CHAPTER 2

Biographical Sketches of Great Trial Lawyers in History

Meet Some of the Great Trial Lawyers of the Past: Study these Lawyers, Learn from Them, and Be Inspired

The adage "practice makes perfect" is applicable to excelling in the courtroom. Trying case after case is the best way to learn—and to succeed. Nevertheless, reading briefly about some of those who have achieved recognition can be both inspirational and instructive.

Demosthenes (384 B.C.–322 B.C.)

Demosthenes is the greatest orator of ancient times. Legend, reported by Plutarch, has it that to eliminate a stutter, Demosthenes secluded himself in a cave, and practiced speaking with pebbles in his mouth. It is said that he copied down Thucydides many times to improve his own style.

Demosthenes is proof that advocacy can be learned. His first public case against his Guardians for stealing his property was a dismal failure, but with self-improvement, he mastered the art.

As Plutarch observed, the orations of Demosthenes differ from Cicero's because they do not rely on rhetorical ornaments such as humor, jest, or satire. Instead, Demosthenes relied heavily on reasoning. But, according to Quintilian, when Demosthenes was asked about the three most important parts of a speech, he responded: "Delivery, delivery, and delivery." Demosthenes could cast a spell over the audience that, to this day, can be cast upon a modern reader with his orations.

Demosthenes' most notable case is known as "On the Crown." The background of the case is that as a result of Demosthenes' eloquent speeches (Philippics) against King Philip of Macedonia seeking to conquer Athens, Ctesiphon, a friend of Demosthenes, in 336 B.C., suggested that Demosthenes be honored by Athens, and presented with a Golden Crown.

Aechines, a rival of Demosthenes, initiated a prosecution against Ctesiphon for having violated the law in presenting the crown to Demosthenes. Aechines claimed that the award of the crown violated requirements that were not fulfilled by Demosthenes.

Demosthenes defended Ctesiphon and used the defense as a way to challenge those who were comfortable with peace and Macedonian rule. His eloquence is preserved to this day.

I urge you to read Demosthenes' speech "On The Crown." The theme of his oration was that although Athens could be defeated, it is far better to suffer defeat in a struggle for independence than to peacefully surrender the heritage of freedom.[1]

Demosthenes' speeches against the encroachments of Philip II of Macedonia, known as the Philippics, are eloquent.

Consider in the first Philippic:

> What is the worse aspect of your political situation from the past is the best for the future? What is this? It is the fact that your affairs are in a bad way because you have not done your duty in any way; whereas if they were so, if you had done all that you should, there would be no hope of their improving.
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> When then, Athenians, when will you do your duty? What must first happen? When there is a need for it? What then should we consider? What is now happening? For in my opinion the greatest "need" is a sense of shame in the political situation. Or do you want, tell me to go around and ask each other "is there any news?" Could there be anything more newsworthy than a

1. *See Demosthenes' on the Crown*, edited by James J. Murphy with a translation by John J. Keaney (Random House, Inc. 1967), which includes Plutarch's biography of Demosthenes. *See also Demosthenes of Athens and the Fall of Classical Greece*, Ian Worthington (Oxford University Press, 2013).

> fellow from Macedonia defeating Hellenes in a war at regulating their affair? Is Philip dead? No, he's not, but he's ill. What difference does it make to you? If anything happens to him, you will soon create another Philip if this is how you attend to your business.[2]

Demosthenes' speeches reveal a style of passion, eloquence, and arrangement. Bear in mind demonstrative aides did not exist in those days. It is said that Demosthenes exuded enthusiasm and emotions, spoke clearly, and emphatically used metaphor and similes to great success. For example, he compares Philip to a "fever which strikes even those who fear that they are at safe distance from him."[3] Demosthenes' speeches are replete with rhetorical questions, and imaginary dialogues with his listeners:

> What time or what opportunity, Athenians, do you seek better than the present one? When will you do your duty, if not now? Has not the Fellow already seized all our strongholds, and if he becomes master of this territory, will not your disgrace be absolute? Are not those people now at war whom we promise that we would save if they went to war? Is he not our enemy? Does he not hold what is ours? Is he not a barbarian? Is he not anything that you want to call him?[4]

Note a series of short, sharp rhetorical questions building up to the sustained and explosive climax.

Demosthenes used the technique of repetition to engage his listeners:

> It was not safe in Olynthus to urge Philip's cause without at the same time benefiting the masses by giving them Potidaea to enjoy; it was not safe in Thessaly to urge Philip's cause without at the same time Philip's benefiting the majority by expelling their tyrants and giving back their Thermopylae to them; it was not

2. *See* Philippic 1, quoted by R.D. Milns, in *The Public Speeches of Demosthenes* in *Demosthenes: Statesman and Orator*, edited by Ian Worthington, 212 (Routledge 2000).
3. *Id*. at 213.
4. *Id*.

> safe in Thieves until he gave Boeotia back to them and destroyed the Phoecians. . . .[5]

Demosthenes' arguments reflect techniques worthy of emulation today. He forcefully substantiated his assertions with evidence and facts. He followed each assertion with a presentation and conclusion, often using short, precise sentences.

Effective advocates today can embrace this idea in presenting arguments not only to juries and judges but also to appellate courts. Demosthenes exemplifies the art of rhetoric in the use of his style and delivery. His method is often confrontational and meant to engender action. He rightly acknowledges that there is resistance to the action he desires, and he works with and through that resistance by giving it voice and responding to it with force. This technique of directly taking on the opponent's views is vital to any advocate. A trial lawyer who anticipates, acknowledges, and explicitly addresses the jurors' uncertainties or doubts about the case before them will enjoy a much higher ethos than one who ignores the jury's equivocation.

Another technique Demosthenes relied on was figurative language. In the same speech cited earlier, Demosthenes compares the way the Athenians combat Philip to the way a barbarian combats a Greek. Later, he says that Philip "strikes like a fever even those at a great distance from him."[6] Such metaphors and similes should be second nature to great trial lawyers. "Stab the corporate monster in the pocketbook, and award punitive damages" is a familiar appeal. As Demosthenes knew, figurative language works particularly well when the comparisons it makes strike an emotional chord with the listener. To characterize the Athenians as barbarians surely cut close to the bone, as did comparing Philip to a fever likely to strike them, at a time when illness could quickly ravage an entire population.[7]

In the following example, observe how Demosthenes used the technique of *anaphora* (repetition of words or phrases at the beginning of sentences):

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5. *Id.* at 212.
6. *See* Philippic 1, *supra* note 2, at 213.
7. *Id.*

> It was not safe in Olynthus to urge Philip's cause without at the same time benefiting the masses by giving them Potidaea to enjoy; it was not safe in Thessaly to urge Philip's cause without at the same time Philip's benefiting the majority by expelling their tyrants and giving back Thermopylae to them; it was not safe in Thebes until he gave Boeotia back to them and destroyed the Phocines.[8]

You will sometimes see this same technique in the context of current-day witness examinations: "Tell us what time you returned home. When you returned home at midnight, did you see anyone? When you returned home at midnight and saw your mother, did you notice anything unusual about her appearance?" The effect here, as in the preceding quotation, is to drill important assertions into the memory of the listener, who too quickly forgets what you want him or her to remember.

Demosthenes blended logic and reasoning by using many valuable stylistic devices. He was at his best when employing simple words in short sentences:

> Guard this; cleave to it; if you preserve this, you will never suffer any dreadful experience. What are you seeking? Freedom. Then do you not see that even Philip's titles are most alien to this? For every King and every tyrant is an enemy of freedom.[9]

For more reading about Demosthenes, consider Plutarch, *Parallel Lives; Demosthenes' On the Crown*, edited by James J. Murphy (Random House, 1967); *Demosthenes Statesman and Orator*, edited by Ian Worthington (Routledge, 2000); *Orations of Demosthenes* (The Colonia Press, 1900); and, of course, Plutarch on *Demosthenes*.[10]

We learn from Demosthenes that skill in advocacy can be accomplished by practice (although not necessarily with pebbles in our mouth), and that the words we use—our style—are important in persuasion.[11]

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8. *Id*.
9. Philippic 2, *id*. at 217.
10. *See also Demosthenes of Athens and the Fall of Classical Greece, supra* note 1.
11. *See infra*, Chapter 11.

Quintus Hortensius Hortalus (114 B.C.–50 B.C.)

Quintus Hortensius Hortalus was a renowned Roman lawyer, a contemporary of Cicero's, and a frequent opponent of his in court. Hortensius was the foremost Roman advocate, but was eventually overshadowed by Cicero. They were adversaries in more cases than the scribes could record. The apex of their professional rivalry is the famous criminal case filed against Gaius Verres (discussed later).

It is noteworthy that Cicero, in his book *Brutus or History of Famous Orators* praises Hortensius as one of two orators who reigned in the Forum, whose glory fired Cicero's emulation. Sadly, none of Hortensius' highly acclaimed orations exists today. More is known about his daughter, Hortensia (see later in the chapter).

Marcus Tullius Cicero (106 B.C.–43 B.C.)

Marcus Tullius Cicero was a great Roman trial advocate, orator, philosopher, and author. John Adams remarked that "[A]ll Ages of the world have not produced a greater statesman and philosopher combined." He saw the Roman Republic fall into civil war, and succumb to dictatorship during his lifetime. Often a staunch supporter of Republican rule, Cicero became the spokesperson for the Senate after the assassination of Julius Caesar. In this position, he assailed Marc Anthony, a supporter of Caesar and consul, in a series of speeches he named after Demosthenes' *Philippics.* His defense of the rule of law, unfortunately, cost him his life.

He was assassinated upon the Order of the Second Triumvirate, which consisted of Octavian, Marc Anthony, and Lepidus.

Cicero's writings are prolific, and are still read today, often for insight into Roman and Greek oratory.[12]

Like many Romans of his day, Cicero studied Greek oratory and applied the lessons he learned from it in court.[13] His speeches are marked by a certain savvy and dry humor.

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12. *See Brutus or History of Famous Orators*; *The Orator or Accomplished Speaker*.

13. *See also* Loeb Classical Library for voluminous writings by Cicero on all phases of oratory.

Consider Cicero's famous prosecution of Gaius Verres, who was charged by citizens of Sicily for abusing his office by stealing valuable works of art. It was not an easy case, and one of the few in which Cicero acted as prosecutor. First, the trial itself was delayed by political allies of Verres. Second, Verres and his allies engaged the best advocate of the day, Quintus Hortensius Hortalus. Third, the fear that the jurors were bribed was prevalent.

Cicero was very tactical. Trials in 70 B.C. in Rome usually began with a lengthy oration, then proceeded to a discussion of evidence. Cicero, however, cut to the chase. He went straight to evidence after a brief introduction. He needed to keep his case condensed, so it could conclude before the scheduled August recess for Pompeii's Games:

> Today the eyes of the world are upon you. . . . This man's case will establish whether a jury composed exclusively of Senators can possibly convict someone who is very guilty—and very rich. Let me add that because this is the kind of man who is distinguished by nothing except his criminality and his wealth, the only imaginable explanation for an acquittal will be the one that brings the greatest discredit to you. No one will believe that anybody likes Verres or that he is related to any of you, or that he has behaved well in other aspects of his life, no, nor even that he is moderate in his faults. No such excuses can extenuate the number and scale of his offenses.[14]

Consider Cicero's use of satire:

> I come now to what Verres calls his consuming interest in Art, what a sympathetic friend of his might describe as his weakness and aberration and the Sicilians call highway robbery. I am not sure what name to attach it, so let me merely lay the case before you to judge on its own terms rather than by its name. Familiarize yourselves with the type of thing it is, gentlemen of the

14. *See Cicero, The Life and Times of Rome's Greatest Politician,* Anthony Everitt, 79 (Random House, 2001).

