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Teaching Advocacy with History and in Context.

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It has been said that students faced with greater expenses than before of attending university are choosing, with an eye to their future, to study law courses which have a vocational element.

At universities there has been a growth of courses which introduce students to advocacy in simulated court cases, and in clinical legal education, often involving, representing real clients before various tribunals under supervision². Students are taught practical skills of advocacy. These courses are generally well received by students, often provide them with confidence and may well lead some to qualify as lawyers³.

It is submitted that students' appreciation and knowledge of courtroom advocacy could be further enhanced by adding study about what has shaped it and what is doing so now: The writer, having comparatively recently completed a PhD on the subject⁴, is convinced that the story of advocacy deserves being told wider.

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²Mooting, another form of experiential education, engaging the learner in the phenomena being studied (see Jeffrey Cantor, *Experiential Learning in Higher Education: Linking Classroom and Community* ,ERIC Clearing house on Higher Education 1997), has also increased over recent years.

³Their educational advantages were ably set out by Lars Mosesson and Peter Coe, of Buckingham New University, in their Workshop on Mooting and Advocacy as Part of a Law Degree delivered at Association of Law Teachers Conference at Lady Margaret Hall, Oxford in 2012.

⁴*Influences on Court Advocacy from the 17th to the 21stCentury*, University of Surrey, 2012.

A proposal to include history and context in courses with much vocational content requires elaboration and to be justified⁵.

A suggested approach

A number of approaches could be taken for adding history and context to advocacy skills courses. One might involve explaining that for the greater part of the period it is envisaged covering, the early 17th Century to the present, much advocacy in England and Wales, especially for jurors, was directed to the passions, the emotions. It was often loud, long and declamatory, frequently diffuse and meandering, full of pathetic description, florid, extravagant in words and gestures to the point of theatricality. Advocacy was sometimes marked by intemperate exchanges amongst counsel and between counsel and judges, brow beating and bullying of witnesses. An important part of advocacy was to obscure and confuse, to cloak weaknesses in cases. Examples of this sort of advocacy could be introduced to students⁶. A contrast would next be drawn to today's advocacy which is no longer prolix, but highly focused and limited by considerations of time, vastly more subdued, undertaken in plain language without the borrowed plumage of poetry and the classics, restrained by tight rules of procedure and evidence and, in a spirit of forensic enquiry, aimed at satisfying what is required by substantive law. Any appeal to the emotions of jurors is carefully disguised as reason or made subliminally. Advocacy now extends beyond the oral to that on paper and outside the court to various forms of arbitration and mediation.

The great changes in English advocacy, which occurred at an uneven speed, and were most rapid in the late 20th Century, resulted from a complex mixture of many influences, but most notably because of individual advocates, alterations in the law and broader social factors.

⁵Because of its apparent novelty, the writer is unable to situate directly the proposal in existing literature on the subject.

⁶ For sheer aggression and ruthlessness, passages from Edward Coke's prosecution of Sir Walter Raleigh, in 1603 and exchanges in court between Coke and Francis Bacon could be read to students. Perhaps, as an example of the extravagance and floridity of language, much employed at the beginning of the 19th Century, passages from John Philpot Curran's closing speech in the scandalous Marquess of Headfort case, in which allusion is piled on analogy, metaphor and simile and syllogism is richly present in an overwhelming appeal to emotion, could be presented (See Appendix One for excerpts from these cases that might be presented to students).

Taking the long view, from the early Seventeenth Century, principal drivers identified as key in the development of advocacy⁷ could be introduced and examined. They would include:

The approaches, methods and styles of successful members of the bar.

In a small profession, which, until very recently, lacked formal training in advocacy, junior advocates watched closely how *big men* performed in court and sought to emulate their triumphs. Those particularly observed, and who often took advocacy further along its path, include: Coke, Bacon, Cowper, Yorke, Murray, Burke, Sheridan, Garrow, Brougham, Scarlett, Erskine, Romilly, Copley, Curran, O'Connell, Phillips, Kenealy, Parry, Ballantine, James, Digby –Seymour, Hawkins, Clarke, Holker, Hardinge-Giffard, Russell, Isaacs, Muir, Wrottesley, Carson, Smith, Marshall- Hall, Hastings and Curtis-Benett, Birkett⁸.

Opportunities would thus arise to present students to lawyers from the past who did so much to shape advocacy and some much beyond. Samples of their advocacy, descriptions of their careers, the significance of cases in which they appeared (for example those of Thomas Erskine, who did much to establish the cab –rank rule⁹ at the bar and halt the repression under Pitt in the 1790's) and personal histories could be presented.

