

Advocacy Under Islam and Common Law

God means no injustice to any of His creatures.*

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ABSTRACT

This Article demonstrates that advocacy arose as a reformist doctrine under both Islamic and common law traditions. Reformist advocacy fights laws with laws. In this fight, both traditions require that the advocates striving for justice be courageous but courteous. The advocates must be courageous to challenge power-based injustices. They must be courteous because aggressive manners are not essential to effective advocacy. For a variety of reasons, reformist advocacy has lost its way in both traditions. Advocacy in the United States has turned to manipulation whereas advocacy in the Islamic tradition has embraced militancy. At a time when America and Islam are engaged in an epic struggle to influence each other, this study illuminates advocacy values they share and critical distinctions they draw in the enforcement of advocacy ethics.

* QURAN, *sura al-Imran* 3:108.

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I. INTRODUCTION

This Article compares the concepts of advocacy under Islamic and common law traditions. In both traditions, advocacy arose as a reformist doctrine. It was a zealous calling to subvert the establishment of wrongs, and dismantle hardships inflicted on the powerless and the outcast. When a system is unjust, advocacy can be a sturdy shield to defend its victims.¹ Reformist advocacy aims at curbing gross violations of “dignity that God has conferred on the children of Adam.”² It challenges the laws of ignorance that deny personal freedoms and the normalcy of life. Reformist advocacy undermines lawless or law-based injustices. It fights laws with laws, supporting fairness and equity. In the United States, for

1. See generally E. W. Timberlake, Jr., *Origin and Development of Advocacy as a Profession*, 9 VA. L. REV. 25, 25 (1922) (explaining that “from time immemorial,” the principle of advocacy has been critical to the administration of justice).

2. QURAN, *sura al-Isra* 17:70. Please note that the translation of the Quran throughout this Article is the Author’s translation unless otherwise noted.

example, the people's lawyers combat social injustice through advocacy.³ Academic writings remind lawyers that "ethical speech in law, . . . can, . . . forge bonds of shared struggle."⁴

For a variety of reasons, advocacy as a doctrine of justice is losing its way in both traditions. In common law, zealous advocacy, frequently associated with clientelism,⁵ has degenerated into manipulation. Clientelism thrives on the partisan passion to bend statutes, cases, and other legal materials, substantive and procedural, to advance client-serving claims of facts and law. Postmodernist epistemological discomfort with the notions of truth, virtue, justice, and knowledge create and legitimize relativism⁶ under which self interest is touted as the reigning paradigm. In Islam, advocacy has turned to militancy to enforce the rule of the Basic Code—the Quran and the Sunna. This militancy, however, has evolved out of rigid historical modes of obedience to rulers and adherence to classical *fiqh* (Islamic jurisprudence).⁷ Manipulation and militancy—both forms of advocacy—have damaged the reputation of their respective legal traditions. Yet popular and professional tolerance for manipulation in common law jurisdictions and for militancy in Muslim countries continues to assure the longevity of these forms of advocacy.

A comparative study of advocacy under Islam and common law might be dismissed as an odd comparison. A religious tradition, one might argue, cannot be compared with a secular tradition. This argument is meritless. The discussion below will demonstrate that the two traditions, though one religious and the other secular, support the same core ethics that constitute advocacy as a doctrine of justice. Furthermore, the two traditions came in close contact during the reign of the British Empire.⁸

3. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 13 (2004) (distinguishing between legal aid lawyers and public interest lawyers).

4. Robin West, *Speech, Silence, and Ethical Lives in the Law*, 105 MICH. L. REV. 1397, 1397 (2007).

5. Clientelism here means a law practice devoted exclusively to protecting the interests of clients without regard to the justice or morality of these interests. In political literature, clientelism refers to powerful patrons who promise favors to "clients" in exchange for votes.

6. Henry G. Hultquist, *Legal Philosophy and a Postmodernist Fallacy*, 2 GEO. MASON L. REV. 223, 236 (1995) (discussing postmodernist notions of philosophy).

7. See Ali Khan, *The Reopening of the Islamic Code: The Second Era of Islamic Ijtihad*, 1 U. ST. THOMAS L.J. 341, 341 (2004).

8. See David Bonderman, *Modernization and Changing Perceptions of Islamic Law*, 81 HARV. L. REV. 1169, 1177 (1968) (explaining the Western influence on Islamic law).

In this period, the law-based technical skills of advocacy were imparted to numerous legal systems in the Muslim world.⁹ Professor John Makdisi provides credible evidence to demonstrate that the common law of England itself “could be the true offspring of Islamic law,” particularly in adopting a rational civil procedure and trial by jury.¹⁰

In the common law tradition, American ethics for advocacy also had religious roots. These ethics were drawn from the scholarship of Professor George Sharswood¹¹ who “relied heavily on scriptural teachings and moral principles as a basis for [his] work.”¹² A regular reader of the Greek Testament, Sharswood saw inseparable bonds between law and religion. “The law of a country is the school of its morality,” he preached in one of his lectures.¹³ Sharswood’s *Essay on Professional Ethics*¹⁴ also played a central role in the drafting of the first ABA code of professional responsibility in 1908.¹⁵ Historically, therefore, American ethics for lawyers are anchored in religious sensibilities.

9. Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1026–27 (1991) (observing the Western-style legal training in law schools in Muslim countries). See also Asifa Quraishi, *Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 67 (2006) (“[T]here may be as much the same as is different between the jurisprudence of Islam and the United States.”).

10. John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635, 1695–96 (1999).

11. George Sharswood (1810–1883) served both as the Chief Justice of the Supreme Court of Pennsylvania and as a professor of law at the University of Pennsylvania. *The Legal Education of George Sharswood (1810–1883): An Excerpt from his Manuscript Family Memoranda in the Hampton L. Carlson Collection of the Free Library of Philadelphia*, 2 AM. J. LEGAL HIST. 259, 259–60 (Howell J. Heaney ed., 1958). His major works include George Sharswood, *Introductory Lecture on the Aims and Duties of the Profession of the Law*, Address at the Opening of the 1854 Session at University of Pennsylvania School of Law (Oct. 1854). Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 692 (1950). Sharswood read the Greek Testament on a regular basis and discussed its nuances with a clerical friend. At his death, a copy of the Greek Testament was found upon the couch. *Id.* at 693.

12. *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848, 861 (Ala. 2004). See also Justice Hugh Maddox, *Lawyers: The Aristocracy of Democracy or “Skunks, Snakes, and Sharks”?*, 29 CUMB. L. REV. 323, 329 (1999).

13. George E. Wickersham, Judge Sharswood, Address Before the Sharswood Law Club of the University of Pennsylvania (Apr. 22, 1914), in 62 U. PA. L. REV. 615, 617 (1914).

14. HON. GEORGE SHARSWOOD, AN ESSAY PROFESSIONAL ETHICS (5th ed., Fred B. Rothman & Co. 1993) (1884).

15. H.M.B., Note and Comment, *The Proposed Code of Legal Ethics for the American Bar Association*, 6 MICH. L. REV. 318, 319 (1908). The copies of the Essay were distributed to the ABA members. In 1887, however, the Alabama State Bar Association was the first American organization to author a code of ethics for lawyers, a code founded substantially on Sharswood’s ethics. *Id.*

This comparative study aims at building understanding between the United States and the Muslim world.¹⁶ “For the most part the brilliant legal heritage of the Muslims,” wrote Donald Marquardt more than fifty years ago, “has remained a closed subject to by far the majority of students of American law.”¹⁷ Lack of familiarity with Islam, which continues, does not deter intellectuals and policymakers from advocating erroneous assumptions about Islam.¹⁸ Advocates of war on terrorism have generated extensive literature that presents Islam as an intrinsically violent religion.¹⁹ Negative images of America proliferate in the Muslim world, and vice versa.²⁰ American and Islamic legal traditions, which remained alien to each other for centuries, and despite huge differences in their roots and branches, are now engaged in an epic struggle to influence each other.²¹ Like opposing counsels in a hotly-contested case, advocates for America and Islam²² accuse each other of foul play.²³ Mutual fear and suspicion mar meaningful conversations.²⁴ This Article shows that both Anglo-American and Islamic legal traditions have been

16. See generally Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2084 n.1 (1996) (recognizing that Islam is now the second largest faith in the United States); James C.N. Paul, *Islam and the State: The Problems of Establishing Legitimacy and Human Rights*, 12 CARDOZO L. REV. 1057, 1058 (1991) (mentioning the diversity of Muslims across continents and subcontinents).

17. Donald E. Marquardt, *Law in the Middle East*, 69 HARV. L. REV. 1350, 1350 (1956) (book review).

18. IBRAHIM WARDE, *ISLAMIC FINANCE IN THE GLOBAL ECONOMY* 12 (2000) (“In a recent American poll, over half the respondents described Islam as inherently anti-American, anti-Western, or supportive of terrorism—though only five per cent of those surveyed said they had much contact with Muslims personally.”).

19. Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 48–49 (2006) (examining the literature that presents Islam as an intrinsically violent religion).

20. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1220 (2007) (reporting cases where critics of Islam have been prosecuted under hate law crimes and arguing that hate speech prosecutions inhibit public debate about the relationship between terrorism and Islamic radicalism).

21. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 988 (2002) (arguing that the United States must not allow the war on terrorism to be defined as the West against Islam); Amartya Sen, Op-Ed., *A World Not Neatly Divided*, N.Y. TIMES, Nov. 23, 2001, at A39 (criticizing the viewpoint of clash of civilizations between Islam and the West).

22. See generally Jessica Powley Hayden, Note, *Mullas on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 172–73 (2006) (analyzing whether the U.S. promotion of moderate Islam in Muslim countries is consistent with the Establishment Clause).

23. L. ALI KHAN, *A THEORY OF INTERNATIONAL TERRORISM* 133–71 (2006).

24. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1582 (2002) (arguing that the American public is being instructed to profile a Muslim citizen as a terrorist).

highly sophisticated in supporting advocacy as a doctrine of justice. And both traditions must save this doctrine from distortions that have corroded the doctrine's normative foundation. This comparative study will hopefully provide insights into jurisprudential recesses of each tradition. It might also inform lawyers, judges, and academics of the two traditions, possibly generating mutual respect and learning.

II. BASICS OF ADVOCACY

This section furnishes the basics of advocacy to highlight two important points. The first point explains litigation advocacy in the common law, known as *khusuma* in Islamic law. The second point emphasizes the distinction between advocacy demeanor and advocacy substance. These points facilitate the understanding of comparative conceptions of advocacy in Islamic and common law traditions.

Advocacy shares space with rhetoric, persuasion, knowledge, reasoning, marketing, incivility, and aggression. Advocacy may be taught and employed in numerous legal and non-legal contexts.²⁵ In religion, missionary advocacy spreads a faith and recruits new believers. Evangelical advocacy has been even more aggressive in spreading the faith it preaches. In politics, campaigning for a political office involves advocacy with voters. Lobbyists and pressure groups advocate, appealing to the legislature, for and against the enactment of specific laws. In private matters, one may advocate for receiving a favorable will from a testator. The advocacy of one's interests in contract negotiations, including labor and employment contracts, is often necessary.²⁶ In the United States, even advocacy of the use of force or law violation is tolerated under the Constitution, provided such advocacy is not directed to inciting imminent lawless action.²⁷ These and other public and private activities involve highly specialized advocacy skills.

A. *Litigation Advocacy*

In law, advocacy is often identified with litigation advocacy where lawyers contest partisan viewpoints before juries and judges for client-serving outcomes. In offering legal services, lawyers play several roles

25. Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 117 (2006) (observing that law schools do not sufficiently teach oral advocacy).

26. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 654 (2001) (hoping that a legal framework can be imagined that promotes justice, equality, dignity, and fairness in the emerging workplace).

27. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

that may or may not require advocacy. Lawyers advise clients. They construct and execute transactions. They prevent and minimize disputes. American academic literature characterizes the lawyer, “as a counselor, planner, drafter, negotiator, investigator, lobbyist, scapegoat, champion, and, . . . a friend.”²⁸ In litigation advocacy, however, lawyers clash with lawyers to produce favorable outcomes for clients. Advocacy exists, writes Aristotle, “to affect the giving of decisions.”²⁹ In this sense, lawyers are professional persuaders.³⁰

Persuasion is not exclusively oral.³¹ In law, advocacy includes written materials, such as memoranda and briefs. Persuasive writing is as vital, if not more, to the outcome of cases as is oral advocacy. Advocacy skills in writing are not the same as in oral speech, a fact that Aristotle notes with splendid insights.³²

Litigation advocacy is dispute oriented. The existence of a dispute—wherein parties may have competing versions of facts, competing cases and statutes applicable to issues, competing claims and counterclaims, and may vie for different outcomes and remedies—is the sine quo non of litigation advocacy. The dispute, factual and legal, is often complex to invite litigation. In some cases, parties may agree on facts but not on laws. In all cases, however, litigation advocacy presupposes a weighty dispute, for no advocacy is necessary if contentions are inconsequential. Litigation advocacy is thus a method of resolving complex and contentious disputes. While in small claims courts parties themselves may fight their cases, most complex cases are contested with the help of lawyers.

28. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 242 (1984).

29. ARISTOTLE, *Rhetoric*, in 9 GREAT BOOKS OF THE WESTERN WORLD 622 (Robert Maynard Hutchins et al. eds., 1987).

30. Celia W. Childress, *The Trial Lawyer’s Persuasive Speaking Voice*, in 81 AM. JUR. *Trials* 317, at § 19 (2001). Advocacy is not an end in itself, nor is it coterminous with any or all means of influence. In courts of law, for example, advocacy is a means to obtain favorable judgments from lay and professional judges. However, not all means to obtain favorable judgments are ethical. Any appeal to ethnic, racial, national origin, tribal, caste, or any such relational sentiments with juries and judges constitutes unlawful advocacy. Any such proposed solidarity generates prejudices and undermines the principle that all parties to litigation must be treated with equal respect.

31. ARISTOTLE, *supra* note 29, § 1414a, at 666–67.

32. *Id.* at 256. A client may therefore need two advocates, one skilled in writing and the other in oral speech. Modern law firms involve several advocates in a lawsuit, thus combining their writing and oral skills for a greater impact on the audience.

The common law ethics literature supports the view that the lawyer's responsibility is multidimensional.³³ The lawyer's responsibility towards the client is the most obvious. The lawyer engaged in protecting the client's interests is simultaneously obligated to protect the spirit of the legal profession, respect for courts, and public interest in maintaining a just system.³⁴ The obligation to protect public interest may or may not be synonymous with that of protecting state interest. In apartheid South Africa, for example, the lawyer's obligation to uphold state interest meant perpetuation of injustice. When a state takes away the people's fundamental rights, the lawyer's obligation to promote justice trumps his obligation to protect state interests. In unjust legal systems, reformist lawyers are "subversive."³⁵ They look into the "face of the power of the state"³⁶ and subvert state sponsored injustices.

Reformist advocacy, though it promotes social responsibility, is not opposed to individual rights: It protects them. Universal individual rights and freedoms are great contributions to the unfolding of human civilization.³⁷ The rise of individualism has weakened, if not demolished, patriarchic conceptions of social order. It freed members of the household from the oppressive doctrine of *Patria Potestas*, a social aggregation practiced under Roman and German laws, which subordinated children and servants to powers of the patriarch.³⁸ Individualism is incompatible with the caste system that suppresses members of lower castes to perpetual degradation.³⁹ Individual rights also dismantle racism, a social structure that first identifies individuals as members of a racial group and then attributes superiority or inferiority to the entire group, unjustly allocating social benefits and burdens. Likewise, individual rights challenge gender oppression, which associates questionable attributes to

33. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (1998) (arguing that a basic goal of ethics is to promote justice); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 7, 10 (1988) (defining independence of lawyers as distance from both the client and the state). See also MODEL RULES OF PROF. CONDUCT R. 2.1 (1983).

34. MODEL RULES OF PROF. CONDUCT pmbl. 1 (2007); MODEL RULES OF PROF. CONDUCT pmbl. 1 (1983).

35. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1084–86 (2006) (arguing that lawyers must immerse themselves in communities in authentic ways to represent them most effectively).

36. These multidimensional responsibilities are vividly articulated in COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS pmbl. 1.1 (2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1182240432.pdf.

37. L. ALI KHAN, *A THEORY OF UNIVERSAL DEMOCRACY* 81–112 (2003) (arguing that universal values are valid across religions and cultures).

38. SIR HENRY SUMNER MAINE, *ANCIENT LAW* 109–65 (Dorset Press 1986) (1861).

39. Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289 (2001) (analyzing how different systems produce rigid social structures of manual labor).

women as a group and denies them their individuality. Individual rights accord respect and dignity to the physical existence, intellect, emotions, and spirituality of each person.⁴⁰

In sum, advocacy in the chambers of a socially active bar is a transformative tool to remove social ills through the rule of law. Reformist advocacy engineers social relations toward justice and power-driven relations away from oppression. The more unjust the system, the more useful is reformist advocacy. Advocacy in the service of public interests is markedly different from advocacy in the service of clients whose claims deepen inequities. The universal right to representation assures legal services to all. But it does not dilute the distinction between advocacy for a client's narrow interests and advocacy for social equities.⁴¹ This distinction must not be lost in cynical Kelsenian obfuscation of a supposedly value-relative question: what is justice?⁴²

B. *Khusuma*

Khusuma, the most relevant concept of the Basic Code, furnishes a parallel to litigation advocacy. It means adversarial argumentation.⁴³ The Quran mentions the concept in the following verse: "He (God) hath created man from a drop of fluid; yet . . . he (man) is an *khaseemun mubeenun*."⁴⁴ The word *mubeenun* means *plain, clear, or evident*. However, the word *khassemun* in the context of the verse poses some difficulty of interpretation. Picktall translates *khaseemun* as *opponent*.⁴⁵ Yusuf Ali translates this word as *disputer*.⁴⁶ Yet, Muhammad Asad, relying on the authority of past jurists, translates the phrase *khaseemun mubeenun* as a person endowed "with the power to think and to argue."⁴⁷ Picktall and Yusuf Ali emphasize human arrogance in forgetting their

40. *Id.* at 341–55.

