

# Parsons's Charge: The Strange Origins of Stand Your Ground

DANIEL BREEN<sup>†</sup>

## I. INTRODUCTION

On the evening of January 3, 1807, a crowd of perhaps a thousand men marched through the streets of Boston on their way to the Common. Once there, the marchers constructed a pair of gallows from which they suspended two effigies. One depicted a lawyer named Thomas O. Selfridge, who a week before had been acquitted on charges of manslaughter arising from the death of Charles Austin. The trial had been politically explosive, as the victim was the son of Benjamin Austin, a longtime chief figure in Boston's Republican Party; the assailant was a fervent Federalist. The other effigy depicted Theophilus Parsons, Chief Justice of the Supreme Judicial Court (SJC), whose charge to the Grand Jury in November had produced an indictment for manslaughter, rather than murder.<sup>1</sup>

Chief Justice Parsons's charge was a watershed moment in legal history. It paved the way for Selfridge's acquittal at trial: the first successful assertion in American law of the doctrine now known as "Stand Your Ground."<sup>2</sup> As presently codified in twenty-four states, Stand Your

---

<sup>†</sup> Dr. Daniel L. Breen received his JD from the University of Georgia School of Law in 1987, and his Ph.D. in History from Boston College in 2003. He is currently a full-time instructor in the Legal Studies program at Brandeis University.

<sup>1</sup> See THE REPERTORY, Jan. 6, 1807, for accounts of the "Selfridge Riots;" BOSTON GAZETTE, Jan. 12, 1807; BOSTON GAZETTE, Jan 15, 1807; 3 WILLIAM BENTLEY, DIARY OF WILLIAM BENTLEY, 270 (1905); Letter from Fisher Ames to Josiah Quincy, Jr. (Feb. 3, 1807), in 1 WORKS OF FISHER AMES, 393-94 (Seth Ames, ed., Boston, Little-Brown 1854); THE DIARY OF DR. NATHANIEL AMES OF DEDHAM, MASSACHUSETTS, 862 (Robert Hansen, ed., 1998) (while accounts differ as to the size and orderliness of the crowd that night, all agree on the essential facts that the effigies depicted Selfridge and Parsons).

<sup>2</sup> As Richard Maxwell Brown notes, the doctrine was later adopted by Francis Wharton in his 1855 textbook *The Law of Homicide*, citing the *Selfridge* case as authority. See RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 7 (1994) (for the importance of the *Selfridge* case in the legal evolution of the Stand Your Ground doctrine). Later, the influential Ohio case of *Erwin v. State*, 29 Ohio 186 (1876), also used Parson's charge in support of the proposition that a "true man" should not have to flee from a person who seeks to do him serious harm. 29 Ohio at 197-99. See also Jennifer Randolph, *How to Get Away with Murder: Criminal and Civil Immunity Provisions in 'Stand Your Ground' Legislation*, 44 SETON HALL L. REV. 599, 602 (2014); P. Luevonda Ross, *The Transmogrification of Self-Defense by National Rifle Association-Inspired Statutes*, 35 S.U.L. REV. 1, 6-7 (2007); Richard Singer, *The Resurgence of Mens Rea: Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 B.C. L. REV. 459, 477 (1987); Cynthia Ward, *'Stand Your Ground' and Self Defense*, 42 AM. J. OF CRIM. L. 89, 100 n.39 (2015).

Ground laws provide that a person accused of homicide may successfully assert a claim of self-defense, even if there was no attempt to retreat, and the victim was not threatening deadly force, so long as the defendant reasonably believed his or her life to be in danger.

Modern critics of these laws, at least in their recent forms, have placed their attacks on two foundations: a broad social critique based on the proposition that such laws tend to encourage deadly violence<sup>3</sup> and are too often racist in their application,<sup>4</sup> and a more narrow political critique, based on the contemporary role of the National Rifle Association (NRA) in lobbying for such statutes as a way to promote gun ownership.<sup>5</sup> Modern polling suggests that the doctrine “splits the country sharply along political, general, and racial lines,” with Republicans (and especially white men) favoring Stand Your Ground laws by a wide margin and Democrats (and especially women and African-Americans) aligning almost as strongly against them.<sup>6</sup>

This divide is familiar to us today, but the actions of the effigy-builders that night in 1807 should instruct us that even at a very early stage in its development, Stand Your Ground did not go uncontested. Just as today, it split observers along partisan and cultural lines and delineated two distinct outlooks about the world.

Specifically, Parsons’s charge and the popular response to it throw into relief a tension between two sets of expectations in the early nineteenth century. One stems from an “honor culture,” in which gentlemen like

---

N.B., examples of Stand Your Ground statutes include: ALA. CODE § 13A-3-23 (2012); FLA. STAT. § 776.012 (2013); 18 PA. CONS. § 505 (1998); and TENN. CODE § 39-11-611(b)(1) (2010).

<sup>3</sup> See, e.g., American Bar Association, Nat’l Task Force on Stand Your Ground Laws, *Final Report and Recommendations* (Sept. 2015), [http://www.americanbar.org/content/dam/aba/images/abanews/SYG\\_Report\\_Book.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/SYG_Report_Book.pdf).

<sup>4</sup> See, e.g., D. Marvin Jones, *He’s a Black Male...Something is Wrong with Him*, 68 U. OF MIAMI L. REV. 1025 (2014) (One leading argument against Stand Your Ground is the common stereotype that young black men have a propensity for committing violent acts—a stereotype that is all too likely to make an armed person open fire on the assumption that he or she is under threat). Patrik Johnson, *Racial Bias and Stand Your Ground Laws: What the Data Show*, CHRISTIAN SCIENCE MONITOR, August 6, 2013; Marc H. Morial, *Stand Your Ground Laws: A License to Kill*, PHILADELPHIA TRIBUNE, Oct. 7, 2015; and Khalil El-Assaad, *Stand Your Ground Laws: The Enshrinement of Racism under the Guise of Self-Defense*, (Sept. 3, 2014), <http://www.racialjusticeproject.com/stand-your-ground-laws-the-enshrinement-of-racism-under-the-guise-of-self-defense/>.

<sup>5</sup> See, e.g., According to Mayor Michael Bloomberg, for example, in pushing for Stand Your Ground laws, NRA leaders “weren’t interested in public safety. They were interested in promoting a culture where people take the law into their own hands....” E. J. Donne, Jr., *Why the NRA Pushes Stand Your Ground*, WASHINGTON POST, April 15, 2012.; Samantha Lachman, *The NRA is Directly Behind a Bill Loosening Florida’s ‘Stand Your Ground’ Law*, The Huffington Post, [huffingtonpost.com/2014/01/17/nra-guns-florida-\\_n\\_4619171.html](http://huffingtonpost.com/2014/01/17/nra-guns-florida-_n_4619171.html); *How Gun Rights Harm the Rule of Law*, THE ATLANTIC, April 1, 2015.

<sup>6</sup> This, at any rate, is the finding of a 2013 Quinnipiac University Poll, summarized at [www.qu.edu/news-and-events-quinnipiac-university-poll/national/release-detail?ReleaseID=1931](http://www.qu.edu/news-and-events-quinnipiac-university-poll/national/release-detail?ReleaseID=1931).

Selfridge had to preserve their public reputations at all costs.<sup>7</sup> The other comes from an older and broader “culture of neighborliness,” in which social harmony was the greater, overriding virtue. If the former tended to be cherished by a largely (although not exclusively) Federalist, professional, and mercantile class in Boston, the latter found support among a broader mass of people on whom Jeffersonian Republicans depended for support.

In this article, I would like to explore that divide by examining the origins of the Selfridge case. Crucial to the story are the particular dilemmas the case posed for Selfridge’s fellow Federalists—among whom was the newly appointed Chief Justice of the SJC. I will contend that, given its decidedly shaky common law foundations, the charge is best understood as an artful but ultimately unsuccessful attempt by Parsons to improve Federalist chances in the upcoming gubernatorial election of 1807. This essay, in fact, will be the first to situate the American origins of Stand Your Ground in the particular political context of the time.

Despite Parsons’s probable intentions, the charge backfired. By offending longstanding ideals about community “neighborliness”—ideals that historian Barbara Clark Smith has placed at the core of popular opposition to British policies during the Revolutionary Era, and which still loomed large in Republican party rhetoric thirty years later—the charge may have helped elect James Sullivan as Massachusetts’ first Republican governor.

From its very beginnings, Stand Your Ground has been ensnared in a web of conflict, in which one’s opinions about the doctrine have as much to do with one’s identity and background as anything else.

In Part II, I summarize the political situation that faced Massachusetts Federalists in 1806. The facts suggest that the killing on State Street was the culmination of an intentional effort on Selfridge’s part to publicly embarrass Ben Austin and thus improve Selfridge’s party’s prospects at the

---

<sup>7</sup> The leading work on the honor culture of the early republic remains Joanne B. Freeman’s *Affairs of Honor: National Politics in the New Republic* (2001) (For Freeman, in a political culture that had not yet developed established parties and traditions, public figures were driven to a near-obsessive concern for maintaining their reputations for honesty and courage in order to recommend themselves most effectively to the public and their peers. The result, in extreme cases, could be a duel). See also, Christopher G. Kingston & Robert E. Wright, *The Deadliest of Games: The Institution of Dueling*, 76 S. ECON. J. 1094 (2010) (The authors explain how certain sets of circumstances could conspire to make a duel a rational choice.) As Freeman notes, this honor culture prevailed most intensely among the professional elite, whose ambitions put them most often in the public eye. However, rather than springing up naturally on American soil, the rituals of this honor culture owed much to the influence of the French upon the American officer corps during the Revolution. See Richard Bell, *The Double Guilt of Dueling: The Stain of Suicide in Anti-Dueling Rhetoric of the Early Republic*, 29 J. OF THE EARLY REPUBLIC 383, 390 (2009).

next election. I argue that, when Austin's son assaulted Selfridge to chastise him for this course of conduct, Selfridge's professional status left him no choice other than to "stand his ground" and resist the assault through deadly force.

In Part III, I summarize the complex legal consequences of Selfridge's actions, and how they presented a political problem for his fellow Federalists. While a murder indictment would usually have followed from Selfridge's arrest, significant political benefits would follow for Federalists if the indictment was for manslaughter instead. These benefits help account for the otherwise extraordinary charge to the grand jury by Chief Justice Parsons. It was that charge that established Stand Your Ground as a feature of American law. Previous commentators on the case, notably Richard Singer, have failed to appreciate the crucial extent to which the charge shaped the course of the ensuing trial and led directly to Selfridge's acquittal.<sup>8</sup>

Finally, in Part IV, I examine the political reaction to the charge by Massachusetts Republicans, led by the grieving father, Ben Austin. That reaction, based on venerable cultural values of harmony and "neighborliness," helps us understand what the crowd thought it was doing when it constructed those gallows on Boston Common, and may provide links to our own contemporary suspicions about Stand Your Ground statutes.

## II. FEDERALISTS ON THE DEFENSIVE: THE POLITICAL BACKGROUND

In the summer of 1806, Caleb Strong, a Federalist, was in the midst of his seventh consecutive term as governor of Massachusetts. In a union increasingly dominated by Jeffersonians, the Bay State stood out as one of the few remaining places where Strong's party commanded significant popular support. But the enemy was at the gates. Behind the standard of Attorney General James Sullivan, Republicans had been edging ever closer to victory in the state's annual gubernatorial elections, buoyed by a rapidly growing, and heavily Republican, District of Maine.<sup>9</sup> In the most recent

---

<sup>8</sup> Richard Singer, *The Resurgence of Mens Rea, Part II*, 28 BC. L. REV. 459, 476-78 (1987). By focusing on Justice Parker's charge to the trial jury—which only elaborated on what Parsons had already said in the Grand Jury charge—Singer misses the vital fact that (as discussed below) it was only the manslaughter indictment that lent legal viability to the argument that Selfridge had no duty to retreat.

<sup>9</sup> Maine was the fastest growing state in the region, and most of the newcomers were voting Republican. Hancock and Washington Counties, for example, had cast a total of 1841 votes in the 1804 election, of which 874 went to Sullivan. In 1805, the counties cast 2177 total votes, of which 1355 went to Sullivan. The Republican nominee's percentage of the total vote thus rose from 46% to 60% in only one year. Similar trends in other Maine counties did not make for encouraging reading for the state's

election, held as usual on the first Monday in April, Strong had eked out a victory by the very slimmest of margins, a mere 40 votes out of an official total of over 72,000 ballots.<sup>10</sup> The writing was on the wall: if the trend continued, Sullivan would finally eject Strong from the governor's chair in 1807.<sup>11</sup>

That he had yet to do so was due in no small part to the personal appeal of Governor Strong, whose integrity was apparently unassailable.<sup>12</sup> Accordingly, with no major intervening issue around which they might rally the voters, the Federalists reminded the electorate that it was no use exchanging a known and respected quantity like Strong for Sullivan, whose considerable resume did not include the governor's office, and whose "jacobinical" party could be bent on unknown mischief.<sup>13</sup> As the *Newburyport Herald* put it:

the farmer, who should pull up a flourishing hill of corn, to see if there was a worm at the root, would be thought unwise. Surely he can have no greater claim to wisdom, who overturns a prosperous and happy government, because there are some fancied defects.<sup>14</sup>

This "if it ain't broke don't fix it" argument had some force with the voters. In 1806, after all, Strong had won a majority of votes in April even as his party lost both houses of the legislature in May.

