

## Pro Bono Representation: An Historical Perspective

Law Day is the day we examine and celebrate our commitment to the rule of law. No one embodied that commitment more than John Adams, who in 1774 referred to “a government of laws, not of men.”<sup>1</sup> That phrase expressed his firmly held belief that the rule of law was not only the foundation for republican government, but also for political and personal liberty. Adams’ belief in the rule of law was demonstrated by his representation of the British soldiers accused of killing five colonists in the Boston Massacre.

The stage for what would become known as the Boston Massacre was set in 1768 when British troops began arriving to enforce order after the colonists started protesting what they considered to be unfair taxes. By 1770, there were 4,000 British troops in Boston alone, a town of just 20,000 residents. On the evening of March 5, 1770, British soldiers under the command of Captain Thomas Preston fired into a crowd of protestors who had gathered near the Customs House on King Street in Boston. Five colonists died. Captain Preston and eight of his men were arrested and indicted for murder.

Adams agreed to represent the soldiers because he believed they deserved an effective defense. He recognized, however, that the representation would come at great cost. In his autobiography, Adams recalled being asked to represent Preston:

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<sup>1</sup>“Novanglus Papers” no. 7 (1774), *quoted in Yale Book of Quotations* (Fred Shapiro, ed.) (Yale University Press, 2006) at 4.

The next Morning . . . Mr. Forrest came in . . . . I had some Acquaintance with him. With tears streaming from his Eyes, he said I am come with a very solemn Message from a very unfortunate Man, Captain Preston in Prison. He wishes for Council, and can get none. . . . I had no hesitation in answering that Council ought to be the very last thing that an accused Person should want in a free Country. That the Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance. And that Persons whose Lives were at Stake ought to have the Council they preferred: But he must be sensible this would be as important a Cause as ever was tryed in any Court or Country of the World: and that every Lawyer must hold himself responsible not only to his Country, but to the highest and most infallible of all Trybunals for the Part he should Act. . . . Before or after the Tryal, Preston sent me ten Guineas and at the Tryal of the Soldiers afterwards Eight Guineas more, which were all the fees I ever received or were offered to me, and I should not have said any thing on the subject to my Clients if they had never offered me any Thing. This was all the pecuniary Reward I ever had for fourteen or fifteen days labour, in the most exhausting and fatiguing Causes I ever tried: for hazarding a Popularity very general and very hardly earned: and for incurring a Clamour and popular Suspicions and prejudices, which are not yet worn out and never will be forgotten as long as History of this Period is read.

3 John Adams, Diary and Autobiography of John Adams 292-94 (L.H. Butterfield ed., The Belknap Press of Harvard University Press 1961).

Preston's trial began in October 1770, during which Adams cast doubt on whether the Captain had given orders to shoot. Preston was acquitted. The trial of the eight soldiers began in December 1770. Adams argued the soldiers had fired in self-defense based on reports that the protestors had hurled insults, snowballs,

oyster shells, and other objects at the soldiers. The jury acquitted six of the soldiers, but found the two who had fired their weapons guilty of manslaughter. In a diary entry made on the third anniversary of the Boston Massacre, Adams wrote of his representation:

The Part I took in Defence of Cptn. 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.

2 John Adams, Diary and Autobiography of John Adams 79 (L.H. Butterfield ed., The Belknap Press of Harvard University Press 1961).

Adams' legacy of defending the rights of the accused and representing unpopular clients has continued throughout the history of this country. In 1846, William Seward, who would become President Lincoln's secretary of state, took on the highly unpopular defense of William Freeman. Freeman, a mentally ill man of Native American and African American descent, was accused of breaking into a home and killing its four occupants, including a child and a pregnant woman. Seward argued against executing Freeman on the then relatively new defense of insanity. In 1886, three attorneys represented eight men accused of inspiring a riot and killing police officers in Chicago. The eight, known as the Haymarket 8, were mostly immigrant workers. The three attorneys – Sigmund Ziesler, William Foster, and William Perkins Black – defended their clients with appeals to the jury to remember their duty to apply the law without prejudice. As the jury was packed with

supporters of the prosecution, the attorneys' appeals fell on deaf ears. All eight defendants were convicted, and four were hanged. In 1893, the three surviving defendants<sup>2</sup> were pardoned by Governor John P. Altgeld. Altgeld, who was also an attorney, wrote a detailed pardon in which he painstakingly argued the injustice of the men's trial.<sup>3</sup> In issuing the pardon, Altgeld knowingly sacrificed a promising political career to correct what he saw as a gross miscarriage of justice.