⁷See Andrew Watson, *Influences on Court Advocacy from the 17th to the 21st Century*, PhD thesis, University of Surrey, 2012, Conclusion, pp.352-357.

Two principal research techniques were employed in the thesis: A literature survey and semi-structured interviews. The former involved finding and reading modern literature dealing with the history of advocacy and its contemporary practice, and books, journals and articles that provided more general explanation and background; discovering and exploring works about courtroom advocacy, mainly written for practitioners, from earlier centuries; considering law reports; studying press and journal accounts of trials and how advocates conducted themselves in them; reading biographies and autobiographies of judges and renown advocates⁷; listening, or reading transcripts, of radio programmes which concern advocates, judges and trials, and watching television programmes and plays on these subjects.

Libraries resorted to most were: Lincoln's Inn; Gray's Inn; Institute of Advanced Legal Studies, University of London; Senate House, University of London; Squire Law Library, University of Cambridge; University Library, Cambridge University; Harvard Law School Library; Harvard University Library; Roger Williams University, Rhode Island; and the Law Library, College of Law, Bloomsbury Branch, London.

Interviews in England and Wales took place with: judges in the House of Lords (3), the Court of Appeal (3), the High Court (2), the County Court (2) and the Crown Court (2); practicing barristers (12, including 6 Queen's Counsels); solicitors (8); retired judges (including 2 from the House of Lords and 3 from the County Court), barristers (6, including 1 Queen's Counsel) and solicitors (3); and teachers of legal vocational courses (5). Additionally, interviews were conducted with lawyers and judges from the United States and with British and American academics.

⁸ In more recent times DuCann, Carman, Gray, Arlidge and Beloff would be of much interest.

⁹ The cab rank rule provides that a Barrister must not withhold their services on the basis of their personal views of the case, client or funding source. It has been a defining feature of the English Bar for several hundred years,

Judicial tastes. Advocates seeking to persuade adopt styles and techniques calculated to please judges. These may bear resemblance to those used by judges when they were advocates. When sitting without jurors judicial taste is strongly for practical and unadorned advocacy. Much appreciated is an orderly presentation of the facts, to which the law must be applied, after which they greatly prefer to be left alone, unexposed to rhetorical embellishment.

Changes in court procedure brought about by judges, for example in the 18th Century allowing counsel to represent prisoners charged with felony (and in the civil context, over two centuries later, the High Court Practice Directions of the 1980s and 1990s), *and under statute,* notably the Prisoners' Counsel Act 1836, allowing defendants full representation by counsel. Some students may well be surprised that what are now accepted as fundamental features of fair procedure are comparatively recent in origin.

Public and press opinion about the acceptable limits of advocates' tactics and oratory: This was very relevant with the excesses of the first sixty or so years of the Nineteenth Century, especially after the Prisoners' Counsel Act 1836.

Rules of etiquette and conduct established by barristers and solicitors and the enforcement of them by the Bar Council, Bar Messes and the Law Society.

Levels of respect and civility between advocates and between the bar and the Bench and the latter's ability to control proceedings in court and impose limits on counsel's forensic license.

The amount of reporting by the press of court cases: A link existed, probably at its strongest in the 19th Century, between the publicity advocates received and their

conduct. The matter is topical once again with proposals to televise certain court proceedings.

Greater following by courts of case precedent, the consolidation of stare decisis, in the Eighteenth and Nineteenth Centuries and its effect on argumentation by lawyers.

Reforms in the law of evidence concerning who, and what, may be put before courts and informing the content of submissions made. Conspicuous examples include the rise of hearsay evidence and its demise in civil trials, the ability of defendants to give evidence on their own behalf and expert evidence.

More and complex substantive law after the opening of the Victorian period with greater regulation, in the wake of industrialization, growth of commerce and banking and huge expansion of international trade. The need to satisfy requirements of statutes, ie to make submissions on law, displaces room for rhetoric and also promotes precise, rather than indiscriminate, examination of witnesses and strictly relevant closing speeches.

Major alterations to criminal and civil procedure in both the Nineteenth and Twentieth Centuries. Prominent examples of the former include the Criminal Procedure Act 1851 and the Indictments Act 1915 and of the latter, the Judicature Acts 1873-1881 and Civil Procedure Rules, 1999.

A reduction in the use of juries in both civil and criminal trials, from the mid-Nineteenth Century. This lessened opportunities for passionate appeals to emotion, floral passages and histrionic gestures.

