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A Case of Murder: Criminal Justice in Early Minnesota

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Until 1860, Ellen Dugan's life had been a conventional one for the middle of the nineteenth century in America. Born in Ireland, she had been taken as a baby to Scotland, where she lived until she was twenty. She then left Scotland for America, taking a position as a skullery maid in Manhattan. Two years later, perhaps lured by visions of a better life to the west, Ellen Dugan moved first to LaCrosse, Wisconsin and then on to St. Paul, Minnesota. There she met and five months later married Michael Dugan, a fellow Irish Catholic. She gave up her life as a maid, and the newly wedded couple moved to Anoka, twenty miles north of St. Paul on the Rum River. They bought a house, the front room of which they converted to a bar from which they earned their living serving drinks and Ellen Dugan's home-cooked meals. Within a year they had a baby girl and had settled down to what should have been a comfortable life. Then tragedy struck—on January 11, 1860, Michael Dugan was brutally murdered by two lumberjacks from St. Paul who were passing through Anoka on their way to a hunting expedition.

Eight months later, on August 28, 1860, Ellen Dugan took the stand as a witness for the prosecution of the two lumbermen accused of her husband's murder. Her version of what happened that day was recounted in all of its gory detail in a storefront that was, at the time, Anoka's courthouse. The testimony went on all day and well into the evening, requiring the court to pay the jurors for staying overnight. Her story went something like this:[1]

January 11, 1860, was a bitterly cold day. Charlie Dumphey and Sam Tripp, two lumbermen from St. Paul, strode into Michael Dugan's home-cum-tavern shortly after noon. Hardly had Michael handed them a bottle of whisky than the pair downed five glasses apiece. Warmed by the fire and perhaps

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1. Clerk of District Court, Anoka County, Court Minutes (unnumbered volume) (1860).

bored by the lack of action, they began, to use their words, "horsing around." With several drinks under their belts, the horsing around turned quickly into a confrontation with the Dugans. Ellen asked them to go outside if they were going to tussle because they were frightening her baby. Their response was fast, blunt, and insolent: "God Damn your stinking soul, you feel very interested about your baby. . . ." And they did not budge.

Michael then joined Ellen, pleading in an apparent effort to calm them down, "Come on, let the baby sleep." Instead of complying, Sam and Charlie only demanded more liquor and became even more violent, smashing their glasses, kicking in the bar, and finally walloping Michael on the head with the butt of a gun. The sordid mess finally ended when Dumphey sank an axe into Dugan's face. His skull split open, he groaned, "I am gone," and died.

At this point in the trial Ellen lost her composure and could testify no more. Nevertheless, for two more days testimony relentlessly went on. Before the trial ended, nine witnesses for the prosecution and 14 for the defense had rendered their versions of what had transpired on that cold winter day in the Dugan's tavern.

The jury's verdict could not have come as a surprise. Charlie Dumphey was found guilty of murder in the first degree and Sam Tripp of manslaughter. Tripp was immediately sentenced to seven years hard labor at Stillwater Prison, but Dumphey's sentencing did not take place until February 4, 1861. When it did, all the delay had accomplished was postponement of the ultimate agony.[2] Dumphey was sentenced to two months solitary confinement in Stillwater Prison and then to hang by the neck until dead.

According to popular notions of punishment, Dumphey and Tripp may well have got their just deserts for perpetrating such a heinous crime, but their punishment did nothing to solve Ellen Dugan's problems. Within months after the trial, she and her tiny daughter were in the Anoka County poorhouse.[3]

The human tragedy and the dramatic potential inherent in the saga of Ellen Dugan and her husband's murder are painfully

2. State v. Dumphey, 4 Minn. 340 (1860).

3. U.S. CENSUS OFFICE, EIGHTH CENSUS, 1860, MINNESOTA POPULATION SCHEDULES [housed in Minnesota Historical Society Division of Manuscripts and Archives].

obvious. But there is more here than material for an episode in a TV series about the American frontier. The case of Michael Dugan's murder creates an opportunity to join a lawyer's eye for technical niceties with the historian's sensitivity to the perspective of the past in order to point the way to answering some questions about the administration of justice in Minnesota's early days.

