Adams' Argument for the Defense: 3–4 December 1770

Adams' Argument for the Defense [1]

3–4 December 1770

May it please your Honours and you Gentlemen of the Jury,

I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis *Beccaria:* "If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind." [2] As the prisoners stand before you for their lives, it may be proper, to recollect with what temper the law requires we should proceed to this trial. The form of proceeding at their arraignment, has discovered that the spirit of the law upon such occasions, is conformable to humanity, to commonsense and feeling; that it is all benignity and candor. And the trial commences with the prayer of the Court, expressed by the Clerk, to the Supream JUDGE of Judges, empires and worlds: "God send you a good deliverance."

We find, in the rules laid down by the greatest English Judges, who have been the brightest of mankind; We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security what so ever. I will read the words of the law itself.

The rules I shall produce to you [3] from Lord Chief Justice *Hale,* whose character as a lawyer, a man of learning and philosophy, and as a Christian, will be disputed by nobody living; one of the greatest and best characters, the English nation ever produced: his words are these. 2. H.H.P.C. *Tutius semper est errare, in acquietando, quam in puniendo, ex-parte misericordiae, quam ex parte justitiae,* it is always safer to err in acquitting, than punishing, on the part of mercy, than the part of justice. The next is from the same authority, 305 *Tutius erratur ex parte mitiori,* it is always safer to err on the milder side, the side of mercy, H.H.P.C. 509, the best rule in doubtful cases, is, rather to incline to acquital than conviction: and in page 300 *Quod dubitas ne feceris,* Where you are doubtful never act; that is, if you doubt of the prisoners guilt, never declare him guilty; this is always the rule, especially in cases of life. Another rule from the same Author, 289, where he says, In some cases, presumptive evidence go far to prove a person guilty, though there is no express proof of the fact, to be committed by him; but then it must be very warily pressed, for it is better, five guilty persons should escape unpunished, than one innocent person should die.

The next authority shall be from another Judge, of equal character, considering the age wherein he lived; that is Chancellor *Fortescue,* in praise of the laws of England, page 59, this is a very ancient writer on the English law: his words are, "Indeed one would rather, much rather, that twenty guilty persons escape the punishment of death, than one innocent person be condemned, and suffer capitally." Lord Chief Justice *Hale,* says, It is better five guilty persons escape, than one innocent person suffer. Lord Chancellor Fortiscue, you see, carries the matter farther, and says, Indeed one had rather, much rather, that twenty guilty persons should escape, than one innocent person suffer capitally. Indeed this rule is not peculiar to the English law, there never was a system of laws in the world, in which this rule did not prevail; it prevailed in the ancient Roman law, and which is more remarkable, it prevails in the modern Roman law, even the judges in the Courts of Inquisition, who with racks, burnings and scourges, examine criminals, even there, they preserve it as a maxim, that it is better the guilty should escape punishment, than the innocent suffer. *Satius esse nocentem absolvi quam insentem damnari,* [4] this is the temper we ought to set out with; and these the rules we are to be governed by. And I shall take it for granted, as a first principle, that the eight prisoners at the bar, had better be all acquitted, though we should admit them all to be guilty, than, that any one of them should by your verdict be found guilty, being innocent.

I shall now consider the several divisions of law, under which the evidence will arrange it self.

The action now before you, is homicide; that is the killing of one man by another, the law calls it homicide, but it is not criminal in all cases, for one man to slay another. Had the prisoners been on the *Plains of Abraham,* and slain an hundred *Frenchmen* apiece, the *English* law would have considered it, as a commendable action, virtuous and prais[e]worthy: so that every instance of killing a man, is not a crime in the eye of the law; there are many other instances which I can not enumerate, an officer that executes a person under sentence of death, &c. So that Gentlemen, every instance of one man's killing another, is not a crime, much less a crime to be punished with death. But to descend to some more particulars.

The law divides homicide into three branches; the first, is justifiable, the second excusable, and the third felonious; felonious homicide, is subdivided into two branches; the first is murder, which is killing with malice aforethought, the second is manslaughter, which is killing a man on a sudden provocation: here Gentlemen, are four sorts of homicide, and you are to consider, whether all the evidence amounts to the first, second, third, or fourth of these heads. The fact, was the slaying five unhappy persons that night; you are to consider, whether it was justifiable, excusable, or felonious; and if felonious, whether it was murder or manslaughter. One of these four it must be, you need not divide your attention to any more particulars. I shall however, before I come to the evidence, show you several authorities, which will assist you and me in contemplating the evidence before us.

I shall begin with justifiable homicide; if an officer a sheriff execute a man on the gallows, draws and quarters him, as in case of high treason, and cuts off his head, this is justifiable homicide, it is his duty. So also, Gentlemen, the law has planted fences and barriers around every individual; it is a castle round every man's person, as well as his house. As the love of God and our neighbour, comprehends the whole duty of man, so self-love and social, comprehend all the duties we owe to mankind, and the first branch is self-love, which is not only our indisputable right, but our clearest duty, by the laws of nature, this is interwoven in the heart of every individual; God almighty, whose laws we cannot alter, has implanted it there, and we can annihilate ourselves, as easily as root out this affection for ourselves. It is the first, and strongest principle in our nature, Justice *Blackstone* calls it, "The primary cannon in the law of nature."[5] That precept of our holy religion which commands us to love our neighbour as ourselves doth not command us to love our neighbour better than ourselves, or so well, no Christian Divine hath given this interpretation. The precept enjoins, that our benevolence to our fellow men, should be as real and sincere, as our affections to ourselves, not that it should be as great in degree. A man is authorised therefore by common sense, and the laws of England, as well as those of nature, to love himself better than his fellow subject: If two persons are cast away at sea, and get on a plank, (a case put by Sir Francis *Bacon*,) and the plank is insufficient to hold them both, the one hath a right to push the other off to save himself.[6] The rules of the common law therefore, which authorize a man to preserve his own life at the expence of another's, are not contradicted by any divine or moral law. We talk of liberty and property, but, if we cut up the law of self-defence, we cut up the foundation of both, and if we give up this, the rest is of very little value, and therefore, this principle must be strictly attended to, for whatsoever the law pronounces in the case of these eight soldiers will be the law, to other persons and after ages, all the persons that have slain mankind in this country, from the beginning to this day, had better have been acquitted, than that a wrong rule and precedent should be established.

I shall now, read to you a few authorities on this subject of self-defence. Foster 273 in the case of justifiable self-defence, "The injured party may repell force with force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth with violence, or surprize, to commit a known felony upon either." In these cases he is not obliged to retreat, but may pursue his adversary, till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable. Keiling, 128, 129.[7] I must in treat you, to consider the words of this authority, the injured person may repell force by force against any who endeavours to commit any kind of felony on him or his, here the rule is, I have a right to stand on my own defence, if you intend to commit felony; if any of the persons made an attack on these soldiers, with an intention to rob them, if it was but to take their hats feloniously, they had a right to kill them on the spot, and had no business to retreat; if a robber meets me in the street, and commands me to surrender my purse, I have a right to kill him without asking questions; if a person[8] commits a bare assault on me, this will not justify killing, but if he assaults me in such a manner, as to discover an intention, to kill me, I have a right to destroy him, that I may put it out of his power to kill me. In the case you will have to consider, I do not know there was any attempt to steal from these persons; however, there were some persons concerned, who would probably enough have stolen, if there had been any thing to steal; and many were there who had no such disposition, but this is not the point we aim at, the question is, are you satisfied, the people made the

