Cicero
The Advocate

edited by

JONATHAN POWELL

and

JEREMY PATERSON

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Epilogue: Cicero and the Modern Advocate

JOHN LAWS

In everything that follows there are connections, similarities, and differences between the courts of Cicero's Rome and the practice of the advocate's profession in modern England. I am mostly interested in comparisons, not judgements. Only an unintelligent reader (and, of course, there will be none) will be bothered if he finds anachronisms.

i. The Ethics of the Advocate

In the first century BC the background to the practice of the law by advocates in the courts of Rome was one of violence and intimidation: they had come to be included in the armoury of political activity. The tribune Tiberius Sempronius Gracchus had been murdered by senators and their friends in 133 BC. His brother Gaius was killed twelve years later. The disastrous Social War, in which Cicero served, followed in the early years of the first century (91–89). Then there was the dictatorship of Sulla, who in 82, according to Plutarch (*Sulla* 4), 'now devoted himself entirely to the work of butchery'. Sherwin-White says:

> Cicero's writings reveal the ambiguous and contradictory attitudes towards the concepts of law and self-help to which he and other Romans were reduced when they found themselves in the no-man's land where the city-state fails to control partisan violence.[1]

So in the case which made Cicero an immediate reputation, the defence of Sextus Roscius of Ameria in 80 BC on a charge of parricide, Cicero explained that 'notable orators and eminent citizens' remained 'firmly rooted in their seats' and, though sympathetic, did not undertake the

[1] A. N. Sherwin-White, review of A. W. Lintott, *Violence in Republican Rome*, *JRS* 59 (1969) 286.

defence of Roscius 'owing to the hazardous times in which we live' (*propter iniquitatem temporum*). Fascinating and alien to the modern advocate is the fact that Cicero thought it necessary or desirable to go on to explain to the judges his own motives for taking the brief:

> You may well ask, then, my real motive in undertaking this defence of Sextius Roscius, which the others were so reluctant to touch. Well, my motive was this. These men I am speaking of are important, authoritative figures. Now, if any of them had made a statement, if anything in this statement had possessed political implications–a thing which would have been inevitable in a case like the present one–then people would have made out that he was meaning a great deal more than he had actually intended to. But I, on the contrary, can say every single thing that needs to be said, and say it with the most complete freedom, without there being the slightest question of my speech becoming known or achieving publicity to anything like the same degree. . . .
>
> And another reason why I accepted the commission is this . . . the approach to myself came from men whose friendship I regard as carrying enormous weight; I cannot forget all the services I have received from them, not to speak of the high positions they occupy in the state. The kindness they have done me, as well as the importance of their rank, seemed to me too great to disregard; and so I felt that I could not possibly ignore their wishes.
>
> Those are the reasons why I agreed to undertake Roscius' defence. It is not a question of having been singled out as the most talented pleader.[2]

No barrister in an English court (at least, no competent one) would expatiate on why he had taken the brief, and if he did so the court would regard it as unprofessional and inappropriate. He takes the brief because he is obliged to do so by the 'cab-rank' rule: that is, he is required by his profession's rules of conduct to take any case that comes his way if it is within his field of expertise, unless he is otherwise engaged or would be professionally embarrassed, and the case is offered at a proper fee. He may welcome it; he may not.

The culture of the English Bar,[3] and the value attributed to it, rests largely on its independence, in particular its independence from the State. This is very real. Daily in the High Court counsel appear to advance arguments to the effect that the executive government has arrived at an unlawful decision in such sensitive fields as immigration and political asylum.

[2] *Rosc. Am.* 1–5. The translation is Michael Grant's, published in *Cicero, Murder Trials* (Harmondsworth, 1975). The Introduction to the volume is a very useful *vade mecum* to the context of Cicero's defence speeches in homicide cases, and I acknowledge, with pleasure, the extent to which I have drawn on it.

[3] The extension of rights of audience to solicitors in the higher courts in England has been very contentious, but does not, I think, affect what I have to say; and nothing I have written in this chapter implies any views about it.

