

**Changes in American court advocacy during the long nineteenth century: Classical influences, their decline, similarities and comparisons with England and Wales**

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# ***Changes in American Court Advocacy during the Long Nineteenth Century: Classical influences, their decline, similarities and comparisons with England and Wales.***

Andrew Watson\*

## **Abstract.**

*Important alterations in the style and content of court advocacy occurred throughout the common law world in the Nineteenth Century. This article turns to the United States, where a sea change in advocacy took place, and to similarities and differences with England and Wales. Matters considered include: influences of Greek and Roman classics and rhetoric in late Eighteenth Century and first half of the Nineteenth Century America and their decline thereafter; key changes in evidence and procedure; discussion whether advocates should be allowed to express belief in the causes of their clients and later adoption of professional rules forbidding the practice; granting accused persons the right to give evidence on oath; the presence of expert witnesses in court; the introduction of plea bargaining procedure and the origins of bench trials.*

**Key words:** Court Advocacy; Changes; Nineteenth Century; America, England; Comparisons.

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## *Introduction.*

In the 19th century considerable alterations in advocacy took place throughout the common law world; not just England and Wales. Major developments occurred in the United States, very conspicuously in criminal courtroom advocacy. However, there was nothing akin to the English and Welsh Prisoners Counsel Act 1836 (and the debate which preceded it), a milestone, granting prisoners charged with felonies the right of a full defence by counsel: That right had already been secured in all states and Federal courts under the Bill of Rights (Sixth Amendment to the US Constitution) 1789.

The place of the Greek and Roman classics and rhetoric in advocacy in late 18<sup>th</sup> Century America and in the first half of the Nineteenth Century is explored in this article. Use by many attorneys of an apologetic, dispassionate and formulaic type of criminal advocacy bearing much of the influence of Cicero, strongly contrasts with the extravagant, melodramatic and flowery styles of address in the English courts at the time. However, changes in procedure, laws of evidence and the prevailing general style of public oratory led, in the third quarter of the 19<sup>th</sup> Century to attorneys assuming the mix of flamboyance, appeal to emotion and aggression which has been their hallmark before juries ever since. As in England and Wales, discussion occurred about whether advocates should be allowed to express belief in the causes of their clients and later professional rules forbidding the practice were adopted. Further, like in England, it became necessary for attorneys in the United States to adjust to laws granting accused persons the right to give evidence on oath and also to the presence of expert witnesses in court. Attorneys in criminal cases, had to be able to conduct plea bargaining, a procedure which arose independently in a number of jurisdictions in the early mid -19<sup>th</sup> Century, and pleas in mitigation. The late 19<sup>th</sup>

Century saw the beginnings of bench trials which became more frequent in the following century. Taking the jury out of the court had a huge impact on advocacy. Unlike jurors, judges had no time for stirring speeches, sensationalism and histrionics. Strict attention to evidence and law by attorneys was required.

### ***Cicero and other classical influences.***

Until roughly the mid-19th century most criminal advocacy was largely apologetic, deliberately avoiding extravagance, fervour and pushiness. Although by 1800 it had begun to be overshadowed in politics and the pulpit by newer models of persuasive eloquence which emphasised plainer speech and effective elocution, Ciceronian oratorical techniques still strongly influenced lawyers during the opening decades of the 19th century.

Use of classical argumentation, allusions and sentence structure dated back to the preceding century when much education centred around knowledge of antiquity. Richard Davis in his *Intellectual Life in Jefferson's Virginia*<sup>1</sup> wrote :

*“Americans , Virginians especially, were fully aware of formal critiques of the art of eloquence from ancient Greece to their own time. During the latter half of the eighteenth century colleges taught rhetorical theory, including Aristotle's Rhetoric and Poetics, Cicero's De Oratore and the critical epistles of Horace and Longinus”*<sup>2</sup> .

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<sup>1</sup> Chapel Hill: University of North Carolina Press, 1964, Page 365. Classical influences on early America have long been noted. See Mullet, C.F, *Classical Influences on the American Revolution*, Vol 35 Classical Journal, 1939-40, pp. 92-104 and Meyer Reinhold, ed., *The Classick Pages: Classical Reading of Eighteenth Century Americans*, University Park, Pennsylvania State University, 1975.

<sup>2</sup> On the study of classical rhetoric in Connecticut, especially at Yale, from where, after the Revolution, the number of graduates going to the bar exceeded those going to the pulpit, see Christopher Grasso, *A Speaking Aristocracy*, University of North Carolina Press, 1999, Chapter 8.

When Davies wrote of “*Americans*” and “*Virginians*” he did not, of course, refer to the population at large but to a very small, though highly influential, classically educated minority.

The 2<sup>nd</sup> Century orator, politician, general and writer, Cato the Elder also had a strong appeal to Virginians<sup>3</sup> whilst Cicero was particularly admired as an orator and philosopher in New England<sup>4</sup>.