attack in order to kill the soldiers? If you are satisfied that the people, who ever they were, made that assault, with a design to kill or maim the soldiers, this was such an assault, as will justify the soldiers killing in their own defence. Further it seems to me, we may make another question, whether you are satisfied that their real intention was to kill or maim or not? if any reasonable man, in the situation of one of these soldiers, would have had reason to believe in the time of it, that the people came with an intention to kill him, whether you have this satisfaction now, or not in your own minds, they were justifiable, at least excusable in firing; you and I, may be suspicious that the people who made this assault on the soldiers, did it to put them to the flight, or purpose that they might go exulting about the town afterwards in triumph; but this will not do, you must place yourselves in the situation of *Wemms* or *Killroy*— consider yourselves, as knowing that the prejudices of the world about you, were against you; that the people about you, thought you came to dragoon them into obedience to statutes, instructions, mandates and edicts, which they thoroughly detested; that many of these people were thoughtless and inconsiderate, old and young, sailors and land men, negroes and molattos; that they, the soldiers had no friends about them, the rest were in opposition to them; with all the bells ringing, to call the town together to assist the people in *King-street;* for they knew by that time, that there was no fire; the people shouting, huzzaing, and making the mob whistle as they call it, which when a boy makes it in the street, is no formidable thing, but when made by a multitude, is a most hideous shriek, almost as terrible as an Indian yell; the people crying Kill them! Kill them! Knock them over! heaving snow-balls, oyster shells, clubs, white birch sticks three inches and an half diameter, consider yourselves, in this situation, and then judge, whether a reasonable man in the soldiers situation, would not have concluded they were going to kill him. I believe, if I was to reverse the scene, I should bring it home to our own bosoms; suppose Colonel *Marshall,* when he came out of his own door, and saw these grenadiers coming down with swords, &c. had thought it proper to have appointed a military watch; suppose he had assembled *Gray* and *Attucks* that were killed, or any other persons in town, and had planted them in that station as a military watch, and there had come from *Murray's* barracks, thirty or forty soldiers, with no other arms than snow-balls, cakes of ice, oyster-shells, cinders and clubs, and attacked this military watch in this manner, what do you suppose would have been the feelings and reasonings of any of our householders; I confess I believe they would not have borne the one half of what the witnesses have sworn the soldiers bore, till they had shot down as many as were necessary to intimidate and disperse the rest; because, the law does not oblige us to bear insults to the danger of our lives, to stand still with such a number of people round us, throwing such things at us, and threatening our lives, until we are disabled to defend ourselves.

"Where a known felony, is attempted upon the person, be it to rob, or murder, here the party assaulted may repel force with force, and even his own servant then attendant on him, *or any other person present,* may interpose for preventing mischief, and if death ensues, the party so interposing will be justified. In this case nature and social duty co-operate." Foster 274.[9]

Hawkins P.C. Chap. 28, §25. towards the end, "Yet it seems that a private person, a *fortiori,* an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, in as much as he only does his duty in aid of the public justice."[10] Section 24. "And I can see no reason why a person, who without provocation is assaulted by another in any place whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may not justify killing such an assailant, as much as if he had attempted to rob him: For is not he who attempts to murder me, more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my goods than for my life; and it is not only highly agreeable to reason that a man in such circumstances, may lawfully kill another, but it seems also to be confirmed by the general tenor of our law books, which speaking of homicide *se defendendo,* suppose it done in some quarrel or affray."[11]

"And so perhaps the killing of dangerous rioters, may be justified by any private persons, who cannot otherwise suppress them, or defend themselves from them; in as much as every private person seems to be authorized by the law, to arm himself for the purposes aforesaid." Hawkins p. 71. §14[12] —Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence, that distinction is material and must be attended to.

Hawkins, page 75. §14. "And not only he who on an assault retreats to the wall or some such streight, beyond which he can go no further, before he kills the other, is judged by the law to act upon unavoidable necessity; but also he who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other

without retreating at all."[13] —§16. "And an officer who kills one that insults him in the execution of his office, and where a private person, that kills one who feloniously assaults him in the high way, may justify the fact without ever giving back at all."[14]

There is no occasion for the Magistrate to read the Riot act. In the case before you, I suppose you will be satisfied when you come to examine the witnesses, and compare it with the rules of the common law, abstracted from all mutiny acts and articles of war, that these soldiers were in such a situation, that they could not help themselves; people were coming from *Royal-exchange-lane,* and other parts of the town, with clubs, and cord wood sticks; the soldiers were planted by the wall of the *Custom House;* they could not retreat, they were surrounded on all sides, for there were people behind them, as well as before them; there were a number of people in *Royal-exchange-lane;* the soldiers were so near to the *Custom house,* that they could not retreat, unless they had gone into the brick wall of it. I shall shew you presently, that all the party concerned in this unlawful design, were guilty of what any one of them did; if any body threw a snow-ball, it was the act of the whole party; if any struck with a club, or threw a club, and the club had killed any body, the whole party would have been guilty of murder in law.

Ld. C.J. HOLT, in Mawgridge's Case, Keyling 128, says, "Now it hath been held, that if A of his malice prepensed assaults B, to kill him, and B draws his sword and attacks A and pursues him, then A for his safety gives back, and retreats to a wall, and B still pursuing him with his drawn sword, A in his defence kills B. This is murder in A. For A having malice against B, and in pursuance thereof endeavouring to kill him, is answerable for all the consequences, of which he was the original cause. It is not reasonable for any man that is dangerously assaulted, and when he perceives his life in danger from his adversary, but to have liberty for the security of his own life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath malice against another, is not fit to be trusted with a dangerous weapon in his hand. And sore solved by all the Judges when they met at Seargeant's inn, in preparation for my *Lord Morley's* trial."[15]

In the case here, we will take *Montgomery,* if you please, when he was attacked by the stout man with the stick, who aimed it at his head, with a number of people round him, crying out, Kill them! Kill them! had he not a right to kill the man. If all the party were guilty of the assault made by the stout man, and all of them had discovered malice in their hearts, had not *Montgomery* a right, according to Lord Chief Justice *Holt,* to put it out of their power to wreak their malice upon him. I will not at present, look for any more authorities in the point of self-defence; you will be able to judge from these, how far the law goes, in justifying or excusing any person in defence of himself, or taking away the life of another who threatens him, in life or limb; the next point is this, That in case of an unlawful assembly, all and every one of the assembly is guilty of all and every unlawful act, committed by any one of that assembly, in prosecution of the unlawful design they set out upon.

Rules of law should be universally known, what ever effect they may have on politics; they are rules of common law, the law of the land, and it is certainly true, that where ever there is an unlawful assembly, let it consist of many persons or a few, everyman in it is guilty of every unlawful act committed by any one of the whole party, be they more or be they less, in pursuance of their unlawful design. This is the policy of the law: to discourage and prevent riots, insurrections, turbulence and tumults.

In the continual vicissitudes of human things, amidst the shocks of fortune and the whirls of passion, that take place at certain critical seasons, even in the mildest government, the people are liable to run into riots and tumults. There are Church-quakes and state-quakes, in the moral and political world, as well as earthquakes, storms and tempests in the physical. Thus much however must be said in favour of the people and of human nature, that it is a general, if not universal truth, that the aptitude of the people to mutinies, seditions, tumults and insurrections, is in direct proportion to the despotism of the government. In governments completely despotic, *i.e.* where the will of one man, is the only law, this disposition is most prevalent.—In Aristocracies, next—in mixed Monarchies, less than either of the former—in compleat Republick's the least of all—and under the same form of government as in a limited monarchy, for example, the virtue and wisdom of the administration, may generally be measured by the peace and order, that are seen among the people. However this may be, such is the imperfection of all things in this world, that no form of government, and perhaps no wisdom or virtue in the administration, can at all times avoid riots and disorders among the people.

Now it is from this difficulty, that the policy of the law hath framed such strong discouragements, to secure the people against tumults; because when they once begin, there is danger of their running to such excesses, as will overturn the whole system of government. There is the rule from the reverend sage of the law, so often quoted before.