Defendants accused of horrific terrorist offences are represented in the Crown Court before judge and jury by leading and junior counsel at the public expense. There is no question of counsel being criticized for doing so. We take all this for granted. None of it was true in Cicero's time. If an advocate then was prepared to stand up for his client in the face of hostile vested interests, where to do so might risk his own advancement or even his personal safety, he might do it out of duty to a patron, or (most likely) the allure of some yet greater interest of his own, or out of his own courage and conscience; or any combination of these. It would not be because, simply, that was what was expected and required of him by his profession, by the court, and by the public. And the Roman advocate's motives, no doubt, were not unaffected by the fact that he was forbidden to accept fees for his services. Moreover the possibility of the advocate's acting with anything like what we would regard as independent professional judgement was further undermined by the circumstance that prosecutions were not undertaken by a public authority whose duty before the case was launched was to consider objectively whether there was sufficient evidence to offer a likelihood of conviction and whether it was in the public interest to proceed.[4] In Cicero's Rome prosecutions were brought by private individuals. Wolfgang Kunkel says:

> Every citizen of good reputation was, in principle, permitted to initiate a prosecution (except in the case of the procedure before the *quaestio de iniuriis*) . . . The motives of the prosecutors were naturally very varied. Besides an injured party's thirst for vengeance . . . enmities which had nothing to do with the crime in question played a great part; and so, above all, did greed for money, for the criminal statutes promised rewards of considerable size for the victorious prosecutor: indeed, in the case of capital condemnation the prosecutor actually received a proportion of the confiscated property. Without doubt there were many people who made a business of instituting prosecutions, and very few who in instituting them thought only of the public interest.[5]

While in the United Kingdom we are right to be proud of our powerful tradition of independent advocacy, it is easy to forget that much of its strength rests on the fact of its general acceptance; no one–at least no one sensible–disapproves of it. In particular *government* does not disapprove of it–quite the reverse. In the criminal courts, as I have said, the defendants charged with grave offences are regularly represented by leading and junior counsel at the public expense. I am not here concerned with the arrangements under which they are paid out of legal aid. What I am at pains to

[4] This is, I hope, a fair summary in very short form of the duty of the Director of Public Prosecutions and the Crown Prosecution Service in England.

[5] W. Kunkel, *An Introduction to Roman Legal and Constitutional History* (Oxford, 1966) 64.

emphasize is the cultural, endemic nature of the legal profession's independence. No one raises an eyebrow when a QC who not long before was briefed to defend an accused on a terrorist murder charge is raised to the High Court bench. And it is generally regarded as a virtue for barristers in criminal practice to take briefs both for prosecution and defence;[6] it tends to enhance objective judgement, and to discourage the vice of the advocate falling in love with his cause–a vice which Cicero and his contemporaries would simply not have seen as such. Indeed he and they would be likely to accept a case *precisely because* of their connections with the client.[7]

In the British jurisdictions[8] there is nothing dishonourable for counsel to take a brief in the most unpopular cause imaginable; indeed, other things being equal, it is his *duty* to do so. His client may be as morally repulsive as you could suppose; the case against him, on an objective view of the evidence, may seem insuperable; but he is obliged by his very profession of barrister to run his client's case as tenaciously as he can, however unpromising it is, restricted only by his duty to the court. That is an overriding duty: he must not deceive the court, either as to the evidence or the law. This was not the culture of Cicero's Rome.

I may enter a parenthesis here about the old chestnut–a favourite opening gambit at a drinks party, where someone asks a barrister how he can defend someone he knows to be guilty. Quite sophisticated people seem to have difficulty with this, yet the answer is perfectly simple. Dr Johnson had it right in 1773:

> A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge.[9]

The underlying principle, of course, is that every man is entitled to have his case, criminal or civil, tried by an impartial court with the benefit of

[6] However, there are certainly members of the criminal Bar who only defend or only prosecute. At the Central Criminal Court (the Old Bailey) there is a *cadre* of barristers who only prosecute. They are known as Treasury Counsel (not to be confused, confusing though it is, with the office of First Junior Counsel to the Treasury, to which I will refer shortly). I understand this to be justified, or sought to be justified, by the needs of the Director of Public Prosecutions to have uninterrupted access to a team of high quality specialist prosecuting counsel, having regard to the unremitting stream of very heavy cases at the Old Bailey, not a few of which are of particular public importance or attract an especially heightened glare of publicity. I believe there are some barristers who only defend because of their personal views about authority or the establishment, call it what you will; if there are, I think it is a breach of the cab-rank rule. Of course a barrister may rightly get a name as a formidable defender, as did Sir Edward Marshall Hall KC, of whom more later.

[7] Cf. *Off.* 2.51 (cited below, p. 407).

[8] That is: England and Wales; Scotland; Northern Ireland. These are all separate jurisdictions.