> jury, and you will probably have little difficulty in applying the appropriate name to it.[15]

Cicero knew exactly what to call the conduct of Verres, but mocks the crime as a "consuming interest in art." He then piled on the evidence that he obtained after a lengthy investigation and allowed the jury to make up its own mind.

Verres fled toward the end of the trial, and the jury found him guilty in absentia.

There is much to learn from Cicero. He always began his arguments by going straight to the heart of the matter. In particular, he would explain why the opposing view of the matter was incorrect and the reason why.

Hortensia (50 B.C.–c. 1 B.C.)

One little-known lawyer of ancient times was a model of courage and dedication to the rule of law—the Roman advocate Hortensia, daughter of Quintus Hortensius Hortalus.

As a young woman, Hortensia schooled herself in history and the arts, including law. This was not easy to do. If you think there are prejudices and difficulties confronting women lawyers in current times, imagine the problems that Hortensia endured. Consider a case she argued before the leaders of Rome in 42 B.C. on behalf of wealthy women who were unfairly levied with high taxes.

Rome was engulfed in civil war. Its leaders—Octavian (later to be the first Emperor of Rome, Caesar Augustus), Anthony, and Lepidus—were combating the assassins of Julius Caesar. To fund the war, they seized the property of wealthy citizens, and slaughtered many of them by proscription. But still, funds were insufficient. Then they placed a tax on 1,400 of Rome's most wealthy women.

The women were incensed by the imposition of the tax and marched to the Forum. Hortensia marched with them. She was their advocate. Here is what she argued:[16]

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15. 2 *Cicero, The Verrine Orations*, 283 (L.H.G. Greenwood, trans., Harvard 1953).
16. As reflected in "The Histories of Appian," published in the Loeb Classical Library, 1913 titled "*The Civil Wars Book IV*" (paragraphs 32–34).

> As was appropriate for women like ourselves, when addressing a petition to you, we rushed to your women folk. But we did not get the treatment we were entitled to from Fulvia, and had been driven by her into the Forum. You have already stolen from us our fathers and sons and husbands and brothers by your proscriptions, on the grounds that they had wronged you. But if you also steal from us our property, you will set us into a state unworthy of our family and manners. If you claim that you have in any way been wronged by us, as you were by our husbands, proscribe us as you did them. But if we women have not been voted by any of you public enemies, if we did not demolish your houses or destroy your army or lead another army against you, if we have not kept you from public office, or honor, why should we share the penalties if we have no part in the wrongdoing?
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> Why should we pay taxes when we have no part in public office or our government in general, an evil you have fought over with such disastrous results? Because you say this is a time of war? And when have there not been wars? And when have women paid taxes? Our mothers on one occasion long ago paid taxes, when your whole government was threatened, when the Carthaginians were pressuring you. They gave willingly, not from their land or their fields or their dowry or their households, but from their own jewelry, not under threat or by force, but only as much as they themselves chose. Why are you now so anxious? If there should be a war against the Celts or Parthians, we will not be less eager for our country's welfare than our mothers. But we will never pay taxes for civil wars, and we will not cooperate with you against each other.[17]

The leaders were angry that women had the nerve to hold a public meeting. They ordered the lictors to drive them away from the tribunal, until the lictors were stopped by the shouts of the crowd outside, and the triumvirs postponed the proceedings. On the following day, the triumvirs reduced the number of women to be taxed and the amount.

17. *Id.*

Appian honored Hortensia, writing: "For by bringing back her father's eloquence, she brought about the remission of the greater part of the tax. Quintus Hortensius lived again in the female line and breathed through his daughter's words."[18]

We learn from Hortensia the importance of courage in facing fearful odds on behalf of a client in court.

Andrew Hamilton (1676–1741)

For students of legal history, the name Andrew Hamilton brings to mind the 1735 criminal trial of John Peter Zenger in New York. Zenger, the editor of *New York Weekly Journal*, printed "lampoons and provocative items" against the governor of New York. He was prosecuted criminally for seditious libel. But the jury resisted intense pressure from the government, and the judiciary acquitted Zenger.

The politics of the matter were hot and heavy. Freedom of speech was an embryo. This case gave it birth. Zenger, hence establishing truth was a defense, was imprisoned for eight months awaiting trial. Under English law, truth would not excuse a libel. His original lawyers were disbarred.

But one of the leading trial lawyers of the day was Andrew Hamilton of Philadelphia, who took up the challenge of the defense on a pro bono basis.

Here are some excerpts from the closing arguments:

> Prosecutor: [A]s Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the King; for supposing they were true the law says that they are not the less libelous for that; nay the law says there being true is an aggravation of the crime.[19]
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> Hamilton: Well suppose it were so, and let us agree for once that truth is the greater sin than falsehood. Yet as the offences

18. *Id.*

19. This was accurate at the time but not the law today. *See The Case and Trial of John Peter Zenger*, James Alexander, Introduction by Alan M. Dershowitz, 62 (The Notable Trials Library, Published by Leslie B. Abrams, Jr, Esq. 1989).

> are not equal, and as the punishment is arbitrary, that is according to the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is true or false, that they by that means be able to apportion the punishment. . . . And yet this a monstrous and ridiculous as it may seem to be, is to be, is the natural consequence of Mr. Attorney's doctrine that truth makes a worse libel than falsehood. . . .[20]

Consider the high temperature of the time. It seemed to be an open and shut case. Members of the jury were even threatened by the chief judge of the court that, if they did not render a verdict of guilty, they would face severe consequences. Nevertheless, Hamilton persevered for his client, and withstood the pressure with determination and dedication for his client, for the cause of freedom of speech.

Interestingly, in 1735—and to modern times in many jurisdictions—the jury, in criminal cases, was the judge of both the law and the facts. This is not the case today.

Here is another excerpt from Hamilton's closing argument, under circumstances where he was prohibited from introducing evidence of truth during trial testimony:

> Then gentlemen of the jury it is to you we must now appeal for witness to the truth of the facts we have offered and are denied the liberty to prove; and let it not seem strange that I apply myself to you in this manner, I am warranted to do so both by law and reason. The law supposes you to be summoned out of the neighborhood where the fact is alleged to have been committed: and the reason of your being taken out of the neighborhood is because you are supposed to have the best knowledge of the fact that is to be tried. . . .
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> A proper confidence in a court is commendable; but as the verdict . . . will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of the opinion there is no falsehood in Mr. Zenger's papers, you will, nay

20. *Id.* at 71.

> . . . you ought to say so: because you don't know whether . . . the Court may be of the same opinion. It is your right to do so, and there is much depending upon your resolution as well upon your integrity.[21]

A good lesson from Hamilton is when worthy causes arise, taking the case for public good is an important role of the trial lawyer.

John Adams (1735–1826)

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."[22]

So argued John Adams—future signer of the Declaration of Independence and future president of the United States—in December 1770, on behalf of British soldiers in the famous Boston Massacre Trials, two in number.

At the time of the Boston Massacre, he was 34 years old, a staunch Federalist, and a trial lawyer with numerous experiences in defending unpopular causes. He successfully defended American sailors charged with killing a British officer who attempted to seize sailors for the British Navy. But none of his prior trials was as intense as, or in the heated turmoil arising out of, the killing of five colonists by British soldiers the previous March.

The trials involved the British soldiers who guarded the Customs House and fired their rifles into a large crowd of colonists, who were taunting the soldiers and throwing objects at them, including snowballs, stones, and oyster shells.

In light of the deep and widespread hostility of the Bostonians toward the British soldiers, the defense was courageous. Nevertheless, Adams believed that his duty as a lawyer required proceeding with the case, particularly since no other lawyer would represent the accused.[23]

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21. *Id.* at 75.
22. Argument in defense of the British Soldiers in the Boston Massacre Trials Dec. 1770.
23. *See John Adams*, David McCullough, 63–66 (Simon & Schuster 2001).

The first trial involved the defendant Captain Preston, the lead British officer. The issue was whether he had given the order to fire.

In the second trial, against the soldiers, McCulloch tells us Adams described the mob: pelting the soldiers with snowballs, oyster shells, and sticks "how the shrieking 'rabble' pelted the soldiers with snow balls . . . sticks and every piece of rubbish, crying 'kill them, kill them.' One soldier was knocked down. . . . Do you expect he should behave like a stoic philosopher, in apathy?"[24]

Self-defense was a basic tenant of the law, Adams argued. The defense prevailed again. Six soldiers were acquitted and two were convicted of manslaughter.

Adams was to say this was his most exhaustive case. It was also the most stressful.

Notwithstanding the angry crowds, the jury acquitted, based on the defense. It was the mob that brought on the tragedy, not the soldiers.

The cases clearly show the courage of the trial lawyer in representing the unpopular defendant and the sacrifices made in so doing. For example, it is said that Adams' law practice suffered significantly for a period of time.[25]

Of interest, John Adams' son John Quincy Adams also had a robust legal career. After his term as president of the United States, at the age of 73, he represented the so-called *Amistad* captives in the U.S. Supreme Court.

Certainly, John Adams demonstrates, in addition to his courtroom skill, courage and tenacity, notwithstanding taking on a very unpopular case that could cause his law practice to suffer.

Luther Martin (1748–1826)

Luther Martin, a "New Jersey farm boy of modest origins," was one of the most distinguished lawyers in Maryland history, and among the

24. *Id*. at 68.

25. For more reading on the Boston Massacre, *see The Boston Massacre*, Heller B. Zobel (W.W. Norton & Company 1970); *John Adams and the American Revolution*, Cathern Drinker Bowen (Little, Brown and Company 1949).

most distinguished lawyers in U.S. history.[26] Chief Justice William H. Rehnquist called Martin "one of the great lawyers in American history, and also one of the great iconoclasts of the American Legal Profession."[27]

Gore Vidal, in his novel *Burr*, describes Martin as "the redoubtable Tory, the drunk, the brilliant, the incomparable Luther Martin (easily the best trial lawyer of our time)."[28]

"He became Maryland's most vivid character, alternatively endearing and infuriating."[29] He walked about with abstracted air, lost in thought when he was not lost in spirits. His dress was slovenly. It has been said that on one occasion he was walking down Baltimore Street and bumped into a cow. He tipped his hat, said excuse me, and walked on.[30]

Luther Martin graduated from Princeton, and moved to Queen Anne's County, Maryland, for a teaching position.[31] He soon left for a teaching position in Virginia. In the nights, he studied law and became licensed in Virginia as well as in Maryland.[32]

On February 11, 1778, he was appointed attorney general of Maryland. He served for 30 years.[33] It is said that his courtroom style was that of fairness to the accused, and he presented to juries not only evidence that favored his case but also evidence that was against him in the case.

Among his prominent cases are the defense of Supreme Court Justice Samuel Chase in his impeachment trial in the U.S. Senate in 1804; the defense of Aaron Burr for treason; and numerous other significant cases in the U.S. Supreme Court. He argued 40 cases in the Supreme Court, including *Fletcher v. Peck*[34] (holding that a grant to a private land company was a contract within the meaning of the Contract Clause of

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26. *See Forgotten Founder, Drunken Prophet: The Life of Martin Luther*, Bill Kauffman, 11 (ISI Books, Wilmington, Delaware 2008). *See also* Reverdy Johnson*, infra.*
27. *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*, William H. Rehnquist, 23 (New York: Morrow 1992); *id*. at 13.
28. *Burr*, Gore Vidal, 464 (Penguin Random House LLC 1973).
29. *Id*. at 120.
30. *Id*.
31. *Id*. at 16.
32. *Id*. at 18.
33. *Id*. at 112.
34. Fletcher v. Peck, 10 U.S. 87 (1810).

the Constitution, and once made could not be repealed. The Court established a strict interpretation of the Contract Clause; the case marked the first time the Supreme Court struck down a state law on constitutional grounds); and *McCulloch v. Maryland*[35] (holding that Congress could establish a national bank, and the State of Maryland could not impose a tax on the federal bank. The case held that federal law took priority over state law.).

