

MASSACHUSETTS JURY DUTY - YOU MAKE A DIFFERENCE

With Professor Alan Rogers
By the Massachusetts Judicial Branch

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Dominguez

1 CAPTION: Jury Duty, Michael Ryan, Host

2 MICHAEL RYAN, BNN LIVE HOST: Hello. My name is Mike Ryan.
3 The name of the show is Jury Duty: You Make a Difference on
4 BNN, the show that should answer all your questions regarding
5 the one day, one trial jury system.

6 HOST RYAN: Our guest today is Professor Alan Rogers from
7 Boston College. Welcome Professor.

8 MR. ROGERS: Thank you very much.

9 HOST RYAN: Thank you for --

10 MR. ROGERS: Pleasure to be here.

11 HOST RYAN: Thank you for coming here.

12 Professor Rogers is a graduate of the University of
13 California at Santa Barbara and also later earned his
14 Doctorate at the same university. He has been at Boston
15 College for 40 years, and he is a prolific lecturer and writer
16 on legal history and especially the United States
17 constitution.

18 And today we'd like to talk about jury trials, but also he
19 wrote an article about the fight for women to sit on juries in
20 Massachusetts.

21 So we'd like to start off today with the Boston massacre
22 trials. I mean we've all in, somewhere in school, we've
23 learned about the Boston massacre, but what were the, what
24 were the facts behind it?

25 MR. ROGERS: Well, the facts as you know, first, the context

1 before the facts came into the Court, the context was it was
2 obviously a tumultuous time, the run up to the revolution. It
3 wasn't so described, but in, by hindsight, we know yes in fact
4 that was what was going on.

5 There was violence in the streets. A particular person who
6 was a, a loyalist, Richardson, there was some shooting. There
7 was a mob scene every once in a while, soldiers and would be
8 workers who were uncomfortable with the fact that soldiers
9 were taking the jobs of unemployed Bostonians and so, that and
10 politics. So it was quite a tumultuous scene.

11 The massacre occurred of course May 5th, March 5th --

12 HOST RYAN: March 5th.

13 MR. ROGERS: -- yeah, 1770.

14 A mob gathers, taunts the soldiers. Soldiers who had been
15 reinforced a few minutes earlier standing in front of the
16 Counting House.

17 And while witnesses differ as to exactly what happened,
18 shots were fired. Americans fell to the ground, including
19 Crispus Attucks most notably, and trial ensued.

20 HOST RYAN: So, and so there were two, two jury trials,
21 correct?

22 MR. ROGERS: Yes. Yes.

23 HOST RYAN: The first one was against the British Captain?

24 MR. ROGERS: Captain Preston, right.

25 HOST RYAN: Preston, and I guess the legal term was Rex vs.

1 Preston but --

2 MR. ROGERS: Yes.

3 HOST RYAN: -- Rex means --

4 MR. ROGERS: King.

5 HOST RYAN: -- the King.

6 MR. ROGERS: Yes.

7 HOST RYAN: And who was the lead counsel for, for Captain
8 Preston?

9 MR. ROGERS: Yes, John Adams.

10 HOST RYAN: And John Adams. Now, was that a popular thing
11 to do at that time?

12 MR. ROGERS: Well, there is some controversy about that. In
13 Adams's memory, and 30 years old at the time that he delivered
14 this, I mean the memory was 30 years old, so one wants to look
15 at it carefully, he spoke of rising to the cause, and he
16 thought that since no one else was willing, and he didn't want
17 the trial to go to the radicals though he himself was a
18 radical certainly, he didn't, he thought others were more fire
19 brand than he.

20 HOST RYAN: Like his cousin?

21 MR. ROGERS: Yes, like his cousin, Sam.

22 So he felt pressured in other words to, and I think this is
23 an honest evaluation. He felt pressured to stand up for the
24 rule of law.

25 Certainly, he wasn't on the side of the British. Certainly

1 I mean he would have rolled over in his grave now and many
2 times over if that accusation had been made.

3 But he thought it was time to stand up for the law, to show
4 that the Americans were not a rabble, that they indeed had
5 just grievances and they were going to press those grievances
6 through the law, and eventually by armed force.