[9] R. W. Chapman (ed.) *Johnson's Journey to the Western Islands of Scotland and Boswell's Journal of a Tour to the Hebrides with Samuel Johnson, LL.D.* (Oxford, 1924) 175.

counsel. If counsel were allowed to refuse the brief because the evidence against the client appeared so strong that he and any other reasonable man–including, it may be, anyone else in the Temple to whom the brief was returned–were driven to believe that the client was going to lose, he would be deprived of a trial in which he was properly represented; he would end up represented, if at all, by the incompetent or the unscrupulous, or the briefless barrister to whom any case is a blessing.[10] That would be barbarous.

In the field of civil cases, the institutional independence of the advocate's profession in England is perhaps clearest in the context of judicial review litigation, in which executive decisions taken by government ministers or in their name are challenged every day in the court calendar. Counsel appearing in court against the government in such cases are judged solely by their professional competence. They are so judged by the court itself, which *expects* a good point to be taken against the government if there is one. They are also so judged by the government itself. A very considerable proportion of the heaviest government litigation is taken by First Junior Counsel to the Treasury, which is a misleading (though historically hallowed) title for the barrister appointed by the Attorney General to conduct the leading cases in which the government appears as a party in the higher courts and in the European Court of Justice at Luxembourg. But there is so much government work that the Treasury Junior can by no means do all of it. Some government cases are conducted by silks–Queen's Counsel; much is done by junior barristers (that is, not silks) appointed by the Attorney General to one of three panels of counsel whom government departments are authorized to instruct. Unlike the Treasury Junior, silks and the members of the panels briefed by the government are not restricted to Crown work.[11] They may regularly be instructed against the government, and just as often on its behalf.[12] Junior Counsel not yet on a

[10] What may in short be called rights of due process are guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms, incorporated into the law of the United Kingdom by the Human Rights Act 1988: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent & impartial tribunal established by law.'

[11] The Treasury Junior takes no private, that is non-government, clients. This is an exception to the cab-rank rule, justified and accepted by the profession on the grounds of necessity. First, he may be called on at any time to give urgent advice or appear in court for the government at extremely short notice, so that it would be unfair to the private client if he had to drop the latter's case at the last minute; and the pressure of government work, to which he is obliged to give priority, is so great that he could not do justice to his private client's interests. Secondly, he is privy to some of the inner workings of government and to what is sometimes extremely confidential information, knowledge of which would put him in an impossible position if he were obliged to accept briefs against the Crown. What is important for present purposes is that the exception to the cab-rank rule *needs* to be justified.

[12] It is true that some sets of barristers' chambers have a name as 'establishment' sets, and others as 'anti-establishment' sets. The reasons are not straightforward, but it is a very bad thing.

panel, who come to the notice of the Treasury Solicitor because of the quality of their work *against* the government, may be considered for, and offered, a panel appointment for that very reason.

I may add a word about my own experience as Treasury Junior for seven years between 1984 and 1992. Over that period the work involved an increasing majority of public law cases, brought by judicial review or similar proceedings, in which actions or decisions of government were challenged by affected parties as being unlawful. I had not infrequently to give advice to government departments in cases of considerable political sensitivity, as my predecessors and successors in the office must also have done. There was not a single occasion on which any pressure of any kind was put upon me to give what might be seen as convenient advice, or to conduct a case in court other than in accordance with the Bar's strictest professional standards. If any such suggestion had even been hinted at, it would have been regarded as entirely outrageous; it would also have been so regarded by the Law Officers and by the Lord Chancellor, and by the senior judiciary if they heard of it. Of course no such suggestion was made, and it never occurred to me or, I am sure, to anyone else that it might be. All the government was concerned with was my competence at the work (as to which, were I Cicero, I would no doubt roundly disavow any claim).

In the same vein, I recall some occasions on which the applicant for relief against the government was incompetently represented, and if I thought he had a point but had not seen it, I put it to the court myself, even though I was acting for the respondent government department. I claim no credit whatever for this; it was what the court expected, and it was what *my clients expected.* It required no courage on my part, nor any unlooked-for independence. It is merely a function of the legal culture to which court, government, and advocate are alike committed.

The virtue of all this is an institutional virtue; it is not a virtue of particular individuals, though individuals have certainly contributed to it over time. It is too easy to forget the demands of personal courage and determination exacted of an advocate–and, indeed (and perhaps especially), the judges–in the courts of a place where the culture promotes no such ideal. Across the world there are nowadays lamentable instances of that very thing. It is not for us to sit back in cosy self-congratulation; the independence of Bar and Bench has been given to us, we have not in this generation created it. It is certainly our duty to defend it without compromise if it is threatened, but it is also our duty to lend support, wherever it is proper and legitimate to do so, to the legal professions in places where it has to be fought for.