As the Fathers of the American Republic were no strangers to ancient Rome and Greece, it is perhaps not surprising to find references to things classical in the decisions of judges in federal and state courts of the new nation. In a study based on the years 1790 – 1800, Richard J. Hoffman<sup>5</sup> focused on the Supreme Court of the United States and the Virginia Court of Chancery, the latter because of the importance of its first sole Chancellor, George Wythe, a man who was significant in national and state politics and, as a judge, key to the development of law in Virginia. He was also in the opinion of Thomas Jefferson “*the best Latin and Greek scholar in the State*” and was dubbed by his contemporaries “*a walking library*”. Hoffman found that the sources and functions of the classical references in the judgments of Wythe and the Supreme Court were similar. Allusions and quotes were drawn from Greek and Roman literature, history and mythology. Any dissimilarity between the two courts came in the frequency of the references and in the use of Roman Law. Wythe made extensive use of the classics, especially of the *Corpus Iuris Civilis* of Justinian, while the Supreme Court justices

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<sup>3</sup> See Fredric M. Litto, *Addison's Cato in the Colonies*, William and Mary Quarterly, 3d Ser., Vol., 23, 1966, pp. 431-449.

<sup>4</sup> Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Early Classical Influence*, Classical Journal Vol. 73, pp .313 - 321.

<sup>5</sup> Richard J. Hoffman, *Classics in the Courts of the United States, 1790-1880*, American Journal of Legal History, 1978, Vol. 22, No1, pp.55-84.

were more sparing in their allusions and made no reference to Roman Law. In neither court were references generally made for the mere display of erudition by judges but for literary functions that were identical and fell into three broad categories. First specific quotes from classical literature were used to express a particular feeling, or sentiment, of the user. Second, quotes or allusions were employed as similes. In the third category as an extended simile by which ancient events or points of law were used as precedents for the holdings or views of judges <sup>6</sup>. In both courts the percentage of cases in which classical references are present amounted to twenty percent. Interestingly, Robert Hoffman examined judgments from the same period by the English High Court of Chancery and King's Bench. Usually each Chancellor and Chief Justice was classically educated, to a level beyond most American jurists, and had the ability both to read and write Latin and Greek. Some, like Lord Mansfield and Lord Loughborough, were also trained in Roman Law. Given this, it could reasonably be expected that their judgments would be liberally sprinkled with quotes and allusions from antiquity and contain numerous citations from Roman Law. The contrary appears to be the case. Hoffman read Chancery and Kings Bench decisions between 1790 and 1800, and occasionally before and after, at random. Against expectations, he found that few classical allusions appeared in them <sup>7</sup>. Only rarely was Roman Law cited in arguments before the courts

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<sup>6</sup> Hoffman, *ibid*, pp.57-58. Chancellor Wythe, in the Virginia High Court of Chancery, made 85 classical references in a total of 21 reported cases. Of these, 39 appear in the text of the judgment and 46 are contained in notes added either simultaneously or later for publication. In the Supreme Court 12 classical references are made in five cases by four Supreme Court justices, one Attorney General and several attorneys arguing before the court.

<sup>7</sup> Richard J. Hoffman, *Classics in the Courts of the United States 1790-1880*, American Journal of Legal History, Vol. 22. No1, page 69, does, however identify some exceptions, a notable one being *ex parte Wrangham*, 2 Ves. Jun. 609 (1795), a case involving Trinity Hall, Cambridge. In it Lord Loughborough used many classical allusions and quotes. However, Hoffman speculates, this may be that as Visitor for Trinity Hall he was keen to demonstrate that his classical training in Scotland was not inferior to that at Cambridge.

or in their decisions and when done so it was usually limited to appeals from Ecclesiastical Courts, where Canon Law and Roman Law stood side by side.

In seeking to explain the greater use of the classics by the courts in America, where in fact fewer judges were classically educated, than those in England, Hoffman drew attention to the general nature of polemical literature then in the country. In sermons, pamphlets, newspapers and various writings on national affairs classics played an important part. Because classics were present in the writings of Americans they could also be expected in judicial decisions, seen by Hoffman as a specialized form of polemicism. He gives greater weight, however, to two other factors. At the federal level judges had to work out the legal relationship between the states, and between a state and the federal government. In these respects, Britain, not organized as a federal state, could not provide an adequate legal model for the new country. Classics, particularly those referring to ancient constitutional arrangements, could and did play a role for judges and lawyers who attempted to deal with various problems that arose. Secondly, the question asked within states was to what extent ought English Law and practices be observed? Traditionalists thought they should be followed closely. Others, of whom Chancellor Wythe was a prominent example, believed that English precedents should not be slavishly followed and that Roman law should be the basis of a new system. In this cause they not only quoted widely in cases from Justinian's *Corpus Iuris Civilis* but also made as many classical allusions and references as possible; the intended effect of which being to heighten the break with Britain and connect the young republic with something solid from the ancient past.

