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What One Lawyer Can Do for Society: Lessons from the Remarkable Career of William P. Homans Jr.

MARK BRODIN*

ABSTRACT

William P. Homans Jr. was an iconic civil liberties and criminal defense lawyer who mentored generations of younger lawyers that followed in his path. He appeared in cases that defined his times, from representing targets of the McCarthy-era inquisitions of the 1950s, to defending publishers of books like *Tropic of Cancer* when the authorities sought to suppress them, to serving on the defense team in the conspiracy trial of internationally-renowned pediatrician Benjamin Spock and four other leaders of the anti-Vietnam-War movement, to defending a doctor charged with manslaughter arising from an abortion he performed soon after *Roe v. Wade* legalized such procedures. In each case, Homans advanced the larger causes as well as his clients' interests.

William Homans also defended countless persons whose names are not widely known and who paid him little or nothing because, like John Adams before him, he believed profoundly that each accused is entitled to the best defense possible. Acutely aware of the many imperfections and biases in the criminal justice system, he was a passionate opponent of the death penalty, and in a series of landmark cases, he persuaded the Supreme Judicial Court to abolish the penalty in Massachusetts.

Homans's contributions to the law remain a model for the legal profession, and many valuable lessons may be drawn from his fifty-year career at the Bar.

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Few are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of their society. Moral courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential vital quality for those who seek to change a world that yields most painfully to change.¹

As a fellow student of Bill Homans at Harvard College famously advised: “[A]sk not what your country can do for you—ask what you can do for your country.”² In the same inaugural address, John F. Kennedy observed:

The torch had been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage—and unwilling to witness or permit the slow undoing of those human rights to which this Nation has always been committed, and to which we are committed today at home and around the world.³

The new President could well have been describing one particular member of that generation, William P. Homans Jr., who spent his fifty-year career following JFK’s admonition to give more to society than one takes.

Homans emerged from two of Boston’s most venerable family lines, which together had produced generations of celebrated doctors, corporate lawyers, Harvard academics, and politicians since the mid-1750s.⁴ Raised on a forty-acre estate on Homans Lane in lush Canton, he followed his forebears into Harvard College, its exclusive Phoenix final club, the Hasty Pudding Institute of 1770, and all the other usual venues of Brahmin privilege in America’s City on a Hill.⁵

Yet waiving his birthright, Homans chose a life of great self-sacrifice, devoting himself to the representation of society’s cast-offs and the

¹ JESSICA MITFORD, *THE TRIAL OF DR. SPOCK, THE REV. WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, AND MARCUS RASKIN* 182 (1969) (closing argument by William P. Homans, Jr. on behalf of Michael Ferber in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969)).

² John F. Kennedy, President, Inaugural Address (Jan. 20, 1961), in *JOINT CONG. COMM. ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989*, S. DOC. NO. 101-10, at 308 (1st Sess. 1989).

³ *Id.* at 306.

⁴ See Mark S. Brodin, *WILLIAM P. HOMANS JR.: A LIFE IN COURT* ix, 1-6 (2010).

⁵ *Id.* at 1, 7-8.

advocacy of causes that often put him on the wrong side of public opinion.⁶ Though heralded as one of the best criminal defense and civil liberties lawyers of his time, and among the most important figures in the Boston legal community,⁷ Homans lost many of his cases, particularly at the trial level.⁸ The lawyer who ventures on such a path, who follows Oliver Wendell Holmes's instruction to "immerse [oneself] in the agonies of the times,"⁹ has to be prepared to suffer painful defeats and reverses.

After all, Clarence Darrow, America's archetypal "people's lawyer" — who left a lucrative practice as a railroad lawyer to represent Socialist leader Eugene V. Debs and his American Railway Union in the momentous Pullman Strike of 1894¹⁰—lost his first big case and had to watch his obviously deranged client go to the gallows.¹¹ Darrow also lost his most famous case, when Tennessee high-school-biology-teacher John Scopes was convicted for teaching evolution in the historic 1925 "monkey trial."¹² The teaching of evolution was not protected by the Constitution until decades later, in 1968, with *Epperson v. Arkansas*.¹³ Darrow did not live to see any notable success in his life-long battle against the death penalty, even though he succeeded in putting the issue on the national agenda with his impassioned plea that saved "thrill murderers" Nathan Leopold and Richard Loeb from execution for the random killing of a neighborhood boy.¹⁴

The late historian Howard Zinn paid Homans the highest of compliments when he described him as a "Clarence Darrow-like defender of poor and black people."¹⁵ Especially before *Gideon v. Wainwright*,¹⁶ many

⁶ See *id.* at ix, xii.

⁷ See Alan M. Dershowitz, *Biography Tells Balanced Story of Complex Man, Great Lawyer*, MASS. LAW. WKLY., Apr. 12, 2010, at 13.

⁸ See BRODIN, *supra* note 4, at 70-71.

⁹ Arthur Kinoy, *The Role of the People's Lawyer in the 1990s*, 2 TEMP. POL. & CIV. RTS. L. REV. 209, 226 (1992) (quoting Oliver Wendell Holmes's advice to young lawyers and professionals).

¹⁰ See Gerald F. Uelman, *Who is the Lawyer of the Century?*, 33 LOY. L.A. L. REV. 613, 632 (2000).

¹¹ See JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 62 (2011). A delusional Patrick Prendergast shot and killed the mayor of Chicago in the mayor's home, telling police the victim had reneged on a promise to appoint him as counsel. Prendergast was a twenty-five-year-old newspaper deliveryman, who even the state psychiatrists proclaimed was insane. The jury took only an hour to come forward with a guilty verdict. *Id.* at 55-56.

¹² See *id.* at 364-65, 397.

¹³ 393 U.S. 97, 107, 109 (1968) (holding that an Arkansas law preventing the teaching of evolution in the classroom violated the First and Fourteenth Amendments).

¹⁴ FARRELL, *supra* note 11, at 348-56.

¹⁵ HOWARD ZINN, JUSTICE IN EVERYDAY LIFE: THE WAY IT REALLY WORKS 106 (Howard Zinn

of these people would have gone unrepresented or poorly represented. For lawyers like Darrow and Homans, gratification comes not from frequent victories but from the struggle itself and constantly challenging the justice system to truly produce just results.

An effective criminal defense lawyer has to, above all else, relish the good fight against long odds. When Homans was a seventeen-year-old college freshman, he visited Germany and stayed for six weeks with a family that had a son in a Hitler youth group.¹⁷ The year was 1938; the Nuremberg laws had already stripped Jews of their citizenship, subjecting them to brutal abuse and humiliation, and worse was soon to come.¹⁸ The young Homans was forever changed by what he saw that summer, and his lifelong commitment to defense of the downtrodden and powerless was forged.

When he graduated from Harvard College in June 1941, the United States was still neutral, standing aside (except for the modest Lend-Lease support that President Franklin D. Roosevelt could muster in the face of an isolationist Congress) while Hitler's forces overran Europe and threatened Britain.¹⁹ But Homans was determined to get into the fight. So six months before the Japanese attacked Pearl Harbor,²⁰ which finally brought the United States into the war, he traveled to Canada and enlisted in the British Royal Navy Volunteer Reserve.²¹ He sailed across the Atlantic on a perilous journey during which several ships in the convoy were sunk by German U-boats. As one of twenty-two American volunteers, Lieutenant Homans served with distinction and bravery until transferring to the American Navy and shipping out for the Mediterranean.²² Winston S. Churchill, grandson of Britain's inspirational war-time Prime Minister, belatedly

ed., 2002).

¹⁶ 372 U.S. 335, 344-45 (1963) (recognizing the right to counsel in all criminal cases and the obligation to appoint counsel for indigents).

¹⁷ BRODIN, *supra* note 4, at 9-10.

¹⁸ *Id.* at 10; see TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 25-26 (1970) (describing the brutal progression from 1939 to 1942 of Hitler's campaign to effectuate the "final solution of the Jewish problem" through the use of concentration camps and labor camps).

¹⁹ See BRODIN, *supra* note 4, at 12.

²⁰ See John Mueller, *Military Inconvenience, Political Disaster*, in THE AMERICAN EXPERIENCE IN WORLD WAR II: PEARL HARBOR IN HISTORY AND MEMORY at xi, 50-51, 65, 161 (Walter L. Hixson ed., 2003).