The impeachment case of Justice Chase in 1804 emanated from the opinion by the Federalists that the Justice was infuriatingly partisan on and off the bench in favor of the Anti-Federalists. During the time of the Constitutional Convention in Philadelphia and thereafter, Anti-Federalists regarded consolidation of governmental power with great suspicion. They argued for power to the states and the people, not for a centralized government.[36]

Luther was an avid Anti-Federalist himself. As a delegate from Maryland to the Convention, he registered his protest in refusing to support the new government.[37]

A grand jury had indicted Justice Chase for his partisanship prior to the impeachment trial, finding that his conduct was seditious. Martin prevailed at trial and Justice Chase was acquitted. One important feature of the case was the concept that judicial impeachments must satisfy the standard of "high crimes and misdemeanors" for impeachment of federal judges.

In 1807, Luther Martin successfully defended Aaron Burr in his trial for treason. Chief Justice Marshall presided. Burr, considered a "founding father," was the third vice president (1801–1805) of the United States, serving under the first term of Thomas Jefferson. The two men had tied in the presidential election, and Jefferson prevailed in the Congress. The treason trial was based on allegations that Burr was actively working to persuade states bordering on the Ohio and Mississippi rivers to form a separate government.[38]

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35. McCulloch v. Maryland, 17 U.S. 316 (1819).
36. *Burr*, *supra* note 24, at 7.
37. *Id*. at 13.
38. *Id*. at 136.

Here is an excerpt from Martin's closing argument in the case, which was then called the trial of the century. The case was presided over by Chief Justice John Marshall.

> Before concluding, let me observe that it has been my intention to argue the cause correctly, without hurting the feelings of any person in the world. We are unfortunately situated. We labor against great prejudices against my client, which tend to prevent him from having a fair trial. I have with pain heard it said that such are the public prejudices against Colonel Burr, that a jury, even should they be satisfied of his innocence, must have considerable firmness of mind to pronounce him not guilty. I have heard it not without horror. God of heaven! have we already under our form of government (which we have so often been told is best calculated of all governments to secure all our rights) arrived at a period when a trial in a court of justice, where life is at stake, shall be but a solemn mockery, a mere idle form and ceremony to transfer innocence from the gaol to the gibbet, to gratify popular indignation, excited by bloodthirsty enemies! But if it require in such a situation firmness in a jury, so does it equally require fortitude in judges to perform their duty.
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> And here permit me again, most solemnly, and at the same time most respectfully, to observe that, in the case of life and death, where there remains one single doubt in the minds of the jury as to facts, or of the court as to law, it is their duty to decide in favor of life. If they do not, and the prisoner fall a victim, they are guilty of murder is {is so} whatever their guilt may be. . . .
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> When the sun mildly shines upon us, when the gentle zephyrs play around us, we can easily proceed forward in the straight path of our duty; but when bleak clouds enshroud the sky with darkness, when the tempest rages, the winds howl, and the waves break over us—when the thunders awfully roar over our heads and the lightnings of heaven blaze around us—it is then that all the energies of the human soul are called into action. It is then that the truly brave man stands firm at his post. It is then that, by an unshaken performance of his duty, man approaches the nearest possible to the Divinity. Nor is there any object in

> the creation on which the Supreme Being can look down with more delight and approbation than on a human being in such a situation and thus acting. May that God who now looks upon us, who has in his infinite wisdom called you into existence and placed you in that seat to dispense justice to your fellow citizens, to preserve and protect innocence against persecution—may that God so illuminate your understandings that you may know what is rights; and may he hold your souls with firmness and fortitude to act according to that knowledge.[39]

Martin's fortunes declined dramatically in his last years. Heavy drinking, illness, and poverty all took their toll. Paralysis, which had struck in 1819, forced him to retire. In 1826, at the age of 78, Luther Martin died in Aaron Burr's home in New York City, and he was buried in an unmarked grave in St. John's churchyard. In his declining years, the Maryland Bar Association imposed a small tax of $5 on its members to support him.

Thomas Erskine (1750–1823)

The great advocate Thomas Erskine was called to the bar in the year 1778. As with many of the lawyers in our legal heritage, many of his cases are legendary. He was appointed Lord Chancellor in 1806.

His first case as junior barrister was in the defense of Captain Thomas Baillie, lieutenant-governor of Greenwich Hospital. In a pamphlet, Baillie published abuses he had uncovered in the hospital's management, and in particular by Lord Sandwich, First Lord of the Admiralty.

Lord Sandwich initiated a proceeding for a ruling that criminal libel charges should be brought against Captain Baillie.

Erskine addressed the Court last. He was the most junior, but it was his brilliant speech that won the case, and exonerated Baillie. When the judge interrupted him by stating that Lord Sandwich was a missing witness and not in the courtroom, Erskine responded:

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39. Prof. Douglas Linder, *Famous Trials*; *The Burr Conspiracy Trial*, at famous-trials.com (1995) (last visited July 4, 2021).

> I know that he is not formally before the Court, but for that very reason I will bring him before the Court. . . . I will drag him to the light, who is the dark mover behind this scene of inequity.[40]

In 1780, Erskine defended Lord George Gordon, charged with high treason. Gordon, a prominent politician, was head of the Protestant Association. He was accused of leading a riot of thousands against the government in 1780.

In reality, Gordon, as head of the Protestant Association, led a group of thousands to the House of Commons to present a petition to repeal certain legislation. The so-called Gordon Riots lasted for days, and the protestors were deemed to be out of control and anti-government.[41] Extensive damage to property was inflicted including destruction of homes.

Erskine's closing argument was brilliant. Read it for yourself.[42] He argued to the jury:

> Can any man living believe that Lord George Gordon could possibly have excited the mob to destroy . . . [referring to the home of Judge Mansfield]. No gentleman it is not credible that a man of noble birth and liberal education, unless agitated by the most implacable personal resentment, which is not imputed to the prisoner, could possibly consent to this burning of the . . . house.[43]
>
> What then has produced this trial for High Treason? What! But the inversion of all justice, by judging from consequences instead of from causes and designs? What! But the artful manner in which the Crown has endeavored to blend the petitioners in a body, and the zeal with which an animated disposition conducted it, with the melancholy crimes that followed—crimes which the shameful indolence of our magistrates, which the total

40. *See Campbell's Lives of the Lord Chancellors* 380 (Vol. 6, 3d ed., 1850). Campbell writes that the impression made by Erskine was "unprecedented." *Id*. at 382.

41. *Id*. at 392.

42. *See Speeches of the Hon. Thomas Erskine When at the Bar*, Collected by James Ridgway, 70 (London 1810).

43. *Campbell*, *supra* note 35, at 394.

> extinction of all the police and all government, suffered to be committed in broad day, in the delirium of drunkenness, by an unarmed banditti, without a head, without plan or object, without a refuge from the instant gripe of justice, a banditti with whom [Lord Gordon] had no manner of connection. . . .[44]

The verdict was not guilty.

Other cases in which Erskine was involved included the defense of John Stockdale, a bookseller charged with seditious libel. In 1792, Erskine defended Thomas Paine, who remained in France, charged with seditious libel for the publication of *Rights of Man*. This was a very unpopular case.

Here, in part, is what Erskine said to the jury in closing argument about barristers taking such a case:

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he *will* or will *not* stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end.[45]

Although his unpopular defense of Thomas Paine may have cost him ridicule and public office, in 1792, Thomas Erskine was named Lord Chancellor of England. I urge you to read *For the Defense Thomas Erskine, The Most Enlightened Liberal of His Times 1750–1823* by Lloyd Paul Stryker.[46]

William Garrow (1760–1840)

English barrister William Garrow was remarkable for his skill in the courtroom, and for his contributions to the development of the adversary system of trial as we know it today. He is known for his "extensive

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44. *Id*. at 395.
45. *Id*. at 438.
46. *For the Defense Thomas Erskine, The Most Enlightened Liberal of His Times 1750–1823*, Lloyd Paul Stryker (Doubleday & Company, Inc. Garden City, New York, 1947). *See also Thomas Erskine and Trial by Jury*, John Hostettler (Waterside Press, 2010).

growth of the adversarial criminal trials" in England. Early English criminal trials did not permit defendants to have counsel. They had to defend themselves.[47]

It was Garrow who implanted the principal of "presumption of innocence," the concept of reasonable doubt in criminal cases, and the right to counsel in certain circumstances. These concepts have ancient heritage. He was instrumental in developing the adversary system as well as rules of evidence.[48] He is known to have tried thousands of cases in the Old Bailey.

> In an age [beginning in the 1730s] when the rights of individuals were growing in importance, the focus of the criminal trial became "the defense of the individual against the power of the state, rather than the state finding the offender on behalf of the victim. . . ." [Garrow] placed a new emphasis on defendants' rights . . . was insistent and pressing on cross-examination of prosecuting witnesses. His importance lies in the fact that he was the first to develop such techniques and skills and in doing so changed the nature of the trial into an adversarial [proceeding].[49]

During his career, he both prosecuted and defended cases, with most being for the defense. His forceful advocacy served as a model for other barristers. He became the leading barrister in the Old Bailey.[50]

He displayed his brilliance in direct examination and cross-examination, learning it by observing other barristers at work in the courtroom.

Here is an excerpt from a cross-examination by Garrow in the defense of theft. On direct, the witness—the constable who arrested the defendant—testified that he saw the defendant "pushing up behind

47. *See Sir William Garrow: His Life, Times and Fight for Justice*, John Hostettler and Richard Braby, 39–43 (Waterside Press 2009). Also, BBC created a series called *Garrow's Law* in 2019.

48. *Id.*

49. *Id.* at 42, 61, quoting *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, J.M. Beattie 238, 247 (Law and History Review, University of Illinois Press 1991).

50. Hostettler and Braby, *supra* note 41, at 323.

the victim in a great crowd," and that money was found in the defendant's coat pocket.

Q. What way of life are you in?

A. I am a constable.

Q. We see you very frequently everywhere?

A. Very frequently.

Q. I take it for granted, this is under your advice that this is laid to be a highway robbery? You know it makes the difference of forty pounds that you are to have your share. . . . Do you understand that?

A. Yes.

Q. Was it a loose great coat?

A. Yes, and a right hand outside pocket.

Q. Now I am going to ask you a question: Do you know that it has frequently happened, both at the theatre and other public places, that after an alarm has been given, the thief very often puts the money into an honest man's pocket?

A. I do not know it.[51]

But the jury did, and rendered a verdict of not guilty.

James Scarlett, another remarkable barrister of the time, said this about Garrow:

> A glance at the eloquence of Garrow is gained when in his early years at the Bar, he prosecuted case A for the Crown. These were cases involving theft. Garrow to the jury:
>
> > I assure myself, that having heard [the] facts . . . you will feel great pleasure that it has become your duty to diminish by one at least a nest of vermin, who have but too long

51. *Id*. at 73–74.

> infested this metropolis to the utter ruin of some of the first families in the Kingdom.[52]
>
> My Lord . . . The case which we are now arguing is precisely like the case of a man who goes to Smithfield Market and chooses a horse the owner delivers him for purposes of trying his paces, and the stranger rides away with the horse. If I was to address myself to the common understanding of any man who hears me, and was to ask in whom possession the horse resided, he would answer, that the actual possession . . . was determined by his delivery to the stranger, but the law has said, that this possession having been acquired by a felonious intent . . . such a taking is a felony.[53]

William Garrow became attorney general of England and Wales and then Chief Justice of Chester. While his name might not live on, his contributions to the rule of law surely do. The importance of creativity is one of the lessons we learn from William Garrow.

James Scarlett (1769–1844)

Barrister James Scarlett was a great figure at the bar. He tried scores of cases, and became Attorney General and then Judge-Chief Baron, Court of Exchequer.