For a long time, perhaps too long, scholars, novelists and dramatists alike have portrayed the American frontier as riddled with violence. Everyone knows the lengths to which its lawless side has been fictionalized, cinematized, dramatized, and televised in the past three quarters of a century. And the image created is not limited to this side of the Atlantic. In Britain, the television screens and cinema houses are regularly deluged with scenes of American frontier lynch law, individual acts of lawlessness, and mob violence. Unfortunately, few scholars have scrutinized this image with an eye toward testing it against reality. On the contrary, most of them have accepted it and fairly relish savoring the details of it as fundamental aspects of nineteenth century American life. Professor Philip Jordan, an expert on frontier law and order, promises in his latest collection of essays that:

> Unlike the traditional treatment of this subject matter, which is largely devoted to infamous brawls, feuds, and the exploits of famous peace officers, the emphasis here is upon the nature of law—statutes and ordinances—which the bad man and evil woman transgressed.[4]

And he amply fulfills his promise. The whole 174 pages of text is strewn with juicy stories about the depravity of the American frontier and how people took the law into their own hands in order to forcibly redress the community's loathing of individual acts of evil.

Richard Maxwell Brown, the leading expert on vigilante movements in the United States boldly asserts that:

> Vigilantism arose as a response to a typical American problem: The absence of effective law and order in a frontier region . . . . A vigilante roundup of ne'er-do-wells and outlaws followed by the flogging, expulsion, or killing of them not only solved the problem of disorder but had crucial symbolic value as well.[5]

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4. P. JORDAN, FRONTIER LAW AND ORDER ix (1970).

5. Brown, *The American Vigilante Tradition*, in THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 154, 156 (H. Graham & T. Gurr ed. 1969).

Joe B. Frantz, who has given us what might be labeled the definitive work on the American cowboy, calls the frontier tradition "an invitation to violence."[6] In a beautifully written argument he confidently concludes that "every frontier state went through its period of lawlessness and its corresponding period of mobocracy . . . ."[7]

At first, Michael Dugan's murder may appear to support the image of a violent Minnesota past. But if we go beyond the crime itself to the *procedure* that led Samuel Tripp to prison and Charlie Dumphey to his death at the end of a noose, we encounter a curious paradox. A brutal murder is juxtaposed with a punishment which was arrived at and executed in a very controlled manner, not by lynch mobs and vigilantes but rather by the age old procedures of arrest, indictment, trial, conviction, and sentence. These procedures are old and tough, some of them tough enough to have survived from at least late medieval England[8] and to have endured both transfer to colonial America[9] and the scientific, reforming trend of the twentieth century.[10] The dangers of Anoka citizens taking the law into their own hands was, because of these traditional legal procedures, minimal.

The question turns, then, not on the violence of the crime, but on the way in which procedure was used to enforce the criminal law. More specifically, who administered the criminal justice system in Anoka in 1860, how was it administered, and what were the end results of that administration? Only with this information can an assessment of the system be made.

The case of *State v. Dumphey* was argued before and decided by the Minnesota Supreme Court in the 1860 term.[11] In its opinion, the court drew liberally from legal precedents (primarily English) and learned treatises (mainly Wharton's CRIM-

6. Frantz, *The Frontier Tradition: An Invitation to Violence*, in THE HISTORY OF VIOLENCE IN AMERICA, *supra* note 5, at 127.

7. *Id.* at 145.

8. *See* J. SAMAHA, LAW AND ORDER IN HISTORICAL PERSPECTIVE xii-xiv (1974).

9. *See* J. GOEBEL & R. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK (1970).

10. *See* Y. KAMISAR, W. LEFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 4-14 (4th ed. 1974).

11. State v. Dumphey, 4 Minn. 340 (1860). Dumphey's conviction was appealed on a number of grounds, including an insufficient indictment, juror bias, and an evidentiary error in failing to admit testimony as to Michael Dugan's quarrelsome character.

INAL LAW). Citations were sparse in contrast to the array usually found in modern judicial opinions, yet the opinion was erudite and logical enough to sustain a sound decision. Interweaving common sense and legal authority—as do the best judges in all ages—Associate Supreme Court Justice Charles E. Flandreau dismissed the defendant's arguments with admirable clarity, Holmesian brevity, and some unusually graceful legal writing.

