Author: Richard L. Marcus
Source: University of Illinois Law Review
Citation: 1984 U. Ill. L. Rev. 675 (1984).
Title: The Tudor Treason Trials: Some Observations on the Emergence of Forensic Themes

Reproduced by permission of the publisher from 1984 UNIVERSITY OF ILLINOIS LAW REVIEW 675.
THE TUDOR TREASON TRIALS:
SOME OBSERVATIONS ON THE
EMERGENCE OF FORENSIC
THEMES

Richard L. Marcus*

I. INTRODUCTION

On November 17, 1603, Sir Edward Coke, the King's Attorney General, faced a jury of good solid Englishmen at Winchester, pointed a finger at the defendant, Sir Walter Raleigh, and promised to "make it appear to the world, that there never lived a viler viper upon the face of the earth." Raleigh had risen to great prominence at the court of Elizabeth I, the last of the Tudors, who had died in March 1603. Raleigh was charged with treason for allegedly plotting with the confessed traitor Cobham to enlist Spanish support for an effort to displace James Stuart, Elizabeth's successor on the English throne, and to install Arabella Stuart. Coke's evidence against Raleigh was extremely thin—principally charges by Cobham that Cobham later recanted. During the trial, Raleigh repeatedly asked that the Crown bring Cobham to the trial to confirm or deny the story put forth by Coke, but his requests were denied. Despite the weakness of the evidence, Coke succeeded, with a considerable outpouring of vitriol, in convincing the jurors that Raleigh was "the notoriest Traitor that ever came to the bar." The jury deliberated less than a quarter of an hour before returning a guilty verdict.

* Professor of Law, University of Illinois. B.A. 1969, Pomona; J.D. 1972, University of California, Berkeley. I am indebted to my colleague, Michael Helflich, for his manifold assistance in providing guidance to a lawyer who wants to sound like a historian. The errors that remain are mine only:

1. Ironically, November 17 was the anniversary of Elizabeth I's accession to the throne; for decades, until March 1603, the English had celebrated November 17 as the holiday of Accession Day.
2. Rex v. Raleigh, 2 Complete Collection of State Trials 1, 26-27 (1603) (the date refers to the date of the case) [hereinafter Complete Collection of State Trials is abbreviated as State Trials]. For a description of the State Trials, see infra notes 13-15 and accompanying text.
3. 2 State Trials at 16, 18.
4. Id. at 7. For other examples of Coke's vitriol, see id. at 9 ("the most horrible practices that ever came out of the bottomless pit of the lowest hell;" "You are the absolutist Traitor that ever was."); 20 ("Thou hast a Spanish heart, and thyself art a Spider of Hell"), 26 ("the confidentest Traitor that ever came at a bar;" "Thou art an odious fellow"), 28 ("Oh, damnable atheist!").

675
Raleigh’s trial, probably the best known of the treason trials growing out of the Tudor period, continues to be cited as an example of tyranny in the courtroom. It is even credited as the stimulus behind the inclusion of the confrontation clause in the American Constitution.\(^5\) From a twentieth-century perspective, the treatment of sixteenth-century criminal defendants seems unfair indeed. Defendants were usually imprisoned until trial, and given little or no notice of the charges the Crown would bring against them. Indeed, they were often refused even a copy of the indictment, which was merely read to them at the beginning of the trial. During the trial, the defendants were denied counsel, could not call witnesses, and, like Raleigh, had no assurance that they could confront their accusers.\(^6\) Moreover, those accused of treason received harsher treatment than other defendants.\(^7\) The procedure used in Raleigh’s trial offended even contemporary observers and transformed popular attitudes toward Raleigh. Before the trial, Raleigh was “the most hated and feared Englishman of his time” and people lined the route he traveled to court to hurl insults at him.\(^8\) The patent unfairness of the trial, however, exonerated Raleigh in the public eye. As one contemporary observer at the trial later reported to King James, “whereas, when he saw him first, he was so led with the common hatred, that he would have gone a hundred miles to have seen him hanged, he would, ere he parted, have gone a thousand to have saved his life.”\(^9\)

Historians have examined the Tudor treason trials from a variety of perspectives, but none has scrutinized the participants’ methods of advocacy. Scholars now recognize advocacy skills as a discrete area of concern, and one which legal education is slowly adapting to

---


7. Writing in the late nineteenth century, Professor Willis-Bund concluded that “it seemed that if a person was accused of treason he was to be deprived of every chance of an acquittal.” I J. Willis-Bund, A Selection of Cases from the State Trials 69 (1879).

8. 1 E. Edwards, The Life of Sir Walter Raleigh 386 (London 1868); W. Wallace, Sir Walter Raleigh 4, 202 (1959). In part, Raleigh was unpopular due to his role in the Earl of Essex’s execution for treason. See id. at 172; Reg. v. Robert Dudley, Earl of Essex, 1 State Trials 1333 (1600).

promote, but none have traced the emergence of advocacy skills in the maturing English judicial system. From this perspective, Raleigh's trial, although it occurred shortly after the end of the Tudor period, may be viewed as representative of the Tudor treason trials. While Holdsworth has called Coke's performance during the trial "a permanent stain on his memory," another commentator has recognized that the trial was "quite ordinary as state trials go." This article examines Raleigh's trial and the Tudor treason trials in an effort to identify recurrent themes of advocacy.

Because the Tudor treason trials were historically important, we have more information about these trials than we do about other sixteenth-century or earlier trials. The information on which this article is based consists of relatively contemporary reports compiled, beginning in the eighteenth century, in a series called the State Trials. For the Tudor era, these reports include reasonably verbatim chronicles of proceedings against Raleigh, as well as proceedings against a number of other famous persons—Thomas More, Anne Boleyn, the Earl of Essex, and Mary Stuart, Queen of Scots. Although these reports often reflect the biases of the chronicler, these biases probably would not color reports on advocacy techniques. Indeed, as Stephen put it in the nineteenth century, the State Trials have "such completeness and authenticity as to give to that great collection the character of a judicial history of England." We are unlikely to obtain more accurate detailed information on sixteenth-century trial proceedings from other sources. Of necessity, therefore, the State Trials will have to suffice.

To provide a background for examining the advocacy techniques found in the Tudor treason trials, this article begins with a brief overview of Tudor history and the role of treason trials in the Tudor era. This context points up the extra-legal significance of the trials and

13. One of the sixteenth-century accounts was written by the defendant himself. See Reg. v. Udall, 1 State Trials 1271 (1590). In other instances, the compilers of the State Trials themselves cautioned the reader about the biases of the persons who wrote the reports the compilers relied upon. See, e.g., Rex v. Fisher, 1 State Trials 395, 397 (1535).
15. Thus, Professor Langbein, who was anxious to escape reliance on the State Trials because he felt they did not reflect ordinary criminal trials (see infra notes 61-68 and accompanying text) relied instead on the Old Bailey Session Papers, but found little that was useful in reconstructing verbatim proceedings prior to the 1730's. Langbein, The Criminal Trial before the Lawyers, 45 U. Chi. L. Rev. 263, 269-70 (1978). See also G. Elton, England: 1200-1640, at 60-62 (1969) (describing absence of data on what actually occurred in criminal trials); S. Milsom, Historical Foundations of the Common Law 360 (1969) ("Of the actual conduct of the trial we know almost nothing before the sixteenth century, not nearly enough until the eighteenth.").
explains some themes that appear in the trials. The article then describes the procedural context of the trials, focusing not only on the procedures used in sixteenth-century trials, but also on the evolution from nonrational modes of trial to the modern jury trial, a very gradual metamorphosis. Against this background, the article then examines the reports contained in the *State Trials* and finds that the participants consciously engaged in advocacy along certain repeated lines ranging from appeals to prejudice to logical analysis of the evidence. The article concludes that, although the emergence of recognized rules of evidence lay well in the future, the focus of the participants in the Tudor treason trials was turning toward concerns that endure into the modern era. The metamorphosis in orientation from nonrational methods to the modern jury trial was, therefore, largely completed.

II. **The Historical Context**

The historical context is particularly important in developing a proper appreciation of the Tudor treason trials because of the peculiarly great risk that treason posed to the state. This risk existed for two reasons. First, the continued uncertainty over succession to the crown dogged Tudor monarchs and invited treason. In 1485, Henry Tudor defeated and killed Richard III at Bosworth and became Henry VII of England. He promptly married Elizabeth of York and thereby united the warring houses of York and Lancaster, which had ravaged England for three decades contesting the succession. Unhappily, the only healthy male heir to issue from the merger of the two warring houses was Henry VIII, and all three of his children, reigning in turn, labored under the threat of uncertain succession. Moreover, Elizabeth, the last of the line, outlived her life expectancy by about twenty years; for two decades the nation endured the threat of imminent renewed warfare over the succession.

Second, religious differences provided an additional incentive for treason. This stimulus resulted in part from concern over the succession. Henry VIII's first wife, Catherine of Aragon, bore him no healthy male children. In order to divorce her, Henry VIII had to break with the Roman Catholic Church, a development that aligned England with the Protestant camp in Europe as the Continental powers became increasingly polarized along religious lines. During the reign of Henry VIII, the religious issue fortunately prompted only moderate domestic difficulty. For forty years after Henry VIII's death, however, there was a religious incentive to assassinate the monarch in order to bring about a premature succession: from Protestant Edward to Catholic Mary to Protestant Elizabeth to Catholic Mary Stuart, Queen of Scots.16

---

16. Professor Neale described the situation after Mary Tudor became queen and married Phillip of Spain in his biography of Elizabeth: "What wonder if, when men turned from Mary in disappointment, their hopes rested on her sister! Elizabeth was Protestant and in her Englishry
During Mary Stuart's twenty years of captivity in England, the risk of regicide became particularly pressing because the pope had issued a bull of excommunication against Elizabeth that allegedly released English Catholics from allegiance to her. Meanwhile, Mary Stuart continually schemed to unseat her cousin. Only after Elizabeth had Mary executed in 1586, and the English repulsed the Spanish Armada in 1587 did the danger of religious strife and Spanish invasion abate. As the charges against Raleigh illustrate, however, concern over Spanish invasion persisted even after the Tudor era ended.