41. Book Note, 120 HARV. L. REV. 1367, 1383 (2007) (reviewing KERMIT ROOSEVELT, *IN THE SHADOW OF THE LAW* (2005)).

42. HANS KELSEN, *What is Justice*, in *WHAT IS JUSTICE* 24 (1957).

43. The words *khusma* and *khaseemun* are derived from the root *khs*m, which means adversary.

44. QURAN, *sura an-Nahl* 16:4.

45. QURAN, *sura an-Nahl* 16:4, in *HOLY QURAN* 280 (Marmaduke Pickthall trans., Taj Co. 1983).

46. QURAN, *sura an-Nahl* 16:4, in *THE HOLY QUR-AN* 656 (Abdullah Yusuf Ali trans., Ashraf Press 1969).

47. QURAN, *sura an-Nahl* 16:4, in *THE MESSAGE OF THE QUR'AN* 394 (Muhammad Asad trans., E. J. Brill 1980).

humble origin and embarking upon contentions. Asad's translation emphasizes God's powers in turning a small particle of fluid into an intellectual and spiritual being that can think and argue to sort out confusions and disputes. In either understanding, advocates fit the definition of *khaseemun mubeenum*—vivid adversaries.

Al-Ghazali (1058–1111), a Muslim jurist and law professor, defines *khusuma* as a form of predatory argumentation aimed at depriving others of their rights or property.⁴⁸ He opens the discussion of *khusuma* with the Prophet's proverb that "the most hated person in the sight of [God] is *al-khisam* (a person who engages in *khusuma*)."⁴⁹ In further explaining the meaning of *khusuma*, al-Ghazali uses the example of lawyers to distinguish between acceptable and unacceptable *khusuma*. *Khusuma* employed to fight for one's rights and property, says al-Ghazali, cannot be condemned.⁵⁰ Thus, lawyers may use their argumentative and adversarial skills to demand justice for their client. However, any *khusuma* which exaggerate one's claims or inflicts pain upon opponents is unethical.⁵¹ At its extreme end, warns al-Ghazali, lawyers engaged in *khusuma* care less about the rights in dispute and more about hurting each other's feelings, honor, and reputation.⁵² This belligerent use of *khusuma* is contrary to the Quran's injunction: "speak unto all people in the best possible manner."⁵³ The Prophet himself never talked in an insulting manner, and instructed his followers in the following words: "The best among you are those who have the best manners and character."⁵⁴

C. Demeanor and Substance

This Article builds upon a fundamental distinction between advocacy demeanor and advocacy substance. Advocacy demeanor consists of a lawyer's conduct in the course of litigation, including the use of respectful or rude language, pleasant or offensive gestures, bullying and intimidation of witnesses, contempt or courtesy toward opposing counsel,

48. See 3 ABU HAMID AL-GHAZALI, REVIVAL OF RELIGIONS LEARNINGS (*IHYA ULUM-ID-DIN*) 97–98 (Fazl-Ul-Karim trans., Durul-Ishat 1993), available at <http://www.ghazali.org/books/ihya-v3.pdf>. This book is one of the most influential in Islamic legal literature. It consists of four volumes and has been translated in numerous languages, including English.

49. *Id.* at 190. The hadith is authentic. See 3 SAHIH AL-BUKHARI, *The Book of Oppressions* 43:637, at 381 (Dr. Muhammad Mushin Khan trans., Kazi Pubs. 1979).

50. 3 AL-GHAZALI, *supra* note 48, at 191.

51. *Id.*

52. *Id.*

53. QURAN, *sura al-Baqara* 2:83; 3 AL-GHAZALI, *supra* note 48, at 191.

54. 8 SAHIH AL-BUKHARI, *supra* note 49, § 73:222, at 142–43 ("The prophet was the best of all the people in character."); 1 SAHIH MUSLIM, *Kitab al-Salat* 4:1388, at 386 (Abdul Hamid Siddiqi trans., Kitab Bhaven 2000).

trust and mistrust of judges. All these and other related behaviors constitute advocacy demeanor.⁵⁵ Discussions about zealous advocacy frequently focus on a lawyer's courtroom demeanor. But advocacy demeanor is distinguishable from substantive zeal that lawyers employ to argue for clients' best interests. Substantive advocacy focuses on uses of law to obtain desired results. It requires skills to distinguish cases and interpret statutes. It requires knowledge to analyze moral and social dimensions of a case. It requires vision to propose legal solutions. Substantive advocacy may or may not be supplemented with an aggressive demeanor. A lawyer may engage in substantive zeal with the kindest demeanor.

Loud voice and theatrical rhetoric cannot defeat a respectful but steely mind determined to undo a manifest wrong. In the United States, zealous advocacy is losing its moral momentum; it has been expelled from the text of numerous professional codes; and, it may be discarded as a professional ethic in the near future.⁵⁶ This conspicuous decline is partly due to confusion between advocacy demeanor and advocacy substance and association of zealous advocacy with theatrical excesses.

The distinction between demeanor and substance is not new. Aristotle drew a similar distinction between personal and impersonal advocacy.⁵⁷ A good advocate combines the personal and impersonal factors of advocacy to demonstrate the case of his client. The impersonal advocacy belongs to the extrinsic means of persuasion, which include evidence of witnesses, the application of laws, and contracts that litigants may have made, performed, or breached. In modern language, the impersonal advocacy may simply be called competence.⁵⁸ An incompetent lawyer will fail to be an effective advocate, no matter how good his speaking skills are. Rules of professional responsibility first require that a lawyer have the requisite legal knowledge.⁵⁹ Expert lawyers may master all nuances in some single area of law. Nonetheless, good advocates are more than experts. They possess a temporal wisdom of law. They understand the spirit of laws they practice. More importantly, they develop an intuitive

55. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305 (2001) (examining whether demands of civil speech from lawyers are consistent with the First Amendment).

56. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1165–66 (2006) (suggesting that professional zeal may have hit its peak in vigor one hundred years ago).

57. Aristotle, *supra* note 29, at bk. II, § 1375b.

58. *Id.*

59. MODEL RULES OF PROF. CONDUCT R. 1.1 (1984).

sense of how laws might develop in the future. This temporal depth of law comes through legal knowledge, reflection, and experience of the real world in a dynamic context of time.

In addition to expertise, case specific preparation is critical to advocacy. Sound expertise in an area of law, though necessary, is inadequate for effective advocacy. Each case has its own facts, procedural history, issues, background dynamics, and party expectations. An advocate not only learns these specific traits of a case, but she also develops a feel for the case and its potential possibilities and limits in pursuing appropriate legal remedies. A mere mechanical understanding of the case does not lead to effective advocacy.⁶⁰ A case must be understood as a living organism in the process of unfolding its fullness. This profound understanding of a case requires thorough preparation and reflection.⁶¹ These micro skills are often indispensable to bringing about micro transformations, regardless of whether the legal system is predominantly secular or religious.

III. REFORMIST ORIGINS

This section demonstrates that in both Islamic and common law traditions, the first calling of advocacy was iconoclastic. It challenged false gods and their injustices. In Islam, the doctrine of advocacy to undo wrongs is derived, in the seventh century, from the Quran's teachings of *tawakkul*—the singular trust in God; a trust that nullifies loyalties to unjust families, unjust tribes, unjust customs, and to the era of ignorance. In common law, the doctrine is derived, in the early nineteenth century, from the reformist movement in Great Britain, an Empire that practiced colonialism, slave trade, unfair labor practices, and other social ills at home and abroad. Henry Brougham (1778–1868), a leader of the reformist movement, presented the concept of singular duty to undo these injustices, even if this duty clashes with loyalty to the royal family, the country, or to the British Empire.⁶² The iconoclastic teachings of singular trust and singular duty were derived from diverse sources, but their respective mission was no other but to empower advocacy for justice. This empowerment was no license for incivility, abusive tactics, or violence. It was aimed at bringing down false gods with the power of the pen and a trustworthy character.

60. *Id.* at R. 2.1.

61. *Id.* at R. 1.1.

62. *See* discussion *infra* Part III.B.

A. Singular Trust

In the Islamic tradition, advocacy as a doctrine of justice did not arise in courts of law. Nor was it ever granted exclusively to lawyers. The Quran democratizes advocacy to strive for justice so that it reaches all believers, regardless of profession, gender, or social origin. This democratization of advocacy is not tied to recruiting new believers. It is tied to striving for social and economic justice. The Quran establishes a competitive world of virtue (but a distributive world of goods) in which each individual strives to excel in piety—not wealth—to obtain nearness to God.⁶³ Everyone contributes to the making of a world of virtue. Justice-based advocacy is not merely verbal. It is manual, it is speech, and it is mindset. The Prophet is reported to have said:

He who amongst you sees something abominable should modify it with the help of his hand; and if he has not strength enough to do it, then he should do it with his tongue; and if he has not strength enough to do it, (even) then he should (abhor it) from his heart, and that is the least of faith.⁶⁴

This expanded notion of advocacy derives its strength, as discussed below, from the teachings of *tawakkul* (singular trust in God).

Singular trust is related to the classical Arabic word for lawyer—*wakeel*—a word of the Quran.⁶⁵ In its fuller meaning, *wakeel* means a trustee, guardian, fiduciary, representative, defender, and protector. The client is known as *mutawakel*, a person who in the disposal of worldly affairs relies on the expertise, guidance, and sincerity of *wakeel*. Al-Ghazali explains that the relationship between *wakeel* and *mutawakel* is anchored in trust.⁶⁶ This relationship of trust is possible only if *wakeel* has qualities that generate trust and *mutawakel* has the heart to trust.⁶⁷ An incompetent or devious *wakeel*, primarily interested in gathering fees, fails to beget trust. But some clients have suspicious hearts.⁶⁸ They

63. QURAN, *sura al-Hujurat* 49:13 (the most honored in the sight of God is the most righteous); Abdulaziz Sachedina, *Guidance or Governance? A Muslim Conception of "Two-Cities,"* 68 GEO. WASH. L. REV. 1079, 1090 (2000) (explaining the concept of competing with one another in good works).

64. 1 SAHIH MUSLIM, *supra* note 54, Kitab Al-Iman 1:79, at 40.

65. The word *wakeel* (or *vekil*) is a pre-Quranic Arabic word. The words *wakeel* and *wakalat* are derived from the stem *wkl*, which means to trust, appoint, authorize, empower, or put in charge.

66. 4 AL-GHAZALI, *supra* note 48, at 210–11, available at <http://www.ghazali.org/books/ihya-v4.pdf>.

67. *Id.*

68. *Id.*

are untrusting. They do not trust even if the *wakeel* has all the trustee's qualities and is known to be reliable and protective. Thus, trust is relational. Its strength lies in the client's capacity to trust as much as it lies in the trustee's trustworthiness. This reciprocity of trust is the key to understanding the Quran's teaching of singular trust.

Furthermore, the word *wakeel* in its original meaning is completely positive; it carries no negative connotations as does the word *lawyer*. In fact, *al-Wakeel* is one of God's names.⁶⁹ The word *wakeel* appears numerous times in the Quran, mostly associated with God and in instructions to the prophets. In most verses, the Quran reminds believers that they take God alone, and no one else, as their *wakeel*.⁷⁰ In some verses, God specifically instructs Prophet Muhammad that he tell the people that he is a messenger but not a *wakeel*.⁷¹ Jacob, in speaking to his sons,⁷² and Moses, in speaking to the Children of Israel,⁷³ both make the same confession that God alone is *al-Wakeel*. God makes this point clear even to Satan that he would have no authority over believers, for God alone is *al-Wakeel*.⁷⁴ This specific exclusion of the prophets and Satan from the ultimate trusteeship is meant to illuminate God's exclusive power over affairs of the universe.⁷⁵ It is also meant to clarify that prophets, though dear to God, do not share God's powers and, more fundamentally, that the line between God and a prophet should never be crossed.

Even though the Quran repeatedly informs readers that God is the most reliable *al-Wakeel*, no relationship of singular trust between God and man⁷⁶ comes into being unless man has a trusting heart. Those who do not believe in God, says the Quran, have hearts that are filled with doubts and "waver between one thing and another."⁷⁷ If an individual believes that God is just, powerful, and sincere, and that He will not betray the individual's genuine interests, a relationship of trust is formed.

69. According to the Quran, "the most beautiful names belong to [God]." QURAN, *sura al-A'raf* 7:180.

70. *Id.* at *sura al-Imran* 3:173 (God is sufficient, for He is the best *wakeel*).

71. *Id.* at *sura al-An'am* 6:66 (God instructs the Prophet to say to those who reject the truth that "I am not your [*wakeel*]."); *see also id.* at *sura al-An'am* 6:107; *id.* at *sura al-Isra* 17:54.

72. *Id.* at *sura Yusuf* 12:66–68.

73. *Id.* at *sura al-Isra* 17:2.

74. *Id.* at 17:65.

75. *Id.* at *sura al-An'nam* 6:102 (God is one and He has exclusive powers and the one ultimate *wakeel*).

76. Here, the word *man* is used to include both men and women. The Quran uses the words *insan* or *bashar* that are gender neutral. Liaquat Ali Khan, *An Islamic View of the Battlefield*, 7 BARRY L. REV. 21, 21 n.3 (2006).

77. QURAN, *sura at-Tauba* 9:45.

The individual will then be prepared to trust God in the disposal of his affairs.

This doctrine of trusting God with human affairs has been the most reformist doctrine because it makes the individual fearless in facing adversity and challenging oppression. Any injury that the trusting individual suffers—the loss of liberty or life—is God’s doing to which the individual submits with no resentment. This striving trust in God, sometimes condemned as fundamentalism, and sometimes misunderstood by militants who resort to violence, is most threatening to unjust systems that rely on worldly sanctions to enforce tyranny.

The doctrine of singular trust is no quiescent theology. Its active consciousness is a practical tool to dismantle exploitative patronage. Throughout human history, patronage has been a favorite construct of oppression. Rulers, landed aristocracy, nobles, and even church elites have used patronage to create relationships of dependence. Patrons sponsored self-serving art and literature. They also extended employment, loans, and protection, but rarely without a quid pro quo. The beneficiaries must always give something precious in return. They must show fidelity to the patrons’ person, family, ideology, values, and interests. Exploitative patronage creates slavery-type social and economic bonds that the beneficiaries could not break without suffering loss of liberty and life.

Patrons were indeed the false gods that Islam was determined to demolish. Islam’s calling for the rejection of idols was not a theological self-righteousness. It was to liberate man from man-made oppression and show him the way to attain existential freedom that opposes egotistic dictates of earthly patrons. “Say, ‘Am I to take for my master anyone but God, the Originator of the heavens and the earth, when it is He who gives nourishment and Himself needs none?’”⁷⁸ Earthly patrons feed in order to be fed; they help in order to be helped; they protect in order to be protected. Earthly patronage is essentially self-serving. Contrast this patronage, the Quran implies, with that of God who feeds but has no need to be fed.

Singular trust is, therefore, an inherently liberation doctrine that challenges man-made oppression. This liberation doctrine is anti-establishmentarian if the establishment uses instruments of fear to subdue the powerless. Singular trust inspires the subjugated people to put their trust in God and refuse to submit to practices that degrade their

78. *Id.* at *sura al-An’am* 6:14.

spiritual, intellectual, and physical dignity. The Quran furnishes the metaphor of the battlefield to illustrate God as the ultimate *al-Wakeel*. When the Prophet and his companions—a small force of limited means—were fighting for survival in the Battle of Uhd,⁷⁹ they were frightened with a report that a powerful army was gathering against them. The report designed to dishearten the Prophet and his companions, however, increased their faith in God and they said: “God alone is sufficient for us, and He is the best *al-Wakeel*.”⁸⁰ Dismantling man-made injustices, brick by brick, in a patient and persistent manner, is the central message of singular trust.

Take, for example, slavery in the seventh century when the Quran was revealed. Islam did not outlaw slavery, but it strongly advocated for the humanization and manumission of slaves. This advocacy was necessary for banishing slavery from the hearts of slave masters.⁸¹ The Quran warns Muslims that righteousness should not be reduced to ritual turning of faces for worship to the East or to the West, but that real righteousness consists of right beliefs and good deeds, including the ransom paid for the manumission of slaves.⁸² This command reversed the link between wealth and slavery. Wealth was to be used to buy the freedom of slaves rather than to buy their servitude. The Prophet’s Sunna further established spiritual and practical rules to weaken the institution of slavery consistent with the doctrine of singular trust: According to the Prophet, freeing slaves assured masters’ freedom from Hellfire.⁸³ Whoever frees his portion of a common slave, said the Prophet, should free the slave completely if he has the means to pay the rest of the slave’s total price.⁸⁴ The best kind of manumission is the manumission of “the most expensive slave and the most beloved by his master.”⁸⁵ The Prophet ordered the manumission of slaves at the time of solar and lunar eclipses.⁸⁶ The Prophet assured a double reward for a master who educates a female slave, treats her nicely, and then manumits her.⁸⁷ With respect to slaves not freed, the Prophet ordered Muslims to treat them as brothers, feeding them what they themselves ate, clothing them

79. *Id.* at *sura al-Imran* 3:172 n.130.

80. *Id.* at 3:173.

81. *Cf.* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 309–10 (2003) (stating that Southern planters believed that they were designed to be masters).

82. QURAN, *sura al-Baqara* 2:177.

83. 3 SAHIH AL-BUKHARI, *supra* note 49, § 46:693, at 419.

84. *Id.* § 46:704, at 423.

85. *Id.* § 46:694, at 420.

86. *Id.* § 46:695–96, at 420.

87. *Id.* § 46:720, at 433.

with what they themselves wore, and sharing their work, if the work is more burdensome than the slaves could handle.⁸⁸

B. Singular Duty

While justice-based advocacy in Islam arose from God's revelations to a Prophet born among the early seventh century Arab pagans, the common law concept of zealous advocacy—the concept and not the phrase—surfaced in a royal scandal in early nineteenth century Great Britain. Henry Brougham,⁸⁹ the British scientist, writer, founder of the *Edinburgh Review*, and lawyer, articulated the notion of singular duty in defending Queen Caroline of Brunswick, a princess born in Germany and married to the unpopular British King, George IV. On ascending the throne in 1820, George IV wished to divorce his estranged wife accused of committing adultery—a high treason under the laws. The Pain and Penalties Bill 1820 was introduced in the House of Lords “to deprive Her Majesty, Caroline Amelia Elizabeth, of the Title, Prerogatives, Rights, Privileges, and Exemptions of Queen Consort of this Realm; and to dissolve the Marriage between His Majesty and said Caroline Amelia Elizabeth.”⁹⁰ This Divorce Bill—the British version of the American Bill of Attainder, under which the legislature acts as the judicial magistrate⁹¹—was a public trial of the Queen who, despite her lifestyle transgressions,⁹² commanded the sympathies of the British people.⁹³

Henry Brougham, the Queen's legal advisor, defended the Queen before the House of Lords. It was no trial, said Brougham, but “every channel of defamation had been opened and poured upon the accused.”⁹⁴ In defending the Queen, Brougham knew that he was fighting against, as

88. SAHIH MUSLIM, *supra* note 54, Kitab al-Aiman 15:4092, at 1067–68.

89. See generally Michael Lobban, *Henry Brougham and Law Reform*, 115 ENG. HIST. REV. 1184, 1184–1215 (2000) (discussing Brougham's career and reform efforts).