7 But therefore he stood up one way or another, however,
8 whatever his recollection.

9 HOST RYAN: So the Preston trial lasted six days. It was
10 the longest murder trial at that time in Massachusetts?

11 MR. ROGERS: Yes. Murder trials ordinarily took a day.
12 Sometimes they would spill over to the second day, but they
13 were done quickly.

14 Hiller Zobel, who wrote the book, of course, on the Boston
15 Massacre always lamented the fact that it took so darn long
16 now, 20th Century, to run a murder trial or any sort of trial,
17 and in the good old days, it was done by the numbers and done
18 quickly, and he thought the verdicts were just as good, just
19 as just in the 18th Century as they were in the 20th.

20 I'm not so sure about that, but.

21 HOST RYAN: Was this the first time jury was sequestered?

22 MR. ROGERS: Yes, the first time juries were sequestered.
23 Yes. And, and not, it was not at all a common, either then at
24 the time, it certainly was uncommon, but even subsequently,
25 not, not a common thing to do, much more routine now to do

1 that.

2 But yes, it was a novelty at the time.

3 HOST RYAN: In your book *Murder and Death*, and the Death
4 Penalty in Massachusetts, you mention that one of the junior
5 Judges mentioned that jurors should be convinced beyond a
6 reasonable doubt and that --

7 MR. ROGERS: Yes.

8 HOST RYAN: -- may have been the first time that was
9 uttered.

10 MR. ROGERS: That phrase was used, that's correct. And that
11 certainly is a landmark, I mean certainly is a mark not only
12 in legal history but in the shift in culture.

13 Certainly God and country, one took, one plead God and
14 country meaning to a jury trial, so God wasn't completely
15 absent from the, from the lexicon of jurors and lawyers.

16 But to say that jurors had to be convinced beyond a
17 reasonable doubt indicated that the good old days of
18 Puritanism and deferring to religion as a sort of marker of
19 what was good and true had passed. And the idea was now we're
20 in an age of reason, and so that is the way in which jurors
21 should measure guilt or innocence.

22 HOST RYAN: So Captain Preston was acquitted by a jury?

23 MR. ROGERS: Yes.

24 HOST RYAN: And a month later, the eight soldiers --

25 MR. ROGERS: Yes.

1 HOST RYAN: -- were --

2 MR. ROGERS: Yes.

3 HOST RYAN: -- tried.

4 MR. ROGERS: Again.

5 HOST RYAN: Again.

6 MR. ROGERS: John Adams as their counsel.

7 HOST RYAN: John --

8 MR. ROGERS: Yes.

9 HOST RYAN: -- Adams. And not one of those jurors came from
10 Boston.

11 MR. ROGERS: No, right.

12 HOST RYAN: Which is kind of --

13 MR. ROGERS: Well --

14 HOST RYAN: -- interesting.

15 MR. ROGERS: Yes. Of course there were a number of jurors
16 who were paraded in front, jurors of course were selected
17 differently then. They were selected by town meeting. And
18 town meeting was eager of course to place more radicals on the
19 jury than was Adams or pretty much anyone else.

20 So yes, they were struck. And as, in Preston's trial, of
21 course, that meant they had to go out into the, because they
22 had gone through the, Adams had gone through and the defense,
23 Pain, had gone, Robert Pain, had gone through a number of
24 jurors, and therefore, they went out into the street to round
25 up five more needed to, to make the twelve good men in true.

1 So not surprising that there weren't Bostonians.
2 Surprising that the five that were rounded up in Preston's
3 trial were known loyalists, or at least leaned in that
4 direction, so that it wasn't quite the impartial jury I
5 suppose that the defense would have liked.

