tel 864-888-1301.

F. Richard Stephenson [ancient eclipses, ΔT secular behavior], Department of Physics, University of Durham, Durham DH1 3LE, UK; tel (44) 191-374-2153.

 ISSN 1041-5440. This printing: 2022\6\27.

A Fresh Science-History Journal: Cost-Free to Major Libraries

DIO

Tel 410-889-1414 **diozqj@gmail.com**

DIO — The International Journal of Scientific History.

Deeply funded. Mail costs fully covered. No page charges. Offprints free.

• Since 1991 inception, has gone without fee to leading scholars & libraries.

• Contributors include world authorities in their respective fields, experts at, e.g., Johns Hopkins University, Cal Tech, Cambridge University, University of London.

• Publisher & journal cited (1996 May 9) in *New York Times* p.1 analysis of his discovery of data exploding Richard Byrd's 1926 North Pole fraud. [*DIO* vol.4.] Full report co-published by University of Cambridge (2000) and *DIO* [vol.10], triggering *History Channel* 2000&2001 recognition of Amundsen's double pole-priority. New photographic proof ending Mt.McKinley fake [*DIO* vol.7]: cited basis of 1998/11/26 *New York Times* p.1 announcement. *Nature* 2000/11/16 cover article pyramid-orientation theory: *DIO*-corrected-recomputed, *Nature* 2001/8/16. Vindicating DR longtime Neptune-affair charges of planet-theft and file-theft: *Scientific American* 2004 December credits *DIO* [vols.2-9]. *DIO*-opposites mentality explored: *NYTimes* Science 2009/9/8 [nytimes.com/tierneylab].

• Journal is published primarily for universities' and scientific institutions' collections; among subscribers by request are libraries at: US Naval Observatory, Cal Tech, Cornell, Johns Hopkins, Oxford & Cambridge, Royal Astronomical Society, British Museum, Royal Observatory (Scotland), the Russian State Library, the International Centre for Theoretical Physics (Trieste), and the universities of Chicago, Toronto, London, Munich, Göttingen, Copenhagen, Stockholm, Tartu, Amsterdam, Liège, Ljubljana, Bologna, Canterbury (NZ).

• New findings on ancient heliocentrists, pre-Hipparchos precession, Mayan eclipse math, Columbus' landfall, Comet Halley apparitions, Peary's fictional Crocker Land.

• Entire *DIO* vol.3 devoted to 1st critical edition of Tycho's legendary 1004-star catalog.

• Investigations of science hoaxes of the -1^{st}, $+2^{nd}$, 16^{th}, 19^{th}, and 20^{th} centuries.

Paul Forman (History of Physics, Smithsonian Institution): "*DIO* is delightful!"

E. Myles Standish (prime creator of the solar, lunar, & planetary ephemerides for the preeminent annual *Astronomical Almanac* of the US Naval Observatory & Royal Greenwich Observatory; recent Chair of American Astronomical Society's Division on Dynamical Astronomy): "a truly intriguing forum, dealing with a variety of subjects, presented often with [its] unique brand of humor, but always with strict adherence to a rigid code of scientific ethics . . . [and] without pre-conceived biases . . . . [an] ambitious and valuable journal."

B. L. van der Waerden (world-renowned University of Zürich mathematician), on *DIO*'s demonstration that Babylonian tablet BM 55555 (100 BC) used Greek data: "*marvellous*." (Explicitly due to this theory, BM 55555 has gone on permanent British Museum display.)

Rob't Headland (Scott Polar Research Institute, Cambridge University): Byrd's 1926 latitude-exaggeration has long been suspected, but *DIO*'s 1996 find "has clinched it."

Hugh Thurston (MA, PhD mathematics, Cambridge University; author of highly acclaimed *Early Astronomy*, Springer-Verlag 1994): "*DIO* is fascinating. With . . . mathematical competence, . . . judicious historical perspective, [&] inductive ingenuity, . . . [*DIO*] has solved . . . problems in early astronomy that have resisted attack for centuries . . . ."

Annals of Science (1996 July), reviewing *DIO* vol.3 (Tycho star catalog): "a thorough work . . . . extensive [least-squares] error analysis . . . demonstrates [Tycho star-position] accuracy . . . much better than is generally assumed . . . . excellent investigation".

British Society for the History of Mathematics (*Newsletter* 1993 Spring): "fearless . . . . [on] the operation of structures of [academic] power & influence . . . much recommended to [readers] bored with . . . the more prominent public journals, or open to the possibility of scholars being motivated by other considerations than the pursuit of objective truth."