It was said that the secret of his success was that he blended his mind with the minds of the jurors. Their thoughts were his thoughts. As one juror remarked, "He is a lucky one, because he is always on the right side."[54]

In his unfinished memoir, we become acquainted with some of Scarlett's trial techniques.[55] He discounts reading his arguments to the judge

52. *Id*. at 63–64.

53. *Id*. at 64.

54. *See The 12 Secrets of Persuasive Argument*, Ronald Waicukauski, Paul Mark Sandler, and Joanne Epps (American Bar Association 2009).

55. *A Memoir of the Right Honourable James, First Lord Abinger, Chief Baron of Her Majesty's Court of Exchequer*, Peter Campbell Scarlett and James Scarlett (John Murray, Albemarle Street, 1877).

or jury; he made it his business to "know and remember the principal facts, to lay the unimportant wholly out of memory." Quoting Horace in Latin he says:

> Words will not fail when the matter is well considered meaning that if he remembers the principal facts of the case he can achieve his goal of making the jury understand in plain terms the nature of the case. . . . the essential part of speaking is to make yourself understood." He valued brevity, he could open his case in five minutes using the "simplest terms." It was his style to understate rather than overstate the facts he intended to prove.[56] "No error is more fatal to an advocate, or more common, than exaggeration."[57]
>
> He wisely appreciates that "For whatever strikes the mind of a juror, as the result of his own observation and discovery, makes always the strongest impression upon him and the ease in which the proof falls much below the statement is supposed for that very reason not to be proved at all."
>
> He states that he learned from experience that "the most useful duty of an advocate is the examination of witnesses, and that much more mischief than benefit generally results from cross-examination."
>
> "I therefore rarely allowed that duty to be performed by my colleagues." Interestingly, he states that in his cross-examinations he focused more with a view "to enforce and illustrate the facts I meant to rely upon than to affect the witnesses' credibility."[58]

Scarlett's reliance on notes sparingly and talking at the level of the jurors are important talents to emulate.

Daniel Webster (1772–1852)

Daniel Webster is known as one of the finest orators in the history of the United States. He served as secretary of state, a U.S. congressman, and

56. *Id.* at 74.
57. *Id*. at 74 and 76.
58. *Id*. at 75.

a U.S. senator. He argued, it is said, 200 cases before the U.S. Supreme Court, including *Dartmouth College v. Woodward*; *McCulloch v. Maryland*; and *Gibbons v. Ogden.*

Webster was also an outstanding trial lawyer, prevailing in many cases, especially trials by jury. He was born in New Hampshire and began the practice of law there, before moving to Boston, Massachusetts.

In New Hampshire, at an early age, he began to make a name for himself as a trial lawyer. Robert V. Remini, in his respected biography *Daniel Webster, the Man and His Time*, describes the young advocate:

> He developed a style and manner in addressing the court that were most individual and very appealing to his listeners. When he began to speak, his voice low, his massive head sunk upon his chest, eyes fixed upon the floor, and his feet moving incessantly, backward and forward, . . . soon his voice swelled and filled the room, his head now erect, his eyes black as death—with the voice of a lion. He always remembered to whom he was speaking. For different audiences he presented different styles.[59]

Commenting on his style, Webster remarked that he addressed the "understanding of common men"—by convincing juries "using language perfectly understandable to them. You will therefore find, in my speeches to juries no hard words, Latin phrases, no *fieri facias*, and that is the secret of my style, if I have any."[60]

Webster was excellent at cross-examination. Remini recounts this example:

The signature of a bank president was challenged for its authenticity. Webster cross-examined the bank's cashier:

> Q. You say you think this is not Mr. Tuft's signature. What means had you of knowing Mr. Tuft's signature?
>
> A. I was the cashier of the bank of which he was president; and used to see his signature in all forms. . . .

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59. *Daniel Webster, the Man and His Time*, Robert V. Remini 79 (W.W. Norton & Company, New York-London, 1997).
60. *Id.*

Q. And you think that is not his signature? . . . Please . . . point out where there is a discrepancy?

A. I do not know as I can tell. . . .

Q. But a sensible man can tell why he thinks one thing is not like another?

A. After examining the check. Well . . . in the top the n used to be closed. . . .

Q. Go on?

A. The s at the end of his name was usually kept above the horizontal line this is below. . . .

Q. Any other?

A. Not any other.

Then Webster reached over and picked up one of about 40 checks with Tuft's signatures available to him, his eyes glinting with wicked amusement. He turned to the jury and showed the documents to them. Every one of the peculiarities denied by the witness as characteristic of Tuft's handwriting could be found in the signature.

The witness paled. He "looked chapfallen, and took his seat; and nearly all the witnesses were floored the same way."[61]

The fame of Webster looms large to this day. He is the only lawyer who tried a case against the devil, and prevailed.[62]

Lord Henry Brougham (1778–1868)

In the trial of Queen Caroline in 1820, King George IV charged her with adultery. The great luminary at the bar of the day, Henry Brougham, later Lord Chancellor, appeared for her defense in the House of Lords. Brougham was confronted with one Theodore Majocchi, an Italian servant who presented some of the strongest testimony against the Queen.

61. *Id.* at 147–48 (quoting *Reminiscences* and *Anecdotes of Daniel Webster*, Peter Harvey, 93–94 (Little Brown & Co. 1877).

62. *See The Devil and Daniel Webster*, Stephen Vincent Bene (1936).

If his testimony were believed, it was more than sufficient to establish the Queen's guilt. The witness as an eyewitness to the offence, describing the position of the rooms of the Queen and the alleged paramour:

> Majocchi appeared immune from cross-examination. But Brougham honed in and asked a long series of questions that any eyewitness to the alleged adultery would be able to answer. The answer to each question was: "*Non mi ricordo.*" "*Non mi ricordo*."[63] Included in Brougham's questions were the positions of some of the furniture in the room, of which the witness testified on direct examination. But Majocchi could only reply: "*Non mi ricordo.*"

Here is a portion of Brougham's closing argument:

> Theodore Majocchi, of happy memory, will be long known in this country and everywhere else, after the manner in which the ancient sages have reached in our day, whose names are lost in the celebrity of the little saying by which each is now distinguished by mankind, and in which they have been known to have embodied in the practical result of their own experience and wisdom. My Lords, this person is a witness of great importance. He was first called and the latest to be examined; continuing by the case and accompanying it throughout. . . .
>
> There is an end, then of innocent forgetfulness, if when I come to ask where the rest slept, he either tells me, "I do not know," or "do not recollect," because he had known and must have recollected when he presumed to say to my learned friends "these two rooms were alone near and connected, and others were distant and apart"; when he said that, he affirmed his recollection of the proximity of those rooms and the remoteness of others. He swore that at first and afterward said "I know not," "I recollect not" and perjured himself as plainly as if he had told

63. *Lives of the Lord Chancellors and Keepers of the Great Seal of England*, Vol. VIII, at 311–17 (London John Murray, Albemarle Street, 1869).

your Lordships one day that he saw a person, and the next day that he never saw him in his life.[64]

After serving on the king's bench, in 1830, Lord Brougham became Lord Chancellor of England.

Brougham's adroit cross-examination of Majocchi demonstrates there are alternatives to obtaining the answer "yes," for example, answers that are unreasonable, or unbelievable, reminding the jury by the nature of the questions and answers that the witness is not to be believed.

Charles Phillips (1787–1859)

Charles Phillips was a leading criminal defense lawyer, and a leader of the Old Bailey Bar. According to O'Neill Ryan, LLD, Phillips possessed an unusual degree of power of persuasion.[65] "Often florid, at times dazzling, he seemed to woo verdicts from reluctant juries. Indeed, in one instance, a new trial was vainly sought because he had 'fascinated' a jury into submission to his will."[66]

One incredible case is associated with Phillips. It is the *Francois Benjamin Courvoisier* murder trial of 1840. Courvoisier was a valet in the household of Lord William Russell, who was discovered in bed one morning with his throat cut from ear to ear. Courvoisier was accused of the murder.

In the midst of representing Courvoisier for the brutal murder, after a particular day in court, Courvoisier stunned Phillips by confessing to the crime. Nevertheless, he told Philips to continue to defend him, and win the case.

Phillips did proceed. During vigorous cross-examination of the household cook, Ms. Manser, Phillips implicated her as the murderer. He besieged her with questions about her dislike of her employer, Lord Russell, and negative comments about him she conveyed to others.

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64. *Lives of the Lord Chancellors and Keepers of the Great Seal of England*, John Lord Campbell, (London, John Murray 1869); reprinted *Anatomy of a Trial, a Handbook for Young Lawyers*, 2d ed., Paul Mark Sandler, Esq. (American Bar Association 2014).
65. Ryan O'Neill, *The Courvoisier Case*, 12 Wash. U. L. Rev. (July 1926).
66. *Id*. at 40.

However, the jury ultimately found Courvoisier guilty, and the presiding jurist, Justice Tindal, sentenced him to hang. Over 40,000 people attended the execution, including Charles Dickens and William Thackery. Sometime thereafter, Ms. Manser became insane—a life ruined.

After trial, Phillips suffered public ridicule, and censor for his questions on cross-examination of Ms. Manser, implying that she had committed the murder.

The ethical and moral dilemmas presented by this case have captured the attention of the bench, the bar, and the public to this day.

Should a lawyer continue to represent a client who admits his guilt? Is it ethical to imply that the witness, and not the defendant, is responsible for the crime, when the defendant confesses guilt? If it is ethical, is it moral?[67] This is a difficult subject, but the weight of authority in a criminal case indicates counsel may ask such insinuating questions if, and only if, the facts asserted in the question are true.

Reverdy Johnson (1796–1876)

Born in Annapolis, Maryland, Reverdy Johnson attended St. Johns College and then found his way to Baltimore. It was there he established his law practice.

He became known for his "great brilliancy and success because of the vigor of his intellect and the determination of his character."[68] His skill in the courtroom was well recognized. He stood without equal in his cross-examinations. In court, he was lucid before judge and juries, and he was highly regarded by his contemporaries. In addressing juries, he stood in front of them with his left hand in his trouser pocket. When he expressed enthusiasm in an argument, he would remove his hand vigorously to make a point.

Johnson was also known for his study of the law. He appreciated that the success in trying a case depended on mastering the principles of the law, and applying them to the case, if one desired to be a great lawyer.[69]

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67. See *infra*, Chapter 5.
68. *The Life of Reverdy Johnson*, Bernard C. Steiner, 3–5 (The Norman Remington Co., Waverly Press, Baltimore 1914).
69. *Id.* at 3–4.

Judge J. Upshur Dennis of Baltimore remarked that it was a treat to see Johnson

> fence with a bright but hostile witness—how he would joke with him and provoke repartee, out of which Mr. Johnson was pretty sure to get something on his own side of the case before he got through, either from the witness himself, or by his own replies intended for the jury; for of the jury he never lost sight from the time the case was called until the verdict was announced. . . .[70]

In court, Johnson had an imposing appearance. He spoke slowly in a full strong voice—but never loud.

He was handicapped by the loss of an eye due to an accident, and later in life, he lost sight in the other eye.[71] Johnson served Maryland in many ways, including as a U.S. senator, having been elected in 1845, and as Maryland Attorney General under President Zachary Taylor. He was so highly regarded that he served as a pall bearer at Abraham Lincoln's funeral.

Johnson demonstrated his courage as a trial lawyer by serving as one of the lawyers defending Mary Surratt, who was tried by military commission and was subsequently executed as a co-conspirator in the assassination of Lincoln. Johnson explained that the legal profession was obligated to provide a defense for her. While Johnson did not attend the trial every day, he did present a written argument stating that the evidence against Mary Surratt was "suspicious," that she was innocent, and that the trial should proceed in the civil courts.[72]

Rufus Choate (1799–1859)

Known for his oratorical skills, Rufus Choate of Massachusetts was an outstanding trial lawyer, and a member of the U.S. House of Representatives and the U.S. Senate. A statue at the front of the John Adams courthouse in Boston commemorates his memory.

