

Newer Light on the Boston Massacre

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DEFENSE OF THOSE accused of participating in the so-called Boston Massacre has always been considered the apogee of the American legal profession. That a pair of true-blue and red-hot patriots like John Adams and Josiah Quincy should risk position and popular honor to represent a clutch of hated lobsterbacks has given the American Bar an apparently perpetual and unquenchable glow of self-satisfaction. That Quincy and Adams were able to cap their heroism with seven honest-to-goodness acquittals (plus two non-punishable manslaughter convictions) has always been cited to show that in America, justice does indeed triumph, and that Yankee jurors were even then as honest as they were independent. At a minimum, the Massacre trials prove that Boston lost a pretty fair trial lawyer when at the age of forty John Adams doffed his barrister's robes forever in favor of a career in the public service.¹

But despite the patriotism and the pride, the Quincy-Adams performance has also produced a feeling of mystery, of what might even be called doubt. As early as 1788, the Reverend William Gordon, who had lived in Boston and knew Adams personally, suggested in his history that Adams had tried the case with something less than full zeal:

While carrying on, Mr. Quincy pushes the examination and cross-examination of the witnesses to such an extent, that Mr. Adams, in order to check it, is obliged to tell him, that if he will

¹The latest encomium appears in the *American Bar Association Journal*, LIV (1968), 148.

not desist, he shall decline having anything further to do in the cause. The captain and his friends are alarmed, and consult about engaging another counsellor; but Mr. Adams has no intention of abandoning his client. He is sensible that there is sufficient evidence to obtain a favorable verdict from an impartial jury; and only feels for the honor of the town, which he apprehends will suffer yet more, if the witnesses are examined too closely and particularly, and by that mean[s] more truth be drawn from them than what has an immediate connection with the soldiers firing, by or without the orders of the captain.²

The posthumous publication in 1828 of Governor Thomas Hutchinson's third volume in his history of Massachusetts-Bay did not resolve the doubts. He referred to the lawyers anonymously as 'two gentlemen of the law, who were strongly attached to the cause of liberty,' and never discussed the legal punch-pulling.³ Samuel M. Quincy's annotated edition of Josiah Quincy's notebook (published in 1865) maintained a similar silence,⁴ as did the diary of Chief Justice Benjamin Lynde, which first appeared in print in 1880.⁵

In 1883, Peter Orlando Hutchinson, the Governor's great-grandson, published in England the first volume of Hutchinson's post-1774 *Diary and Letters*. Although this work contains a lengthy autobiographical narrative, and transcribes some notes which the Governor made in his Almanac for 1770 (of which more anon), it does not allude to the issue raised by Gordon.⁶

No further reference to the problem appears to have been published until 1937, when Randolph G. Adams printed, first in the *Proceedings* of the American Antiquarian Society, and

² William Gordon, *The History of the Rise, Progress, and Establishment, of the Independence of the United States of America*, 4 vols. (London, 1788), I, 291. Adams, when he read Gordon's account, wrote in the margin: 'Adams' Motive is not here perceived. His Clients lives were hazarded by Quincy's too youthful ardour.' Adams' own copy is now in the Boston Public Library.

³ Thomas Hutchinson, *The History of the Colony and Province of Massachusetts-Bay*, 8 vols., ed. Lawrence Shaw Mayo (Cambridge, 1936), III, 235-236.

⁴ Josiah Quincy, Jr., *Reports of Cases*, ed. Samuel M. Quincy (Boston, 1865).

⁵ *The Diaries of Benjamin Lynde and of Benjamin Lynde, Jr.* (Boston and Cambridge, 1880).