Flandreau was no stereotypic frontier legal windbag. His background and training had prepared him to be a fluent and educated judge. His father had been Aaron Burr's New York law partner.[12] Flandreau himself learned law by joining his father's prestigious firm in 1849 and was admitted to the New York bar in 1851.[13] Then, like so many others of his day, he moved west, arriving in St. Paul in November of 1851.[14] Due to the sparse population, the law practice he established there was not immediately successful, but he quickly took up other service which paid him fairly well. He became in turn Notary Public, Deputy Clerk, and finally District Attorney for Nicollet County. He was appointed agent to the Sioux Indians by President Buchanan in 1856 and was elected a member of the Minnesota Constitutional Convention in 1857. Governor Sibley appointed him Judge Advocate General for the state in 1858. His career on the bench began when President Buchanan named him Associate Justice of the Territorial Supreme Court.[15] Shortly after Minnesota became a state, Flandreau became a state supreme court justice in the wake of a Democratic election landslide in 1858.[16] After serving a full term on the court he migrated still further westward, this time to Nevada, where he quickly built up a lucrative law practice.[17]

In view of Flandreau's background and education, the sophisticated opinion he wrote in the case of *State v. Dumphey* is no mystery. But how typical was it on the frontier to have men from professional Eastern families trained formally in the law and experienced in its practice? Over two-thirds of the fifteen judges who served on the Minnesota supreme court between 1858 and 1890 had fathers who were merchants, bankers, wealthy

12. Atwater, *Territorial Bench of Minnesota*, 7 MAGAZINE OF WESTERN HISTORY 650, 656 (1888).
13. *Id.* at 657.
14. *Id.*
15. *Id.* at 659.
16. *Id.*
17. *Id.* at 664.

farmers, lawyers, clergymen, doctors, or teachers.[18] Thirteen had English ancestors.[19] The Anglo-American heritage of those judges did not rest on accidents of birth alone. Education was a further means by which they were imbued with the universalistic values of the Anglo-American legal system. Eleven did their undergraduate work at Yale, Harvard, and Dartmouth, four were Harvard law graduates, and three had law degrees from Yale.[20]

The Minnesota supreme court in the beginning, therefore, was dominated by Easterners with upper class social backgrounds and Ivy League educations. Such a bench could not help but reflect the influences of the Anglo-American system of criminal justice. But there is more. It is one thing to show that the justices of the Minnesota supreme court mirrored East Coast and British values. But it would be wrong to read from this the general conclusion that the whole criminal justice system in early Minnesota, from the center in St. Paul to the local communities throughout the state, was imported from England and the East Coast. A bit of common sense warns of the yawning gap between what a supreme court says and what local people do. The final disposition of *State v. Dumphey* was surely influenced by the Minnesota supreme court and the social makeup of its members, but we still must examine the local personnel and proceedings to determine what the reality of criminal justice administration was.

What, then, did the criminal justice system look like in Anoka County? To begin with, the judge in the trial court, Charles E. Vanderburgh, was a man on the threshold of a brilliant legal career.[21] His life was in many ways a carbon copy of the lives of the supreme court judges. Like Flandeau, he was an Easterner; he graduated from Yale in 1853, studied law in New York City, and was admitted to the New York bar in 1855.[22] He emigrated immediately to Minneapolis, where he entered a partnership with a future justice of the Minnesota supreme court, F.R.E. Cornwell.[23] When Minnesota became a state in 1858 he

18. Heiberg, *Social Backgrounds of the Minnesota Supreme Court Justices: 1858-1968*, 53 MINN. L. REV. 901, 910 (1969).
19. *Id.* at 915.
20. *Id.* at 922-23.
21. *See* 6 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 130-31 (1929).
22. *Id.*
23. *Id.* at 131.