The social origin of jurors and levels of their education. Greater education amongst common jurors in the later Victorian era made them less susceptible to advocates' melodramatic appeals than before. Jurors with broader perspectives,

including scientific knowledge and Charles Darwin's theories, expected more of an appeal to reason in a conversational and matter of fact manner, rather one pitched at their emotions and religious faith. Successful barristers in the later Nineteenth Century recognised this and altered their advocacy accordingly.

Democratization of juries. The Juries Act 1974, which swept away the property qualification for jury service, led to a massive increase in numbers of potential jurors, more women jurors and a reduction in the minimum age to 18. Advocates became more aware than ever that in addressing juries they had to take into account the range of educational attainment and contemporary use of language and, when making allusions, draw on popular culture, shaped by newspapers, novels, radio, films and television (and now increasingly the computer internet).

General styles of public speaking and discourse in society, for example the decline of declamation and grand oratory and the emergence of a more intimate *fireside* approach. Students may also be made aware of how language has changed over the centuries studied.

The rise of "paper advocacy" advocacy in the late Twentieth Century with skeleton arguments and witness statements standing as examination in chief in civil cases and an increase in reliance on the written word in criminal matters.

The educational curriculum usually received by judges and lawyers, which has substantially evolved since the 1960s, and its effect on allusions made in court. The much reduced place of the Classics, Latin and Greek, once so prominent, is a striking feature.

Formal teaching of advocacy to barristers and solicitors, only comparatively recently introduced and generally held to be beneficial.

Payment. A relationship, although not a simplistic one, between the quality of advocacy and the amount parties and the state are prepared to pay for it. This is

perhaps particularly germane at present with cuts both to public funding of cases (legal aid) and to the Crown Prosecution Service.

Technology including the effect of television on the attention spans of jurors, said to have been observed since the Nineteen Sixties, concerns about whether younger jurors, used to obtaining information in a highly visual world, can follow lengthy verbal addresses to them (Students could be asked for their opinions on this) and about unauthorized research during trials using the internet. The use of computers to display evidence, a more prominent feature in the United States, is also highly topical.

Widening the pool of advocates to include solicitors with Higher Rights of Audience in the higher civil courts and the Crown Court and above, Fellows of the Institute of Legal Executives in the lower courts and representatives of the Crown Prosecution Service not admitted as members of the legal profession in the Magistrates.

Measures to ensure the quality of advocacy including the formation of the Quality Assurance for Advocacy Scheme and the programme operated by the Crown Prosecution Service for all levels of its advocates.

Additionally, in classes, comparisons could be drawn between modern advocacy in England and Wales and America (references could also be made to how it has evolved in the latter) and between countries with a non common law legal tradition. A fascinating comparison could be made with Japan where oral advocacy has assumed a greater importance in recent years¹⁰.

¹⁰In May, 2009, a new mixed court system (*Saiban-in Seido*), in which six randomly chosen citizens sit as lay judges with three professional judges to try serious criminal cases, previously tried by judges alone, was introduced in Japan after five years of planning. Hitherto, language used by judges and advocates in court was highly technical. Little examination of witnesses occurred and there was much reference to written evidence and submissions. Documents would be read to judges, usually in a dry way and with hardly any eye contact, in the knowledge they would be reviewed by them later. All this took place in a context of a shared unspoken understanding between judges prosecutors and defence lawyers and in which subtle signals to each other, including rhythmic breathing, were employed. Considerable preparation was undertaken to ensure that the style and content of lawyers' addresses to the lay members of the court would be comprehensible to them. This included holding mock trials and training prosecutors, defence lawyers and judges, often drawing on foreign expertise, about oral advocacy

Issues of modern relevance such as whether the cab rank rule should continue to exist as a rule of professional ethics¹¹, preparation of witnesses, televising courts, particularly rich from the point of view of international comparison, the reduction in public funding of cases and the expected rise in people representing themselves in court, as a result¹² others could be discussed and debated, perhaps in the form of moots. Further, similarities and contrasts could be drawn between courtroom fiction and reality. This might be aided by showing excerpts from films and documentaries.