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70. *Id.* at 7.
71. *Id.* at 9–16.
72. *Id.* at 115–16.

According to one of his biographers, Choate's presence attracted robust crowds. He excelled before juries, and was able to persuade them to rule for his clients.[73] He was thoroughly prepared and was a student of the law his entire life.

He gave great attention to the testimony of witnesses, and was a wizard at cross-examination. He was known for stating: "Never cross-examine any more than is absolutely necessary . . . if you don't break your witness, he breaks you."[74] But he had a knack for discovering the weak points of the opposing case and bearing down on the weakness.

One of his characteristic approaches to his defense of cases was to present "alternative hypotheses." He would offer the jury, based on the evidence, alternative theories of what might actually have occurred.

In one of his cases, he defended Albert J. Tirrell for murder. It was a sensational case in 1846. Tirrell was accused of murdering his mistress in a brothel. The victim was found dead with her throat cut in a room that had caught fire.

Witnesses against the accused lived in the brothel. Choate attacked their character. He argued that all the evidence was circumstantial, and that there were no witnesses to the crime and no motive.

Then Choate offered his alternative hypotheses consistent with the evidence: The victim committed suicide, or the defendant committed the murder while sleepwalking. Hence, Tirrell could not be responsible for the crime.[75]

The verdict was not guilty.

There was an outcry by many, arguing that Choate had made it safe to murder, that his genius ignored public virtue. But, often, such is the life of the great trial lawyer. In one of my cases years ago, I was the object of public outcry when representing a particularly hated individual. Death threats were added to outcry. Police protection was provided. In upholding the rule of law, we trial lawyers are called upon to do our duty, as you will be called upon someday to do the same.

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73. *See*, *Rufus Choate The Law and Civic Virtue*, Jean V. Matthews (Temple University Press, Philadelphia, 1980).

74. *Id*. at 155.

75. *Id*. at 157–59.

We should remember Choate's advice on cross-examination: Never cross-examine more than is necessary. Stated otherwise: Know when to sit down.

Abraham Lincoln (1809–1865)

Certainly one of the most fascinating and revered Americans in history is Abraham Lincoln. However, not everyone knows that Lincoln was a brilliant trial lawyer. While he excelled in all aspects of trial practice, his ability to cross-examine was his high point.

Judge Lawrence Weldon (1829–1905) had this to say about Lincoln:

> In the trial of a case he moved cautiously . . . and never examined or cross-examined a witness to the detriment of his own side. If the witness told the truth, he was immune from his attacks; but woe betide the unlucky or dishonest individual who suppressed the truth.[76]

It is said that some of Lincoln's cross-examinations resulted in dramatic successes.[77] Frederick Trevor Hill in *Lincoln the Lawyer* suggests his skill in cross-examination was the result of daily practice in courts.[78]

One example, especially, illustrates Lincoln's style:

In 1832, Lincoln, at the age of 22, had traveled to New Salem, Illinois. During his six-year stay there, he had formed a close relationship with Jack Armstrong, who led a rough group known as Clary's Grove Boys.

Lincoln as a new arrival was confronted by Armstrong, but prevailed in a long hard-fought wrestling match. A strong friendship emerged.[79]

Years later, in 1858, Lincoln, who had moved to Springfield in 1837, in the midst of the Lincoln Douglas debates, answered the plea of the late Jack Armstrong's widow to return to New Salem to defend her son for

76. See *Lincoln the Lawyer*, Frederick Trevor Hill, 222 (The Century Co. 1906); reprinted by the Legal Classics Library (1996).
77. *Id*. at 228.
78. *Id*.
79. *Id*. at 230.

murder. The case was moved to Beardstown, another jurisdiction, due to public outrage toward young Armstrong.[80]

Allegedly the murder occurred at night on August 29, 1857. It was a strong case against Armstrong. A key witness for the prosecution, Charles Allen, maintained that he actually saw Armstrong "strike the fatal blow" with a shotgun.[81]

On cross-examination, Lincoln led him to locate the hour of the incident. Lincoln pressed the witness to state the time at night he had observed the crime. The answer was "11 at night." Then Lincoln pressed further as to how the witness could see so clearly in the dark. The witness answered, "by the moonlight." The following then transpired. Lincoln asked:

> Q. Well was there light enough to see everything that happened?
>
> A. The moon was about in the same place that the sun would be at 10 o'clock in the morning and was almost full.[82]

Lincoln then confronted the witness with a calendar showing the moon, which was slightly passed its first quarter on the night in question. Moreover, the moon afforded no light at 11 o'clock that night, and set just after midnight.[83] The jury acquitted Armstrong.

Interestingly, other versions—with only slight differences—relate that Mr. Allen testified clearly and convincingly. He testified that he saw Norris, the co-defendant, who pled guilty, hit the victim on the back of the head with a heavy object, and observed Armstrong hit him hard in the right eye with another hard object.[84] On cross-examination of the witness, Beverage writes:

> Lincoln casually asked and with seeming unconcern, how far away Allen was standing, and how much light there was. The witness

80. *Id.* at 231.
81. *Id.* at 232–33.
82. *Id.*
83. *Id.* at 233.
84. See the seminal multivolume biography *Abraham Lincoln*, Albert J. Beverage, Vol. 2, 264–68 (Houghton Mifflin Company 1928).

> answered promptly that he was fifteen or twenty yards distant, that the hour was eleven o'clock at night, that the moon was shining brightly and was about as high as the sun would be at ten o'clock. . . . Thereupon Lincoln produced an Almanac for 1857, which showed that, at that hour of the murder, the position named by Allen, but instead was low in the western sky—in fact within an hour of setting. The jury broke into laughter. That Almanac 'floored the witness' [according to several jurymen]. . . .[85]

Beverage tells us that it was not just the Almanac that swayed the jury but it was the power of Lincoln's closing argument. According to Lincoln's associate counsel at trial, Lincoln argued to the jury that "if this witness was so badly mistaken on so conspicuous a fact as the position of the moon, he might be in error on other matters."[86]

This is just one example of Lincoln in court. He was at the bar for over 20 years, and represented individuals and corporations. He argued over 100 cases on appeal, and was respected for his clear writing.[87] He also tried scores of trials, and was highly sought after by clients.

Hill writes that in one important case he represented the Illinois Central Railroad in a case against McClean County. The case involved a claim by the railroad that the county had no right to impose certain taxes. The case went up on appeal twice with the railroad prevailing.[88]

Doris Kearns Goodwin writes that Lincoln's success at trial was his "uncanny ability to break down the most complex case or issue into its simplest elements."[89]

Goodwin also writes: "An Illinois judge captured the essence of Lincoln's appeal to juries. He 'had the happy and unusual faculty of making the jury believe they—and not he—were trying the case.' He became a

85. *Id*. at 266–69.

86. *Id*. at 268–69. *See also A. Lincoln*, Ronald C. White, Jr. 244–45 (Random House, New York, 2009).

87. Hill, *supra* note 68, at 248.

88. *Id*. at 252.

89. See *Leadership in Turbulent Times*, 107 (Simon & Schuster, 1918).

leader of the profession and was a mentor to young lawyers."[90] He stressed the key to success is "work, work, work."[91]

This advice is valid today: Thorough preparation is the sina qua non of a great trial lawyer.

Edward Henry Carson (1854–1935)

Edward Henry Carson was born in Dublin in 1854. He was called to the Irish bar in 1877, and to the English bar—Middle Temple—in 1893. He earned his reputation by his skill in the courtroom. One of his unique qualities was that he only took on one case at a time.[92] Carson is the only advocate the great Sir Edward Marshall Hall feared.[93] He wrote:

> Ever since the day-alas, so many years ago-when I received a brief marked "with you Mr. Carson and asked who the Dickens you were," you are the only advocate I feared as an opponent. . . . I have had to fight (and generally on the worst side) all the men who have made reputations in the Courts during the past twenty years. There was one time and one time only when I had the chance to lead you, in those days long ago, but then as now I recognize you were the leader, and that no accident of professional etiquette could alter the reality of that position.[94]

One of Carson's first of many cases was the defense in 1893 of *The Evening News* in a libel suit filed by Havelock Wilson, an important trade union leader. The paper reported that the union leader was financially irresponsible and tried to start a public strike to divert attention from financial irresponsibility.

Carson's defense surprised many. He argued "fair comment on a matter of public interest."[95] On cross-examination, he exposed Wilson for what he was: a fraud.

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90. *Id.*
91. *Id.* at 109.
92. *Carson the Advocate*, Edward Marjoribanks, 177 (Macmillan Company 1932).
93. See *supra*, Chapter 2.
94. *Carson the Advocate*, *supra* note 84, at 171.
95. *Id.* at 179.

Q. You say in your declaration, in your sworn declaration that at Bristol, the expenses of your election had been £400 Odd? (Wilson nodded his head.)

Q. Yet in this balance sheet, there is £500 odd donated by the union for the expenses at that very contest?

A. Yes, I cannot explain that.

Carson showed through questioning that the union was in financial despair. Then he asked:

Q. Can you suggest why £19,000 should be spent on management, and only £5,000 in benefits, £2,000 of which went to the law courts?

A. No, the man who spent the money knew all about how it was spent.

(Whereupon a great shout of laughter went up in court.)[96]

In one of his most famous—or infamous—cases, Carson defended the Marquess of Queensberry of criminal libel, instituted by Oscar Wilde in 1895. Wilde had instituted this case upon the Marquess, accusing Wilde of homosexuality. The case, with its tragic conclusion for Wilde, led to the demise of the great playwright.

During the trial on cross-examination, Carson probed the private life of Wilde, but Wilde, according to Marjoribanks, never faltered.[97] But, when Carson asked about "a young servant at Oxford and did you ever kiss him?" Wilde made a gesture of disgust and said, "He was a particularly plain boy. He was unfortunately very ugly. I pitied him for it."[98]

"It was a deadly question and a fatal reply."[99]

Wilde withdrew the case in the midst of trial, and was convicted of homosexuality and subsequently imprisoned. He later moved to France and died impecunious.

96. *Id.* at 180–81.
97. *Id.* at 219.
98. *Id.*
99. *Id.*

In 1908, Carson successfully represented young George Archer-Shee, a 13-year-old cadet at the Royal Naval College at Osborne to demonstrate his innocence and hear his alleged theft of a postal order subsequently cashed at the post office. The case wound its way through the court system.

The admiralty conducted a superficial inquiry but allowed no right of counsel or divulged pertinent information.

The Crown took the position that the dismissal was not subject to the jurisdiction of the courts because young Archer-Shee as a cadet was within the jurisdiction of the Admiralty, and thus the Crown claimed immunity.

Carson fought on to a higher court and a second hearing.[100] He filed what was styled as a petition of right, which meant, at the discretion of the Crown, a case could be heard when damage occurs from a breach of contract.[101] Carson suggested that a contract existed between the college and the student.

After years of persistence, Carlson won the right for trial by jury on the issue of Archer-Shee's claim of innocence. During the heated trial, Carlson battled the unfairness of the judge, and spoke passionately to the jury. At long last, victory for his client. Interestingly, Terence Rattington based his play *The Winslow Boy* on this case.[102]

Clarence Darrow (1857–1938)

Clarence Darrow is often described as the preeminent criminal defense lawyer of his time. His courtroom presentations drew enormous attention from the press and large crowds. This attention was due not only to the sensational cases in which Darrow was involved but also to his courtroom presentations, or—as many would articulate—his sensational

100. *Id.* at 428.
101. *Id.* at 425.
102. This is currently a movie on Netflix.

presentations. "He would walk into a courtroom, the conversation would stop, and people would murmur, There is Darrow."[103]

Among his well-known trials is when he represented John Scopes in *The State of Tennessee v. John Thomas Scopes* in 1925, often referred to as the Scopes Monkey Trial.

