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## The Essence of Advocacy

During oral argument in the United States Supreme Court in an important constitutional case in 1972, Mr Justice Douglas asked the assistant prosecutor from Louisville, Kentucky why his submissions had failed to address the leading cases. “Your Honor must realise”, the advocate replied, “I am a very busy man.”<sup>1</sup>

In my forty years – so far – as a busy advocate, I have been thinking about advocacy, bad as well as good, its morality and its future. So I am delighted that the Hamlyn Trustees gave me the opportunity to develop my thoughts in three lectures. Especially as, in more than seventy years of Hamlyn Lectures, very little has been said on a subject so central to justice and the rule of law.<sup>2</sup>

In 1941, Miss Emma Warburton Hamlyn of Torquay died leaving money on trust for lectures “among the Common People of the United Kingdom of Great Britain and Northern

<sup>1</sup> *Branzburg v Hayes* 408 US 665 (1972). See Floyd Abrams *Speech to Graduating Class, University of Michigan Law School* (13 May 1990), pp. 3–4.

<sup>2</sup> The subject was mentioned by R E Megarry *Lawyer and Litigant in England* (1962), chapter 2, and by Erwin N Griswold *Law and Lawyers in the United States* (1965), chapter 2. And, as my former pupil master Michael Beloff QC has pointed out to me, one of the star advocates in the television series *LA Law* (eight seasons from 1986), Michael Kuzak, was played by the actor Harry Hamlin (no relation).

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Ireland” so that they “may realise the privileges which in law and custom they enjoy in comparison with other European Peoples”, a trust purpose particularly relevant post-Brexit. One of those privileges is that oral advocacy has a central place in our legal system, by comparison with continental legal systems, as anyone who has appeared in, or watched the proceedings of, the Court of Justice of the EU or the European Court of Human Rights will confirm.

After Lord Justice Denning published a book based on the first set of Hamlyn Lectures, *Freedom Under the Law*, in 1949, the Lord Chancellor’s Department produced a list of his “errors”.<sup>3</sup> I hope to provoke a more positive response from all those interested in the law.

There is a danger in lecturing on advocacy: what you say may be wholly unpersuasive. Especially as, according to Quintilian in the first century AD, “[t]he art of speaking depends on much effort, continual study, varied kinds of exercise, long experience, profound wisdom and unfailing strategic sense”.<sup>4</sup> The importance of the subject justifies the risk that these lectures may fail to convince.

We should celebrate the concept of advocacy: that legal issues in civil and criminal courts are decided after reasoned argument in which the participants refrain (usually)

<sup>3</sup> The Lord Chancellor, Lord Jowitt, also wrote to Lord Justice Denning to remind him that the less judges said out of court “the better”. See R F V Heuston *Lives of the Lord Chancellors 1940–1970* (1987), p. 214 and Robert Stevens *The Independence of the Judiciary: The View from the Lord Chancellor’s Office* (1993), p. 93.

<sup>4</sup> Quintilian *The Orator’s Education*, Book 2, chapter 13 (edited and translated by Donald A Russell, 2001), p. 347.

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from shouting, personal insults or threats, and the points on each side of the debate are tested for their relevance, their accuracy and their strength by an independent adjudicator.<sup>5</sup> Such a process does not guarantee that the correct answer will be achieved. But it does make such a conclusion more likely, and it also means that the parties whose arguments do not prevail are more willing to accept the result. I much prefer this principle to the Chinese proverb to which Jan Morris refers: that “[i]t is a step towards chaos . . . when argument begins”.<sup>6</sup>

The virtues of advocacy have force outside as well as inside the courtroom. Today, political debate increasingly involves either insulting or ignoring your opponents rather than engaging with what they say and seeking to convince people of the merits of your own position. This is not to suggest that politics should adopt legal methods of reasoning. As Lord Reed, President of the Supreme Court, said for a seven-judge panel in 2021, politics involves a very different process to adjudication. Politics concerns “the management of political disagreements within our society so as to arrive, through negotiation and compromise, and the use of the party political power obtained at democratic elections, at decisions

<sup>5</sup> As pointed out by James Shapiro in *Shakespeare in a Divided America* (2020), p. xxvi, one of the main reasons why Shakespeare’s plays remain so relevant and powerful today is that he was “a product of an Elizabethan educational system that trained young minds to argue . . . on both sides of the question”. Shapiro notes at p. 89 that the young lawyer Abraham Lincoln carried around with him on circuit the works of Shakespeare.