Federalist leadership. Returns of Votes for Governor, 1804-1805 (on file with the Massachusetts State Archives).

<sup>10</sup> Return of Votes for Governor, 1806 (on file with the Massachusetts State Archives).

<sup>11</sup> Leading Federalists understood this very well, even if they did their best to maintain a braver front in the party press. In 1804, for example, Harrison Gray Otis had written that "our Governor may be saved for a year or two, but the precipitate course of this dreadful (Jeffersonian) torrent will finally overwhelm and perhaps destroy us." Letter from Otis to John Rutledge (Dec. 20, 1804) (on file with the South Caroliniana Library, John Rutledge Papers).

<sup>12</sup> James Trumbull, *History of Northampton* 602 (1902). Strong had little in common with such merchant nabobs as Harrison Gray Otis and James Handysyd Perkins, having grown up in rural Northampton rather than Essex or Suffolk Counties. He seems to have learned to mix easily with people from all backgrounds during his upbringing there, and there is no reason to doubt his biographer's judgment that Strong was distinguished for his "humble, condescending, mild, cheerful, just, temperate, and devout temper." Alden Bradford, *Biograph of the Hon. Caleb Strong* 28 (Boston, West, Richardson & Lord 1820). Even the Republican *Salem Register* admitted that he was honest, while finding it necessary to add that the assassin of King Henry IV was also "honest" in his own way. *To the Electors of Salem*, SALEM REGISTER, April 3, 1806.

<sup>13</sup> See *Look Before You Leap: An Address to the People of Massachusetts* 4 (Newburyport, MA, E.M. Blunt 1805); Daniel Webster, *An Appeal to the Old Whigs of Massachusetts* 6-11 (1806) (contrasting the "well-known" character of Strong to the "concealed and serpentine" habits of Sullivan).

<sup>14</sup> *To the Freeholders of Essex*, NEWBURYPORT HERALD, March 28, 1806.

When that legislature met in June, however, Republicans badly overplayed their hand. Seizing on a set of minor irregularities in the gubernatorial returns (residents of the Maine plantation of Davistown, for example, had purported to vote for one “Caleb Srong,” and Isleboro residents had cast 12 votes for “Caleb Stoon”),<sup>15</sup> they tried to frustrate the obvious intent of the voters by rejecting such ballots and delivering the victory to Sullivan. They backed down from this inept bit of power-grabbing at the last minute, but by then the damage had been done. Federalists, reveling in their opponents’ “mortification and disgrace,”<sup>16</sup> could argue with enhanced plausibility that the state was better off with the tried and true, eminently principled Strong at the helm. “After the outrage [Republicans] came so near perpetrating,” sniffed the *Boston Gazette*, “we are no longer left to conjecture the nature of their designs.”<sup>17</sup>

The whole sordid business would, according to *The Repertory*, “open the eyes of many a misled and deceived citizen.”<sup>18</sup> Indeed, that summer the Federalist press contained many pleas for “undecideds” and lukewarm Republicans to heed the lesson of the election chicaneries and rally to their standard.<sup>19</sup> Perhaps those efforts would succeed, but Federalists could not afford a misstep. For the past three years, every stroke of the axe in the District of Maine had been bringing Sullivan (a son of Maine himself) closer to victory. The last thing Federalists needed was a new controversy that would erase memories of Republican ballot manipulations and put them back on the defensive.

#### A. “Murder at Noon-Day”

The failed Republican political coup of June planted the seeds for the death of Charles Austin. What was expedient for Republicans as a whole was perfectly galling to Benjamin Austin, the chief organizer and polemicist of Boston Republicans.<sup>20</sup> The elder Austin insisted that Strong

---

<sup>15</sup> REPORT OF THE COMMITTEE OF THE MASSACHUSETTS LEGISLATURE APPOINTED TO EXAMINE THE RETURNS FOR THE SEVERAL TOWNS, LEGISLATIVE RECORDS, MASSACHUSETTS STATE ARCHIVES, 258–460 (1806); Edward Stanwood, *The Massachusetts Election of 1806*, in 20 Proceedings of the Massachusetts Historical Society, 12 (1906).

<sup>16</sup> Letter from Samuel Cabot to Samuel Williams (June 13, 1806); Samuel Cabot Papers, (Mass. Historical Society).

<sup>17</sup> BOSTON GAZETTE, July 17, 1806.

<sup>18</sup> THE REPERTORY, June 13, 1806.

<sup>19</sup> See, e.g., *To Honest Democrats*, BOSTON GAZETTE, July 17, 1806; *A Spectator*, HAMPSHIRE FEDERALIST, July 1, 1806; *Senate Protest*, COLUMBIAN CENTINEL, June 11, 1806.

<sup>20</sup> Austin—whose father had been an associate of Samuel Adams during the 1770s—long regarded himself as a link between Boston’s revolutionary past and its Republican present. JEFFREY L. PAISLEY, *THE FIRST PRESIDENTIAL CONTEST: 1796 AND THE FOUNDING OF JEFFERSONIAN DEMOCRACY* 341 (2013); *Benjamin Austin, Jr.*, *DICTIONARY OF AMERICAN BIOGRAPHY* 432. The

should not be certified as governor, going to the absurd length of arguing that the men of Isleboro could have intended to vote for a real live “Caleb Stoon.”<sup>21</sup> His next move should be understood in the context of his disappointment with those moderate Republicans—probably including Sullivan himself, with whom Austin had long been at odds<sup>22</sup>—who had acquiesced in Strong’s certification. With the Fourth of July looming in three weeks, Austin was determined to rally the faithful by holding a special Republican Independence Day celebration. Stymied by the Federalist Board of Selectmen in his attempt to secure Faneuil Hall for the purpose,<sup>23</sup> he decided to shift the celebration to Copp’s Hill, in the North End. There, “on the ruined battlements of the British troops,” Republican citizens would be invited “to give a display of their patriotism on the great principle of American Independence,”<sup>24</sup> mostly through a series of anti-Federalist speeches and toasts. Austin had sponsored such open air “political fêtes”<sup>25</sup> to foment opposition to the Washington administration fifteen years before; now he would return to the tactic in order to regain momentum for his party—and not incidentally, remind moderates like Sullivan of Austin’s political importance.

The story of what happened next has been told before,<sup>26</sup> and nothing but the most essential details need be repeated here. Austin’s Republican

Republican *Independent Chronicle* served as the vehicle through which Austin constantly depicted Republicans as the true heirs of the principles of 1775, with Federalists playing the role of “Old Tories.” Indeed, “for twenty years at least, hardly a number of the *Chronicle* was issued, without containing something from the pen of Mr. Austin.” JOSEPH BUCKINGHAM, SPECIMENS OF NEWSPAPER LITERATURE 373 (1850).

<sup>21</sup> INDEPENDENT CHRONICLE, June 16, 1806.

<sup>22</sup> “They are men,” Sullivan wrote, clearly referring to Austin, “who have a seat in the front rank of republicanism, who constantly express sentiments that are not congenial to any form of government that can subsist among men...” Letter from Sullivan to William Eutis (Jan. 17, 1802) (on file with the Mass. Historical Society), in THOMAS C. AMORY, 2 LIFE OF JAMES SULLIVAN (Boston: Phillips, Sampson & Co. 1859), 97. He had long felt that way about Austin having written fifteen years before that Austin’s anti-lawyer polemics in the *Chronicle* were nothing more than “vagaries of a distempered brain.” INDEP. CHRON., June 1, 1786. See also JAMES SULLIVAN, “TO HONESTUS,” JAMES SULLIVAN PAPERS (on file with the Massachusetts Historical Society); A confirmed moderate, adept at shifting with the political winds as they blew beyond Boston Neck, Sullivan was never likely to share Austin’s hard and fast commitment to Boston’s urban radical tradition, even as he depended on the force of Austin’s pen to rally the voters. Federalists were well aware of the tension between the two Republican leaders and were not shy about pointing it out. See, e.g., *Sydney*, COLUMBIAN CENTINEL Jan. 11, 1804.

<sup>23</sup> MINUTES OF SELECTMEN MEETINGS 1799-1810 (Boston: Municipal Printing Office 1904) 302.

<sup>24</sup> INDEP. CHRON., June 30, 1806.

<sup>25</sup> For the importance of such festive gatherings in the politics of the Early Republic, see DAVID WALDSTREICHER, IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM 1776-1820 (1997); SIMON P. NEWMAN, PARADES AND POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC (1997).

<sup>26</sup> The fullest account is still found in CHARLES WARREN, JACOBIN AND JUNTO 183-214 (1931); Warren, however, devotes most of his attention to Selfridge’s trial, rather than Chief Justice Parsons’s grand jury charge, despite the fact that it was the charge that most enraged Republican opinion in

“fête” succeeded all too well. Among the invited guests on Copp’s Hill that afternoon was the ambassador from Tunisia and his retinue, on their way home from an official visit to President Jefferson.<sup>27</sup> The prospect of gawking at the gorgeously-arrayed North Africans led twice as many people to attend the event as expected. This created a major problem for Mr. Eben Eager, who had contracted with Austin and Boston’s Republican Committee to provide food and drink for only 300 guests. Having instead been forced to satisfy the hunger and thirst of nearly 600 celebrants, Eager naturally demanded in the days following the event that Austin and the Committee increase his pay accordingly.

This Austin refused to do, probably because many of the extra attendees had not bothered to pay the Committee for a ticket. A frustrated Eager then sought the advice of 31-year old Thomas Selfridge, a lawyer who despite his youth had ample experience in debt collection matters.<sup>28</sup> Selfridge also happened to be a committed Federalist,<sup>29</sup> who, according to Sullivan, was in the habit of behaving with “impudence” towards Massachusetts’ few Republican lawyers, and enjoyed being “huzzahed and applauded” by his fellow partisans.<sup>30</sup> For a man of Selfridge’s political convictions, Eager’s tale would have presented a tantalizing opportunity.

Federalists were never slow to paint Austin as a hypocrite; they had long been pointing out that after years of “indecent abuse of the funding system” designed by Hamilton, Austin was now happily collecting a salary for selling bonds issued by Jefferson’s treasury.<sup>31</sup> And now here was the most notorious Jacobin in Boston refusing to pay the bill of an honest tradesman. Going public with the matter of the unpaid bill would strengthen the hypocrisy charge, exposing Austin and his party to acute

---

Boston. Jack Tager’s emphasis is also on the trial and its place in the “honor culture” of the early republic. Jack Tager, *Politics, Honor and Self-Defense in Post-Revolutionary Boston: The 1806 Manslaughter Trial of Thomas Oliver Selfridge*, HIST. J. MASS 84–104 (2009). Neither author traces the vital influence of the charge on the ensuing trial, nor do they place the charge in its full political context. *Id.*

<sup>27</sup> The ambassador had been sent by Jefferson and Madison for a tour of the major northeastern cities as a way to dispel the (all too accurate) impressions of American weakness he might have taken back with him had his only experiences been in tiny Washington. Letter from James Madison to William Eustis (May 19, 1806) (William Eustis Papers, Library of Congress).

<sup>28</sup> Mostly as a plaintiff seeking to collect fees owed him by his clients. *See, e.g., Selfridge v. Lovering*, (Suffolk Court of Common Pleas, May 20, 1806), in SUFFOLK COUNTY RECORD BOOK (Boston: Mass. Judicial Archives), 69.

<sup>29</sup> THOMAS OLIVER SELFRIDGE, JR., WHAT FINER TRADITION: THE MEMOIRS OF THOMAS O. SELFRIDGE, JR. 4 (1987) (Selfridge’s name appears regularly on lists of party operatives entrusted with the task of handing out Federalist ballots during Boston election days).

<sup>30</sup> Letter from Sullivan to James Madison (August 16, 1806) (James Madison Papers, Library of Congress).