I. H.H.P.C. 437. "All present, aiding and assisting, are equally principal with him that gave the stroke, whereof the party died. For tho' one gave the stroke, yet in interpretation of law, it is the stroke of every person, that was present aiding and assisting."[16]

I. H.H.P.C. 440. "If divers come with one assent to do mischief, as to kill, rob, or beat, and one doth it, they are all principals in the felony. If many be present, and one only gives the stroke whereof the party dies, they are all principal, if they came for that purpose."[17]

Now if the party at *Dock-square,* came with an intention only to beat the soldiers, and began the affray with them, and any of them had been accidentally killed, it would have been murder, because it was an unlawful design they came upon; if but one does it, they are all considered in the eye of the law to be guilty, if any one gives the mortal stroke, they are all principal here, therefore there is a reversal of the scene; if you are satisfied, that these soldiers were there on a lawful design and it should be proved any of them shot without provocation and killed any body, he only is answerable for it. First Hale's pleas of the crown.

1. H.H.P.C. 444. "Although if many come upon an unlawful design, and one of the company kill one of the adverse party, in pursuance of that design, all are principals; yet if many be together upon a lawful account, and one of the company, kill another of an adverse party, without any particular abetment of the rest to this fact of homicide they are not all guilty that are of the company, but only those that gave the stroke or actually abetted him to do it."[18]

1. H.H.P.C. 445. "In the case of a riotous assembly to rob or steal deer, or do any unlawful act of violence, there the offence of one, is the offence of all the company."[19]

In another place, 1. H.H.P.C. 439. "The *Lord Dacre* and divers others went to steal deer in the park of one Pelham—Raydon one of the company, killed the keeper in the park; the *Lord Dacre* and the rest of the company being in the other part of the park. Yet it was adjudged murder in them all, and they died for it."[20] And he quotes Crompton, 25. Dalton 93 p. 241.[21] So that in so strong a case as this, where this nobleman set out to hunt deer in the ground of another, he was in one part of the park, his company in another part, yet they were all guilty of murder.

The next is *Hale's* Pleas of the Crown, 1. H.H.P.C. 440, "The case of *Drayton Bassit,* diverse persons doing an unlawful act, all are guilty of what is done by one."[22]

Foster, 353, 354. "A general resolution against all opposers, whether such resolution appears upon evidence to have been actually and implicitly entered into by the confederates, or may reasonably be collected from their number, arms or behaviour, at, or before the scene of action, such resolutions, so proved, have always been considered as strong ingredients in cases of this kind. And in cases of homicide, committed inconsequence of them, every person present; in the sense of the law, when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow."[23]

Foster. "The cases of Lord *Dacre* mentioned by *Hale,* and of *Pudsey,* reported by *Crompton,* and cited by *Hale,* turned upon this point. The offences they respectively stood charged with as principals, were committed far out of their sight and hearing; and yet both were held to be present. It was sufficient, that at the instant the facts were committed, they were of the same party and upon the same pursuit, and under the same engagements and expectations of mutual defence and support, with those that did the facts."[24]

Thus far I have proceeded, and I believe it will not be hereafter disputed by any body, that this law ought to be known to every one who has any disposition to be concerned in an unlawful assembly, whatever mischief happens in the prosecution of the design they set out upon, all are answerable for it. It is necessary we should consider the definitions of some other crimes, as well as murder; sometimes one crime gives occasion to another, an assault is sometimes the occasion of man-slaughter, sometimes of excusable homicide. It is necessary to consider what is a riot. 1. *Hawk.* c. 65.§2. I shall give you the definition of it. "Where so ever more than three persons use force or violence, for the accomplishment of any design whatever, all concerned are rioters."[25]

Were there not more than three persons in *Dock-square?* Did they not agree to go to *King-street,* and attack the *Main guard?* Where then, is the reason for hesitation, at calling it a riot? If we cannot speak the law as it is, where is our liberty? And this is law, that wherever more than three persons, are gathered together, to accomplish any thing with force, it is a riot. 1. *Hawk.* c. 65, §2. "Wherever more than three, use force and violence, all who are concerned therein are rioters: But in some cases wherein the law authorizes force, it is lawful and commendable to use it. As for a sheriff, 2. *And.* 67. *Poph.* 121. or

constable, 3 *H*. 7. 10. 6. or perhaps even for a private person, *Poph*. 121. *Moore,* 656. to assemble a competent number of people, in order with force, to oppose rebels, or enemies, or rioters, and afterwards with such force, actually to suppress them." [26]

I do not mean to apply the word rebel on this occasion: I have no reason to suppose that ever there was one in *Boston,* at least among the natives of the country; but rioters are in the same situation, as far as my argument is concerned, and proper officers may suppress rioters, and so may even private persons.

If we strip ourselves free from all military laws, mutiny acts, articles of war and soldiers oaths, and consider these prisoners as neighbours, if any of their neighbours were attacked in *King-street,* they had a right to collect together to suppress this riot and combination. If any number of persons meet together at a fair, or market, and happen to fall together by the ears, they are not guilty of a riot, but of a sudden affray: here is another paragraph which I must read to you, 1. *Hawkins,* c. 65, §3, "If a number of persons, being met together at a fair or market, or on any other *lawful* and *innocent occasion,* happen on a sudden quarrel, to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty, but those who actually engage in it," &c. [27] End of the §. It would be endless, as well as superfluous, to examine, whether every particular person engaged in a riot, were in truth one of the first assembly, or actually had a previous knowledge of the design thereof. [28]

I have endeavoured to produce the best authorities, and to give you the rules of law in their words, for I desire not to advance any thing of my own. I chuse to lay down the rules of law, from authorities which cannot be disputed. Another point is this, whether, and how far, a private person may aid another in distress? Suppose a press gang should come on shore in this town, and assault any sailor, or householder in *King street,* in order to carry them on board one of his Majesty's ships and impress him without any warrant, as a seaman in his Majesty's service, how far do you suppose the inhabitants would think themselves warranted by law, to interpose against that lawless press gang? I agree that such a press gang would be as unlawful an assembly, as that was in *King street*. If they were to press an inhabitant, and carry him off for a sailor, would not the inhabitants think them-selves warranted by law to interpose in behalf of their fellow citizens? Now Gentlemen, if the soldiers had no right to interpose in the relief of the Sentry, the inhabitants would have no right to interpose with regard to the citizen, for whatever is law for a soldier, is law for a sailor, and for a citizen, they all stand upon an equal footing, in this respect. I believe we shall not have it disputed, that it would be lawful to go into *King-street,* and help an honest man there, against the press master. We have many instances in the books which authorize it, which I shall produce to you presently.

Now suppose you should have a jealousy in your minds, that the people who made this attack on the Sentry, had nothing in their intention more than to take him off his post, and that was threatened by some; suppose they intended to go a little farther, and tar and feather him, or to ride him, (as the phrase is in *Hudibras*) [29] he would have a good right to have stood upon his defence, the defence of his liberty, and if he could not preserve that without hazard to his own life, he would be warranted, in depriving those of life, who were endeavouring to deprive him of his; that is a point I would not give up for my right hand, nay, for my life.