⁶ Thomas Hutchinson, *Diary and Letters*, 2 vols., ed. P. O. Hutchinson (London, 1883-1886).

then as a separate pamphlet, 'New Light on the Boston Massacre,' a collection of correspondence, principally between Hutchinson and General Thomas Gage, British Army Commander.⁷ Drawn from the Gage Papers in the William L. Clements Library, Ann Arbor, and covering all the dramatic days of 1770, 'New Light' contained Hutchinson's reports to Gage in New York on the progress of the defense. During the soldiers' trial, Hutchinson wrote, there was 'a Report in Town . . . that one of the Council is not so faithful as he ought to be.' But, Hutchinson hoped, 'there is nothing more in it than a difference in opinion from some others of the necessity of entering into the examination of the Conduct of the Towns people previous to the Action itself, he being a Representative of the Town and a great Partisan wishes to blacken the people as little as may be consistent with his Duty to his Clients.'⁸

Hutchinson thus seemed to be noting the problem, but dismissing it as simply a difference of professional opinion over the quantum of a necessary defense. In fact, the issue was considerably deeper, as we learned in 1949 when Catherine Barton Mayo published (also in the *Proceedings* of the American Antiquarian Society) 'Additions to Thomas Hutchinson's "History of Massachusetts Bay".'⁹ The 'Additions' were really first-draft material which Hutchinson, preparing his manuscript for the press, had excised. From Hutchinson's comments, it is plain that he considered Adams to have played politics with his clients' defense, even though in describing what happened, Hutchinson was ready to give counsel the benefit of the doubt:

They [that is, Quincy and Adams] were faithful to their client unless the refusal of one to suffer evidence to be produced to

⁷ Randolph G. Adams, 'New Light on The Boston Massacre,' American Antiquarian Society, *Proceedings*, XLVII (1937), 259-354, hereinafter 'New Light.'

⁸ Adams, 'New Light,' 348-349.

⁹ C. B. Mayo, ed., 'Additions to Thomas Hutchinson's "History of Massachusetts Bay",' American Antiquarian Society, *Proceedings*, LIX (1949), 11-74, hereinafter 'Additions.'

shew that the expulsion of the Troops from the Town of Boston was a plan concerted among the inhabitants, can be urged to the contrary. Mr. Adams one of the counsel declined being further concerned if any further evidence of that sort was insisted upon probably having no doubt that the other evidence without it was sufficient for the acquittal of his client; while Mr. Quincy the other counsel was willing it should be produced. . . .

The employing counsel who were warmly engaged in popular measures caused some of the evidence to be kept back which would otherwise have been produced for the prisoners. The counsel for the crown insisted upon producing evidence to prove the menaces of the soldiers preceding the action, and the counsel for the prisoners consented to it, provided they might have the like liberty with respect to the inhabitants. After the evidence had been given on the part of the crown, and divers witnesses had been examined to shew the premeditated plan of the inhabitants to drive out the soldiers, one of the counsel, Mr. John Adams, for the prisoners then declined proceeding any further, and declared that he would leave the cause, if such witnesses must be produced as served only to set the town in a bad light. A stop therefore put to any further examination of such witnesses, by which means many facts were not brought to light which the friends to government thought would have been of service in the cause, though it must be presumed the counsel did not think them necessary, for it was allowed, that they acted with great fidelity to their clients, when it was evident, that a verdict in their favour, must be of general disservice to the popular cause, in which counsel had been, and afterwards continued to be, warmly engaged.¹⁰

It is worth emphasizing here that Hutchinson's final draft did not mention Adams' peculiar strategy, much less his threat to quit. Even Hutchinson's original draft, written in the late 1770s, did not suggest that Adams had in any way seriously endangered the soldiers' lives. And the letter to Gage had been equally mild in this respect.

But Hutchinson, we can now be sure, knew much more than he was willing to tell the General, or even publicly to commit

¹⁰ Mayo, 'Additions,' 31-33.

to posterity. On a few leaves of that Almanac for 1770, he wrote down information quite different from anything that later went into print or even writing. The book, *An Astronomical Diary; or, Almanack For the Year of Christian Æra, 1770*, by Nathanael Low, printed and sold by Kneeland and Adams in Milk Street, Boston, passed from Hutchinson to his great-grandson, Peter Orlando Hutchinson, and ultimately to the British Museum.¹¹

For reasons unknown, the Almanac has lain largely ignored ever since. History, particularly legal history, has been the loser by this neglect, because on his almanac's pages, Hutchinson had recorded a startling picture of the difficulties which John Adams' behavior imposed on the men he was trying to save, behavior which caused Hutchinson and Commodore Samuel Hood to consider seriously the feasibility of replacing Adams in mid-trial.