<sup>31</sup> *See, e.g., COLUMBIAN CENTINEL*, Feb. 13, 1805.



embarrassment just when they were trying to recover from the election debacle of the previous month. And in this connection, no one would have been happier to hear about the case than John Park, editor of *The Repertory*, whose attacks on Austin had been frequent and bitter.<sup>32</sup>

Finally, as a lawyer, Selfridge had special reasons to detest Austin. Twenty years before, writing under the pseudonym Honestus, (which is what Federalists would call him ever afterwards), Austin had made his reputation with a series of angry attacks on the legal profession and its allegiance to common law,<sup>33</sup> and he continued to malign lawyers at every turn.<sup>34</sup>

Hence, since few (if any) other Federalists could have known the details of Eager's problems with Austin, it is reasonable to conclude that Selfridge was the source of the following letter in Park's *Repertory* of July 15, 1806:

I confess that I am a Democrat, and like to see fair play and no hucking.—I wish to know if the Committee on Arrangements, who provided for the democrattick party, on the 4<sup>th</sup> of July, have paid the Jefferson Tavern keeper, for the entertainment which they and their associates partook of on Cop's Hill?—If not, whether they intend doing it without a lawsuit from the said Tavern keeper, who has been defied to commence a suit by one of the Committee, not very remarkable for mild language, and lowness of voice, and as well known for his nice Economy as generosity.<sup>35</sup>

Of course, no real democrat would have written about Austin this way. But Park would have, and Selfridge had every incentive to give him the materials for doing so.<sup>36</sup>

---

<sup>32</sup> Park was a master of invective, who on various occasions had referred to Austin as “an arch-hypocrite” and “a veteran in slander.” THE REPERTORY, July 23, 1805; THE REPERTORY, November 1, 1805. Park had only recently called attention to Austin's position as loan officer. See, e.g., THE REPERTORY, July 11, 1806. The unpaid bill would have represented a chance too good to be missed.

<sup>33</sup> Austin's essays appeared originally in 1786 as occasional pieces in the *Independent Chronicle*, but were later compiled—in edited form—under the title OBSERVATIONS ON THE PERNICIOUS PRACTICE OF LAW (Boston: True & Weston, 1819). See Aaron T. Knapp, *Law's Revolution: Benjamin Austin and the Spirit of '86*, 25 YALE J. OF LAW & THE HUMANITIES 271 (2013), for a detailed summary of Austin's anti-lawyer critique.

<sup>34</sup> See, e.g., *The Examiner*, no. 40, INDEP. CHRON., July 11, 1805.

<sup>35</sup> THE REPERTORY, July 15, 1806.

<sup>36</sup> Park later implied that he had come by knowledge of the collection suit by other means, and had even suppressed a “communication” on the matter on Selfridge's request. He went on to claim that

At any rate, Eager's unpaid bill was a distraction Republicans did not need, and the matter was settled by informal arbitration shortly after Selfridge filed the suit. There matters might have stood, had not Austin held his own suspicions about the propriety of Selfridge's actions. On July 28, 1806 the day of the settlement, Austin was holding court as usual at Russell's Insurance offices on State Street. When someone asked him about the suit, Austin answered that the whole thing had been cooked up by "a federal lawyer."<sup>37</sup> Given the insular world of commercial life in Boston, it is not surprising that the remark made its way to Selfridge's office two blocks away at the Old State House. According to his later account, Selfridge took mortal offense at the comment and decided that he could not simply let it pass without a response.<sup>38</sup>

It may be that Selfridge *was* offended, but his later claims that he had to do something to rescue his cherished professional reputation ring hollow. The truth is that nothing Austin said could have lowered that reputation among the men who mattered most to the young lawyer: the largely Federalist mercantile and legal community of Boston. No man in New England was more reviled in that community than the lawyer-baiting *Honestus*. Harrison Gray Otis had only the month before, during the election controversy, called him a "prevaricator and a slanderer,"<sup>39</sup> and the lawyer (and future Governor) Christopher Gore considered him a man of "false and dastardly temper."<sup>40</sup> Austin's repute among Selfridge's colleagues is captured by the following bit of doggerel:

In the Reign of Democracy, dead to all shame,  
The Demons of falsehood infect us;  
Vice and Folly assume Wit and Virtue's fair name,  
And the devil himself's called *Honestus*.<sup>41</sup>

---

he only published what he knew when informed that the suit had been settled. "Mr. Park's Deposition," in THOMAS O. SELFRIDGE, A CORRECT STATEMENT OF THE WHOLE PRELIMINARY CONTROVERSY BETWEEN THO O. SELFRIDGE AND BENJ. AUSTIN 24 (Charlestown, Samuel Etheridge 1807). This cannot be true. The suit was settled on July 28<sup>th</sup>, while the above-cited "letter" appeared in Park's *Repertory* on July 15<sup>th</sup>.

<sup>37</sup> Austin never denied that he had said something like this, but insisted that he had done so only in the "jocular tone" he customarily used among his circle at Russell's. INDEP. CHRON., March 9, 1807.

<sup>38</sup> SELFRIDGE, *supra* note 36, at 33.

<sup>39</sup> COLUMBIAN CENTINEL, June 21, 1806.

<sup>40</sup> Letter from Christopher Gore to Rufus King (Aug. 24, 1806), in 4 THE LIFE AND CORRESPONDENCE OF RUFUS KING 538 (Charles R. Kind ed., New York, G.P. Putnam & Sons, 1897).

<sup>41</sup> Anonymous, *Epigram*. [In the reign of Democracy, dead to all shame] (1809), reprinted in THE CITIZEN POETS OF BOSTON 90 (Paul Lewis ed., 2016).

Nevertheless, Selfridge demanded that “the devil himself” retract his remark in the hearing of anyone who had been present at Russell’s that afternoon; and professing to be dissatisfied with Austin’s efforts to do so, “posted” him as “a COWARD, a LIAR, and a SCOUNDREL” in the August 4 issue of the *Boston Gazette*. Only a week had passed since the remarks were made.

Joanne B. Freeman has reminded us that in the “honor culture” of the early nineteenth century, a man of standing in the community might resort to the device of a “posting” in order to publicly humiliate a person who had violated the man’s honor while refusing a formal challenge to a duel.<sup>42</sup> Selfridge, however, had never issued such a challenge, and at any rate, a duel between the two was an exceedingly unlikely prospect.<sup>43</sup> Moreover, the indecent haste with which Selfridge published his post, compared to the lengthy negotiations that usually comprised affairs of honor at the time, seems puzzling. But if one believes Selfridge was the man who leaked news of Eager’s suit to Park, and if one recalls the unlikelihood that Austin’s unguarded remarks had truly put Selfridge’s public character and reputation at stake, the posting becomes part of an intelligible pattern. The young Federalist was trying to subject Austin to further public embarrassment, at a time when the election controversy offered them a renewed hope of persuading “honest but deluded” Republicans to support the congenial Governor Strong in his bid for an eighth term. Selfridge’s posting was probably a tactic in the affairs of politics, rather than in a legitimate affair of honor. Nevertheless, if the posting did not really arise from an offended sense of honor, it immediately created one.

In the elite professional and political milieu of the early republic, in which “death before dishonor was a predominant reality in most...social and familiar circles,”<sup>44</sup> a son was expected to defend a father’s reputation when the father could not very well do so himself. Only the year before, Sullivan’s son had notoriously beaten Benjamin Russell on Court Street for

---

<sup>42</sup> JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE EARLY REPUBLIC* 172 (2001). General James Wilkinson, for example, had similarly “posted” John Randolph when the latter contemptuously refused the general’s challenge at the time of the Burr treason trial.

<sup>43</sup> For one thing, Austin was twenty years older than Selfridge. And there was also the notorious fact that in 1792, *Columbian Centinel* publisher Benjamin Russell had publicly spit on Austin in State Street owing to statements Austin had made in the last town meeting. Austin had not challenged Russell over the insult, but had filed a lawsuit instead. A man who would not issue a challenge after being spit on would certainly refuse another’s challenge. See Letter from John Quincy Adams to Thomas Boylston Adams (Jan. 28, 1792), in 9 *ADAMS FAMILY CORRESPONDENCE*, 252-56 (Margaret A. Hogan et al. eds., 2009).

<sup>44</sup> RYAN CHAMBERLAIN, *PISTOLS, POLITICS AND THE PRESS: DUELING IN NINETEENTH CENTURY AMERICAN JOURNALISM* 38 (2009).

printing insulting remarks about the candidate in the *Centinel*.<sup>45</sup> Accordingly, after reading the highly-insulting posting, Ben Austin's 18 year old son Charles, a newly-minted Harvard graduate, purchased a short hickory cane with the probable intention of administering a sound beating on Selfridge.<sup>46</sup> The latter knew that the younger Austin was lying in wait for him on State Street,<sup>47</sup> which in 1806 acted as the town's public stock exchange, where lawyers and merchants met every day to conduct business. Nevertheless, shortly after noon, Selfridge emerged from his office and entered State Street as usual. In his pocket was a loaded pistol.

Seeing Selfridge approach, Austin stepped towards him with arm and cane upraised, confronting Selfridge nearly on the precise spot of the Boston Massacre of 1770. As the cane descended, Selfridge pulled out his pistol and opened fire. The cane made a serious gash in Selfridge's forehead; the bullet pierced Austin's chest and caused a fatal wound. Amidst the tumult of the surrounding crowd (which included the Tunisians), Selfridge shouted "I am the man who did it," while Austin died on the floor of a nearby shop.

The killing astonished the town, where for many years afterward the day was known as "Black Monday." For Republicans, who were always quick to link Federalists to "old Tories," the associations with the Massacre of 1770 were obvious; another innocent defender of liberty had been cut down by a representative of monarchy and privilege. Parts of the next edition of the *Chronicle* were bordered in black, as the *Boston Gazette* had been after the Massacre, and a large gathering of townspeople followed Charles Austin's funeral procession, as another gathering had done in March, 1770.<sup>48</sup> Later that day, Selfridge was confined to the stone fastness

---

<sup>45</sup> The incident is referred to in the *NEW ENGLAND PALLADIUM*, Mar. 15, 1805.

<sup>46</sup> Charles Austin had an example near at hand of a son's obligations in matters like this. Only three months before, young James Elliott had fought a duel with Charles' cousin William, after the latter had insulted the integrity of James' father. WALTER AUSTIN, *A LONG FORGOTTEN DUEL* (Boston, privately printed, 1914). Why Charles did not issue a challenge to Selfridge must remain a matter for speculation. The Austins were an old and established family in Boston, and Charles may have considered the social-climbing Selfridge, whose father was a Hubbardston farmer, too socially inferior for a duel. More likely, Charles suspected that Selfridge had not been acting out of a concern for honor, but rather for political advantage. If so, his motives may have seemed craven enough to merit a beating rather than a challenge.

<sup>47</sup> THOMAS LLOYD & GEORGE CAINES, *TRIAL OF THOMAS O. SELFRIDGE, ATTORNEY AT LAW, BEFORE THE HON. ISAAC PARKER, ESQUIRE* 32 (Boston, Russell & Cutler 1807).

<sup>48</sup> *INDEP. CHRON.*, Aug. 7, 1806; *BOSTON DEMOCRAT*, Aug. 6, 1806 ("The universal sentiment of commiseration and abhorrence which this melancholy event has excited in every class of the community has never been equaled since the fatal Massacre of the 5<sup>th</sup> of March."). Letter from William Sumner to Hannah Austin (Aug. 8, 1827) (on file with the William Sumner Papers, Massachusetts Historical Society).

of the Boston Gaol, to await his arraignment on charges yet to be determined.

### III. THE LEGAL PROBLEM: WHAT HAD SELFRIDGE ACTUALLY *DONE*?

No one doubted that Selfridge had fired the pistol. There were dozens of onlookers, and of course the lawyer had loudly proclaimed his responsibility as Austin lay dying. But what exactly, if anything, was Selfridge guilty of? In the absence of systematic law reports from their own courts,<sup>49</sup> the Massachusetts bench and bar could only make legal sense of the events of Black Monday by resorting to the definitions passed down through the common law, as embodied in the classic works of the British treatise writers. Selfridge's fate would necessarily rest upon them.

Based upon the discussions of homicide contained in those treatises, all signs pointed to a murder indictment. The authorities were in substantial agreement that murder consisted of "the willful killing of any subject through malice aforethought,"<sup>50</sup> and that a defendant killed out of malice when his actions displayed a "wicked, depraved, malignant spirit."<sup>51</sup>

Selfridge, of course, bore no particular ill will towards Charles Austin. But this did not resolve the issue. The authorities agreed that a defendant who killed one person out of malice towards another was guilty of murder.<sup>52</sup> Since "antecedent menaces" and "former grudges" on the part of the defendant were evidence of malice,<sup>53</sup> a jury could reasonably conclude, on the basis of everything that had happened since Eager's visit to his office, that Selfridge had persistently sought to injure the contemptible Honestus, had goaded him beyond any rational necessity and that in taking the son's life, had continued to act out of this pre-existing malice towards the father.

<sup>49</sup> Massachusetts had only begun publishing SJC decisions in 1804.

<sup>50</sup> 1 WILLIAM HAWKINS, *A TREATISE ON THE PLEAS OF THE CROWN* 78 (London, Eliz. Nutt 1716). *See also Discourse II, Of Homicide*, in 2 MICHAEL FOSTER, *DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW* 255–56 (London, E. and R. Brooke 1792); 4 WILLIAM BLACKSTONE, *COMMENTARIES* 194–95 (Oxford, Clarendon Press 1769); 1 EDWARD EAST, *A TREATISE ON THE PLEAS OF THE CROWN* 214 (London, A. Strahn 1803).

<sup>51</sup> 2 FOSTER, *supra* note 50, at 307–08; 4 BLACKSTONE, *supra* note 50, at 199.