Well, I say, if the people did this, or if this was only their intention, surely the officer and soldiers had a right to go to his relief, and therefore they set out upon a lawful errand, they were therefore a lawful assembly, if we only consider them as private subjects and fellow citizens, without regard to Mutiny Acts, Articles of War, or Soldiers Oaths; a private person, or any number of private persons, have a right to go to the assistance of their fellow subject in distress and danger of his life, when assaulted and in danger from a few or a multitude. *Keyl*. 136. "If a man perceives another by force to be injuriously treated, pressed and restrained of his liberty, tho' the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter. *Keyl*. A and others without any warrant, impress B to serve the King at sea, B quietly submitted and went off with the press master; *Hugett* and the others pursued them, and required a sight of their warrant; but they shewing a piece of paper that was not a sufficient warrant, thereupon *Hugett* with the others drew their swords, and the press masters theirs, and so there was a combat, and those who endeavoured to rescue the pressed man killed one of the pretended press masters. This was but manslaughter, for when the liberty of one subject is invaded, it affects all the rest: it is a provocation to all people, as being of ill example and pernicious consequences." [30]

2. Lord *Raymond,* 1301. The Queen *versus* Tooley *et alios,* Lord Chief Justice *Holt* says, 3d. "The prisoner (*i.e. Tooley*) in this case had sufficient provocation; for if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion;—and where the liberty of the subject is invaded, it is a provocation to all the subjects of England, &c. and sure a man ought to be concerned for magna charta and the laws; and if any one against the law imprisons a man, he is an offender against magna charta." [31]

I am not insensible of Sir *Michael Foster's* observations on these cases, [32] but apprehend they do not invalidate the authority of them as far as I now apply them to the purpose of my argument. If a stranger, a mere fellow subject may interpose to defend the liberty, he may to defend the life of another individual. But according to the evidence, some imprudent people before the Sentry, proposed to take him off his post, others threatened his life, and intelligence of this was carried to the *Main-guard,* before any of the prisoners turned out: They were then ordered out to relieve the Sentry, and any of our fellow citizens might lawfully have gone upon the same errand; they were therefore a lawful assembly.

I have but one point more of law to consider, and that is this: In the case before you, I do not pretend to prove that every one of the unhappy persons slain, were concerned in the riot; the authorities read to you just now, say, it would be endless to prove, whether every person that was present and in a riot, was concerned in planning the first enterprise or not: nay, I believe it but justice, to say, some were perfectly innocent of the occasion, I have reason to suppose, that one of them was, Mr. *Maverick;* he was a very worthy young man, as he has been represented to me, and had no concern in the riotous proceedings of that night; and I believe the same may be said, in favour of one more, at least, Mr. *Caldwell* who was slain; and therefore many people may think, that as he, and perhaps another was innocent, therefore innocent blood having been shed, that must be expiated by the death of somebody or other. I take notice of this, because one gentleman nominated by the sheriff, for a Juryman upon this trial, because he said, he believed Capt. *Preston* was innocent, but innocent blood had been shed, and therefore somebody ought to be hanged for it, which he thought was indirectly giving his opinion in this cause. [33] I am afraid many other persons have formed such an opinion; I do not take it to be a rule, that where innocent blood is shed, the person must die. In the instance of the *Frenchmen* on the *Plains of Abraham,* they were innocent, fighting for their King and country, their blood is as innocent as any, there may be multitudes killed, when innocent blood is shed on all sides, so that it is not an invariable rule. I will put a case, in which, I dare say, all will agree with me: Here are two persons, the father and the son, go out a hunting, they take different roads, the father hears a rushing among the bushes, takes it to be game, fires and kills his son through a mistake; here is innocent blood shed, but yet nobody will say the father ought to die for it. So that the general rule of law, is, that whenever one person hath a right to do an act, and that act by any accident, takes away the life of another, it is excusable, it bears the same regard to the innocent as to the guilty. If two men are together, and attack me, and I have a right to kill them, I strike at them, and by mistake, strike a third and kill him, as I had a right to kill the first, my killing the other, will be excusable, as it happened by accident. If I in the heat of passion, aim a blow at the person who has assaulted me, aiming at him, I kill another person, it is but manslaughter. *Foster,* 261. §3. "If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensues against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and inconsiderately, it will be manslaughter: not accidental death, because the act upon which death ensued, was unlawful." [34]

"Under this head, &c. [*See the remainder inserted in pages*] 145, 146 [35]

Supposing in this case, the Molatto man was the person made the assault, suppose he was concerned in the unlawful assembly, and this party of soldiers endeavouring to defend themselves against him, happened to kill another person who was innocent, though the soldiers had no reason that we know of, to think any person there, at least of that number who were crouding about them innocent, they might naturally enough presume all to be guilty of the riot and assault, and to come with the same design; I say, if on firing on these who were guilty, they accidentally killed an innocent person, it was not their faults, they were obliged to defend themselves against those who were pressing upon them, they are not answerable for it with their lives, for upon supposition it was justifiable or excusable to kill *Attucks* or any other person, it will be equally justifiable or excusable if in firing at him, they killed another who was innocent, or if the provocation was such as to mitigate the guilt to manslaughter, it will equally mitigate the guilt, if they killed an innocent man un-designedly, in aiming at him who gave the provocation, according to Judge *Foster,* [36] and as this point is of such consequence, I must produce some more authorities

for it. 1. *Hawkins,* 84. "Also, if a third person accidentally happen to be killed, by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only."[37] H.H.P.C. 442.[38] To the same point, and 1. H.H.P.C. 484[39] and 4 *Black*. 27.[40]

I shall now consider one question more, and that is concerning provocation.*[41] We have hitherto been considering self-defence, and how far persons may go in defending themselves against aggressors, even by taking away their lives, and now proceed to consider, such provocations as the law allows to mitigate or extenuate the guilt of killing, where it is not justifiable or excusable.

An assault and battery, committed upon a man, in such a manner as not to endanger his life, is such a provocation as the law allows to reduce killing, down to the crime of manslaughter. Now the law has been made on more consideration than we are capable of making at present; the law considers a man as capable of bearing any thing, and every thing, but blows. I may reproach a man as much as I please, I may call him a thief, robber, traitor, scoundrel, coward, lobster, bloody back, &c. and if he kills me it will be murder, if nothing else but words preceed; but if from giving him such kind of language, I proceed to take him by the nose, or fillip him on the forehead, that is an assault! that is a blow; the law will not oblige a man to stand still and bear it; there is the distinction; hands off, touch me not, as soon as you touch me, if I run you thro' the heart it is but Manslaughter; the utility of this distinction, the more you think of it, the more you will be satisfied with it; it is an assault when ever a blow is struck, let it be ever so slight, and sometimes even without a blow. The law considers man as frail and passionate, when his passions are touched, he will be thrown off his guard, and therefore the law makes allowances for this frailty, considers him as in a fit of passion, not having the possession of his intellectual faculties, and therefore does not oblige him to measure out his blows with a yard stick, or weigh them in a scale; let him kill with a sword, gun or hedge stake, it is not murder, but only manslaughter. Keyling's Reports 135. *Regina versus* Mawgri[d]ge. "Rules supported by authority and general consent, shewing what are always allowed to be sufficient provocations. First, if one man, *upon any words shall make an assault* upon another, either by *pulling him by the nose, or filliping upon the forehead,* and he that is so assaulted, shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner, might have some further design upon him."[42] So that here is the boundary, when a man is assaulted, and kills in consequence of that assault, it is but manslaughter; I will just read as I go along the definition of an assault, 1. Hawkins Chap. 62, §1. "An assault is an attempt or offer, with force or violence, to do a co[r]poral hurt to another; as by stricking at him, with or without a weapon, or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitchfork at him, or by any other such like act done in an angry, threatning manner, &c. But no words can amount to an assault."[43] Here is the definition of an assault, which is a sufficient provocation to soften killing down to manslaughter, 1. Hawkins, Chap. 31, §36. "Neither can he be thought guilty of a greater crime (than manslaughter) who finding a man in bed with his wife, or being actually *struck by him,* or *pulled by the nose,* or *filliped upon the forehead,* immediately kills him, or in the defence of his person from an unlawful arrest; or in the defence of his house, from those who claiming a title to it, attempt forcibly to enter it, and to that purpose shoot at it, &c."[44] Every snow-ball, oyster shell, cake of ice, or bit of cinder that was thrown that night, at the Sentinel, was an assault upon him; every one that was thrown at the party of soldiers, was an assault upon them, whether it hit any of them or not. I am guilty of an assault, if I present a gun at any person, whether I shoot at him or not, it is an assault, and if I insult him in that manner, and he shoots me, it is but manslaughter. Foster, 295, 6. "To what I have offered with regard to sudden rencounters, let me add, that the blood, already too much heated, kindleth afresh at every pass or blow. And in the tumult of the passions, in which mere instinct self preservation, hath no inconsiderable share, the voice of reason is not heard. And therefore, the law in condesension to the infirmities of flesh and blood doth extenuate the offence."[45] Insolent, scurrilous, or slanderous language, when it preceeds an assault, aggravates it. Foster 316. "We all knew [*know*] that words of reproach, how grating and offensive soever, are in the eye of the law, no provocation, in the case of voluntary homicide, and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knoweth, that affronts of that kind, pierce deeper, and stimulate in the veins more effectually, than a slight injury done to a third person, tho' under colour of justice, possibly can."[46] I produce this to show the assault, in this case, was aggravated by the scurrilous language which preceeded it. Such words of reproach, stimulate in the veins, and exasperate the mind, and no doubt if an assault and battery succeeds them, killing under such a provocation, is softened to manslaughter, but, killing without such provocation, makes it murder.