90. 3 PARL. DEB., H.L. (1st ser.) (1820) 1727.

91. *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).

92. In 1806, a commission investigated the charges against Caroline that she had birthed an illegitimate child. The commission found her innocent but imprudent.

93. LORD HENRY BROUGHAM, *Conscientious Belief of the Innocence of the Queen Declared*, in OPINIONS OF LORD BROUGHAM, at ix–x, 124 (Paris, Baudry's European Library 1841) [hereinafter OPINIONS].

94. 3 LORD HENRY BROUGHAM, THE LIFE AND TIMES OF HENRY LORD BROUGHAM 8 (Harper & Brothers 1872) [hereinafter LIFE AND TIMES], available at <http://books.google.com/> (search “Life and Times of Henry Lord Brougham”; then follow first hyperlink entitled “The Life and Times of Henry, Lord Brougham”).

he put it, “the strong hand of an unscrupulous power.”⁹⁵ Here, he uttered the famous words to conceptualize the lawyer’s singular duty to defend and protect his client:

[A]n advocate, by the sacred duty of his connexion with his client, knows, in the discharge of that office, but one person in the world—that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon others; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client.⁹⁶

“No stronger statement in Anglo-American law of the single-minded duty owed by attorney to client can be found than that of Henry Brougham.”⁹⁷ This duty to defend the client, even if the lawyer has to renounce patriotism, has little to do with courtroom demeanor or aggressive behavior. Brougham was not advocating incivility or disrespect. He uttered his statement in the British House of Lords, where manners were valued even to prudish limits. What Brougham emphasized was the lawyer’s duty to use the full force of laws, substantive and procedural, without fear of the state or favor to the country, in the service of a cause.

Brougham’s view of singular duty is most certainly anti-establishmentarian, prepared to challenge the entrenched forces of an unjust imperial order. However, it is by no means anarchist or cynical. In his own words, Brougham is not “a passive and idle spectator of the ravages of time” and he also notes that “a rash, hasty, wholesale system of change is utterly abhorrent to my views.”⁹⁸ He discarded patriotism not because the love of country is inherently ill, but because it can compromise honest and forceful defense of a just cause. Brougham’s words may also be misinterpreted to declare that he was promoting atomistic advocacy that throws away larger concerns to pursue a narrow mission. In its proper historical context, however, Brougham uttered these words to expose the hypocrisy of the British royal establishment that was determined to inflict pain and punishment on a Queen rendezvousing with an Italian of “low origin”⁹⁹ but was most forgiving to the King who

95. *Id.*

96. LORD HENRY BROUGHAM, *The Duty of an Advocate to His Client*, in OPINIONS, *supra* note 93, at 107.

97. *Frankel v. Roberts*, 567 N.Y.S.2d 1018, 1022 (N.Y. App. Div. 1991) (Wallach, J., concurring).

98. LORD HENRY BROUGHAM, *Repudiation of Violence in Reform*, in OPINIONS, *supra* note 93, at 68.

99. LORD HENRY BROUGHAM, *The History of Bergami, the Alleged Paramour of the Queen*, in OPINIONS, *supra* note 93, at 118–19.

himself had extramarital relations with a Catholic mistress, contrary to the laws of the nation.¹⁰⁰ In the conclusion of his speech in defense of the Queen, Brougham quoted from Scriptures to warn the Lords that they should not “[harden] their hearts” to serve “the purposes of unjust judgments.”¹⁰¹

Even if there had surfaced no royal scandal or existed no Queen Caroline, Brougham was the ideal man to proclaim the concept of singular duty to the client in tearing apart unjust practices. Brougham traced his own zeal for justice from the schools in Scotland where the educational system cultivated “higher objects than mere learning” and inculcated “a nobler ambition than the mere acquisition of prosody and the dead languages.”¹⁰² Brougham could have justified reformist advocacy in defending the right to education of children whose parents lacked the means to send them to schools in the Dickensian England.¹⁰³ He could have uttered these words in Manchester in the defense of thirty-eight handloom weavers who, while forming a trade union, were charged with sedition to destroy steam looms. In each case, Brougham’s reformist advocacy on behalf of the powerless was cause-inspired and had a vivid moral purpose. Brougham was a law reformer.¹⁰⁴

Long before the Queen’s trial, Brougham had been a strong advocate for the abolition of the African slave trade. He highlighted the immorality of the “base practice” of using the whip to compel men and women slaves to toil at plantations.¹⁰⁵ The British Parliament had passed laws to abolish the slave trade but no real efforts were made to effectuate the laws. Brougham knew that no legislative measure could “at once destroy slave-trade”¹⁰⁶ for it “had entwined itself with so many interests, prejudices,

100. The British public had no lasting love for the Queen but in a duel with the King, she was certainly the lesser evil.

101. LORD HENRY BROUGHAM, *Conclusion of the Speech in Defence of the Queen*, in OPINIONS, *supra* note 93, at 119–20.

102. LIFE AND TIMES, *supra* note 94, at 9.

103. The five education bills that Brougham introduced in the Parliament in 1820, 1835, 1837, 1838, and 1839 were all defeated. See G.F.A. Baer, *Henry Lord Brougham: Champion of Popular Education*, 6 HIST. EDUC. J. 153, 158–59 (1954).

104. Lobban, *supra* note 89, at 1182–1215.

105. LORD HENRY BROUGHAM, *The Comparison Instituted Between the West India Slaves and the Roman Domestic Slaves*, in OPINIONS, *supra* note 93, at 149.

106. LORD HENRY BROUGHAM, *Course of the Anti-Slavery Principle*, in OPINIONS, *supra* note 93, at 27–28.

and passions.”¹⁰⁷ This realism, however, did not extinguish his zeal and tenacity. He continued to expose the hypocrisy of the Empire, arguing that “we never failed at all when our object was to obtain new colonies and extend the slave-trade.”¹⁰⁸ But failure had struck the Empire now that “[its] object [was] to abolish or limit this same slave-trade.”¹⁰⁹ Artfully chiding his supportive colleagues in the Parliament, Brougham drew a distinction between sincerity and fervor for a good cause—“that we have been very sincere, no doubt, but, rather cold; without a particle of ill-will towards the abolition, but without one spark of zeal in its favour.”¹¹⁰ Zeal, rather than mere sincerity, as the key to dismantling social injustices had been Brougham’s persistent message.

C. Judicial Independence

Reformist advocacy is meaningful only if judges are independent, fair, competent, and of high moral character. Furthermore, judges must have no personal stake in litigation outcomes, as do lawmakers who may lose their seats in the legislature if they act contrary to wishes of the people or campaign contributors. Most secular systems vouch for an independent judiciary and assure judges that no harm would visit them for exercising prudent judicial options. Despite theoretical constructs of judicial independence, judges may be unable to overcome their personal prejudices, political preferences, social bonds, and other mental facts that affect decisions.¹¹¹

The Quran commands judges to decide cases between parties “with justice.”¹¹² In Islam, as in Judaism, however, justice is softened with forgiveness.¹¹³ Advocacy as a calling to dismantle injustices lies at the core of Islamic faith. “I will not become a witness for injustice”¹¹⁴ is its

107. LORD HENRY BROUGHAM, *National Honour—The Slave-Trade*, in OPINIONS, *supra* note 93, at 28.

108. *Id.*

109. *Id.* at 29.

110. *Id.*

111. Ali Khan, *Suppressive Rulings*, NAT’L L.J., July 24, 2006, at P31 (analyzing why Turkish judges have been attacked for their secular stance against the Islamic scarf). Even the European Court of Human Rights has been criticized for its prejudice against the Islamic scarf. See Carolyn Evans, *The ‘Islamic Scarf’ in the European Court of Human Rights*, 7 MELBOURNE J. INT’L L. 52, 71 (2006).

112. QURAN, *sura al-Nisa* 4:58.

113. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1158 n.105 (2000) (citing Ann Kathleen Bradley, *Seeking Forgiveness in the World’s Spiritual Traditions*, SPIRITUALITY & HEALTH, Winter 1999, at 29).

114. “Narrated An-Nu’man bin Bashir: My mother asked my father to present me a gift from his property; and he gave it to me after some hesitation. My mother said that she would not be satisfied unless the Prophet was made a witness to it. I being a young boy, my father held me by the hand and took me to the Prophet. He said to the Prophet,

defining attribute. Islamic ethos resists atomistic versions of advocacy that defend the client's interests to the exclusion of those of other parties to the dispute, and sometimes even to the exclusion of community interests.

IV. SHARED ETHICS

In their respective doctrines of singular trust and singular duty, Islamic and common law traditions espouse shared ethics that constitute the heart of reformist advocacy. First, both traditions strongly believe that forceful arguments can be made with good manners and that rough manners hurt the cause of advocacy. As indicated in Part II, advocacy demeanor and substantive zeal do not make a congenital twin. A lawyer weak in substantive zeal may adopt an aggressive demeanor. And a lawyer with a highly reformist ideology may be gentle and even vulnerable in manners. Both Islamic and common law traditions disapprove aggressive demeanor and commend advocates who are strong in persuasion but respectful in manners. The strength of advocacy rests in its power of reasoning, and not in its aggressive demeanor.

Second, both traditions embrace a universal understanding that the advocate's personal character cannot be separated from his power of persuasion. A lawyer with questionable moral character cannot be the voice of justice just as a liar cannot preach truth effectively. Good manners carry little impact if the advocate's personal character is untrustworthy. Effective advocacy is rarely severable from the person of the lawyer. Communication skills, choice of words, quality of voice, eye contact, gestures, postures, are some of the attributes of personal advocacy. In lawsuits, therefore, where the competing stories are equally credible, where issues are complex, or where the law itself is controversial, the advocate's personal goodness, particularly his trustworthiness and sincerity on the position he takes, may turn out to be a decisive factor that tilts the case in his favor. If a lawyer is unable to acquire the trust of the court or the jury, his advocacy skills do not help and might even backfire on him to his client's detriment.

'His mother, bint Rawaha, requested me to give this boy a gift.' The Prophet said, 'Do you have other sons besides him?' He said, 'Yes.' The Prophet said, 'Do not make me a witness for injustice.' Narrated Ash-Shabi that the Prophet said, 'I will not become a witness for injustice.'" 3 SAHIH AL-BUKHARI, *supra* note 49, § 48:818, at 497.

A. Courageous and Courteous Manners

Courageous and courteous manners—*aadab*—are an integral part of the Islamic faith. They are integral parts of internal ethics. The Basic Code commands persons of faith to practice good manners in all acts and at all occasions, even when practicing good manners is hard.¹¹⁵ Good manners are not mere personal preferences or social etiquettes; they are related to existential and legal matters.

In divorce litigation, in which parties are often inclined to be contentious and vicious, the Quran mandates that good manners be observed to make divorce easy on the parties. After the waiting period is over, divorcing husbands who might be inclined to cruelty and vengefulness are specifically instructed to either reconcile in a fair manner or separate in a fair manner.¹¹⁶ They must not play games, such as proposing bad faith reconciliations with the intention of torturing their estranged wives.¹¹⁷ Of course, parties of faith do not authorize their lawyers to do what they themselves are prohibited from doing. The lawyers of faith, as representatives of their clients, do everything to make divorce the least painful for both parties.

Al-Ghazali devotes a significant portion of his scholarship in explaining good manners in Islam.¹¹⁸ In Islam, everything including dispute resolution leads to God-consciousness, because with God rests the final outcome of all events.¹¹⁹ Good manners are practiced not for gaining social approval or to show off a cultivated self. Good manners are practiced primarily to offer gratitude to God. Take the simplest and the most common act that all human beings perform every day: eating. Al-Ghazali explains that eating is an act of worship.¹²⁰ Eating is indispensable for the maintenance of the human body because a healthy body helps individuals in discharging their worldly and spiritual obligations. Eating as an act of worship, therefore, requires the food to

115. Occasions to practice good manners would include the pilgrimage during which believers, experiencing an intense state of spirituality, abstain from lewd speech and quarreling. QURAN, *sura al-Baqara* 2:197. In taking care of old and frail parents, the persons of faith do not even utter the word *ugh* to their parents, let alone scold them; and they always speak to parents in the most reverent and kind speech. *Id.* at *sura al-Isra* 17:23; Liaquat Ali Khan, *Taking Care of Old and Frail Parents*, PAKISTAN LINK, June 11, 2004, <http://www.pakistanlink.com/opinion/2004/june04/11/01.html>.

116. *See* QURAN, *sura al-Baqara* 2:231.

117. *Id.*

118. Good manners in almost all aspects of life are discussed. *See generally* 2 AL-GHAZALI, *supra* note 48, at 117–38, 207–24 (proscribing rules of good conduct and recounting the Prophets good conduct), *available at* <http://www.ghazali.org/books/ihya-v2.pdf>.

119. QURAN, *sura Luqman* 31:22.

120. 2 AL-GHAZALI, *supra* note 48, at 1–2.

be *halal*,¹²¹ that is, clean and obtained through lawful means.¹²² Just as an act of worship is performed after ablution, good manners require washing dirty hands before eating.¹²³ And just as prayers are performed with humility, food is consumed in a state of thankfulness.¹²⁴

The *halal* food is no mere dietary prescription. In lawyering, it is directly related to professional ethics. For example, the Quran prohibits trustees, which include lawyers, from consuming property that lawfully belongs to others, substituting good items with worthless items, or mixing the beneficiary's accounts with those of the trustee for the purpose of embezzlement.¹²⁵ These ethics allow trustees of faith to consume *halal* food. Food items purchased with unlawful funds are unclean, and consuming unclean foods is a breach of God's "clear" decree of sustenance.¹²⁶ This way, good manners against embezzlement are not confined to premises of the court or to law chambers. These manners assert themselves in foods purchased with embezzled money and arrive home with the unlawful foods the lawyer brings for his family, and the foods, nay the fire,¹²⁷ he pours in bellies of the family. For lawyers of faith, embezzlement is not merely a violation of internal and external ethics; it is defiance of God.

Just like eating, speaking too is an act of worship. The Basic Code instructs persons of faith to cultivate good speech manners—manners that constitute the core of written and oral advocacy. Speaking truthfully is the Quran's most emphatic lesson: God speaks the truth.¹²⁸ And God knows what we reveal in our speech and what we conceal.¹²⁹ And "[t]hey say with their tongues what is not in their hearts."¹³⁰ The

121. QURAN, *sura al-Ma'idah* 5:88.

122. *Id.* at *sura al-Baqara* 2:172 (commanding followers to eat good things and thank God).

123. 2 AL-GHAZALI, *supra* note 48, at 2.

124. QURAN, *sura al-Baqara* 2:172 (commanding followers to eat good things and thank God). Eating in a hurry or with mouthful bites or arrogantly or greedily is contrary to good manners. Eating with bad manners is also detrimental to bodily health.

125. *Id.* at *sura an-Nisa* 4:2. *See also* MODEL RULES OF PROF. CONDUCT R. 1.15(a) (1983) (mandating separate account for the client's funds).

126. QURAN, *sura Hud* 11:6 (noting that God provides sustenance to all creatures); *id.* at *sura an-Nahl* 16:71 (specifying that unequal distribution of sustenance is part of God's plan).

127. *Id.* at *sura n-Nisa* 4:10 (warning that eating the property of orphans is like eating fire).

128. *Id.* at *sura al-Imran* 3:95; *id.* at *sura al-Ahzab* 33:4.

129. *Id.* at *sura al-Anbiya* 21:110.

130. *Id.* at *sura al-Fath* 48:11.

Prophet said that lying carries bad odor that repulses angels.¹³¹ Just as unclean foods contaminate the body, lies sully the soul. Lies also befoul the air and the atmosphere. These internal ethics assist lawyers of faith in purifying written and oral advocacy. The lawyers of faith do not conceal evidence,¹³² nor do they lie to their clients, opponents, or courts. A court is a place of truth that must not be polluted with lies in civil or criminal cases. Parties, witnesses, and lawyers, particularly when they all are persons of faith, must tell the truth, the whole truth, so that disputes are resolved honestly and efficiently consistent with the Quran's instruction that persons of faith "speak words straight to the point."¹³³

Furthermore, it is not enough to speak the truth. Even the truth must be spoken with good manners. Speaking truth is no license to raise voice or use odious language. The Quran strongly disapproves speaking in a harsh voice, comparing harsh voices with the braying of asses.¹³⁴ The Prophet strongly disapproved of persons who quarrel in an insulting manner.¹³⁵ In light of these guidelines, lawyers must speak the truth and dispute with each other with courtesy and decorum, avoiding unilateral or mutual insults. Truthful and honorable speech is the ethical standard that the Basic Code offers to lawyers for arguing cases and resolving disputes through settlement.

Just as the Islamic tradition requires good manners in disputation, the common law tradition prescribes similar values. In the United States, advocacy¹³⁶ runs into difficulty when lawyers cross the invisible line between permissible zeal and ethical violations.¹³⁷ American courts tolerate what they call aggressive advocacy.¹³⁸ No litigation defense or strategy in their view, however, warrants that lawyers sacrifice "respect

131. 7 ENCYCLOPAEDIA OF HADITH 24 (Maulana Muhammad Razi Khan Afridi ed., Anmol Publications Pvt. Ltd. 2007) (citing Imam Tirmidhi).

132. Al-Ghazali discusses few exceptional cases when not telling the whole truth might be allowed. For example, concealing truth will be allowed to save the life of an innocent person. 3 AL-GHAZALI, *supra* note 48, at 216.

133. QURAN, *sura al-Ahzab* 34:70.

134. *Id.* at *sura Luqman* 31:19.