6 It made perhaps Adams's job a bit easier.

7 HOST RYAN: So of the,- six of the eight jurors were found
8 not guilty --

9 MR. ROGERS: Yes.

10 HOST RYAN: -- of murder --

11 MR. ROGERS: Yes.

12 HOST RYAN: -- and two were convicted of manslaughter.

13 MR. ROGERS: Manslaughter, right.

14 HOST RYAN: So in lieu of being imprisoned or tortured, they
15 claimed --

16 MR. ROGERS: Right of clergy, yes.

17 HOST RYAN: And what, what, what was that?

18 MR. ROGERS: Clergy, right of clergy, it comes, it's a, from
19 England. And the practice was that if you could recite a
20 particular verse from the Bible, then you, it was called the
21 hanging verse colloquially, then you could plea right of
22 clergy and therefore not be put to death, but in fact
23 punished, the soldiers, with the branding on the thumb.

24 HOST RYAN: So six of the eight were found not guilty, two
25 were convicted of manslaughter --

1 MR. ROGERS: Yes.

2 HOST RYAN: -- branded, but then they were freed?

3 MR. ROGERS: Yes.

4 HOST RYAN: So is this, do you think in the long life of
5 John Adams, who I believe was 94 when he passed, was this his
6 finest hour?

7 MR. ROGERS: Well --

8 HOST RYAN: He looked fondly --

9 MR. ROGERS: Yes, his finest legal hour. Yes.

10 HOST RYAN: Yeah.

11 MR. ROGERS: No question. I mean he did a masterful job.
12 He was after all quite a good lawyer. This wasn't his first
13 time out. He had tried criminal cases before.

14 He writes in his diary of a case that he tried of a man
15 indicted and on trial for rape, which was a capital crime at
16 the time, and Adams was so pleased with the result. That is
17 to say he was able to convince the jury that this man in fact
18 should go free.

19 And he then followed them after the trial, he followed the
20 man to his cell, and the man with tears in his eyes embraced
21 Adams and, and Adams just felt like his whole life had been
22 vindicated and so on.

23 So he was a skilled lawyer. He was a trained lawyer. He
24 had been, he had seen it all I think by the time, by 1770.

25 And I think he was happy that he had, he had stood up for

1 the law, and that the revolution was on its way. He was
2 certainly committed to that goal, so, both goals, the law and
3 the revolution.

4 HOST RYAN: Let's go a little farther ahead into the 20th
5 Century, and would you say that the Sacco and Vanzetti trial
6 was probably the most controversial trial of recent times?

7 MR. ROGERS: Well, we've had a lot of controversial times,
8 trials since.

9 Certainly two, certainly it was one of those, and certainly
10 in the sense that it captured international attention,
11 attention across the United States, and across, and literally
12 around the world, and that it was so, so deeply politicized.
13 I think that's what gave it its, its panache, its, the fact
14 that everyone still recognizes it as a landmark trial, yes.

15 HOST RYAN: And they, Sacco And Vanzetti recused of robbery
16 and shooting two people to death.

17 MR. ROGERS: Right.

18 HOST RYAN: And they were tried in 1920 --

19 MR. ROGERS: Yes.

20 HOST RYAN: -- but they were not executed until 1927.

21 MR. ROGERS: '27, yes.

22 HOST RYAN: Which seems like a very long time even by
23 today's standards.

24 MR. ROGERS: Well, yes. There were a number of appeal, of
25 appeals, yes, as most people are familiar. And the appeals,

1 as then as now, moved slowly. And there was, and they were
2 controversial.

3 So it took a while.

4 HOST RYAN: And with, what was interesting was that in your
5 book that Vanzetti had already been convicted of attempted
6 armed robbery a few months prior --

7 MR. ROGERS: Yes.

8 HOST RYAN: -- to the Braintree --

9 MR. ROGERS: Yes.

10 HOST RYAN: -- bank robbery.

11 MR. ROGERS: Yes.

12 HOST RYAN: And it was the same Judge --

13 MR. ROGERS: Yes.

14 HOST RYAN: -- who --

15 MR. ROGERS: Webster Thayer.

16 HOST RYAN: -- who sentenced --

17 MR. ROGERS: Yes.

18 HOST RYAN: -- him, who was --

19 MR. ROGERS: Right

20 HOST RYAN: -- part of the Sacco trial --

21 MR. ROGERS: Yes.

22 HOST RYAN: -- as well.

23 MR. ROGERS: Yes, yes. An unusual phenomenon.

24 The record doesn't show that he necessarily asked for such
25 an, for the follow up --

1 HOST RYAN: He just happened to be assigned.

2 MR. ROGERS: -- assignment. But it certainly seems likely
3 that he did, and that otherwise, he would have been in a
4 rotation that would have taken him out of that.