All this brings me back to Cicero. It is interesting he always preferred to defend in criminal cases, although, of course, he had a spectacular success as a prosecutor against Verres (70 BC). In his defence of Roscius he

expresses this preference with an insouciant hypocrisy which, as so often with Cicero, is maddening but engaging for its sheer *chutzpah*:

> If I enjoyed being an accuser, there are other people I should prefer to accuse, engaging in cases that would advance my career. But this I have decided not to do, as long as the option remains open to me. For real respect is earned by improving one's reputation by one's own merits, not by climbing upon the distresses and disasters of someone else.[13]

In the Roscius case Chrysogonus, the man behind the prosecution, was a favourite freedman of the dictator Sulla. I think it is not too romantic a view to regard Cicero's defence as an instance of courage displayed by the independent advocate in the face of the State's power, even though it is true that Cicero was very careful to mount no attack on Sulla himself.

In the treatise *De Officiis*, written much later, Cicero offered a longer explanation of his preference for defending:

> There is no need ... to have any scruples about occasionally defending a person who is guilty–provided he is not really a depraved or wicked character. For popular sentiment requires this; it is sanctioned by custom, and conforms with human decency. The judges' business, in every trial, is to discover the truth. As for counsel, however, he may on occasion have to base his advocacy on points which *look like* the truth, even if they do not correspond with it exactly ... the greatest renown, the profoundest gratitude, is won by speeches defending people. These considerations particularly apply when as sometimes happens, the defendent is evidently the victim of oppression and persecution at the hands of some power and formidable personage. That is the sort of case I have often taken on. For example, when I was young, I spoke up for Sextus Roscius of Ameria *against the tyrannical might of the dictator Sulla* (my emphasis).[14]

Perhaps all men embroider history when they write about themselves. But the passage is more interesting than its somewhat loaded recall of Roscius' case. It shows very clearly that the Roman advocate regarded his client's merits as highly relevant to his decision to take the case.

The modern advocate's ethics, however, are by no means only concerned with the virtues of courage and independence and the cab-rank rule. I have mentioned his duty to the court, which in our jurisdiction is a permanent obligation. Cicero would not have recognized such a duty as we now conceive it. Quintilian said, 'Cicero boasted that he had thrown dust in the eyes of the jury in the case of Cluentius'.[15] It has a modern ring.

[13] *Rosc. Am.* 83 (Grant's translation). Cf. *Off.* 2.48 ff. One can perhaps see why Peter Green, *Classical Bearings* (London, 1989) 149 referred to Cicero as 'that stupefyingly respectable bourgeois politician'; but he was so much more than that.

[14] *Off.* 2.51. Translation by Michael Grant, *Cicero, The Good Life* (Harmondsworth, 1971).

[15] *Inst.* 2.17.21: 'tenebras se offudisse iudicibus'. Cluentius was charged with murder. Pliny the Younger (of whom more below) regarded this as the best of Cicero's speeches (*Ep.* 1.20.4).

There are some present-day English barristers who might make the same boast of their latest triumph down at the Old Bailey. But not the best ones. You must not deceive the court; you must not misrepresent the law, or the evidence. The principle is easy enough to apply when the case is heard by a professional judge without a jury. Apart from anything else, most judges' eyes are, I hope, immune to the throwing of dust. But what price the throwing of dust before a jury of laymen?

Juries' common sense and powers of concentration are, I think, much underestimated. But because they try all cases where the defendant is arraigned in the Crown Court and pleads not guilty, their remit includes complex frauds; and in such cases the defence advocate's best weapon can be the sheer scale and detail of the case. The jury may simply be worn down by it. Counsel for the defence, while behaving perfectly properly and honourably, may require the Crown to spend an unconscionable welter of time in proving a range of facts and matters which are not at the centre of the dispute, which, in the end, as likely as not, will simply be whether the defendant had acted dishonestly. The way in which these cases ought best to be managed is the subject of current discussion. There is, I think, a question in cases of this kind as to the relation between the advocate's duty to the court and his duty to his client.