<sup>52</sup> "[I]f one shoots at A and misses him and kills B, this is murder, because of the previous felonious intent, which the law transfers from one to another." 4 BLACKSTONE, *supra* note 50, at 201; *See also* 1 HAWKINS, *supra* note 50, at 83; 1 EAST, *supra* note 50, at 230.

<sup>53</sup> 4 BLACKSTONE, *supra* note 50, at 199.

More generally, “malice” could be inferred in any situation where the defendant, acting out of a “depraved inclination to [do] mischief,” acted in such a way that homicide was the probable consequence.<sup>54</sup>

It would not be difficult for a good prosecutor (and Attorney General Sullivan was certainly that) to persuade a jury that Selfridge had knowingly created a state of affairs in which—given the “honor culture” that prevailed among Boston’s elite—Ben Austin’s son was all too likely to be lying in wait for him that afternoon; and that, having been informed of the son’s presence, Selfridge’s decision to enter State Street with a loaded pistol in his pocket was therefore so “manifestly attended with danger” as to compel a guilty verdict.<sup>55</sup> For these reasons, anyone familiar with the common law of homicide would have expected Selfridge to face a murder indictment.<sup>56</sup>

If the Boston bar had a dream team of legal talent in 1806, it was certainly the trio of Federalists who would be representing Selfridge at trial: Samuel Dexter, Christopher Gore and Harrison Gray Otis. Yet even they would be hard-pressed to overcome the presumption of malice that would have accompanied such a murder indictment. Under the common law, they would have to argue affirmatively that the killing amounted to either “justifiable homicide” or “excusable homicide.” Neither option seemed to fit the facts of Black Monday.

To support a justifiable homicide defense, for example, they would have to persuade the jury that Selfridge had used deadly force to prevent Charles Austin from committing a “known felony.”<sup>57</sup> If this were the case, Selfridge would have been under no duty to retreat when Austin approached him with his upraised cane—he could legally have done just what he did: “stand his ground” and use deadly force to prevent the felony.<sup>58</sup> Crucially, at least some of the treatise writers—anticipating the gist of modern Stand Your Ground laws—agreed that even if the deceased had *not* intended to commit a felony, the defense would still apply as long as “the party killing had reasonable grounds for believing that the person slain had a felonious design against him...”<sup>59</sup>

---

<sup>54</sup> 1 EAST, *supra* note 50, at 231. *See also* 4 BLACKSTONE, *supra* note 50, at 200; 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 465–66 (London, E. Rider 1800)

<sup>55</sup> 1 EAST, *supra* note 50, at 231.

<sup>56</sup> This was certainly what Sullivan expected—*See* Indictment, *Commonwealth v. Selfridge*, (Boston: Mass. Judicial Archives 1806).

<sup>57</sup> *See, e.g.*, 2 FOSTER, *supra* note 50, at 274; 1 HALE, *supra* note 54, at 486–87.

<sup>58</sup> 1 HALE, *supra* note 54, at 484. *See also*, Sarah L. Ochs, *Can Louisiana’s Self-Defense Law Stand Its Ground?* 59 LOYOLA L. REV. 673, 681 (2013).

<sup>59</sup> 1 EAST, *supra* note 50, at 273.

For two reasons, however, this language was not likely to cause Sullivan to lose much sleep. First, immersed as he was in the honor culture of Boston's elite, and given everything that had happened between himself and Ben Austin, Selfridge would have known (along with everyone else) that Charles Austin did not intend to kill him, nor had he intended to commit any other known felony. To the contrary, Austin's intent was clearly to chastise Selfridge for the insulting post he had published that morning in the *Gazette*.<sup>60</sup> A chastisement amounted to an assault and battery, which was not a felony under common law.

Second, and even more seriously for Selfridge's dream team, a successful justifiable homicide defense demanded, as Blackstone said, that the killer had to be entirely blameless, culpable "not even in the minutest degree,"<sup>61</sup> and any fair evaluation of Selfridge's conduct in the weeks before Black Monday casts grave doubt on his ability to pass that rigorous test. Were Sullivan to conduct a searching inquiry into Selfridge's conduct over that time span, the jury would hear evidence suggesting a good deal more than minute blame on the defendant's part.

Even less promising was the option of predicating a defense on the grounds of excusable homicide. According to Blackstone, this defense was available where the defendant had killed another "in the course of a sudden brawl or quarrel" by way of defending himself against an assault.<sup>62</sup> The key word here is sudden. All the authorities agreed that the defense was not available where the killing resulted from some preexisting design on the defendant's part.<sup>63</sup> More importantly, a successful plea of excusable homicide demanded that the defendant show that before striking the fatal blow, he had "declined any further combat, and had retreated as far as he could go with safety."<sup>64</sup> Justice Trowbridge had emphasized this "duty to retreat" in his instructions to the jury in the Boston Massacre trials<sup>65</sup>—a meaningful precedent indeed, given the spot where Selfridge had opened fire.

---

<sup>60</sup> Beatings on a family member's behalf for the purpose of chastisement were common in Selfridge's Boston. In 1804, for example, Jacob Eustis had caned *The Repertory's* John Park for the latter's insulting remarks about Eustis's brother, a member of Congress. See THE REPERTORY, Nov. 27, 1804. And just before the 1805 election, Sullivan's son had beaten the *Centinel's* Benjamin Russell when Russell persisted in questioning his father's integrity. Letter from Christopher Gore to Rufus King (Mar. 10, 1805) in 4 THE LIFE AND CORRESPONDENCE OF RUFUS KING 448 (Charles R. Kind, ed., New York, G.P. Putnam & Sons 1897).

<sup>61</sup> 4 BLACKSTONE, *supra* note 50, at 182. See also, Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 598 (2009).

<sup>62</sup> 4 BLACKSTONE, *supra* note 50, at 184.

<sup>63</sup> See, e.g., EAST, *supra* note 50, at 283; HALE, *supra* note 54, at 479.

<sup>64</sup> EAST, *supra* note 50, at 280.

<sup>65</sup> See FREDERIC KIDDER, HISTORY OF THE BOSTON MASSACRE 262 (1870).

Dexter and company would obviously find themselves in trouble if they staked Selfridge's defense on excusable homicide. Their client's troubles with Ben Austin had been percolating for over a week, and he had carried that loaded pistol onto State Street after being told that Austin's son was waiting for him with a cane. These were hardly the makings of a sudden quarrel. Moreover, he did not try to retreat "as far as he could go," even though he had plenty of room to do so in a street filled with dozens of people who could have helped him. His position was the opposite of the British soldiers of March 1770, whose backs were literally to the wall. Selfridge's back was to the middle of State Street, the daily bustle, and the safety of the Exchange.

Sullivan, then, was on firm legal ground when, two weeks after the killing, he determined that there could be no question of a successful defense on the grounds of justifiable or excusable homicide.<sup>66</sup>

For all these reasons, a murder indictment would have presented Selfridge's lawyers with grave problems, fastened upon them by that same common law which their party liked to extol as the repository of "the immutable principle of justice" by which alone liberty and life are enjoyed.<sup>67</sup> Under Massachusetts law, such an indictment would have meant that three members of the all Federalist Supreme Judicial Court would have had to preside over the trial.<sup>68</sup> A verdict of guilty would mean a mandatory death sentence for Selfridge.<sup>69</sup>

Short of an outright acquittal, however, Selfridge might still escape that fate if the jury, despite the murder indictment, found him guilty of the lesser included offence of manslaughter instead. (Murder indictments, of course, had produced just this result in regard to two of the Boston Massacre defendants).

Defense lawyers in Massachusetts routinely saw it as their duty to steer juries towards "lesser included offenses," especially when outright acquittals seemed unlikely and the original indictment carried the death penalty.<sup>70</sup> Hence, while *manslaughter* indictments were uncommon in

---

<sup>66</sup> Letter from James Sullivan to James Madison (Aug. 16, 1806) (on file with the Library of Congress).

<sup>67</sup> *The Supreme Judicial Court*, COLUMBIAN CENTINEL, Apr. 12, 1806, at 1.

<sup>68</sup> ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 141 *An Act Making Further Provision for the Judicial Department*, § 1804, ch. 105 (1898).

<sup>69</sup> ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 179 *An Act Providing for the Punishment of Murder, Manslaughter, Felonious Maims and Assaults, and Dueling, and for the Prevention Thereof*, § 1804, ch. 123 (1898).

<sup>70</sup> See IRENE QUENZLER BROWN & RICHARD BROWN, *THE HANGING OF EPHRAIM WHEELER* 65 (2003). Such dispositions were especially common in burglary indictments, which still carried the death penalty in early nineteenth century Massachusetts. See, e.g., *Commonwealth v. Harris*, 256 (Feb. Term, Suffolk County, 1802) (Mass Judicial Archives).



Massachusetts,<sup>71</sup> manslaughter convictions did occasionally follow from *murder* indictments. As Alan Rogers has pointed out, in fact, where some sort of killing had occurred, the usual course in Massachusetts was for the grand jury to indict the killer for murder, “leaving it to the [trial] jury to determine whether the crime was homicide, manslaughter or ‘misadventure.’”<sup>72</sup>

Unfortunately for Selfridge, the classic definition of manslaughter was “the killing of another without premeditation or malice aforethought.”<sup>73</sup> Since a murder indictment would allow Sullivan to delve into the entire history of Selfridge’s dealings with Ben Austin, it would not be hard for him to show, as we have seen, that the lawyer’s actions were at least characterized by “general malice.” Unlike other cases where the jury had delivered manslaughter verdicts on murder indictments,<sup>74</sup> this simply did not seem to be one where the killing had arisen from the “heat of blood,” or in a “sudden affray.” Nor was it a case of a sudden provocation, in which a person had killed before he had had time to “cool off.”<sup>75</sup> On the contrary, Selfridge’s actions in leaving his office and striding out on to State Street indicate a calculated decision to meet Charles Austin’s assault with deadly force rather than allow a beating to take place. The lawyer had never been in a “heat of passion” in the first place; there was nothing to “cool off” from.

---

<sup>71</sup> Sullivan, in fact, claimed during the Selfridge case that they were all but unknown. *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 27. In fact, Massachusetts grand juries *did* occasionally issue manslaughter indictments. Examples include *Commonwealth v. Robins*, SJC Hampshire Term 1795 (Reel 26, p. 88, Mass. Judicial Archives) and *Commonwealth v. Foster*, referenced in *Independent Chronicle*, (Jan. 1, 1789). These cases, however, bore no resemblance to the events of Black Monday. *Robins* involved an act of sudden violence with no evidence of a prior grudge between the parties, and *Foster* involved a purely accidental killing following a militia muster.

<sup>72</sup> ALAN ROGERS, *MURDER AND THE DEATH PENALTY IN MASSACHUSETTS* 16 (2008). *See also* 2 THOMAS C. AMORY, *LIFE OF JAMES SULLIVAN*, 168 (1859). According to Amory, “it had been usual, in similar cases, to find a bill for murder, because, in such an indictment, the prisoner could be convicted of the lesser included offense of manslaughter” if evidence of malice were lacking at trial.

<sup>73</sup> HAWKINS, *supra* note 50, at 76.

<sup>74</sup> *See, e.g., Commonwealth v. Haskell, Nathan Dane*, “Docket Book,” Box 18, File 7, Nathan Dane Papers, Mass. Historical Society (an Essex County case where the defendant had killed the victim with a scythe as part of a sudden brawl); *Commonwealth v. Pierce*, Cumberland Term, 1790, 23 Reel 143 (where the defendant got into a sudden fight and struck the victim with a wooden mallet); *Commonwealth v. Kelley*, Hampshire Term, 1781, 18 Reel 42 (where the defendant had recklessly given the infant-victim half a pint of rum).

<sup>75</sup> Mitchell N. Berman & Ian P. Ferrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1039 (2011); *See* Elise J. Percy, et al., “*Sticky Metaphors*” and the Persistence of the Voluntary Manslaughter Doctrine, 44 U. MICH. J. L. REFORM 383, 389–90 (2011).

And precisely here was the real difficulty from a common law perspective. Nothing in the treatises really captured the concrete situation in which the defendant found himself on the afternoon of Black Monday.

Whatever his motivations might have been towards the despised Honestus, powerful social conventions, rather than a truly “malignant spirit” or the “heat of blood,” prompted Selfridge to act as he did in regard to the man who was waiting for him with that cane. As legal historian Allison LaCroix wrote, an affair of honor in the early republic was always a *public* affair, in which a gentleman had to be seen behaving with courage, or else lose his vital public reputation.<sup>76</sup> Honor was a matter of public bearing. Having received word that Charles Austin was waiting for him, Selfridge could not cower in his office after the noon hour. He *had* to walk out on to State Street, and be seen to do so, because as a lawyer, that is where he customarily would have been. Nor could he have left his pistol behind, for the alternatives—enduring the beating or else running away—would have been unthinkable to a gentleman in 1806. As he himself put it after the trial, to have acted otherwise than he did would have been to exist as “a living monument to disgrace,”<sup>77</sup> unworthy of the trust and respect of his peers.<sup>78</sup> The common law insisted that concerns for personal honor had to be put aside in situations like this, and that a man should retreat in the face of a non-felonious assault. But Blackstone’s writ did not run on State Street. In short, having by his posting triggered an affair of honor, Selfridge was no caught in its snares.

