

# DID SHE DO IT?

## REARGUING LIZZIE BORDEN

**Mark Hull**

**I** just finished prosecuting Lizzie Borden, and I think you should, too.

A bit of background, if I may. In addition to courses on war crimes prosecution and military law, I teach an advanced trial practice course for the US Army Command and General Staff College at Fort Leavenworth, Kansas. The majors and lieutenant colonels I work with from the Judge Advocate General's Corps are experienced litigators whose career paths include extensive time as both prosecutor and defense counsel. They are well educated, know their way around the courtroom, and—as I have learned—are highly competitive.

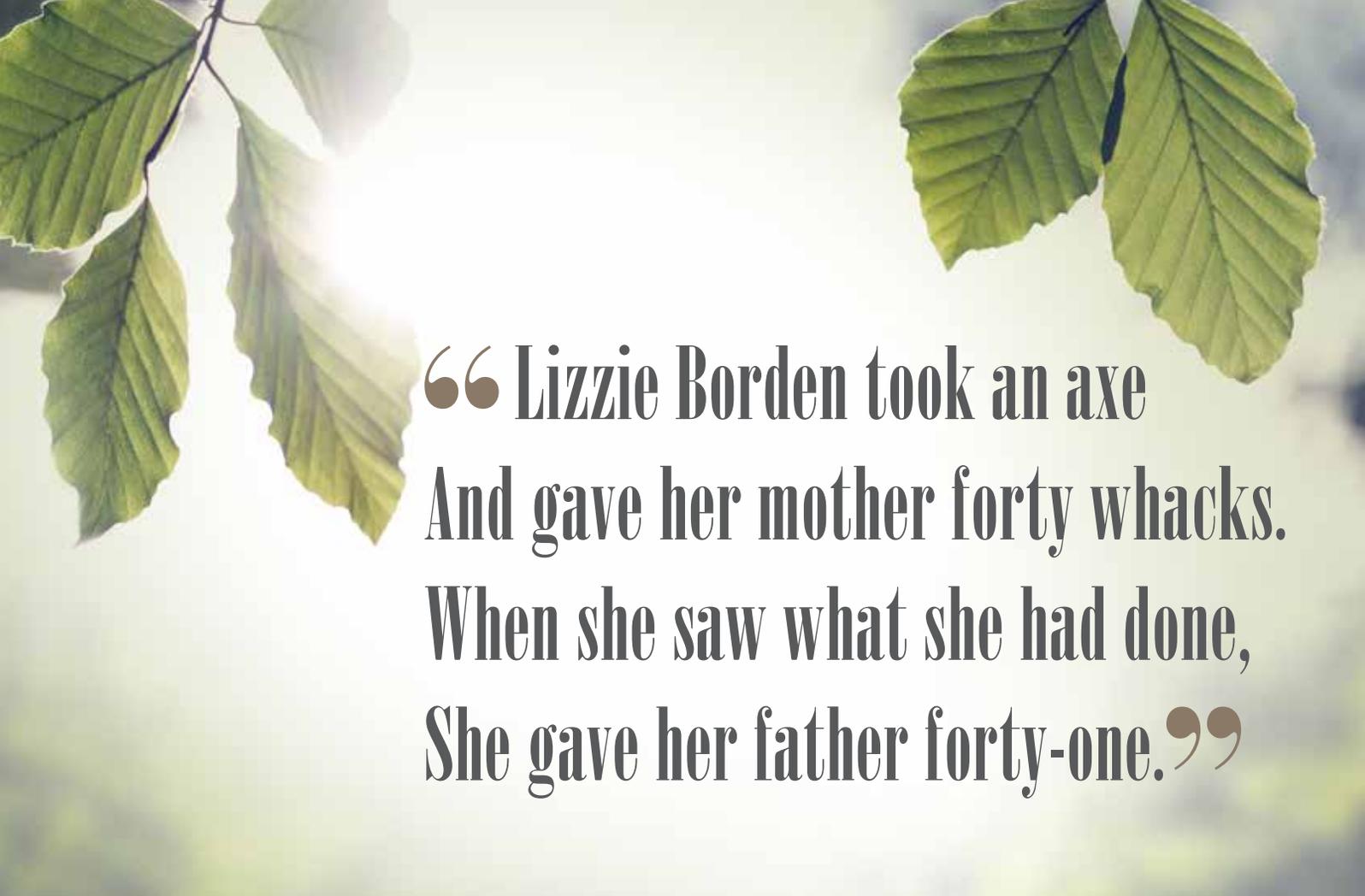
A few years ago I invited a guest speaker to this class who prosecuted a nationally known mass murder/command responsibility case from the Vietnam War, and lost. At the end of his presentation, I asked a question: given the forty years since, how would he argue the case differently today to get the panel (military jury) to convict? Considering the adverse historic outcome, his answer surprised me: “I wouldn't change anything.”