²¹ BRODIN, *supra* note 1, at 12-13 (noting that Homans had originally tried to enlist in the Royal Air Force, but was not a good fit for the cockpit of the Spitfire airplane).

²² *Id.* at 14-15.

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commemorated the service of these gallant men in October 2001, praising them for coming forward “when the fate of Great Britain and the cause of Freedom hung in the balance.”²³

What perhaps most distinguished Bill Homans as a criminal defense lawyer was his total emotional immersion in each case, no matter how routine, or hopeless, it might be. Judges and associates observed that he often appeared far more upset about losing than his client, the one who was going to prison. In a revealing essay found after his death, Homans speaks of becoming not just the accused’s advocate, but his surrogate, imprisoned in his own way after a conviction.²⁴ For a committed defense lawyer, each guilty verdict “adds one more scar to his collection of mental and emotional scars.”²⁵ Homans wrote:

Who can fairly criticize the lawyer who would prefer [to handle civil cases] to avoid this kind of involvement? The role of the surrogate is not a hero’s role—it is a role which brings rare and soon forgotten moments of elation, dashed hopes, often a sense of the inevitability of guilt notwithstanding the lawyer’s absolute belief in innocence, and, most of all, the feeling that, as surrogate, he stands completely in the shoes of his client, since the client is powerless to accomplish what the lawyer is expected to accomplish.²⁶

Such identification with his clients sharply distinguished Bill Homans from the stereotypical cool, detached, and hardened criminal defender conjured up in the popular mind.

Homans took the cases that other defense lawyers shunned, where the crime was horrific and the cry of vengeance from the public deafening.²⁷

²³ *Maritime Memorials*, NATIONAL MARITIME MUSEUM, Memorial M5059, <http://www.nmm.ac.uk/memorials/Memorial.cfm?EventGroup=14&MemorialID=M5059> (last visited Oct. 28, 2011) (describing a marble floor-tablet memorial located at Old Royal Naval College Painted Hall, Greenwich, London, England, which was erected in 2001 by Roger Francis in memory of those American seamen who served between 1939-1941).

²⁴ BRODIN, *supra* note 4, at 70 (“The lawyer who represents someone accused of crime becomes not merely his representative, but, with any sensitivity on the lawyer’s part, his surrogate. It is true—the lawyer, if his client is found guilty, will not go to prison himself. But the lawyer sees the consequences of disaster in about the same terms. In a sense, suffering defeat for his client, he finds himself as imprisoned as his client, should the worst happen.”).

²⁵ *Id.*

²⁶ *Id.* at 71.

²⁷ See *id.* at 65, 69, 71 (describing the types of clients Homans typically represented); cf. Bella English, *His Defense Never Rests; Criminal Defense Attorney Jay Carney Takes on the Gruesome Cases that No One Else Will*, BOS. GLOBE, Dec. 7, 2005, at E1, available at http://www.boston.com/news/globe/living/articles/2005/12/07/his_defense_never_rests/ (discussing the

Among his multitude of clients were persons accused of killing police officers, elderly women, and even teenagers. In this, he stood in the venerable tradition of lawyers who, in their dedication to the rule of law and the right of each accused to the best possible defense, courageously step forward to defend even the most unpopular client. John Adams set the model early when he took on the defense of the British soldiers who killed five colonists demonstrating in front of the State House in the “Boston Massacre” of 1770.²⁸ Although Adams jeopardized both his livelihood and personal safety because of the fierce resentment of his fellow Bostonians, he later wrote in his diary:

The part I took in Defence of Captn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently.²⁹

Adams persuaded the jury that the Red Coats had fired only because they felt endangered by the mob; six were acquitted while two others were convicted of the lesser charge of manslaughter.³⁰

The lawyer who is uncomfortable when asked how he could defend such persons, who is at a loss to explain the critical role they play in the criminal justice process, had best move along to other work. For Bill Homans, “lawyering up” was not a dirty word but rather the sacred right of any citizen charged with crime and a sacred obligation of all members of the Bar. Even when he did not believe his client’s stories, he believed in the adversary system. His meticulous preparation and attention to detail, together with Brahmin accent and bearing, brought a new standard to the practice of criminal defense in Boston’s grimeiest courts.

William P. Homans Jr. was, at his core, a civil libertarian who recognized that the cherished Bill of Rights handed down to us by the Framers is not self-enforcing but demands constant vigilance.³¹ For many

typical tendency of lawyers to avoid representing clients involved in horrific crimes).

²⁸ BRODIN, *supra* note 4, at xi.

²⁹ John Adams, 1773, *March 5th, Fryday*, in 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, 1771-1781, at 79 (L. H. Butterfield ed., 1961).

³⁰ See generally HILLER B. ZOBEL, THE BOSTON MASSACRE 241-94 (The Norton Library ed. 1971) (1970) (providing a comprehensive account of the trials of the British soldiers who participated in the Boston Massacre).

³¹ See BRODIN, *supra* note 4, at i-xii, 41 (providing an overview of Homans’s philosophy and approach to the law as it applies to civil liberties and the Bill of Rights).

years he was Counsel to the Civil Liberties Union of Massachusetts, and for his entire career he was at the forefront of the effort to protect free expression against governmental interference.³² When he appeared on behalf of despised persons like neo-Nazis and Ku Klux Klan members seeking parade permits or other speaking opportunities, Homans would argue that it was the “principles” not the “principals” that mattered.

His first decade of practice was shaped by the political repression that characterized the 1950s, the so-called McCarthy era.³³ The period was named for the infamous senator from Wisconsin who “exposed” Communists and subversives everywhere, in and out of government, spawning the “witch hunts”³⁴ that destroyed so many lives and careers. In what iconic journalist I.F. Stone dubbed “the haunted Fifties,” attorneys for “Reds” and “fellow travelers,” summoned by the House Un-American Activities Committee and its ilk, were painted with the same unpatriotic brush as their clients.³⁵ Homans was one of a handful of Boston lawyers courageous enough to represent persons called before these inquisitions. He was one of even fewer public voices of constant and vigorous opposition to the proliferation of these investigations that were often welcomed by a fearful public. Homans understood all too well what Clarence Darrow meant when he spoke of “standing in the lean and lonely front line facing the greatest enemy that ever confronted man—public opinion.”³⁶

These were also years of cultural repression, and Homans enlisted in this fight as well. “Banned in Boston”³⁷ was not just a catchphrase—it reflected the puritanical morality crusade waged against “smut” and

³² See *id.* at 41.

³³ See generally THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* 106-07, 223-33, 595-96, 635, 662 (Madison Books 1997) (1982) (providing an overview of the circumstances surrounding McCarthy’s release of a list of known Communists, the hearings that resulted, and his subsequent rise to national prominence).

³⁴ The term aptly describes the mass paranoia of the McCarthy era, caused by the unfounded persecution of a particular group of individuals. Cf. ARTHUR MILLER, *THE CRUCIBLE* 7 (Penguin Books 1981) (1953) (“The witch-hunt was a perverse manifestation of the panic [in Salem, Massachusetts in the 1690s] which set in among all classes when the balance began to turn toward greater individual freedom.”).

³⁵ I.F. STONE, *THE HAUNTED FIFTIES* 30-45 (1963).

³⁶ CLARENCE DARROW, *THE STORY OF MY LIFE* 232 (1932) (describing the physical and emotional toll that defending the criminally accused exacts on an attorney whose sense of humanity makes him recoil at the thought of a client being put to death, regardless of whether that position was contrary to public sentiment).

³⁷ NEIL MILLER, *BANNED IN BOSTON: THE WATCH AND WARD SOCIETY’S CRUSADE AGAINST BOOKS, BURLESQUE, AND THE SOCIAL EVIL* 13 (2010).

pornography.³⁸ Although hard to imagine today, authorities routinely seized copies of great literary works like James Joyce's *Ulysses*³⁹ and D.H. Lawrence's *Lady Chatterly's Lover*⁴⁰ and prosecuted their publishers and booksellers.