In 1931, nine young black men were accused of raping two white women on a Southern Railroad freight train. They were arrested, tried, convicted, and sentenced to death in April of that year. Trials and appeals would go on for more than seven years, and the case twice came before the United States Supreme Court, which overturned the convictions on constitutional grounds, resulting in retrials. In 1933, Samuel Liebowitz, a New York attorney, began representing the men, who had become known as the Scottsboro Boys. In Alabama, Liebowitz encountered vicious anti-Semitism and received numerous threats. The trial judge, James Horton, became convinced of the defendants' innocence, and on June 22, 1933, he granted a defense motion for a new trial. Judge Horton faced reelection the next year and knew that setting aside the verdict would ruin his chances. He nonetheless did so because he believed "one should 'let justice be done, though the

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<sup>2</sup>One defendant committed suicide while in jail.

<sup>3</sup>The full text of the pardon of the remaining three defendants can be found at [http://law2.umkc.edu/faculty/projects/ftrials/haymarket/pardon.html#REASONS\\_FOR\\_PARDONING](http://law2.umkc.edu/faculty/projects/ftrials/haymarket/pardon.html#REASONS_FOR_PARDONING).

heavens may fall.”<sup>4</sup> As a result of this principled ruling, Judge Horton did indeed lose his reelection bid. After a new judge was assigned to the case, two defendants were convicted and sentenced to death after a racially charged trial. After years in prison, four of the remaining defendants were released and three were paroled or pardoned. The trial of Tom Robbins in *To Kill a Mockingbird* is widely believed to have been inspired by the trials of the Scottsboro Boys, which had attracted national attention.

Closer to home, attorneys who are members of this District were appointed to represent Timothy McVeigh after the April 19, 1995 bombing of the Alfred P. Murrah Federal Building. Before the federal courthouse was even cleared of debris, attorneys Susan Otto and John Coyle were ensuring that McVeigh received effective representation by representing him at his initial appearance and detention hearings and by filing a number of motions including motions to transfer and to preserve evidence. After Otto and Coyle were permitted to withdraw, the court appointed Stephen Jones, Richard Burr, and Robert Nigh to represent McVeigh, which they did through trial. The court appointed Michael Tigar and Ronald G. Woods to represent Terry Nichols, McVeigh’s co-defendant in the federal case. After Nichols was convicted of conspiracy and manslaughter in the federal case and sentenced to life imprisonment, he was indicted by the State of Oklahoma on 161 counts of first

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<sup>4</sup>Douglas O. Linder, *The Trials of “The Scottsboro Boys”* [http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB\\_acct.html](http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.html).

degree murder. Ponca City attorney Brian Hermanson was appointed to lead the defense for Nichols during the state prosecution. Echoing thoughts that Adams had voiced more than 200 years earlier, Hermanson reflected

I had many concerns. Death penalty work is always hard on the lawyer and his or her family. The case consumes you and the stress level is high. These cases cause financial hardships and can have a long-term effect on your practice. My family readily accepted my role in leading the defense of [Nichols]. They . . . really believed that he needed the assistance of dedicated counsel.<sup>5</sup>

In the end, Hermanson felt it was a great honor to be selected as the lead attorney even though he knew he would be representing a man “who was hated by most Oklahomans”. Id.

The need for attorneys to ensure that we are a nation of laws and not men continues today. In 2002, the Bush Administration established a detainment facility for enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba. At one time, as many as 800 men were at this facility; fewer than 200 remain today. Lawyers sought to represent the detainees almost from the beginning, and the legal status of the detainees has been determined largely through their efforts. For example, in Boumediene v. Bush, 553 U.S. 723, 771 (2008), the United States Supreme Court held that detainees were entitled to the privileges of habeas corpus to challenge the legality of their detention. In March 2010, twenty-two prominent lawyers signed an open letter supporting the role of attorneys in representing

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<sup>5</sup><http://www.abanet.org/genpractice/magazine/2006/jul-aug/brianhermanson.html>.

Guantanamo detainees, declaring, “The American tradition of zealous representation of unpopular clients is at least as old as John Adams’s representation of the British soldiers charged in the Boston Massacre.”<sup>6</sup> John Adams would be proud that what he called “one of the best Pieces of Service I ever rendered my Country” continues today through the actions of attorneys who do not hesitate to heed the call of pro bono service.

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<sup>6</sup>*Statement on Justice Department Attorney Representation of Guantanamo Detainees* [http://www.brookings.edu/opinions/2010/0307\\_guantanamo\\_statement.aspx](http://www.brookings.edu/opinions/2010/0307_guantanamo_statement.aspx).