The sentence structure and content of the entries, when compared to those of Hutchinson's *History* and the 'Additions,' indicate clearly that the Almanac entries were an earlier working out of the account which Hutchinson finally published. The entries are both dated December 5, 1770, the day the soldiers' trial ended. But one cannot say certainly that they were written then. Two blanks, indicating Hutchinson's apparent temporary ignorance of the date the trial commenced, suggest that he composed his remarks an appreciable time after the event. On the other hand, the failure to include in the almanac notes Private Montgomery's post-trial admission that he was first to fire, although it does appear in the 'Additions,' indicates that the notes were written quite soon after the trial—the Boston troop commander, Lt. Col. William Dalrymple, sent the soldiers to rejoin their regiment in New Jersey shortly after the verdict.¹²

¹¹ Peter Oliver, *Origin and Progress of The American Revolution*, ed. Douglass Adair and John A. Schutz (San Marino, 1961), xx. The almanac is Egerton MS 2666 in the British Museum.

¹² Adams, 'New Light,' 352-353.

The happy outcome of the case eliminated the problem, and even tempered Hutchinson's own summation. Nonetheless, the acquittals are immaterial, as is Hutchinson's conclusion that by winning, Adams and Quincy had 'done more to hurt the general cause in which they had been warmly engaged than they ever intended.' Allow though we may for the understandable anxiety current among the Loyalist chiefs, which might have caused them to view the progress of the trial as less favorable than it actually was, we still come away from the Hutchinson account with the uncomfortable feeling that in trying to do what he considered justice to Boston, John Adams came shockingly close to sacrificing his clients for the good of his constituency.

The two entries are here reprinted verbatim, with original orthography and punctuation. The figures in brackets are the leaf numbers, with 'a' and 'b' representing face and reverse, respectively.

[48a] [Dec.] 5. The Trial of the 8 Soldiers began the ¹³ November & held till the 5 December about 4 Clock PM when two Kilroy & Montgomery¹⁴ were found Guilty of Mansl.¹⁵ the other 6 acquitted. Three of the Judges were without any doubt that all ought to be acquitted. Judge Lynde said if the jury should have any doubt about the two it certainly could amount in them to no more than Manslaughter he did not think it could amount to that. It seems upon the whole Evidence that altho' this Action may be excused yet the Soldiers might well enough have bore further Insult before they fired as they might keep off the mob with their Bayonets. This probably inclined the Jury to find these two Guilty of Mansl. tho Kilroy who fired first was struck with a

¹³ 27 Nov.: *The Legal Papers of John Adams*, 3 vols., ed. L. Kinvin Wroth and Hiller B. Zobel (Cambridge, 1965), hereinafter *Legal Papers*, III, 24.

¹⁴ Matthew Kilroy (Killroy); Hugh Montgomery (Montgomery). *Legal Papers*, III, 47.

¹⁵ i.e., manslaughter.

Club¹⁶ & Montgomery was of as good a Character as any but there was [48b] certain Evidence that these two fired and as there was 8 present & but 7 Guns fired it was not possible for the Jury to tell who the eighth man was that did not fire and if they had brot all of them in Guilty of MSl. one innocent person must have been found Guilty for they were a lawful Assembly and he who was not principal in ye 1 degree could not by any Rule of Law be considered as principal in the 2d or as aiding & abetting.¹⁷

[73b] Dec. 5. The Jury gave in their Verdict after ¹⁸ days trial of the 8 Soldiers. Kilroy and Mongomery they found Guilty of Mslaughter the other six they acquitted. It was sworn to by one or more witnesses that the two fired & Kilroy had some days before declared he would take the opportunity to fire upon the Inhabitants.