135. 3 SAHIH AL-BUKHARI, *supra* note 49, *The Book of Oppressions* 43:639, at 382.

136. Several courts mention aggressive advocacy in a positive light, distinguishing it from misconduct. *See, e.g., Zamboroski v. Karr*, No. 04-73194, 2006 WL 3253271, at *1 (E.D. Mich. Nov. 8, 2006) (appreciating aggressive advocacy); *Boston Scientific Scimed, Inc. v. Cordis Corp.*, 434 F. Supp. 2d 308, 317-18 (D. Del. 2006) (discussing aggressive advocacy and attorney misconduct).

137. In United States courts, the phrase *zealous advocacy* appears for the first time in 1966 in an opinion of the Military Court of Appeals. *United States v. Tackett*, 36 C.M.R. 382, 386 (C.M.A. 1966) (taking a negative view of the overzealous advocacy of the trial counsel).

138. *Pratt v. Philbrook*, 38 F. Supp. 2d 63, 69 (D. Mass. 1999).

and dignity for the adjudication process.”¹³⁹ Civility is conducive to contemplative justice, say the courts, but not meant to turn courtroom lawyers into “obsequious sycophants in order to avoid offending the fragile sensibilities of judges.”¹⁴⁰ In disciplining aggressive lawyers, American courts repeatedly remind legal professionals that they must conduct themselves with courtesy in dealing with opposing counsel, cross-examining witnesses, and interacting with judges. Denouncing the war-like imagery of aggressive advocacy, the courts issue frequent reminders like this one: “Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity which appears on the legal landscape. The practice of law is not and cannot be a free fire zone.”¹⁴¹ These criticisms are primarily aimed at the lawyer’s advocacy demeanor.

Sharswood draws the ethical portrait of an advocate who is simultaneously courageous and courteous. A courageous advocate represents a client without fear of the client’s adversary who might be “a man of station, wealth, and influence.”¹⁴² Vigorous advocacy against powerful adversaries, however, carries the risk of retaliation. Parties, including governments, often refuse to distinguish between their opponents and lawyers who represent them. If a lawyer is vigorously advocating his client’s cause, the lawyer is not only identified with the client but may be seen as an aider and abettor.¹⁴³ In emotional cases, hatred for opponents is often transferred to their attorneys.¹⁴⁴ Lawyers all over the world have been arrested, assaulted, and even killed for challenging power centers and defending unpopular clients.¹⁴⁵ Sharswood’s courageous advocate may adopt security measures but he does “not permit such thoughts to arise in his mind” and fearlessly performs his duty to the client and the cause.¹⁴⁶ In 1898, the Pennsylvania Supreme Court declared: “An independent

139. *Disciplinary Counsel v. LoDico*, 833 N.E.2d 1235, 1241 (Ohio 2005).

140. *Disciplinary Counsel v. Breiner*, 969 P.2d 1285, 1291 (Haw. 1999).

141. *Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 162 (D.N.J. 1999).

142. SHARSWOOD, *supra* note 14, at 118.

143. *Cf.* Michael M. Schmidt, *Neither Aider Nor Abettor Be: Attorneys Become Prosecutorial Targets for Federal Healthcare Crimes*, 32 J. HEALTH L. 251, 264 (1999) (arguing that the aiding and abetting liability should not be imposed on lawyers without showing both actual knowledge of wrongdoing and wrongful intent).

144. Marian Neudel, Letter to the Editor, *Good Office Security Should Be Real Concern for All Lawyers*, CHI. DAILY L. BULL., Jan. 3, 2007, at 2.

145. John F. Burns & Christine Hauser, *3rd Saddam Lawyer is Killed in Baghdad*, INT’L HERALD TRIB., June 22, 2006, at 4, available at <http://www.iht.com/articles/2006/06/21/news/iraq.php>.

146. SHARSWOOD, *supra* note 14, at 118.

and fearless bar is a necessary part of the heritage of a people free by the standards of Anglo Saxon freedom.”¹⁴⁷

A courageous advocate must also be courteous. No lawyer, says Sharswood, should “allow himself to be hired to abuse the opposite party.”¹⁴⁸ Good manners require that an opponent and his witnesses “be treated with civility and courtesy.”¹⁴⁹ In promoting good manners, Sharswood makes both class-based and pragmatic arguments. Invoking “the bearing, of a gentleman,” Sharswood urges lawyers to adopt high class manners that shun unbecoming language even when severe things must be said.¹⁵⁰ Making a pragmatic argument derived from self interest, Sharswood cautions lawyers to treat the opponent’s witnesses with respect because their mistreatment “tells badly on the jury.”¹⁵¹ Adopting Sharswood’s proposed ethics, the first Code of Professional Ethics in the United States declared in Sharswood’s precise words that “it is not a desirable professional reputation to live and die with-that of a rough tongue.”¹⁵² In providing a more nuanced balance between courage and courtesy, the ABA Model Rules of Professional Conduct state that “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”¹⁵³

B. Good Character

The personal character under Islamic law is known as *khuluq*, a word in the Quran.¹⁵⁴ When the Prophet was advocating submission to One God, he was derided and accused of suffering from madness. God advised the Prophet to continue to display the best character as he had in the past,¹⁵⁵ and to continue consistent good behavior, says the Quran, one must distinguish reasonableness from madness.¹⁵⁶ It is most instructive that the Quran ties truth of the message to truth of the messenger’s personal character. No matter how persuasive the message is, it will

147. Commonwealth v. Hill, 39 A. 1055, 1055 (Pa. 1898). The Court, however, cautioned lawyers not to evade the due course of legal justice. *Id.*

148. SHARSWOOD, *supra* note 14, at 118.

149. *Id.* at 119.

150. *Id.*

151. *Id.*

152. ALA. STATE BAR ASS’N, CODE OF ETHICS, Canon 26 (1899), *reprinted in* HENRY S. DRINKER, LEGAL ETHICS app. F at 358 (1953); *see* SHARSWOOD, *supra* note 14, at 118.

153. MODEL RULES PROF. CONDUCT R. 1.3 cmt. 1 (2007).

154. QURAN, *sura al Qalam* 68:4; Ebrahim Moosa, *Muslim Ethics?*, in THE BLACKWELL COMPANION TO RELIGIOUS ETHICS 237, 237–38 (William Schweiker ed., 2005).

155. QURAN, *sura al Qalam* 68:4.

156. *Id.* at 68:6.

have little impact if the audience has doubts about the advocate's character. "On the Day of Resurrection," said the Prophet, "[t]here is nothing heavier than good character put in the scale of a believer."¹⁵⁷

In delivering professional ethics, Sharswood is most emphatic in weaving direct ties between the lawyer's character and his profession, saying "that no man can ever be a truly great lawyer, who is not in every sense of the word, a good man."¹⁵⁸ He concedes that a lawyer without personal integrity may shine for a while, but such a lawyer can have no permanent success as "his light will soon go out in blackness of darkness."¹⁵⁹ In drawing the importance of character in law practice, Sharswood seems to be addressing new lawyers who are under tremendous pressure to make a living, particularly if they lack other means to support themselves.¹⁶⁰ In hardship and struggle for professional survival, a lawyer may consider goodness as a barrier to success. In these trying times, Sharswood advises new lawyers that "the strictest principles of integrity and honor" offer the best safety.¹⁶¹ Losing goodness is no apocalyptic event; it is no one big error; it is no one huge bad decision. Furnishing remarkable insights, Sharswood explains that good character "whispers away" when a lawyer swerves "from truth and fairness, in small particulars."¹⁶² One's character is secreted in details of his behavior.

In the United States, jury trials in both criminal and civil cases are demonstrations of the lawyer's character. Expert trial lawyers and experienced judges agree "that a jury tries the lawyers and not the case."¹⁶³ An advocate must know that the jurors see him more than his client. In criminal cases, the client may never say a word in the courtroom. Even in civil cases, the client's exposure to the jury is

157. 3 SUNAN ABU DAWUD, Kitab al-Adab bk. 36, No. 4781 (Ahmad Hasan trans., 1984). Consistent with these injunctions, Muslim countries have adopted codes of professional responsibility that require good manners and good character. Pakistani rules, for example, disqualify lawyers from practicing law if they have been convicted of an offense involving moral turpitude or if they have been dismissed from service of government or of a public statutory corporation on charges of misconduct or moral turpitude. Legal Practitioners & Bar Councils Act, No. XXXV of 1973, § 28A (Pak.), amended by Act of Sept. 17, 2007, available at http://www.pbbarcouncil.com/downloads/barcouncil_act_amended_2005.pdf.

158. SHARSWOOD, *supra* note 14, at 168.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 61 (2d Cir. 1948).

limited. But in both criminal and civil cases, “the lawyer is before the jury all the time.”¹⁶⁴ The jurors pay attention not only to what the lawyer says and does, but also who he is as a person.

Argumentum ad hominem refers to personal attacks in argumentation. Personal attacks violate the rules of decency and courtesy. Advocacy conducted by means of personal attacks is ineffective and no good lawyer substitutes insults for good arguments. Logic rejects argumentum ad hominem as a valid response. Logic requires that what is said, and not who is saying it, belongs to the realm of authentic discourse. The *Stanford Encyclopedia of Philosophy* takes issue with “Aristotle’s suggestion that the *ethos* of a speaker plays a critical role in determining whether an argument is persuasive or not.”¹⁶⁵ Turning Aristotle on his head, the *Encyclopedia* asserts that an ad hominem argument “undermines, not the *ethos* of the person attacked, but the *ethos* of the speaker who has presented it.”¹⁶⁶

Distaste for argumentum ad hominem, however, does not refute the thesis that the ethos of the arguer matters. A known deliberate liar, for example, will be ineffective in persuading an audience that he “[n]ever tell lies,”¹⁶⁷ unless his presentation is self-referential in that he discloses how his own lies have destroyed his reputation and fortune. The audience does pay attention to the speaker’s character and evaluates his utterances in light of his manifest behavior. If the speaker is unknown, the audience may interpret his gestures and speech not only to understand what he is saying but also to speculate what kind of person he is.

The personal life of an advocate is inseparable from his role as an advocate. Privacy is no hideout for lawyers. The lawyer’s personal life constitutes the invisible part of his advocacy. And the lawyer’s character reputation is inseparable from his law practice. For example, a lawyer who commits a criminal act is most likely to lose his trustworthiness.¹⁶⁸ Similarly, a lawyer engaged in conduct involving dishonesty, fraud, deceit or misrepresentation is rarely an effective advocate.¹⁶⁹ Codes of professional responsibility sanction lawyers engaged in criminal or fraudulent activity.

164. *Id.* at 62 (quoting HARRY SABBATH BODIN, *SELECTING A JURY* 50 (1945)).

165. Leo Groarke, *Informal Logic*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, § 9. Example: Ad Hominem (Edward N. Zalta ed., Winter ed.), <http://plato.stanford.edu/entries/logic-informal/#One>.

166. *Id.*

167. Henry W. Johnstone, Jr., *Philosophy and Argumentum ad Hominem*, 49 *J. PHIL.* 489, 495 (1952).

168. MODEL RULES PROF. CONDUCT R. 8.4(b) (2007).

169. *See id.* R. 8.4(c).

C. Internal and External Ethics

Good manners and good character are core advocacy ethics under Islam and common law. The enforcement of these ethics, however, differs under the two traditions. The Islamic tradition uses both fear of God and fear of sanctions to demand compliance. The secular tradition of common law, however, relies solely on sanctions to enforce professional ethics. Nonetheless, the secularization of common law ethics does not prevent lawyers of faith, some of whom are Muslims, from God-consciousness in their professional lives.

To understand God-consciousness, internal ethics may be distinguished from external ethics. Internal ethics reside in faith. They are an integral part of one's spirituality. By contrast, external ethics are man-made rules. For example, the ABA Code of Professional Conduct is an example of external ethics. Internal ethics are existential; they are enforced by the person himself. External ethics are coercive; they are enforced by means of disciplinary sanctions.¹⁷⁰

The Quran supports the distinction between internal and external ethics. The concept of *taqwa* furnishes internal ethics whereas the concept of *takhsha* refers to external ethics.¹⁷¹ The opening chapters of the Quran forewarn that the Quran is a book of guidance for those who practice *taqwa*.¹⁷² *Taqwa* is God-consciousness. In its simplest meaning, *taqwa* means the fear of God. God says in the Quran, "Do not fear them, but fear Me."¹⁷³ This command was first given to the Prophet and through him to all believers. "Them" refers to false gods and patrons of injustice. *Taqwa* is not the fearlessness of a self-righteous brute. Nor is it a state of mind that arises from misinformed militancy. In matters of law, *taqwa* furnishes a firm understanding that God is just and supports lawyers of faith who use their intellectual and spiritual resources to seek justice, without imposing their faith on others.¹⁷⁴

170. JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 186 (Barbara Herman ed., 2000). John Rawls provides a powerful distinction between external and internal legislation. The external legislation uses the fear of sanctions to determine behavior whereas internal legislation is an attribute of virtue that also determines behavior. *Id.*

171. *Takhsha* or *Khashya* mean the fear of man.

172. QURAN, *sura al-Baqara* 2:2.

173. *Id.* at 2:150; *id.* at *sura al-Ma'idah* 5:3, 5:44; *id.* at *sura al-Tauba* 9:13; *id.* at *sura al-Ahzab* 33:37.

174. *Id.* at *sura al-Baqara* 2:256 (asserting that there is no coercion in faith).

In the realm of advocacy, the lawyer of faith draws personal strength from practicing internal ethics. As a general rule of guidance, the lawyer of faith understands that God is pleased when he engages in ethically responsible advocacy and displeased when he engages in ethical violations. Internal ethics are thus the knowledge of God's permissions and prohibitions. The lawyer of faith develops the cognitive sense of right and wrong in the spiritual context of internal ethics. The lawyer of faith transacts the business of the day fully conscious of internal ethics. His claims and counterclaims on behalf of others are not separated from his internal ethics. For the lawyers of faith, therefore, internal ethics are not merely a theological construct having no relevance to the practice of law. Internal ethics are an active part of the lawyer's intellectual cognition and spiritual intelligence. They constitute the lawyer's character that inspires him to engage in ethically informed advocacy.

The Quran contrasts *taqwa*, the fear of God, with *takhsha*, the fear of man.¹⁷⁵ Consider a lawyer who does not believe in God. Fear of God is no part of his internal ethics. Even this lawyer, however, may develop a sense of internal ethics derived from humanistic reflection or experience. Now consider a lawyer without internal ethics. Suppose this lawyer wishes to embezzle the client's funds. Even though no internal ethics guide this lawyer, the fear of sanctions may deter the lawyer from the prohibited conduct. Thus, even in the absence of internal ethics, the fear of penalties—*takhsha*—may prevent ethical violations.¹⁷⁶ In secular advocacy, *takhsha* of disciplinary sanctions plays a significant role in the enforcement of professional ethics.

Internal and external ethics are not always mutually exclusive, nor are they always in harmony. The behavior prohibited under external ethics may also be forbidden under internal ethics. In such cases, internal and external ethics create a combined psychological intelligence against the proscribed behavior. But when the two ethics collide with each other, the lawyers of faith choose internal ethics. They do not compromise God-consciousness for what the Quran calls "a miserable price."¹⁷⁷ This internalized ethics orientation, however, does not have to take the route of militancy.

175. *Id.* at *sura al-Ma'idah* 5:44.

176. Even in civil cases, *khashya* of losing property may dictate parties not to breach contracts or civil laws. *Khashya* may force corporations not to manufacture dangerous products if law imposes stiff penalties.

177. QURAN, *sura al-Ma'idah* 5:44. *Khashya*, however, occupies the character of a coward who loses all personal courage to say or do the right thing. Few persons of faith abandon *taqwa* for the sake of *khashya*. In a verse of the Quran, God exposes the duality of fears to teach the Prophet: "That you feared the people, whereas it is more befitting for you to fear God." *Id.* at *sura al-Ahzab* 33:37. The Prophet is reported to have said that a coward shrinks from defending even his father and mother. MUWATTA' IMAM MALIK, *Kitab al-Jihad* 7:982, at 208 (Muhammad Rahimuddin trans., 1980).

V. ADVOCACY DEVELOPMENTS IN ISLAMIC LAW

This section and the next explain that in both Islamic and common law traditions, reformative advocacy gradually began to lose its original mission of dismantling injustices.

In Islam, the doctrine of singular trust was compromised once Muslims instituted their own empires. The notion that the Caliph is God's vice regent established a culture of obedience rather than reformist militancy for the establishment of justice. Although the Caliph's infallibility could never become a central thesis of Islamic theocracy or political theory, and although some Caliphs were cruel and some openly un-Islamic, the tradition of challenging the authority lost its way. Furthermore, Islamic law developed primarily in schools of great jurists and rarely in courts of the Caliphs. The notion of justice and a profound distaste for oppression erected a wall of separation between Caliphs and jurists. Independent-minded jurists refused to become part of the Muslim Empires and they continued to issue private opinions—*fatwas*—to guide the development of law. Even this enterprise was severely compromised during the era of strict precedents—*taqlid*—when a jurisprudential quietude was imposed declaring that Islamic law had been perfected and that no future generation could rethink or reinterpret the basic sources of Islamic law, that is, the Quran and the Sunna.

A. Technical Developments

In Islamic legal history, two significant technical developments took place with respect to the concept of *wakeel*. First, the term *wakeel* has been gradually humanized and legalized. Second, advocacy has been added to the concept of representation. The second development is more significant because it deviates from the strictures of ancient Islamic jurisprudence.

Shirk, that is, associating partners with God, is strictly prohibited in Islam. It is, however, acceptable to give God's names to human beings.¹⁷⁸ Thus, even though the Quran repeatedly states that God alone is *al-Wakeel*, human beings could use this name without violating any fundamental

178. In many Muslim communities, *Wakeel* is an acceptable male name, although the full name might be *Abdu-al-Wakeel*, which means, the slave of *al-Wakeel*, thus preserving the distinction between man and God. The lack of intention on part of the family or community to commit shirk is critical in naming children with God's names mentioned in the Quran.

tenets of Islam. The humanization of God's name, *al-Wakeel*, introduced the concept of representation in Islamic law.