was elected to the district court bench, where he served a distinguished twenty-two year term during a seminal period in the state's legal development. No precedents had as yet been formally laid down and from 1860 onwards Judge Vanderburgh literally wrote the Anglo-American legal system into much of the law of Minnesota. In all areas, from property to contracts, from torts to crime, his opinions at the trial level nearly always were upheld. They were, moreover, not only upheld by the Minnesota supreme court, but they were also frequently cited in state and federal courts throughout the country and in legal treatises.[24]

He first obtained national prominence in 1860, the year that he presided in the trial of Dumphey and Tripp. On a writ of habeas corpus he decided that a slave brought into the free state of Minnesota by her master was free in law and advised the young woman she could choose whether to return to Mississippi with her master or remain in Minnesota as a free person.[25] His long run impact should not, however, be allowed to overshadow his performance in the trial of Dumphey and Tripp. With his background, it was inevitable that he would adopt proceedings in the district court similar to those which Justice Flandreau had approved in the state supreme court. The atmosphere, procedures, and rules of substantive law which he had learned in the East and which were indelibly imprinted upon him by his own Anglo-American legal heritage were bound to prevail. And so they did. The proceedings in the trial court were those well known to twentieth century lawyers: opening statements, presentation of evidence, court rulings, cross-examination, objections, instructions, and verdict. Judge Vanderburgh's performance reinforced the Anglo-American strain in Minnesota law already evident in the composition of the supreme court.

The Minnesota supreme court and Judge Vanderburgh in the district court, valuable as they may have been in the state's legal history, were still a considerable distance from the social fabric and the daily activity involved in enforcing the law in Anoka County in 1860. Vanderburgh was a resident of Minneapolis and only occasionally rode out to Anoka to try cases. Therefore, he had little or nothing to do with law enforcement during the critical time from investigation through indictment. We must turn to the local officials if we are to get closer to the realities of

24. *Id.*
25. *Id.*

the personnel and practices of the criminal justice system in the community of Anoka in 1860.

The Sheriff of Anoka County was also a New Yorker who had moved to Minnesota just a few years prior to Michael Dugan's murder. He devoted only part of his time to enforcing the criminal law, spending the remainder as a farmer.[26] A full record of his labors, unfortunately, does not remain; the jail register for the county was lost when the offices were moved a few years ago. However, from the records that survive it is clear that he did his job following Dugan's murder in exemplary fashion. From his quick arrival at the scene of the crime following the murder and his serving arrest warrants and bringing defendants and witnesses into custody, to his giving testimony at the preliminary hearings and the trial of the defendants, he meticulously emulated traditional Anglo-American technical criminal procedure in handling the crime and those suspected of it. The warrants served were similar in all respects to those which had been issued for centuries in England and on the East Coast, and much like those issued by magistrates today. They formally embraced the notion of "probable cause," specifically defined the alleged offense, and were issued under the signature of the local magistrate, the justice of the peace.[27] The procedures followed at the preliminary examination were also consistent with longstanding Anglo-American tradition. The local justice of the peace, Mr. Shaw, (another Easterner) questioned Ellen Dugan and other witnesses for the prosecution, interrogated the defendants, and heard and determined the defense counsel's objections.[28] At the end of this typically Anglo-American procedure Shaw ruled that the evidence showed reasonable grounds to believe both that a murder had been committed and that Dumphey and Tripp had perpetrated it. He committed the suspects to jail without bail and bound Ellen Dugan over to appear and give evidence against them at the next sitting of the district court. The indictment, too, duplicated English practice, noting that the grand jury found sufficient evidence to send the case on for trial.

No account of the local dimension of the criminal justice sys-

26. MINNESOTA POPULATION SCHEDULES, *supra* note 3.

27. Clerk of District Court, Anoka County, Docket Book (unnumbered) (1860).

28. Clerk of District Court, Anoka County, Docket Book (unnumbered) (1860).

tem would be complete without reference to the grand and petty juries. The makeup of the Anoka County grand and petty juries is revealing. The grand jurors were, for the most part, mature Eastern farmers, ranging in age from 27 to 49 with a median age of 32 and an average of 33.6.[29] Although most were Maine farmers, some were traders and artisans with roots in New York and Massachusetts. The petty jury was similarly made up largely of Maine farmers, although two were artisans and one was a real estate dealer.[30]