FIVE o'Clock, P.M. the Court adjourned till *Tuesday* morning [*4 December*], nine o'Clock.

Tuesday, NINE o'Clock, the Court met according to adjournment, and Mr. ADAMS proceeded.

May it please your Honours, and you Gentlemen of the Jury,

I yesterday afternoon produced from the best authorities, those rules of law which must govern all cases of homicide, particularly that which is now before you; it now remains to consider the evidence, and see whether any thing has occurred, that may be compared to the rules read to you; and I will not trouble myself nor you with laboured endeavours to be methodical, I shall endeavour to make some few observations, on the testimonies of the witnesses, such as will place the facts in a true point of light, with as much brevity as possible; but I suppose it would take me four hours to read to you, (if I did nothing else but read) the minutes of evidence that I have taken in this trial. In the first place the Gentleman who opened this cause, has stated to you, with candour and precision, the evidence of the identity of the persons.

The witnesses are confident that they know the prisoners at the barr, and that they were present that night, and of the party; however, it is apparent, that witnesses are liable to make mistakes, by a single example before you. Mr. *Bass,* who is a very honest man, and of good character, swears positively that the tall man, *Warren,* stood on the right that night, and was the first that fired; and I am sure you are satisfied by this time, by many circumstances, that he is totally mistaken in this matter; this you will consider at your leisure. The witnesses in general did not know the faces of these persons before; very few of them knew the names of them before, they only took notice of their faces that night. How much certainty there is in this evidence, I leave you to determine.

There does not seem to me to be any thing very material in the testimony of Mr. *Aston,*[47] except to the identity of *McCauley,* and he is the only witness to that. If you can be satisfied in your own minds, without a doubt, that he knew *McCauley* so well as to be sure, you will believe he was there.

The next witness is *Bridgham,* he says he saw the tall man *Warren,* but saw another man belonging to the same regiment soon after, so like him, as to make him doubt whether it was *Warren* or not; he thinks he saw the *Corporal,* but is not certain, he says he was at the corner of the *Custom house,* this you will take notice of, other witnesses swear, he was the remotest man of all from him who fired first, and there are other evidences who swear the left man did not fire at all; if *Wemms* did not discharge his gun at all, he could not kill any of the persons, therefore he must be acquitted on the fact of killing; for an intention to kill, is not murder nor manslaughter, if not carried into execution: The witness saw numbers of things thrown, and he saw plainly sticks strike the guns, about a dozen persons with sticks, gave three cheers, and surrounded the party, and struck the guns with their sticks several blows: This is a witness for the crown, and his testimony is of great weight for the prisoners; he gives his testimony very sensibly and impartially. He swears positively, that he not only saw ice or snow thrown, but saw the guns struck several times; if you believe this witness, of whose credibility you are wholly the judges, as you are of every other; if you do not believe him, there are many others who swear to circumstances in favour of the prisoners; it should seem impossible you should disbelieve so great a number, and of crown witnesses too, who swear to such variety of circumstances that fall in with one another so naturally to form our defence; this witness swears positively, there were a dozen of persons with clubs, surrounded the party; twelve sailors with clubs, were by much an overmatch to eight soldiers, chained there by the order and command of their officer, to stand in defence of the Sentry, not only so, but under an oath to stand there, *i.e.* to obey the lawful command of their officer, as much, Gentlemen of the Jury, as you are under oath to determine this cause by law and evidence; clubs they had not, and they could not defend themselves with their bayonets against so many people; it was in the power of the sailors to kill one half or the whole of the party, if they had been so disposed; what had the soldiers to expect, when twelve persons armed with clubs, (sailors too, between whom and soldiers, there is such an antipathy, that they fight as naturally when they meet, as the elephant and Rhinoceros) were daring enough, even at the time when they were loading their guns, to come up with their clubs, and smite on their guns; what had eight soldiers to expect from such a set of people? Would it have been a prudent resolution in them, or in any body in their situation, to have stood still, to see if the sailors would knock their brains out, or not? Had they not all the reason in the world to think, that as they had done so much, they would proceed farther? Their clubs were as capable of killing as a ball, an hedge stake is known in the law books as a weapon of death, as much as a sword, bayonet, or musket. He says, the soldiers were loading their guns, when the twelve surrounded them, the people went up to them within the length of their guns, and before the firing; besides all this he swears, they were called cowardly rascals, and dared to fire; he says these people were all dressed *like* sailors; and I believe, that by and bye you will find evidence enough to satisfy you, these were some of the persons that

came out of *Dock-square,* after making the attack on *Murray's barracks,* and who had been arming themselves with sticks from the butchers stalls and cord wood piles, and marched up round *Corn-hill* under the command of *Attucks.* All the bells in town were ringing, the ratling of the blows upon the guns he heard, and swears it was violent; this corroborates the testimony of *James Bailey,* which will be considered presently. Some witnesses swear a club struck a soldier's gun, *Bailey* swears a man struck a soldier and knocked him down, before he fired, "the last man that fired, levelled at a lad, and moved his gun as the lad ran:" You will consider, that an intention to kill is not murder; if a man lays poison in the way of another, and with an express intention that he should take it up and die of it, it is not murder: Suppose that soldier had malice in his heart, and was determined to murder that boy if he could, yet the evidence clears him of killing the boy, I say admit he had malice in his heart, yet it is plain he did not kill him or any body else, and if you believe one part of the evidence, you must believe the other, and if he had malice, that malice was ineffectual; I do not recollect any evidence that assertains who it was that stood the last man but one upon the left, admitting he discovered a temper ever so wicked, cruel and malicious, you are to consider his ill temper is not imputable to another, no other had any intention of this deliberate kind, the whole transaction was sudden, there was but a very short space of time between the first gun and the last, when the first gun was fired the people fell in upon the soldiers and laid on with their weapons with more violence, and this served to encrease the provocation, and raised such a violent spirit of revenge in the soldiers, as the law takes notice of, and makes some allowance for, and in that fit of fury and madness, I suppose he aimed at the boy.

The next witness is *Dodge,* he says, there were fifty people near the soldiers pushing at them; now the witness before says, there were twelve sailors with clubs, but now here are fifty more aiding and abetting of them, ready to relieve them in case of need; now what could the people expect? It was their business to have taken themselves out of the way; some prudent people by the *Town-house,* told them not to meddle with the guard, but you hear nothing of this from these fifty people; no, instead of that, they were huzzaing and whistling, crying damn you, fire! why don't you fire? So that they were actually assisting these twelve sailors that made the attack; he says the soldiers were pushing at the people to keep them off, ice and snow-balls were thrown, and I heard ice rattle on their guns, there were some clubs thrown from a considerable distance across the street. This witness swears he saw snow-balls thrown close before the party, and he took them to be thrown on purpose, he saw oyster-shells likewise thrown.—Mr. *Langford* the watchman, is more particular in his testimony, and deserves a very particular consideration, because it is intended by the council for the crown, that his testimony shall distinguish *Killroy* from the rest of the prisoners, and exempt him from those pleas of justification, excuse or extenuation, which we rely upon for the whole party, because he had previous malice, and they would from hence conclude, he aimed at a particular person; you will consider all the evidence with regard to that, by itself.