In its general meaning, a *wakeel* does not have to be a person learned in law. Any representative who protects the interests of another person is a *wakeel*.¹⁷⁹ A *wakeel* may also be an agent who serves a principal. In matrimonial matters, a person representing the matrimonial interests of a spouse is a *wakeel*. Thus, the term *wakeel* has not been confined to persons trained in law. In the legal system, however, *wakeel* is a term of art used to describe lawyers who appear before courts and tribunals. With the passage of time, the term *wakeel* has increasingly been used to describe persons engaged in the practice of law.¹⁸⁰

Classical *fiqh* prefers that litigants appear in person to present their cases to the judge. Jurist Abu Hanifa required that a litigant seek permission from his adversary before appointing a *wakeel*, since the introduction of a third party may have disturbed the equity of litigation. However, his disciples did not agree with the master jurist and allowed anyone to be a *wakeel*.¹⁸¹ In almost all schools of jurisprudence, the appointment of *wakeels* has been available in almost all matters. The Hanafi restrictions on the engagement of a *wakeel* are waived under necessity. Representation without the adversary's permission is allowed for a number of reasons dictated by practical realities. No permission is required if the client is legally incompetent to present his case to the court, nor if the client is

179. *Wakeel* "is a person in whom one has complete faith; so much so that one can entrust all one's affairs to him with full satisfaction of the heart." ABU ALA MAUDUDI, THE MEANING OF THE QURAN, *sura al-Muzzammil* 73:10, Desc. No.10, available at <http://www.translatedquran.com/meaning.asp?pagetitle=AL+-+MUZZAMMIL&sno=73&tno=1690>. Islamic law permitted no discrimination in who could be a *wakeel*. A Muslim may represent even non-Muslims. Likewise, a *dhimmi* (non-Muslim) is allowed to represent Muslims. A man may represent a woman and a woman may represent a man. A master may represent the slave and a slave may represent the master. Thus, representation was not burdened with any personal distinctions.

180. In Iran, however, the term *wakeel* is deeply entrenched in social memory. For many centuries, the office of the *wakeel al-ra-aya*, or the people's *wakeel*, played a real and a symbolic ombudsman role in protecting the indigent, the weak, and the helpless. In the eighteenth century—during the time of the American Revolution—Karim Khan Zand ruled Iran (1751–1779) on behalf of a Safavid prince. Khan Zand first refused to accept any specific title, including the title of shah. Later, however, he chose to be called *Wakeel al-ra-aya*. J. R. Perry, *Justice for the Underprivileged: The Ombudsman Tradition of Iran*, 37 J. NEAR E. STUD. 203, 211–13 (1978). This unique title, which the successors of the Khan Zand dynasty refused to adopt, was a political move on behalf of the new ruler to identify with the common man and provide justice and fair treatment to them. Khan Zand politicized the term, suggesting that a ruler can be, and perhaps ought to be, the people's representative. JOHN R. PERRY, *KARIM KHAN ZAND: A HISTORY OF IRAN, 1747–1779*, at 216 (1979). In 1815, an Iranian visitor to London described the House of Commons as the House of *wakula al-ra-aya*—the people's representatives. Perry, *supra* note 180, at 212.

181. Ronald C. Jennings, *The Office of Vekil (Wakeel) in 17th Century Ottoman Sharia Courts*, 42 *STVDIA ISLAMICA* 147, 149 n.1 (1976).

unavailable due to illness or physical disability. These practical needs reinforce the concept of *wakalat* or representation.

The representation relationship between *wakeel* and client—*muwakkil*—has always been, and continues to be, a contract under Islamic law, requiring two witnesses as a legal formality for the contract's validity.¹⁸² The representation contract requires that the scope of *wakeel*'s authority be spelled out in the agreement.¹⁸³ A client may contract with more than one *wakeel* to represent his various interests or even the same interest. Therefore, there exists no systemic presumption in Islamic law that a *wakeel* has the general power of attorney to dispose of all matters of his client. However, the law does not prohibit clients from granting a general power of attorney to a designated *wakeel*. Despite its contractual nature, the representation relationship imposes no obligation on a *wakeel* to defend the client's interests with zeal. The *wakeel* presents the client's case to a judicial tribunal, in good faith, fully, and truthfully.

Even though the concept of advocacy is deeply anchored in the Basic Code, advocacy skills used in the practice of law are relatively new to Islamic legal systems and may be attributed to Western influences. French jurist Emile Tyan aptly points out that advocacy has not existed in classical Islamic law.¹⁸⁴ Classical *fiqh* viewed advocacy as an unacceptable, perhaps deceptive, methodology to present facts, contest issues, and interpret the applicable law. The Arabic language—the language of the Quran and the Sunna—contains no parallel word to capture the special sense of the word *advocacy* employed in the art of lawyering. In numerous Arab countries, the word *wakeel* means the lawyer, although the word *muhami* is also used to describe attorneys and advocates. The two words are interchangeable, though *muhami* is a new coinage to capture the evolving meaning of the lawyer.¹⁸⁵

182. *Id.* at 147–49. “No advocate shall appear or act for any person in any Court or tribunal unless he has been appointed for the purpose by such person by a document in writing signed by such person or his recognized agent or some other person duly authorized by him to make such appointment, and such document has been filed in such Court or tribunal.” Legal Practitioners & Bar Councils Act, *supra* note 157, at § 22(3).

183. Jennings, *supra* note 181, at 147.

184. EMILE TYAN, HISTOIRE DE L'ORGANISATION JUDICIAIRE EN PAYS D'ISLAM 262 (2d ed. 1960). “Il n'y pas en droit musulman d'avocats, au sens special du mot.” *Id.* (meaning “[T]here is no Islamic law of advocacy in the specific sense of the word.”).

185. Gamal M. Badr, Letter to the Editor, *Islamic Criminal Justice*, 32 AM. J. COMP. L. 167, 167–68 (1984) (explaining the distinction between *wakeel* and *muhami*); Ann Elizabeth Mayer, Letter to the Editor, *Islamic Criminal Justice*, 32 AM. J. COMP. L. 167, 168–69 (1984) (same).

Western colonialism has left deep marks on the art of lawyering in many Muslim countries.¹⁸⁶ In Egypt, for example, the introduction of French laws and the French legal education transformed the role of lawyers.¹⁸⁷ Secular courts, called Mixed Courts,¹⁸⁸ were established in 1875 to oust the reign of the Sharia from the colonized legal system. The sources of the Mixed Courts were confined to the European Codes adopted in Egypt, custom, natural law, and equity. The Sharia was excluded as a source because the foreigners did not wish to resolve their disputes under the laws of the Sharia.¹⁸⁹ With the establishment of a Westernized court system, the role of lawyers changed dramatically. Initially, the Europeans dominated the bench and the bar. But a perpetual importation of lawyers and judges was unsustainable. As such, indigenous lawyers were sponsored to run the Europeanized legal system.¹⁹⁰

After the British occupation of Egypt in 1882, the legal system was infused with the doctrine of precedent as indigenous judges learned to apply, distinguish, and overrule precedents.¹⁹¹ The introduction of the doctrine of precedent sharpened the advocates' lawyering skills as they

186. Pakistan's Legal Practitioners and Bar Councils Act, for example, does not even contain the words *lawyer* or *attorney*. *Advocate* is the primary word used in the statute. Legal Practitioners & Bar Councils Act, *supra* note 157, at §§ 23–26. An advocate is defined as a legal practitioner who is enrolled in bar records, known as rolls. *Id.* at §§ 23–25. Persons qualified to practice law before various courts of Pakistan are called advocates. *Id.* at § 26. The Pakistan Supreme Court Rules employ the words *advocates*, *advocates-on-record*, and *senior advocates* who “shall be entitled to appear and plead before the Court on signing his respective roll.” PAK. SUP. CT. R. IV:1–2 (1983). The words *lawyer* or *attorney* do not appear in the Rules.

187. The French domination of the Egyptian legal system attracted Coptic and Syrian Christians to the legal profession. However, Muslim lawyers were needed to run Muslim Egypt. This need demanded a new class of lawyers other than the traditional lawyers trained only in Islamic law. See Donald M. Reid, *The National Bar Association and Egyptian Politics, 1912–1954*, 7 INT’L J. AFR. HIST. STUD. 608, 611–12 (1974). There is some controversy over whether the new word *muhami* represents a new class of professional lawyers trained in the Western tradition or whether it is interchangeable with the classical word *wakil*. See Gamal M. Badar & Ann Elizabeth Mayer, Letters to the Editor, *Islamic Criminal Justice*, 32 AM. J. COMP. L 167, 167–69 (1984).

188. See JASPER YEATES BRINTON, *THE MIXED COURTS OF EGYPT* 33 (rev. ed. 1968). The Mixed Courts resolved the disputes between foreigners and Egyptians and among foreigners. Disputes among Egyptians were resolved through Native courts. The two court systems were merged into National courts in 1949. A new Civil Code under the leadership of Ahmed al-Sanhouri was drafted. See Mark S. W. Hoyle, *The Mixed Courts of Egypt: An Anniversary Assessment*, 1 ARAB L.Q. 60, 61 (1985).

189. These courts were designed to stem the proliferation of frivolous and inflated claims that the foreigners were making against the Egyptian government. These courts, however, were a constant reminder to the natives that a foreign legal system had been planted in their soil.

190. FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW, AND LIBERALISM IN MODERN EGYPT* 33 (1968). The first Egyptian law school was established in 1868. The Court system, fashioned after the Anglo-French model, became operational in 1884.

191. See Hoyle, *supra* note 188, at 63.

learned to actively engage the legal materials and find solutions through interpretation rather than an intuitive sense of justice. The task of a *muhami* thus became to aggressively argue the best interests of his client. The doctrine of precedent also introduced the novel idea that the absence of written law is no bar to seeking remedies, because judges can always manipulate old cases to develop appropriate remedies suited to new causes of action.¹⁹² Thus, lawyering was introduced into the enterprise of the Egyptian legal system. In the succeeding decades, a more nationalist Egypt would discard many foreign sources of law and adopt the Islamic law as one of its founding sources. Despite this change in the substantive law, the advocacy skills that the Europeans introduced into the system would become a more permanent feature of the system.¹⁹³ In others parts of the Muslim world, the concept of advocacy and the word *advocate* have entered with great acceptance.

B. The Obedience Doctrine

Soon after the Prophet's death in 632 A.D., conquering Muslims were successful in establishing their own empires. They needed the doctrine of obedience to establish peace and order. This doctrine preached that Muslims must obey the rulers charged with authority. Obedience of laws is critical for the establishment of social order. Communities face permanent anarchy if the people are acculturated to challenge authority and refuse to obey laws considered incompatible with perceived self interests. The obedience doctrine, meant to minimize rebellions, chilled the development of reformist advocacy.

The support for the obedience doctrine was drawn from the Basic Code, the Quran and the Sunna.¹⁹⁴ The Quran commands Muslims: "O

192. *Id.* at 63–64.

193. In the Turkish language, the word *wakeel*—spelled as *vekil*—means an attorney or agent, and the Turkish word *vekaletname*, meaning the power of attorney, is derived from the word *wakeel*. Jennings, *supra* note 181, at 147. However, the Turkish word *avukat* is used to describe attorneys and advocates. In Persian and Urdu, the word *wakeel* is the primary word to describe attorneys, advocates, and lawyers. In India, Pakistan, and Bangladesh, the word *advocate* has been imported to accommodate the modern techniques of lawyering. In these countries, however, the word *wakeel* also has come to acquire the advocacy dimension. As such, the words *advocate* and *wakeel* are used synonymously, and the word *wakeel*, though derived from the language of the Quran, has acquired some negative connotations associated with the word *lawyer*.

194. IMAM MALIK IBN ANAS, AL-MUWATTA OF IMAM MALIK IBN ANAS, bk. 21 No. 21.1.5, at 173 (Aisha Abdurrahman Bewley trans., 1989).

ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you.”¹⁹⁵ This verse was revealed when the Prophet appointed a commander to an army detachment,¹⁹⁶ signaling to Muslim soldiers that obeying the appointed commander was essential for maintaining discipline of the armed forces. The Prophet’s Sunna reinforces the Quran’s commandment. The Prophet instructed Muslims “to listen to the ruler and obey him in adversity and prosperity, in pleasure and displeasure, and even when another person is given (rather undue) preference over you.”¹⁹⁷ The Prophet reinforced obedience to the rulers on the occasion of the Last Pilgrimage saying: “If a slave is appointed over you and he conducts your affairs according to the Book of Allah, you should listen to him and obey (his orders).”¹⁹⁸

The Prophet’s Sunna, read in light of the Quran, clarifies elements of the obedience doctrine. First, social and economic grievances cannot be the basis to disobey the ruler. It is easier for individuals and communities to obey rulers in times of social prosperity. But blaming the rulers is also common when natural or man-made disasters hit communities, disrupting the normalcy of life. In adverse times, such as famines, epidemics, and economic downturns, the Prophet’s Sunna mandates that Muslims continue to obey the rulers. Obedience to the ruler is required even if the ruler practices discrimination and preferences. Demands for equal treatment cannot be the grounds for disobeying the rulers. Islamic enlightenment imposes the obligation to maintain social order. If a Muslim disapproves of something done by the ruler, the Prophet recommended patience and not rebellion, since disrespect for rulers had been an artifact of the law of ignorance.¹⁹⁹

Second, the Prophet’s Sunna democratizes the ruling class. It rejects the notion that only the houses of royalty, nobility, and powerful people are entitled to rule Muslim communities. Muslims must obey rulers even if rulers are slaves appointed in positions of authority. This democratization of the ruling class stands in contradistinction to the Greek ideology, for example, under which the ruler and the ruled belong to two different human species.²⁰⁰ The Prophet’s Sunna also rejects the caste system under which higher castes rule and lower castes perform

195. QURAN, *sura al-Nisa* 4:59.

196. 6 SAHIIH AL-BUKHAHRI, *supra* note 49, *Book of Commentary* 60:108, at 89; 3 SAHIIH MUSLIM, *supra* note 54, *Kitab al-Imara* 20:4517, at 1230.

197. 3 SAHIIH MUSLIM, *supra* note 54, *Kitab al-Imara* 20:4524, at 1230.

198. *Id.* at 20:4528.

199. 9 SAHIIH AL-BUKHAHRI, *supra* note 49, *Book of Afflictions* 88:176–77, at 145–46.

200. Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 295 (2001).

menial jobs on intergenerational bases. The appointment of rulers on ethnic, social, economic, racial, or any such basis is prohibited under Islamic law. This nondiscrimination among rulers deepens respect for authority and demolishes the mindset that only powerful people are entitled to be heads of the community. When offices of authority are reserved for a ruling class pre-identified on the basis of social hierarchy, the system produces resentment, rebellion, and instability.

Islam's strong preference for egalitarian leadership, however, does not protect incompetent or oppressive rulers. Although the obedience doctrine recommends patience when a ruler does something disagreeable, reformist advocacy to peacefully remove unwanted rulers is still compatible with this doctrine. The obedience doctrine is addressed to the people, not rulers. The rulers must be just and caring. They must work hard for the welfare of communities. In fact, the obedience doctrine presupposes that the rulers are God-fearing Muslims who conduct affairs of the community not in accordance with personal preferences but the law of spiritual intelligence revealed in the Basic Code. The obedience doctrine must be understood in the context of checks and balances. It must not be interpreted to confer unlimited powers on rulers or to shield their oppression from reformist advocacy. The obedience doctrine does not convert Muslim communities into fatalistic herds who must bear excesses of the regime without protest.

Accordingly, the Basic Code does not sponsor rigid obedience without exceptions. The Quran allows Muslims to unite against *fitnatun fee alardi*—oppression on earth—and *fasadun kabeerun*—great corruption.²⁰¹ Oppression and corruption, however, are serious charges. They cannot be diluted to mean minor acts of discrimination or corruption. The unity against oppression and corruption is not restricted to fighting non-Muslim rulers; it also applies to resisting Muslim rulers. In fact, the perpetration of oppression is so offensive to Islamic teachings that Muslims are allowed to fight the oppressors without worrying about bloodshed, provided no peaceful means are available to remove the ruler or otherwise remove the oppression. This militancy against oppressive rulers, Muslim or non-Muslim, has been the defining attribute of Islam.

Jurisprudentially, the obedience doctrine does not overrule reformist advocacy. Al-Ghazali notes that a cruel and unjust ruler is liable to be

201. QURAN, *sura al-Anfal* 8:73.

removed from office.²⁰² However, even the removal of a bad ruler may lead to chaos and anarchy. If the forced removal of a ruler is likely to cause social disorder, al-Ghazali prefers that Muslims bear the ruler's injustices rather than rebel against him.²⁰³ But al-Ghazali leaves out the middle option of reformist advocacy. A bad ruler may be tolerated for preserving social order, but his policies and laws may still be resisted through reformist advocacy.

The Quran distinguishes between communities on the basis of the law by which they govern themselves. Some communities seek the law of ignorance—*hukum al jahiliyyati*—others the law of moral intelligence.²⁰⁴ Historically, the law of ignorance refers to the law of pre-Islamic tribes in Arabia. Conceptually, however, the law of ignorance denies the existence of moral intelligence, defends hierarchies and inequities, promotes hedonistic lifestyles, asserts the power of the ruler or the ruling elites, and justifies predatory aggression against the weak and the helpless. The law of ignorance is often derived from “opinions, desires and customs” inconsistent with God’s commandments.²⁰⁵

According to the Prophet’s Sunna, Muslims are under no obligation to obey a ruler who practices open *kufir*—disbelief.²⁰⁶ *Kufir* is the resurrection of the law of ignorance. However, the allegations of *kufir* are easy to launch, particularly in areas of unsettled jurisprudence. Muslim communities will suffer unending chaos if popular rebellion were allowed for the ruler’s minor or private discretions of faith. For example, rebellion would be unjustified if a ruler is rumored to drink alcohol in privacy but refrains from drinking in public. But if a ruler openly defies the fundamentals of Islam, Muslim communities decline to submit to his regime. Pious and just rulers are entitled to obedience but even imperfect rulers deserve to be obeyed for the welfare of the community as a whole. The obedience to the ruler, however, must never be confused with obedience to his laws of ignorance. Reformist advocacy supplies an effective tool in fighting *kufir*, without toppling the ruler.

C. Jurisprudential Cutting Edge

Reformist advocacy by its very nature thrives on the cutting edge. It supplies dynamism to the enterprise of law. Islamic law protected its initial dynamism by establishing the free markets of *fiqh*—Islamic

202. 2 AL-GHAZALI, *supra* note 48, at 226.