5 But it seems like he wanted it.

6 HOST RYAN: What was interesting in your book too that you
7 said during jury deliberations, during, after, you know, after
8 the trial was over, that the foreman of the jury brought in
9 gun shells that supposedly --

10 MR. ROGERS: Yes.

11 HOST RYAN: -- were the same that Vanzetti had in his gun?

12 MR. ROGERS: Yes. Yes.

13 Well, one can imagine that, that would not be, not be
14 permitted today or any time in the modern era, but yes, he
15 did. And of course, that was the cause for some to say that
16 the trial was badly done, that it was, that jurors were swept
17 up in the radicalism of the time and were eager and bound to
18 look, to convict when the evidence didn't demonstrate that at
19 all.

20 HOST RYAN: And similarly to the massacre trial, they had a
21 tough time getting indifferent jurors, correct?

22 MR. ROGERS: Yes, yes, yes. The first batch of jurors
23 brought in to Thayer was 500, and they, out of that number,
24 had seven only.

25 They brought in another several hundred and drew a blank,

1 and therefore again the sheriff was ordered --

2 HOST RYAN: The highways --

3 MR. ROGERS: -- (inaudible at 13:25, low audio.)

4 HOST RYAN: -- and the byways.

5 MR. ROGERS: -- to go out into the streets and round up five
6 more people which they did, and swore them in the, the same
7 morning they brought them in.

8 So yes, it was very much like the massacre trial, only I
9 think these jurors were not as committed to one cause or other
10 as perhaps the ones were rounded up for the massacre trial.

11 HOST RYAN: It was interesting. I didn't realize the trial
12 was in Dedham which is of course in Ded, in Norfolk County.
13 But at that time, it was paired with Plymouth County.

14 MR. ROGERS: Yes.

15 HOST RYAN: The District Attorney's Office was Norfolk and
16 Plymouth.

17 MR. ROGERS: Yes, right.

18 HOST RYAN: That, definitely different.

19 Now, there was a point post trial that there was the, from
20 the defense, that there was new evidence that did not, that
21 said that they did not commit the crime, and that was appealed
22 and --

23 MR. ROGERS: Yes. Didn't go much of anywhere.

24 I mean it was, it, the new evidence of course came from
25 someone who was already convicted, himself convicted of

1 murder, and so the idea was, well, he was looking for a way
2 out, and the, the appeal failed, yes. I mean I think justly
3 so.

4 HOST RYAN: Now, the, eventually, the governor at the time,
5 Governor Alvin T. Fuller, the founder of the miracle mile, I
6 believe --

7 MR. ROGERS: Yes.

8 HOST RYAN: -- had an advisory commission post-verdict. Has
9 that ever happened that, in your research?

10 MR. ROGERS: No. No, that was a, that was a unique part of
11 the trial as well or the aftermath of the trial, yeah.

12 I suppose it was looking for, you know, some justification,
13 some, some way to lift the shadow that was over the Mass Bar
14 at the time and the judicial system, to lift that shadow. It
15 didn't work.

16 It wasn't until quite some time later. In fact, it wasn't
17 until I would say until 1975 when Justice Tauro and his
18 compatriots hinted that they were going to abolish capital
19 punishment in Massachusetts.

20 And I believe it was Justice Wilkins who at the time
21 referred to the Sacco Vanzetti trial, and said this, our move
22 now will lift that cloud that's hanging over us, that has hung
23 over the Mass Judicial System.