From the beginning of the Tudor period, charges of treason loomed large as a tool to deal with such risks. Indeed, Professor Elton explains Henry VII's decision to set the commencement of his reign as the day before the battle of Bosworth as "a typical piece of sharp practice designed to enable him to deal with Richard's supporters on that day as traitors to himself." Early in his reign, Henry VIII learned the value of treason prosecutions to further political ends. Within a year after becoming king, he sacrificed Empson and Dudley, two loyal but extremely unpopular servants of his father, by having them tried on trumped-up charges of treason. Holdsworth calls this stratagem "the greatest blot" on Henry's reign, but it was not out of keeping with the contemporary use of the treason trial.

The centerpiece of treason legislation was a 1352 statute, one of England's earliest criminal statutes, which defined treason in part as compassing or imagining the death of the king. As Serjeant Hale observed, "the words compass or imagine are of a great latitude." The position the crown took during the Tudor period was that mere intent could support a treason conviction, a point which prosecutors stressed. Needless to say, the focus on evil intent invited efforts to

was no foreign strain. If Mary died childless she would be their ruler, and the more rash were tempted to make such a future certain and speed its coming." J. Neale, Queen Elizabeth I 32 (1957). After Elizabeth became queen, the situation was in a sense reversed: "It seemed as though the history of the late reign would be repeated, and as Elizabeth had then been the focus of Protestant hopes against her sister's Catholicism, so Mary Queen of Scots would now become the focus of Catholic hopes." Id. at 86-87.


18. Rex v. Empson and Dudley, 1 State Trials 283 (1509).

19. 4 W. Holdsworth, supra note 11, at 26. Elton adds that "whoever suggested the treason trial [to Henry VIII] had much to answer for when Henry remembered the lesson on later occasions." England Under Tudors, supra note 17, at 71.


21. 25 Edw. 3, st. 5, ch. 2 (1352).


23. Thus, Serjeant Puckering "opened unto the Jury, that the original of his Treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason" in Reg. v. Perrot, 1 State Trials 1315, 1318 (1592). Similarly, in the trial of Essex, Coke urged that "the thought of Treason to the prince, by the law is death." Reg. v. Robert Dudley, Earl of Essex, 1
inflame jury passions against the defendant and created an atmosphere that rewarded informers.24

After the religious break with Rome, the Tudor monarchs added a variety of new treason statutes. In 1534, for example, slandering the king’s new marriage to Anne Boleyn became treason.25 Three years later, after Henry VIII executed Anne Boleyn for treason, Parliament declared it treason to say that either of Henry VIII’s first two marriages was good.26 Similarly, Parliament extended treasons involving the sexual adventures of the king’s wife (the transgression charged against Anne Boleyn), a matter of crucial importance to the legitimacy of the queen’s issue.27 Marriage to the king’s brothers, sisters, aunts, or children without his consent was also declared treason.28 Beyond that, treason was used as a device to cement the new Protestant religion. Thus, in 1537, it became treason to refuse to take an oath to the king as spiritual head of the country.29 At the outset of their reigns, each of Henry VIII’s children tended to abolish the new types of treasons, but their liberal attitudes soon passed, and they each created their own new types of treason.30 This article does not pass judgment on the proliferation of treason laws under the Tudors, as some have done, but rather recognizes, as Elton puts it, that treason laws were “a weapon which no effective sixteenth-century government could avoid.”31 Treason prosecutions, like treason laws, were important matters of state.

III. THE PROCEDURAL CONTEXT

The twentieth-century Anglo-American lawyer is so accustomed to viewing the jury trial as a device for rational analysis of material

STATE TRIALS 1333, 1337 (1600). In his treatise, however, Coke contended that an overt act is required. See R. COKE, THE THIRD PART OF THE INSTITUTES OF ENGLAND 14 (W. Clarke ed. London 1809) (“As for example: a conspiracy is had to levi warre, this . . . . is no treason by this act untill it be leveded. . . . And it is commonly said, that bare words may make an heretick, but not a traytor without an overt act.”).

24. The flexibility of treason law allowed the law to be misused for private ends by those willing to perjure themselves and accuse others of uttering treasonable thoughts. Richard Rich, rightly or wrongly, has become a symbol of such activity for his role in the trial of Thomas More. For another example, see Rex v. Edward Duke of Buckingham, 1 STATE TRIALS 287, 287-88 (1522) (duke brought down by one Charles Knevet, who was removed from duke’s estates and turned informer). Such behavior is not unknown in modern America; see L. HELLMAN, SCOUNDREL TIME (1976) (describing atmosphere of suspicion during McCarthy era).

25. 26 Hen. 8, ch. 22, § 6 (1534).
26. 28 Hen. 8, ch. 7, § 12 (1537).
27. 33 Hen. 8, ch. 21, §§ 8, 9, 10 (1542) (making concealment of adultery by king’s wife treason).
28. 28 Hen. 8, ch. 24, § 2 (1537).
29. 28 Hen. 8, ch. 10, § 8 (1537).
30. Thus, the first Parliaments of both Edward and Mary eliminated existing treasons and enacted new ones. See 1 Edw. 6, ch. 12 (1547); 1 Mary, Sess. 1, ch. 1 (1553). The leniency of new Tudor monarchs was usually not long-lasting. In Mary’s case, it has been suggested that her leniency was scotched by the acquittal of Nicholas Throckmorton. T. BELLAMY, TUDOR LAW OF TREASON 57-58 (1979).
31. ENGLAND UNDER TUDORS, supra note 17, at 219.
presented in court that it is difficult to appreciate the relative newness of this concept. Before turning to a more specific examination of the criminal trial processes in the sixteenth century, therefore, it is necessary to provide a broad-brush description of the evolution of trial methods in England. A striking feature of this evolution is the gradualness of fundamental change; consequently, it is worthwhile to go back to the beginning.

A. Early Trial Methods

The beginning is the pre-Conquest Anglo-Saxon period. While the details of the method of trial are generally sketchy, some points are clear. The development of social, and therefore legal, institutions to control disorder was very gradual and startlingly unselfconscious. As Professor Milsom put it in describing the thirteenth century, the emergence of the common law "was an exploit not of juristic thought but of administration." 32 The early development of trial methods was, if anything, less intellectual. Indeed, in the pre-Conquest period the orientation of trial methods was antirational. The Age of Reason was far away, and people believed that they were not competent to make decisions about questions of guilt or innocence. As Professor Harding explains, "[i]t was just because they had a civilized awareness of the complex origins of men's deeds, and the humility to realize that only God, and not they, could search men's hearts, that they made trial a ritual nonrational combat through which God could give the answer." 33 Thus the outcome of a trial depended on battle or ordeal. 34 At some point the alternative of oath-helping, or compurgation, developed; this approach directed courts to decide disputes on the basis of the number of supporters each disputant could round up to swear belief in his cause. Most importantly for our purposes, none of these methods of trial emphasized rational examination of evidence. Although an edict in 1215 effectively ended trial by ordeal by forbidding priests to participate in such events, 35 the nonrational means of trial did not disappear quickly. 36

The Norman Conquest did introduce a new method—trial by jury,

32. S. Milsom, supra note 15, at 27.
33. A. Harding, The Law Courts of Medieval England 25 (1973). See also S. Milsom, supra note 15, at 31 (describing trial as "a ritual formulation of a question to be put to an oracle beyond the need of human guidance").
34. For general discussions of these alternative modes of trial, see 1 W. Holdsworth, supra note 11, at 299-311; J. Thayer, A Preliminary Treatise on Evidence at the Common Law 16-46 (1898).
36. Thus, Stephen reports that appeals of murder, in which the complaining party does battle with the alleged miscreant, persisted into the nineteenth century. 1 J. Stephen, supra note 6, at 249-50. Pollock and Maitland state that the last reported English case of compurgation was in 1824. 2 F. Pollock & F. Maitland, The History of English Law 601 n.2 (2d ed. 1903); cf. Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845, 861 (1982) ("Compurgation may still have its uses").
which the English adapted from the Norman inquest. Although trial by jury seems to be addressed more directly toward logical examination of information to decide questions of fact, it originally was markedly different from the modern jury trial. The original jury was composed of persons who already had information about the matter in dispute. Accordingly, Stephen reported that "the impaneling of the jury was in very ancient times equivalent to the choice of the witnesses by whom matters of fact were to be determined," and the rules governing challenges to jurors were in effect methods the parties used to attempt to exclude testimony by those jurors challenged.

This ancient model may never have existed in a pure form, and by the thirteenth or fourteenth century the jury was obtaining information from outside sources. Throughout the sixteenth century, however, jurors could still decide disputes on the basis of their own personal knowledge. Only gradually did the idea emerge that juries should decide cases on the basis of logical deductions drawn from the material the parties presented in court, and rules of evidence designed to keep certain information from them had not yet developed. Thus, although trial by jury was, for practical purposes, the only mode of trial in English criminal cases after 1550, modern notions of trial by jury were still gradually evolving in the sixteenth century.

What of civil cases? Scholars have said that the law of evidence first emerged in civil cases and was later imported for use in criminal cases. This analysis suggests that skill in developing factual contentions might have become important at an earlier point in civil cases, but rational methods of fact determination did not play a major role in resolving civil cases at least through the sixteenth century. Instead, the principal emphasis in civil litigation was on pleading, a technique which was designed to narrow the dispute in each case to a single issue before the trial, and which became increasingly ornate over time.

37. Id. at 301; see Helmholtz, The Early History of the Grand Jury and the Canon Law, 50 U. CHI. L. REV. 613, 620 (1983) ("The use of public fame to initiate prosecutions in the church did not become the purely formal matter one might suppose. Medieval communities were smaller and the courts were more immediately tied to them than would be true anywhere today. Public suspicion could, and did, circulate."). Lest it be thought that the idea the jury should bring its own knowledge to bear vanished in the sixteenth century, see 9 J. WIGMORE, EVIDENCE § 2570 (1940) (describing nineteenth century reliance on jury's own knowledge).