<sup>6</sup> Jan Morris *Hong Kong* (2nd edition, 2000 reprint), p. 201.

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whose legitimacy is accepted not because of the quality or transparency of the reasoning involved, but because of the democratic credentials of those by whom the decisions are taken”.<sup>7</sup> Nevertheless, there is an important role for advocacy in politics: that is, seeking to persuade people of the merits of your policies and the defects of those of your opponent. In 1952, the Democratic Party nominee for President of the USA, Adlai Stevenson, said on the campaign trail that if his opponents “stop telling lies about [us], we will stop telling the truth about them”.<sup>8</sup>

The art of persuasion is now less valued in politics, but it remains of central importance in so many forms of social discourse. We learn this at an early age: “Please can I have an ice cream?” And we exercise or experience the art of advocacy throughout our lives: from “Buy this car”<sup>9</sup> to “Will you marry me?”

Advocacy can be dated back at least as far as the submissions of Moses as recorded in the Old Testament. The children of Israel, freed from slavery in Egypt after God has worked miracles on their behalf, petulantly complain that Moses, their leader, has been up Mount Sinai in the presence of God for too long. They lose patience and build a golden calf

<sup>7</sup> *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428 at paragraph 169.

<sup>8</sup> *The Yale Book of Quotations* (2006, edited by Fred R Shapiro), p. 732.

<sup>9</sup> See Robert B Cialdini *Influence: The Psychology of Persuasion* (1984). Note Stephen M Shapiro “Oral Argument in the Supreme Court of the United States”, 33 *Catholic University Law Review* 529, 531 (1984): “Every advocate is, in an important sense, a salesperson and the object of advocacy is persuasion of other human beings.”

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for the purpose of idolatry. An angry God tells Moses that he intends to punish them. “But”, the book of Exodus explains, “Moses set himself to placate the Lord his God.” Moses, the advocate, presents some cogent and persuasive points by way of mitigation and “So the Lord relented”.<sup>10</sup>

My subject in these lectures is oral advocacy in court – not in social discourse, politics or conversations with a deity. As Cicero pointed out in the first century BC, “no single kind of oratory suits every cause or audience or speaker or occasion”.<sup>11</sup> Even within the legal domain, advocacy in the Supreme Court is different from advocacy in the Luton Magistrates’ Court. And, as Quintilian understood, the nature of the cause will affect the style of advocacy: “What use is it to apply a lofty style to trivial causes, a concise and refined one to momentous ones; a cheerful manner to gloomy themes, a smooth one to harsh; a threatening tone when we plead for mercy, a submissive one where energy is needed, and a brutal and violent one when what the subject demands is charm?”<sup>12</sup>

But the basic principles of advocacy are common to all legal contexts. And they apply to whoever the advocate may be. Since the coming into force of the Courts and Legal Services Act 1990, advocacy in the High Court and above is no longer restricted to barristers. There are many solicitor

<sup>10</sup> *Exodus* 32:1–14. See similarly *Numbers* 14:1–21.

<sup>11</sup> Cicero *On the Orator* (translated by H Rackham, 1942), Book 3, chapter 54, p. 167.

<sup>12</sup> Quintilian *The Orator’s Education*, Book 11, chapter 1 (edited and translated by Donald A Russell, 2001), p. 9.

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advocates. So when I refer to “advocates” and “counsel”, I of course include solicitor advocates.

In this first lecture, I want to address the essence of advocacy, though inevitably not in a comprehensive manner – Quintilian produced twelve volumes on oratory in the first century AD.