24 HOST RYAN: You said in your book that whether Sacco and
25 Vanzetti were guilty or not is an elusive goal --

1 MR. ROGERS: Yes.

2 HOST RYAN: -- but you also said because of that trial, it
3 opened the doors to the abolition --

4 MR. ROGERS: Yes.

5 HOST RYAN: -- of the death penalty.

6 MR. ROGERS: Yes. Yeah. It opened the doors. I mean of
7 the five or several hundred jurors who were, who were
8 challenged for cause, almost to a man, they said no, they
9 couldn't be on a jury in which someone was going to be put to
10 death.

11 And I think that was the beginning. I mean not necessarily
12 the idea that some, I, I credit Sarah Airman for pushing --
13 for becoming the face and the energy of the anti-capitalist --
14 of the, to abolish capital punishment.

15 But it, I think it was, it was there, and someone had, and
16 Airman was one of the people who helped pull that together,
17 that, that energy against capital punishment, and eventually
18 succeed.

19 Yeah.

20 HOST RYAN: And you, you're in, you wrote an article a few
21 years ago about the fight for women to be in the jury box.
22 And I think a lot of people felt at the time, when women were
23 allowed to vote, which was the 19th Amendment, and it --

24 MR. ROGERS: Yes.

25 HOST RYAN: -- took place in 1920, that women could sit on a

1 jury.

2 MR. ROGERS: Yes.

3 HOST RYAN: But that's not what the amendment entailed,
4 correct?

5 MR. ROGERS: No. It wasn't what the amendment entailed.
6 Though a number of states interpreted it as such, and
7 certainly during the campaign for women's right to vote, it
8 was often mentioned in other states and certainly here in
9 Massachusetts that that right to vote included, though it
10 wasn't specifically included, but it was presumed to be
11 included the right to sit on juries. I mean that was how it
12 operated normally. That is to say when a person, an immigrant
13 came into Massachusetts and was here some time and when he
14 established residency and became a citizen and had the right
15 to vote, then it followed that he was subject, he was subject
16 to be called for jury service.

17 So it wasn't farfetched that women thought well, yes, that,
18 that's, that's the way it will work for us.

19 Of course, that was --

20 HOST RYAN: And --

21 MR. ROGERS: No.

22 HOST RYAN: And there were no women on a jury in Wyoming in
23 1870 --

24 MR. ROGERS: Yes, in 18, in the --

25 HOST RYAN: -- when it was a territory.

1 MR. ROGERS: -- 1880s, yes, right, and a number of western
2 states in particular granted women the right to sit on juries
3 early.

4 HOST RYAN: So it took 30 years from the pass, passage of
5 the 19th amendment --

6 MR. ROGERS: Yes.

7 HOST RYAN: -- for women to be called into the jury.

8 MR. ROGERS: Yes.

9 HOST RYAN: What was some of the reasons behind --

10 MR. ROGERS: Well, the same reasons that were used in
11 opposition to granting women the right to vote were behind the
12 idea that women shouldn't sit on juries.

13 It would destroy their femininity. It would tear up the
14 family. It, they were, they were too soft, too sentimental to
15 sit on juries. Sitting on, or oppositely sitting on a jury
16 would harden women. They wouldn't be the same sweet, lovely
17 people that we know them to be now, but they would be tough.
18 They would have, I think Frank Grenell used the phrase they
19 would have the iron in their soul, right, and nobody wanted
20 that. That was terrible.

21 Jury service was a man's job, and it was a dirty job but
22 someone had to do it, and the men were obviously the choice
23 since they had the power.

24 HOST RYAN: Wasn't one of the reasons they'd, they'd have to
25 build additional bathroom facilities in the courthouses?

1 MR. ROGERS: Yes, right. There was that. That was used as
2 an excuse, yes.

3 HOST RYAN: So --

4 MR. ROGERS: As though that were an insurmountable, yeah.

5 HOST RYAN: And there were several studies I guess through
6 the '20s and the '30s rejecting the fact that, that the, women
7 shouldn't go into the jury pool. Notably, League of Women
8 Voters fought for it.