Students could experience modern advocacy in visits to courts. In London these might include busy Magistrates courts, the Old Bailey, the Royal Courts of Justice, for the High Court and Court of Appeal, and the Supreme Court. A tour around the Inns of Court(steeped in history) , including entering some of the Halls with their portraits of great advocates past, might also be organised¹³.

to lay persons. See Colin Jones, *An American Lawyer's View of the Law Judge System*, Heibonshinsho, Tokyo, 2009 and A Watson in Hans –Peter Marutschke ed. *Laienrichter in Japan, Deutschland und Europa*, BWV, Berlin, 2006, *Popular Involvement in Criminal Justice; Should the Jury Return to Japan? – And the question of mixed court*, pp. 101 – 186. Jury trial has been restored in Russia and Spain. Reforms to civil procedure in 1993 and 2003 in Finland, partly to reduce delay caused by repeated adjournments and to establish a more concentrated form of hearing, have resulted in greater orality during court proceedings and have lessened reliance on written evidence and legal submissions. See Laura Ervo, *Scandinavian Trends in Civil Pre-trial Proceedings*, Civil Justice Quarterly., Volume 26, October, 2007, pp. 466- 483.

¹¹See, for example, Flood J. and Hviid M., *The Cab Rank Rule*, Report for the Legal Services Board, 2013, who see it as serving no clear purpose and, whilst to be lauded as a professional principle enshrining virtuous values, is redundant and McLaren et al, *The “Cab Rank Rule”: A Fresh View*, Fountain Chambers ,2013(<http://www.barstandardsboard.org.uk>) , who consider the Cab Rank Rule both as important and relevant in ensuring that even unpopular clients can secure representation by an advocate of their choice and should therefore be retained.

¹² The Bar Council has published *A Guide to Representing Yourself in Court*(2013), for the benefit of persons who do not qualify for legal aid but cannot afford court representation and whose number ,it anticipates, will sharply increase.

¹³ Dr Noelle Higgins, Dr Elaine Dewhurst and Mr Los Watkins, *Field Trips as Short –term Experiential Learning Activities in Legal Education* , Journal of the Association of Law Teachers, Vol.46 No2 analysed a limited sample of student surveys based on a legal tour that was incorporated into the first year undergraduate law curriculum at Dublin City University. In addition to witnessing advocacy and realizing the importance of moot court activities, the use of field trips was found beneficial in a number of ways. These included : “ *as a motivating tool for both study and extra-curricular activities* ” ; as a means “ *of contextualising legal theory and focusing the students on career options and possibilities* ” ; as de-mystifying the legal professions and the courts; increasing confidence in dealing with the professions and visiting the courts; as an “ *empowering tool to facilitate students gain ownership over future learning experiences* ” ; and as strengthening bonds between students in their class.

Ideally much of the above would be covered, however it is recognized that that pressures of time will necessitate selectivity. There must, however, be enough to convey that advocacy is fluid - not static as might be thought by those who regard courts and the law as very conservative- and subject to a complex interplay of factors which have varied in weight over time. Students should be informed that during their careers they will inevitably witness further changes and that, if they become lawyers, they may actually contribute to them. They might be encouraged to think about what the alterations might be. On each course involving advocacy skills thought would have to be given as to when, and how much, history and context should be put before students. Should it be at the beginning, the end, or integrated with specific topics?

Assessment of students and evaluation of courses.

Whether historical and contextual additions on university advocacy skills courses should be formally examined would have to be decided in each case. If it is decided that they should a variety of methods might be considered including forming part of a written examination, an essay to be written in a prescribed time and preparation and presentation of a topic in a seminar. An open mind should exist about other possible forms of assessment.

Evaluation of courses with historical and critical dimensions would be very important. If necessary, the assistance of colleagues with greater experience in devising detailed quantitative and qualitative research should be sought to ensure that it is robust.

Questionnaires should be devised and distributed to students at the end of the course which, ask them about: the extent their understanding has been deepened, or not, by these additions; the impact, if any, it had on their performance as advocates in real or simulated settings; whether it will stimulate them to read about advocacy afterwards; what, in their opinion, courses should also cover; teaching methods employed; choice of material used; and the balance of historical and critical content with skills on the course. Careful thought would have to be given to the wording of questions, so they are not too closed or too open ended,

and to the length of the questionnaire to encourage maximum student participation and obtain the most significant sample size possible. Selecting some students, on a random basis, for semi – structured forms of interview might be considered. Further holding a discussion with students during part of a teaching session at the end of the course could also yield valuable data. Teachers should be sufficiently flexible to accommodate suggestions and well founded criticism obtained. They should also be prepared to discuss with colleagues teaching similar courses in other institutions about teaching methods and course content and to share the results of their evaluations.

Discrete courses on the development of advocacy at undergraduate and postgraduate levels and as a background on professional courses.