The turning point finally came in 1962, when Homans and co-counsel Charles Rembar won the first crucial victory on behalf of Henry Miller's sexually explicit *Tropic of Cancer*.⁴¹ In an opinion stunning for its time, Justice R. Ammi Cutter wrote for the Supreme Judicial Court that: "It is not the function of judges to serve as arbiters of taste or to say that an author must regard vulgarity as unnecessary to his portrayal of particular scenes or characters or to establish particular ideas."⁴²

In 1960, Massachusetts—the same state that sent liberal-sophisticate John F. Kennedy to the White House—embarked on a crackdown on "crimes against chastity, morality, decency and good order."⁴³ Caught up in the wide dragnet were several faculty at Smith College, including the distinguished literary critic Newton Arvin and his protégés. When Bill Homans read the *New York Times* headline *2 Smith Teachers Held In Vice Case*,⁴⁴ he was incensed to learn that these homosexual men stood accused of a new felony: sharing homoerotic magazines and photographs in the privacy of their own apartments.

On a recommendation from historian Arthur Schlesinger Jr., who described Homans as the best civil-liberties lawyer in the state, indicted assistant-professor Joel Dorius sought out Homans, who eagerly agreed to take the case.⁴⁵ The trial in Hampshire Superior Court began months later with the denial of the defense's motion to suppress the allegedly obscene materials seized from Dorius's apartment by way of a hopelessly vague

³⁸ *Id.* at 12-13 (describing how, at the turn of the twentieth century, the New England Watch and Ward Society attempted to eradicate all "indecent" in books, pictures, paintings, photographs, and performances).

³⁹ See, e.g., *United States v. Random House, Inc.*, 72 F.2d 705, 706 (2d Cir. 1934) (holding that *Ulysses* was not obscene under statute prohibiting importation of obscene books).

⁴⁰ See, e.g., *People v. Dial Press, Inc.*, 48 N.Y.S.2d 480, 483 (N.Y. Magis. Ct. 1944) (holding that *Lady Chatterly's Lover* was obscene material).

⁴¹ *Attorney Gen. v. Book Named "Tropic of Cancer,"* 184 N.E.2d 328, 334 (Mass. 1962) (holding that "the predominant effect and purpose of the book as a whole is not prurient"); BRODIN, *supra* note 4, at 49.

⁴² *Book Named "Tropic of Cancer,"* 184 N.E.2d at 334.

⁴³ BRODIN, *supra* note 4, at 42.

⁴⁴ See Caleb Crain, *Search and Destroy*, N.Y. TIMES, Aug. 5, 2001, at 26, available at <http://www.nytimes.com/2001/08/05/books/search-and-destroy.html?src=pm>.

⁴⁵ BRODIN, *supra* note 4, at 43-44.

warrant,⁴⁶ which read distressingly like the reviled writs of assistance used by Crown officials against the colonists and which prompted the Founders to adopt the Fourth Amendment.⁴⁷ The trial climaxed with the betrayal of Dorius by his mentor and friend, Newton Arvin, who appeared for the prosecution in full-ratting mode.⁴⁸

A guilty verdict followed.⁴⁹ However, Bill Homans and his client found their vindication two years later in the state's highest court, which overturned the conviction on the very Fourth Amendment grounds that Homans had raised initially.⁵⁰ His original motion had anticipated the U.S. Supreme Court's landmark decision in *Mapp v. Ohio*, which had been decided in the interim.⁵¹

Unfortunately, the "porn professors" (as they came to be known) were terminated anyway by Smith College and never recovered from the public humiliation of the "Great Pink Scare."⁵² Sadly, Homans did not live to see the school's belated confession of error when, in 2002, it established the Doruis/Spofford Fund for the Study of Civil Liberties and Freedom of Expression.⁵³

Homans had thus been a combatant in an early skirmish of the "culture wars."⁵⁴

⁴⁶ See *Commonwealth v. Dorius*, 191 N.E.2d 781, 782 (Mass. 1963) (internal quotation marks omitted) (explaining that the warrant was invalid because it failed to precisely designate "the objects of search or seizure").

⁴⁷ M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 1*, 5-6 (1978).

⁴⁸ See Joel Dorius, *The Smith College Porn Panic of 1960*, GAY & LESBIAN REV. WORLDWIDE, Mar.-Apr. 2003, at 19.

⁴⁹ See *Dorius*, 191 N.E.2d at 783 (alteration in original) (holding that the illegal search "constituted a violation of the Fourteenth Amendment [which so] infected the proceedings as to require . . . setting aside the finding of guilty and . . . the entry of judgment for the defendant"); see also *Dorius*, *supra* note 48.

⁵⁰ See *Dorius*, 191 N.E.2d at 782-83.

⁵¹ Compare *id.* at 782 (explaining that the defendant's motion asserted that the search and seizure was unreasonable because the warrant used in the search was invalid), with *Mapp v. Ohio*, 327 U.S. 643, 643-45, 655 (1961) (holding that the search and seizure was unreasonable and thus unconstitutional because, *inter alia*, no search warrant was produced at trial).

⁵² See *Independent Lens: The Great Pink Scare* (PBS television broadcast June 6, 2006).

⁵³ BRODIN, *supra* note 4, at 47, 257.

⁵⁴ Michael Wm. Doyle, *Debating the Counterculture: Ecstasy and Anxiety Over the Hip Alternative*, in *THE COLUMBIA GUIDE TO AMERICA IN THE 1960S* 143, 151-52 (Columbia University Press 2001) (defining "culture wars" as the public discourse over the counterculture's impact on society).

Bill Homans's two best-known cases resulted in disheartening jury convictions after extremely hard-fought trials. However, his victories in the subsequent appeals significantly advanced the respective causes of free speech during wartime⁵⁵ and women's reproductive rights.⁵⁶

He first met Harvard graduate student Michael Ferber at Boston's Arlington-Street Church in October 1967.⁵⁷ Ferber was one of the organizers of a closely-watched event at which hundreds of young men turned in (and some burned) their draft cards in opposition to both the Vietnam War and the Selective Service System. The cards and ashes were delivered days later to the Justice Department as the culmination of the protest. Homans gave Ferber and the others his business card, offering his (as usual) free legal services in the likely event that charges flowed from the nationally-publicized protest.⁵⁸

But when the omnibus indictment came down in January, Homans was, like so many others, shocked by its breadth. An angry Lyndon Johnson, with his presidency under siege, had decided to make an example of the five leaders of the burgeoning antiwar movement.⁵⁹ Charged together with Ferber in a conspiracy to aid and abet resistance to the draft were: Benjamin Spock, world-renowned pediatrician and author of the standard reference on child-rearing; Reverend William Sloane Coffin Jr., the highly-distinguished Chaplain at Yale; Marcus Raskin, liberal scholar and former security adviser to President Kennedy; and Mitchell Goodman, celebrated writer and public intellectual.⁶⁰

That the five barely knew each other, and had never coordinated any of their far-flung activities against the war, did not dissuade the Justice Department from seeking and obtaining a conspiracy indictment carrying five-year prison sentences and \$10,000 fines. Nor did the fact that all of the acts were entirely *public* events—rallies, demonstrations, press conferences, the Arlington-Street church service, and the distribution of a pamphlet titled *A Call To Resist Illegitimate Authority*—discourage the Justice Department.⁶¹ This pamphlet was signed by more than 150 cultural and intellectual figures including: Noam Chomsky, Lawrence Ferlinghetti,

⁵⁵ See *United States v. Spock*, 416 F.2d 165, 178-79, 183 (1st Cir. 1969) (overturning the conviction of two defendants charged with conspiracy to counsel, aid, and abet draft resistance).

⁵⁶ See *Commonwealth v. Edelin*, 359 N.E.2d 4, 4, 14, 18 (Mass. 1976).

⁵⁷ BRODIN, *supra* note 4, at 114.

⁵⁸ *Id.* at 113.

⁵⁹ *Id.* at 117.

⁶⁰ MITFORD, *supra* note 1, at 3.

⁶¹ BRODIN, *supra* note 4, at 119.