Scopes was a teacher in Tennessee. He taught high school physics, and expounded on the theory of evolution, debunking creationism. He was prosecuted for violating a state law for prohibiting the teaching of evolution in public schools. William Jennings Bryan represented the State. Although Scopes was convicted, the case was reversed on appeal. Most significant about the case was its national attention. A circus atmosphere surrounded the trial in Dayton, Tennessee, including reporters and members of the public. The rivalry between Bryan and Darrow was no secret. Imagine the surprise of those in the courtroom when the defense actually called William Jennings Bryan to the witness stand.

The New York Times described this as "the most amazing court scene in Anglo-Saxon history."

> [The defense] asked that William Jennings Bryan be called to the stand as an expert on the Bible. Bryan assented, stipulating only that he should have a chance to interrogate the defense lawyers. Bryan, dismissing the concerns of his prosecution colleagues, took a seat on the witness stand, and began fanning himself. Darrow began his interrogation of Bryan with a quiet question:
>
> "You have given considerable study to the Bible, haven't you, Mr. Bryan?" Bryan replied, "Yes, I have. I have studied the Bible for about fifty years." Thus began a series of questions designed to undermine a literalist interpretation of the Bible. Bryan was asked about a whale swallowing Jonah, Joshua making the sun stand still, Noah and the great flood, the temptation of Adam in the Garden of Eden, and the creation according to Genesis. After initially contending that "everything in the Bible

103. *Clarence Darrow: Attorney for the Dammed*, John A. Farrel, 6 (Doubleday, Random House 2011).

> should be accepted as it is given there," Bryan finally conceded that the words of the Bible should not always be taken literally. In response to Darrow's relentless questions as to whether the six days of creation, as described in Genesis, were twenty-four hour days, Bryan said "My impression is that they were periods."[104]

Other cases tried by Darrow include the *Leopold Loeb* case, in which he defended Nathan Leopold and Richard Loeb, two wealthy students at the University of Chicago who brutally murdered a young man, Bobbi Franks, to prove they could commit the perfect crime.

Darrow persuaded his clients to withdraw their prior guilty plea and permit him to argue against the death penalty. One of his arguments was that Leopold and Loeb should not be punished for their wealth. His argument was eloquent with passion and reason. Here are excerpts from his 12-hour argument for incarceration and not capital punishment:

> I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful to them, but not merciful to civilization, and not merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind. To spend the balance of their days in prison is mighty little to look forward to, if anything. Is it anything? They may have the hope that as the years roll around they might be released. I do not know. I do not know. I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large. I believe they will not be until they pass through the next stage of life, at forty-five or fifty. Whether they will then, I cannot tell. I am sure of this; that I will not be here to help them. So far as I am concerned, it is over.
>
> I would not tell this court that I do not hope that some time, when life and age have changed their bodies, as they do,

104. *See Famous Trials*, Professor Douglas O. Linder, *State v. John Scopes*, an Account on famous-trials.com (last visited Apr. 3, 2021). *See also* the 1960 movie *Inherit the Wind*.

and have changed their emotions, as they do—that they may once more return to life. I would be the last person on earth to close the door of hope to any human being that lives, and least of all to my clients. But what have they to look forward to? Nothing. And I think here of the stanza of Houseman:

Now hollow fires burn out to black, /
And lights are fluttering low:
Square your shoulders, lift your pack /
And leave your friends and go.
O never fear, lads, naught's to dread /
Look not left nor right:
In all the endless road you tread /
There's nothing but the night.

I care not, your Honor, whether the march begins at the gallows or when the gates of Joliet close upon them, there is nothing but the night, and that is little for any human being to expect.

But there are others to consider. Here are these two families, who have led honest lives, who will bear the name that they bear, and future generations must carry it on.

Here is Leopold's father—and this boy was the pride of his life. He watched him, he cared for him, he worked for him; the boy was brilliant and accomplished, he educated him, and he thought that fame and position awaited him, as it should have awaited. It is a hard thing for a father to see his life's hopes crumble into dust. . . .[105]

I feel that I should apologize for the length of time I have taken. This case may not be as important as I think it is, and I am sure I do not need to tell this court, or to tell my friends that I would fight just as hard for the poor as for the rich. If I should succeed, my greatest reward and my greatest hope will be that

105. *Clarence Darrow: Attorney for the Dammed*, John A. Farrell (Doubleday, Random House 2011).

for the countless unfortunates who must tread the same road in blind childhood that these poor boys have trod—that I have done something to help human understanding, to temper justice with mercy, to overcome hate with love.

I was reading last night of the aspiration of the Old Persian poet, Omar Khayyam. It appealed to me as the highest that I can vision. I wish it was in my heart, and I wish it was in the hearts of all:

So I be written in the Book of Love,
I do not care about that Book above.
Erase my name or write it as you will,
So I be written in the Book of Love.[106]

It was reported that tears were steaming down the Judge's face, and that those in the courtroom were mesmerized.[107]

Clarence Darrow tried many other cases during his career. Earlier in his career, he represented Eugene Debbs, a leader of the America Railway Union. Debbs, in 1894, had organized a nationwide railroad strike known as the Pullman Strike. The government prosecuted Debbs, who was eventually convicted. In another case that same year, Darrow was not able to save Patrice Prendergast, who murdered Chicago Mayor Carter Harrison, from execution, after Darrow was brought into the case after the jury verdict.

Another significant case among many was the Sweet murder case. The Sweet family were black residents of Detroit who moved into a white neighborhood. A mob gathered and threw stones at the house. In defense, shots were fired and someone in the mob was killed. After a hung jury on the first case, the prosecution dropped all charges. Darrow to the rescue!

But not all was wonderful about Darrow's career. In 1911, while in the midst of defending James B. McNamara and John J. McNamara in Los Angeles, of the International Association of Bridge and Structural Iron Workers, Darrow allegedly bribed two jurors. The brothers were

106. *Id.* at 86–87.
107. *Id.* at 87–88.

charged with bombing the offices of *The LA Times* and another building. They eventually pled guilty and were incarcerated.

In January 1911, Darrow was indicted for bribery of a jury in the *McNamara* case. His trial commenced on May 15th. Representing him was the great Earl Rogers, Esq., a very talented criminal defense lawyer in his own right.[108]

Darrow took part in the jury selection: "Hoisting a leg upon a chair and leaning on his knee with folded arms, speaking soothingly as he "began to impress his subtle personality upon the jurymen." Even the *Times* admitted that Darrow was "remarkably effective."[109]

The outcome of the trial was not guilty. Credit was given to Earl Rogers. But that did not end the matter. The prosecution proceeded with a second trial. The outcome was a hung jury. The matter ended, and Darrow returned to Chicago broken in heart, but as history well notes, he went forth to try many criminal cases, giving him the appellation: "Attorney for the Dammed."

Many books have been written about Clarence Darrow, including his own autobiography, *The Story of My Life*,[110] as well as *Clarence Darrow: Attorney for the Dammed* by John A. Farrell[111] and *Darrow, A Biography* by Kevin Tierney.[112]

Edward Marshall Hall (1858–1927)

Edward Marshall Hall became one of the most celebrated barristers of his generation, putting up fine performances for both prosecution and defense of some of the most sensational trials of the early 20th century.

His commanding presence in court combined with his striking oratory to make him a legal celebrity before that word enjoyed its modern wide currency.[113]

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108. See *infra*, Chapter 2.

109. *Clarence Darrow: Attorney for the Dammed, supra* note 97.

110. Charles Scribner & Sons, 1932.

111. Doubleday, Random House, 2011.

112. Thomas Y. Crowwell Publishers (Loc of 11455), 1979.

113. Clare Rider and Val Horsler, editors, *The Inner Temple a Community of Communities*, 50 (Third Millennium Publishing, London 2007) (The Honourable Society of the

He was as well-known as any man in England, and millions read of his doings with interest and awe day by day and year by year, for over a quarter of a century.[114]

He was called to the bar at the Inner Temple in 1883. His practice as a criminal lawyer is legendary. He also handled civil cases. In presenting a closing argument in one of his criminal cases, he stood tall, stretching out his arms as if he were the scales of justice. With his arms outstretched, he described the nature of the proof required for a verdict of guilty.

Many of his cases were cause celebs, but not always popular with the public or his colleagues. He exhibited courage and tenacity in pursuing the defense of his clients.

Consider the *Chattell* case, a defamation case in which Hall represented Miss Hattie Chattell against the *Daily Mail*, a popular newspaper of the day. The paper allegedly defamed his 28-year-old client, by stating that: "Miss Rosie Boote, whose name is frequently before the public just now, is the daughter of Hattie Chattell, the principle "boy" in the Hippodrome." Miss Chattell was furious.[115] The *Daily Mail* printed a prompt apology:

> There are many well-known married actresses who perform under their maiden names, but the many friends and admirers of Miss Chattell are aware that she is an unmarried lady, and we offer her our sincere apologies.[116]

Miss Chattell was not appeased as she complained the paper did not mention her age of 28. Thus, she believed an offensive inference could be drawn from the original publication and the apology, if read together.[117]

After the case for libel was filed, the *Daily Mail* asked for three weeks to present a defense. None was presented.

During the trial, Hall argued that the apology intensified the libel: The newspaper confessed its mistake and asked for three weeks to deliver

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Inner Temple, commonly known as the Inner Temple, is one of the four Inns of Court.).

114. *For the Defense*, *The Life of Sir Edward Marshall Hall*, Edward Marjoribanks, 1 (Macmillan Company, New York 1929).

115. *Id.* at 160.

116. *Id.* at 161.

117. *Id.*

a defense in order to make inquiries all around the country, but then uncovered nothing against her. Hence, he argued there was no defense. In a powerful closing argument, the jury awarded "immense" damages:

> My client may have to work for her living, but her reputation is entitled to the same consideration as that of any lady in the land. . . .[118]

The aftermath was not pleasant for Hall. On appeal for a new trial, the counsel for the paper argued that Hall improperly inflamed the jury by stating the paper had requested three weeks so it could "ransack" all of England to find something against Miss Chattell.[119]

Here is a portion of the colloquy between Hall and the court. Observe Hall standing his ground:

Court:	It is a most shocking imputation to make, and it is without foundation of any sort.
Hall:	I submit there was foundation.
Court:	None.
Hall:	The jury thought so. . . . I put it as a suggestion.
Court:	And what is the meaning of that?
Hall:	The defendants could have called solicitors to say there was no truth whatever to the suggestion.
Court:	It was a disgraceful imputation that was made upon them.
Hall:	I resent the word disgraceful.
Court:	You make a disgraceful imputation against solicitors, and you suggest they should have been put in the [witness] box." (The imputation is that the solicitors were seeking to uncover conduct of Miss

118. *Id.*
119. *Id.* at 167.

Chattell that would demonstrate poor character so she could be disparaged in court.)

Hall: I must accept your Lord's comment when you say my conduct was disgraceful, but I submit with respect that it was perfectly legitimate to say here are the facts. I suggest the inference was so and so.[120]

The court was angry. The verdict was not permitted to stand.

Hence, we see that even the best of us cannot prevail all of the time. It has been said that the lawyer who never loses a case, does not try many cases. What is important to observe is Edward Marshall Hall's courage in resisting the criticism of the court as is often the plight of the trial lawyer.

Earl Rogers (1869–1922)

Earl Rogers was a brilliant and prominent criminal defense lawyer whose courtroom skill was remarkable and widely known. Sadly, he was afflicted with alcoholism and died at the age of 50.