Mongomery as one or more witnesses swore was knocked down with a Club & then fired¹⁹ & he was a fellow of very good character & the Court seemed to wish he had been acquitted. I was applied to to remit the burning but did not think it prudent.²⁰ Dalrymple & other Officers wished I would not. The Court doubted whether in any the fact could be M.S. the violence offered by the people they supposed would make it se defendendo²¹ in every one of the Soldiers, but it seems the Jury thought they ought to have been longer before they fired & if it had [74a] been proved that all fired they would have brought in all Guilty of MSr but the general run of the Evidence was that there was only 7 Guns fired by 8 whoever the eighth was there was nothing which could involve him in

¹⁶ Actually, it was Montgomery who, being struck by the club, fired first. See 'Additions,' 33.

¹⁷ The legal authorities are cited and discussed in *Legal Papers*, III, *passim*.

¹⁸ Seven and one-half trial days, plus the intervening Sunday. *Legal Papers*, III, 28-29.

¹⁹ See, e.g., testimony of James Bailey, *Legal Papers*, III, 115.

²⁰ Compare *Legal Papers*, III, 31 note.

²¹ i.e., in self-defense.

the guilt of the other seven. Rather therefore than convict one of the six not proved to have fired who must be innocent the jury acquitted five who were Guilty.

The Counsel for the Crown urged to be admitted to prove the threats &ct. of the Soldiers preceding the Action. The Court doubted the propriety but being consented to by the Prisoners Counsel they having the same liberty as to the Inhabitants it was allowed. Mr. Auchmuty²² did not like it but not being a conductor²³ did not oppose it. The reason he gave to me was that they would find Witnesses to outswear the Witnesses for the Soldiers. But the disadvantage was not there. After [74b] all had been given on the part of the Crown and Quincy one of the Counsel for the prisoners was for giving very large Evidence against the Inhabitants to prove a premeditated design to drive out the Soldiers & frequent abuse as well as threats Adams was against it & Blowers²⁴ who acted as an Attony²⁵ to prepare the Evidence told me that Adams said if they would go on with such Witnesses who only served to set the Town in a bad light he would leave the cause & not say a word more. So that a stop was put & many witnesses were not brought who otherwise would have been. Such a disposition appeared in Adams to favor the Town that the Commodore²⁶ & others spoke to me & told me they expected the cause was lost & the Commod. sent for Auchmuty & urged him to insert himself instead of Adams. He declined [75a] & I declined [consenting] to it as it would have been extremely irregular & would have done more hurt than good especially as he had not attended thro' the whole of the Trial & could not be sufficiently prepared to close the Cause.²⁷

²² Robert Auchmuty, Judge of Vice Admiralty and counsel to Captain Preston. *Legal Papers*, I, xcvi; III, 6, 15, 16.

²³ i.e., trial counsel.

²⁴ Sampson Salter Blowers. *Legal Papers*, I, xcvi; III, 24, 101.

²⁵ As opposed to a barrister. 'Attorney' here means 'solicitor,' in the English sense.

²⁶ Samuel Hood, who was then Commander in Chief on the North American Station. Public Record Office, London, ADM 51/798.

²⁷ i.e., to make the closing jury argument.

It was finally allowed that Mr. Adams closed extremely well & with great fidelity to his Clients altho his bias to the general conduct of the Town appeared very strong & some great indecencies dropd respecting the conduct of Administration in sending Troops here &ct.²⁸

Adams & Quincy being too hot lawyers in favour of all popular irregularities & both of them men of parts though the latter a Tyro²⁹ Preston was advised to secure them by a sufficient fee³⁰ to each but had [75b] there been others of different principles & equal powers who would have engaged with zeal it certainly would have been more advisable to have employed them & have silenced these if the Court had not required them to appear for the Crown³¹ for the frequent strokes in favour of the general cause in which the Town was engaged against the King & Parliament tended to bias the jury against the Soldiers employed by the King < &c > which measure had been approved by Parliament.³² The issue however is favorable to the cause of Government and the Counsel for the prisoners have done more to hurt the general cause in which they had warmly engaged than they ever intended & I think it not impossible if they could have foreseen it they would have [76a] declined engaging or measures would have been taken to discourage them from it.