The reply was disturbing on many levels. For the aspect that concerned my class, I began to wonder, “Why not try and find out?” Might it be useful to retry not only that case but others, not as an academic exercise or a wasteful at-

tempt to rewrite history but rather as a way of both teaching and practicing trial skills? Time for a beta test. The next time my advanced trial practice course came around, I assigned three historic cases to the group: Sacco and Vanzetti, Richard Hauptmann, and Lizzie Borden. Since replicating the core of the trial testimony is impractical, I settled on having my students deliver new closing arguments in each case, from both prosecution and defense . . . and the group devoured it.

The task necessarily involved a mountain of research over the two-month course, and I chose trials for which a transcript and images of physical evidence existed, if not forensic testimony. The students' task was to take no more than thirty minutes, argue only based on what was known at the time, and not to stray outside the boundaries of the modern federal rules of closing argumentation. Further, they were prohibited from objecting during the opponent's closing (although I might allow that in future iterations). The “jury” consisted of three fellow faculty members, and I was pleased to discover that I had more applicants for the jury than seats available. I opened up the proceedings to interested students and faculty, and the room was packed.

The level of preparation and enthusiasm was astounding. Although the cases might be more than a century old (Borden), that intangible element of a good trial attorney—the I-can-win-this spirit—provided the magic. I had high expectations, and my students exceeded them. We have a tra-



“Lizzie Borden took an axe  
And gave her mother forty whacks.  
When she saw what she had done,  
She gave her father forty-one.”

*Skipping-rope rhyme memorializing the Lizzie Borden case*

dition in the army that a commander does not order troops to do something that the commander is unwilling to do, so I was obliged to join in and prosecute Lizzie Borden after more than a century since her last trial.

This has since become a part of the course, and it is never the same as each group takes a different tack as to whether to convict or acquit. Because of the unexpected success of this experiment in honing the skills of my military lawyers, I decided to go one step further. What would happen if we took the same template of a historic trial, two feisty advocates, and closing arguments to the community?

Working with friends at the Kansas City Metropolitan Bar Association and the Platte County Bar Association, we set up a lawyer versus lawyer duel at the Leavenworth Public Library, whereby Lizzie would be retried. I prosecuted and Sarah Recker—formerly the president of the Platte County

Bar Association—defended her. I shall skip over the final result other than to say that one must conclude that the defense nullified the jury (that is, the state did not fare well). We advertised the event on social media as well as in print, and even though we expected a healthy turnout, there were many more people in the audience than we had seats for. Twelve people in the audience were randomly selected as the jury and seated separately, and we issued them the appropriate verdict forms.

There are a few factors that might account for the public interest. First, people have heard of Lizzie Borden, even if only through the dim memory of the macabre children’s song, and the mystery of an unsolved case is always intriguing. Second, people are attracted to the idea of a public spectacle with actual trial lawyers doing their level best to out argue their opponent; while the event might at first seem like a stage show, the advocates’ desire to win is both genuine and

instinctual. I was a prosecutor before becoming a law professor, and Recker is a formidable defense attorney with an active practice in Parkville, Missouri; neither of us likes to lose. Third, this proved an effective, positive, and engaging way for the bar association to interact with the public. Very often, people see an attorney only when they must, and there are tangible benefits to making that introduction earlier and in a way that fascinates.

Although I am in temporary exile from “The City” while working for the army, my experimental results indicate that the same idea would work in San Francisco, only better. It makes sense to draw upon our rich history of famous cases—Roscoe Arbuckle (1921–22), perhaps. Many earlier cases, famous at the time but almost unknown today, would be interesting to reintroduce to the public—the Preparedness Day Bombing (1916) or the Liu Fook murder trials (1930), for example.

The requirements are simple: at least two advocates from The Bar Association of San Francisco willing to research a historic trial, a suitable venue, social media advertising, and more chairs than you think necessary. It would be good

community outreach, professionally challenging for the advocates, and fun for everyone that participates and attends. How often do we encounter situations in the law where there are no losers? This could be one of them.

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