Hemmingway, the sheriff's coachman, swears he knew *Killroy,* and that he heard him say, he would never miss an opportunity of firing upon the inhabitants: this is to prove that *Killroy* had preconceived malice in his heart, not indeed against the unhappy persons who were killed, but against the inhabitants in general, that he had the spirit not only of a *Turk* or an *Arab,* but of the devil; but admitting that this testimony is litterally true, and that he had all the malice they would wish to prove, yet, if he was assaulted that night, and his life in danger, he had a right to defend himself as well as another man; if he had malice before, it does not take away from him the right of defending himself against any unjust aggressor. But it is not at all improbable, that there was some misunderstanding about these loose expressions; perhaps the man had no thoughts of what his words might import; many a man in his cups, or in anger, which is a short fit of madness, hath uttered the rashest expressions, who had no such savage disposition in general: so that there is but little weight in expressions uttered at a kitching fire, before a maid and a coachman, where he might think himself at liberty to talk as much like a bully, a fool, and a madman as he pleased, and that no evil would come of it. Strictly speaking, he might mean no more than this, that he would not miss an opportunity of firing on the inhabitants, if he was attacked by them in such a manner as to justify it: soldiers have sometimes avoided opportunities of firing, when they would have been justified, if they had fired. I would recommend to them, to be tender by all means, nay, let them be cautious at their peril; but still what he said, amounts in strictness, to no more than this, "If the inhabitants make an attack on me, I will not bear from them what I have done already;" or I will bear no more, than what I am obliged by law to bear. No doubt it was under the fret of his spirits, the indignation, mortification, grief and shame, that he had suffered a defeat at the Rope-walks; it was just after an account of an affray was published here, betwixt the soldiers and inhabitants at *New York.*[48] There was a little before the 5th of *March,* much noise in this town, and a pompous account in the news-papers, of a victory obtained by the inhabitants there over the soldiers; which doubtless

excited the resentment of the soldiers here, as well as exultations among some sorts of the inhabitants: and the ringing of the bells here, was probably copied from *New York,* a wretched example in this, and in two other instances at least: the defeat of the soldiers at the Rope-walks, was about that time too, and if he did, after that, use such expressions, it ought not to weigh too much in this case. It can scarcely amount to proof that he harboured any settled malice against the people in general. Other witnesses are introduced to show that *Killroy* had besides his general ill will against every body, particular malice against Mr. *Gray,* whom he killed, as *Langford* swears.

Some of the witnesses, have sworn that *Gray* was active in the battle at the Rope walks, and that *Killroy* was once there, from whence the Council for the Crown would infer, that *Killroy,* in *King-street,* on the 5th of *March* in the night, knew *Gray* whom he had seen at the Rope-walks before, and took that opportunity to gratify his preconceived malice; but if this is all true, it will not take away from him his justification, excuse, or extenuation, if he had any. The rule of the law is, if there has been malice between two, and at a distant time afterwards they met, and one of them assaults the other's life, or only assaults him, and he kills in consequence of it, the law presumes the killing was in self defence, or upon the provocation, not on account of the antecedent malice. If therefore the assault upon *Killroy* was so violent as to endanger his life, he had as good a right to defend himself, as much as if he never had before conceived any malice against the people in general, or Mr. *Gray* in particular. If the assault upon him, was such as to amount only to a provocation, not to a justification, his crime will be manslaughter only. However, it does not appear, that he knew Mr. *Gray;* none of the witnesses pretend to say he knew him, or that he ever saw him. It is true they were both in the Rope-walks at one time, but there were so many combatants on each side, that it is not even probable that *Killroy* should know them all, and no witnesses says there was any rencounter there between them two. Indeed, to return to Mr. *Langford's* testimony, he says, he did not perceive *Killroy* to aim at *Gray,* more than at him, but he says expressly, he did not aim at *Gray*. *Langford* says, "*Gray* had no stick, was standing with his arms folded up." This witness, is however most probably mistaken in this matter, and confounds one time with another, a mistake which has been made by many witnesses, in this case, and considering the confusion and terror of the scene, is not to be wondered at.

Witnesses have sworn to the condition of *Killroy's* bayonet, that it was bloody the morning after the 5th of *March*. The blood they saw, if any, might be occasioned by a wound given by some of the bayonets in the affray, possibly in Mr. *Fosdick's* arm, or it might happen, in the manner mentioned by my brother before. One bayonet at least was struck off and it might fall, where the blood of some person slain afterwards flowed. It would be doing violence to every rule of law and evidence, as well as to common sense and the feelings of humanity, to infer from the blood on the bayonet, that it had been stabbed into the brains of Mr. *Gray* after he was dead, and that by *Killroy* himself who had killed him.

Young Mr. *Davis* swears, that he saw *Gray* that evening, a little before the firing, that he had a stick under his arm, and said he would go to the riot, "I am glad of it, (that is that there was a rumpus) I will go and have a slap at them, if I lose my life." And when he was upon the spot, some witnesses swear, he did not act that peaceable in-offensive part, which *Langford* thinks he did. They swear, they thought him in liquor—that he run about clapping several people on the shoulders saying, "Dont run away"—"they dare not fire." *Langford* goes on "I saw twenty or five and twenty boys about the Sentinal—and I spoke to him, and bid him not be afraid."—How came the Watchman *Langford* to tell him not to be afraid. Does not this circumstance prove, that he thought there was danger, or at least that the Sentinel in fact, was terrified and did think himself in danger. *Langford* goes on "I saw about twenty or five and twenty boys that is young shavers."—We have been entertained with a great variety of phrases, to avoid calling this sort of people a mob.—Some call them shavers, some call them genius's.—The plain English is gentlemen, most probably a motley rabble of saucy boys, negroes and molattoes, Irish teagues[49] and out landish jack tarrs.—And why we should scruple to call such a set of people a mob, I can't conceive, unless the name is too respectable for them: —The sun is not about to stand still or go out, nor the rivers to dry up because there was a mob in *Boston* on the 5th of *March* that attacked a party of soldiers.—Such things are not new in the world, nor in the British dominions, though they are comparatively, rareties and novelties in this town. *Carr* a native of *Ireland* had often been concerned in such attacks, and indeed, from the nature of things, soldiers quartered in a populous town, will always occasion two mobs, where they prevent one.—They are wretched conservators of the peace!

Langford "heard the rattling against the guns, but saw nothing thrown."—This rattling must have been very remarkable, as so many witnesses heard it, who were not in a situation to see what caused it. These things which hit the guns made a noise, those which hit the soldiers persons, did not—But when so many things were thrown and so many hit their guns, to

suppose that none struck their persons is incredible. *Langford* goes on "*Gray* struck me on the shoulder and asked me what is to pay? I answered, I don't know but I believe something will come of it, by and bye."—Whence could this apprehension of mischief arise, if *Langford* did not think the assault, the squabble, the affray was such as would provoke the soldiers to fire? —"a bayonet went through my great coat and jacket," yet the soldier did not step out of his place. This looks as if *Langford* was nearer to the party than became a watchman. Forty or fifty people round the soldiers, and more coming from *Quaker-lane,* as well as the other lanes. The soldiers heard all the bells ringing and saw people coming from every point of the compass to the assistance of those who were insulting, assaulting, beating and abusing of them—what had they to expect but destruction, if they had not thus early taken measures to defend themselves?

Brewer saw *Killroy,* &c. saw Dr. *Young,* &c. "he said the people had better go home." It was an excellent advice, happy for some of them had they followed it, but it seems all advice was lost on these persons, they would harken to none that was given them in *Dock-square, Royal exchange-lane* or *King-street,* they were bent on making this assault, and on their own destruction.