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Allen Ginsburg, Nat Henthoff, Christopher Lasch, Robert Lowell, Philip Roth, and Susan Sontag. The Government and trial judge would refer to the signers as unindicted co-conspirators throughout the trial.⁶²

Harvard Law Professor Alan Dershowitz denounced the prosecution as patently designed “to stifle organized public opposition to the war,”⁶³ which had been growing dramatically. As trusted CBS anchorman Walter Cronkite pronounced in early-1968, the war was a hopeless stalemate and not the inevitable American victory relentlessly portrayed by the Johnson Administration and the Pentagon.⁶⁴

Conspiracy charges have long been a favorite weapon of government officials against their political enemies.⁶⁵ When Sir Walter Raleigh became a political threat to the British Crown, he found himself convicted of conspiracy to murder the King and sentenced to be hanged.⁶⁶ Prosecutions for sedition have been infamously pursued to silence opponents of military ventures, as in the cases of Eugene Debs, Scott Nearing, and Charles Schenck for advocating resistance to the World War I draft.⁶⁷

United States v. Spock was perhaps the most ambitious of these attempts to stifle dissent, as the accused were a cross-section of the entire antiwar movement.⁶⁸ At stake was nothing short of the right of American citizens to peacefully oppose what they believed to be an unjust and immoral war.⁶⁹

The fashion of the times in such political prosecutions was to turn the courtroom into a soapbox for the defendants, foregoing legal defenses in

⁶² *Id.* at 118.

⁶³ ALAN M. DERSHOWITZ, *AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION* 386 (2004).

⁶⁴ BRODIN, *supra* note 4, at 109.

⁶⁵ See generally Peter Margulies, *Guantanamo By Other Means: Conspiracy Prosecutions and the Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 523-25 (2008); see also BUD SCHULTZ & RUTH SCHULTZ, *IT DID HAPPEN HERE: RECOLLECTIONS OF POLITICAL REPRESSION IN AMERICA* 91-92 (1989).

⁶⁶ JOHN HOSTETTLER, *AT THE MERCY OF THE STATE: A STUDY IN JUDICIAL TYRANNY* 35, 42 (1998).

⁶⁷ See *Debs v. United States*, 249 U.S. 211, 212, 217 (1919) (finding defendant guilty of inciting mutiny and refusal of military duty after he delivered a speech about socialism to a public crowd); *Schenck v. United States*, 249 U.S. 47, 48-49, 53 (1919) (finding defendant guilty of conspiring to violate the Espionage Act by circulating a Socialist document in an attempt to cause insubordination and obstruction); *United States v. Nearing*, 252 F. 223, 224 (S.D.N.Y. 1918) (finding defendants guilty of violating the Espionage Act by circulating a Socialist pamphlet).

⁶⁸ *United States v. Spock*, 416 F.2d 165, 168 (1st Cir. 1969).

⁶⁹ See *id.* at 169.

favor of guerilla theater.⁷⁰ The prime example was the so-called “Chicago Seven” trial arising from the tumultuous demonstrations at the Democratic nominating convention in August 1968.⁷¹ The defendants sparred disrespectfully with the judge throughout the entire five-month trial.⁷² The defendants: celebrated their birthdays (as well as the judge’s) in the courtroom with cakes replete with candles;⁷³ dressed in costumes and face paint;⁷⁴ and rallied their supporters in the gallery like an athletic event.⁷⁵ The defense team abandoned all legal convention and decorum, instead favoring provocation of the judge and prosecution.⁷⁶ Found guilty of contempt of court, the defense lawyers ended up joining their clients in prison.⁷⁷

In sharp contrast, the defense team in *Spock* decided to put on a traditional defense—to challenge the Government on every available legal ground, leaving the agitating to large rallies on Boston Common and antiwar events around the country.⁷⁸ Homans and co-counsel Raymond Young were joined by a stellar group: Leonard Boudin, unofficial dean of progressive lawyers; James D. St. Clair, Calvin Bartlett, and Ed Barshak, luminaries of the Boston trial bar; and Telford Taylor, Columbia Law School professor and former chief prosecutor at the Nuremberg tribunals.⁷⁹ Homans and Barshak appeared pro bono on behalf of the Civil Liberties Union of Massachusetts, which quickly recognized the central importance of the case.⁸⁰

⁷⁰ Dwight Macdonald, *Introduction* to THE TALES OF HOFFMAN: FROM THE TRIAL OF THE CHICAGO 8, at xiii-xv (Mark L. Levine et al. eds., 1970).

⁷¹ *Id.*

⁷² *Id.* at 182-83, 235 (capturing how the defendants openly mocked the judge’s attempt to keep order in the courtroom by telling the court, “You got to cut our tongues out to order us [to keep quiet.]”).

⁷³ *See id.* at 55 (capturing how the defendants asked to be allowed to present and eat a birthday cake during the trial).

⁷⁴ *See id.* at 235 (capturing how the defendants walked into court wearing judicial robes).

⁷⁵ *See id.* at 231 (capturing how the defendant told the judge that the defendants were fighting for all of the oppressed, to which spectators cheered, “RIGHT ON”).

⁷⁶ *See* Macdonald, *supra* note 70, at 63-64, 107 (capturing how defense counsel told the judge he created a disgrace by having the defendant bound and gagged during the proceedings and how defense counsel called the judge “inhumane” for not allowing lawyers to sit with witnesses).

⁷⁷ *See id.* at 260.

⁷⁸ BRODIN, *supra* note 4, at 121-23.

⁷⁹ *Id.* at 113-14.

⁸⁰ *Id.* at 113.

Criminal defense attorneys often voice frustration that the deck is stacked against their client from the outset.⁸¹ Despite the presumption of innocence that supposedly clothes the accused, the public perception equating accusation with guilt is widespread, and jurors sometimes bring it with them into court. Judges themselves, whose career path more often runs from the prosecutors' offices than from defense firms, may also favor the Government's case.⁸² The *Spock* defense team faced both hurdles.

Despite challenges to the jury pool, which included only nine women among the one hundred persons summoned,⁸³ the seated jury consisted of twelve white males.⁸⁴ With their short crew cuts, Ferber described them as a platoon of marines.⁸⁵ Francis Ford, who was eighty-five-years-old and known as a prosecutor's judge, lived up to his well-earned reputation by overruling virtually all defense objections, while oftentimes making and sustaining the Government's objection *before* its counsel, John Wall, even got to his feet.⁸⁶ On numerous occasions, Ford would interrupt and harshly scold defense counsel in front of the jury. The *Washington Post* reporter covering the trial observed that the cold transcript could "not convey the manner in which Judge Ford showed his disbelief in the defense's case and his display of bias."⁸⁷ A juror would later describe Ford's final instructions to them as "the kiss of death" for the defendants.⁸⁸

Defense counsel must not, of course, respond disrespectfully to the bench, no matter what the provocation. So when Judge Ford undercut the entire defense strategy—which was to establish their client's good-faith belief that the Vietnam War was both immoral and illegal—by constantly reiterating to the jury that "the Vietnam conflict is irrelevant in this case,"⁸⁹ the lawyers simply had to breathe deeply and move on. And when the jurors were told by Ford that to be found guilty, the defendants need not actually have agreed among themselves to violate the law, or have accomplished any of their objectives, and that their actions could still

⁸¹ *Id.* at 73.

⁸² *See id.* at 123.

⁸³ Hans Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 1, 1 (1969). Polls indicated that women were much more likely to oppose the Vietnam War than men. *See id.* at 11.

⁸⁴ BRODIN, *supra* note 4, at 125.

⁸⁵ *See id.*

⁸⁶ *See* Daniel Lang, *A Reporter at Large: The Trial of Dr. Spock*, THE NEW YORKER, Sept. 7, 1968, at 56.

⁸⁷ *Id.*

⁸⁸ MITFORD, *supra* note 1, at 232.

⁸⁹ BRODIN, *supra* note 4, at 141.

constitute a conspiracy no matter how public they were, counsel could not avoid the inevitable guilty verdict. All they could do was to switch gears to the appeal.