38. See J. THAYER, supra note 34, at 100-01; 119-20; 1 W. HOLDSWORTH, supra note 11, at 303.

39. Indeed, it may be that the law of evidence was a result of the shift from self-informed to passive jurors. See J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 119 (1972). Thus, Professor Langbein finds the "true law of evidence" emerging in the early seventeenth century. Id. at 123-24.


41. Id. at 39.

42. R. PALMER, THE COUNTY COURTS OF MEDIEVAL ENGLAND 90-91 (1982). For a description of the formalistic pirouette that pleading contests became, see A. HARDING, supra note 33, at 78-79.
Accordingly, lawyers focused their attention on pleading, and "the trial itself was an afterthought, as it were, to the pleading." By the sixteenth century, the decline of oral pleading may have caused the serjeants, who had excelled in oral pleading, to turn their attentions to proving factual contentions, but civil trials were hardly a proving ground for a new breed of advocate. As with the criminal trial, then, the evolution of the modern civil trial progressed slowly.

Although the function of the criminal trial continued evolving in the sixteenth century, most criminal trials remained, like life, nasty, brutish, and short. A single judge, using two juries, often held as many as fifty trials in one day. Courts often tried defendants seriatem, with the same jury charged to return verdicts on defendants charged with several unrelated crimes simultaneously. One of the reasons that the judges could complete trials so rapidly was that the trials very rarely involved lawyers. Even criminal matters were prosecuted by the victim; the idea that the defendant should turn control of the case over to a lawyer was far into the future.

Partly as a consequence of the absence of lawyers, courtroom proceedings were often extremely unruly. As Sir Thomas Smith wrote in the 1560's, a trial often devolved into an "altercation" between the complaining witness and the defendant. In 1588, for example, a man was murdered in court during a trial. These excesses did not completely vanish when lawyers were present, however, and the stakes involved in treason cases may have stimulated adversary outbursts. For example, consider the following exchange from the 1592 trial of John Perrot for high treason, which the chronicler informs us the participants delivered with "great vehemence:"

---
43. R. PALMER, supra note 41, at 90; see also R. LEMPERT & S. SALZBURG, A MODERN APPROACH TO EVIDENCE 647 (2d ed. 1982) (through the sixteenth century, "litigation (even criminal litigation) turned more on argument than on fact.").
44. See A. HARDING, supra note 33, at 112 (As oral pleading by serjeants declined, "the serjeants... moved to the new techniques of examining witnesses and presenting evidence.").
46. For examples of group trials, see Reg. v. Campion, 1 STATE TRIALS 1049, 1050-51 (1581) (judges reject argument that severance was necessary to avoid jury confusion); Reg. v. Abington, 1 STATE TRIALS 1141 (1586).
47. In fact, the defendant was not even allowed counsel to assist him. For an example of the extent to which things have changed, consider Chief Justice Burger's concurring opinion in Wainwright v. Sykes, 433 U.S. 72 (1977), which argues that while criminal defendants may not be held responsible for their own tactical decisions, they should still be held responsible for their lawyer's decisions because "[h]e, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Id. at 93. We may have come so far, then, that only the lawyer's decision counts because the lawyer, not the client, is in true control of the proceedings.
48. T. SMITH, DE REPUBLICA ANGLORUM 114 (M. Dewar ed. 1982).
49. J. COCKBURN, supra note 45, at 109.
50. See L. ABBOTT, LAW REPORTING IN ENGLAND, 1485-1585, at 65 (1973) (referring to "the more notorious treason trials—which seem to have elicited the worst traits in every advocate").
Perrot: Mr. Attorney, you did me wrong now, as you did me before.
Queen’s Attorney: I never did you wrong.
Perrot: You did me wrong.
Attorney: Instance wherein I did you wrong.
Perrot: You did me wrong.
Attorney: I never did you wrong.\(^{51}\)

Such quarrelsome behavior was not unusual; in Raleigh’s trial Coke threw a tantrum and refused to continue with the trial when the judges informed him that Raleigh would address the jury last.\(^{52}\) Rather than chastise Coke, the judges coaxed him into continuing. While hardly unknown today,\(^{53}\) such behavior in the sixteenth century was not even theoretically improper.

### B. The Jury

Observing these tumultuous proceedings was a jury usually composed of twelve men. In theory, these jurors would be persons of substance since the qualification for jury service was a minimum annual income.\(^{54}\) In reality, the difficulty of assembling juries led to widespread corruption, and the Tudors had to deal with problems of bribery and false verdicts throughout the sixteenth century.\(^{55}\) As a result, the jurors risked imprisonment, attaind, and proceedings before the Star Chamber if they acquitted a defendant.\(^{56}\) For example, in 1554 the jurors who acquitted Nicholas Throckmorton were imprisoned, and further directed to pay fines of as much as £2000 apiece, although they ultimately paid only £60 to £200 each.\(^{57}\) Such pressures could be effective; shortly thereafter another jury convicted Throckmorton’s brother on virtually identical evidence.\(^{58}\) With respect to Raleigh, some

\(^{51}\) Reg. v. Perrot, 1 State Trials 1315, 1329 (1592). \textit{See also} Reg. v. Parry, 1 State Trials 1095, 1109-10 (1584) (defendant “cried out in a furious manner, I never meant to kill her: I will lay my blood upon queen Elizabeth and you, before God and the world. And thereupon fell into a rage and evil words with the queen’s majesty’s attorney-general . . . .”); Reg. v. Blunt, 1 State Trials 1409, 1444 (1600) (Coke, making pun on name of defendant Cuffe, said “he would give him a cuff that should set him down”).

\(^{52}\) 2 State Trials at 26.

\(^{53}\) \textit{See, e.g.}, Illinois v. Allen, 397 U.S. 337 (1970) (criminal defendant may be excluded from his trial for disruptive actions including threats to judge). I am also aware of at least one case in the 1970’s in which a California attorney for a criminal defendant physically attacked the prosecutor in court. He was prosecuted and convicted for assault and battery, but not disciplined by the Bar. \textit{See also} Standing Committee on Discipline of the United States District Court v. Ross, 735 F.2d 1168, 1170-71 (9th Cir. 1984) (attorney who was convicted of battery against another attorney and found to have menanced two others suspended from practice).


\(^{55}\) \textit{Id.} at 141-44; \textit{England Under Tudors, supra} note 17, at 58.

\(^{56}\) G. Elton, \textit{Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell} 319 n.3 (1972) [hereinafter cited as \textit{Policy and Police}]; J. Cockburn, \textit{supra} note 45, at 123. It is unclear, however, how often these punishments were actually visited on jurors.

\(^{57}\) \textit{See} 1 State Trials at 901; J. Thayer, \textit{supra} note 34, at 163.

\(^{58}\) \textit{See} 1 State Trials at 902; C. DuCann, \textit{Famous Treason Trials} 66-67 (1965).
commentators have concluded that the jury convicted him because of intimidat_i0n. Not until 1670 did the King’s Bench hold invalid the practice of punishing jurors for “false” verdicts, and then on the atavistic ground that the judge could not determine whether the verdict was right because the jury was authorized to decide the case on the basis of its own knowledge of the facts, and was not limited to the evidence the parties presented in court. Throughout the Tudor period, then, the jury retained some of its responsibility to decide cases based on something other than the proceedings observed in court.

C. Treason Trials

Although the crown handled the treason trials in accordance with the general pattern for criminal trials, commentators have characterized the treason trials as “misleading precedents” because they differed from normal trials in significant ways due to their importance to the state. The treason trial defendants were hardly ordinary people. Many held high stations. Many were remarkably able. For example, Raleigh has been called “truly the Renaissance man of Elizabethan England,” and Thomas More was indeed a man for all seasons. Undoubtedly, the common highwayman, unrepresented by counsel, did not compare to these treason defendants as an adversary in the courtroom.

Presumably in recognition of the defendants’ abilities, as well as the importance of the proceedings, the crown had lawyers prosecute the treason trials. Professional prosecutors were virtually unknown in ordinary sixteenth-century criminal cases, and lay Justices of the Peace normally shouldered such prosecutorial responsibility. While lawyer-prosecutors must have made more polished in-court presentations, the level of prosecutorial preparation for treason trials was sometimes not high. In one 1586 treason case, for example, the indictment named one of the defendants by the wrong name. Similarly, in the trial of the Duke of Norfolk in 1571, Lord Burghley, one of the judges, had to correct the Queen’s Serjeant’s translation of some of the evidence. One possible result of having lawyers involved is that these treason trials did take a good deal longer than normal criminal trials. Some treason trials took a full day to complete, and on occasion the jury

63. For a description of the characteristics and performance of these officials, see J. Gleason, The Justices of the Peace in England, 1558-1640 (1969).
64. Reg. v. Abington, 1 STATE TRIALS 1141 (1586) (Catherine Bellamy misnamed Elizabeth Bellamy).
65. Reg. v. Thomas Howard, Duke of Norfolk, 1 STATE TRIALS 957, 974-75 (1571).
66. See, e.g., Reg. v. Thomas Howard, Duke of Norfolk, 1 STATE TRIALS 957, 1031 (1571)
took as long as two hours to reach a verdict, a much slower pace than the cases in ordinary criminal courts.

Thus, the objection that treason trials do not accurately reflect the handling of ordinary criminal cases seems justified, but the features that make treason cases different—prosecution by lawyers, capable representation of defendants, and more time spent in preparation and in trial—make these cases more closely resemble modern jury trials. To the extent these cases were exceptional, therefore, they were harbingers of eventual evolutional change for all Anglo-American trials.