203. *Id.*

204. QURAN, *sura al-Maidah* 5:50.

205. 3 TAFSIR IBN KATHIR 202 (Shaykh Safiur-Rahman Al-Mubarakpuri et al. eds., 2d ed. 2003).

206. 9 SAHIH AL-BUKHARI, *supra* note 49, *Book of Afflictions* 88:178, at 146.

jurisprudence.²⁰⁷ These free markets first strengthened and later weakened the cutting edge of reformist advocacy. Free markets strengthened advocacy because they allowed jurists a free mind to interpret the Basic Code, the Quran and the Sunna, to find solutions to new legal issues that arose in real and hypothetical cases. Great jurists arose in different parts of the Islamic Empire who refused to become part of the official administration of justice. This refusal was primarily motivated by a desire to preserve juristic freedom to interpret the Basic Code without pressure from the Caliph.²⁰⁸ The Empire needed judges to resolve cases. But private justice was also available to litigants.²⁰⁹ Different schools of jurisprudence offered different solutions to same problems. This jurisprudential diversity, however, was territorialized. The prominent schools began to be associated with distinct parts of the Empire. In the seventh century Iraq, for example, the Abu Hanifa school of jurisprudence emerged as the dominant school whereas in contemporary Medina, the Maliki school of jurisprudence earned great following. Minor schools of jurisprudence also arose. In the free markets of *fiqh*, however, the influence of a juristic school depended on the number of followers.²¹⁰

Paradoxically, free markets also weakened the concept of advocacy as a reformist doctrine. Minor schools of *fiqh* that offered radical solutions to social ills were ineffective because very few people followed their teachings, thus major schools with large followings had internal constraints not to offer a legal viewpoint that might diminish the school's prestige and leadership. Furthermore, new solutions and the legal methods by which new solutions were found, had to also fit with the school's methodology and normative perspectives. If a jurist within a certain school offered a radical departure from the existing jurisprudence, he was simply ignored even within the school itself. As the jurisprudence of a school matured, it became increasingly difficult to repudiate its core methodology or social and economic perspectives. A radical departure from the school was also difficult because each school's *fiqh* was considered part of the Sharia, God's Laws, and the Prophet's Sunna.

207. Liaquat Ali Khan, *Free Markets of Islamic Jurisprudence*, 2006 MICH. ST. L. REV. 1487, 1488.

208. Unlike common law that was cultivated primarily in courts of law, Islamic law developed in the chambers of pious jurists.

209. If litigants followed a certain jurist, they were often willing, without coercion, to resolve their dispute according to his jurisprudence.

210. See Khan, *supra* note 7, at 363–65.

Thus, each school's jurisprudence acquired a mystique of immutability, ignoring the distinctions between the revealed and man-made sources. The Basic Code is immutable. But immutability was also becoming a characteristic of *fiqh*. Islamic law began to lose touch with an ever dynamic evolution of human life.²¹¹

D. Militancy

Ever since the Islamic tradition has arisen from its historical inertia and entered into the second era of *ijtihad*,²¹² zealous advocacy has morphed into zealotry. A new militancy has begun to define Islam. This militancy no longer subscribes to the obedience doctrine. It is willing to challenge and rebel against rulers who refuse to defend the goals of militancy. Militancy wishes to liberate Muslim communities from internal and external rulers who marginalize Islam and enforce secularism.

In some Muslim communities, the quest for liberation has descended into cyclical vengeance. Aggression has become a preferred tool to advocate viewpoints. Militant protectors of the Basic Code—the Quran and the Prophet's Sunnah—trust no secular system. Suffering from a siege mentality, they have lost faith in secular laws, rulers, and courts. Peaceful interpretations of the Basic Code are misunderstood as appeasements and compromises to what they call morally bankrupt secularism, foreign rule, and neocolonialism. Justice, they believe, cannot be obtained through persuasion and mild manners. Furthermore, obsessive militancy thrives on the partisan passion to interpret the Quran, the Sunnah, and the classical *fiqh* in a manner convenient to advance self-righteous ideologies. Fierce portraits of Islam distort Islam's core spirituality that is inherently powerful to disarm injustice through the generosity of spirit and knowledge. Zealotry ignores that the very first revelation of the Quran illuminated persuasive power of the pen, and not sword.²¹³ It forgets that scholars, and not warriors, are the heirs of the Prophet.

Reformist advocacy is not synonymous with militancy. It means fighting laws with laws. Islam most certainly restrains the sword to behead an imperfect ruler. But it does not restrain lawyers to argue against inequities and injustices. Zealous advocacy as a rhetorical weapon may summon the people to overthrow an unjust ruler. This use of advocacy, however, must be restricted to most extreme circumstances of cruelty and injustice. Most often, zealous advocacy is a legal tool to reform the

211. *Id.*

212. *Id.*

213. QURAN, *sura al-Alaq* 96:4. The first five verses of this sura were revealed to Prophet Muhammad in 610 CE in the Hira Cave, near Makka. These five verses were the first revelation of the Quran.

laws of ignorance and their effects. Fighting injustices by means of law most certainly threatens the ruler's ego and power. A ruler determined to enforce unjust laws he has promulgated may not tolerate challenges to his authority, and rarely does a ruler accept that he is unjust. Most cruel rulers are self-righteous and highly regard their policies and notions of justice. Zealous advocacy, even if it were to be used in courts of law, might be offensive to such rulers who may persecute lawyers and judges who use legal methodologies to weaken the ruler's authority. Since zealous advocacy subverts injustices, lawyers and judges may adopt appropriate strategies that weaken the reign of cruelty without inviting the ruler's wrath.

If fighting is allowed to erase wrongs, peaceful advocacy in courts of law to annul the laws of ignorance cannot be prohibited. Opposition to the laws of ignorance does not have to be bloody. It can be translated into legal methodologies to fight wrongdoers through courts and tribunals. The path of ease argues for peaceful and law-based methods to dismantle injustices. Muslim communities suffer hardship when disputes are resolved through bloodshed. The Quran declares in clear terms that "God wills that you shall have ease, and does not will you to suffer hardship."²¹⁴ God helps those who find easy solutions to the problems, easy solutions that do not lay heavy burdens on the people. "And God will make it easy for you when you follow the path of ease."²¹⁵ Ibn Kathir interprets this verse to suggest that God promises to make the law "that is easy, tolerant, straight and just, with no crookedness, difficulty or hardship in it."²¹⁶ The Prophet's Sunna also recommends finding easy solutions to problems that incite agitation and strong emotions.²¹⁷

VI. ADVOCACY DEVELOPMENTS IN THE UNITED STATES

In common law, litigation remained the primary method of developing and refining rules of law. Even when common law entered the age of statutes and legislatures began to freely engineer social forces, lawmaking

214. *Id.* at *sura al-Baqara* 2:185.

215. *Id.* at *sura al A'la* 87:8.

216. 10 TAFSIR IBN KATHIR, *supra* note 205, at 449.

217. 8 SAHIH AL-BUKHAHRI, *supra* note 49, *Book of Afflictions* 73:149, at 93-94. When a Bedouin urinated in the mosque, some Muslims rushed to beat him. The Prophet ordered Muslims to leave the Bedouin alone and wash the spot with water. The Prophet then said, "You have been sent to make things easy (for the people) and you have not been sent to make things difficult for them." *Id.*

through courts refused to go away. As such, zealous advocacy suffered no loss. However, the singular duty to the client was no longer tied to notions of social justice. As the United States rose to prominence and assumed leadership among common law countries, its social and cultural paradigm of enlightened self interest further weakened a communitarian view of justice. A major shift occurred in the notion of zealous advocacy. The reformist role of zealous advocacy was no longer its central motif. The lawyer is an advocate and not a judge. He must not pass judgments on the justice or injustice of his client's claims nor must he evaluate those claims on the standard of morality. The lawyer must argue his client's case within the bounds of law and let the notions of justice fall where they might. The doctrine of zealous advocacy shifted from its reformist origins to an amoral artistry defending claims of the client.

In 1803, years before Henry Brougham articulated the concept of zealous advocacy, the United States had put in place the promising doctrine of judicial review in the holding of *Marbury v. Madison*,²¹⁸ declaring that Congress could not pass laws contrary to the Constitution. The doctrine was a revolutionary departure from the common law tradition under which the Parliament "can make any laws it thinks fit."²¹⁹ The *Marbury* holding did establish the rule of constitution by empowering judges to scrutinize and even invent social policy. It was, however, a double-edged sword. With one edge, it weakened the democratic principles under which the people's representatives may embrace notions of justice through legislative means, since the courts could declare legislation unconstitutional.²²⁰ The other edge provided a cutter to trim the excesses of a majoritarian and utilitarian lawmaking. With one edge, the judges could now use the Constitution to preserve power relations, as did Justice Taney in *Dred Scott*.²²¹ With the other edge, they could dismantle social injustices, reversing law-based inequitable power relations, as in *Brown v. Board of Education*.²²² Unmindful of the future impact of the *Marbury* holding on power relations, the passionate

218. 5 U.S. (1 Cranch) 137 (1803).

219. Nicholas Aroney, *Politics, Law and the Constitution in McCawley's Case*, 30 MELB. U. L. REV. 605, 635 (2006). The Privy Council even asserted that Australia, unlike the United States, has no conception of judicial review.

220. Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986). "The usual line of present day constitutional conservatives is that where the preferences of the framers are not clear, judges should defer to the elected branches." *Id.* at 290.

221. 60 U.S. (19 How.) 393, 452 (1856).

222. 347 U.S. 483, 495 (1954).

rhetoric at the time of its invention was for the most part reactionary, vividly employed in the service of states' rights.²²³

The doctrine of judicial review is a grand invitation to substantive zeal, but has little to do with courtroom demeanor. It unleashed tremendous professional energy for lawyers to challenge laws, including the ones duly passed through democratic processes. In mid-nineteenth century America, lawyers began to challenge government policies, congressional laws, and even provisions of the U.S. Constitution with a degree of substantive zeal²²⁴ unknown in Great Britain, where Brougham spoke his famous words. Initially, however, few could perceive the connections between reformist advocacy and judicial review. The two concepts flowed apart from each other, as if they could not be combined to correct inequitable power relations. In fact, the post-*Marbury* legal profession in America was skeptical of Brougham's zealous advocacy.

A. From Brougham to Sharswood

Describing Brougham's "justly celebrated defense of the Queen," George Sharswood dismissed Brougham's famous words as "extravagant, . . . led by the excitement of so great an occasion, . . . what cool reflection and sober reason certainly never can approve."²²⁵ Unlike Brougham who lived and loved *viva activa*, Sharswood was an establishmentarian, a law professor, a high court judge, enjoying *viva contemplativa*, a man who viewed society and government as indispensable prerequisites for the happiness of the individual. "It is for no vain national power or glory, for no experimental abstraction," believed Sharswood, "that governments are instituted among men."²²⁶ Instead of seeing society and government as potentially oppressive structures, as did Brougham, Sharswood argued that "without society—and government, which of course results from it—men would not be free."²²⁷

223. ERIC H. WALTHER, *THE FIRE-EATERS* 123 (1992). In the Nullification Crisis, a radical South Carolinian, Robert Barnwell Rhett, exclaimed that "[i]mpotent resistance will add vengeance to [one's] ruin." *Id.*

224. Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393, 393 (1999) (explaining how the courts ignored monetary clauses of the Constitution that prohibited the issuance of paper money and had declared gold and silver coin to be legal tender).

225. SHARSWOOD, *supra* note 14, at 86–87.

226. *Id.* at 16.

227. *Id.*

Sharswood's assessment of Brougham, however, fails to see the historical context in which Brougham lived and argued.²²⁸ Sharswood also failed to see unjust power relations that Brougham was determined to dismantle. Brougham's Imperial Britain was in need of serious reforms. But so was Sharswood's United States.

Sharswood was born, raised, and schooled in a city, Philadelphia, which had been the nerve-center of the American Revolution.²²⁹ If Brougham was imbued with a reformist spirit, Sharswood was raised with fond memories of the American Revolution and the role his hometown had played in the movement for independence. Brougham was a rebel, skeptical of patriotism. Sharswood was a patriot and a conservative with no plans to challenge unjust power relations that existed in the United States during Sharswood's professional life in law—1831–1882.²³⁰

Sharswood could have embraced Brougham's zealous advocacy as a reformist doctrine, for Sharswood lived to see great injustices outside and inside the realm of law. In 1830, a year before Sharswood was admitted to practice law, Congress passed the Indian Removal Act to relocate tens of thousands of Indians from their ancestral lands. In 1838, the forcible removal of Cherokees to Oklahoma caused numerous deaths, an episode known as the Trail of Tears. In 1856, Chief Justice Roger Taney declared that sons and daughters of black Africans, slave or free, were not citizens of the United States.²³¹ In 1872, the United States Supreme Court upheld Illinois's exclusion of women from admission to the state bar, pontificating that "the paramount destiny and mission of woman" are the offices of wife and mother.²³² In 1882, a year before Sharswood retired, the Chinese Exclusion Act outlawed all Chinese immigration and denied citizenship to all Chinese living in the United States.

228. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2443–46 (2003).

229. The meetings of the Second Continental Congress to defend the rights of Americans took place in Philadelphia's State House (Independence Hall). ALAN BRINKLEY, *AMERICAN HISTORY* 152 (10th ed., McGraw Hill 1999). In 1787, the Constitutional Convention was held in Philadelphia. *Id.* at 196. From 1790 to 1800, Philadelphia served as the capital of the United States. *Id.* at 206, 238.

230. In 1831, Sharswood was admitted to the bar of the Commonwealth of Pennsylvania. History of Penn Law, <http://www.law.upenn.edu/about/history/medallions/sharswood/index.html>. In 1882, he retired as the Chief Justice from the Supreme Court of Pennsylvania. *Id.*

231. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1856). Pennsylvanians, however, had abolished slavery in the state, resisted the enforcement of Federal Fugitive Slave Law, and valiantly fought in the Civil War. Nearly 350,000 Pennsylvanians, including 8600 African Americans, joined the Union Forces. LARRY D. MANSCH, *ABRAHAM LINCOLN, PRESIDENT ELECT* 179 (2005).

232. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873).

American courts have been critical of Brougham's zealous advocacy. Some misinterpret Brougham's purposes and intentions. In 1870, New York Judge John Hackett was the first American judge to mention Henry Brougham's famous statement in a reported U.S. case.²³³ In giving instructions to the jury in a murder case, Hackett said, "I do not say whether I approve or disapprove of it—I state it as the extreme view, and one which any counsel for defense might adopt with conscientious belief in it."²³⁴ But judge and jury, warns Hackett, "must discriminate only the evidence, amid zealous means and zealous expedients."²³⁵ Judge Hackett seemed to have a soft corner for the Brougham type of conscientious commitment to the client's defense. But he feared that the lawyer's zeal might distort the evidence. It might. But reformist advocacy need not confuse the evidence of crime. Confusing evidence is no zealous advocacy. It is an ethical transgression. But if the defense attorney fights against capital punishment, he engages in advocacy as a reformist calling. For now his purpose is not to muffle the reality of murder but to argue that a state must not extinguish life in the name of justice.

In 1995, Circuit Judge Jacobs McLaughlin declared that Henry Brougham "was an early apostle of what today would be known as Rambo litigation tactics."²³⁶ This characterization of Brougham is contrary to Brougham's efforts, intentions, and purposes. Brougham was not an offensive tactician. He was a man imbued with reformist substance, determined to effect social reform through the rule of law. He defended clients to undo larger social injustices. By way of criticism, Judge McLaughlin narrated a story of the English Chief Justice who delivered a speech at a dinner for barristers, with the eighty-six-year-old Lord Brougham in the audience, and said that a lawyer must "reconcile the interests of his clients with the eternal interests of truth and justice."²³⁷ The Chief Justice's speech did draw applause from the audience, as Judge McLaughlin points out. But this applause was as much, if not more, for Brougham who devoted his life to promote truth and justice for his clients as well as for the working class people and their children.

Supporting Brougham's cause-oriented advocacy, Sharswood argued that the "noblest faculty of the [legal] profession [is] to counsel the

233. McFarland's Trial, 8 Abb. Pr. (n.s.) 57, 87–88 (1870).

234. *Id.* at 87.

235. *Id.* at 88.

236. United States v. Cutler, 58 F.3d 825, 840 (2d Cir. 1995).

237. *Id.* at 841 (quoting 5 ENCYCLOPEDIA BRITANNICA 941 (1947)).

ignorant, defend the weak and oppressed, and to stand forth on all occasions as the bulwark of private rights against the assaults of power.”²³⁸ Sharswood described three intertwined “fidelities” that the lawyer must hold at the same time: “fidelity to the court, fidelity to the client, [and] fidelity to the claims of truth and honor.”²³⁹

Section 10 of the Proposed Alabama Code of Legal Ethics, the first American code of ethics and derived from Sharswood’s Essay, upholds the principle of “warm zeal in the maintenance . . . of [the client’s] cause.”²⁴⁰ However, the Code beseeches lawyers to dispel the public prejudice against lawyers as a class that originates from a “false claim”; the attorney’s duty requires that he “do everything to succeed in his client’s cause.”²⁴¹ Assuming that all lawyers believe in God, the Alabama Code reminds them that “[t]he attorney’s office does not destroy man’s accountability to the Creator.”²⁴² Just like Islamic law, the Alabama Code allows a lawyer of faith to represent his client with God-consciousness: a consciousness that must be at peace with itself while advocating a case.²⁴³ In preserving the attorney’s existential integrity, the Alabama Code does not compel a lawyer to fight for a cause in which he has no moral stake.

Despite the presence of God-consciousness in the early history of American professional ethics, a powerful dichotomy was introduced to separate internal and external ethics. Sharswood argued that a lawyer is not responsible for the client’s “unjust cause.”²⁴⁴ The lawyer who refuses his professional assistance because the client’s case is unjust “usurps the functions of both judge and jury.”²⁴⁵ Under this theory, the lawyer must separate his existential values from his professional values. The lawyer may disagree with the client’s cause and still offer representation. Professional ethics were now gathering a new meaning. They would weaken the notion of lawyer’s self-righteousness and expand the right of representation; for, otherwise, a self-righteous bar would refuse to represent some causes and some clients. This positive development toward universal representation, however, would occur at the expense of separating the lawyer’s heart from the mind. This distance from the client’s cause, warns Sharswood, does not mean that “all causes are to be

238. SHARSWOOD, *supra* note 14, at 53–54.

239. *Id.* at 58.