Many lawyers had read Cicero's political works and criminal defences either in the original, those entering university would have to demonstrate competence in the classical tongues, or, more usually, in translation. A useful source was a popular translation, completed in 1740, of Cicero's orations by William Guthrie, a hack Tory writer from Grub Street in London. Surprisingly, Guthrie's fondness for Cicero did not prevent him elsewhere lavishing praise on Julius Caesar as "*perhaps the greatest man that was ever on earth*"<sup>8</sup>. First published in 1744, Thomas Gordon, an English libertarian polemicist, appended Cicero's four orations against Catiline, charged with plotting against the Roman republic, to his translation of Sallust, where further details of Cicero's life might be obtained. Gordon prefaced his work with a lengthy discourse on what he saw as the true principles of government heavily drawing on those of republican Rome. This book, which soon travelled to the colonies, is said to have had a decisive influence on early American political culture<sup>9</sup>.

Caleb Bingham's *Columbian Orator*, first published in 1797 was widely used in American schoolrooms in the first quarter of the 19<sup>th</sup> Century to teach reading and speaking. In addition to pieces praising republican virtues this anthology, "*to improve youth and others in the ornamental and useful art of eloquence*", gave examples of the speeches of Cicero whose oratorical techniques were strongly praised and presented as a model for statesmen

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<sup>8</sup> Stephen Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Early Classical Influence*, *Classical Journal* Vol. 73, page 315.

<sup>9</sup> Another much read book in late 18<sup>th</sup> Century America was John Ward's *System of Oratory*, first published in 1759, which drew heavily on Cicero's oratorical technique.



and lawyers to aspire <sup>10</sup>. Over two hundred thousand copies of this influential book were published in twenty three editions over fifty years.

At university professors of law would combine teaching of English common law with Greek democratic principles and Roman republicanism in their lectures. This tradition began at the College of William and Mary with the appointment of George Wythe as the first professor of Law and Police <sup>11</sup>.

### ***Employment in criminal trials.***

Following Cicero's methods, many lawyers would inform jurors of their lack of experience and limited ability in criminal trials and of how little they were acquainted with the defendant, but despite this, a solemn sense of professional duty compelled them to represent him or her. After this self-justificatory preliminary, again in the manner of Cicero, attorneys would often try to blunt the prosecution evidence with dispassionate stylized arguments about human nature and behaviour which they submitted should govern the way jurors, assessed the facts. To reinforce what they said about universal human conduct lawyers frequently quoted from sentimental novels, at first imported from Britain but soon written in abundance at home. By the technique of concentrating on general norms of human behaviour, rather than upon the defendant's discrete acts and intentions, lawyers sought to obscure the motives of their clients and encourage jurors to interpret the evidence with

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<sup>10</sup> Especially in "Introduction, General Directions for Speaking" and "An oration on the powers of eloquence written for an exhibition at a school in Boston 1791" *Columbian Orator*, Caleb Bingham and Co, Boston, 1817, pp. 7-30 and pp. 282-287.

<sup>11</sup> On the place of classical rhetoric in American legal education, see Linda Levine and Kurt Saunders, *Thinking like a Rhetor*, Journal of Legal Education, Vol. 43 1993, pp. 108 – 122.

mercy. As well as throwing this oratorical cloak about their clients, lawyers would tell jurors that by finding a defendant guilty they would have decided he or she had no sense of right and wrong and were like amoral monsters found in gothic novels, which were popularly read at the time, and appeared in theatrical melodrama <sup>12</sup> .

In conducting defences, especially in capital trials, lawyers urged juries to insist on an almost absolute standard of proof before convicting their clients and to reject circumstantial evidence. Attorneys frequently underlined the gulf between jurors and defendants, who were often forlorn and on the margins of society, but, nonetheless, urged juries to accept that they had a special duty, stretching long back into history, to treat them, even if they were not objects of ready sympathy, with fairness, humanity and clemency.

Contrasting strongly with the apologetic, dispassionate and formulaic type of criminal advocacy established throughout much of America, a small group of attorneys in New York, into whose hands much of the criminal work was concentrated during the first quarter of the 19th century, developed an ardent form of oratory intended to show defendants as deserving of pity, and to inform jurors that displays of mercy would encourage obedience and instill morality amongst rootless and impoverished people in trouble with the law <sup>13</sup> . Courts witnessed emotional language, flights of rhetoric, flashes of humour and even buffoonery. Reports of this distinctive advocacy were not always well received by attorneys in other parts of the country. To some extent, the "New York style" has been explained by the fact that the criminal bar in the city attracted to it a number of radicals from England and Ireland, where

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<sup>12</sup> See, Michael Millender, *The Transformation of the American Criminal Trial 1790 – 1875*, Doctoral Dissertation, Department of History, Princeton University 1996, pp. 92 – 106.

<sup>13</sup> Michael Millender, *ibid*, pp. 108 – 122.

florid appeals to emotion and zealous advocacy, in the spirit of Thomas Erskine and Henry Brougham, were more ensconced.

***Major alterations in procedure, evidence and general oratory.***

By the end of the second quarter of the 19th century profound procedural and evidential changes had swept across the United States. Appellate courts, convinced in their decisions by trial judges and prosecutors, stressed the ability of defendants, as bearers of rights and aided by lawyers to enforce them, to look after their own interests during jury trials. They also rejected arguments that a guilty verdict could only be legitimate if based on direct proof; accepted circumstantial evidence<sup>14</sup>; and, very importantly, emphasized that jurors need only heed reasonable doubts, and not demand an almost absolute substantiation, when considering the prosecution's case. Further, appeal court judges and writers of treatises on evidence maintained that jurors, through their everyday experiences of life, should be sufficiently confident to reach conclusions, even if not of complete certainty, about defendants' intentions and mental states from the evidence of their words and actions.