However that may be, the duty to the court is generally clear. I think Cicero would at least have recognized one of its pragmatic features: if you deceive the court, and are found out, it will not trust you next time.

ii. The Art of the Advocate

The art of advocacy is, of course, the art of persuasion. Cicero's spectacular success depended on a mixture of flattery, emotional appeal, and the force of argument. In the *De Optimo Genere Oratorum* 1.3 he said:

> The best of orators is one who by his speech informs, entertains, and persuades the minds of his audience. It is his duty to educate; his privilege to entertain; and of necessity he must persuade.

In 70 BC Cicero undertook the prosecution of Verres for extortion in Sicily. The defence brief was held by his senior Hortensius, who was then pre-eminent at the Roman Bar. According to the usual account, Verres gave up after the *actio prima* of Cicero's presentation, and went into exile. There were still five speeches to come, and which have come down to us, in the *actio secunda*. Verres' flight after the *actio prima* puts me in mind of a nice story of a great leader of the North-East Circuit, Henry Scott QC,

who sometime in the 1960s had the brief to prosecute a serious charge in which until the trial the defendant had vigorously contested the accusation. Scott delivered his opening speech–*actio prima*–to the jury. There was then the lunchtime adjournment; the defendant went to see his lawyers, indicated his intention to change his plea to guilty, and said, 'I am not now so convinced of my innocence as I was before I heard Mr Scott's speech.' Cicero, perhaps, lacked the gift of brevity, which to the modern English judge, required to listen to arguments good and bad, is a prince among the advocate's virtues. In another case in which he was prosecuting, Scott QC came to make his closing speech to the jury after all the evidence was over including that of the defendant who gave a full account of himself, protesting his extremely improbable innocence. Usually Crown counsel at this stage analyses the evidence, often in some detail, exposing the points which might fairly lead the jury to convict the defendant. Not Scott. He said, 'Members of the jury, are there fairies at the bottom of your garden?' and sat down. The jury convicted.

The art of persuasion is not single, uniform. Some advocates are wonderful with the facts, others with the law (some are bad at both, and they should not be in practice; some are good at both). In the British jurisdiction the former will generally find their successes in the first instance courts, and in particular before juries. The latter are more likely to flourish in the appellate courts; and appellate advocacy is a distinct form of the art. In Cicero's Rome there was not the hierarchy of appeals we possess, and records of his cross-examination of witnesses–often the stuff of first instance trials–have, perhaps inevitably, not come down to us. He was clearly a master of the facts, as the cases of Roscius, Cluentius, Verres, and others amply demonstrate.

For the barrister interested in his own posterity (and it has always been a profession of prima donnas) in one sense advocacy is a melancholy art. Its brilliance fades as soon as the words are spoken. Its red blood is in the seduction of the tribunal, judge or jury, then and there. If you try to recall its tinder and its sparks, you hear an echo, not a voice. The British advocate has to improvise; especially at the appeal level, he is likely to be interrupted, closely questioned, his arguments tested, by the judge or judges. There is no modern practice of publishing speeches after the event, 'written up' (*confecta*), as Cicero did.[16] Indeed, the dialectical nature of live advocacy would make it almost impossible. The nearest we get is the account of counsel's arguments which appear in the official Law Reports, but these make pretty dry reading, however good the advocate. However, this is very much the common law tradition;

[16] *OCD* 3rd edn. (Oxford, 1996) 156.

in the civil law systems the bulk of the argument is presented in written briefs, and the role of oral submissions is distinctly subordinate. Counsel's address to the court is frequently severely time-limited. I have heard it said that whereas the English advocate expects to be interrupted and questioned by the court (indeed, if he is good at his job he may welcome it, for it can help him drive home his case), the French advocate would regard it as an insult. When I first appeared in the European Court of Justice at Luxembourg [17] in the early 1980s, I was greatly struck by the court's lack of response to argument; there seemed to be very little debate. The Advocate General and the *Juge Rapporteur* assigned to the case (his principal task is the drafting of the judgement) would ask some questions; they would generally do it in the decorous Continental manner, at the end of counsel's speech. And the speech was limited to thirty minutes, unless you made a justified request for further time, and I have the impression that that was rather frowned on. By the time I last went there as an advocate in 1991, there had been a significant change. The time limit remained, but I was questioned quite freely, as I recall, both during, as well as after, my thirty minutes. By this time the United Kingdom had been a Member State of the European Community (as it still was) for very nearly twice as long as when I first appeared at the Court of Justice. Many lawyers with much greater experience of practice at that court than I had would, I think, agree that the court had been influenced by the common law tradition. They were presented with advocates who were used to being interrupted, whose stock in trade was thinking on their feet, and they found it of considerable assistance.[18]

Cicero's speeches have of course come down to us in the versions which he worked up. We do not know how often he was likely to be interrupted when actually addressing the court. I have found one instance, recounted

[17] This is the court of the European Union and is not to be confused with the European Court of Human Rights at Strasbourg, established under the auspices of the Council of Europe, a body altogether different from the European Union. I mention this wholly elementary fact of current affairs only because the newspapers get it wrong all the time.