Ultimately, as we will see, Selfridge’s lawyers would try to persuade the jury that the rules of the honor culture *had* left Selfridge no choice but to “stand his ground.”<sup>79</sup> In the meantime, the common law landscape outlined above also presented Federalists with a serious *political* dilemma. Unlike the men who constructed those gallows on the Common in January, modern commentators have not considered the crucial political aspect of the upcoming trial. It is that aspect, however, that explains the successful introduction into American law of “Stand Your Ground.” Just as the political agenda of the NRA helps account for the spate of Stand Your

---

<sup>76</sup> Allison LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth Century Dueling as Public Law and Private Code*, 22 HOFSTRA L. REV. 501, 503 (2004).

<sup>77</sup> SELFRIDGE, *supra* note 36, at 44 (emphasis in original).

<sup>78</sup> In fact, acting otherwise would have put an end to Selfridge’s own sense of self-worth; which, after all, for a gentleman, was always shaped by the quality of the “public gaze” that was always evaluating his actions. Joanne B. Freeman, *Dueling as Politics: Reinterpreting the Burr-Hamilton Duel*, 53 WM. & MARY Q. 289 (1996); See LaCroix, *supra* note 76, at 549.

<sup>79</sup> As indeed it eventually did. During his closing argument, Dexter concentrated on the overriding need for a gentleman to preserve his honor regardless of the consequences. See *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 126–27.

Ground statutes, so the political agenda of Massachusetts Federalists helps explain the way the doctrine appeared in the Selfridge case.

A. *The Federalists' Problem: The Political Uses of Manslaughter*

As noted above, Republican polemicists were quick to draw comparisons between Black Monday and the Boston Massacre. If anything, they insisted, Selfridge's deed was worse, for he used a "concealed weapon" to kill Charles Austin, whereas the British soldiers wielded their muskets openly.<sup>80</sup> By constantly reiterating this point, Republicans skillfully placed the killing in the context of years of charges that Federalists had *concealed* designs to subvert democratic institutions and restore the evils of monarchy on American shores;<sup>81</sup> "every day," Ben Austin had proclaimed during the last election season, in a typical specimen, "unfolds the designs of a faction against the Republican form of government, against the social compact which forms and binds the United States as a nation."<sup>82</sup> Gore was perfectly correct in suspecting that Republicans hoped that the case would allow them to regain some of the ground they had lost due to the election fiasco.<sup>83</sup> This was a problem that the party did not need, given the discouraging electoral trends since 1804. Leverett Saltonstall may have had this in mind when he urged a friend in Boston to "[h]ang Selfridge if you can."<sup>84</sup> In fact, the case presented Federalists with more serious dangers—just as Governor Strong was once more preparing to face the electorate.

Owing to the circuit-riding schedule of the justices of the SJC, no grand jury could be convened in Boston until November. If the indictment was for murder—the most likely legal result—Massachusetts law demanded that three justices preside over the ensuing trial. All of them would be Federalists, and all would be entitled to give instructions to the jury and join in considering evidentiary rulings. In the event of an

<sup>80</sup> See, e.g., INDEP. CHRON., Aug. 11, 1806.

<sup>81</sup> As Salem's Joseph Story had said, Federalist rhetoric was really "a mere stalking puppet, to deceive us of our liberties; a pantomimic ghost . . . to beguile us into hereditary government." Joseph Story, Speech in Commemoration of National Independence, in AN ORATION PRONOUNCED IN SALEM ON THE FOURTH DAY OF JULY, 1804, at 31. See also *An Address to the People of Massachusetts*, INDEP. CHRON., Feb. 27, 1806; *Electioneering*, INDEP. CHRON., May 5, 1806.

<sup>82</sup> *Proof Positive of British Influence*, INDEP. CHRON., Mar. 13, 1806. Sullivan was as a rule less excitable than his old enemy Honestus, but he also thought that Federalists silently yearned for a monarchy. See, e.g., Letter from James Sullivan to James Monroe (May 9, 1806) in 4 THE WRITINGS OF JAMES MONROE, 482, 482–83 (Stanislaus Murray Hamilton ed., 1902).

<sup>83</sup> Letter from Christopher Gore to Rufus King (Aug. 24, 1806), in 4 THE LIFE AND CORRESPONDENCE OF RUFUS KING 538, 338 (Charles R. King ed., 1897).

<sup>84</sup> Letter from Leverett Saltonstall to William Minot (Aug. 5, 1806) in 81 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 326, 326 (Robert Earle Moody ed., 1974).

acquittal, or even a conviction on the lesser included offense of manslaughter, the opportunity for Republicans to allege judicial favoritism would be clear and obvious. They had long claimed that the bench and bar were arrayed against them,<sup>85</sup> and anything less than a conviction on the murder charge would go far towards making that allegation more compelling.

A murder conviction would present an even more urgent problem. Since the mandatory sentence in that event would be death, Selfridge and his friends would no doubt petition Governor Strong for a pardon.<sup>86</sup> In keeping with his likable image, Strong regularly pardoned men and women who had been convicted of minor crimes, and were languishing in jail because they were too poor to pay their fines.<sup>87</sup> Occasionally, however, he also pardoned individuals facing the death penalty if the prisoner's friends could attest to his lack of "malignity of heart," and if the death sentence seemed to serve no useful purpose.<sup>88</sup> Petitioners on Selfridge's behalf could plausibly make this claim, for aside from Black Monday, the lawyer had led an exemplary professional life, and boasted a growing family.

Still, if in the midst of the 1807 campaign Strong pardoned Selfridge in response to these petitions, he would jeopardize that reputation for moderation and impartiality that remained the strongest remaining arrow in the quiver of Massachusetts Federalists. Just that summer he had denied pardons to James Halligan and Dominick Daley, Irish laborers whose murder convictions, given gaps in the factual evidence, seemed tainted by anti-Irish sentiment on the jury.<sup>89</sup> If Strong pardoned Selfridge, who had unquestionably entered State Street with a loaded pistol and the knowledge that Charles Austin was waiting for him, Republicans would be quick to

---

<sup>85</sup> See, e.g., NAT'L AEGIS, Sept. 10, 1806, at 3 ("it has often been discovered in our Supreme Court" that party feeling governs decisions); see also Letter from Jacob Crowninshield to William Bentley (Nov. 13, 1803) (on file with the Peabody Essex Museum).

<sup>86</sup> The Governor's Council—all Federalists—would receive such petitions and issue recommendations. Occasionally, political considerations weighed heavily in these matters. Governor Hancock, for example, had pardoned those convicted of treason after Shays' Rebellion, partly in order to dull the appeal of Austin's anti-judicial radicalism. John Dryden Kazar, Jr., *No Early Pardon for Traitors: Rebellion in Massachusetts in 1786*, 33 HIST. J. OF MASS. 109, 122 (2005).

<sup>87</sup> See, e.g., "Petition of Alexander Clark," (Aug. 21, 1805) (on file with the Pardon Files, Massachusetts State Archives).

<sup>88</sup> Such was the case with Jacob Azzet Lewis, who had been convicted of rape. When Lewis's friends petitioned for his pardon on the grounds that the circumstances indicated no evil intent, but rather cultural confusion, Strong commuted the sentence to deportation back to Lewis's native India. "To His Excellency the Governor and Honorable Council of Massachusetts," (Dec. 1801) (on file with the Pardon Files, Massachusetts State Archives).

<sup>89</sup> Petition of Ann Daley (May 27, 1806) (on file with the Pardon Files, Massachusetts State Archives). See REPORT ON TRIAL OF DOMINIC DALEY AND JAMES HALLIGAN (Northampton, S&E Butler 1807).

question his motives. Even before the trial Republicans were noting the contrast between Federalist support for Selfridge and their silence on behalf of Harrigan and Daley.<sup>90</sup>

If, on the other hand, Strong allowed Selfridge to be hanged, he risked alienating some members of his party at a time when Federalists needed all the votes they could get.<sup>91</sup> These men would not vote for Sullivan in 1807, but they might stay home, giving in to the “supineness and lethargy” that Boston Federalists always worried would play into the hands of Republicans.<sup>92</sup> Hence, the inevitable pardon petitions would present Strong with an impossible quandary. One decision promised to anger crucial “middle of the road” voters while the other promised to lessen the fervor of the faithful. Given the governor’s miniscule margin of victory in 1806, alienating either group would certainly deliver the state to Sullivan.

There was only one way to escape the conundrum. If, instead of a murder indictment, the grand jury should take the unusual step of indicting Selfridge for manslaughter, three results would follow, all of them good for Federalists.

First, only one Federalist judge, not three, would have to preside over a manslaughter trial. In the event of an acquittal, Republicans would find it harder to allege judicial favoritism. Second, a manslaughter conviction would not carry the death sentence. Absent the immediate threat of capital punishment, any application for a pardon would create fewer partisan pressures on Governor Strong, who in any case could easily delay a decision until after the election in April. Finally, a manslaughter indictment would actually—and paradoxically—make an acquittal more likely than (in the event of a murder indictment) a conviction for manslaughter as a lesser included offense.

It was a matter of timing. Manslaughter involved a non-premeditated killing that arose from a “sudden passion.” Hence, if the indictment were for manslaughter, Sullivan would have to limit most of his case to the events of August 4th. That meant that it would be difficult for Sullivan to show the considerable degree to which Selfridge, in the preceding week, had needlessly goaded the father and so invited the son’s assault. He would certainly not be able to introduce evidence tending to show that Selfridge had leaked word of the lawsuit to the *Repertory*’s John Park.

<sup>90</sup> See *Be Just and Fear Not*, NAT’L AEGIS, Sept. 3, 1806.

<sup>91</sup> Federalist papers constantly reminded their readers that party fortunes depended on every Federalist going to the polls. See, e.g., *Attend to the Election—and Nothing Else*, BOSTON GAZETTE, Apr. 2, 1807, at 2.

<sup>92</sup> Central Committee Circular Letter, (1805)(on file with the William Shaw Papers, Boston Athenaeum).

If the indictment were for murder, Sullivan could introduce such evidence in order to show Selfridge's "general malice," making it hard indeed for the jury either to acquit (on the basis of justifiable homicide) or to find that the killing had really arisen from a sudden passion.

But if the indictment were for manslaughter, it would be much harder for Sullivan to introduce that evidence. This, in turn, would make a jury finding of acquittal based on justifiable homicide—by which a man was under no duty to retreat-- at least within the reach of Otis, Dexter and Gore. It would also, not incidentally, embarrass Sullivan just before the beginning of his fourth attempt to displace Strong from the governor's office.

### B. *The Giant of the Law*

None of this could possibly have been lost on Chief Justice Theophilus Parsons, the man who would deliver the grand jury charge when the SJC met for its next Suffolk Term in November. In fact, no man in Massachusetts had a more capacious grasp of common law doctrines than Parsons, whose mastery of those materials had earned him the sobriquet "the Giant of the Law."<sup>93</sup> During his long career as an attorney, his contemporaries had the impression that Parsons remembered the details of every case he had ever read, for he could "quote from memory passages so apposite to the case at hand, that his opponents were sometimes tempted to suspect that he made the law, which he pretended to recite."<sup>94</sup> Parsons continued the custom as a judge, occasionally annoying leading attorneys like Dexter by interrupting oral arguments in order to bring up authorities he felt they were neglecting.<sup>95</sup> The pronouncements of Hale, Hawkins, Blackstone and East were as familiar to Parsons as that morning's edition of Benjamin Russell's *Centinel*.

Moreover, there was no doubt of his thoroughgoing Federalism. Parsons's home on Pearl Street was often the site of meetings of Boston's party committee,<sup>96</sup> and his recent elevation to the SJC was largely the work

---

<sup>93</sup> WILLIAM SULLIVAN, *THE PUBLIC MEN OF THE REVOLUTION* 394 (Philadelphia, Carey & Hart 1847). See also ROGERS, *supra* note 72, at 71. According to his colleague, Justice Isaac Parker, Parsons's habit of "looking deeply into the ancient books of the common law, and tracing back settled principles to original decisions...was the principle source of his early and continued celebrity." ISAAC PARKER, *A SKETCH OF THE CHARACTER OF THE LATE THEOPHILUS PARSONS* 11-15 (Boston, John Eliot 1813).

<sup>94</sup> Such was the opinion of Senator William Plumer, as related by his son. WILLIAM PLUMER, JR., *LIFE OF WILLIAM PLUMER*, 176 (Boston, Phillips, Sampson & Co. 1856).

<sup>95</sup> *Theophilus Parsons*, SIBLEY'S HARVARD GRADUATES 190, 205 (Clifford K. Shipton ed., 1975).

<sup>96</sup> See, e.g., Resolutions at the Home of T. Parsons (June 18, 1804) (on file with the William Sullivan Papers, Boston Athenaeum).

of elite lawyers like Gore, who hoped that Parsons's genius could maintain "a stable judiciary in a time of democratic madness."<sup>97</sup> The justice himself had accepted the appointment only the previous June, assuring Governor Strong that careful attention to the law was the only security "for our social and civil rights, and it is a source of consolation, if our political rights should ever be abused."<sup>98</sup> There was no mystery as to the men whom Parsons believed were most likely to "abuse" those rights.