Perhaps nothing more clearly demonstrates the link between the legal institutions of Anoka and the community as a whole than the striking resemblance that the composition of the juries in Anoka bore to the social structure of the town as it is recorded in the 1860 census. A large portion of the town's inhabitants were Maine farmers who had immigrated as a group to Minnesota.[31] They made up 132 of the total 353 inhabitants in the town, a total of 37 percent. If the 18 Canadian immigrants from New Brunswick, immediately adjacent to Maine on the north, are added to this population, the percent rises to 42. Next to these northern New Englanders, New Yorkers were most numerous in the population. The New Yorkers dominated the town's business and professional life. Nearly every shopkeeper, dentist, doctor, and real estate dealer in the town had come from New York.[32] And as we have seen, New Yorkers held the top posts in the criminal justice system. Whether the distinction is significant is impossible to tell from the remaining evidence, but it is clear that the New Yorkers, as distinct from the New Englanders, were preeminent in the town. Perhaps it is most revealing to note that families from Maine, Massachusetts, New Hampshire, Vermont, Connecticut, and New York made up 78 percent of the total population of Anoka in 1860.[33] A mere 6 percent, on the other hand, had moved from birthplaces in the eastern Middlewest.[34] Moreover, a comparatively small 14 percent were foreign born.[35] If the number of immigrants from New Brunswick is subtracted from this total, the proportion of foreign-born residents decreases appreciably. Besides the New Brunswick immigrants, 18 of the foreign-born residents were Irish, made up

29. MINNESOTA POPULATION SCHEDULES, *supra* note 3.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

almost entirely of one family of brothers and sisters.[36] The remaining foreigners consisted of four English, four Canadian, three Scottish, one Swedish, and three German families.[37]

Maine farmers, therefore, numerically dominated Anoka society and the grand and petty juries that decided the fates of suspects in criminal cases. (Indians and other non-whites were excluded from the juries.) It is noteworthy that the Anoka grand and petty juries thus bear a striking resemblance to the sixteenth century English juries, which also represented the lower rungs of respectable male society.[38]

What kind of community was Anoka in its early days? It had been established in 1846 as a trading post and by 1855 had 300 inhabitants.[39] In 1858, Anoka County was officially formed. Although it had no courthouse and trials had to be held in stores or other convenient places, a small jail was immediately erected, alleviating the problem of prisoner escapes, which, some say, plagued other frontier areas.[40] It is perhaps of some symbolic significance that putting up a place to detain people suspected of crime and to imprison those convicted of it was given higher priority than building a courthouse in which to try them.

By 1860, the county had also built several schools, enrolling over 600 students,[41] and five churches—Methodist, Episcopal, Congregational, Baptist, and Roman Catholic.[42] Farming was the predominant occupation of the community during the summer, spring, and fall. In winter farmers turned to lumbering, clearing land in an outward circle around their original plots.[43] Milling also flourished as early as 1855, when the first flour mill was erected.[44] By 1860, then Anoka Township, with its 353 inhabitants, had the basic social and legal institutions of a stable society.

But is all this meaningful in terms of the development of criminal justice on the western American frontier? Is it significant that one small rural community in Minnesota at about the

36. *Id.*
37. *Id.*
38. *See* SAMAHA, *supra* note 8, at 149-51.
39. MINNESOTA HISTORICAL RECORDS SURVEY PROJECT, DIVISION OF PROFESSIONAL AND SERVICE PROJECTS, WORKS PROGRESS ADMINISTRATION, INVENTORY OF THE COUNTY ARCHIVES OF MINNESOTA 7 (1937).
40. JORDAN, *supra* note 4, at 149-51.
41. MINNESOTA HISTORICAL RECORDS SURVEY, *supra* note 39, at 12.
42. *Id.* at 14.
43. *Id.* at 19-23.
44. *Id.* at 23.

time of the Civil War turns out, upon close inspection, to be rather staid and well-established and to put great stock in the traditional institutions of Anglo-American criminal justice?