Bill Homans worked tirelessly before, during, and after the agonizing six-week trial because he believed profoundly in the right of dissent, even (and most especially) in wartime. As a combat veteran of World War II, he knew the unrestrained destructive power of war: to soldiers, to civilians, to humanitarian ideals.⁹⁰ Looking back five years after the verdict, with the Vietnam War still raging, he sadly bemoaned in a page-one op-ed that the federal courts had ducked, time and again, the question of the legality of the war, thereby allowing the political leaders to cynically pursue their endless misadventure.⁹¹

As he did so many times, Homans—together with co-counsel—was able to reach out to an appeals court, which was more insulated from the immediate pressures of politics and public opinion, to undo a grave injustice. The First Circuit Court of Appeals reversed the *Spock* convictions in a ringing endorsement of the First Amendment right to peaceful protest.⁹² A skeptical Chief Judge Bailey Aldrich described the defendant's so-called "crimes" as follows:

As is well known, the war in Vietnam and the draft to support it have engendered considerable animosity and frustration. In August 1967 a number of academic, clerical, and professional persons discussed the need of more vigorous opposition to governmental policies. From their eventually consolidated efforts came a document entitled "A Call to Resist Illegitimate Authority" (hereinafter the Call) and a cover letter requesting signatures and support. The letter was signed by defendant Dr. Benjamin Spock and defendant Rev. William Sloane Coffin, Jr., and two other persons. The Call was originally signed by them, numerous others, and eventually by hundreds. The defendant Mitchell Goodman had been preparing a somewhat similar statement against the war and the draft. In mid-September he learned of the Call, which he also signed. He, Coffin, Spock and others spoke on October 2 at a press conference in New York City to launch the Call. It was there announced by Goodman that further activities were contemplated, including a nationwide collection of draft cards and a ceremonial surrender thereof to the Attorney General. On October 16 a draft card burning and turn-in took place at the Arlington Street Church in Boston, arranged by the defendant Michael Ferber, and participated in by Coffin. Four days afterwards all four

⁹⁰ See *id.* at 13-14 (describing Homans's time as a combat veteran during WWII).

⁹¹ See William P. Homans Jr., *The Mighty Are More Equal*, BOS. GLOBE, Oct. 14, 1973, at 1.

⁹² *United States v. Spock*, 416 F.2d 165, 168 (1st Cir. 1969).

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defendants attended a demonstration in Washington, in the course of which an unsuccessful attempt was made to present the fruits of that collection and similar gatherings to the Attorney General.⁹³

While Aldrich's opinion for the court chose narrow grounds for reversal of the convictions—i.e., the insufficiency of the evidence against the defendants—Judge Frank Coffin's separate opinion has had far more lasting influence on First Amendment doctrine.⁹⁴ Judge Coffin recognized that this “[was] a landmark case and no one . . . suppose[d] that this [would] be the last attempt by the government to use the conspiracy weapon,”⁹⁵ and found “no legal precedent for applying the conspiracy theory to [the defendants’ acts of advocacy].”⁹⁶ The “hazards to free expression of opinion”⁹⁷ were unacceptable, as successful prosecution would have produced “a pronounced chilling effect—indeed that of a sub-zero blast—on all kinds of efforts to sway public opinion,”⁹⁸ and “the ranks of individuals enlisted in a controversial public cause would visibly shrink if they knew that the jury could find them to be members of a conspiracy.”⁹⁹

The *Boston Globe's* lead editorial, *The Shrinking Conspiracy*, praised Coffin's courage and insight.¹⁰⁰ It is clear that, had the convictions of the *Spock* defendants been allowed to stand, the antiwar movement might have suffered a fatal setback. Instead, the demonstrations grew larger and more frequent, and while the war tragically lasted four more years, the “Boston Five” and their fellow resisters played a significant role in its final termination in 1973.¹⁰¹ The decision in *Spock* remains a bulwark against official attempts to stifle dissent.¹⁰²

⁹³ *Id.*

⁹⁴ *Id.* at 184 (Coffin, J., concurring & dissenting); John J. Dystel, Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 873 (1970) (noting the influence of Judge Coffin's dissent on reconciling conspiracy law with the First Amendment).

⁹⁵ *Spock*, 416 F.2d at 191.

⁹⁶ *Id.* at 186.

⁹⁷ *Id.* at 187.

⁹⁸ *Id.* at 188.

⁹⁹ *Id.*

¹⁰⁰ BRODIN, *supra* note 4, at 149.

¹⁰¹ See MICHAEL S. FOLEY, CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR 345-46 (2003) (noting that protests rose in 1968 and that there are strong arguments that the protests contributed to the withdrawal of troops and the ending of the conflict).

¹⁰² See Matthew Lippman, *Civil Resistance: The Dictates of Conscience and International Law Versus the American Judiciary*, 6 FLA. J. INT'L L. 5, 21 (1990).

In 1993, the twenty-fifth anniversary reunion of the Boston Five and their lawyers was held at the Park Plaza Hotel, a short walk from the Arlington-Street Church, where the critical events culminating in the indictment occurred. Prosecutor John Wall was an honored guest and speaker.¹⁰³ Now a criminal defense lawyer, he praised the defendants and counsel for their courageous idealism in those most trying times, and confessed that the *Spock* trial had converted him to the antiwar cause. Trial lawyer to trial lawyer, Wall singled out one member of the defense team in particular: “No one ever argued with more sincerity, conviction, and integrity than Bill Homans.”¹⁰⁴

The Supreme Court’s 1973 decision in *Roe v. Wade*¹⁰⁵ was—like *Brown v. Board of Education*¹⁰⁶ for an earlier era—a defining moment in American law and politics. Just as the 1954 decision condemning segregation in public schools dramatically split the nation as it had not been since the Civil War,¹⁰⁷ dividing North from South, *Roe*’s constitutional embrace of abortion has set its supporters and opponents in perpetual conflict ever since.¹⁰⁸

Nowhere was *Roe* more hostilely received than in Boston. And, once again, Bill Homans leaped into the fray. What began as a hearing before the City Council, investigating the use of fetal tissue in medical experimentation at Boston City Hospital, strangely evolved into the manslaughter prosecution of its chief resident in obstetrics and gynecology, Dr. Kenneth Edelin. Bill Homans was stunned when he first read the indictment: It charged that Edelin “‘did assault and beat a . . . Baby Boy ___, . . . kill[ing] . . . said person.’”¹⁰⁹ It turned out that a search of the hospital’s pathology lab led to the discovery of a fetus identified with a hysterectomy procedure that Edelin performed to abort his teenage patient’s

¹⁰³ David Nyhan, *A Prosecutor Praises “Patriot” Spock*, BOS. GLOBE, Sept. 30, 1993, at 15.

¹⁰⁴ BRODIN, *supra* note 4, at 150.

¹⁰⁵ 410 U.S. 113, 164 (1973) (holding that a state statute criminalizing abortions at any stage except to save the mother’s life violated the Due Process Clause of the Fourteenth Amendment).

¹⁰⁶ 347 U.S. 483, 495 (1954) (holding that segregation in public schools deprived African Americans equal protection of the law guaranteed by the Fourteenth Amendment).

¹⁰⁷ See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 710-31 (Alfred A. Knopf ed., 1976).

¹⁰⁸ See N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* 3 (2d ed. 2010) (describing the rift between abortion advocates and opponents in the aftermath of the *Roe v. Wade* decision).

¹⁰⁹ BRODIN, *supra* note 4, at 156-57, 159.

pregnancy.¹¹⁰ The medical examiner determined the “baby boy” had been viable and concluded it had been suffocated.¹¹¹

Edelin, a widely respected doctor who devoted nearly all his waking hours to the care of poor women and their babies, faced a twenty-year prison sentence in what many viewed as a transparent attempt to circumvent and, in effect, overturn *Roe v. Wade*.¹¹² Abortions were suspended at Boston’s only public hospital, and doctors and hospital administrators elsewhere around the country took very close notice.¹¹³

As is demanded of a defense lawyer in a complex case such as this, Homans spent several months intensely mastering the medical issues and formulating a trial strategy. The key issue was the viability of the “homicide victim” because *Roe*’s constitutional protection lifted after a fetus developed sufficiently to be able to survive on its own.¹¹⁴ Homans argued—and the judge agreed—that a manslaughter conviction could only follow if there was a live “person” whose life was terminated.¹¹⁵

Homans secured the testimony of several highly distinguished medical experts, all of whom assured the jury that the 600-gram fetus could not possibly have survived outside the mother’s body.¹¹⁶ He vigorously challenged the contrary opinions of the prosecution experts, successfully swaying many court observers.¹¹⁷ In dramatic fashion, Homans discredited the prosecution’s key witness, a resident present at the abortion procedure. The witness testified that Dr. Edelin had forcefully detached the “baby boy” from the placenta and then proceeded to deprive it of oxygen, while coldly counting off three minutes on the operating room wall clock.¹¹⁸ Homans proved with hospital maintenance records that there was *not* a working clock in the operating room at that time and that the resident’s story was otherwise medically implausible.¹¹⁹

¹¹⁰ See KENNETH C. EDELIN, *BROKEN JUSTICE: A TRUE STORY OF RACE, SEX AND REVENGE IN A BOSTON COURTROOM* 162 (2008).