Whilst conceived as an addition to courses involving skills of advocacy sufficient material is now available for discrete courses on the development of advocacy to be run at both undergraduate and graduate level¹⁴ (See lists below of books, pamphlets, papers and journal articles). Such courses may have an appeal beyond the law faculty to students of history and other disciplines. Indeed teaching and research into the evolution of advocacy may in a modest way contribute to the growing body of *external legal history*,¹⁵

which examines law and legal phenomenon within wider historical, social , economic and political contexts and may also be of interest other than to lawyers.

Although it is recognised that time on professional vocational courses is limited, it is nonetheless submitted that some could be set aside to explain to students the historical basis of advocacy. Interestingly the introductory lecture on advocacy on the Bar Professional Vocational Course at the College of Law in Bloomsbury London does include some historical background and context for students learning

¹⁴An example of a post –graduate course which draws much on history and classical rhetoric is *Modern Advocacy and Classical Rhetoric*, which was introduced some five years ago and taught by Mr David Pope at University College London. An outline of this course is set out in Appendix One.

¹⁵*External legal history* may be contrasted to *internal legal history*, a phrase used to describe the activity of tracing the history of legal rules and legal principles which largely confines itself to internal sources such as statutes and case law and secondary sources concerned with articulating the meaning of the law within traditional doctrinal or theoretical legal analysis. See D. Ibbetson, *What is legal history a history of?* in Andrew Lewis and Michael Lobban (eds) *Law and History* (2003) 6 Current Legal Issues pp. 863-879.

professional advocacy skills. It is reported that they find it interesting and some ask where further information can be found on the subject and even for optional lectures, in live or recorded form¹⁶. With bar students this may well be pushing at a much open door as many are attracted by the courtroom, many seeing it as the centrepiece of their careers.

Conclusion.

In the Preface to his book, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865*, Clarendon Press, 1998, David Cairns described the history of advocacy as neglected: *no more sophisticated or significant expression of the art of the lawyer has been studied less*. Inattention to the subject, in his view, exemplified the continuing gulf between the worlds of legal scholarship and legal practice. He expressed the wish that his book would stimulate further research and writing on advocacy. In the ten or so years since David Cairns published his work some impressive scholarly works have been written on aspects of the subject. These include: Jan –Melissa Schramm's *Testimony in Victorian Law, Literature, and Theology*, Cambridge University Press, 2000, spanning the first half of the 19th Century, John Langbein's *The Origins of the Criminal Trial*, Oxford University Press, 2003, covering the 1690's to the 1780's, Allyson May's *The Old Bailey and the Bar 1785 – 1834*, University of North Carolina, 2003 and Sadakat Kadri's *The Trial: A History from Socrates to O.J. Simpson*, Harper Collins, 2005. Notwithstanding these and other books, advocacy, especially in the form of any comprehensive scholarly treatment over the centuries and about how it may develop in future, remains understudied. Indeed, Geoffrey Robertson QC, in his Preface to *Sir William Garrow, His Life Times and Fight for Justice*, by John Hostettler and Richard Braby, Waterside Press, 2009, criticises legal history's disdain of advocacy *in favour of teaching the tedious history of contract and land law, partly*

¹⁶One possibility might be to include a chapter or chapters in training manuals used by institutions that teach the BPTC.

because of the inability of historians to comprehend the dynamics of forensic practice and how this impacts on the rules of the trial process.

Courses informing students of the rich history of advocacy may result in more scholarship on the subject especially by those who become advocates and who will acquire a strong grasp of courtroom dynamics. More awareness of what has shaped it may also enhance the quality of modern advocacy. The worlds of legal scholarship and legal practice, seen as widely apart by David Cairns and Geoffrey Robertson, may, therefore, be drawn more closely together.

Historical and critical dimensions to the teaching of advocacy would, it is submitted, bring students many insights and entirely accord with the view of Counsellor Pleydel, in *Guy Mannering*, by Sir Walter Scott, a lawyer and son of a lawyer (and whose work is undergoing a revival in popularity), “*A lawyer without history or literature is a mechanic – a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect.*”

Below are books, pamphlets, papers and journal articles of possible use in designing and teaching historical and critical backgrounds to advocacy (Those in black type may be particularly helpful in building a foundation of knowledge in the subject¹⁷.)

The writer would be happy to receive readers’ thoughts and criticisms on the courses proposed in this article and, if considered feasible, to assist in designing them.

Books, Pamphlets and Papers:

Baker, J H. *An Introduction to English Legal History*, 4th Edition, Oxford University Press, 2002.