Several problems arise if generalizations about criminal justice administration on the frontier are to be made on the basis of the evidence remaining for Anoka County. In the first place is the question whether Anoka was a "typical" community on the American frontier. What a typical frontier community looked like is not yet known, although many have assumed that the popular conception of a frontier community is close to reality. A cattle town, like Dodge City, is a good example. Cowboys, guns, horses, saloons, whorehouses, dancehalls, and cattle—they all come to mind, and they were all a part of Dodge City. No one knows how many other places became quiet, settled communities like Anoka. Even if we take Dodge City as the typical frontier community, one would be hard put to translate the popular image of violence and lynch mobs into objective reality. Although it was not the main point of the book and despite misinterpretations by many who have read it, Robert Dykstra's brilliant study, THE CATTLE TOWNS, has put that nonsense to rest. Dodge City saw few murders and few lynch mobs, except in the very first year of its history. And it was to Dodge City's eternal misfortune and at the cost of historical fact that everyone remembers only the first turbulent years of that city's life and not that it quickly tired of upheaval and demanded an active and effective law enforcement machinery, which it quickly received.[45] A survey of the criminal records of the early twentieth century in northeast Minnesota, a mining and lumbering area populated mainly by Swedes, Norwegians, Finns, and Indians suggests a similar development there.[46] Given the similarity of criminal justice administration in cattle towns like Dodge City, mining communities such as Grand Marais in northern Minnesota, and farming areas like Anoka, the question of Anoka's typicality is apparently answered in the affirmative.

A second problem is using a murder case to demonstrate normal reality in the criminal process. It has been conclusively

45. R. DYKSTRA, THE CATTLE TOWNS 113, 144-46 (1968).

46. In research completed but not yet written, the author found that the records are not at all in doubt that a criminal justice system of the Anglo-American type was quickly established in the Arrowhead region. This, of course, is not surprising in view of the fact that the Minnesota constitution required it. What is significant is that the system seems to have been as faithfully carried out in practice as it was clearly written in law.

demonstrated by modern social scientists that murder is not a typical case by which to measure normal procedure in the administration of justice in America. However wide the gap may yawn between formal legal requirements and actual daily practice, in murder cases it closes almost entirely.[47] So, it can be persuasively argued that if practice conforms to formal rules in murder cases, little has been demonstrated with regard to other crimes. However, the aforementioned survey of all criminal cases (both felony and misdemeanor) in northern Minnesota demonstrates conclusively that the procedures followed in Dumphey and Tripp's case were not at all atypical.

According to the record, regular procedures were followed even in cases of petty theft by Indians.[48] Naturally, the records of northeastern Minnesota lumbering communities cannot, by themselves, settle the question of what was usual process in criminal cases. Nevertheless, they beckon scholars to reconsider whether lynch law and vigilantism or more formal criminal procedure was the rule of the frontier.

The most intractable problem, however, is not ascertaining the level of lawlessness in nineteenth century America, although that is, to be sure, a massive task. Nor is it quantifying the criminal justice records in order to learn the workings of the criminal process. No analysis, however extensive, of criminal court records can totally describe that process. It would be naive to expect the social reality of crime and criminal procedure to be contained entirely in formal legal records generated by the institutions of criminal justice. The entire criminal process is riddled with opportunities for selective enforcement and punishment. Police discretion to arrest, prosecutorial discretion to charge, the judge's discretion in sentencing, and the correctional authorities' discretion to parole are only some of the decisions made with varying degrees of control.[49] The breadth of this undocumented discretion must give pause to anyone attempting to equate the formal records with actual practice in the criminal justice system.

But the records do provide a beginning. With all their shortcomings, they show that in early Minnesota it was possible to get due process of law in felony cases. Moreover, they demonstrate that the officers of the law were representative of the

47. J. SKOLNICK, JUSTICE WITHOUT TRIAL 242 (1975).
48. *See* note 46 *supra*.
49. *See* A.K. BOTTOMLEY, DECISIONS IN THE PENAL PROCESS (1973).

majority in the community, although, to be sure, the lowest rungs of society were not in that majority. Finally, they testify to the essential durability of the Anglo-American common law system of criminal justice administration. And even if it would be whimsical to equate longevity with goodness, any system which has served in so many settings over so long a time is at least deserving of respect.