¹¹¹ See *id.*; Diane White, *Jury Convicts Edelin of Manslaughter*, *BOS. GLOBE*, Feb. 16, 1975, at 4.

¹¹² BRODIN, *supra* note 4, at 157; White, *supra* note 111, at 1.

¹¹³ BRODIN, *supra* note 4, at 157.

¹¹⁴ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

¹¹⁵ BRODIN, *supra* note 4, at 169, 182, 184-85; see also Lawrence K. Altman, *Boston Jury Weighs Case Against Doctor in Abortion*, *N.Y. TIMES*, Feb. 15, 1975, at 30.

¹¹⁶ BRODIN, *supra* note 4, at 178-80.

¹¹⁷ William A. Henry III, *Those For and Against Abortion Agree Verdict is ‘Pro-Life’ Victory*, *BOS. GLOBE*, Feb. 16, 1975, at 9.

¹¹⁸ BRODIN, *supra* note 4, at 168.

¹¹⁹ *Id.* at 168-69, 181.

But Edelin's case was in the hands of a lay jury that was unversed in medical matters and in the sway of the flamboyant and folksy district attorney. Homans had unsuccessfully challenged the jury's composition, which was all white and overwhelmingly male.¹²⁰ Edelin was African-American.

On Saturday, February 15, 1975, after only seven hours of deliberations—following a grueling six-week trial—and to the gasps of many in the courtroom, the jury convicted Dr. Kenneth Edelin of manslaughter.¹²¹ Despite the substantial medical evidence to the contrary, the jurors found the fetus had been viable and capable of surviving on its own. In post-verdict interviews, some jurors pointed to an autopsy photograph admitted into evidence over defense objection, which looked enough to them like a baby to overcome any of their doubts.¹²²

Bill Homans later expressed shock at how vehemently the foreman shouted out "Guilty!" twice.¹²³ "It shows something of the temper of the part of the populace from which some of the members of the jury came," he mused.¹²⁴ "The evidence was so strongly in our favor," the usually circumspect Homans added to a reporter, "as to demonstrate there had to have been some kind of extraneous consideration in the minds of the jurors."¹²⁵

Despite the judge's explicit instructions that they could convict only if they found the doctor acted wantonly or recklessly and that negligence would not be sufficient, the jurors later explained they were put off by what they perceived as the defendant's cavalier attitude towards the fate of the fetus during his testimony.¹²⁶ They concluded on their own that a doctor performing an abortion is obligated to preserve the life of the fetus if at all possible, regardless of the prospects for meaningful existence.¹²⁷

Homans and Edelin gloomily predicted at a hastily called press conference that the verdict could bring back the dark era before *Roe v.*

¹²⁰ *Id.* at 163-64.

¹²¹ *Id.* at 186.

¹²² James Gleick, *The Commonwealth's Case*, THE HARV. CRIMSON, Feb. 22, 1975, available at <http://www.thecrimson.com/article/1975/2/22/the-commonwealths-case-pbnbot-long-after/>.

¹²³ White, *supra* note 111, at 1, 4.

¹²⁴ *Id.*

¹²⁵ *Doctor Asks Judge to Void Conviction in Abortion Trial*, N.Y. TIMES, Feb. 20, 1975, at 28.

¹²⁶ BRODIN, *supra* note 4, at 192-93.

¹²⁷ William A. Henry III, *Lone Holdout for Acquittal Tells How He Changed His Mind*, BOS. GLOBE, Feb. 17, 1975, at 1; John Kifner, *Women Rally for Doctor Convicted in Abortion*, N.Y. TIMES, Feb. 18, 1975, at 27; Seth Mydans, *When Is an Abortion an Abortion?* BOS. GLOBE, Feb. 16, 1975, at 1, 14.

Wade, when women's lives were endangered because medically safe abortions were not available.¹²⁸ Indeed, fearing prosecution, several hospitals around the country did suspend abortion procedures, especially late-term,¹²⁹ as did many individual doctors.¹³⁰ Other hospitals announced that life-support services would have to be on-hand for any late-term abortions performed at their facility, threatening to make such procedures cost-prohibitive.¹³¹

The personal impact of the verdict on Bill Homans and his client was immeasurable. Dr. Edelin angrily denounced the entire prosecution as a "witch hunt" against one of Boston's very few African-American physicians.¹³² The so-called "school-busing crisis," which followed the federal court's order to desegregate the public schools by transporting students outside their neighborhoods, caused tremendous racial tension in the city during that period.¹³³ Opposition in parts of the city had turned violent. The ugliness of the mood was captured in Stanley Forman's Pulitzer Prize-winning photograph of Ted Landsmark—a young black professional—being savagely speared in the face with an American flag wielded by anti-busing demonstrators right in front of City Hall.¹³⁴

The intense pressures of the high-stakes trial and the eighteen-hour days combined with the crushing blow of the verdict to cause the fifty-three-year-old Homans to suffer a major heart attack.¹³⁵ The next weeks and months would be the lowest point of the legendary lawyer's life. Lying helpless in the intensive care unit, he learned that Ken Edelin had retained noted Harvard Law professor Charles Nesson to prosecute the appeal.¹³⁶ Used to being able to seize victory on appeal from the jaws of a trial defeat, as he had in the *Spock* case,¹³⁷ Homans was despondent. Fortunately,

¹²⁸ See Joe Pilati, *Edelin Says 'Die Was Cast When Jurors Were Picked'*, BOS. GLOBE, Feb. 17, 1975, at 32.

¹²⁹ Lawrence K. Altman, *Implications of Abortion Verdict*, N.Y. TIMES, Feb. 16, 1975, at 41; Maria Karagianis, *Decision Seen Curtailing Later Abortions*, BOS. GLOBE, Feb. 19, 1975, at 3.

¹³⁰ Matt Clark et al., *A New Doctor's Dilemma*, NEWSWEEK, Mar. 3, 1975, at 24; Altman, *supra* note 129, at 41.

¹³¹ Ken O. Bowwright, *Abortion Changes May Hurt the Poor*, BOS. GLOBE, Feb. 19, 1975, at 1.

¹³² *Doctor Asks Judge to Void Conviction in Abortion Trial*, *supra* note 125; *Doctor, Convicted in Abortion, Charges Prejudice Barred Fair Trial in Boston*, N.Y. TIMES, Feb. 17, 1975, at 41.

¹³³ See generally *Morgan v. Hennigan*, 379 F.Supp. 410, 481-83, (D. Mass. 1974).

¹³⁴ Stanley J. Forman, *The Soiling of Old Glory*, Stanley Forman Photos (Apr. 5, 1976), <http://stanleyformanphotos.com/images/OldGlory.jpg> (last visited Oct. 28, 2011).

¹³⁵ BRODIN, *supra* note 4, at 195.

¹³⁶ *Id.* at 196, 198.

¹³⁷ See Thomas Church Jr., *Conspiracy Doctrine and Speech Offenses: A Reexamination of Yates v. United States from the Perspective of United States v. Spock*, 60 CORNELL L. REV. 569, 586

however, he recovered his health as well as his client's confidence, and he and Nesson went on to win one of the great victories in the struggle to protect women's reproductive choices and their doctors' right to practice medicine without fearing criminal sanctions.¹³⁸

When Homans first entered the case, he filed a series of pretrial motions for bills of particulars requiring the prosecution to delineate its theory of the case, specifically: (1) how a medical procedure of the sort Edelin performed could constitute manslaughter under the laws of the Commonwealth;¹³⁹ (2) precisely *what acts* constituted the homicide;¹⁴⁰ (3) whether the alleged manslaughter occurred *during or after* the procedure;¹⁴¹ (4) whether the fetus was *inside or outside* its mother at that time; and (5) when the fetus became a "person," and what was its *life expectancy*?¹⁴²

As in so many of Homans's cases, those early moves on the litigation chessboard turned out to be the source of the successful appeal years later. Trial lawyering is a complex strategic enterprise requiring considerable foresight and patience.¹⁴³ Counsel must operate in two time dimensions: real time, in the moment of the trial itself, and simultaneously in future time, with an eye towards presenting the matter on a cold transcript to an appellate court should the necessity arise.¹⁴⁴

The theory of the Commonwealth's case spelled out in response to Homans's pretrial motions—that Edelin had allowed the child to be born, by detaching it from the placenta, and then smothered it while still within its mother's womb—was not the same case that emerged at trial, where the tiny fetus died because Edelin had failed to provide it with immediate medical support to maintain its viability.¹⁴⁵

The Supreme Judicial Court's decision overturning Edelin's conviction, penned by Justice Benjamin Kaplan, one of the great minds in our profession, concluded that the case should never have been submitted to the jury.¹⁴⁶ The variance between the prosecution's conflicting theories of

(1975).