Bentley, David. *English Criminal Justice in the Nineteenth Century*. Hambledon Press, London, 1998.

Birkett, Lord Norman. *Six Great Advocates*. Penguin, 1961.(Elegantly and clearly written essays on Edward Marshall-Hall, Patrick Hastings, Edward Clarke, Rufus Isaacs and Thomas Erskine.)

Cairns, David. *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865*. Clarendon Press, Oxford, 1998.(This book examines the debate and the practical implications of procedural reform for the conduct of criminal trials in the 19th Century with especial reference to the Prisoners’ Counsel Act 1836. The topics discussed include the increasing sophistication of prosecution and defence advocacy, the beginnings of modern professional ethics and the conscious rationalisation of adversary procedure as the best means to discover the truth. This is the first scholarly work to analyse the practice of advocacy and to identify its significance for the administration of justice. It includes case studies of four major criminal trials which

¹⁷ A fuller list will be supplied on request.

demonstrate the interrelationships between advocacy and procedure in the making of the adversarial criminal trial.)

Campbell, Lord John. *Lives of the Chancellors*, John Murray, London, 1856.

Campbell, Lord John. *Lives of the Chief Justices*, John Murray, London, 1858.

Carman, Dominic. *No Ordinary Man: A Life Of George Carman Q.C.* Coronet Books, Hodder and Stoughton, 2002.

Carr, E. H. *What is History?* , Penguin, London, 1987.

Cornish, William. *The Jury*. Penguin, 1971.

Cornish W. R. and G de N. Clark. *Law and Society in England 1750-1950*, Sweet and Maxwell, London, 1989.

DuCann, Richard. *The Art of the Advocate*. First Edition 1964 and Revised Edition 1993. Penguin Books. (Drawing much on their historical origins, this well written book surveys the role and craft of advocates at every stage of their work.)

Duxbury, Neil. *The Nature and Authority of Precedent*, Cambridge University Press, 2008.

Erskine, Lord Thomas. *The Speeches of the Right Honourable Lord Erskine When at the Bar, with a Preparatory Memoir by the Right Honourable Lord Brougham*. James Ridgeway, London, 1910.

Evans, Keith. *Advocacy in Court*. Blackstone Press, 1995.

Foote, John Alderson. *Pie powder from the Law Courts; being dust from the law courts, collected and recollected on the Western Circuit by a circuit tramp*. John Murray, London, 1911.

Fordham, Edward. *Notable Cross-examinations*. Constable, 1951.

Gabb, Sean, *Thomas Erskine: saviour of English Liberty*, Libertarian Alliance, 1990.

Goodman, Andrew. *Influencing The Judicial Mind- Effective Advocacy in Practice*. XPL Publishing , 2006.

Hamilton, Richard. *All Jangle and Riot – a Barrister’s History of the Bar*. Professional Books, 1986. (A highly readable and well researched history of the English and Welsh Bar and advocacy.)

Hastings, Sir Patrick. *Cases in Court*. William Heinemann, London, 1949.

Hostettler, John. *Champions of the Rule of Law*, Waterside Press, 2011.

Hostettler, John and Braby, Richard, *Sir William Garrow, His Life, Times and Fight for Justice*. Waterside Press, 2009. (An appreciation of the importance of a barrister who did so much to introduce cross-examination in criminal trials and who was featured in a recent BBC drama.)

Hostettler, John. *The criminal jury old and new: jury power from early times to the present day*. Waterside Press, 2004.)

Hostettler, John. *Lord Halsbury*. Barry Rose, Chichester, 1998.

Hostettler, John. *Thomas Erskine and trial by jury*. Barry Rose, Chichester, 1996. (A book on the life and professional career of a towering presence in advocacy in the late 18th Century and 19th Century and who did much to entrench the “Cab-rank rule” and limit the effects of William Pitt’s repression following the French Revolution.)

Humphreys, Travers. *Criminal Days*. Hodder and Stoughton. London, 1946.

Kadri, Sadakat. *The Trial :A History from Socrates to O. J. Simpson*, Harper Collins, 2005. (The book crosses from the marbled courtrooms of Athens through the ordeal pits of Anglo-Saxon England, past the torture chambers of the Inquisition to the judicial theatres of 17th-century Salem, and from 1930s Moscow and post-war Nuremberg to the virtual courtrooms of modern Hollywood.)

Keeton, G W. *Harris’s Hints on Advocacy*. Stevens and Sons , London, 1943.)