One exceptional aspect of the handling of the treason trials distinguishes them, however, from modern proceedings—jury packing. We have seen that in general the crown had problems with jury corruption and false verdicts in favor of defendants; ordinary juries were hardly packed with persons who favored the prosecution. Because of the importance of the treason trials, the crown went to some pains to avoid such embarrassment in those cases. As Professor Oldham has recently observed, “the cases in the State Trials demonstrate that, in cases of national importance, jury panels of well-bred men were returned almost as a matter of course.” Beyond that, the crown selected jurors in the expectation that they would return guilty verdicts. Defendants were aware of this jury packing. For example, at the beginning of his trial in 1554, Nicholas Throckmorton expressed his hope that the jury was not made up of “picked fellows for the nonce,” and indeed the jury acquitted him. In other instances the crown packed the jury more effectively. Thus, two of the jurors who condemned Thomas More in 1535 were subsequently assigned to sit on the jury that tried, and condemned, Bishop John Fisher six weeks later. These two probably did not do continuous jury service for that six week period.

Jury packing became somewhat more complicated with peers, who were tried by other peers. Arguably peers made better jurors; thus, in the trial of the Earl of Essex in 1600, Francis Bacon observed that “I speak not to any ordinary Jury, but to prudent, grave and wise peers.”

---

67. (lords return after 8:00 p.m. with verdict); Reg. v. Babington, 1 State Trials 1127, 1131-32 (1586) (trial adjourned until next day lest it last until 3:00 a.m.); Reg. v. Philip Howard, Earl of Arundel, 1 State Trials 1249, 1263 (1589) (trial ends at night).

68. Cf. 5 W. Holdsworth, supra note 11, at 190 (“some of the rules of criminal procedure which were approved because they gave enormous advantages to the crown in all state prosecutions, soon became the ordinary rules of criminal procedure”).

69. Oldham, supra note 54, at 157. See also J. Cockburn, supra note 45, at 119 (in important cases, juries were packed with people of superior status).

70. Langbein, supra note 15, at 266 (“jurors were handpicked for the individual case, and they felt the eyes of the government upon them”); T. Bellamy, supra note 30, at 167-68. Edwards noted that there were erasures from Raleigh’s jury list. E. Edwards, supra note 8, at 384-85.

71. 1 State Trials at 871.

72. The two jurors were Jasper Leake (or Leak) and Thomas Burbage. See 1 State Trials at 392, 399. More’s trial was on May 7, 1535, and Fisher’s on the following June 17.

73. 1 State Trials at 1350.
Surely peers could feel more independent than ordinary jurors, and some of them might harbor grudges against the crown. Trial before the peers more closely resembled the traditional decision by a jury familiar with the facts, a factor that could cut either way. Defendants sometimes said they took solace in this acquaintance. For example, Thomas Howard, Duke of Norfolk, noted that “I am no stranger” in addressing his peers during his 1571 trial.\(^74\) Eighteen years later Thomas Howard’s son, Philip Howard, Earl of Arundel, observed that he was “well contented to be tried by his peers . . . that knew his life.”\(^75\) Cutting against such contentment, however, was the risk that these peers not only knew the defendant but hated him. For this, the defendant had no remedy. For example, when the Duke of Somerset was tried in 1551 for plotting against the Duke of Northumberland and the Marquis of Northampton, both those lords were permitted to sit in judgment because “a peer of the realm might not be challenged.”\(^76\) On balance, it is difficult to say whether the crown or the defendant benefited more from a jury composed of peers. In at least some cases, however, the crown was able to affect the composition of the fact finder by holding the trial before the Lord High Steward when Parliament was not in session.\(^77\) Even here, then, jury packing could occur.

Despite the various advantages held by the crown, Professor Elton cautions that “it would be wrong to suppose that [the trial] was a mere formality; the trial jury played a genuine and vital part in the business.”\(^78\) Even the State Trials contain examples of acquittals.\(^79\) Why, then, did the crown decide to run any risk of acquittal? Rather than try traitors, the crown could have sought bills of attainder from Parliament. This alternative was cumbersome, however, and available only when Parliament was in session. While the crown might have preferred attainder to trial when the prospects of a conviction at trial seemed unpromising,\(^80\) the crown generally considered trial the accepted course, in part because it suited the Tudor desire to legitimize the crown’s actions through common law judges.\(^81\) Indeed, the crown

\(^74\) 1 State Trials at 969.
\(^75\) 1 State Trials at 1253.
\(^76\) 1 State Trials 515, 521 (1551).
\(^77\) W. Holdsworth, supra note 11, at 389-90; Tudor Constitution, supra note 20, at 81.
\(^78\) Policy and Police, supra note 56, at 294. See also id. at 314; accord, T. Bellamy, supra note 30, at 171 (“Conviction of the accused was thus by no means automatic.”).
\(^79\) During the Tudor period, the most noteworthy was the acquittal of Nicholas Throckmorton. 1 State Trials at 869. The lords acquitted Lord Dacre, 1 State Trials 407 (1535), and acquitted the Duke of Somerset of treason, although they found him guilty of felony. 1 State Trials at 521.
\(^80\) For example, Katherine Howard, Henry VIII’s third wife, was dispatched by writ of attainder because there was some concern about whether judges would hold that her actions were encompassed within the treason statutes. T. Bellamy, supra note 30, at 40-41. Thomas Cromwell was handled in a similar fashion, id. at 211, as was the Duke of Norfolk in 1547. See 1 State Trials at 460-61.
\(^81\) Policies and Police, supra note 56, at 275; see also England Under Tudors, supra.
made such trials occasions for display and encouraged the public to attend. Even if there were a guilty plea, the prosecution would often present its evidence to the assembled multitude.\textsuperscript{82} Beyond impressing the finders of fact, then, the Tudors designed the proceedings to impress the nation.

In summary, a principal feature of the sixteenth-century trial, from our perspective, was its flexibility and freedom from hard and fast rules. The precise purpose for the trial—rational examination of evidence or ritual invocation of superhuman insights—was still unclear, and no rules of evidence limited the material that the fact finder could consider. The defendants had few of the protections that are commonplace today, but they had greater freedom of action during the trial than a modern criminal defendant or defense lawyer. The prosecutor was similarly unfettered in his presentation. We turn, therefore, to examine what the parties did with this latitude in the Tudor treason trials.

IV. EMERGING FORENSIC THEMES

A. Background

The actual strategies employed by the participants in ordinary sixteenth-century criminal trials remain indistinct. Such strategies were probably not the result of formal schooling even in cases where lawyers were involved. Although the Inns of Court were then in their “golden age,”\textsuperscript{83} they focused on training lawyers to argue legal, not factual, points. There is no indication that the Inns of Court attempted to train lawyers in the skills addressed in contemporary law school trial advocacy courses;\textsuperscript{84} indeed, the \textit{State Trials} possibly later served this purpose.\textsuperscript{85} Sixteenth-century novices supplemented their training at the

\textsuperscript{82} See Reg. v. Party, 1 \textit{State Trials} 1095, 1098 (1584) (“for the satisfaction of this great multitude, let the whole matter appear, that every one may see the matter of itself is as bad as the Indictment purporteth”); Reg. v. Babington, 1 \textit{State Trials} 1127, 1130 (1586) (same). Such use of treason trials is not unknown in the twentieth century. See A. Koestler, \textit{Darkness at Noon} 86-87 (1961) (describing different handling of public and “administrative” trials in Soviet Union in the Stalin era). For contemporary American views, see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-06 (1982) (emphasizing value of public access to criminal trials to observe criminal justice system).

\textsuperscript{83} 6 W. Holdsworth, \textit{supra} note 11, at 481.

\textsuperscript{84} See Barnes, \textit{Star Chamber Litigants and Their Counsel}, in \textit{Legal Records and the Historian} (J. Baker ed. 1978), at 7, 23 (“The barrister’s formal training of that age placed less emphasis even than do our law schools on acquiring skill in conducting the factual side of the case.”). Since the Renaissance was in full swing by the sixteenth century, it should be noted that the Greeks had a highly-prized tradition of adversary oratory. See generally G. Kennedy, \textit{The Art of Persuasion in Greece} (1963). But it does not appear that this possible classical influence was actually felt in the Inns of Court.

\textsuperscript{85} See S. Warren, \textit{Ten Thousand A-Year} 341 (London 1841), in which a fictional attorney in the early nineteenth century recommends the \textit{State Trials} to a young man who wants to become a lawyer, saying that “I read every word of them—speeches, examinations, cross-exami-
Inns of Court with court-watching—extended observation of actual proceedings in court. But the purpose of this exercise was apparently for the novices to learn how to argue points of law, not to give them insight into factual presentations or trial strategy. As Professor Baker has described the sixteenth-century outlook, "lawyers were concerned with law, not with disputes about facts." Even participants trained in the law, then, had few established guidelines for handling factual disputes.

The absence of recognized patterns of advocacy in the Tudor treason trials must to some extent be a holdover from the earlier English concept that the jury already possessed the pertinent information and could resolve factual issues by itself. How exactly did an advocate persuade such a jury to decide in that advocate's favor? Certainly the advocate had no intrinsic reason to rely on the presentation of "evidentiary" matter and arguments about the logical force of the material presented. Instead, the advocate could as well, or perhaps more effectively, rely on various forms of lobbying. Indeed, an advocate might simply trust the jurors to inform themselves and reach a correct result without exhortation from the parties. In so doing, the jurors might gather factual data and make reasoned deductions from it. But in an age in which trial by battle or trial by compurgation were still viewed as legitimate alternatives to trial by jury, one could not assume that jurors inevitably would pursue such a rational course or consider such factual material important to their decision.