I should start by recognising that public speaking is a challenge for almost everyone. The exceptionally talented Barack Obama commented in his presidential memoirs that “[t]he days had long passed since I got nervous on a big stage”.<sup>13</sup> The extremely self-confident Piers Morgan asserted in June 2020 that “I rarely feel any nerves before speaking in public, even if I have to wing it with no notice”.<sup>14</sup>

For the rest of us, public speaking is a stressful experience, though perhaps not to the extent suffered by Mark Zuckerberg, the co-founder and chief executive of *Facebook*, who, it was reported in 2020, would become so worried when making presentations in public “that his PR team had to blow-dry his armpits before he went on stage”.<sup>15</sup> Jerry Seinfeld has a stand-up comedy routine on the theme that the number one fear of the average person is public speaking. Number two is death. “How in the world is that?”, asks Seinfeld. “That means to most people, if you have to go to a funeral, you would rather be in the casket than doing the eulogy.”<sup>16</sup> Public speaking has much in common, at least in

<sup>13</sup> Barack Obama *A Promised Land* (2020), p. 285.

<sup>14</sup> Piers Morgan *The Mail on Sunday* 7 June 2020.

<sup>15</sup> *The Times* 20 February 2020, reporting claims (since denied) made in Steven Levy’s book, *Facebook: The Inside Story* (2020).

<sup>16</sup> Jerry Seinfeld *Is This Anything?* (2020), p. 98.

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this respect, with acting. The actress and singer Elaine Stritch suffered badly from stage fright. When she refused a drink in the wings before the start of a performance (she was a recovering alcoholic), her colleague was surprised: “You mean, you’re going out there alone?”<sup>17</sup>

Professional advocates give speeches for a living – and almost all of us worry about what is going to happen in court. The Chief Justice of the US Supreme Court, John Roberts, said that he was always nervous appearing before that court as counsel and “if . . . you are not very nervous you don’t really understand what is going on”.<sup>18</sup> Several counsel have fainted while presenting arguments in the US Supreme Court,<sup>19</sup> including in 1935 Solicitor General Stanley F. Reed, who toppled over while arguing for the validity of a key piece of New Deal legislation.<sup>20</sup>

<sup>17</sup> Libby Purves “Long lockdown has given us all stage fright” *The Times* 25 April 2021.

<sup>18</sup> Clare Cushman *Courtwatchers: Eyewitness Accounts in Supreme Court History* (2011), p. 132.

<sup>19</sup> Timothy R Johnson and Jerry Goldman *A Good Quarrel: America’s Top Legal Reporters Share Stories from Inside the Supreme Court* (2009), Foreword.

<sup>20</sup> Clare Cushman *Courtwatchers: Eyewitness Accounts in Supreme Court History* (2011), p. 130. In his recent memoirs, Graham Boal gives a very frank account of how his “stage fright” as a barrister was “almost crippling” and contributed to his alcoholism: Graham Boal *A Drink at the Bar* (2021), p. 102. And in fiction see Robert Harris *Dictator* (2015), p. 167: Cicero “was often nervous before a big oration, and suffered from loose bowels and vomiting”. And John Grisham *Rogue Lawyer* (2015), p. 317: “An old trial lawyer once told me that if the day came when I walked into a courtroom and faced a jury without fear, then it was time to quit.”

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This is true of cases at the beginning of practice. Sir Patrick Hastings, one of the great advocates of the twentieth century, was briefed for his first case in a county court. He had prepared a cross-examination but was “too nervous to say anything. He was saved because his opponent stood up first and applied for an adjournment. ‘I could have kissed him’, said Hastings afterwards”.<sup>21</sup> When Travers Humphreys conducted his first case as defence counsel early in the twentieth century, he heard nothing of what the prosecution witness said, “being engaged in a strenuous and fortunately successful effort to avoid being sick”.<sup>22</sup>

For many barristers, however experienced and eminent, the nervousness is a permanent feature of our work. Cicero quotes the advocate Crassus, who said that “the better the orator, the more profoundly is he frightened of the difficulty of speaking, and of the doubtful fate of a speech, and of the anticipations of an audience”. Crassus confessed that he would “turn pale at the outset of a speech, and quake in every limb and in all my soul”.<sup>23</sup>

<sup>21</sup> H Montgomery Hyde *Sir Patrick Hastings: His Life and Cases* (1960), p. 24.

<sup>22</sup> Travers Humphreys *Criminal Days* (1946), p. 138.