American oratory generally in the 19<sup>th</sup> Century was much influenced by two rhetorical texts, both written in the Eighteenth Century Scottish Enlightenment: *The Philosophy of Rhetoric*, by George Campbell and *Lectures on Rhetoric and Belle Lettres* by Hugh Blair. Stressing that human beings could discover truth through experience and only communicate it by recreating that experience in the minds of their listeners, the rhetorician was expected to

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<sup>14</sup> On the acceptability of admitting circumstantial evidence into trials see, for example, the jurist James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Little Brown and Company, 1898, Chapter VI.

develop his own understanding by reflecting on experience and then to explain such comprehension to an audience by appealing to faculties of mind which included understanding and imagination. Following this approach, 19<sup>th</sup> Century American orators often told stories of their experiences and or created “word pictures” to impart their ideas. The purposes of rhetoric was not merely to entertain, but to persuade listeners towards noble ends.

An essay entitled *American Eloquence*, from the United States Democratic Review <sup>15</sup> written in 1854, described what it considered to be the chief characteristics of American oratory including their “*Fervor*”, strong “*common sense*”, “*frank, open business-like air*” and appeals to emotion. On the latter, it was said

*“Powerful and effective eloquence always has been and always must be addressed mainly to the passions or feelings in a man’s heart. What could all the metaphysical subtleties of Thomas Aquinas and Duns Scotus effect, in impelling men to action , or in accomplishing any great and grand end, when compared with that warm, gushing eloquence, coming from the heart and going to the heart? We care not how powerfully the intellect is addressed and stimulated, enlightened and convinced, by argument. But let us remember, the work is not effectually done, the grand end and aim of eloquence is not attained, till the consenting sympathies of the inner man of the heart are touched and roused and brought into action. True eloquence – effective , useful eloquence – must appeal to the heart, through the understanding and the conscience. It must open the floodgates of sensibility within us, and thus bring into exercise our active powers for the promoting of good or the preventing of*

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<sup>15</sup> Volume 34. Issue 1. pp.40-52.

*evil, or else, its real power and utility will be of a very small amount. And such, we think, in a very grand degree, is the character of American Eloquence”*<sup>16</sup>.

Attachment in public oratory to the classics waned generally, although some speakers held on to them tenaciously<sup>17</sup>.

### ***A sea change in advocacy.***

Changes in procedure, laws of evidence and the effect of the prevailing general style of oratory produced a sea-change in advocacy in court, at first in the big cities and then spreading beyond. Attorneys adopted the mix of flamboyance, appeal to emotion and aggression that has been their hallmark ever since<sup>18</sup>. No longer able to argue that jurors were duty bound to acquit if there was any doubt in a case, they attempted to move jurors with the sincerity of their belief in the innocence of their client and, where possible, by closely examining evidence so as to point to different conclusions than those urged by the prosecution. Alternative versions, narratives, of what had happened were put forward. In doing so they jettisoned earlier objections to circumstantial evidence, the admissibility of

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<sup>16</sup> Volume 34. Issue 1. page 45.

<sup>17</sup> One such was William Henry Harrison, elected as President of the United States in 1840, after a campaign in which his Democratic opponents had portrayed him as a simple frontier fighter, and a hard cider drinker living in a log cabin. In reality he was from the Virginia planter aristocracy and had studied classics and history. Once elected – and determined to slay this false image – he delivered a three hour inaugural address, on a cold March 1841 day in Washington, which employed many the rhetorical flourishes from his classical training and included references to the ancient Athenian constitution. He caught a cold . Unfortunately, this later developed into pneumonia and he died soon after.

<sup>18</sup> J. A. Millender, *The Transformation of the American Criminal Trial 1790-1875*, Doctoral Dissertation, Department of history, Princeton University 1996, Chapter 7. Commercial necessity may well have contributed to the major changes in advocacy that occurred. Lawrence M. Friedman, *A History of American Law*, Simon and Schuster, New York, 1973, pp. 270 – 275,” saw *flamboyance, tricks and courtroom antics*” adopted in the 19<sup>th</sup> Century by lawyers, and not restricted to criminal cases, as influenced by business reasons. Lawyers constantly needed to advertise themselves to attract new clients. Although they could place notices in newspapers, word of mouth was the most effective way. Their style of advocacy was “*more than a matter of personality; this behaviour created reputation; and a courtroom lawyer who did not impress the public and gain a reputation would be hard pressed to survive*” ( Page 270).

which had been championed by the prosecution. Very unlike the earlier advocacy, which underlined differences between jurors and usually wretched defendants, lawyers started to stress the faculty of jurors to know the innermost thoughts and emotions of defendants, as well as their own, those of their spouse, or child, or neighbour.