For their part, Republicans returned the favor. Sullivan had long regarded Parsons as one of his bitterest partisan foes,<sup>99</sup> and Ben Austin had attacked him as a charter member of the hated "Essex Junto,"<sup>100</sup> and in addition to that, as a man of "unbounded vanity and ambition" whose talents were "over-rated."<sup>101</sup> Indeed, if Austin had a polar opposite, it was surely the new Chief Justice. Where Honestus excoriated the common law as an aristocratic leftover from the colonial past, the "Giant of the Law" revered it as a bulwark of reason against the leveling tide of anarchy.

In short, Theophilus Parsons was the least likely man in Massachusetts to miss the political benefits of a manslaughter indictment in the Selfridge case. In my view, the only way to understand the clumsy and misleading nature of his grand jury charge—something otherwise mystifying in a man of Parsons's learning—is to conclude just what Republicans concluded at the time: that it was calculated to steer the grand jury away from a murder indictment and towards a politically desirable indictment for manslaughter.

### C. *Parsons's Charge: "The Most Palpable Absurdities and Glaring Contradictions"*<sup>102</sup>

On November 25<sup>th</sup>, after a four month period in which Black Monday had been the talk of Boston, the grand jury finally convened in the Suffolk Courthouse to hear Chief Justice Parsons's charge.

It began simply enough, with a summary of the difference between murder and manslaughter at common law. Matters quickly took a curious

<sup>97</sup> Richard E. Welch, Jr., *The Parsons-Sedgwick Feud and the Reform of the Massachusetts Judiciary*, 92 ESSEX INST. HIST. COLLECTIONS 171, 177 (1956). See also WILLIAM SULLIVAN, AN ORATION, PRONOUNCED JULY 4<sup>TH</sup>, 1803 14 (Boston, Gilbert & Dean 1803).

<sup>98</sup> Letter from Theophilus Parsons to Caleb Strong, (June 5, 1806) (on file with the Theophilus Parsons Papers, Boston Public Library).

<sup>99</sup> Letter from James Sullivan to William Tudor (May 11, 1804) (on file with the James Sullivan Papers, Massachusetts Historical Society).

<sup>100</sup> *Old South*, No. LXXII, INDEP. CHRON., Nov. 8, 1802.

<sup>101</sup> See *To Theophilus Parsons, Esq.*, INDEP. CHRON., Oct. 28, 1802; and INDEP. CHRON., Nov. 8, 1802. Austin was attacking Parsons for his involvement in a case then pending in Boston's federal district court involving a challenge to the constitutionality of the Judiciary Act of 1802.

<sup>102</sup> NAT'L AEGIS, Dec. 3, 1806.

turn, however, with Parsons's discussion of "manslaughter by provocation":

Any assault made, not lightly, but with violence, or with circumstances of indignity, upon a man's person, if it be resented immediately, and in the heat of blood, by killing the party with a deadly weapon, is a provocation, which will reduce the crime to manslaughter; unless the assault was sought for by the party killing, and induced by his own act, to afford him a pretense for wreaking his malice. To illustrate this exception, a case is stated of the falling out of A and B. A says he will not strike, but will give B a pot of ale to touch him; on which B strikes A, who thereupon kills B. This is murder in A...because A sought that provocation.<sup>103</sup>

The language is based on passages in the treatises, notably those of East, Blackstone and Hale, outlining the definition of manslaughter.<sup>104</sup> It is easy to see how members of the grand jury might apply this language to Selfridge. He had been assaulted "with circumstances of indignity," and he had resented the assault with a "deadly weapon." Here were plausible grounds for a manslaughter indictment.

Plausible, however, only if one read no further than the language quoted above. For both East and Blackstone had been quick to point out in their treatises that the rule would *not* apply to "any trivial provocation, which in point of law amounts to an assault."<sup>105</sup> If the force used by the defendant was out of proportion to the seriousness of the assault, then the appropriate charge was murder. A reasonable grand juror might well believe that a pistol shot to the chest went far beyond what was necessary to resist an assault with an 8-inch hickory cane, but Parsons chose to omit this exception entirely.

Instead, Parsons chose to quote East's "pot of ale" language; an exception to the rule that had no possible relation to anything Selfridge had done. The defendant had not suddenly dared Charles Austin to touch him. He may well have induced the assault by other actions prior to the afternoon of Black Monday, but nothing in the charge alerted the Grand

---

<sup>103</sup> LLOYD & CAINES, *supra* note 47, at 6.

<sup>104</sup> 1 EAST, *supra* note 50, at 233; 4 BLACKSTONE, *supra* note 50, at 191; 1 HALE, *supra* note 54, at 456.

<sup>105</sup> 1 EAST, *supra* note 50, at 234; 4 BLACKSTONE, *supra* note 50, at 199–201.



Jury that such a course of conduct could be enough to take the case out of the definition of manslaughter.<sup>106</sup> Just after the pot of ale language, in fact, East cautions us that it is murder, not manslaughter, if the killing arose from an old grudge; a factor far more obviously applicable to Black Monday, which was conveniently and crucially omitted by Parsons.<sup>107</sup>

By leaving out two exceptions that directly bore on the facts of the case, and quoting an exception that had nothing at all to do with those facts, Parsons neatly preserved the force of the rule: that a killing done with a deadly weapon in the heat of blood to resist an assault was manslaughter.

Having gone this far towards stacking the deck in Selfridge's favor, Parsons then got to the heart of the matter:

A man may repel force by force, in defence of his person, against anyone who manifestly intends, or endeavors by violence, or surprise, feloniously to kill him. And he is not obliged to retreat...and if he kill him in so doing, it is *justifiable self-defence*...There must be an actual danger at the time. And (in the language of Chief Justice Hale,) it must plainly appear by the circumstances of the case, as the manner of assault, the weapon, etc., that his life was in imminent danger; otherwise, the killing of the assailant will not be *justifiable homicide*.<sup>108</sup>

In this paragraph, Parsons was relying on substantially similar language in East,<sup>109</sup> who in turn was quoting from the treatise of Sir Michael Foster, who states that the killer is not obliged to retreat before striking the fatal blow if the victim had intended to commit a known felony upon him.<sup>110</sup> But Foster made it clear that in speaking of justifiable self defense he was referring to what other authorities called justifiable homicide, which (as noted above) was available as an affirmative defense

---

<sup>106</sup> The authorities agreed that pre-existing malice between the parties involved in the assault is enough to make the appropriate charge murder, not manslaughter. Hale, for example stated that if there were pre-existing malice, only a "casual" meeting between the killer and victim might reduce the charge to manslaughter. 1 HALE, *supra* note 54, at 478.

<sup>107</sup> EAST, *supra* note 50, at 239.

<sup>108</sup> *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 7 (emphasis in original).

<sup>109</sup> EAST, *supra* note 50, at 271.

<sup>110</sup> Foster, *supra* note 50, at 273.

only if the defendant was free of all fault himself.<sup>111</sup> Indeed, the whole purpose of fastening no duty to retreat on the killer in this situation was to serve the public peace by preventing a felony. The plea made no sense at all if the killer had done something to bring a deadly dispute on himself.

This crucial requirement—carefully noted by East, the most recent of the treatise writers<sup>112</sup>-- appears nowhere in the charge. That a man of Parsons's legal attainments could simply have forgotten this vital element of the definition of justifiable homicide is out of the question, especially given the fact that his teacher, Edmund Trowbridge, had included it in his charge to the jury in the Boston Massacre trials.<sup>113</sup>

By this point in the charge, the grand jury had heard that a man might resent an assault by killing the assailant with a deadly weapon, without first having to retreat, as long as the assailant was committing a known felony. Of course, Charles Austin was not committing a felony on Black Monday; his assault was intended to chastise, not kill.<sup>114</sup> The notion that Selfridge had no duty to retreat that afternoon would therefore seem doubtful in the extreme. Parsons, however, was up to the challenge. The last major portion of charge reads as follows:

But, if the party killing had reasonable grounds for believing, that the person slain had a felonious design against him, and under that supposition kill him; although it should afterwards appear that there was no such design, it will not be murder; but it will be either manslaughter, or *excusable homicide*, according to the degree of caution used, and the probable grounds of such belief.<sup>115</sup>

As we have seen, this statement was accurate as far as it went. Foster, Hale and East all agreed that an accused's guilt might be mitigated if he reasonably believed that the victim intended a felony. But leaving aside the doubtful relevance of this doctrine to Selfridge—who, in the context of Boston's honor culture, could hardly doubt what Charles Austin really

---

<sup>111</sup> *Id.* See also Lance K. Stell, *Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense*, 49 DUKE J.L. & CONTEMP. PROBS. 113, 115 (1986) (justifiable self-defense not available if the kill was done out of a private quarrel).

<sup>112</sup> EAST, *supra* note 50, at 277.

<sup>113</sup> See *The Trial of the British Soldiers* (Boston: William Emmons, 1824), 123.

<sup>114</sup> According to Nailor's Case, cited in most of the authorities, a killing was not in lawful self-defense if the victim had only wanted to chastise, not kill, the defendant. See, e.g., EAST, *supra* note 50, at 276-77.

<sup>115</sup> *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 7 (emphasis in original).

intended to do<sup>116</sup>—the question of what the defendant could reasonably have believed was for the trial jury to decide, after they heard extensive evidence about the course of events leading up to Black Monday.

Furthermore, Parsons muddies the issue considerably with his concluding phrase, to the effect that if Selfridge reasonably believed that he had to prevent a felony, even if he was wrong about that, this could reduce the crime to “manslaughter or *excusable homicide*.”

As noted above, a killer might rest his case on excusable homicide even if he had been somehow at fault; but Parsons does not bother to tell the grand jury that a plea of excusable homicide was not available to a killer who had not tried to retreat.<sup>117</sup> Why leave this crucial legal requirement out? And for that matter, since no one ever claimed that Selfridge had tried to retreat, why even bring up excusable homicide in the first place? The most likely explanation is that Parsons wished to suggest to the jury that it could legitimately bring no indictment at all—leaving manslaughter to appear as an acceptable compromise between a murder indictment and freeing Selfridge entirely.

Parsons concluded by assuring the grand jury that all these principles had been “recognized by the wisest and most humane writers on the common law.”<sup>118</sup> East, Hale, Foster and Blackstone may well have been wise and humane, but their principles were most imperfectly represented in the charge. The tenor of the charge throughout was to put Selfridge’s actions in the best legal light possible, even at the price of omitting crucial elements of the common law of homicide. Based upon what they had just been told, the grand jury might easily conclude that a man might at worst be guilty of manslaughter if he had used a deadly weapon to resent a non-felonious assault without first seeking safety, even if he might easily have done so, as long as he had a reasonable (if mistaken) suspicion that the assailant meant to kill him, and without any regard to the killer’s own possible responsibility for triggering the assault. This was not a cogent summary of the difference between murder and manslaughter. This was a parody of what the treatise writers had actually written, and was far more remarkable for what it left out than for what it included.

Yet the charge was not simply a product of “remarkable laxity,” as Francis Wharton had concluded in his nineteenth century treatise on

---

<sup>116</sup> Selfridge himself admitted after his trial that he knew Austin intended to administer a beating. Selfridge, *supra* note 36, at 36.

<sup>117</sup> Thomas C. Amory noted this omission in his biography of James Sullivan. See AMORY, *supra* note 72, at 168.

<sup>118</sup> *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 7.

criminal law.<sup>119</sup> Given the Giant of the Law's learning and accomplishments, it is improbable that, having had nearly four months since Black Monday to prepare, he had concocted such a charge out of mere laxity. Rather, his position among Boston Federalists compels a much more likely conclusion. Understanding the considerable advantages both to Selfridge and to his party of a manslaughter indictment, he had bent over backwards to give the grand jury just enough legal cover for producing just that result. The grand jury was more than capable of taking the hint, especially since its foreman was Thomas Handysyd Perkins, a leading Federalist merchant and Parsons's Pearl Street neighbor—and, incidentally, the man who had been administering federal bond sales in Boston before President Jefferson replaced him with Ben Austin. Indeed, a manslaughter indictment followed in due course, even though the usual pattern in Massachusetts would have been to indict for murder and leave the defendant's lawyers to argue for manslaughter as a lesser included offense.

It bears repeating that a manslaughter indictment meant that Sullivan would be limited in his ability to present evidence showing the degree to which Selfridge had been at fault in the whole business. That, in turn, would make it possible for the jury to acquit on the basis of justifiable homicide. Under that theory, Selfridge would not have had a duty to retreat as long as he reasonably believed himself in danger. As we have seen, an acquittal would be in the interests not just of the defendant, but of his party as well. It was by these largely political motivations that Stand Your Ground found its first elaboration in a major American case.