<sup>23</sup> Cicero *On the Orator* (translated by E W Sutton and H Rackham, 1948), Book 1, chapter 26, p. 85. In his novel *The Last Trial* (2020), p. 11, Scott Turow expressed the effect of advocacy on his literary creation, the lawyer Sandy Stern. For nearly sixty years, Stern had approached every case “almost as if he, as much as his client, were on trial”. During a case “he will sleep fitfully, as the witnesses take over his dreams”. On the first day of the hearing, “anxiety was a rodent gnawing on his heart”.

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John Mortimer QC observed that counsel often feel “sick with anxiety before you go into court”.<sup>24</sup> Years after giving up practice as a barrister, Mortimer wrote that he still regularly dreamt of running through the Law Courts, inappropriately dressed, to argue a case he had not prepared.<sup>25</sup> He described the “usual courtroom terrors” experienced by his creation, the barrister Horace Rumpole: “sweaty hands, dry mouth and a strong temptation to run out of the door and take up work as a quietly unostentatious bus conductor or lavatory attendant”.<sup>26</sup>

Happily, the worry tends to dissipate once the case begins. A great advocate of the early twentieth century, Sir Edward Marshall Hall, “would be ill with nervousness and anxiety before he went into court, but, once there, all his anxiety would vanish”.<sup>27</sup> And it may help advocates to keep the stress in perspective: in some foreign jurisdictions, and on occasions in this country, advocates must display real courage in taking on powerful and dangerous forces, whether an authoritarian government or malign private entities.<sup>28</sup>

<sup>24</sup> *The Times* 22 April 1992.

<sup>25</sup> John Mortimer *Murderers and Other Friends* (1994), p. 1. He added, at p. 11, that as leading counsel he had a junior and an instructing solicitor, “from whom I must try to hide my doubts and fears”. See also Michael Beloff QC *MJBQC: A Life within and without the Law* (2022), p. 51: “This was the first but also the last time I have ever been late for court – although I continue to have recurrent nightmares about the possibility even after my retirement”.

<sup>26</sup> John Mortimer *Rumpole and the Penge Bungalow Murders* (2004), p. 77.

<sup>27</sup> Edward Marjoribanks *The Life of Edward Marshall Hall* (1929), p. 178.

<sup>28</sup> See the comments of Judge Geoffrey Robertson QC (himself a fearless advocate) in *Prosecutor v Alex Brima and others* (Appeals Chamber of

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To compensate for the stress, advocacy is a profession that, on the rare occasions when all goes well, gives great satisfaction to those who practise it. Cicero had experienced that there is “no more excellent thing” than the power by means of advocacy to direct a tribunal “wherever the speaker wishes, or divert them from whatever he wishes”.<sup>29</sup> Cicero quoted the advocate Marcus Antonius as asking: “Can any music be composed that is sweeter than a well-balanced speech?”<sup>30</sup> Quintilian described oratory as “the best gift of the gods to man”.<sup>31</sup>

the Special Court for Sierra Leone, 8 December 2005, concurring opinion at paragraph 78). There are also, on occasions, real risks of physical danger to counsel in this country. See “The life of a criminal defence lawyer” *The Times* 14 October 2021: “Hate mail, death threats and being spat at in the street have become part of life for Jim Sturman QC after almost 40 years at the criminal Bar.”

<sup>29</sup> Cicero *On the Orator* (translated by E W Sutton and H Rackham, 1948), Book 1, chapter 8, p. 23. Sir Sydney Kentridge QC, a great advocate approaching his 100th birthday, was asked about the secret to successful advocacy. He replied, “with a twinkle in his eye” that it helped “Having a good case to argue”: *The Times* 30 June 2022.

<sup>30</sup> Cicero *On the Orator* (translated by E W Sutton and H Rackham, 1948), Book 2, chapter 8, p. 223.

<sup>31</sup> Quintilian *The Orator’s Education*, Book 12, chapter 11 (edited and translated by Donald A Russell, 2001), p. 341. See also an equally romantic account by Richard du Cann *The Art of the Advocate* (revised edition, 1993), p. 71: “There are magical moments in all advocates’ lives. To sense a response in the minds and hearts of others to the words he chooses to use and the way in which he chooses to use them is the final justification for all the dull preparation which has preceded it. It wipes away all the sacrifices he has to make and the worry and responsibility he has to bear in order to follow his calling.” See also Scott Turow *Innocent* (2010), pp. 184–185: Sandy Stern’s magnetism in a courtroom