Lawyers began to tenderly paint sympathetic pictures, often in the manner of sentimental novelists, of their clients to the jury. Addresses frequently became generously spiced with quotations from literature and poetry and the Bible. Because, as Tocqueville had observed, the great mass of people in nineteenth century America were largely indifferent to “*what occurred in Rome and Athens*”<sup>19</sup>, classical allusions to jurors became rare. This was not to everyone’s liking<sup>20</sup>.

Sensationalism, as a tactic in criminal trials, appeared. Theatrical appeals to the emotions of jurors became more charged and were most probably taken to their extreme by William E

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<sup>19</sup> Quoted by Stephen Botein, *Cicero as a Role Model for Early American Lawyers*, *Classical Journal*. Vol.73, 1978, page 318.

<sup>20</sup> In 1851, a contributor to the *Democratic Review* (*The American Bar in 1851*, XXVIII, pp.195 – 209), presumably not merely presenting his own views but also those more widely held, wrote indignantly about a distinct decline in courtroom advocacy. In his opinion, the *dearth of oratory* was attributed, in part, to *the number of inferior men who crowd themselves within the bar*. (Page 203.) Following the election of President Andrew Jackson in 1828, and the introduction of Jacksonian democracy, aimed at giving citizens greater participation in the running of their country, admission to state bars became much less stringent. This coupled with growing legal business in an expanding economy led to more lawyers, many of whom had not undergone college education, where they would have been exposed to the classics. A further reason for what was seen as a fall in standards was said to be a lack of literary appreciation amongst the mass of the legal profession, college educated or not. According to the *Democratic Review* commentator, “*They study law .....and they study nothing else ..... They are content to know the verbiage of the law, and they bow reverently to the ipse dixit of ancient compilers of rules, and modern digesters of precedents. As to studying the classics, they were bored sufficiently with them at college. As to Burke and Milton, they throw no light upon the Rule of Shelley’s case, and a lawyer should not waste time upon them. Such members of the profession .... will never cultivate eloquence themselves, nor encourage its growth in others*”. The author of the article in the *Democratic Review* complained about “*the disciples of the “black-letter school” who exerted “a pernicious influence*”. They were also to be found elevated to the bench “*where they are apt to discourage the display of those gifts in the advocate, of which they are destitute, either not appreciating their value, or ill-concealing their envy at the superior influence they exert upon jurors and auditors over their own bald exhibitions*”. (pp. 203 -204. ). Further contributing to the neglect of eloquence in oratory, with some notable exceptions, principally works by Kent, Story, Hoffman and Greenleaf, were treatises and text books, written in a “*disorderly, vague and jejune manner*”, with which lawyers and judges stocked their minds (page 204).

Howe<sup>21</sup>, a partner in the infamous New York firm of Howe and Hummel, who could, and did, cry "at will" to win the sympathy of the jury. Described as a *sickening spectacle* in A. H. Rovere's astonishing book, *Howe and Hummel* it often carried a jury to extraordinary decisions<sup>22</sup>. Howe once, despite his considerable bulk, made an entire closing speech on his knees in front of the jury box. Another technique was to place the wife and children of the defendant in the front row "to gaze devotedly at the man on trial. If perchance a particular defendant did not have a pretty wife, fond children, or a snowy haired mother, he was not for that reason deprived of the sympathy they might create on his behalf. Howe would simply supply them from the firm's large stable of professional spectators"<sup>23</sup>.

Theatricality also extended to clothing. At the beginning of a case, Howe would dress showily in a dove –grey suit and with much jewellery. As the days passed he shed his bright garments for darker suits and ties and stopped wearing watch chains, tiepins and rings. By the day the jury would be called on to decide the fate of his client his attire, matching his face, would be very sombre<sup>24</sup>.

Originally a Londoner, William Howe (1828-1902) professed on occasions to have been employed as a clerk at a barrister's chambers in the early 1850s, frequently visiting courts in

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<sup>21</sup> Over the course of his career William Howe represented over six hundred accused murderers – a greater number than the rest of the New York Bar combined. See *Decadence of New York's Criminal Bar*, New York Times, 7<sup>th</sup> September 1902, page 34.

<sup>22</sup> Although Howe's ability to cry was exceptional, others also used the technique. Indeed in 1897 the Tennessee Supreme Court rejected a claim that public displays of emotion were wrong and held they might be positively good. "Tears have always been considered legitimate arguments before a jury. Indeed if counsel has them at his command, it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises". *Ferguson v. Moore*, 39 S. w. 341, 343, Tenn. 1897. Quoted by Sadakat Kadri, *The Trial A History from Socrates to O. J. Simpson*. Harper, 2006, Page 299.

<sup>23</sup> R. H. Rovere, *Howe and Hummel*. New York, Farrar Straus, 1947. Powell and Paterson, *Cicero the Advocate*, Oxford University Press, New York, 2004, page 33, compare this kind of appeal to sympathy with those made in ancient Rome, where a defendant would appear in mourning, unkempt and dirty in the company of family and relatives in a similar way. Interestingly, a junior barrister interviewed considered most advocates in modern England, whilst strongly discouraging displays of emotion from defendants, would encourage their relatives, respectably dressed, to be present before juries.