9 MR. ROGERS: Yes.

10 HOST RYAN: Jennie Loitman Barron --

11 MR. ROGERS: Yes.

12 HOST RYAN: -- who later become a Superior Court Judge --

13 MR. ROGERS: Yes.

14 HOST RYAN: -- led the fight.

15 But finally, there was a legislator from --

16 MR. ROGERS: Yes.

17 HOST RYAN: -- Needham --

18 MR. ROGERS: Yes.

19 HOST RYAN: -- who led --

20 MR. ROGERS: Leslie --

21 HOST RYAN: -- the right.

22 MR. ROGERS: Leslie Cutler. Yes, right. She did lead the
23 fight from 1939 to 1959. She was in the, in the, first in the
24 House, and then in her last couple of years in the Senate.

25 Yes, she left the fight, led the fight, and it was her

1 energy again I think.

2 I mean it's often the case in the studies of the death
3 penalty that it's a woman who's up front and who has the
4 energy and the drive and the commitment to see the task
5 through to, to its fruition.

6 And that was Cutler.

7 Certainly others contributed. The league of women voters
8 as you mentioned held forums and invited others if juror,
9 women who had the right to vote and who were in the law came
10 in from California and Wyoming and Washington and so on and so
11 on.

12 But it was Cutler who fought the good fight day in and day
13 out in the legislature, thought she had won a number of times,
14 but that elusive goal --

15 HOST RYAN: Yes, close.

16 MR. ROGERS: -- slipped away. It was close.

17 And, but she hung in, and obviously succeeded finally in
18 19, 1949, '50.

19 HOST RYAN: Do you think, and I think you mentioned this in
20 your article, that the fact that so many women worked during
21 World War II to help the war effort, do you think that helped
22 them in the --

23 MR. ROGERS: Yes, yes. That was an argument, one of the
24 arguments, that was added. You know, well if women can go to
25 war and fly airplanes from here to Hawaii or whatever, you

1 know, wherever they were going to be sent and work in the
2 defense system at the time, if women can do all of that, you
3 know, sitting on a jury doesn't seem all that terrifying to
4 them or indicates that they had the quality to sit on juries,
5 and men should give up their chauvinism and get with the
6 program.

7 HOST RYAN: So Governor Paul Dever signed it into law in
8 1949.

9 MR. ROGERS: Yes.

10 HOST RYAN: They were eligible in '50, and I think the first
11 women sat on trials or called in --

12 MR. ROGERS: Yes.

13 HOST RYAN: -- 1951.

14 MR. ROGERS: Yes.

15 HOST RYAN: But you said there was one little bit that
16 wasn't cleared up till later, like the 1979, something about
17 certain cases that were, could be embarrassing?

18 MR. ROGERS: Yes. The way the law came as, as Cutler had,
19 well, it was amended when she pushed it through in '49. And
20 it was amended to read that if a trial contained embarrassing
21 information or lurid detail, then women could be automatically
22 exempted.

23 She didn't like that. She thought that was unnecessary.
24 But in order to get the main part of the bill through, she
25 settled for it and allowed that to happen. Yes.

1 And that wasn't taken out until 1975 finally.

2 HOST RYAN: Finally.

3 MR. ROGERS: And it was at, the way the law was changed was
4 any person who finds this particular trial or set of facts
5 lurid or embarrassing may, may request an exemption. It
6 wasn't, no longer automatic.

7 And the main point was that it referred to both men and
8 women, persons. So.

9 HOST RYAN: So it wasn't until 1975 we truly had a jury of
10 our peers?

11 MR. ROGERS: Yes. Yes. One would say, yes.

12 HOST RYAN: It took a lot.

13 MR. ROGERS: Though, as I also mentioned, it was 1978,
14 after, in those years between '75 and '78, it was discovered
15 that the Clerk of Courts was not exactly doing a great job of
16 choosing women.

17 In fact, he chose every two men for every woman to make up
18 the jury pool, when an end was put to that in th, by the
19 Supreme Court ruling in Taylor vs. Louisiana. So.

20 HOST RYAN: Well, we've run out of time.

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22 Make a Difference on BNN.

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24 jury service, you can always go online at MAJury.Gov or call
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3 important to all of us.

4 Thank you Professor Rogers.

5 MR. ROGERS: Thank you very much.

6 HOST RYAN: And thank you at home.

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