[18] One of the stresses and strains arising from the enlarged membership of the Union, which will become more acute with its present enlargement, concerns what one may call the language problem. The text of Community legislation in each of the languages is equally authentic. The resources of time, money, and expertise spent on the task of translation is enormous. The answer is a common official Community (or Union) language for legislation and court proceedings, which, for the avoidance of obvious national sensitivities and associated political difficulty, ought, if other things are equal, plainly to be Latin. But other things are not equal. Far too few people have the good fortune to have been taught Latin (let alone Greek).

by R. G. M. Nisbet. It concerns Cicero's description in the *Pro Milone* of the beginnings of Milo's fatal encounter with Clodius on the Appian Way. After citing a passage from the speech Nisbet says:

> Cicero . . . is trying to put the murder a little later than it actually occurred, and so to suggest that Clodius had no reason for travelling. We are told that when he was pressed in court to give the time when Clodius was killed, he retorted 'sero'; the word can mean both 'late' and 'too late' (Quintilian 6.3.49).[19] However, in the published version of the speech one misses such spontaneous strokes of wit.[20]

Interrupted or not when they were delivered, Cicero's speeches as we have them are surely an echo not a voice. The written word cannot convey the power of their delivery in court. I forget who first said that history is the desire to hear the dead speak (I know the phrase from the distinguished church historian, Professor Eamon Duffy). Would there had been tape recorders in ancient Rome.

Pliny the Younger, however, entertained quite different views about the relation between a speech as delivered and its reduction to writing. In the same letter as he commended Cicero's speech in the Cluentius case, he said this (writing, of course, 150 years after Cicero):

> Then it is argued that there is a great difference between a speech as delivered and the written version. This is a popular view I know, but I feel convinced (if I am not mistaken) that, though some good speeches may sound better than they read, if the written speech is good it must also be good when delivered, for it is the *model and prototype for the spoken version.* That is why we find so many rhetorical figures, apparently spontaneous, in any good written speech, even in those we know were published without being delivered; for example, in Cicero's speech against Verres: 'An artist–now who was he? Thank you for telling me; people said it was Polyclitus.'[21] It follows then that the perfect speech when delivered is that which keeps most closely to the written version, so long as the speaker is allowed the full time due to him; if he is cut short it is no fault of his, but a serious error on the part of the judge. The law supports my view, for it allows speakers any amount of time and recommends not brevity but the full exposition and precision which brevity cannot permit, except in very restricted cases. [My emphasis.][22]

[19] It is not however clear from Quintilian whether the response 'sero' is to be attributed to Cicero or to Milo. The ambiguity of the word puts me in mind of a peculiarity of Modern Greek. The expression 'parapoly' may mean 'too much' or 'very much'. I have a guidebook, translated from the Greek, which describes the beautiful Vikos Gorge in northern Greece as 'much too interesting'.

[20] In T. A. Dorey (ed.), *Cicero* (London, 1965) 70.

[21] The reference is to *Verr. II* 4.3. It is very arch; Cicero writes it as if he were responding to an interchange with his audience, but of course there was no audience, according to the usual view.

[22] *Ep.* 1.20, written to Tacitus. Translation by Betty Radice, *The Letters of the Younger Pliny* (Harmondsworth, 1963).

In the same letter, there shortly follows this passage:

> Regulus once said to me when we were appearing in the same case: 'You think you should follow up every point, but I make straight for the throat and hang on to that.' (He certainly hangs on to whatever he seizes, but he often misses the right place.) I pointed out that it might be the knee or the heel he seized when he thought he had the throat. 'I can't see the throat,' I said, 'so my method is to feel my way up and try everything–in fact I "leave no stone unturned" . . . When I am making a speech I scatter various arguments around like seeds in order to reap whatever crop comes up.'