<sup>24</sup> Francis L. Wellman, *Luck and Opportunity*, MacMillan, New York, 1938, page 27.

the course of his work.<sup>25</sup> It is at least possible to suggest that the histrionic advocacy observable in London at the time may have later influenced his style in New York<sup>26</sup>.

Books began to be produced on forensic address, including an important series compiled by Judge J.W. Donovan. The first edition of *Modern Jury Trials*, published in 1881, contained some forty condensed trials and ninety pages of descriptive matter, and formed a book of 700 pages. Despite being expensive, it sold many thousands of copies. *Trial Practice and Trial Lawyers* followed in 1883 and also met with success. It was confined mainly to descriptions of American advocates, preparing cases for trial and the conduct of court cases. *Tact in Court* was published in 1885. Deliberately moderately priced, and aimed at the great mass of young lawyers, it sold, in various editions, over thirty thousand copies in the following thirty years. The work contained a selection of short articles by eminent advocates. Amongst a great quantity of advice contained within the book were the necessities of thoroughly preparing cases and of formulating a credible intelligent theory why a party's version of events should prevail, suitable confidence, not over- confidence, attention to voice, gestures and appearance, avoiding the appearance of trickery (rather running against the approach taken by William Howe, although, perhaps, his success was in

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<sup>25</sup> Howe claimed to have read law at Kings College, London and, after graduation, had entered the office of George Waugh ' a noted barrister'. There is evidence that he did work for Waugh, who was a solicitor, not a barrister, for a number of years. In this capacity he attended court often. He also appeared in court as a witness in two murder cases and as a defendant in a criminal trial at the Old Bailey in 1854 concerning a perjured bail affidavit. Upon conviction, Howe received 18 months hard labour. See, James Morton, *Uncovering the truth*, Law Society Gazette, 18<sup>th</sup> October, 2007, 104/40, page 17.

<sup>26</sup> Perhaps it is not too unreasonable to speculate that the success of William Howe's appeal to emotion and theatricality may, somewhat later, have influenced the histrionic styles of Earl Rogers (1869 -1922) in California and William Fallon (1886-27) in New York, the pre-eminent criminal attorneys of their respective bars. William Fallon, known as the *Great Mouthpiece*, became the inspiration for Billy Flynn, in the popular entertainment films *Roxy Hart* and *Chicago*. See Gene Fowler, *The |Great Mouthpiece, A Life Story of William J.Fallon*, Covici Friede, 1931. On Earl Rogers see Michael Trope, *Once Upon a Time in Los Angeles: The trials of Earl Rogers*, Arthur H. Clerk Company, 2001.



being able to hide it), courtesy to the court and opposing counsel and careful selection of language before juries. On the latter A. B. Maynard, in an article entitled *Tact in Trials*<sup>27</sup>, wrote:

*“I found farmers had one language, carpenters had another, country merchants had another and labourers another – these are the average jurymen. I adopted and used their catchwords and phrases, not as ‘clap-trap,’ or a ‘trick’, but to talk to them in their own language. I found it took better; they understood me and knew my meaning better. I never lost my suit by a jury’s ignorance of what I contended for”.*

Recognising the respect with which most jurors held judges, Maynard also strongly cautioned advocates from arguing with judges once they had ruled on a particular matter.

In *Winning cases*, by “Different Counsel” the importance of stating facts simply before a jury was stressed along with illustrating points by comparisons with which jurors could easily identify<sup>28</sup>. In this respect, the abilities of Abraham Lincoln’s were much praised<sup>29</sup>. This article also stressed usefulness of drawing on biblical stories<sup>30</sup>.

In *To cross-examine well*, Judge Donovan urged a restrained form of cross-examination:

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<sup>27</sup> *Tact in Court*, Sweet and Maxwell, London, 1915, Edition, pp.35-37.

<sup>28</sup> *Tact in Court*, *ibid*, pp. 49-54.

<sup>29</sup> It has been said that Abraham Lincoln well understood that a lawyer’s success depended more on his popular appeal than on his technical expertise. Charles M. Haar, *The Golden Age of American Law*, George Braziller, New York, 1965, page 4.

<sup>30</sup> By the time of Donovan’s *Modern Jury Trials* this had a long history, especially in some States,. In discussing 18<sup>th</sup> Century Connecticut, where until about 1750 it was common for church ministers to appear in court on behalf of neighbours, Sally Hadden, Professor of History and Law at Florida State University, said that lawyers consciously adopted ministers’ gestures and flourishes. Interview conducted on the 11<sup>th</sup> May, 2010.