In terms of the trial, which began three weeks after the indictment, things could hardly have gone better for Selfridge and the Federalists. A frustrated Sullivan was still angry that the grand jury had departed from usual practice and not returned a murder indictment;<sup>120</sup> and sure enough, he found himself severely hamstrung in his efforts to introduce evidence about the defendant's actions in the weeks before Black Monday, as Gore and Dexter repeatedly objected on the grounds that malice was no part of the crime of manslaughter. "We cannot," Dexter insisted, "come here to defend what we are not charged with."<sup>121</sup> Justice Isaac Parker, presiding alone over his first major homicide trial and clearly not enjoying the experience ("it is my misfortune to sit alone," he lamented at one point)<sup>122</sup>

---

<sup>119</sup> FRANCIS WHARTON, *A TREATISE ON CRIMINAL LAW*, Book One, at 57 (Philadelphia: Kay & Brother, 1880).

<sup>120</sup> *Trial of Thomas Oliver Selfridge*, *supra* note 47, at 27.

<sup>121</sup> *Id.* at 17.

<sup>122</sup> *Id.* at 30.

struggled with the question, but concluded that nothing should be admitted as evidence aside from matters occurring on the day of the killing or “shortly before.”<sup>123</sup>

That “shortly before” window was not enough to allow Sullivan to probe into the kind of evidence that would have established malice on Selfridge’s part, leaving him to whine uselessly that had there had been no precedent for a manslaughter indictment on these facts, and that the indictment prevented “a full examination of the unfortunate event” on State Street. This, of course, was probably Parsons’s objective all along.

Following a spirited closing argument in which Dexter urged the jury to consider that as a gentleman, Selfridge could not under any circumstances submit to a beating no matter what the common law said, (“there are men in every civilized community, whose happiness and usefulness would be forever destroyed by a beating, which another member of the community would voluntarily receive for a five dollar bill”),<sup>124</sup> the jury voted to acquit.

With almost all of the evidence focused only on the events of the day of the killing—as was proper following the manslaughter indictment—the jury may have concluded that a man of Selfridge’s status could not reasonably have been expected to retreat in the face of an assault. Alternatively, while there was still no reason to believe that Charles Austin had any sort of felonious intent, there *was* evidence that Selfridge had a feeble physical constitution;<sup>125</sup> perhaps, on that basis, the jury believed that the lawyer might have thought his life was in danger from a beating that would have left most men with nothing but cuts and bruises. In the absence of a jury questionnaire, it is impossible to know conclusively.

Republicans duly criticized the aristocratic pretensions of Dexter’s argument,<sup>126</sup> and alleged that only in Boston could Selfridge have been acquitted.<sup>127</sup> But it was Parsons’s charge that had raised Stand Your Ground as a plausible route to acquittal in the first place, and it was the charge which sparked the most comment in the Republican press. Selfridge, the *Chronicle* alleged, would never have dared to open fire unless he knew he would receive the “judicial protection” represented by

---

<sup>123</sup> *Id.* at 74.

<sup>124</sup> *Id.* at 137.

<sup>125</sup> While in prison, Selfridge had done his best to find potential witnesses who could testify to his physical debility. See Letter from Abraham Moore to Catherine Mellen (Oct. 11, 1806), Mellen Family Papers, Mass. Historical Society.

<sup>126</sup> See, e.g., NATIONAL AEGIS, Jan. 21, 1807.

<sup>127</sup> See *Communication*, INDEPENDENT CHRONICLE, March 16, 1807.

the charge,<sup>128</sup> and it was that feature of the process, and *not* the verdict, that sent Bostonians building gallows on the Common a week after Selfridge went free. Even if they could not say it outright without risking a seditious libel prosecution,<sup>129</sup> Republicans understood how much the politically-convenient verdict owed to the grand jury charge. Hence, it was Parsons's image, rather than Parker's, that swung in the January breeze.<sup>130</sup>

In fact, that winter saw sustained criticism of Parsons's charge in the Republican press. Whatever Dexter might say about the calls of personal honor, Republicans insisted that Stand Your Ground endangered the peace of the community and threatened the very conditions of civilized life. When Attorney General Eric Holder claimed that Stand Your Ground laws promised to "sow dangerous conflict in our neighborhoods,"<sup>131</sup> in 2013 he was unwittingly echoing a critique that Massachusetts Republicans had already made over two hundred years before—albeit against a very distinct historical background.

#### IV. STAND YOUR GROUND AS AN OFFENSE AGAINST "NEIGHBORLINESS"

To understand why Republicans believed that they could strike a responsive popular chord in attacking Parsons's articulation of "Stand Your Ground," it is useful to recall that in 1806, Bay Staters were only thirty years removed from the Revolution, an event that many of them recalled with pride. Both Federalists and Republicans made certain that the public remembered the role their candidates played in the struggle against the British.<sup>132</sup> Boston Republicans were especially adept at aligning their own ideals with the revolutionary culture of their town, and it is especially in that light that we should understand how they depicted the charge in their electioneering polemics. They would pitch their arguments not to the

---

<sup>128</sup> *To the Electors of Massachusetts*, INDEPENDENT CHRONICLE, March 5, 1807.

<sup>129</sup> Parsons did, in fact, demand that the publisher of the *National Aegis* be prosecuted for libel merely for accusing the Chief Justice of lacking complete impartiality in the Selfridge case. *Burr's Acquittal*, NATIONAL AEGIS, Sept. 16, 1807. It was no idle threat. Republican printer John Lillie, for example, had been sentenced to three months in jail for accusing then-Chief Justice Francis Dana of using a grand jury charge to foist "that execrable engine of tyrants, the common law of England" upon the people of Massachusetts. *Commonwealth v. Lillie*, Suffolk Co. Term, 1802. Mass. Judicial Archives.

<sup>130</sup> Parker's perplexity throughout the trial seems to have won him some sympathy from Republicans, who praised him for his "judgment and impartiality." See NATIONAL AEGIS, Feb. 4, 1807.

<sup>131</sup> See Matt Vasilogambros, *Eric Holder is not a Fan of Stand Your Ground Laws*, ATLANTIC, [www.theatlantic.com/politics/archive/2013/07/eric-holder-is-not-a-fan-of-stand-your-ground-laws/438027/](http://www.theatlantic.com/politics/archive/2013/07/eric-holder-is-not-a-fan-of-stand-your-ground-laws/438027/)

<sup>132</sup> See Ronald Formisano, *The Transformation of Political Culture: Massachusetts Political Parties, 1790s-1840s*

(New York: Oxford Univ. Press, 1983).

honor culture of the professional elite, but to older communitarian ideals that still meant something to the broader public.

In *The Freedoms We Have Lost*,<sup>133</sup> Barbara Clark Smith argues that the Revolution was in large measure a popular movement, fueled by resentment over British threats to an “ideal of neighboring,” describing a traditional community in which people had mutual obligations of fair dealing with one another. As “members in good standing on a particular social ground,” Smith argues, colonial people believed that they had a right to give or withhold consent from official actions, based upon whether those actions threatened popular expectations of a just political economy.<sup>134</sup> On this account, while every citizen deserved a decent “competence” as far as living standards were concerned, it was unneighborly to use connections to British officialdom to amass luxuries.

Hence, when Bostonians engaged in boycotts of British goods, chose homespun over fine imported silks, and pulled down the houses of local tax collectors in the 1760s, they were defending this “neighboring” ideal and acting out their determination that London’s policies were “anti-social,” and were fomenting divisions in what should be a peaceful and coherent community. As Daniel Cohen wrote, Boston crowds were striking in their social heterogeneity, as “cooperation and coordination among different social strata were facilitated both by deeply rooted Puritan traditions of corporate solidarity...”<sup>135</sup>

These expectations had not disappeared with the end of the Revolution; to the contrary, Republicans understood how potent they remained into the early nineteenth century. Both Sullivan and Austin defended the moral virtue of steady hard work in order to achieve a decent competence, as opposed to the arts of speculation and the lust for luxuries.<sup>136</sup> Moreover, their party press was filled with constant assertions that Federalists—that “Old Tory faction”—were the only thing standing in

<sup>133</sup> Barbara Clark Smith, *The Freedoms We Have Lost* (New York: New Press, 2010).

<sup>134</sup> *Id.* at 19. Smith’s greater claim is that colonial elites did not so much *lead* the Revolution as *join* and collaborate with what was really a popular movement.

<sup>135</sup> Daniel Cohen, *Passing the Torch: Boston Firemen, ‘Tea Party Patriots’ and the Burning of the Charlestown Convent*, 24 J. EARLY REPUBLIC 527, 535 (2004). Benjamin Carp, in his study of the Boston Tea Party, agreed that the town’s revolutionary agitators were able to attract people from “a loose coalition of overlapping groups” from “different social ranks.” BENJAMIN CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA* (New Haven, CT: Yale Univ. Press, 2010), 44.

<sup>136</sup> *See, e.g., Electioneering*, INDEPENDENT CHRONICLE (May 5, 1806) (Sullivan attacks “imitative style of undignified opulence” of Boston Federalists); *Old South*, No. XXXIII, INDEPENDENT CHRONICLE (April 27, 1801) (Austin defends making money through “principles of honesty and economy” over the habits of “imperious lordlings who have acquired fortunes through the necromancy of speculation”).

the way of genuine social harmony. Federalism, stated the *Pittsfield Sun*, in a typical specimen, had “destroyed social order and happiness, alienated friends, divided families...and been the greatest scourge the people of this country have ever suffered.” However, all it would take would be Sullivan’s election to restore the people “to peace and unity among themselves.”<sup>137</sup> As Austin wrote, “harmony, peace and moderation depend on the body of *republican citizens*.”<sup>138</sup> Once the State House was genuinely in their hands, once the “arts and intrigues” of Federalists were frustrated, the naturally amicable relations between people would be restored.<sup>139</sup> Casting off the British yoke had preserved this communitarian ideal in 1776; casting out Strong and his friends would preserve it in the new century.

The harmony rhetoric of many a Republican editorial represents a direct thematic link to the cultural expectations that for Smith, helped produce the Revolution. And it gave Republicans a ready made frame of reference for using Parsons’s charge as a campaign issue.

Thus, in responding to the charge, Republicans repeatedly depicted Stand Your Ground as a renewed threat to a cherished “ideal of neighboring;” a strategy fully in keeping with their constant attempts to identify Federalists with the “old Tories” of a generation before (after all Selfridge had opened fire on the site of the Boston Massacre). Where Dexter staked his closing argument on the honor culture which left Selfridge no choice but to stand his ground on Black Monday, Republicans cited an older and broader culture of mutual affection and respect, in which something more than reasonable suspicion ought to be required to avert a murder indictment.

For Republicans, Stand Your Ground posed a distinct danger to that secure fellow-feeling that ought to prevail among the citizens of the town. The *Chronicle*, at least, was quick to draw this conclusion:

[The Charge] is a performance calculated to disturb, rather than promote the peace of society...As this principle now

---

<sup>137</sup> PITTSFIELD SUN (March 3, 1806). See also INDEPENDENT CHRONICLE (Sept. 11, 1806); INDEPENDENT CHRONICLE (Feb. 17, 1806); SALEM REGISTER (March 15, 1806) (with Sullivan’s election, “our worst contentions will cease”).

<sup>138</sup> BENJAMIN AUSTIN, CONSTITUTIONAL REPUBLICANISM IN OPPOSITION TO FALLACIOUS FEDERALISM 6 (Boston: Adams & Rhodes, 1803).

<sup>139</sup> Such ideas were not unique to New England Republicans, of course. As Peter C. Onuf has reminded us, Jeffersonian politics as a whole were marked by an assumption that the mass of people were Republican at heart, so that “peace and harmony” were likely to follow once Federalists were driven from office. PETER C. ONUF, THE MIND OF THOMAS JEFFERSON 34-35 (Charlottesville, VA: Univ. of Va. Press, 2007).



stands, *every accidental dispute or affair* may terminate in death. Suppose a quarrel commences over a bottle of wine, or a mug of flip—the parties threaten each other with a *caning, wringing of the nose*, etc. After leaving the tavern to return home, one of the parties finds the other coming after him in the same road. In this case, he may have ‘*reasonable ground*’ to believe, that some felonious design is intended against him, and immediately turns around and kills his *supposed* antagonist...In the name of *humanity*—in the name of COMMON SENSE—in the name of CHRISTIANITY—we call upon Judge Parsons to be more explicit, and not leave citizens in this dreadful state of *insecurity of their lives*...<sup>140</sup>

Indeed, if a man might kill under the circumstances of Black Monday, armed with a gun and nothing more than a reasonable supposition that he was the target of a felony, no one was safe; the Charge meant that “the security of life has now become an interesting question to every citizen in the Commonwealth of Massachusetts,”<sup>141</sup> for the peace of society was now thrown into doubt.<sup>142</sup> Even innocent sports might end in the death of a beloved son if a man might resent trifling assaults by opening fire with a concealed weapon.<sup>143</sup>

In short, the charge offended the ties that bound people together in a state of civilized society. If a killing might be justified so easily, the social contract was broken, and there was nothing left to do but “disperse and live like savages.”<sup>144</sup> Accordingly, the *Republican Spy* proclaimed that Parsons had forgotten the simple truths “that the *life of man*, being the ‘*breath of the almighty*,’ is the immediate property of God, and conformable to the fiat of God himself, that ‘he who sheddeth man’s blood, by man shall his Blood be shed...this doctrine, it is presumed, will not be controverted in a *Christian Country*, as not being a *correct law*, conformable to the Laws of God, the serenity of society, and the safety of individuals.”<sup>145</sup>

No wonder that residents of Northampton, celebrating the anniversary of Jefferson’s inauguration, reserved the most ironic of their toasts for the

---

<sup>140</sup> INDEP. CHRON. (Dec. 8, 1806).