¹³⁸ Commonwealth v. Edelin, 359 N.E.2d 4, 11-12, 18 (Mass. 1976); see BRODIN, *supra* note 4, at 158, 204, 207.

¹³⁹ BRODIN, *supra* note 4, at 159.

¹⁴⁰ *Id.* at 160.

¹⁴¹ *Id.*

¹⁴² *Id.* at 159-60.

¹⁴³ See Judith A. Livingston & Thomas A. Moore, *Appeals*, in 4 LITIGATING TORT CASES § 47:11 (Roxanne Barton Conlin & Gregory S. Cusimano eds., West 2010).

¹⁴⁴ *Id.*

¹⁴⁵ BRODIN, *supra* note 4, at 173.

¹⁴⁶ Commonwealth v. Edelin, 359 N.E.2d 4, 5 (Mass. 1976).

the crime, as well as the insufficiency of evidence of wanton or reckless conduct on the doctor's part, required reversal of the conviction.¹⁴⁷

Justice Kaplan went on to exonerate Edelin's medical judgment: "To all appearances, the fetus was dead. Dr. Edelin found no heartbeat and saw no other indication that he had a live being in his hands. . . . [Moreover,] no witness was prepared to state that this fetus had more than the remotest possibility of meaningful survival."¹⁴⁸ His decision looked beyond the particular case, warning against allowing lay jurors in a criminal case to second-guess the "professional judgments of a qualified physician acting under stress at the operating table," and cautioning prosecutors against using the criminal process when it "must necessarily trench on professional practice and constitutional freedoms."¹⁴⁹

The Supreme Judicial Court's opinion was a complete vindication of Homans's extremely dedicated client, of his own legal strategy, of a woman's right to choose, and of her doctor's right to treat her accordingly. This final chapter in the Edelin saga was received with intense interest in the worlds of law, medicine, religion, and politics.¹⁵⁰

When his young associate tracked him down during a recess and showed him the court's decision, Bill Homans cried.¹⁵¹ He told reporters it was the happiest moment in his career.¹⁵² He had emerged from a near-death experience after the jury verdict to play a leading role in the preservation of the *Roe v. Wade* decision. Whatever the personal sacrifice had been, it was a glorious outcome.

Like Clarence Darrow, William P. Homans Jr. was passionately opposed to capital punishment. Unlike Darrow, Homans was able to achieve its abolition—at least in Massachusetts. After a series of earlier challenges had chipped away at the application of the ultimate penalty,¹⁵³

¹⁴⁷ See *id.* at 9-10.

¹⁴⁸ *Id.* at 11, 14.

¹⁴⁹ *Id.* at 14.

¹⁵⁰ See Nils Bruzelius, *Impact: Legal, Psychological*, BOS. GLOBE, Dec. 18, 1976, at 8; see also Laurie Hays, *Supreme Court Overrules Edelin Conviction Charges*, HARV. CRIMSON, Jan. 3, 1977, available at <http://www.thecrimson.com/article/1977/1/3/supreme-court-overrules-edelin-conviction-charges>.

¹⁵¹ BRODIN, *supra* note 4, at 204.

¹⁵² Joseph M. Harvey, *Edelin Cleared by High Court in Fetus Case*, BOS. GLOBE, Dec. 18, 1976, at 1.

¹⁵³ See *Commonwealth v. Harrington*, 323 N.E.2d 895, 901 (Mass. 1975); *Commonwealth v. Brown*, 323 N.E.2d 902, 908 (Mass. 1975); *Commonwealth v. King*, 313 N.E.2d 869, 869-70 & n.1 (Mass. 1974); *Commonwealth v. McAlister*, 313 N.E.2d 113, 119 (Mass. 1974); *Commonwealth v. A Juvenile*, 300 N.E.2d 439, 442 (Mass. 1973); *Commonwealth v. Stewart*,

victory came in 1975 when the Supreme Judicial Court decided *Commonwealth v. O'Neal*.¹⁵⁴

Robert O'Neal's case was a most unlikely vehicle for reform, as the crime he was convicted of committing was horrific—breaking into a fifty-eight-year-old woman's home; raping and strangling her; then repeatedly stabbing her helpless disabled adult son, who remarkably survived to testify at trial.¹⁵⁵ O'Neal's conviction for murder committed in the commission of rape was the one remaining crime in Massachusetts that carried a mandatory death sentence.¹⁵⁶

Bill Homans assembled a group of top-flight lawyers and academics¹⁵⁷ to work on the scholarly appellate brief, filled with literary allusions and sociological data, that would ultimately convince the Supreme Judicial Court to do what its counterpart in Washington, D.C. had refused to do¹⁵⁸: declare that the death penalty was cruel and unusual punishment and, therefore, unconstitutional.¹⁵⁹ *Commonwealth v. O'Neal* was issued three days before Christmas and stands as a testament to judicial courage and compassion.¹⁶⁰

Despite the fact that support for the death penalty was at its height, Chief Justice G. Joseph Tauro wrote that “judges cannot look to public opinion polls or election results for constitutional meaning” without sacrificing “that requisite independence and impartiality demanded of us.”¹⁶¹ “Oppressed, disfavored or unpopular minorities would be the victims of any loss of judicial independence,” and “[n]o judge should ever be concerned with whether his decision will be popular or unpopular.”¹⁶²

No clearer statement of Bill Homans's guiding philosophy as an advocate can be found. His clients—even Robert O'Neal—commanded his

270 N.E.2d 811, 815 (Mass. 1971). The strategy was reminiscent of Thurgood Marshall's strategy against the separate-but-equal doctrine. See KLUGER, *supra* note 107, at 288-89, 292-94, 449.

¹⁵⁴ 339 N.E.2d 676, 677 (Mass. 1975).

¹⁵⁵ BRODIN, *supra* note 4, at 209-10.

¹⁵⁶ *Id.* at 210.

¹⁵⁷ *Id.* at 215. The group included: Max Stern, Larry Shubow, Clyde Bergtresser, Tufts Professor Hugo Bedau, and Harvard Law Professor Laurence Tribe.

¹⁵⁸ See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (banning the death penalty only where the jury was permitted by statute to use unbridled discretion in imposing it).

¹⁵⁹ The Massachusetts Constitution bans “cruel or unusual” punishment, while the Federal Constitution's Eighth Amendment speaks in terms of “cruel and unusual.” Compare U.S. CONST. amend. VIII, with MASS. CONST. art. XXVI (emphasis added).

¹⁶⁰ 339 N.E.2d at 676.

¹⁶¹ *Id.* at 692.

¹⁶² *Id.* at 692-93.

total effort on their behalf, notwithstanding their offenses and consequent unpopularity. The Supreme Judicial Court opinion reads like a total endorsement of his abolitionist position—namely, that capital punishment serves no useful purpose as a deterrent but simply reflects society’s most primitive impulse towards vengeance and retribution.¹⁶³ The Commonwealth, which had gained international notoriety for the Salem Witch Trials and the controversial execution of Italian immigrants Sacco and Vanzetti, now led the way towards a more enlightened approach to crime and punishment.¹⁶⁴

There would be many subsequent efforts to restore the death penalty in Massachusetts through legislation and later a ballot referendum amending the state constitution, but at every turn Bill Homans fought back valiantly.¹⁶⁵ In *District Attorney for the Suffolk District v. Watson*,¹⁶⁶ he represented an African-American teenager charged with killing a white taxi cab driver, and facing a new capital punishment statute designed to maneuver around *O’Neal*.¹⁶⁷ Homans persuaded the court to embrace two core arguments that death penalty opponents had been pressing for years: that the penalty is meted out after an endless series of unreviewable, discretionary decisions and that race and ethnicity play an insidious role.¹⁶⁸ The court wrote:

Power to decide [who gets sentenced to death] rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges. In the totality of the process, most life or death decisions will be made by these officials, unguided and uncurbed by statutory standards. In any given case, decisions may rest upon such considerations as the level of public outcry. . . . [T]he criminal justice system allows chance and caprice to continue to influence sentencing, and we are here dealing with the decisions as to who shall live and who shall die. With regard to the death penalty, such chance and caprice are unconstitutional under art. 26. . . . Moreover, the existence of racial prejudice in some persons in the Commonwealth of Massachusetts is a fact of which we take

¹⁶³ *Id.* at 687.