This is interesting and *dreadful.* Pliny's view that the written speech is the template for the delivered oration hopelessly demotes the immediacy of the spoken word, of which we may be sure Cicero was a master. Aside from that, Pliny clearly thinks it good advocacy to take as long as possible and to develop every conceivable point. Nothing could be worse. His job as an advocate–it is every advocate's job–was 'to seize the throat' and sink his teeth in it. It is precisely what the worst advocates cannot do. There are not many cases with more than two or three good points in them (some, of course, have none), and the barrister who persists in ploughing through fifteen bad ones is the judge's nightmare and a menace to his client. If that is what Pliny did, I hope Regulus beat him every time. I do not care that he sat at the feet of Quintilian, whom the Emperor Vespasian had appointed as a salaried professor of rhetoric, or that he was consul at thirty-nine.

The art of advocacy is by no means all rhetoric; though even nowadays, you can get a long way with charm and a natural persuasive talent. I recall once appearing against a very senior QC in a case of some complexity. He opened his case by announcing to the judge that he was going to 'paint with a very broad brush', and addressed the court for a little under an hour, blithely eliding the technical (and undoubtedly tedious) points upon which the case actually turned. The judge was clearly impressed and I had a good deal of difficulty regaining ground. I think Cicero, admiring the rhetoric, would have been on the QC's side, and so, in a sense, am I. The best advocates (and here I will be anachronistic) are cavaliers, not roundheads.

But in a case of any real complexity–and in truth in any case–there is no substitute for painstaking preparation. You have to be absolute master of your brief. Nowadays many prosecutions brought by the Serious Fraud Office are necessarily larded with so much detail that they take weeks of preparation time by lawyers on both sides. It is painstaking, difficult, and often dreary. The task is lightened by the division of responsibility between solicitor and barrister: the former collects and assimilates the evidence, the latter turns it into a form which he can present to the court, in the first

place (if he is the prosecutor) by his opening speech to the jury. The Verres case was very like a SFO prosecution. There was an enormous amount of detail. But Cicero had to act both as solicitor and barrister. As Palmer Bovie says:

> Cicero was allowed one hundred and ten days in which to prepare his case, but with dispatch and energy completed the gathering of evidence and examination of witnesses in Sicily in fifty days, and returned home with the documentary proof he need to support his charges.[23]

So far as Cicero took oral testimony in Sicily, the procedure may be compared with the convenient practice in the English courts of having witnesses examined 'on commission' before the trial and at a different location. Nowadays witnesses may be questioned over a video link; as a first instance judge in one case I heard video evidence given live by an Australian witness, from Australia, while I and counsel sat in the London offices of one of the parties' solicitors. Cicero's fifty days was a remarkable feat.

Like every art, the art of advocacy is subject to changes of style. In England before the current debilitating forms of mass entertainment were available, the leading barristers were pop stars. Chief among them were great figures such as Sir Edward Marshall Hall KC, who died in 1927, F. E. Smith, who as Lord Birkenhead held office as Lord Chancellor between 1919 and 1922, and Norman Birkett KC who participated in the Nuremberg trials and was a much better advocate than a judge. The people crowded into court to watch their cases. Marshall Hall was florid, demonstrative, emotional; his appeal was nakedly to the jury's sentiment. But the style has changed: good advocacy now is much more clinical. In Cicero's case, his own style changed. As the *Oxford Classical Dictionary* has it:

> As he himself observed, in his youth he had a tendency to exuberance . . . best exemplified in the *Pro Roscio Amerino* . . . this was later tempered by increasing maturity and by a change in oratorical fashion.[24]

Tempered also, I venture to think, by his studies in Athens and Rhodes from 79 to 77 BC. There he worked at philosophy, as well as oratory, and was all his life a student of philosophy; in his later years–seeking consolation for the death of his daughter Tullia–he wrote much on the subject. His substantive place as a philosopher is outside my remit, but his intellectual vigour as an advocate, and the refinement of his style, must have been fuelled by the instruction he received in his youth variously from Phaedrus the Epicurean, Philo the chief of the New Academy, and Diodotus the

[23] *Cicero: Nine Orations and the Dream of Scipio* (London, 1967) 18.
[24] *OCD* 3rd edn. (Oxford, 1996) 1560.

Stoic. So he brought to his practice at the Bar the breadth of mind that comes with an education not limited to the law. In recent years a remarkable proportion of talented beginners at the English Bar have graduated in subjects other than Law, which is very heartening. It has bucked the trend for training before education. However, Peter Birks, the present Professor of Civil Law in the University of Oxford, would disagree with this. I do not know whether he is acquainted with the details of Cicero's career. In the United States, law is always a postgraduate qualification; its students must generally first acquire a degree in the liberal arts. It was Sir Walter Scott who said:

> 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.