<sup>141</sup> INDEP. CHRON. (Dec. 1, 1806).

<sup>142</sup> *Extract of a Letter from a Friend in the Country*, INDEPENDENT CHRONICLE (Dec. 11, 1806).

<sup>143</sup> INDEP. CHRON. (Jan. 8, 1807).

<sup>144</sup> REPUBLICAN SPY (Dec. 24, 1806).

<sup>145</sup> *Id.*

Chief Justice, raising their glasses to “Judge Parsons—‘And the *Judgers* will I *Judge*,’ saith the Lord.”<sup>146</sup>

Republicans adopted language like this because they knew that the expectations of social harmony that Smith places at the core of revolutionary sentiment retained considerable force in Massachusetts. But hostility towards Parsons’s summary of Stand Your Ground was not limited to official party polemics. The itinerant preacher John Fletcher expressed his own worries about what such a doctrine meant for the average citizen:

Shall a man be so criminal as to do all in his power to provoke mankind, so that he is afraid of walking the streets at noon-day, without a deadly weapon, looking for and expecting the fruit of his provocation from the hand of the injured; watching an opportunity to take his life? And then plead that he did it in defence of his own? . . . And shall the criminal heart, and the cowardly, and jealous mind have protection by the law, and not call it murder when he has killed a man in time of peace?<sup>147</sup>

Fletcher’s words afford us a glimpse of how many early nineteenth century New Englanders would have perceived that “neighborliness” which “Stand Your Ground threatened: as something ordained as a matter of scripture. “Ne’er presume thy laws to break, or vengeance ever try to take,” cautioned another traveling preacher, Jonathan Plummer, in his own commentary on Black Monday,<sup>148</sup> while John Horace Nichols poetically asked “Shall dire discord & fell Revenge/Open the sluices of our Blood?/Shall Anarch’s lawless Minions Plunge/And Wanton in the Crimson’s Blood?”<sup>149</sup> It was this link between the neighborly and the Godly community that the *Chronicle* no doubt had in mind when it related the following anecdote, supposedly overheard just after the indictment:

A Federalist, hearing that a bill for manslaughter only was found against T.O. Selfridge, exclaimed, he is cleared, *by God*—No Sir, replied a boy, “he is *not* cleared by GOD, though he may be by *MAN*.”<sup>150</sup>

<sup>146</sup> REPUBLICAN SPY (March 11, 1807).

<sup>147</sup> John Fletcher, *Observations on the Law*, 15 (Boston: John Fletcher, 1807) (on file with the American Antiquarian Society).

<sup>148</sup> Jonathan Plummer, *Death of Mr. Charles Austin* (Broadside 1807).

<sup>149</sup> JOHN HORACE NICHOLS, FUNERAL DIRGE: LIBERTY AND SCIENCE MOURN A PROMISING AND FAVORITE SON (Broadside 1806).

<sup>150</sup> INDEP. CHRON., Dec. 11, 1806.

Once we recall the way offenses against popular justice during Samuel Adams's day could once give rise to direct popular action, the meaning of the "effigy riot" falls easily into place. Just as patriot crowds in the years before 1775 deployed mock legal symbols to show their opposition to official actions that violated their sense of the proper, natural social order,<sup>151</sup> Ben Austin's followers ritually hanged Parsons to display their belief that the sentiments of the charge were inconsistent with the way people ought to behave towards one another. Certainly Republicans saw the riots as a renewed burst of the old spirit of the Sons of Liberty. "*We rejoice at it,*" shouted Worcester's *National Aegis*, "we rejoice that the people have in their bosoms a spark of the *old spirit* that once kindled a whole nation to energy and vigor."<sup>152</sup>

Republicans would continue to use Parsons's "extraordinary" charge<sup>153</sup> as an issue in the gubernatorial campaign right up until Election Day, pointing constantly to the social dangers of "justifying" a killing "effected by a person who had made every preparation to bring a trifling controversy to a *fatal conclusion,*" an act, they claimed to be more criminal than anything the British soldiers of 1770 had done.<sup>154</sup> In February, Ben Austin submitted his own "memorial" to the state legislature calling for an immediate change in the law of homicide as stated by Parsons in the charge. Prominently featured on page one of the *Chronicle*, Austin's proposal repeated the claim that Stand Your Ground endangered the bonds of neighborliness that ought to prevail between members of a community. After worrying that the charge threatened a return to the "savage propensities" that governed people in a "state of nature," and after doubting that the charge could be squared with "principles of *piety, religion and morality,*" Austin posed a question: what evils would befall society if a man might kill out of a "supposition" that a felony was intended?

---

<sup>151</sup> Stephen Wilf has written in depth about the revolutionary crowds' persistent uses of "legal vernacular," such as gallows, effigies and trial narratives, as ways of articulating and defending notions of popular justice against contrary official acts. For Wilf, these symbols were ways for people to "imagine" the criminal law as a way to defend popular sovereignty when British policies increasingly threatened that ideal. STEVEN WILF, *IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* (2010).

<sup>152</sup> NAT'L AEGIS, Jan. 21, 1807.

<sup>153</sup> "The Charge is of an extraordinary kind—the bill for manslaughter only, in a case so circumstanced, is unparalleled in the history of the country." INDEP. CHRON., March 5, 1807.

<sup>154</sup> INDEP. CHRON., March 9, 1807; *See also Elector*, INDEP. CHRON., April 2, 1807. (referring to the "blood-stained street in Boston, where blooming innocence fell beneath a ruffian's hand, and federalists sanctioned the crime").

May not every social circle be exposed to some fatal catastrophe, if the fears, apprehensions and jealousies of men, are thus to furnish a *legal proof* to lessen the crime of murder, to manslaughter or excusable homicide? If this doctrine is within the *common law*, your applicant with serious anxiety would enquire whether it is not repugnant to the rights and liberties contained in our Constitution?— Whether it is not opening the door to the most atrocious murders on the slightest pretext of passion and human infirmity?...Do we wish our children to be nourished in these principles which may leave the innocent prey to the ferocious and sanguinary? (if the principles of the Charge are law), will not violence be repulsed by violence?— Havoc produce Havoc...the spectre of civil discord (affirmed with the weapons of jealousy and Suspicion) will be seen stalking through our streets, scattering desolation, misery and crimes!<sup>155</sup>

In the absence of exit polling, it is impossible to say how important rhetoric like this was in securing Sullivan's election as Massachusetts' first Republican governor in April of 1807. But he was elected by a sizable majority of over 2000 votes. For the first time, Massachusetts would have a Republican governor and legislature, leading William Eustis to write that "we have every reason to look forward to peace and tranquility."<sup>156</sup> The *Chronicle* agreed, characteristically predicting that a Republican administration would mean, at long last, a restoration of natural "harmony" to Massachusetts, and hoping that no "*suspicion*" would in the coming year "lead a desperado to imbue his hands in the blood of a fellow citizen."<sup>157</sup> Eight months after Black Monday, then, Republicans continued to view the Selfridge case, and especially Stand Your Ground, through the lens of politics and persistent assumptions about a just and moral society.

## V. CONCLUSION

While the Stand Your Ground doctrine has common law roots, its entry into American law did not spring naturally from that tradition. Nor

---

<sup>155</sup> *The Memorial of Benjamin Austin*, INDEP. CHRON., Feb. 23, 1807. The memorial was received by the legislature and tabled for consideration at a later date.

<sup>156</sup> Letter from William Eustis to Henry Dearborn, (April 9, 1807). (Eustis Papers, Library of Congress).

<sup>157</sup> *FAST DAY—Anticipation*, INDEP. CHRON., April 8, 1807.

did it owe much to what Justice Brandeis called the common law's "beautiful capacity for growth," in response to the needs of an evolving society. Rather, it appeared in imperfect form in a grand jury charge artfully worded so as to secure a manslaughter indictment in the case of *Commonwealth v. Selfridge*; far from reflecting the "felt needs of the time," it ran counter to the human instincts of much of the community of early nineteenth century Massachusetts. Dexter's closing argument had, in fact, specifically taken account of a deep difference of opinion: even if, in the "honor culture" of Boston's elite, a gentleman—merely by virtue of that status—could not be expected to retreat, for most of the people on whom Austin and Sullivan depended for Republican votes—people who did not maintain counting houses and law offices on State Street—"Stand Your Ground's" "unchristian tenets"<sup>158</sup> seemed to violate the moral networks that tied the community together. In 1807, as in 1765, popular leaders were able to mobilize local crowds to protest official action that ran counter to the common understanding of natural justice.

It is not hard to see the parallels between this early reception of Stand Your Ground and current controversies. Opponents of the doctrine continue to argue that it has stemmed more from politics—the agenda of the NRA—than from the rational evolution of criminal law. They continue to argue that Stand Your Ground is inconsistent with a racially just and moral social order.<sup>159</sup> If Parsons's charge threw into relief the difference between the communitarian neighborliness of traditional Boston and the elite honor culture of its gentlemanly caste, modern debates about Stand Your Ground denote a similar divide, between a largely rural "gun culture" and an urban population that is more likely to favor gun control laws.<sup>160</sup> One group extols gun ownership as a way to prevent violence. Oklahoma representative Kevin Calvey spoke for this group when he claimed that Stand Your Ground laws will "give crooks second thoughts about carjacking and things like that. They're going to get a face full of lead."<sup>161</sup> The other group believes that Stand Your Ground only worsens the problem of gun violence,<sup>162</sup> leading to a "world where everyone feels

---

<sup>158</sup> INDEP. CHRON., Dec. 11, 1806.

<sup>159</sup> See, e.g., DEVON JOHNSON, AMY FARRELL AND PATRICIA WARREN, EDS., DEADLY JUSTICE: TRAYVON MARTIN, RACE AND THE CRIMINAL JUSTICE SYSTEM (2015).

<sup>160</sup> See, e.g., MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY 173 (2014).

<sup>161</sup> *States Signing on to Disastrous Self-Defense Law*, MIAMI DAILY HERALD, May 24, 2006., quoted in Daniel Sweeney, *Standing Up to 'Stand Your Ground' Laws*, 64 CLEVELAND STATE L. REV. 715, 733 (2016).

<sup>162</sup> "The message to would-be killers is now clear," proclaims the Coalition to Stop Gun Violence. Stand Your Ground means that killers "need not fear carrying your gun in public, or using it." See "Stand Your Ground Laws", [www.csgv.org/issues/shoot-first-laws](http://www.csgv.org/issues/shoot-first-laws). The theory that Stand Your Ground

pressure to carry a gun.”<sup>163</sup> In 2016, the gulf between the two groups is fully as wide as the one that separated Austin’s effigy-builders from Selfridge’s patrons in 1807.

The story of the Selfridge case also highlights a difference in political cultures in Austin’s day and today. Over two hundred years ago, faced with a grand jury charge that they considered to be politically biased and deeply offensive, Massachusetts Republicans fought back by combining traditional electioneering with the revolutionary vocabulary of street protests, involving actions which crossed the line of legality (the men who erected those threatening gibbets on the Common had not bothered to apply for a permit first, nor would the Federalist Board of Selectmen have issued one if they had). Modern Americans are accustomed to different politics, in which the tactics of organizations like Black Lives Matter have little or nothing to do with partisan efforts to win elections and pass legislation. Americans who worry about the outsized influence of interest groups like the NRA may need to explore ways to bridge this gap, once more invigorating politics with the power of the crowd.<sup>164</sup>

---

may increase the number of homicides has found support in the work of Cheng Cheng and Mark Hoekstra, who found an 8% increase in the homicide rate in twenty states with Stand Your Ground laws. Cheng and Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence*, 48 J. OF HUM. RESOURCES 821 (2013).

<sup>163</sup> Philip J. Cook, *Why Stand Your Ground Laws are Dangerous*, [www.scholarsstrategynetwork.org/brief/why-stand-your-ground-laws-are-dangerous](http://www.scholarsstrategynetwork.org/brief/why-stand-your-ground-laws-are-dangerous), (Aug. 2013).

<sup>164</sup> Others, in fact, have suggested that the direct crowd actions of the early republic provide a model for injecting a new kind of democratic energy into twenty-first century politics. See, e.g., ROBERT W.T. MARTIN, *GOVERNMENT BY DISSENT* (2013). Tabitha Abu El-Haj, on the other hand, finds her model in the popular protests of the late nineteenth century. EL-HAJ, *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. OF PENN. J. OF CONST. LAW 949 (2014).