*“Most young lawyers think they appear dull if they pass a witness without ‘tearing him to pieces’ under rigid questioning , and find that they have fed their enemy at every question. Older advocates use this weapon with tact and caution. They have tried the sabre exercise too often, and remember the deep scars it produced on their clients”.*

A little after he said:

*“The fine art of cross – examination is in making your case out of an opponent’s witness. This is almost always done by a gentle and delicate leading process coupled with concealed kindness that fascinates and encourages, whilst it creates the reasonable doubt or supplies the broken thread of a story that you are seeking to establish” .*

Donovan concludes:

*“There are no better rules of cross- examination than five: (1) Know what you need, and stop when you get it. (2) Risk no case on the hazard of an answer that may destroy it (3) Hold your temper while you lead the witness, if convenient, to lose his. (4) Ask as if wanting one answer when you desire the opposite, if the witness is against you: and reverse the tactics if he is more tractable. (5) Treat a witness like a runaway colt; and see he does not get too much start on his master; and if he does , let go of the reins at the first safe turn in the testimony; but if you see any object to break his running , call the turn quickly”.*

Lawyers who appeared before juries acquired knowledge, not found in books, about the way they often worked. In a satire, but which nonetheless reflected reality, written in 1906, a commentator wrote of a system of “*jury –made lawlessness, or juries imprudence , which recognizes rights that are forbidden by law and denies rights that are granted by law*” . He then set out examples “*of jurisprudence of lawlessness*” including: “*Any man who seduces an innocent girl may, without a hearing be shot , or stabbed to death by....any near relative and In prosecutions for stealing horses, cattle or hogs, the presumption of innocence is shifted in favor of the live stock , and the accused is presumed to be guilty*”<sup>31</sup> . Attorneys who ignored these strong presumptions and other “*unwritten laws*” did so at their peril.

Up until the beginning of the second half of the Nineteenth Century, courts in the United States generally conducted hearings in civil matters at a leisurely pace. Marathon speeches by counsel were allowed. The federal Supreme Court was described in 1824 as “*Not only one of the most dignified and enlightened tribunals in the world, but one of the most patient,. Counsel are heard in silence for hours , without being stopped or interrupted*”<sup>32</sup> . In the course of their speeches judges would sometimes deal with subjects remote to the matter in hand. The speed of court life hastened greatly as the growing economy brought with it burgeoning numbers of cases. To cope with them, courts did not have the time to listen to long speeches, even if judges wanted to. Attorneys had to adapt to this new reality in their advocacy.

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<sup>31</sup> Thomas J. Kernan, *The jurisprudence of lawlessness*, Green Bag 18: 588 (1906). Cited by Lawrence M. Friedman, *American Law in the 20<sup>th</sup> Century*, Yale University Press, 2002, pp. 87-88.

<sup>32</sup> Quoted in Charles Warren, *The Supreme Court in United States History*, Little, Brown and Co, 1922, Volume 1 page 467.

Before lawyers were engaged in significant numbers in managing the legal and commercial affairs of the large corporations that emerged in the third quarter of the 19<sup>th</sup> Century, the business of lawyering was largely conceived as a courtroom activity, mainly carried out by attorneys in sole practice. Good ability in advocacy across a wide variety of criminal and civil cases was important for a lawyer's reputation and success.

### ***Expression of belief in causes.***

As in England and Wales, especially after Courvoisier's case in 1840 and that of William Palmer in 1856 ( both much reported in America), there was discussion in the United States about whether advocates should be allowed to express belief in the causes of their clients. The first American code of ethics, that of the Alabama State Bar Association published in 1887, rejected any distinction between permissible and impermissible expressions of belief: All expressions of belief were disapproved: The Code stated:

*“The same reasons which make it improper in general for an attorney to testify for his client , apply with greater force to assertions , sometimes made by counsel in argument , of personal belief of the client's innocence or the justice of his cause. If such assertions are habitually made they loose all force and subject the attorney to falsehoods; while failure to make them in particular cases will be esteemed a tacit admission of the client's guilt, or the weakness of his cause”* <sup>33</sup>.

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<sup>33</sup> Code of ethics (Ala.) Chapter 18.

Similarly the American Bar Association, somewhat later in 1908, was unequivocal in its prohibition:

*“It is improper for a lawyer to assert in argument his personal belief in his client’s innocence or in the justice of his cause”*<sup>34</sup>.

While American judges repeatedly reaffirmed the no personal belief rule, there is evidence that some lawyers, in civil and criminal cases, disregarded it<sup>35</sup>. Wide latitude was still permitted to lawyers expressing comments on the evidence.

During the second half of the 19th century, every state in the Union, save Georgia, granted accused persons the right to give evidence on oath at their trial<sup>36</sup>. Like England and Wales, where the Criminal Evidence Act of 1898 gave defendants similar rights, lawyers in the United States had to adapt their advocacy to take account of this shift in procedure which weakened their control over their client's defence. Also during this period, US advocates had to adjust to the growing use of expert evidence in court, as did their counterparts in England and Wales. Similar to there, it was for a time a habit to speak slightly of the reliability of the testimony of expert witnesses. In one of the leading American law magazines a professional expert witness was defined as *“a man who is paid a retainer to make a sworn statement”*<sup>37</sup>.

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<sup>34</sup> Canon 15.

<sup>35</sup> David Mellinkoff, *Conscience of a Lawyer*, St Paul, West Pub Co, 1973, Chapter 11.

<sup>36</sup> It was not until 1962 that defendants in Georgia were allowed to testify on oath.

<sup>37</sup> 27 Am. Law Reg., iii., footnote., cited by Frederic Wrottesley, *The Examination of Witnesses in Court*, Sweet and Maxwell, London, 1910, Chapter 3, page 65.