The next witness that knows any thing, was, *James Bailey,* he saw *Carrol, Montgomery* and *White,* he saw some round the Sentry, heaving pieces of ice, large and hard enough to hurt any man, as big as your fist: one question is whether the Sentinel was attacked or not.—If you want evidence of an attack upon him there is enough of it, here is a witness an inhabitant of the town, surely no friend to the soldiers, for he was engaged against them at the Rope-walks; he says he saw twenty or thirty round the Sentry, pelting with cakes of ice, as big as one's fist; certainly cakes of ice of this size may kill a man, if they happen to hit some part of the head. So that, here was an attack on the Sentinel, the consequence of which he had reason to dread, and it was prudent in him to call for the *Main-Guard:* he retreated as far as he could, he attempted to get into the *Custom-house,* but could not; then he called to the *Guard,* and he had a good right to call for their assistance; "he did not know, he told the witness, what was the matter," "but he was afraid there would be mischief by and bye;" and well he might, with so many shavers and genius's round him—capable of throwing such dangerous things. *Bailey* swears, *Montgomery* fired the first gun, and that he stood at the right, "the next man to me, I stood behind him, &c." This witness certainly is not prejudiced in favour of the soldiers, he swears, he saw a man come up to *Montgomery* with a club, and knock him down before he fired, and that he not only fell himself, but his gun flew out of his hand, and as soon as he rose he took it up and fired. If he was knocked down on his station, had he not reason to think his life in danger, or did it not raise his passions and put him off his guard; so that it cannot be more than manslaughter.

When the multitude was shouting and huzzaing, and threatning life, the bells all ringing, the mob whistle screaming and rending like an Indian yell, the people from all quarters throwing every species of rubbish they could pick up in the street, and some who were quite on the other side of the street throwing clubs at the whole party, *Montgomery* in particular, smote with a club and knocked down, and as soon as he could rise and take up his firelock, another club from a far struck his breast or shoulder, what could he do? Do you expect he should behave like a Stoick Philosopher lost in Apathy? Patient as *Epictatus* while his master was breaking his leggs with a cudgel? [50] It is impossible you should find him guilty of murder. You must suppose him divested of all human passions, if you don't think him at the least provoked, thrown off his guard, and into the *furor brevis,* by such treatment as this.

Bailey "Saw the Molatto seven or eight minutes before the firing, at the head of twenty or thirty sailors in *Corn-hill,* and he had a large cordwood stick." So that this *Attucks,* by this testimony of *Bailey* compared with that of *Andrew,* and some others, appears to have undertaken to be the hero of the night; and to lead this army with banners, to form them in the first place in *Dock square,* and march them up to *King-street,* with their clubs; they passed through the main-street up to the *Main-guard,* in order to make the attack. If this was not an unlawful assembly, there never was one in the world. *Attucks* with his myrmidons comes round *Jockson's* [*Jackson's*] corner, and down to the party by the Sentry-box; when the soldiers pushed the people off, this man with his party cried, do not be afraid of them, they dare not fire, kill them! kill them! knock them over! And he tried to knock their brains out. It is plain the soldiers did not leave their station, but cried to the people, stand off: now to have this reinforcement coming down under the command of a stout Molatto fellow, whose very looks, was enough to terrify any person, what had not the soldiers then to fear? He had hardiness enough to fall in upon them, and with one hand took hold of a bayonet, and with the other knocked the man down: This was the behaviour of *Attucks;*— to whose mad behaviour, in all probability, the dreadful carnage of that night, is chiefly to be ascribed. And it is in this manner, this

town has been often treated; a *Carr* from *Ireland,* and an *Attucks* from *Framingham,* happening to be here, shall sally out upon their thoughtless enterprizes, at the head of such a rabble of Negroes, &c. as they can collect together, and then there are not wanting, persons to ascribe all their doings to the good people of the town.

Mr. *Adams* proceeded to a minute consideration of every witness produced on the crown side; and endeavoured to shew, from the evidence on that side, which could not be contested by the council for the crown, that the assault upon the party, was sufficiently dangerous to justify the prisoners; at least, that it was sufficiently provoking, to reduce to manslaughter the crime, even of the two who were supposed to be proved to have killed. But it would swell this publication too much, to insert his observations at large, and there is the less necessity for it, as they will probably occur to every man who reads the evidence with attention. He then proceeded to consider the testimonies of the witnesses for the prisoners, which must also be omitted: And conc[l]uded,

I will enlarge no more on the evidence, but submit it to you.—Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence: nor is the law less stable than the fact; if an assault was made to endanger their lives, the law is clear, they had a right to kill in their own defence; if it was not so severe as to endanger their lives, yet if they were assaulted at all, struck and abused by blows of any sort, by snow-balls, oyster-shells, cinders, clubs, or sticks of any kind; this was a provocation, for which the law reduces the offence of killing, down to manslaughter, in consideration of those passions in our nature, which cannot be eradicated. To your candour and justice I submit the prisoners and their cause.

The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. To use the words of a great and worthy man, a patriot, and an hero, and enlightned friend of mankind, and a martyr to liberty; I mean Algernon Sidney, who from his earliest infancy sought a tranquil retirement under the shadow of the tree of liberty, with his tongue, his pen, and his sword, "The law, (says he,) no passion can disturb. Tis void of desire and fear, lust and anger. 'Tis *menc sine affectu;* written reason; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but without any regard to persons, commands that which is good, and punishes evil in all, whether rich, or poor, high or low,—Tis deaf, inexorable, inflexible."[51] On the one hand it is inexorable to the cries and lamentations of the prisoners; on the other it is deaf, deaf as an adder to the clamours of the populace.

---

1. *Wemms Trial* 148–178.

2. "[I]f, by supporting the rights of mankind and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or of ignorance, equally fatal; his blessing and tears of transport, will be a sufficient consolation to me for the contempt of all mankind." Beccaria, *An Essay on Crimes and Punishments* 42–43. See note 11 above; 1 JA, *Diary and Autobiography* 352–353

3. All the following authorities had been cited in Preston's trial.

4. Roughly, "It is preferable that the guilty be acquitted than that the innocent be condemned."

5. The exact citation has not been established. 3 Blackstone, *Commentaries* * 4, refers to "self-defence . . . the primary law of nature." See Rex v. Preston, note 24.

6. 4 Blackstone, *Commentaries* *186, discusses this example, attributing it to Bacon (Francis Bacon, *Elements of The Common Laws of England,* c. 5) and referring to 1 Hawkins, *Pleas of the Crown* 73, which also discusses the example and attributes it to "Dal. Cap 98," which may be Michael Dalton, *The Country Justice*. In the edition JA used (London 1746) the point appears in chapter 150, at p. 339.

7. See notes 30 and 31 above.

8. *Wemms Trial* erroneously reads "persons."

9. See note 30 above.

10. 1 Hawkins, *Pleas of the Crown* 72. (The section reference should be 23.)

11. 1 Hawkins, *Pleas of the Crown* 72.

12. 1 Hawkins, *Pleas of the Crown* 71, with immaterial grammatical shifts.

13. 1 Hawkins, *Pleas of the Crown* 75.

14. 1 Hawkins, *Pleas of the Crown* 75.

15. See note 31 above.

16. 1 Hale, *Pleas of the Crown* 437.

17. 1 Hale, *Pleas of the Crown* 440.

18. 1 Hale, *Pleas of the Crown* 444.

19. 1 Hale, *Pleas of the Crown* 445.

20. 1 Hale, *Pleas of the Crown* 439.

21. The references are presumably to Crompton, *L'Authoritie et Jurisdiction des Court de la Maieste de la Royaume* 25a (1594), and to Dalton, *The Country Justice*. See note 6 above. In the edition of Dalton which JA used (London, 1746), the point appears in chapter 145, at p. 331.

22. 1 Hale, *Pleas of the Crown* 440. Despite the quotation marks, JA is here only summarizing.