240. DRINKER, *supra* note 152, at 355. *See also* H.M.B., *supra* note 15, at 320 (discussing Section 10).

241. DRINKER, *supra* note 152, at 355.

242. *Id.*

243. *See supra* Part IV.C.

244. SHARSWOOD, *supra* note 14, at 83.

245. *Id.* at 84.

taken.”²⁴⁶ Sharswood grants lawyers the discretion to decline causes but the discretion must be exercised wisely and justly.²⁴⁷

B. Artistic Advocacy

Perhaps energized by the separation of internal and external ethics, common law gave birth to what might be called *artistic advocacy*. Artistic advocacy is amoral and case neutral. It may be employed to defend any cause. Instead of focusing on morality of the cause, artistic advocacy is preoccupied with dynamics of the audience, be it court or jury. It wishes to influence the designated audience to obtain favorable outcomes. The first lessons of artistic advocacy came from Aristotle,²⁴⁸ the Greek philosopher whose works early Muslim jurists incorporated into the analytical structures of Islamic jurisprudence. According to Aristotle, a good advocate possesses a keen sense of the hearers, for the audience determines the success or failure of the advocate’s goals.²⁴⁹

Artistic advocacy knows its audience. Expressing in a more proactive language, Aristotle speaks of this awareness as putting the audience “into the right frame of mind.”²⁵⁰ The advocate must communicate with the audience as if he himself is a member of the audience, speaking the same language, thinking the same thought, holding the same fears, seeing the same prejudice, nurturing the same hope, and tilting toward the same outcome. A profound contact with the audience is the advocate’s first challenge. This contact must not only be made but also maintained through the entire life of the case. An advocate who fails to nurture deep connections with the audience is alienated and his advocacy remains fruitless, since it is always the audience—judge or jury—that rewards advocacy. If the nature of the case is such that the audience is predisposed to favor a particular position, a good advocate defending the “wrong position” uses his skills to neutralize the bias of the audience. Of course, no good advocate would deliberately offend the audience even if it were conspicuously prejudiced toward his position.

246. *Id.*

247. *Id.*

248. ARISTOTLE, *Rhetoric*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2237, 2265 (Jonathan Barnes ed., 1984). Aristotle uses the phrase *forensic advocacy* to describe what I call artistic advocacy.

249. *Id.* at 2194.

250. *Id.*

Language is a huge part of artistic advocacy. In fact, language is so critical to artistic advocacy that some commentators may even confuse artistic advocacy with mere linguistic skills. In law, it is important for an advocate to be able to speak both the technical and lay language with fluency and accuracy. The knowledge of the technical language empowers an advocate to demonstrate to the court and other lawyers that he understands the case in its legal framework. The knowledge of the lay language, which includes the ability to translate complex legal issues into the daily language of the common man, endears the advocate to the jury, the client, the lay audience in the courtroom, and a broader audience elsewhere. An attorney without this linguistic skill fails either to persuade the judge or the jury, the professional or the lay crowd. An effective advocate possesses at least two tongues, one for the profession, and the other for the public. In cases of public importance, the two tongues of the advocate are essential for bridging the gap between the people and legal professionals.

Artistic advocacy, nonetheless, does not throw away the lawyer's personal character. As explained in Part IV, both Islam and common law affirm that the advocate's character is critical to the efficacy of advocacy. Even in Greek philosophy, trustworthy character is an advocate's most valuable asset. Aristotle explains this point as follows: "We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided."²⁵¹ Contrarian writers hold, says Aristotle, that substance of advocacy rather than character of the advocate persuades an audience.²⁵² Disagreeing with these writers, Aristotle maintains that personal goodness is the most effective means of persuasion that an advocate possesses.²⁵³ Particularly in matters where opinions are divided, the speaker's character is an absolute factor.²⁵⁴

Aristotle's thesis that advocacy is persuasion that affects decision makers fails to tell us what persuasion means. Persuasion can be highly useful if it informs coherently and honestly. But persuasion can also slide into manipulation, which is problematic for both pragmatic and ethical reasons. Pragmatically, manipulation as an effort to change someone's mind may backfire and may indeed repel decision makers. Ethically, manipulation accords no respect to the audience and uses the audience as a means to achieve an end. Manipulation may also turn into undue influence. Lawful persuasion does not destroy free agency of the

251. *Id.* at 2155.

252. *See id.*

253. *Id.*

254. *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004) (citing Aristotle with approval).

person persuaded, whereas undue influence manipulates a person to do something against her will.²⁵⁵

Artistic advocacy is a cultural value that emerges from and thrives in the sensibilities of a community. Two major cultural factors support artistic advocacy. First, a culture in which theatrical skills are broadly disseminated and practiced appreciates and expects dramatic advocacy.²⁵⁶ Second, a culture in which individuals, groups, and corporations may vociferously assert their interests develops a high tolerance for theatrics in law.²⁵⁷

Theatrical skills allow a person to play a role—to feel, act, speak, and behave like someone else. They also teach awareness of an audience. An actor playing Hamlet must express the emotions—anger, confusion, and disappointment—that Hamlet feels over the death of his father. The actor’s own father may be alive and well and he may have no uncle who has betrayed his father and married his mother. Yet, the actor must own the story of the play and agonize throughout the play as if his father has indeed been killed. This actor’s negative capability to be someone else is the ultimate achievement of successful theater.²⁵⁸

A sophisticated audience does not suspend moral judgments about the play or characters that appear in the play. But it does not see, much less judge, actors and actresses through the moral prism. The audience will applaud an actor playing villainous Claudius well without confusing the actor with Claudius, the character whom the audience might despise.

255. *Andrews v. Rentz*, 470 S.E.2d 669, 671 (Ga. 1996) (citing *Ehlers v. Rheinberger*, 49 S.E.2d 535, 540 (Ga. 1948)).

256. See Michael Kirby, *On Acting and Not-Acting*, DRAMA REV., Mar. 1972, at 3 (explaining the continuum between acting and non-acting). Artistic advocacy blossoms in cultures where theater is held in high value. Few human beings are innately gifted with theatrical skills, which enable persons to express themselves through self-confident and clear speech purposefully manufactured not simply to be heard, but appreciated and possibly applauded. The same can be said about gestures. Although gestures are natural in human behavior and can be found even in the communication of newborn babies, theatrical gestures are learned behavior. Like theatrical speech, theatrical gestures convey meaning, interpret events, and sometimes furnish more profound insights into a situation than do spoken words. Although effective acting is said to be natural and less contrived, acting is nonetheless the employment of theatrical skills in communication.

257. Although Islamic norms resist theatrical advocacy in law, the al-Qaeda video tapes aimed at the Western audience are often prepared with theatrical efficacy.

258. John Keats, an English poet, invented the term *negative capability*, meaning the capability to be in uncertainties, mysteries, and doubts without irritation. Letter from John Keats to George & Thomas Keats (Dec. 22, 1817), in THE LETTERS OF JOHN KEATS 71 (Maurice Buxton Forman ed., 4th ed. 1952).

Thus, a sophisticated audience develops negative capability too. While the actors playing Hamlet or Claudius may suspend their own personal lives, the audience need not do that. However, the audience must distinguish actors from characters to enjoy the play. Without this double negative capability, the theater cannot develop as an art form.

Artistic advocacy in law mimics stage acting. Both art forms are aimed at specific audiences. Stage acting informs and thrills a crowd in the theater; artistic advocacy informs and thrills a crowd in the courtroom. Actors and advocates face similar challenges. On the stage, some actors play heroes, some villains, and some complex characters. In the courtroom, some lawyers represent clients whom the audience is predisposed to like, some represent villainous clients, and some more complex. Both actors and advocates work for applause. Actors must do well for success of the play, advocates for success of the case.²⁵⁹

Just as in theater, negative capability is a huge part of advocacy in law. The lawyer is an actor who owns the story of the case and plays his part without moral anguish. Judges, as the sophisticated audience, understand that the lawyer is playing a role and that they should not confuse the

259. In recent years, a remarkable display of artistic advocacy was staged for the world when Johnnie Cochran defended O.J. Simpson, who was accused of murdering his ex-wife. Cochran spoke to millions of television viewers in the world. But his real audience was the Los Angeles downtown jury, composed of nine blacks, two whites, and one Hispanic. The background facts were most relevant to the trial. Both Cochran and Simpson were African Americans. The murdered ex-wife was white. So was the chief prosecutor. The judge was Japanese American. This racial panorama sensationalized the trial. A profound prejudice that paints blacks as a violent group lurked behind the trial as Cochran defended Simpson. The task of defending Simpson was Herculean: soon after the murder and before the trial, millions of people had watched, live on television, Simpson fleeing from the police in a chase on the Los Angeles highways—a presumed footage of guilt.

Throughout the trial, Cochran remained deferential to the jury. He did not take the black jurors for granted, nor did he ignore the Hispanic and white jurors. In humanizing the trial and softening the line between prosecution and defense, Cochran expressed feelings of sorrow for the grieving families. But the masterstroke of his advocacy focused on building a relationship of trust with the jurors. “If it doesn’t fit, you must acquit,” Cochran’s mantra in the closing argument, was a clever empowerment-compulsion proposal to the jury. The mantra empowered the jury to assess all the evidence against Simpson to see if the evidence supported the prosecution’s theory of the case. But if the evidence was defective, suggested the mantra, the jury had no option but to acquit the defendant. Psychologically, Cochran forced the jury to examine the entire prosecution case through the lens of a courtroom scene in which the prosecution requested Simpson to wear the gloves in which he had presumably murdered his ex-wife. Millions of people, including the jurors, saw that the small gloves did not match Simpson’s hands. Howard Chua-Eoan & Elizabeth Gleick, *The Simpson Verdict*, TIME, Oct. 16, 1995, at 48. The jury acquitted Simpson, to the disappointment of many white Americans. Interview by PBS Frontline with Charles J. Ogletree, Jr., Director, Charles Hamilton Houston Inst. for Race and Justice (Apr. 12, 2005), <http://www.pbs.org/wgbh/pages/frontline/oj/interviews/ogletree.html>. Ten years later, whites and blacks are still divided over the jury verdict. *Id.*

morality of the case with the morality of the lawyer acting out part of the story. In artistic cultures, the negative capability becomes part of the culture. Consequently, even the lay audience, including jurors, begins to appreciate lawyers as actors and assess their performance from a theatrical viewpoint, and not through rigid moral standards that jurors would apply to persons in real life. Once double negative capability—that is negative capability of performers and the audience—takes hold, advocacy is appreciated as an art. Lawyers, as good actors, are applauded even if they are playing the role of despised villains.

Artistic advocacy in law is not synonymous with high drama or mere oratory.²⁶⁰ It is not “putting on a show at trial.”²⁶¹ A successful trial lawyer describes advocacy as “the art of convincing without seeming to be pushy, arrogant, and intolerable.”²⁶² Undoubtedly, artistic advocacy involves the abilities to tell a story, make simple but effective arguments, and use evidence and law to obtain desired outcomes. But skills alone are not enough to define artistic advocacy. What makes artistic advocacy a worthwhile part of the legal system are its ethical, moral, and emotional dimensions. Ethically, a good advocate prepares every aspect of the case—not just the oral part—with labor and care. Morally, a good advocate conveys a genuine sense of honesty and courage.²⁶³ Emotionally, she feels the plight of her clients. A cold-blooded technician, with no insights into human psychology or social justice, despite being heavily armed with facts and rules, is rarely a commendable or effective advocate.²⁶⁴

C. Cynical Advocacy

While artistic advocacy may manipulate, it must not be confused with what one American court has called “cynical advocacy.”²⁶⁵ Litigants approach lawyers with all sorts of claims, some legitimate, some novel, and some frivolous. Some claims are detrimental to the community’s physical, mental, and spiritual health. Cynical advocacy believes in

260. See Celia W. Childress, *An Introduction to Persuasion in the Courtroom: What Makes a Trial Lawyer Convincing?*, 72 AM. JUR. *Trials* 137 (1999).

261. Colonel Frederick Bernays Wiener, *Advocacy at Military Law: The Lawyer’s Reason and the Soldier’s Faith*, 80 MIL. L. REV. 1, 4 (1978).

262. Joseph D. Jamail, *Advocacy and Lawyers and Their Role*, 47 BAYLOR L. REV. 1157, 1161 (1995).

263. *Id.* at 1161.

264. See *id.*

265. *Magnivision, Inc. v. Bonneau Co.*, 115 F.3d 956, 962 (Fed. Cir. 1997).

no moral values, no conception of justice, and no higher law. It is anchored in true pessimism. It rejects or ridicules “conscience [that] does make cowards of us all.”²⁶⁶ When lawyers are willing to advocate claims without any moral screening, cynicism permeates the adjudication process. “Leave judgment for judges” is a paradigm that, in its proper context, frees the lawyer to argue with a determined will to obtain justice for the individual or the community.²⁶⁷ The same paradigm, in a cynical context, weakens the lawyer’s moral responsibility, turning him into an amoral bullet.

From a religious viewpoint, any advocacy that thrives on morally bad laws and sacrifices communitarian good for questionable freedoms may be condemned as cynical advocacy. Most religions, including Islam, for example, would condemn advocacy that supports hate speech against weak and vulnerable groups. They would condemn advocacy for the protection of pornography that degrades the spiritual health of women and men. They would also question advocacy for the protection of individual property rights that degrade the physical and spiritual environment, and for the protection of wealth accumulation that disdains distributive justice. Even when laws are good from a religious viewpoint, cynical advocacy may manipulate the adjudication process to obtain undue advantages. It may deliberately confuse the issues, introduce scandalous evidence, and promote incorrect application of laws—all as a knowing effort to win the case.²⁶⁸

Cynical advocacy, though incompatible with religious ethos, might enjoy a freer space under secular ethics codes. For example, the New York ethics code allows an advocate to urge “any permissible construction of the law favorable to [his] client.”²⁶⁹ But what is a permissible construction of law seems to belong to an uncharted realm of hermeneutics. One restraint placed on advocates is that they should refrain from asserting frivolous positions. A cynical lawyer with a good imagination is free to imagine all sorts of interpretations. And if he has superb analytical skills, he can fortify his hermeneutic cynicism from charges of frivolity. Professor David Wilkins comes close to defining what might be called cynical advocacy as “argumentative nihilism in which any construction

266. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

267. Hon. George Hampel, *Therapeutic Jurisprudence—An Australian Perspective*, 17 ST. THOMAS L. REV. 775, 777 (2005) (stating that advocates must leave questions of justice to the courts but must be available to represent clients regardless of the nature of the case).

268. *Magnivision, Inc.*, 115 F.3d at 961.

269. N.Y. CODE OF PROF. RESPONSIBILITY EC 7-4 (2007). Cf. MODEL RULES OF PROF. CONDUCT R. 3.1 (2007) (“A lawyer shall not bring or defend a proceeding . . . unless there is a basis [in law and fact] for doing so that is not frivolous . . .”).

of the law is as good as any other and in which there are no restrictions on zealous advocacy.²⁷⁰

Take the Torture Memo.²⁷¹ It is by no means frivolous. It is not even imaginative. But it is perhaps cynical. Government lawyers, at least in the Justice Department, “should more or less always pursue justice rather than seeking the most that the government can get away with.”²⁷² The authors of the Torture Memo were not advocating in an adversarial context before judges.²⁷³ Their hands were free. They were writing to please the client, the U.S. President, possibly to facilitate a policy that the client had wanted.²⁷⁴ As irony would have it, the declared author of the Torture Memo is now a federal judge.

Cynical advocacy can also thrive under secular ethics codes that allow lawyers to make “good faith” arguments to extend, modify, or reverse an existing law.²⁷⁵ (No such freedom exists to change the text of the Quran, although its understanding is dynamic and evolutionary.) This lawyerly freedom is necessary to the functioning of a fluid legal system. Lawyers

270. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 484 (1990).

271. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002). In 2002, the Justice Department lawyers wrote a memorandum, signed by a Jay S. Bybee, to defend torture, in reality of Muslim men allegedly involved in terrorism. This “Torture Memo” is a piece of aggressive advocacy, not in demeanor but substance. The Memo stashes numerous layers of arguments to defend the infliction of severe physical and mental pain on suspected terrorists. In this Memo, the lawyers first manufacture all possible loopholes in the federal statute that implements the Convention Against Torture. But if the manufactured loopholes will not work, the lawyers suggest, the President may challenge the constitutionality of the statute for imposing impermissible constraints on his authority as Commander in Chief to gain intelligence information in the middle of a war. *Id.* at 31. If the unconstitutionality defense also fails, the lawyers then provide “justification defenses,” such as necessity and self defense, “that would potentially eliminate criminal liability.” *Id.* at 39. Many experts inside and outside the legal academy have condemned the Memo’s substantive zeal as contrary to the rules of professional conduct. *See, e.g.*, Michael Hatfield, *Fear, Legal Indeterminacy and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511 (2006).

272. Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1371 (2006) (supporting partisan advocacy as a general thesis but making an exception for government lawyers).

273. Memorandum from Jay S. Bybee to Alberto R. Gonzalez, *supra* note 271, at 1.

274. Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 393.

275. MODEL RULES OF PROF. CONDUCT R. 3.1 (1983). No such freedom exists to change the text of the Quran, although its understanding is dynamic and evolutionary.

cannot be just protectors of the past. They must also be builders of the future. The good faith constraint on argumentation reads well and it summons the lawyer's internal honesty. Yet, the good faith constraint is unable to prevent intellectual ruses. Some codes allow advocates to advance opinions, without regard "to the likelihood that the construction will ultimately prevail."²⁷⁶ This intellectual freedom may also be abused to defend cynical interpretations of laws.

Cynical advocacy, though distinguishable from coercion, is closely related to undue influence. Coercion compels a person to act contrary to his will. A testator asked to sign a will at gunpoint is coerced. Undue influence is less obvious; it nonetheless induces a state of mind for a person to act in a specific way. A niece may not coerce her uncle to will his property to her but she may refuse to take care of him unless he does so. This quid pro quo might not be considered coercion or even undue influence. The law may probate the will on the bargain theory that the niece's advocacy, though self-serving, benefited the uncle as well. However, the law may strike down the decedent's will if the care given was grossly disproportionate to the property allocated in the will.