The trial of the four persons charged with firing out of the Custom House came on the same term.³³

Not a spark of Evidence was produced except Manwarings french boy³⁴ who told the same story he had done at first &

²⁸ See, e.g., *Legal Papers*, III, 246, 266.

²⁹ Quincy was at the time of the trial twenty-six years old; he had been admitted to practice before the Superior Court of Judicature in 1768. *Legal Papers*, I, cvii.

³⁰ See *Legal Papers*, III, 32.

³¹ Hutchinson seems to be suggesting that by retaining Quincy and Adams, Preston was giving them an opportunity to put the town in a good light. Why the Court would, under the circumstances, request them to appear for the Crown is obscure; indeed it is inconceivable.

³² Actually, the Ministry had sent them. See Lawrence Gipson, *The Triumphant Empire: The Rumbling of the Coming Storm, 1766-1770* (New York 1965), p. 160.

³³ *Legal Papers*, III, 29-30 note.

³⁴ Charles, or Charlotte, Bourgatte, servant of Edward Manwaring, acting Tide Surveyor (i.e., Customs inspector) of Boston. *Legal Papers*, III, 4-5; Public Record Office, London, T. 1/482, No. 212.

tho proved by divers Witnesses to have been all the Evening at another place himself & that his Master was then with him & that he had denied the whole in Gaol yet stood to his account with consummate impudence in Court.³⁵ The Jury acquitted them without going from the Bar. The Court ordered the Boy to be kept in Gaol it being intended the Atty General should prosecute him for perjury.³⁶ Justice Dana refused to issue a warrant upon the boys testimony³⁷ it being [76b] absolutely incredible the fact which he swore to being of such a nature that it was impossible it should escape the observation of several hundred persons present, but the Grand Jury whereof Colo. Taylor of Milton³⁸ was foreman & Mr Sam Austin of Boston³⁹ one of his fellows easily found a bill upon the testimony of this Boy & they were all taken & committed & lay several days I think weeks in close Gaol before they were admitted to bail.⁴⁰ Mr Bowdoin in his Narrative found them guilty & in letters which he wrote to England to accompany the Narrative to many of the Nobility & principal Commons he says there was no doubt to be made that guns were fired out of the Customhouse &c.⁴¹

³⁵ *The Trial of William Wemms*. . . (Boston 1770), pp. 211-214, 216.

³⁶ *Legal Papers*, III, 30-31 note. He was in fact tried, convicted, and whipped.

³⁷ This is a reference to the initial refusal of Justice of the Peace Richard Dana to issue a warrant against Manwaring and three others immediately after the Massacre. The Grand Jury, however, indicted them on March 27, after vigorous efforts by the radicals. *Legal Papers*, III, 4-5.

³⁸ William Taylor, colonel in the militia. Teele, ed., *The History of Milton, 1640-1887* (Boston, n. d.), p. 143; Massachusetts Historical Society, Thwing Catalogue.

³⁹ Samuel Austin, a strong patriot, was the father of Jonathan Williams Austin, who was then one of John Adams' clerks, and who subsequently testified at both Preston's trial and the soldiers'. *Legal Papers*, I, xcvi; III, 60, 102-103.

⁴⁰ They were bailed at £400 each on May 31, 1770 before Justice Dana. Massachusetts Historical Society, Dana Notebook.

⁴¹ James Bowdoin, radical and sometime Councillor, wrote *A Short Narrative on the Horrid Massacre in Boston* (Boston 1770). See pp. 12-16 for the argument that some of the firing came from the Custom House.

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