Kelly, Bernard. *Famous Advocates and their Speeches*. Sweet and Maxwell, London, 1921. (Contains numerous examples of Victorian florid advocacy and explains and the movement to a more restrained style.)

Langbein, John H. *The Origins of the Adversary Criminal Trial*. Oxford, 2003. (A key book in which the author traces the origins of the modern adversarial trial in England and Wales from its origins as a noisy altercation between two individuals to a lawyer-dominated and judge-refereed evidentiary quest for answers.)

- Lewis, J R. *The Victorian Bar*, Robert Hale, London, 1982.** (An absolute goldmine of information about the English bar and styles of advocacy from the 1830s to the 1870s: absorbing and lucidly written.)
- Lightman, Sir Gavin. *Advocacy –A Dying Art? Lecture to Chancery Bar Association, January, 2004.***(Deals clearly with changes in civil advocacy brought about the reforms of the late 1990s.)
- Lightman, Sir Gavin. *The Civil Justice System and the Legal Profession- The Challenges Ahead*. Edward Bramley Memorial Lecture, University of Sheffield, 2006.
- Manchester, A H. *A Modern Legal History of England and Wales 1750-1950*. Butterworths, London, 1980.
- Manson, Edward. *Builders of Our Law During the Reign of Queen Victoria*. Horace Cox, London, 1895.
- Marjoribanks, Edward. *For the defence: the life of Sir Edward Marshall Hall*. The MacMillan Company, New York, 1929.
- Marshall, P J. *The Impeachment of Warren Hastings*. OxfordUniversity Press, 1965.
- Martin, Sir Theodore. *A Life of Lord Lynhurst from letters and papers in possession of his family*. John Murray, London, 1883.
- Mathew, Theo. *Forensic Fables*. Published in three books by Butterworths between 1926 and 1929. Complete Edition printed by Wildy and Sons, London, 1999.
- May, Allyson. *Reluctant Advocates: The OldBaileyBar and the Prisoners' Counsel Act 1836*. Paper given at the Institute of Advanced Legal Studies, London, 26th March, 2006.
- May, Allyson. *The Bar and the Old Bailey, 1750-1850*.** The University of North Carolina Press, Chapel Hill and London, 2003.(The author describes the history of the English criminal trial and the development of a criminal bar in London between 1750 and 1850. She charts the transformation of the legal process and the evolution of professional standards of conduct for the criminal bar through an examination of the working lives of the Old Bailey barristers of the period. In describing the rise of adversarialism, May uncovers the motivations and interests of prosecutors, defendants, the bench and the state, as well as the often-maligned "Old Bailey hacks" She explores the role of barristers before and after the Prisoners' Counsel Act. 1836 recognized the defendant's right to legal counsel in felony trials and lifted many restrictions on the activities of defence lawyers.She also details the careers of individual members of the bar -describing their civil practice in local, customary courts as well as their criminal practice. A comprehensive biographical appendix augments this discussion.)
- McRae, Donald. *The Old Devil Clarence Darrow: The World's Greatest Trial Lawyer*, Simon and Schuster, 2009.
- Mellinkoff, David. *The Conscience of a Lawyer*. West Publishing Co, St Paul, 1973.
- Millender, Michael. *The Transformation of the American Criminal Trial 1790-1875*. Doctoral Dissertation, Department of History, PrincetonUniversity, 1996.
- Montgomery Hyde. H. Norman Birkett. *The Life of Lord Birkett of Ulverston*, Hamish Hamilton, London, 1964.
- Montgomery Hyde, H. *Carson; the life of Sir Edward Carson, Lord Carson of Duncairn*, Heineman, London, 1953.
- Montgomery Hyde, H. *Sir Patrick Hastings, his life and cases*. Heinemann, London, 1960.
- Montgomery Hyde, H. *The Trials of Oscar Wilde With an introduction by H. Montgomery Hyde*. Hodge. London, 1948.
- Mortimer, John. *Famous Trials*, Viking , 1984.
- Munkman, John. *Technique of Advocacy*. Stevens and Sons, London, 1951.
- Murphy, Peter. *Murphy on Evidence*. Ninth Edition. OxfordUniversity Press, 2005.
- Murray, Peter L. *Basic Trial Advocacy*. Maine Law Book Co, 2003.