His courtroom life is depicted by his daughter. She tells her readers that Jack London said to her "Never forget that this man your father is an authentic legal genius, going out far beyond what had been thought before."[121]

In court, he combined drama and compassion: "As long as there is such an inhuman and godlike law as capital punishment, I will defend with my last breath any man who might be its victim."[122]

His style in court was indeed dramatic. For example, in representing a young defendant for murder, Al Boyd, during a card game, Rogers interrupted the direct examination of Johnson, the leading prosecuting witness, who testified that he had arranged to recoup under the table funds he might have lost in the card game: "You're telling us that you went into that [card] game ready to double-cross your best friend [the

120. *Id*. at 169.

121. *See Final Verdict*, Adela Rogers St. Johns (Doubleday & Company, 1962) at loc 439 (ebook).

122. *Id*. at loc 442 (ebook).

defendant]?" Commotion erupted in the courtroom until the judge took control.[123]

He was also innovative in the manner in which he used real evidence to prove his cases. For example, in the defense of Boyd, he brought into the court the card table and chairs where the defendant and witnesses were sitting when the murder by shooting occurred. When the prosecutor objected arguing strenuously in opposition, Rogers said:

> My learned opponent speaks eloquently of his obligations to the People of the State of California, of which we are all aware. May I remind him that my mandate from the People is no less clear and powerful than his own? The People insist that this boy, whom they instructed you to presume to be innocent,[124] shall have the ablest, boldest defense it is possible to give him.
>
> They have decided in their might and majesty that the burden of proof is with the district attorney. I am their qualified, duly accredited counsel for the defense as truly as he is their counsel for the prosecution. In their hearts the People are passionately anxious that no injustice shall be done in their name. No innocent man convicted and hung (sic) unfairly to haunt their peaceful slumber. . . .
>
> If this is the first time a man's counsel has produced for the jury the exact scene of the crime, does that entitle the prosecutors to call it a trick? I have a right, a duty to reconstruct the scene and ask him there to re-enact what he swears took place there. So, for the jury to see for itself whether to credit the story Johnson tells or not. If this be theatre it is the enlightened theatre of the Greeks, or Shakespeare tragedies. . . .
>
> I ask you Honor's permission to question the prosecution's witness in the physical setting of the crime. He was an eyewitness, as he says he claimed he was. Or was the murderer.

123. *Id.* at loc. 1103–1104 (ebook).

124. *Id.* at loc 1300 (ebook).

> If this is the first time a courtroom has been arranged to turn into the very scene of the murder, others through the years who are innocent may have cause to bless Your Honor's name.
>
> He won his argument, and also his case, but not before—he pulled out a pistol from his pocket and pointed it at Johnson, who screamed as he crashed his chair, (the gun trick as this became known) all to bring back the witness to the night of the murder; and then asking what Johnson did after the gun was fired that night: Johnson testified he went to the washroom. Q: "Did you wash the powder off your hands? A: "Did I Did I." The jury was out twenty minutes—"Not Guilty."[125]

It came as no surprise to the bar and the public that Clarence Darrow engaged Earl Rogers to defend him in his first trial for "jury rigging."[126] It also came as no surprise that Rogers won.

Here is an excerpt from Roger's brilliant cross-examination of the primary witness against Clarence Darrow in the first of two trials of Darrow for allegedly bribing witnesses in Darrow's defense of the *McNamara* case. The witness, Bert Franklin, had changed his statement about Darrow being innocent. On direct examination, he gave damaging testimony against Darrow.

Q. The district attorney told you he didn't want you. We want Darrow, isn't that what he said?

A. They said if Darrow had been in this they wanted me to tell them.

Q. And you said he hadn't?

A. At first I did.

Q. Well, then you said he was in it?

A. Yes.

125. *Id.* at loc. 1587 (ebook).

126. *See* Clarence Darrow, *supra*.

Q. Which one was the lie—one or the other was a lie—you lied sometime, Bert, didn't you?

A. I didn't tell the truth when I said Darrow didn't know about it.

Q. But how can we tell? How can we tell? How can we be sure which time you lied? They told you they wanted to get Darrow . . . ?[127]

Regardless of his shortcomings, which cannot be ignored, to read Clarence Darrow's closing arguments and to read transcripts of his trials, one is in awe of his eloquence, and his ability to engage judges and juries.

Max D. Steuer (1870–1940)

Max Steuer was born in Homino, Czechoslovakia (now Slavic Republic). At an early age, Steuer's family emigrated to New York. In his youth while attending school, he worked numerous jobs, such as delivering papers and working in the post office. He attended law school at Columbia University, and upon graduation, was unable to find a clerkship in a law firm.

Poor and unemployed, yet fascinated with the law, Steuer started out on his own, and began to make an excellent impression on those who met him, and those who observed him in court.

On one occasion after a trial, a juror was so impressed with him that he invited Steuer to his home. There he met the juror's daughter who subsequently became Steuer's wife.[128]

By 1919, Steuer's trial practice was busy, and his courtroom skills began to be recognized by the bench, the bar, and the general public. When presenting his closing arguments at trial, Steuer would often refer to the testimony of a particular witness as he recalled it. He would state that to the jury, and if opposing counsel disagreed, he would welcome an objection. On one such occasion, he stated a witness's testimony.

127. See, *Darrow: A Biography*, Kevin Tierney, 263–64 (Thomas Y. Crowell, Publishers 1979).

128. *See generally Max D. Steuer—Trial Lawyer*, Aron Steuer, 3–39 (Random House 1950).

Opposing counsel objected strenuously that Steuer had misstated the testimony. Steuer replied modestly, "you will find the [testimony] on page 642 of the stenographic record." The record was consulted. Opposing counsel took his seat.[129]

During his trial career, Steuer tried many cases, including cause celebre. One such case was the defense of Max Blanck and Isaac Harris, both charged with manslaughter in the Triangle Waist case in 1911. The case arose from the deadly fire that erupted on the ninth-floor plant of the Triangle Waist Company near Greenwich Village, killing 146 employees—mostly young women. The defendants owned the company and allegedly had all the doors to the stairways locked to prevent unauthorized breaks by the employees. One of the issues at trial was whether a specific door was locked and whether the defendants knew it.

Steuer's skillful cross-examination of witness Kate Alterman contributed to the verdict of not guilty. He called for her to repeat her testimony, which she did, causing the impression that much of her testimony was not her actual recollection but a coached prepared testimony, without appearing to attack the witness.[130]

In a well-known libel case, *Sherman v. International Publications*, Steuer represented the defendant. An article written by Paul De Kruif in *Hearst's International* attacked Dr. George Sherman for promoting the use of vaccines for prevention of many illnesses without merit.

On cross-examination, Steuer elicits testimony from Sherman's leading expert who was highly critical of Sherman:

> Q. (Reading to the expert from a particular book) Do you agree or disagree with this statement, "It seems that very severe reactions have a devitalizing influence which hinders proteolytic enzyme production to full capacity"?
>
> A. That means nothing to me.
>
> Q. Not at all?

129. *Id.* at 23.
130. *Id.* at 83–110.

A. No. I don't know what a proteolytic reaction is. I doubt the man who wrote the book does.

Q. The man who wrote "It seems that very severe reactions have a devitalizing influence which hinders proteolytic enzyme production to full capacity," in your opinion, did not know what he was writing about?

A. I don't think he does.

Mr. Steuer: Mark this (the book) for identification.

(Steuer then reads the book from which the prior quotation was read, *Vaccine Therapy in General Practice* by Sherman.)

Mr. Steuer: That is all.[131]

Martin Wiley Littleton (1872–1934)

In his book *The Art of Advocacy*, Lloyd Paul Stryker—himself a great lawyer—commented that Martin W. Littleton was the greatest jury lawyer of his generation.[132] Littleton was born in poverty, and had no formal education. He was inspired to become a trial lawyer when he watched a trial of a murder case at age 17. The lawyer in that case became his mentor. Through self-study, he qualified to take the Texas Bar examination.[133]

Eventually, he moved to New York, where he developed a thriving practice with offices on Wall Street. Stryker observed him in trial defending a street cleaning commissioner for murder. He described Littleton's eloquence: "He was the master of what Justice Jackson has so finely called the short Saxon word that pierces like a spear." His voice was low, well-pitched, and strong.[134]

His closing argument was passionate. He made a clear, logical argument, "but he lit his argument with the warm and glowing sympathy of

131. *Id.* at 296–97.
132. Equinox Publishing 1954, at 155.
133. *Id.* at 156–58.
134. *Id.* at 163–64.

his own heart. In expressing his own feelings, and those of his client, he was spreading the contagion of sympathy in the jury box."[135]

As an assistant DA in the early years of his career, Littleton was prosecuting the defendant for shooting two young people at a party, and seriously wounding them. The defense claimed by virtue of insanity that the defendant did not know what he was doing. The key witness for the defense was an eminent psychiatrist.

Here is how Littleton proceeded to cross-examine him:

Q. Doctor, you have expressed the opinion and conclusion that the defendant did not know the difference between right and wrong or appreciate the nature and quality of his act when he shot?

A. Yes, sir. That is my opinion and conclusion.

Q. You testify that in your opinion the defendant did not know the nature and quality of his act. But when he left the dance and went back home, and got the gun from out of the bureau drawer, did he know then that he was getting a gun?

A. Yes, sir.

Q. When he put the gun in his right-hand pocket, did he know that he was putting a gun in his pocket, or did he think he was putting a violin in a violin case?

A. No, sir. He knew he was putting a gun in his pocket.

Q. And when he walked back through the rain to the house, did he know he was going back to the house where he previously had a quarrel, carrying with him a deadly loaded revolver?

A. Yes, sir.

135. *Id.* at 166.

Q. When he opened the front door of the house, did he know that if he turned the knob and opened the door, he could gain entrance to the house?

A. Yes, sir.

Q. And when he walked into the living room where the young couples were dancing, did he know where he was?

A. Yes, sir.

Q. And after he shot the first one and turned his gun toward the second, did he realize then that he had fired the gun and it was capable of inflicting serious injury or death, or did he think he was firing a garden hose around the room?

A. No, sir.

Q. Now, Doctor, in light of all these circumstances, are you not prepared to amend our previous opinion by saying that at best it was speculative?

A. Well Mr. Littleton, I will say that I might be wrong in my opinion. Anyone might honestly express a wrong opinion.

The jury returned a verdict for the prosecution.[136]

Interestingly, Littleton represented Harry Kendall Thaw in his second trial for the murder of famous architect Stan White in "The Trial of the Century." The jury agreed with the defense of insanity. For interesting reading about the case, see *Courtroom Warrior: The Combative Career of William Travers Jerome* by Richard O'Connor.[137] Jerome prosecuted both cases against Thaw.

Weymouth Kirkland (1877–1965)

Trial lawyer Weymouth Kirkland practiced law in Chicago, and rose to prominence by his many successes. He specialized in antitrust litigation,

136. *See Success in Court*, Francis Wellman, 341–44 (The Macmillan Company 1941).
137. Little Brown & Co., 1963.

defending many businesses in litigation. But he tried many other types of civil cases as well, representing large companies including insurance companies.

He became an advocate for free speech and represented the *Chicago Tribune* in a case instituted by the mayor and city of Chicago for libel based on an editorial accusing the mayor of bankrupting the city. He also was counsel on behalf of the American Newspaper Publishers Association in *Near v. Minnesota*, the landmark case that went all the way to the U.S. Supreme Court. It held that prior restraint on publication was found to violate freedom of the press as protected under the First Amendment.

Kirkland also tried a case representing insurance companies, defending a claim by an alleged widow for the death of her husband, who allegedly drowned after falling off a steamer on Lake Michigan. The plaintiff sued for negligence. The defense was that the husband did not drown, but stole away from an unhappy marriage.

The key witness was a cook on another steamer, who claimed to see the body of the husband, whom he recognized floating in the water.