## ***Plea bargaining.***

There is general agreement amongst legal historians that prior to 1800 the distinctively American feature of plea bargaining did not exist. Plea bargaining is a process by which a person agrees to plead guilty to a criminal charge in exchange for concessions by the prosecutor representing the state. The defendant waives the right to trial, losing any chance of acquittal, but usually avoids conviction on a more serious charge. The state on the other hand, is not required to go through the expense of a trial. Matters negotiated in plea bargaining include reduction in the charges, a specific recommendation to the judge on sentence or an agreement not to oppose a request by the defence such as for probation. Plea bargaining began to appear in the early or mid-nineteenth century, apparently independently in a number of jurisdictions. It became a standard characteristic of American urban criminal courts in the last third of that century<sup>38</sup>. Various explanations why it arose and grew have been put forward<sup>39</sup>. They include heavy caseloads of judges, swelled by increasing numbers of civil claims for remedies under newly invented torts, over crowded prisons and that plea bargaining conveniently, in a more bureaucratized criminal justice system, settled cases where guilt was obvious but problematic to prove, thereby lessening risk to both the defendant and prosecution. As most criminal trials were fast paced and frequently resulted in conviction, similar to England, plea bargains were an attractive alternative, especially for

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<sup>38</sup> See Albert Alschuler, *Plea bargaining and its history*. Law and Society Review Vol 91 No2, 1979, pp. 211-246 ; Lawrence Friedman, *Plea bargaining in historic perspective* pp. 247 - 260, same volume ; and John Langbein, *Understanding the short history of plea bargaining*, pp. 261-272, also in the same volume.

<sup>39</sup> See Mary Vogel, *Coercion to compromise: plea bargaining, the courts, and the making of political authority*. New York: Oxford University Press, 2000 and George Fisher, *Plea bargaining's triumph : A history of plea bargaining in America*, Stanford CA:Stanford University Press, 2003.

guilty defendants <sup>40</sup>. By bargaining they had a hand in their own fate, rather than leaving it entirely to the not so tender mercies of the judge and jury <sup>41</sup>. Attorneys in 19<sup>th</sup> Century America, both for the defence and prosecution, as an important aspect of their court work, had to develop the ability to negotiate pleas. Competence by defence attorneys in composing and delivering pleas in mitigation following guilty pleas was essential.

### ***Bench Trials.***

In the 19<sup>th</sup> Century Maryland stood alone in allowing defendants to elect trial before a judge without a jury. These became known as bench trials. By the 1920's, in that state, they far exceeded jury trials. Bench trials were particularly popular with those charged with sexual offences and black people, both at risk of prejudice from jurors. That judges could dispose of many more cases when sitting without a jury was noted as beneficial. Elsewhere there was some constitutional doubt whether a state could allow a defendant to waive the right to jury trial. This began to dissolve. In 1927 Michigan permitted the practice. Other states followed. The Supreme Court approved of bench trials in federal courts in 1930. Eventually almost states came to permit them. In some, Virginia and Mississippi are examples, they became very widespread for felony cases <sup>42</sup>. Taking the jury out of the

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<sup>40</sup> Lawrence Friedman, *American Law in the 20<sup>th</sup> Century*, Yale University Press, 2002, page 85, wrote: "Before plea bargaining became routine, these people went to trial- but the trials were quick, slapdash; they were typically lawyerless, and many of them started and finished within half an hour or even less".

<sup>41</sup> Interestingly George Fisher, *Plea bargaining's triumph: A History of plea bargaining in America*, Stanford CA: Stanford University Press, 2003, found, in his research in Middlesex County, Massachusetts, after 1866, when defendants were given the right to testify, that the trial rate rapidly decreased and guilty pleas rose, presumably because of more bargains being struck. Although meant to safeguard defendants, making them competent to give evidence paradoxically resulted in defendants having less advantage at trial. If they did not testify adverse inferences would often be drawn against them by jurors. Also if they testified there was then no prohibition on prosecutors commenting on their prior silence and questioning them about previous convictions. A reasonable interpretation of the increase in guilty pleas in Middlesex County is that defendants and lawyers were aware of these dangers.

<sup>42</sup> Lawrence Friedman *American Law in the 20<sup>th</sup> Century*, Yale University Press, 2002, page 87.

courthouse had a huge influence on advocacy, as it did in England. Unlike jurors, judges had no time for stirring speeches, sensationalism and histrionics. Strict attention to evidence and the law was required of attorneys, not appeals to passion, sympathy and prejudice <sup>43</sup>.

### **Conclusion.**

This article sought to examine key changes and influences on courtroom advocacy in the United States during the long Nineteenth Century referring to England and Wales for purposes of comparison.

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<sup>43</sup> Lawrence Friedman, *ibid* page 88, mentioned the case of Richard Loeb and Nathan Leopold in 1924 as a rare instance where a strong appeal to emotion was made to a judge sitting alone. Clarence Darrow, on behalf of the two young men, who had murdered a boy, apparently just for the thrill of doing so, made an impassioned speech in mitigation for their lives drawing on psychiatric reports. They were spared death. The judge emphasised their youth. Friedman thinks it unclear whether Darrow's eloquence, which was much reported, made any difference.