- O' Brien, R. Barry. *O'Brien's Life of Lord Russell*. Smith, Elder, 1901.
- O' Flanagan, Roderick F. *The Munster Circuit*. Sampson, Low, Marston and Searle, London, 1880.
- O' Tool, Fintan. *A Traitor's Kiss; The life of Richard Brinsley Sheridan 1751- 1816*. Granta Books, 1998.
- Page, Leo. *First Steps in Advocacy*, Faber and Faber, 1943.
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Appendix One.

Two samples of advocacy past:

Sir Edward Coke, 1603.

In the treason trial of Sir Walter Raleigh, in 1603, the Attorney General, Sir Edward Coke, addressed the defendant, who was about to speak in his own defence:

*“Thou art a scurvy fellow; thy name is hateful to all the realm of England for thy pride. I will now make it appear to the world that there never existed on the face of the earth a viler viper than thou art”*¹⁸.

In the midst of other opprobrious epithets aimed at Raleigh, Coke said:

“Thou art a monster , thou hast an English face , and a Spanish heart. Thou viper! For I thou thee, thou viper”

“It becometh not a man of virtue and quality to call me so” was Raleigh’s dignified rebuke adding, *but I take comfort in it, it is all you can do”*.

Coke then asked Raleigh *“Have I angered you?”* Raleigh replied, *“I am in no case to be angry”* . In other instances, during the trial, similar language was used by Coke towards the prisoner, until he was told by the bench not to be impatient and to allow Raleigh to speak. Admonished, Coke sat down in anger and was only with much difficulty persuaded to proceed. When at length he did , it was with a fresh torrent of invective in which Raleigh was accused of the darkest treasons and called a *“damnable atheist”*. As well as displaying intemperate language, Coke adduced evidence against the prisoner which, even by the then lax practice of trials for treason, was obviously illegal. It was principally upon this proof that Sir Walter Raleigh was convicted

¹⁸ The Trial of Sir Walter Raleigh, 1 State Trials (1730) page 205.

John Philpot Curran, 1805.

John Philpot Curran acted in 1805 for a young and poor clergymen, the Reverend Massey, whose twenty four year old wife had been allegedly enticed from him, although she appeared to go quite voluntarily, by the rich and elderly Cornish aristocrat, the Marquess of Headfort. The Marquess and the cleryman's wife made off together whilst her husband was preaching in church on Sunday. This is a passage from his closing speech:

“The Cornish plunderer intent on spoil , callous to every touch of humanity, shrouded in darkness, holds out false lights to the tempest-tossed vessel [the wife], and lures her, and her pilot [the husband] , to that shore on which she must be lost for ever; the rock unseen, the ruffian invisible, and nothing apparent but the treacherous signal of security and repose; so this prop of the throne, this pillar of the State, this stay of religion, this ornament of the Peerage, this common protector of the people's privileges and of the Crown's prerogative, descends from these high grounds of character to muffle himself in the gloom of his base and dark designs , to play before the eyes of the deluded wife and the deceived husband, the fairest lights of love to the one and the hospitable regards to the other, until she is at length dashed on that hard bosom where her honour and her happiness are wrecked and lost forever

Appendix Two.

Outline of Modern Advocacy and Classical Rhetoric at UCL Faculty of Law.

Module syllabus

1. Introduction

- Summary of the syllabus
- Brief history of classical rhetoric

2. Meaning of 'rhetoric'

- Ancient and modern definitions of 'rhetoric'
- Three elements of a speech
- Three 'types' of rhetoric

3. Means of persuasion

- 'Non-artistic' and 'artistic' means of persuasion
- 'Artistic' means of persuasion in modern advertising

4. 'Canons' of classical rhetoric I

- Analysis of Cicero's speech Pro Ligario

- Invention

5. 'Canons' of classical rhetoric II

- Arrangement
- Style
- Memory
- Delivery

6. Legal arguments

- Introduction to modern advocacy
- Form of arguments, particularly legal arguments
- Outline of Stephen Toulmin's theory of argumentation

7. Written advocacy

- Key skills of written advocacy in modern legal practice
- Analysis of a leading QC's skeleton argument

8. Oral advocacy

- Key skills of oral advocacy in modern legal practice
- Analysis of a leading QC's speech in the UK Supreme Court

9. Witness advocacy

- Types of 'live' evidence
- Key skills of examining witnesses

10. Analysing advocacy

- Analysis of a leading QC's opening speech in a criminal trial
- Review of the module

Learning objectives

The main learning objectives of the module are as follows:

- Know the basic principles of classical rhetoric.
- Understand why those principles are relevant to modern legal practice.
- Know how to analyse written and oral advocacy for persuasive effect.

- Know techniques for constructing and delivering persuasive