Here is Kirkland on cross-examination:

Q. How long had you known Peck?

A. Fifteen years.

Q. You knew him well?

A. Yes, well.

Q. How did you happen to see his body?

A. I looked out of the port hole.

Q. You recognized it beyond doubt as the body of Peck?

A. Yes, sir.

Q. Did you make any outcry when you saw the body?

A. No, sir.

Q. Did you ask the Captain to stop the ship?

A. No, sir.

Q. Did you tell anybody that you had seen Peck's body?

A. No, sir.

Q. What were you doing when you happened to look out the window and saw the body?

A. I was peeling potatoes.

Q. And when the body of your old friend Peck floated by, you just kept on peeling your potatoes?

A. Yes, sir.

Subsequently, during closing argument, Kirkland takes a potato from his pocket and a knife from another. He rests a foot on a chair. Then he says to the jury: "What ho! What have we here? Who is this floating past? As I live and breathe, if it isn't my old friend Peck! I shall have to tell the captain about this in the morning, but in the meantime, I must go right on peeling my potatoes."

The defense prevailed.[138]

The University of Chicago Law School named its moot courtroom *The Weymouth Kirkland Moot Court Room.* The law firm of Kirkland and Ellis still bears his name.

Moe Levine (1908–1974)

Moe Levine practiced in Mineola, New York, and is widely recognized as one of the leading trial lawyers of his day in plaintiff personal injury cases. He was an eloquent speaker and frequent lecturer to legal audiences around the country. He developed what he called "the whole man concept": You cannot injure part of a man; you injure the whole person. He also argued that pain destroys the enjoyment of life.

He told juries that any loss of life, loss of mobility, or loss of ability—no matter how insignificant it may seem to society—has an impact not only on the victim but also on the people who love that person.

138. *See Success in Court*, Francis Wellman, 396–97 (Macmillan 1941), wherein Weymouth Kirkland himself discusses this cross-examination.

Moe's style of advocacy was to elevate the jurors as the voice of the community.[139]

He was creative as well as tenacious on behalf of his injured clients. It has been written that he was "peerless in closing arguments."[140] Here is one of his closing arguments—unusual, but persuasive:

> Your Honor, eminent counsel for defense, ladies and gentlemen of the jury. As you know, about an hour ago we broke for lunch. I saw the bailiff came and took you all as a group to lunch. The court and court clerk went to lunch.
>
> So I turned to my client, Harold, and said: Why don't we have lunch together?
>
> We went across the street to that little restaurant and had lunch.
>
> (After a pause) Ladies and gentlemen, I just had lunch with my client. He has no arms. He ate like a dog.
>
> Thank you very much.

Thurgood Marshall (1908–1993)

Thurgood Marshall was born in Baltimore and studied law at Howard University. He became the paramount leader of the civil rights movement in the trial and appellate courts, culminating in the case of *Brown v. Board of Education* in the U.S. Supreme Court.

He served on the U.S. Court of Appeals for the Second Circuit, then as solicitor general of the United States. In 1967, Thurgood Marshall became the first Black American Justice on the U.S. Supreme Court. He served until 1991when he retired.

While Thurgood Marshall argued 32 cases before the Supreme Court, winning 29, he was a great trial lawyer. As a young lawyer, Marshall established the Legal Defense Fund of the NAACP. He then served

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139. Paul Luvera, Esq. (Internet post).

140. By the late Thomas F. Lambert, Jr., Esq., in the preface to the book *The Best of Moe-Summation* (Condoyne/Glanville Information Services Inc. 1983).

as its director. In this capacity, he combated segregation and racial prejudice in our society around the country in the courts. Under his leadership, many lawsuits were filed to integrate schools and universities and abolish segregation.

He personally traveled throughout the South into many courtrooms where he affiliated with local counsel in trials. In many instances, he would enlist local counsel to take the lead. Other times, he would become actively involved in trying the case. Consider the 1948 case of *Sipuel v. Board of Regents of the University of Oklahoma.* The University denied Ms. Sipuel admission to its law school on the basis of race.

The case wound its way up and down the courts. After losing in the trial court, the Supreme Court reversed, holding that Oklahoma did not provide separate but equal law schools.

Then the state created a new school, Langston Law School, with only three law professors. Challenging this "charade" in the trial court to prove the new law school was inferior to the state school, Marshall took an active role in the trial.

Here is an example of Thurgood Marshall in court where he cross-examines the dean of the new school:

> Marshall loudly drags his chair next to the witness's chair. Leaning forward and holding a copy of the new school catalog, Marshall begins a series of rapid-fire questions:
>
> "What kind of bulletin does your Langston Law School publish?"
>
> The dean, looking embarrassed, says the school doesn't have a bulletin.
>
> Waving the catalog in the air, Marshall says: "The catalog says you have one. What did you do, lie?"
>
> Finally, after 40 minutes of browbeating, Marshall's co-counsel calls out, "Turn him loose, let him go." The tense courtroom erupts in laughter. Later, the judge speaks to Marshall, and says that "Marshall's revealing questions had opened his eyes to the wrong of segregation."

The case was won. Oklahoma no longer maintained a separate segregated law school.[141]

Marshall continued to travel throughout the country, fighting against inequality not only in education regarding the admission of young Black students and equal pay for Black teachers, but also in criminal cases where, for example, the hatred against Blacks was abhorrent and often led to wrongful criminal charges against them.

Frequently, his life was in grave danger. On one particular occasion, he was falsely and maliciously arrested for drunk driving under frightening circumstances of being pulled over on the road, forced into a police car, and driven near very suspicious people. But he was spared when he was marched at night to a judge's chambers, and the judge told the police that Marshall had not been drinking.[142]

Marshall once explained that one reason for his success was his thorough preparation before each case, whether trial or appeal. "One of his special assets was his appreciation for the opposing views," including arguments of opposing counsel and concerns for jurors and judges.[143]

He highly valued moot courting all of his cases, which is one method he used to test his arguments and to appreciate opposing views. A moot court is a practice session with mock juries or judges, depending on the case.

He once said that the night before arguing *Brown v. Board of Education*, during a moot court session around 10 p.m., a student portraying a Supreme Court Justice asked a question Marshall could not answer. Marshall stated that he was very upset, and he and his team worked well into the night to form a response.

The next day, a Justice of the Supreme Court asked the very same question that the student had asked the night before. Marshall was

141. *Thurgood Marshall: American Revolutionary*, at 3667 (Times Books, Random House, 1998) (electronic version).

142. *Id*. Loc, 2889–2913.

143. *See Young Thurgood: The Making of a Supreme Court Justice*, Larry S. Gibson, 331 (Prometheus Books 2012).

prepared—and after pausing a few seconds, "socked the Court in the solar plexus with the answer."[144]

I urge you to read more about Thurgood Marshall.[145]

Edward Bennett Williams (1920–1988)

Edward Bennett Williams was one of the finest courtroom advocates of his time. Among his many clients were Congressman Adam Clayton Powell, for defense of a criminal tax evasion case; Frank Sinatra, in a criminal investigation involving his grand jury testimony as a witness; *Playboy* owner Hugh Hefner, regarding alleged illegal transportation of cocaine; Jimmy Hoffa, for bribery, in which he was acquitted; John Connally, former Secretary of the Treasurer under Richard Nixon; and the Reverend Sun Myung Moon, who was convicted of tax fraud.

It was in 1958 when a grand jury indicted Powell for tax evasion, income tax evasion, and filing false returns.[146] Here is a glimpse of Williams' style on cross-examination in the trial of the government's key witness, IRS agent Morris Emanuel. Williams used the transcript of the grand jury proceedings to catch Emanuel in a series of contradictions. Emanuel had given the wrong figure on Powell's earnings to the grand jury.

Q. "You don't stand by its accuracy, Mr. Emanuel, do you?" Williams asked in a soft voice as he paced back and forth before the witness.

A. "At that time, yes; at this time, no," answered Emanuel.

Q. "So, what you told the grand jury was inaccurate?"

144. 1966 Interview with Paul Mark Sandler, Esq.; see *infra*, for a discussion on moot courts and mock trials.

145. *Young Thurgood: The Making of a Supreme Court Justice*, Larry S. Gibson; *Devil in the Grove*, Gilbert King, winner of the Pulitzer Prize (Harper Perennial 2012); *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench*, Michael Davis and Hunter Clark, a Birch Lane Press Book (Carol Publishing Group 1992).

146. *The Man to See: Edward Bennett Williams: Ultimate Insider: Legendary Trial Lawyer*, Evan Thomas, 139 (Simon and Schuster 1991).

A. "As of today, not as of 1958," said Emanuel, shifting in his chair.

Q. "Do you mean the facts themselves were different in 1958 than they are now, or that you were mistaken about the facts then?" Williams inquired, allowing a slight edge to creep into his voice.

A. "No, I mean and you know the facts were the same. . . ."

Q. Williams cut in. "Then the grand jury did not have the benefit of a complete and accurate investigation by you. Is that right?

A. Squirming, Emanuel replied, "You make that sound a little difficult, Mr. Williams."

Q. Judge Bryan glared at Emanuel and snapped, "All right, that is a question and it deserves an answer, Mr. Emanuel. Did it or did it not?"

Emanuel wiped his forehead. "I received whatever information our investigation had developed up to that point."

Q. Williams closed in. "And you know now, do you not, Mr. Emanuel, on April Fool's day 1960, that was not accurate information?"

A. "That is correct," admitted the witness.

Q. Williams finished him off. "You were wrong, weren't you?"

A. Thoroughly defeated, Emanuel answered, "I was wrong in a lot of things at that time."

A murmur swept through the courtroom.[147]

The jury was not able to agree on a verdict. The vote was 10 to 2, not guilty.[148]

147. *Id.* at 139–42.

148. *Id.* at 143, 141–43.

In July 1974, John Connally was indicted for allegedly accepting a bribe, and for perjury before the grand jury. It was Edward Bennett Williams to the rescue.

His approach was to call Connally as a witness. Hence the preparation, as with most of Williams' cases, was exhausting, including the practice sessions with Connally.[149] Williams was known to work around the clock in trial preparation.

The government's primary witness in the case was Jake Jacobson, who allegedly served as a middleman and accepted a bribe in the amount of $10,000.

Williams, on cross-examination, questioned Jacobson about the gloves Connally supposedly wore during the alleged exchange of the money:

Q. Was the glove beige or yellow?

A. It might have been white.

Q. Where was the glove?

A. I believe the rubber glove or gloves was on the side of the money, not on top of the money.

Williams pointed out that Jacobson had testified before the grand jury that Connolly might have worn two gloves.

Q. When did [you] change [your] mind and decide that Connolly might have worn two gloves?

A. Between the time I testified before the grand jury and the time here.

Q. (pause) What was it that changed your recollection? It was the logic of it, is that right?

A. Yes. . . .

149. *Id.* at 316.

> Q. Was that because, Mr. Jacobson, the prosecutors pointed out to you that nobody could count money with one glove on one hand and a big pile?

The impact of the cross-examination provoked a juror to remark, after the trial, that Jacobson looked like a lowlife, and sleazy and slippery.[150]

One of Williams' many comments relating to helping young lawyers relates to his observation about winning and losing cases:

> Once in a while the illusion is . . . that some great trial lawyer never loses a case. This is pure fiction, and not harmless fiction at that. It casts the whole administration of justice in an unfavorable light. . . . There is a limit to what a genius can do with the material with which he [or she] must work. . . .
>
> If you take a hundred criminal cases and assume that fifty of them should be won on the merits and that fifty should be lost, and then turn them over to the most able and experienced advocate in America, he [or she] will probably win sixty and lose forty.
>
> Turn the same cases over to the most incompetent trial attorney man [or woman], he [or she] will win forty and lose sixty. The concept of a great trial lawyer who always wins has no foundation in reality.[151]

150. *Id.* at 323–24.

151. *Id.* at 157 (quoted from a draft of Williams' autobiography).