So also if he possesses some philosophy. Law is a workhorse discipline; as an education it falls between the rigour of logic and mathematics, and the cultural wealth of the classics, history, or literature. So it needs both. Its necessary medium is language; elegance is, therefore, its virtue and handmaiden. It is as true in English as in Latin. Cicero understood much better than many modern English lawyers the delicate balance between art and logic which law and its medium constitute.

But practising lawyers also need legal academics. Until relatively recently there was an unhealthy tradition in the English legal world, whereby the practitioners–the barristers and judges–looked on academic lawyers, not to put too fine a point on it, as a lower form of life. There was even a convention (still just about current when I was called to the Bar in 1970) that the works of an academic writer could not be cited in court as possessing any authority until the author was *dead*. Similar contempt for the academic law expert existed in Cicero's Rome and he was prepared to exploit it, when it served his purpose, in his debunking of Servius Sulpicius Rufus, in the *Pro Murena*.[25] Yet it is clear that Sulpicius also remained a lifelong, admired friend. Indeed, it was in Cicero's lifetime that the opinions of jurists were first to have an impact on the development of the law.[26] The modern Continental lawyers did not understand the attitude of the English legal world; indeed it is inherent in the civil law systems, derived of course from Roman law, that the work of jurists, scholarly legal writers, is an important source of legal principle. The genesis of this peculiar English tradition lies, however, in the very nature of the common law. The common law is made and evolved by the judges. The only other source of law is legislation. Academic writing is not a source of law. This certainly

[25] *Mur.* 28–9.
[26] See B. W. Frier, *The Rise of the Roman Jurists* (Princeton, 1985).

remains the constitutional position; but, very obviously, it has never justified the *de haut en bas* attitude towards academics which at one time prevailed. Fortunately, that is all gone. Distinguished lawyers in the universities have in recent years had enormous, and manifestly beneficial, influence on the law's development. I might (without being invidious) name two in particular, whose fields have been particular disciplines with which I am more familiar than others. They are Professor Sir William Wade QC and Professor Sir John Smith QC. Sir William's contribution to our public law has been spectacular,[27] and recognized as such in decisions of the House of Lords. No less Sir John's contribution to the criminal law.

It is interesting that Pliny, as good at gossip as he was unsound on the theory of advocacy, has a passage which across the centuries reflects what has sometimes been the successful barrister's patronizing attitude to the academic. Writing to Cornelius Mucianus he says:

> Have you heard that Valerius Licinianus is teaching rhetoric in Sicily? The news has only just come so I doubt if it will have reached you yet. It is not long since this senator of praetorian rank was considered one of the best advocates in Rome. Now he has sunk to his present position–the senator is an exile and the orator a teacher of rhetoric.[28]

The barrister's art, practised at its best, involves an alchemy; an alchemy in which intellect and personality, logic and style, combine to persuade what may be a reluctant, sceptical, or sometimes downright hostile court–or at least it offers the best possible shot. It has some connections with political speech, though in modern Britain they are indirect and sometimes do not apply at all. Cicero, who of course was at least as much a politician as a lawyer, would, I think (given the *milieu* of first-century BC Rome), not have seen much difference between these two forms of the advocate's art. But he would have recognized, must have experienced, the heady moment when you can feel the court turning in your favour. He had logic and style to the full. Budding advocates (and mature ones) should read him. Better if they can do so in Latin.

It was Cicero's misfortune to live in an extremely turbulent era; the Roman Republic, which he loved and defended, was in truth in terminal decline when he was assassinated in 43 BC on the orders of Mark Antony, Octavian, and Lepidus, the Second Triumvirate. He paid with his life for the majestic fourteen Philippics delivered against Antony. He could be forgiven for agreeing with the deeply untrue *dictum* attributed to Confucius, that it is a curse to live in interesting times. He was by nature reflective,

[27] As witness the 8th edition of his majestic *Administrative Law* (Oxford, 2001), written with Dr Christopher Forsyth of Robinson College, Cambridge.
[28] *Ep.* 4.11, Betty Radice's translation.

peaceable, conservative, and no doubt very self-satisfied. He had a lot to be self-satisfied about: he was a very great intellect and a very great advocate. And in the end, and I think at the beginning, he was courageous. Like many with what the Scots call 'a good conceit of themselves', he would not have wished to let himself down.