In contrast to the medieval attitude toward jury decisions, the modern approach rests ultimately on notions of logical relevance and exclusionary rules of evidence. These two concepts color all modern evaluation of courtroom behavior; scholars therefore define forensic misconduct as the attempt to cause the jurors to rely on matters that are not logically probative or are otherwise forbidden to the jury. In the

---

87. See Prest, supra note 86, at 131-32, noting that the Year Books show judges interrupting trial proceedings to clarify points of law for students. The Year Books were informal records of proceedings in court prepared during the thirteenth through the fifteenth century. They "resemble not so much the modern law report as a professional newspaper which combines matters of technical interest with the lighter side of professional life." T. Plunkett, supra note 6, at 270. The inattention of the Year Books to factual development and evidentiary matters is itself strong evidence that such concerns were not considered important.
88. Baker, supra note 40, at 37.
89. Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 Colum. L. Rev. 946, 949 (1954). Professor Arnold has suggested that "there was by the fifteenth century a clear notion of what we would call 'relevance.'" Arnold, Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind, 18 Am. J. Legal Hist. 267, 275 (1974). These remarks appear to be addressed, however, to the need for the trial at the assizes to focus on "the issue reached at Westminster," not on limiting the material brought to the jury's attention. See id. at 275.
Tudor period, we encounter trials without these modern constraints because the law imposed no requirement comparable to modern notions of relevance. If an advocate could inflame the passions of the jury, nothing forbade the jury to give vent to those passions in its verdict. Hence, advocates had a clear incentive to engage in forensic flourishes, but no clear indications about where they should direct those flourishes.

Before examining the themes in the Tudor treason trials, however, it is possible to dispose of two initial points. First, whatever the inflammatory potential of an advocate’s behavior, there is little reason to focus on the type of name-calling Coke used in Raleigh’s trial. Although Stephen asserted that Coke “reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court,” it is not difficult to find mid-twentieth-century American trials in which the prosecution has used similarly inflammatory language. For example, prosecutors have described defendants as “a blackhearted traitor,” “a rattlesnake,” or “a type of worm.” Stephen’s attitude seemingly reflects the greater restraint of the English bar; American courts do not limit the prosecutor to “a vigorless summation of fact in Chesterfieldian politeness.” Nonetheless, name-calling, even though it may be effective, is hardly a strategy, and it deserves no further attention.

Second, some mention should be made of the utility of legal arguments by the accused. In his work on Tudor treason law, Professor Bellamy has asserted that “[t]he most telling response the accused could offer... was a challenge to learned counsel on a point of law.” It is difficult to understand why this should be true. However indistinct many facets of courtroom procedure were in the sixteenth century, it is clear that the judge, not the jury, determined issues of law. To the degree that the accused could persuade the judges on a legal point, the accused, of course, made headway. Although the jury arguably had

90. 1 J. Stephen, supra note 6, at 333.
93. United States v. Walker, 190 F.2d 481, 484 (2d Cir. 1951).
94. For a discussion contrasting English and American attitudes toward such behavior, see Alshuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 Tex. L. Rev. 629, 644 (1973); M. Graham, Tightening the Reins of Justice in America 271 (1982) (contrasting American “holy war of advocacy” with greater detachment of English barristers).
95. Ballard v. United States, 152 F.2d 941, 943 (9th Cir. 1946). Defendants were charged with using the mails to defraud in connection with a supposedly religious solicitation of the public. See United States v. Ballard, 322 U.S. 78 (1944). The majority of the Ninth Circuit refused to overturn the defendants’ convictions on the basis of prosecutorial comments such as “this Ballard racket...a flim flam scheme that has been unparalleled in history” and “the most successful fakers in the history of fakery.” See 152 F.2d at 944. Coke, one suspects, would have approved of such overstatement.
96. T. Bellamy, supra note 30, at 151.
some power of nullification, the force of legal arguments that the judge rejected would likely not persuade the jury that the judge was wrong on the law. Accordingly, the article addresses the defendant’s legal arguments in a different guise—as methods for appealing to the sympathy of the jury on the ground that the trial was unfair.

B. Conscious Advocacy

Because the medieval heritage did not stress advocacy on factual matters, a preliminary question is whether the participants consciously engaged in advocacy at all. The answer, of course, is that they did. Two factors in particular demonstrate this point.

First, both the attorneys for the crown and the defendants repeatedly addressed themselves to the jury. In Raleigh’s trial, for example, Raleigh exclaimed “[y]ou gentlemen of the Jury, mark this” with respect to a certain piece of evidence, and repeatedly addressed the jury directly. Coke similarly spoke directly to the jury and considered the opportunity to address the jury last so important that he threw a tantrum and refused to proceed with the trial when the judges informed him that Raleigh would get to speak last. One encounters other litigants directly addressing the jury throughout the Tudor treason trials. For example, in his trial in 1554, defendant Nicholas Throckmorton spoke to the jury by name at least six times, and the prosecutors did so at least four times during the trial. Other illustrations abound. Thus, the participants were certainly aware of the need to direct their attention to the jury.

Second, the defendants remarked about the oratorical powers of the prosecuting attorneys. For example, in the trial of Edmund

---

97. At the end of the eighteenth century, some still argued that the jury had this power. See C. Stanhope, The Rights of Juries (London 1792). Stanhope said:
The Law of England unquestionably is, that Juries have not only the Power, but also the Right, to decide according to their Consciences. It is, moreover, the Duty of a Jury to exercise that Right; for, the Law expects . . . that they should not give a General Verdict, in blind Compliance with the Opinion of the Court, or Judge, either as to Matter of Law or Fact, without the Conviction of their own Minds. . . .

Id. at 63 (emphasis in original).

98. 2 State Trials at 24.

99. See id. at 6, 10, 25.

100. See id. at 10, 24.

101. See id. at 26.

102. See 1 State Trials at 874, 878, 880, 882, 886, 889.

103. See id. at 873, 884, 889, 895.

104. See Reg. v. Perrot, 1 State Trials 1315, 1323 (1592) (“Mr. Solicitor then said unto the Jury”; “Then Mr. Attorney turning to the Jury said”); Reg. v. Udall, 1 State Trials 1271, 1279 (1590) (prosecutor refers to “My masters, you of the Jury”); id. at 1280 (defendant suggests “Let the Jury consider how that point is proven by it”); id. at 1281 (prosecutor invites “You of the Jury consider this”); Reg. v. Abington, 1 State Trials 1141, 1145 (1586) (“It is well the Jury doth hear your answers”); id. at 1148 (“Let the Jury consider of this Answer”; “Then said the Attorney to the Jury”); id. at 1151 (“Then said Tilney [a defendant] unto the Jury. My very good friends and countrymen of the Jury”); Reg. v. Campion, 1 State Trials 1049, 1057 (1581) (“You, Men of the Jury, I pray you listen.”).
Campion and others in 1581, the defendants demanded "whether [the Queen’s attorney] came as an orator to accuse them, or as a pleader to give in evidence," and Campion later cautioned the jurors: "Who seeith not but these be odious circumstances to bring a man in hatred with the Jury." Similarly, the Earl of Essex observed that "out of a form and custom of speaking, these orators would make them more odious that come to the bar." Despite the absence of a body of rules governing advocacy, therefore, the participants in the Tudor treason trials assumed that the professionals would outdo the amateurs.

C. Emphasizing the Stakes

A theme that one might expect participants to have emphasized in medieval trials would be the significance of the issues at stake in the litigation for both the parties and the jury. Even if the parties could rely upon the jury to reach its own conclusions about the facts, it might behoove them to galvanize the jury to favorable action by emphasizing the importance of the jury’s task. Both prosecutors and defendants made such points in the Tudor treason trials.

The prosecutors emphasized the stability and prosperity of the realm. Under the Tudors, England apparently enjoyed a golden age; the Elizabethan era, in particular, has long stood as a symbol of economic, military, and artistic achievement. Compared to conditions in strife-torn France, the state of England was surely to be envied. Arguably the prosecutors’ recitals were to some extent a matter of form, but the prosecutors appeared also to speak directly to concerns dear to the jurors. The propertied persons who served on Tudor juries would have appreciated the contrast between conditions in England and France, and recognized the risk that England’s stability and prosperity might not last long. For England, prosperity seemed a very fragile thing. Playing on this theme, prosecutors regularly emphasized the tranquility of the realm and the goodness of the monarch. For example, in the 1581 trial of Edmund Campion and other Jesuits, Queen’s Counsel Anderson began: “With how good and gracious a prince the Almighty hath blessed this land, continuing the space of 23 years, the peace, the tranquility, mercies and abundant supplies. . .” In the same vein, in Raleigh’s trial the King’s Serjeant emphasized that “[i]n our King consists all our happiness, and the true use of the Gospel; a thing which we all wish to be settled, after the death of the queen.”

105. 1 State Trials at 1053.
106. Id. at 1054.
107. 1 State Trials at 1354.
108. 1 State Trials at 1051.
109. 2 State Trials at 4; see also id. at 7 (Coke observes that “I shall not need, my lords, to speak any thing concerning the King, nor of the bounty and sweetness of his nature.”); Reg. v. Knightly, 1 State Trials 1263, 1263 (1588) (Attorney General opens “That the prosperous and happy state of her majesty was not unknown to them all.”).
Standing as a threat to all the advantages of prosperity was the defendant. The crown usually charged the defendant with compassing the death of the monarch and thus threatening to plunge the nation into the rigors of a fight over the succession and, in all probability, a fight over religion as well. Prosecutors, therefore, not only invoked the benefits of the present, but also emphasized the risks posed by the defendant’s alleged activities. In Campion’s trial, for example, the queen’s counsel read part of a sermon given by one defendant to prove that “the great day [of reconversion] is threatened, comfortable to them, and terrible to us.” Similarly, in the trial of Mary Queen of Scots, after describing Mary’s desire to ally England with Spain, “[t]he Solicitor put the Commissioners [sent to try her] in mind what would become of them, their honors, estates and posterities, if the kingdom were so conveyed.” In Raleigh’s trial, the prosecution invoked similar portents with respect to the new monarch; generally the prosecution tried to make the triers of fact aware of their personal stake in the result.

Somewhat in response, defendants tended to emphasize the consequences of the litigation for themselves and for their families. For example, Raleigh urged the jury to attend closely to the proceedings for “[t]his is that which must either condemn, or give me life; which must free me, or send my wife and children to beg their bread about the streets.” Similarly, Thomas Howard told the peers who tried him in 1571 that “I stand here before you for my life, lands and goods, my children and my posterity.” Other defendants made the same points.