23. Foster, *Crown Cases* 353–354. Foster says "explicitly entered."

24. Foster, *Crown Cases* 354.

25. 1 Hawkins, *Pleas of the Crown* 156: "[W]here-ever more than three Persons use Force and Violence, in the Execution of any Design whatever wherein the Law does not allow the Use of such Force, all who are concerned therein are Rioters."

26. 1 Hawkins, Pleas *of the Crown* 156.

27. 1 Hawkins, *Pleas of the Crown* 156. The passage continues:

> "because the Design of their Meeting was innocent and lawful, and the subsequent Breach of the Peace, happened unexpectedly without any previous Intention concerning it; yet it is said, That if Persons, innocently assembled together, do afterwards upon a Dispute happening to arise among them, form themselves into Parties, with Promises of mutual Assistance, and then make an Affray, They are guilty of a Riot, because upon their confederating together with an Intention to break the Peace, they may as properly be said to be assembled together for that Purpose from the Time of such Confederacy, as if their first coming together had been on such a Design."

28. 1 Hawkins, *Pleas of the Crown* 157.

29. The reference is apparently to Samuel Butler's *Hudibras,* Part II, Canto II, lines 605–658. The editors have used the London edition of 1739.

30. Reg. v. Mawgridge, Kelyng 119, 136, 137, 84 Eng. Rep. 1107, 1114, 1115 (Q.B. 1707).

31. Reg. v. Tooley et al., 2 Ld. Raym. 1296, 1301, 1302, 92 Eng. Rep. 349, 352, 353 (Q.B. 1709).

32. Foster, *Crown Cases* 312:

> "The Doctrine advanced in the Case of The Queen against *Tooly* and Others hath, I conceive, carried the Law in favour of Private Persons *Officiously* interposing farther than sound Reason founded in the Principles of true Policy will warrant. I say *Officiously* Interposing, because the Interposition of Private Persons in the Cases I have mentioned, for preserving the Peace and preventing Bloodshed, standeth upon quite a different Foot."

Foster continues the discussion at p. 313–316.

33. The individual has not been identified.

34. Foster, *Crown Cases* 261.

35. The reference is to Josiah Quincy's argument, text following note 53 above, *Wemms Trial* 145–146. Quotation marks, brackets, punctuation, and italics follow the original; see *Wemms Trial* 163.

36. Foster, *Crown Cases* 261–262.

37. 1 Hawkins, *Pleas of the Crown* 84.

38. 1 Hale, *Pleas of the Crown* 442.

39. 1 Hale, *Pleas of the Crown* 484.

40. See note 47 above. "Killing the Woman who was hired to wash. This was innocent Blood." Paine Massacre Notes. No such instance appears at the cited page.

41. The paragraphs printed following the asterisk below appear as a footnote in the *Wemms Trial* 164–165. They were clearly based on JA's research in Rex v. Corbet, No. 56; citations for all the authorities may be found in the documentary text of that case.

* The distinction between Murder and Manslaughter, is more easily confounded than many other distinctions of Law relative to Homicide. And many persons among us seem to think that the punishment of Death ought to be inflicted upon all voluntary killing one private man by another, whether done suddenly or deliberately, cooly or in anger. These received notions may have originated partly from a false construction of the general precept to *Noah,* whoso sheddeth man's blood, by man shall his blood be shed. But may not some of these mistaken notions have been derived from law books. We find the distinction between Murder and Manslaughter, sometimes attributed to the peculiar benignity of the English law, and it is sometimes represented that the particular fact which the law of England calls Manslaughter, and indulges with Clergy, is punished with death in all other laws.

Vide Observations on the Statutes page 54. By the law of Scotland, there is no such thing as Manslaughter, nor by the civil law; and therefore a criminal indicted for Murder under the Statute of Henry the Eighth, where the Judges proceed by the rules of the civil law, must either be found guilty of the Murder or acquitted—and in another place, *Observations on the Statutes* 422. *Note* (*z.*) I have before observed that by the civil law, as well as the law of Scotland, there is no such offence, as what is, with us termed Manslaughter: Sir *Michael Foster* 288. If taking general verdicts of acquittal, in plain cases of death, *Per Infortunium, &c.* deserveth the name of a deviation, it is far short of what is constantly practiced at an Admiralty sessions, under 28. H. 8. with regard to offences not ousted of Clergy by particular statutes, which had they been committed at land would have been intituled to Clergy. In these cases the Jury is constantly directed to acquit the prisoner; because the marine law doth not allow of Clergy in any case, and therefore in an indictment for murder on the high seas, if the fact cometh out upon evidence to be no more than Manslaughter, supposing it to have been committed at land, the prisoner is constantly acquitted.

II. Lord Raymond 1496. His Lordship says, "From these cases it appears, that though the law of England, is so far peculiarly favourable (I use the word peculiarly because I know of no other law, that makes such a distinction between Murder and Manslaughter) as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate the greatest of private injuries, as the taking away a man's life is; yet in these cases, it must be such a passion, as for the time deprives him of his reasoning faculties.["]

I shall not enter into any enquiry, how far the Admiralty sessions in England, or a Special Court of Admiralty in America ought to proceed by the rules of civil law, though it is a question of immense importance to Americans. But must beg leave to observe that though the distinction between Murder and Manslaughter is not found in words in the civil law, yet the distinction between homicide, with deliberation and without deliberation, and on a sudden provocation is well known in that law, and the former is punished with death, the lat[t]>er, with some inferior corporal punishment at the discretion of the Judges.

Indeed the civil law is more favourable, and indulgent to sudden anger and resentment than the common law, and allows many things to be a provocation sufficient to exempt the person killing from the *Poena ordinaria,* which is death, which the common law considers as a slight provocation or none at all.

Cod. Lib. 9. Tit. 16, Note 46. Gail, page 503. Maranta, page 49. Par. 4. Dist. 1. 77.

It should seem from these authorities, that the lenity and indulgence of the laws of England, is not unnatural, extraordinary, or peculiar, and instead of being unknown in the civil law, that it is carried much further in many respects than in the common law. And indeed it seems that the like indulgence, was permitted in the Jewish law—though it has been so often represented as peculiar to the English law, that many persons seem to think it unwarrantable, and tending to leave the guilt of blood upon the land.

42. See note 45 above.

43. 1 Hawkins, *Pleas of the Crown* 133–134.

44. 1 Hawkins, *Pleas of the Crown* 82–83.

45. Foster, *Crown Cases* 296.

46. Foster, *Crown Cases* 316.

47. The reporter's mistake for Austin. A similar error (Bass for Bliss) appears in the preceding paragraph; see p. 219 above.

48. The *Boston Gazette,* 19 Feb. 1770, Suppl., had contained a full account of the Liberty Pole riots in New York during Jan. 1770.

49. "Anglicized spelling of the Irish name Tadhg. . . . A nickname for an Irishman." *OED*.

50. "Epaphroditus, it is said, once gratified his cruelty by twisting his slave's Epictetus' leg in some instrument of torture. 'If you go on, you will break it,' said Epictetus. The wretch did go on, and did break it. 'I told you that you would break it,' said Epictetus quietly, not giving vent to his anguish by a single word or a single groan." F. W. Farrar, *Seekers After God* 192 (London, 1891).

51. See Rex v. Preston, text at note 6.

SOURCE PROJECT Adams Papers
TITLE Adams' Argument for the Defense: 3–4 December 1770
AUTHOR Adams, John
DATE 3–4 December 1770
R. Criminal Law, continued: The Boston Massacre Trials Rex v. Wemms: Suffolk Superior Court, Boston
CITE AS "Adams' Argument for the Defense: 3–4 December 1770," *Founders Online,* National Archives, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016. [Original source: *The Adams Papers*, Legal Papers of John Adams, vol. 3, *Cases 63 and 64: The Boston Massacre Trials*, ed. L. Kinvin Wroth and Hiller B. Zobel. Cambridge, MA: Harvard University Press, 1965, pp. 242–270.]