The line between cynical advocacy and undue influence begins to blur when the bargain theory gathers broader respectability.²⁷⁷ In the United States, cynical advocacy has successfully invaded the legislative process. The rhetoric of political persuasion as the mainstay of electoral competition is intact.²⁷⁸ However, money clouds the parameters of persuasion.²⁷⁹ The lobbyists use money to bargain for favorable legislation. The laws have placed numerous restrictions on contributions, and they require that campaign finances be disclosed to the public. Yet big loopholes exist for lobbyists to inject money into political campaigns, influencing elections as well as legislative options of elected officials.²⁸⁰ Summoning the

276. N.Y. CODE OF PROF. RESPONSIBILITY EC 7-4 (2007).

277. *But see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 53-54 (1973) (arguing against the "sinister explanation" that sellers use form contracts to coerce buyers with no choice but to accept).

278. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

279. *See generally* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81 (banning soft money, restricted issue ads, but increased contribution limits); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (limiting the disproportionate influence of corporations and wealthy individuals).

280. James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 *BUFFALO L. REV.* 1413 (2007). Congress has passed legislation to outlaw corrupt practices and corporate money from electoral competition. *Id.* at 1466. While campaign contributions are regulated, campaign expenditures are not. The Supreme Court has struck down expenditure limitations on political campaigns, arguing that such limitations reduce the quantity of political speech. This dichotomy between regulated contributions and unlimited expenditures invite lawyers to find innovative sources of money to meet expensive campaigns.

bargain theory of legislation, Landes and Posner argue that an independent judiciary must uphold the deals that lobbyists make with lawmakers.²⁸¹

VII. TRUTH ORIENTATIONS

Islamic law and common law part company and pursue divergent paths when advocacy turns to manipulation. As discussed above, the two traditions support reformist advocacy. Furthermore, both traditions affirm good manners and good character that advocates must cultivate to engage in ethical advocacy. It would be incorrect to conclude that common law advocacy has lost all moral underpinnings and is moving wholesale toward manipulation. Manipulative advocacy in common law is as unwelcome as is misinformed militancy in Islam. It is also incorrect to assume that advocacy in Muslim countries has been able to rebuff manipulation. The American influence over the Muslim world's advocacy models world is more than perceptible. With these caveats, this section analyzes truth orientations that inform and misinform advocacy.

A. Truth Models

Manipulation flourishes in cultures where the people are generally skeptical about the notion of truth. "Truth skepticism" arises from truth relativity and truth pessimism. If a culture believes in truth relativity, artistic advocacy provides the competing versions of truth. If a culture is pessimistic about truth because it sees the world in moral chaos driven by instincts and irrational forces, truth loses meaning. In truth skeptical societies, the enterprise of law is severed from religion.²⁸² Pleasing or displeasing God is a minor factor in advocating legal outcomes. In such societies, advocacy is free from God-consciousness to pursue partisan agendas. The best interests of the client, though within the bounds of law, guide advocacy.

Islam is founded on the notion of *al-haqq*—doubtless truth.²⁸³ It accepts no skepticism about its moral and legal teachings. Muslims,

281. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975).

282. Note, however, that not all secular societies are truth skeptical. Ideological systems, such as that of the Soviet Union, may actively abandon God and yet embrace the Marxist notion of historical truth. See Ali Khan, *Constitutional Kinship Between Iran and the Soviet Union*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 293 (1988).

283. QURAN, *sura al-Baqara* 2:147.

therefore, adhere to the epistemology of truth. Truth is knowable and communicable, although there exist areas of uncertainty.²⁸⁴ This truth orientation shapes the contours of Islamic advocacy. The fusion of law and religion, however, cannot fortify against truth distortions. A lawyer of faith must tell the truth as he knows it, without dilution and without mixing it with falsehood. And yet he must argue the case to obtain a favorable result for his client. Religious advocacy is not free of this tension. However, when advocacy engages in truth distortions or truth suppression, it breaches the commandments of the Basic Code. One may get away with truth distortions in the temporal world, even though the fear of disciplinary sanctions may deter lawyers from blatant disregard of truth. It is unclear whether internal ethics provide more stringent constraints on the lawyer's inclination to distort truth.²⁸⁵

Legal systems all over the world, religious and secular, to some extent reject truth skepticism and furnish rules and remedies to fight truth distortions. Truth distortions can occur only if there is a presumption in the legal system that the truth exists and is knowable. The laws against perjury, for example, are designed to deter truth distortions. The Old Testament forbids taking false oaths and telling lies.²⁸⁶ Despite the triumph of legal realism in the United States, the rules of criminal and civil procedure continue to operate on the assumption that truth is knowable and can be reproduced in a court of law. A party to a dispute may know the facts and yet not disclose them because disclosure would hurt its interests. Witnesses tell lies, hide facts, and introduce fictitious facts to help or hurt a party to the dispute. The parties may harass witnesses from telling the truth. They may forge documents and conceal written or tangible evidence and assets critical to the outcome of a case. These behaviors affirm the presumptive existence of knowable truth. Yet truth relativity has permeated some secular legal systems.

Truth relativity²⁸⁷ assumes that no fixed truth exists to definitively measure claims and counterclaims, although a procedural mechanism may be put in place to assess these claims. In litigation, for example, parties may sincerely view facts of the case differently. Witnesses may

284. This is a complex area of Islamic jurisprudence and its full discussion is beyond the scope of this article. For further study, see IBN RUSHD [AVERROES], *KITAB FASL AL-MAQAL* (George F. Hourani trans., Luzac & Co. 1961) (circa 1190).

285. See discussion *infra* Part VII.B.

286. *Leviticus* 6:2–7; *Leviticus* 19:12; *Isaiah* 48:1; *Jeremiah* 5:2; *Jeremiah* 7:9; *Hosea* 10:4 (New International Version).

287. ALBERT EINSTEIN, *RELATIVITY* (Robert Lawson trans., Peter Smith 1959) (1920). In examining the Euclidean conceptions of geometry, Einstein put the words *truth* and *true* in quotation marks—“truth” and “true”—to simultaneously recognize the conventional validity of Euclidean conceptions and to contest their validity under the theory of relativity. *Id.* at 2, 4, 16, 149.

truthfully tell facts of the case in light of their own existential predicaments, including intellectual, spiritual, and emotional understandings of facts and their significance. Opposing lawyers may interpret cases and statutes to argue for outcomes that best suit their clients. These variations in narratives, laws, and analyses constitute truth relativity in litigation. As such, no one narration or interpretation of law has a superior claim to truth. The dispute is irresolvable from a truth viewpoint. However, a procedural mechanism is needed to resolve these disputes. Most legal systems transfer this responsibility to juries and judges. In the United States, juries may be recruited to resolve the competing truths of facts, and judges to resolve the competing truths of laws. These determinations of truth may be challenged through appellate procedures under which higher courts may affirm or overrule the findings of juries and lower courts. In the absence of these procedural mechanisms, the truth of facts and laws remains an irresolvable challenge.

The procedural mechanism to mediate competing truths does not guarantee that the ultimate truth would be found. This is so because judges and juries, just like lawyers, parties and witnesses, evaluate evidence and laws through their personal preferences and professional experiences. It is therefore no surprise in the domain of truth relativity if a jury is hung after hearing a case, or if judges in a court, including the highest court, are bitterly divided over the interpretation of laws. The mere existence of positive law in the form of statutes and cases does not assure the truth of laws. The reading of law is relative. Lawyers and judges may draw different conclusions from the same section of a statute and construct diverse meanings from the holding of the same case.

Truth relativity supports artistic advocacy. If both facts and laws are relative in the domain of truth, artistic advocacy highlights different versions and nuances of the same case. Now, litigation is theater. Lawyers, parties, and witnesses are stage actors; judges, juries, and the public inside or outside the courtroom constitute the audience. Juries and judges respond to artistic advocacy in the same way, just as an audience in a theater, including professional critics, responds in a myriad of ways to the unfolding of the same play. Some in the audience pay attention to each line of the play, some miss huge portions of the play, some powerfully relate to a particular character, some are bored, and some simply lack the requisite life experiences to comprehend nuances of life on the stage. Responses in the courtroom are no different than

ones in the theater. A thousand plays come into being from the staging of the same play.²⁸⁸

This American legal realism does not evaporate in religious societies, which must also come to terms with the human factor in the interpretations of sacred texts. Ian Mitroff has argued that even in physical sciences, great minds are not objective truth finders but advocates of hypotheses.²⁸⁹ The commonplace paradigm that science is objective and that personal bias has no room in scientific research is a myth, says Mitroff, particularly with respect to grand scientific ideas. A great scientist discovers a hypothesis and collects evidence to support it. Once credible—though not irrefutable—evidence has been collected, the scientist presents his hypothesis and begins to persuade other scientists about its truth. He may subtly modify his hypothesis to absorb conflicting evidence. Only when the evidence contrary to the hypothesis is immense may the scientist abandon the hypothesis. Since peers are under no obligation to accept the hypothesis and may have their own competing hypotheses, the marketplace of ideas eventually sorts out which of the competing hypotheses is creditworthy.

Feyerabend proposes the principle of tenacity under which the scientist continues to defend his theory despite the gathering opposition to it.²⁹⁰ The principle of tenacity warns against premature abandonment of a theory that carries the elements of truth but lacks the irrefutable evidence. Crude theories in their formative stages are truer in the minds of their discoverers even when they might make little sense to others. “Abandonment of an idea too soon is much worse than wasting time and effort on a [seemingly] worthless supposition. Science, especially the social sciences, needs this kind of tenacity.”²⁹¹

288. Ali Khan, *Learning Legal Reasoning*, 30 WASHBURN L.J. 265, 265–67 (1991) (reviewing JOHN DELANEY, *LEARNING LEGAL REASONING* (rev. ed. 1987)) (describing law as art). Artistic advocacy in law may be compared with sculpturing or painting. The outcome of a case is a shared work of art. It is the handiwork of multiple artists, including lawyers, lawmakers, law commentators, judicial clerks, and judges. The advocate on each side vigorously contributes to influence the effects of the final outcome. No one advocate enjoys a free hand, not even in ex-parte cases, to draw the outcome with unhindered artistic will. In contested cases, numerous restraints are placed on both advocates and advocacy. Nonetheless, a successful advocate is one whose version of facts and law succeeds in shaping the final outcome.

289. Ian I. Mitroff, *The Myth of Objectivity or Why Science Needs a New Psychology of Science*, 18 MGMT. SCI. B-613, B-614–16 (1972).

290. Paul Feyerabend, *Consolations for the Specialist*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 197, 205 (Imre Lakatos & Alan Musgrave eds., 1970).

291. John L. Cotton, *Objective Versus Advocacy Models of Scientific Enterprise: A Comment on the Mitroff Myth*, 7 ACAD. MGMT. REV. 133, 134 (1982) (arguing advocacy is useful in researching science but the results must be objectively reported).

The common law adversarial system accommodates truth relativity, artistic advocacy, and the principle of tenacity. John Rawls anchors the ethics of advocacy in liberal political theory.²⁹² Building on the works of John Rawls and John Stuart Mill, Susan Carle argues that litigation should be available to poor clients as much as it is to more advantaged members of society.²⁹³ She also argues that litigation should be considered as a marketplace of ideas. To promote justice consistent with the concept of liberal political theory, client-centered advocacy is most needed.²⁹⁴ When the truth is relative, client-centered advocacy provides the ultimate tool to mediate competing claims of righteousness. Competing claims are irresolvable and therefore the advocate who makes the best case receives the award.²⁹⁵ Another rationale for client-centered advocacy may be founded on the assumption that parties distort truth to receive a better deal from the legal system. Therefore, the system must allow vigorous advocacy to neutralize distortions.

Truth skepticism grants no license to engage in truth distortions or manipulation. Truth-relativity is not devoid of ethics. It does not sanction lies. It simply refuses to embrace the philosophical notion of fixed truths. By believing in no fixed truths, the people do not lose cognitive faculties to distinguish between night and day. When a rude notion of truth relativity permeates a culture, however, the less sophisticated minds begin to confuse truth relativity with untruth. A highly skeptical society may suffer from a moral breakdown.²⁹⁶ Parties and witnesses may engage in falsehood, believing that there exists no truth and that the other party will engage in similar behavior. If truth is relative, some may boldly conclude that everything goes. This disrespect for truth, nonetheless, is not the intended but the unfortunate consequence of truth skepticism.

292. See John Rawls, *The Law of Peoples* 91 (1999).

293. Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 *HOFSTRA L. REV.* 115, 140–43 (2006).

294. *Id.*

295. *Id.* at 140.

296. See Norman R. Phillips, *The Conservative Implications of Skepticism*, 18 *J. POL.* 28, 33 (1956). If there is no one truth, parties and witnesses may not be accused of truth distortions. Parties are therefore allowed to plead their respective versions of facts and laws. Witnesses may tell what they know, mixing facts with fiction. They may be accused of perjury, however, if the mixing is deliberate. The opposing counsels may engage in artistic advocacy to tell their own truth of law and to contest the truth of the other side. Each side may accuse the other of truth distortions. Yet each side holds on to its respective theory of the case.

B. Revulsions

Since its inception in the seventh century, Islamic law has been skeptical of manipulative advocacy. Malik Ibn Anas (715–796), one of the four founding jurists of Islamic law, reports that two persons stood up and spoke with great eloquence. The people were stunned to hear their speeches. When this event was narrated to the Prophet, he said: “Part of eloquence is sorcery.”²⁹⁷ At another occasion, the Prophet furnished the example of an eloquent person who charms the people by his speech and takes away a right that belongs to a less eloquent person.²⁹⁸ This skepticism of eloquence expressed in the Prophet’s Sunna is consistent with the Quran’s commandments that argumentation must be most gracious.²⁹⁹ Thus, under the combined force of the Quran and the Sunna (the Basic Code), advocacy to defend claims, interests, and viewpoints must neither be harsh, nor sorcerous, because harsh advocacy is insulting and sorcerous advocacy is deceptive.³⁰⁰ Truthful presentation of evidence and respectful delivery of supportive arguments, without employing overreaching eloquence, are the prescriptive norms of advocacy under Islamic law. The most hated person in the sight of God is the most quarrelsome person.

Once the Prophet said, “You people present your cases to me and some of you may be more eloquent and persuasive in presenting their argument. So, if I give some one’s right to another (wrongly) because of the latter’s (tricky) presentation of the case, I am really giving him a piece of fire; so he should not take it.”³⁰¹

This hadith clarifies three important points. First, it recognizes advocacy as a supportive mechanism for the protection of one’s rights. One may lawfully draw on persuasion to argue one’s case and to support claims. Second, it recognizes that judges may reach wrong results under the spell of advocacy. The Prophet did not even exempt himself from committing such an error. Third, and perhaps the most important, the hadith places an obligation on the winner of a lawsuit not to accept the “undeserved fruits” of his advocacy.

297. IMAM MALIK IBN ANAS, *supra* note 194, bk. 56, Ch. 578, No. 56.3.7. John Milton captures this idea in the following lines: “So much of adder’s wisdom I have learned, To fence my ear against thy sorceries.” 4 JOHN MILTON, *Samson Agonistes 1667–1671*, in *THE COMPLETE POEMS OF JOHN MILTON* 414, 438 (Charles W. Eliot ed., Harvard Classics 1959) (1671).

298. ABU DAWUD, *supra* note 157, Kitab al-Adab bk. 36, No. 4994, at 1394; 3 SAHIH MUSLIM, *supra* note 54, Kitab al-Salat bk. 41, No. 494, at 495–96.

299. QURAN *sura an-Nahl* 16:125.

300. ABU DAWUD, *supra* note 157, Kitab al-Adab bk. 41, No. 4994, at 1394.

301. 3 SAHIH AL-BUKHARI, *supra* note 49, § 48:845, at 521.

The hadith does not prohibit the use of advocacy. It fortifies advocacy with responsibility. In dispute resolution processes, including litigation, one may lawfully employ persuasion to make legitimate claims. However, responsible advocacy does not ask for more than its share. It is not predatory, exploitative, or acquisitive. Accordingly, judges must be aware of the pitfalls of eloquent presentations and ask themselves if they have been prejudiced by a party's powerful presentation. This skepticism of advocacy puts judges on guard.

Most people, including judges and juries in secular and religious systems, wish to be informed. They rarely volunteer to be manipulated—particularly by persons who they believe are less informed or intellectually inferior to them. The concept of “hard sell” captures the annoyance of ordinary consumers. The example of a car dealer determined to sell a vehicle to a consumer who walks into the showroom is described as a hard sell. Marketing scientists note that hard selling is aggressive marketing that overstates a product's merits, its bargain value, and creates a false sense of urgency to pressure consumers to not only buy the product but also the high margin add-on features.³⁰² Most consumers view hard selling more annoying than beneficial.³⁰³ Ironically, though, hard sells create financial loss for consumers who avoid hard sellers and end up paying more for products elsewhere.³⁰⁴ Thus, hard selling may injure both the hard seller and the consumer as both lose each other for profitable exchanges.

Judges may have a soft corner for gentle and artistic persuasion but most would detest cynical advocacy that sells injustice. They may be skeptical of truth but they can smell lies and are repulsed. They understand manipulation and know “[t]hat one may smile, and smile, and be a villain.”³⁰⁵ Revulsions against manipulation are universal. Honest, decent, and courageous attorneys at peace with their internal ethics, “cultivate knowledge of the law beyond its use for clients, [and] employ that knowledge in reform of the law.”³⁰⁶

302. Wujin Chu, Eitan Gerstner & James D. Hess, *Cost and Benefits of Hard-Sell*, 32 J. MARKETING RES. 97, 97 (1995).

303. *Id.*

304. *Id.*

305. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

306. MODEL RULES OF PROF. CONDUCT pmb1. 5 (1983).

VIII. CONCLUSION

Reformist advocacy is part of Islamic and common law traditions. In both traditions, however, reformist advocacy has lost its way. In the United States, advocacy has turned to manipulation whereas Islamic advocacy has embraced militancy. These developments will fail to undermine these two great traditions of law, which have been in close contacts for centuries and continue to engage each other. Honest and courageous advocacy derived from profound knowledge of law and religion will reject militancy and manipulation as possible options to forge honorable exchanges between Islam and common law.