In terms of the guilt or innocence of any given defendant, the personal stake of either the jurors or the defendant was not relevant, and the emphasis placed on these points is best viewed as a technique of advocacy. This is not to say that from a modern perspective these litigants were ineffective advocates. To the contrary, attorneys still stress such concerns, but these arguments are not based on the probative value of the evidence.

110. 1 State Trials at 1063.
111. 1 State Trials at 1188.
112. 2 State Trials at 16-17 (Coke asserts that if legal requirements for conviction were as stringent as claimed by Raleigh, “[t]he crown shall never stand one year on the head of the king”).
113. Id. at 10.
114. 1 State Trials at 966.
115. See Reg. v. Perrot, 1 State Trials 1315, 1326 (1592) (defendant urges jury to “have a conscience in the matter; and to remember that his blood would be required at their hands.”); Reg. v. Throckmorton, 1 State Trials 869, 880 (1554) (defendant asserts “I may of right take exception to Vaughan’s testimony, my life and all that I have depending thereupon”); id. at 898 (“the trial of my innocence, the trial of my life, lands, and goods, and the destruction of my posterity forever, doth rest in your good judgments. ... How grievous and horrible the shedding of innocents blood is in the sight of Almighty God.”).
116. See, e.g., J. Mitford, The Trial of Dr. Srock 189-90 (1970) (“Mr. Wall [prosecutor], one eye on the Gallup poll, played the favorite themes of the moment: dangers of permissiveness, and law and order.”).
D. Fairness of the Proceedings

From a modern perspective, the procedures used in sixteenth-century trials seem unfair, particularly so in treason trials. The harshness of the process was not lost on defendants, who repeatedly attacked the fairness of the trials, emphasizing two main points.

First, defendants repeatedly mentioned their poor memories, often attributing the problem to pretrial imprisonment. Thomas More claimed that his imprisonment impaired both his memory and his intelligence, and asserted that he "could scarce remember the third part of what was objected" in his indictment.117 Nicholas Throckmorton claimed that "my memory is not good, and the same much decayed since my grievous imprisonment"118 and pointed out further that he had never studied the law.119 Raleigh also cited "the weakness of my memory"120 and urged that "[i]f ever I read a word of the law of statutes before I was a Prisoner in the Tower, God confound me."121 Undoubtedly, imprisonment in the Tower was often an arduous experience, and the crown intended it to be for those accused of treason.122 But the effects of imprisonment were essentially irrelevant to the defendant's guilt or innocence.

Moreover, one must also take these assertions by the defendants with a grain of salt. Despite his protestations, Raleigh was in fact listed as a member of the Middle Temple in 1575,123 and he had undoubtedly studied the law while a prisoner in the Tower.124 Thomas More, in fact, appeared to recall the charges against him with great specificity and, as Professor Elton has observed, "defended himself brilliantly."125 Throckmorton quoted statutes verbatim,126 his general preparedness prompting Queen's Serjeant Stanford to exclaim that "[i]f I had thought you so well furnished with Book Cases I would have been

117. 1 State Trials at 387, 388.
118. 1 State Trials at 872.
119. Id. at 892.
120. 2 State Trials at 4. In his trial in 1571, the Duke of Norfolk referred to his weak memory four times. See 1 State Trials at 967, 968, 972, 1011. Nonetheless, the duke was able to cite Bracton and the three grounds for the 1352 treason statute, prompting the Attorney General to observe that "it seemeth you have had books and counsel, you allege Books, Statutes, and Bracton." Id. at 1027.
121. 2 State Trials at 16. It should be noted that this statement was made in response to the argument that Raleigh had, in reliance on a legal requirement for two accusers, confined his traitorous dealings to Cobham. See infra text accompanying note 147.
122. T. Bellamy, supra note 30, at 93-94 (purpose of pretrial imprisonment to weaken defendant and cause him to talk).
123. W. Wallace, supra note 8, at 10.
124. Id. at 207.
125. England Under Tudors, supra note 17, at 139; cf. E. Reynolds, The Trial of Sir Thomas More 79 (1964) ("There was no sign of any decline in his mental alertness; what he feared was physical collapse.").
126. See 1 State Trials at 888-89. His performance on this score prompted one of the prosecuting attorneys to remark that "[m]uch think Throckmorton, you need not to have the Statutes, for you have them meetly perfectly." Id. at 889.
better provided for you."\textsuperscript{127} Particularly in view of their actual performances, it is reasonable to conclude that these defendants designed their protestations in part to win sympathy from the jury.

Second, beyond stressing their weakness, defendants also attacked the fairness of the procedure under which the crown tried them. Raleigh, for example, asserted that "[y]ou try me by the Spanish Inquisition" when the crown rejected his requests to have his accuser Cobham brought before him.\textsuperscript{128} Throckmorton repeatedly hammered away at such points. Denied law books, he protested "Do you bring me hither to try me by the law, and will not show me the law?"\textsuperscript{129} He added that "I have only the form and the image of the law"\textsuperscript{130} and concluded by exclaiming "Oh merciful God! . . . [W]hat manner of proceedings are these?"\textsuperscript{131} Yet once the judges rejected these legal arguments, the defendants' protests were irrelevant; again the protests appear designed to appeal to the jury's sense of fair play. Indeed, such tactics are not unknown today.\textsuperscript{132}

These appeals did not go unnoticed by the prosecution or the judges. In part, no doubt, their concern lay more with the role of the trials as spectacle than with the impact of these maneuvers on the jury, but it is difficult to believe that some of their attention was not focused on the jury, and the accommodations made should be viewed in this light. Thus, for example, Raleigh was given a table and ink to assist him in conducting his defense.\textsuperscript{133} Beyond that, Coke assured Raleigh's jury that "[w]e carry a just mind, to condemn no man, but upon plain Evidence."\textsuperscript{134} In other cases, the judges picked up on these themes. Lord Chief Justice Wray assured defendant Edmund Campion that "[w]e would be loth you should have any occasion to complain on the court."\textsuperscript{135} In the same vein, the Lord Chamberlain told defendant John Perrot that "never was any man that came to that place dealt withal so favorably as he [Perrot] was."\textsuperscript{136} However effectively these responses blunted the defendants' arguments, like the arguments these responses had nothing to do with the jury's determination of guilt or innocence based on the evidence presented.

\textsuperscript{127} \textit{Id.} at 892.
\textsuperscript{128} \textit{2 State Trials} at 15.
\textsuperscript{129} \textit{1 State Trials} at 887.
\textsuperscript{130} \textit{Id.} at 888.
\textsuperscript{131} \textit{Id.} at 896.
\textsuperscript{133} \textit{2 State Trials} at 17. In the same vein, Thomas More, complaining of weakness due to imprisonment, was given a chair. \textit{See 1 State Trials} at 388.
\textsuperscript{134} \textit{2 State Trials} at 5.
\textsuperscript{135} \textit{1 State Trials} at 1069.
\textsuperscript{136} \textit{1 State Trials} at 1325.
E. The Man of Wit Theme

"Yond Cassius has a lean and hungry look. He thinks too much; such men are dangerous."

—W. Shakespeare 137

Perhaps Shakespeare gave voice to a universal uneasiness about men who "think too much." Surely this theme crops up frequently in treason trials conducted at the time Shakespeare was writing. 138 In a sense, the protestations of poor memory and ignorance made by defendants address this theme. For example, Throckmorton not only recognized the importance of advocacy, but also quickly sought to shift the mantle of wit to his hapless adversary, Serjeant Stanford, at the beginning of his trial:

It is lawful for you to use your gifts, which I know God hath largely given you, as your learning, art and eloquence, so as thereby you do not seduce the minds of the simple and unlearned Jury, to credit matters otherwise than they be. For Master Serjeant, I know how by presumptions, applying, implying, inferring, conjecturing, deducing of arguments, wresting and exceeding . . . confessions, that unlearned men may be enchanted to think and judge those that be things indifferent, or at the worst but oversights, to be great Treasons; such powers orators have. 139

Given Throckmorton's mastery of the situation, it is difficult to accept his asserted concern about being outmaneuvered in the courtroom. Instead, Throckmorton sought to make the jury skeptical about the points made by the prosecutors.

Ordinarily, however, prosecutors stressed the man of wit theme, repeatedly portraying defendants as clever and therefore untrustworthy. For example, Coke warned Raleigh's jury that "we have to deal to-day with a man of wit." 140 Similarly, when Edmund Campion made telling points in his defense, Attorney General Popham objected that "[t]here is no cloth so coarse, but Campion can cast a color on it." 141 It is hard to believe that Edmund Coke was genuinely worried that even Raleigh had the intellectual advantage of him in court. Instead, Coke understood the theme would strike a responsive chord in many a juror's heart, and he knew he could use the theme to advantage in frustrating Raleigh's efforts to avoid conviction.

Moreover, the prosecution could contrast the defendant's wily

---

137. W. Shakespeare, Julius Caesar, Act 1, Scene 2, at lines 194-95.
138. Julius Caesar was apparently first performed in 1599, four years before Raleigh's trial.
139. 1 State Trials at 872; see also Reg. v. Knightly, 1 State Trials 1263, 1266 (1588) (defendant "besought their lordships to consider his simple wit"); Rex v. Raleigh, 2 State Trials at 25 (1603) (Raleigh invites jury to "[c]onsider my disability, and their ability.").
140. 2 State Trials at 8; see also id. at 25-26 ("I hope to make this so clear, as that the wit of man shall have no colour to answer it. . . . Raleigh hath no answer but the shadow of as much wit, as the wit of man can devise.").
141. 1 State Trials at 1065.
cleverness with proper respect for the virtues of Tudor government. Robert Cecil thus attacked Essex on the basis that “[a]lthough I lack wit and you, Essex, have it, I shall win out for . . . I stand for loyalty.”142 Similarly, Chief Justice Catlin admonished Robert Hickford, who had plead guilty, that “I would to God there had been in thee as much loyalty and truth, as there is learning.”143 Presented with a choice between the defendant’s cunning and the prosecution’s loyalty, the crown could expect jurors to return convictions.