¹⁶⁴ *Id.* at 695 n.1 (Wilkins, J., concurring).

¹⁶⁵ See generally Alan Rogers, “Success—At Long Last”: *The Abolition of the Death Penalty in Massachusetts, 1928-1984*, 22 B.C. THIRD WORLD L.J. 281, 350-53 (2002) (tracing history of the capital punishment debate in Massachusetts following *Commonwealth v. O’Neal*).

¹⁶⁶ 411 N.E.2d 1274 (Mass. 1980).

¹⁶⁷ *Id.* at 1275.

¹⁶⁸ *Id.* at 1283 (“It is inevitable that the death penalty will be applied arbitrarily. Also, experience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks.”).

notice.¹⁶⁹

Chief Justice Hennessey concluded the opinion with the sentiment that had driven Bill Homans for decades: “There is an impetus to respond in kind in punishing the person who has been convicted of murder, but the death penalty brutalizes the State which condemns and kills its prisoners.”¹⁷⁰ Homans lived to see the *Watson* decision cited as precedent by the newly formed Constitutional Court of South Africa when it abolished the death penalty in the Republic.¹⁷¹

Homans saw the death penalty as a grotesque manifestation of both the frailties of the criminal justice system, as well as the base instincts residing deep in the human psyche. His success in the campaign against it can be attributed to his stubborn persistence, his magnificent skills of persuasion, and the moral courage of the state’s highest judges. But Homans also had a unique capacity to bring the issue—too often treated as an abstraction—down to a personal level:

It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify—those most like ourselves in appearance, background and mores. Conversely, wrongs we could not tolerate when done to our own kith or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities and to the poor therefore cannot be ignored in assessing the quality of such acceptance as the penalty has had. . . . To the average citizen and the citizens of influence, death remains for *them*, not for *us*. . . . A harsh penalty, unacceptable in general application is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared.¹⁷²

Very few of us would make the deliberate and calculated choice to be the man or woman who kills another man or woman, no matter how depraved. Those who have made that choice beyond the sanctions of the law are murderers. As citizens each of us ultimately *is* the Commonwealth of Massachusetts. When we authorize our officials to kill, do we not place ourselves on the level of the murderers?

¹⁶⁹ *Id.* at 1285-86.

¹⁷⁰ *Id.* at 1286.

¹⁷¹ See *State v. Makwanyane* 1995 (3) SA 1 (CC) at 54 n.82 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf>.

¹⁷² Brief for Defendant at 123-26, *Commonwealth v. O’Neal*, 327 N.E.2d 662 (Mass. 1975) (No. 15, 449) (footnotes omitted).

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The Commonwealth's choice, and therefore our choice, is as deliberate and calculated as the murderer's choice. To choose to kill makes each one of us part of the cycle of violence we abhor. The death penalty is a legal and moral institutionalization of violence.¹⁷³

Among the numerous honors and awards he received during his career, none meant more to Bill Homans than that conferred by the Massachusetts Campaign Against the Restoration of the Death Penalty in May 1982.¹⁷⁴ The overflow crowd event at Harvard Law School featured legendary civil rights leader Julian Bond, who presented Bill with a plaque commemorating "his outstanding contributions toward eliminating the death penalty in Massachusetts and for many other achievements protecting and defending the civil rights of the citizens of the Commonwealth."¹⁷⁵

The intense pressures of his work—taking on far too many cases for any one lawyer to handle, many of them capital murder—together with his egregious inability to manage his finances, took a major toll on Bill Homans. He engaged in the self-destructive behavior all too familiar among some trial lawyers—alcohol, tobacco, and fifteen-hour workdays.¹⁷⁶ It cost him a stable family life, several close friendships, and ultimately his health. Homans would quip to friends that his home was his office, and that was all too true.

In this regard, of course, Bill Homans is certainly not a role model for young lawyers. But in terms of his profound commitment to clients and causes, his intellectual prowess, and his idealism, he has set a very high bar for all of us. He truly lived by Dostoyevsky's dictum that a society should be judged not on how it treats its outstanding citizens, but its most despised criminals and prisoners.¹⁷⁷

Bill Homans believed a republic founded on democratic ideals and the dignity of each individual must afford everyone accused of crime, no matter its nature, a fair trial with competent representation and the full panoply of procedural protections, putting the Government to its

¹⁷³ *Forum*, BOS. HERALD, Apr. 3, 1981, at 17.

¹⁷⁴ BRODIN, *supra* note 4, at 225-26.

¹⁷⁵ *Id.*; Laurie Ledgard, *Fight Death Penalty, Bond Says in Mass.*, BOS. GLOBE, May 26, 1982, at 64.

¹⁷⁶ BRODIN, *supra* note 4, at 31-33.

¹⁷⁷ *Kane v. Winn*, 319 F. Supp. 2d 162, 175 (D. Mass. 2004) (citation omitted) ("As Fyodor Dostoyevsky once said: 'The degree of civilization in a society can be judged by entering its prisons.'").

substantial burden of proof.¹⁷⁸ He believed the death penalty has no place in such a polity, particularly given what he knew all too well were the flaws in the criminal justice system and the extent to which unguided discretion by law enforcement and prosecutorial officials rendered selection of its victims an arbitrary and capricious enterprise.¹⁷⁹

Always true to his code, always ready to fight for his values, Bill Homans and others including former U.S. Attorney General Ramsey Clark, former Assistant Attorney General Burke Marshall, and Professor Charles Nesson established the Lawyers Military Defense Committee (“LMDC”) in Saigon in 1970 (shortly after the *Spock* case) to provide *pro bono* representation to American soldiers accused of serious offenses and tried before military courts.¹⁸⁰ They knew that these tribunals, where the prosecutors, defense lawyers, and judges are all in the same chain of command, could not assure fair treatment of the accused.¹⁸¹

Homans traveled to Vietnam to defend the LMDC’s first client, Private First Class Tyrone Peterson, a twenty-year-old African American draftee from the Roxbury section of Boston, charged with shooting and killing his staff sergeant after an altercation over a Vietnamese woman.¹⁸² The Army sought the death penalty.¹⁸³

As *Time Magazine* reported:

In Boston, Homans is known as a “right-on lawyer” – he defends blacks, war protesters and poor people. But in Viet Nam, the huge, jocular attorney was too wise to come on as an overweight William Kunstler. He made sure that all the military people knew he was a World War II Navy veteran; he affected a when-in-Rome costume of field boots and green fatigues with his name sewed on the shirt pocket. And he did not advertise that he had defended Michael Ferber at the Dr. Spock (draft conspiracy) trial.

Respectful but never inhibited in court, Homans put the prosecution witnesses through an uncompromising interrogation. Their stories became confused, and Peterson was acquitted of all charges.¹⁸⁴

¹⁷⁸ See Rogers, *supra* note 165, at 347 (discussing arguments that William Homans made in his brief for the defendant).

¹⁷⁹ See BRODIN, *supra* note 4, at 220-21.

¹⁸⁰ See *id.* at 151.

¹⁸¹ See *id.*

¹⁸² *Id.* at 151-52.

¹⁸³ *Id.* at 152.

¹⁸⁴ *The Law: Counsel for the GI Defense*, TIME, Oct. 19, 1970, at 4, available at <http://www.time.com/time/magazine/article/0,9171,944148,00.html>.

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If he were alive today, William P. Homans Jr. would be denouncing the system of military tribunals for detainees at Guantanamo, and flying to Cuba to represent them. He would do this while juggling dozens of other trials and appeals for persons of little consequence to the rest of society, some guilty as charged, some not. He would offer his services to any individual or group whose speech the Government sought to curtail, regardless of whether he agreed, or vehemently disagreed, with their views. He would challenge the crackdown and oppression of the despised *du jour*, be they Muslims, or immigrants, or counterculture activists.

No one has fought harder to ensure that the American system of justice lives up to the lofty ideals set for it by the brave souls that made the Revolution and wrote our Constitution.