The man of wit theme was also useful in blunting defendants’ protestations about the fairness of their trials and the adequacy of the evidence against them. Prosecutors attempted to treat defense efforts to use the few legal tools available to them as “quiddities and quirks invented to delay matters.”144 Further, the prosecution even attempted to convert the defendant’s reliance on the law into proof of the defendant’s evil heart, a ground that many prosecutors urged to justify a treason conviction. The best example of this strategy is the prosecutorial response to a defendant’s argument that the law required two competent accusers in treason trials, a legal issue that has received much attention and remained unsettled.145 Defendants who made this argument were, according to prosecutors, willfully undermining the security of the state. For example, when Edward Abington raised this point at his trial in 1586, the Queen’s Solicitor responded that “if it should be as [the defendant] would have it, there could never any Treason be sufficiently proved.”146 Coke responded to Raleigh’s protests about the need for another accuser by arguing that Raleigh had deliberately confined his traitorous dealings to his alleged pawn Cobham in order to invoke this defense if their plans fell through.147 Thus, the suspicion of cleverness could even comprehend such calculation based on supposed legal requirements. Moreover, cleverness alone could be a ground for attack; thus, when Nicholas Throckmorton capably rebutted the prosecution’s charges, the Queen’s Attorney responded with the dire prediction that “[i]f the prisoner may avoid his Treasons after this

142. 1 STATE TRIALS at 1351. Essex’s wit at court did not extend to cleverness in the courtroom, but it was harped upon. Thus, Cecil added that “so well I know, you have wit at will.” Id. at 1351. Even Coke raised the point: “I know you can speak as well as any man.” Id. at 1338. It is worth noting that Cecil truly did merit the mantle of wit he thrust on Essex. See J. NEALE, supra note 16, at 342 (Robert Cecil inherited his father’s intelligence).
143. 1 STATE TRIALS at 1045.
144. Rex v. Bonner, 1 STATE TRIALS 631, 662 (1550) (statement of Sir Thomas Smith, the King’s principal secretary).
145. See Hill, supra note 12.
146. 1 STATE TRIALS at 1148. See also Reg. v. Thomas Howard, Duke of Norfolk, 1 STATE TRIALS 957, 992 (1571) (“[T]he law hath been found too hard and dangerous for the prince.”); id. at 1027 (regarding alleged disqualification of Scots as witnesses: “This were a strange device, that Scots might not be witnesses; for so, if a man would commit Treason, and make none privy but Scots, the Treason were unpunishable”).
147. 2 STATE TRIALS at 16. Certainly this argument is attenuated; it prompted Raleigh’s response denying having read the law before his imprisonment. See supra note 121 and accompanying text.
manner the queen's surety shall be in great jeopardy." 148

Putting aside popular prejudices against men who "think too much," the man of wit theme may have been peculiarly appropriate in treason cases. Elizabethan England highly prized wit, and men were able to rise to prominence by their wit. Raleigh was a leading example of the phenomenon, for he had risen from obscurity to great power through his wit. In a sense, this upward mobility based on wit was a symptom of the shift from a medieval to a modern state. 149 Precisely this sort of success could bring about greater ambition which, in that unruly age, might lead to treason. Certainly Essex's rise and fall fit this mold; having risen to power at court, he aspired to greater power through scheming once his prominence at court faded. 150 Thus, wit itself might tempt the talented into treason, and once so tempted the able would surely be more dangerous than less capable malefactors. Indeed, the stealth and calculation required of a successful traitor makes intelligence highly important. Accordingly, one might even argue in modern terms that the defendant's intelligence was relevant. In any event, the prosecution clearly emphasized it.

F. Attacking Witnesses

As we have seen, the evolution of trial by jury involved a shift from investigation by jurors to reliance on evidence from witnesses. For various reasons, however, the early common law disqualified many persons from serving as witnesses—parties, their relatives, convicted felons, and other categories of persons could not give evidence. 151 Although these exclusionary rules proved unworkable as evidence from witnesses became more important, such attitudes surface in the Tudor treason trials. For example, the Duke of Norfolk urged that one witness against him was "a stranger and a Scot; a stranger can be no sufficient Witness, much less a Scot." 152 As to another witness, Norfolk asserted that the witness "hath confessed himself a Traitor, and therefore is no sufficient witness against me." 153 The court rejected these arguments for disqualification; the evidence could be considered. 154

148. 1 State Trials at 892.
150. For a description of the rise and fall of Essex, see J. Neale, supra note 16, at 331-50, 365-91.
151. For a list of American statutes eliminating such impediments, see 2 Wigmore, Evidenve in Trials at Common Laws § 488 (J. Chadbourn rev. ed. 1979).
152. 1 State Trials at 1002.
153. Id. at 1010. On another point Norfolk was more modern in his approach. The queen's attorney urged that the crown's evidence was more forceful because the crown had three witnesses against the Duke's story. This victory by numbers approach is a sort of holdover from the mediaval trial by witnesses. See supra text following note 34. The Duke properly responded that "twenty witnesses may prove but one witness." Id. at 1013.
154. For an early seventeenth-century articulation of the view that relatives of parties could
The modern view is that witnesses capable of perceiving events and making themselves understood by the jury are competent.155 The law entrusts the jury with determining the weight to give to each witness’s testimony. The advocates therefore try to discredit the witness. The Tudor treason trials show that the participants relied on techniques that are still the primary methods for discrediting witnesses—showing bias, attacking the character of the witness through evidence of the witness’s reputation or past misconduct, and emphasizing prior statements by the witness that are inconsistent with the witness’s testimony. In this extremely important sense, sixteenth-century advocates were quite modern in orientation.

1. Bias

The modern cross-examiner may always elicit information showing the witness’s bias.156 Without the right to confront and cross-examine, the Tudor defendants still could make such arguments about the prosecution’s witnesses. Defendant Edward Abington, whom convicted traitor Anthony Babington had named as a plotter, put the argument thus: “And for Babington’s Accusation, what force can it be of? for he having committed and confessed Treason in the most high degree, there was no hope for him but to accuse.”157 Similarly, Throckmorton asked, “who doth accuse me but this condemned man?”158 and Essex characterized the witnesses against him as “men within the danger of the law, and such as speak with a desire to live.”159 Prosecutors still face the perennial problem that prosecution witnesses are often criminals who may benefit from effective service in the witness chair. Tudor prosecutors could not escape this problem, and Tudor defendants were alert to use such bias to discredit testimony against them.

2. Character

The extent to which the law should permit a modern advocate to attack a witness on grounds of bad character or conduct has been the subject of much debate.160 Beyond doubt, such an attack is an effective method for discrediting the witness’s testimony in the eyes of the jury, and the debate has focused primarily on the type of character evidence or bad conduct that an advocate may properly inject into the trial.

---

be witnesses, see E. COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND 489 (R. Small ed. Philadelphia 1826).
155. See, e.g., FED. R. EVID. 601.
157. 1 STATE TRIALS at 1147.
158. 1 STATE TRIALS at 877.
159. 1 STATE TRIALS at 1348.
160. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 608[01] (1982); see Fed. R. Evid. 608 & 609.
Without restraint in this regard, sixteenth-century advocates often attacked witnesses forcefully. Consider, for example, the arguments made by Philip Howard, Earl of Arundel, in 1589:

To Walton, my lord took exception, affirming that he was a naughty lewd fellow, who had sold that little land he had to three several men: and of the other witnesses, he said, that some were attained, some indicted, bad men and prisoners, and that their words were worth little credit.  

These assertions would raise some problems under modern law. What exactly is a “naughty lewd fellow”? If that is a character trait, why does it bear on the witness’s credibility? Thomas More was closer to the mark in his trial when he told witness Richard Rich, who had recounted supposedly treasonous statements by More, that “you always lay under the odium of a very lying tongue, of a great gamester, and of no good name.” These aspects of Rich’s reputation are pertinent to Rich’s truthfulness, and would surely be proveable in a modern trial.

Philip Howard’s reference to witnesses’ prior bad acts does not make a distinction that a modern jurist might urge. That one witness defrauded other people might suggest that the witness lacked truthfulness, but the fact that a witness is a criminal defendant would not, standing alone, provide a basis under modern law for impeaching the witness. Status as a criminal defendant does not bear on credibility. But these modern rules did not exist in Tudor England; in general, the treason trial defendants were alert to the possibility of attacking prosecution witnesses on grounds of character, and suffered mainly for lack of opportunities to prove their points.

One particular character attack deserves special mention—the charge that the witness is an atheist. Coke laid such a charge against Raleigh in his trial, as some Catholic writers had in tracts circulated ten years before. Under modern rules, such a charge would not bear upon a witness’s ability to take the oath, but in the sixteenth century, the charge addressed a real concern about the credibility of the speaker.

---

161. 1 State Trials at 1258. See also Reg. v. Perrot, 1 State Trials 1315, 1325-26 (1592) (witness accused of being a counterfeiter, a common drunkard and liar, and of having changed religion five times in six years); Reg. v. Campion, 1 State Trials 1049, 1069 (1581) (witness objected to on grounds he is a murderer).

162. 1 State Trials at 390.

163. See, e.g., E. Cleary, supra note 156, ¶ 44; Fed. R. Evid. 608(a).

164. See, e.g., E. Cleary, supra note 156, ¶ 42; Fed. R. Evid. 608(b); cf. Fed. R. Evid. 609(a).

165. 2 State Trials at 28. For another example, see Reg. v. Campion, 1 State Trials 1049, 1069 (1581).

166. See E. Strathmann, supra note 9, at 25, 28. Not able to dismiss the charge without comment, Professor Strathmann concludes that in reality Raleigh’s unorthodox views were not atheistic. See id. at 271-72. It is noteworthy, however, that there was enough substance in the general suspicion to cause this scholar to tarry over it.

167. See Fed. R. Evid. 603. As the Advisory Committee note to Rule 603 explains, the rule is “designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children.”
Thus, while the predicate for the charge is passé, in terms of advocacy the charge makes perfect sense.

3. Prior Inconsistent Statement

Commentators often say that the most effective impeachment is showing that the witness made a prior inconsistent statement. Putting aside questions of credibility, the inconsistency robs the witness's present testimony of much of its force, by suggesting, on this point at least, that the witness's recollection is doubtful.\textsuperscript{168}

Sixteenth-century defendants recognized the impeachment power of such evidence. Thus the Puritan John Udall, on trial in 1590, attacked one witness on the ground that "he hath reported it so diversely, that it seemeth he remembereth not what he said."\textsuperscript{169} Defendants also used such contradictions to attack the witness's honesty. Raleigh, for example, countered Cobham's accusations against him with a letter from Cobham that exonerated Raleigh and exclaimed: "Now I wonder how many souls this man hath! He damsone in this Letter, another in that."\textsuperscript{170} The procedural disadvantages under which the defendants labored severely handicapped them in proving such prior inconsistent statements, but they appreciated whatever use that they could make of these statements. According to Professor Barnes, civil litigants often used petitions before the Star Chamber to unearth discrepancies in a witness's testimony for impeachment purposes.\textsuperscript{171} Thus, when the tools were available, litigants surely appreciated their value. All that the treason trial defendants lacked was a method for obtaining proof of them.

G. Probative Weight of Evidence

In addition to attacking the credibility of opposing witnesses, modern advocates may also attack the probative weight of the evidence. A defendant's reliance on such arguments represents a true appreciation of modern trial concerns, for it emphasizes both the importance of the factual presentation during trial (as opposed to private information-gathering by the jury) and the value of the jury's rational analysis of factual material (as opposed to trusting the intervention of divine will in a trial by ordeal or battle). Such arguments also surfaced in Tudor treason trials.

By far the most important function of inferences from evidence is

\textsuperscript{168} See E. Cleary, \textit{supra} note 156, § 34, at 74:
The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.

\textsuperscript{169} \textit{1 State Trials} at 1281.

\textsuperscript{170} \textit{2 State Trials} at 29.

\textsuperscript{171} Barnes, \textit{supra} note 84, at 19-20.
to link pieces of circumstantial evidence together. Modern criminal trials, particularly in the wake of decisions limiting the use of in-custody statements by the defendant,\(^{172}\) frequently depend heavily on careful presentations of circumstantial, often scientific, evidence linking the defendant to the crime. Sixteenth-century trials depended little on circumstantial evidence, however. Evidence tended to be direct, albeit scanty and subject to attack, and in treason cases some even argued that the two witness requirement precluded a prosecution based on circumstantial evidence.\(^{173}\) Advocates nevertheless appreciated the utility of circumstantial evidence, and arguments recognizing the force of such information do surface in a few instances. For example, in his trial, the Duke of Norfolk, accused of collaborating in a plot to put Mary Stuart on the throne, excused his destruction of letters he received from her on the ground that “they were nothing but private letters”\(^{174}\) and emphasized his failure to flee England rather than face trial as a factor arguing for his acquittal.\(^{175}\) In each instance, Norfolk’s unstated assumption was that flight, or the destruction of evidence, is circumstantial evidence of the defendant’s consciousness of guilt, an accepted modern evidentiary idea.\(^{176}\) The argument, of course, depends for its weight on rational deductions from proven facts.

Another recurring circumstantial argument involves the defendant’s emphasis of the prosecution’s failure to produce available evidence. Throckmorton, for example, repeatedly made this point. Throckmorton was charged with complicity in Sir Thomas Wyatt’s Rebellion against Mary Tudor, partly on the basis of testimony by Cuthbert Vaughan that he had made arrangements for the plot with Throckmorton. Throckmorton attacked Vaughan’s testimony by stressing the absence of corroborating evidence that would have been available to the prosecution had it existed:

[Vaughan] referred the confirmation of this surmised matter to a letter sent from him to sir Tho. Wyat; which letter doth neither appear, nor any Testimony of the said Mr. Wyat against me touching the matter: for I doubt not sir Tho. Wyat hath been examined of me, and hath said what he could directly or indirectly. Also Vaughan saith, that young Edward Wyat could confirm this matter, as one that knew this pretended discourse betwixt Vaughan and me. . . . [B]ut where is Edw. Wyat’s depositions of any thing against me. . . . I desired twice or thrice Edw. Wyat should be examined; and I am sure, and most assured, he hath been willed to

---

173. Thus Raleigh asserted that “[y]ou try me by the Spanish Inquisition if you proceed only by the circumstances, without two Witnesses.” 2 State Trials at 13. For discussion of the two witness rule, see supra text accompanying note 145.
174. 1 State Trials at 1014.
175. Id. at 1002.
176. E. Cleary, supra note 156, § 271.
say what he could . . . .\textsuperscript{177}

Others made similar arguments.\textsuperscript{178} These arguments are also based on a deduction from the material presented—that the omitted information would have helped the defendant—which is an accepted modern gambit of advocacy.\textsuperscript{179}

Defendants also used logic to counter prosecution evidence on the ground that it was improbable. Raleigh, accused of plotting to overthrow James and assist an invading Spanish army, asked the jury to consider “[i]s it not strange for me to make myself Robin Hood . . . knowing England to be in better estate to defend itself than ever it was.”\textsuperscript{180} Several defendants argued that the jury should not believe their accusers because, assuming the defendants had traitorous intentions, they likely would not have disclosed their intentions to such persons. Thomas More, for example, after describing Richard Rich’s reputation for lying, asked: “Can it therefore seem likely . . . that I should in so weighty an affair as this, act so unadvisedly, as to trust Mr. Rich, a man I had always so mean an opinion of, in reference to his truth and honesty . . . ?”\textsuperscript{181}

With this focus on rational deductions from the evidence, the advocates adopted a thoroughly modern perspective. Procedural limitations precluded them from gathering and presenting other material that would have provided a basis for further such arguments. The stimulus was clearly present, however, and only the tools were lacking.

\section{V. Concluding Observations}

To the modern observer, particularly if trained in the law, the above canvas of the Tudor treason trials may seem to emphasize the obvious. In a real sense, however, that is precisely the point. Modern evidence scholars like to say that evidentiary decisions are based as much on common sense as on common law.\textsuperscript{182} The closely-related

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{177} 1 Success Trials at 878-79; see also id. at 875-76 (“Master Crofis is yet living, and is here this day; how happeneth it he is not brought face to face to justify this matter . . . ?”).
\item \textsuperscript{178} See Reg. v. Udall, 1 Success Trials 1271, 1281 (1590) (defendant denies that the written statement accurately reflects the witness’s testimony “for if it be, why is he not present to verify it face to face . . . ?”); id. at 1282 (“Why is not Thompkins heret o [sic] declare his testimony, and to say what he can?”); compare Rex v. Raleigh, 2 State Trials 1, 7 (1603) (Coke argues that an accusation is more forceful evidence where it tends to condemn the accuser).
\item \textsuperscript{179} E. Cleary, supra note 156, § 272.
\item \textsuperscript{180} 2 State Trials at 11.
\item \textsuperscript{181} 1 Success Trials at 390-91; see also Reg. v. Throckmorton, 1 Success Trials 869, 878 (1554) (“I refer it to your good judgment, whether it were like that I knowing only Vaughan’s person from another man . . . would so frankly discover my mind to him in so dangerous a matter.”); Reg. v. Abington, 1 State Trials 1141, 1151 (1586) (“that I should trust him in so high a matter for three times acquaintance, is altogether improbable.”); Reg. v. Essex, 1 State Trials 1333, 1343 (1600) (“It is very probable that I should trust him so far, that had before betrayed me, is it not?”).
\item \textsuperscript{182} See, e.g., J. Maguire, Evidence: Common Sense and Common Law 1-9 (1947) (arguing that trial courts decide evidence issues more on common sense than on dry rules of law).
\end{itemize}
\end{footnotesize}
concepts of effective advocacy depend even more on common sense. But the modern emphasis on common sense and rational decision-making was not always true of judicial proceedings. Imprisoned in our twentieth-century outlook, we regard the maneuvers of sixteenth-century advocates as obvious, if somewhat lumbering. Viewed from the perspective of an equal period before the sixteenth century, that is, from the twelfth century, these “natural” concerns were distant indeed. In the twelfth century, English society trusted God, not man, to decide questions of guilt and innocence. Even the relatively new institution of the jury trial, although looking to decisions by men, depended not on advocacy by litigants, but on investigation by jurors. A professional class of lawyers had yet to surface, and once it did appear lawyers at first disdained factual disputes and restricted themselves to arguing legal issues. By no stretch of the imagination could an observer say that the trial system was “modern” in the twelfth century.

The evolution to modern trial methods was gradual, but the State Trials confirm that this evolution had advanced a great deal by the sixteenth century. The fact that we recognize the strategies employed by the participants, rudimentary though they may seem, shows that the trial system had traversed a great distance since the twelfth century. The participants, even though not formally schooled in advocacy, relied on methods for attacking adverse witnesses that continue to be critical to modern advocates. The participants also argued about the weight to be accorded the evidence. Even where the participants addressed their efforts to jury-swaying on matters that are not technically relevant, one can observe contemporary parallels: Where Tudor prosecutors played on the jurors’ fear of civil war, contemporary prosecutors may play on jurors’ fear of crime in the streets. A Tudor defendant, like a modern defendant, would appeal to jurors to consider the severe consequences of their decision. Generalization is a hazardous business, especially when done at several centuries’ remove and based on a limited number of examples. Nevertheless, the behavior of the participants in the Tudor treason trials suggests that they clearly understood the main outlines of advocacy and that developments over the ensuing four centuries represent refinements in advocacy methods, and not revolutionary new approaches. This insight into the emergence of forensic themes is not obvious, but it is significant.

183. This is not to say that systematic analysis of such issues is not useful. See J. Wigmore, The Principles of Judicial Proof 1-4 (1913) (emphasizing need to develop “scientific” principles of constructing factual arguments); Twining, supra note 10.