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Margery S. Schauer

Frederick Schauer

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LAW AS THE ENGINE OF STATE: THE TRIAL OF ANNE BOLEYN

MARGERY STONE SCHAUER*
AND
FREDERICK SCHAUER**

Until recently it was common to use the state trials of Tudor England in order to generalize about legal principles, procedures, and institutions in the Tudor era.¹ Now the pendulum seems to have swung to the opposite extreme. Legal historians have recognized that the state trials were politically inspired and that the procedures employed in these trials bore little resemblance to the procedures prevalent in more mundane civil and criminal litigation.² Scholars today often treat the state trials as political events having little if any relevance to the study of the history of legal institutions.³

This latter view, deemphasizing the importance of the state trials to legal history, seems as misguided as the former view, which over-emphasized the legal significance of the state trial. The state trials were not midnight executions carried out by armies at the snap of the monarch's fingers. They were *trials*, with at least the outward manifestations of procedures carried out in accordance with governing statutes, settled legal procedures, and the general

* A.B., Clark University.

** Professor of Law, Marshall-Wythe School of Law, College of William and Mary; A.B., M.B.A., Dartmouth College; J.D., Harvard Law School.

"We are indebted to John Pagan for his detailed critical comments on an earlier draft of this Article. What errors remain are, of course, solely our own responsibility."

1. See, e.g., 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW 184-85* (1924); G. WILLIAMS, *THE PROOF OF GUILT 4-9* (1st ed. 1955).

2. See, e.g., J. COCKBURN, *A HISTORY OF ENGLISH ASSIZES 1558-1714*, at 124 (1972); G. ELTON, *POLICY AND POLICE* (1972); G. ELTON, *THE TUDOR CONSTITUTION 169-70* (1968) (distinguishing law from "the security services of the state"); J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974); 2 *THE REPORTS OF SIR JOHN SPELMAN, Introduction* 300 (J. Baker ed. 1978); Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 264-67 (1978).

3. See authorities cited at note 2 *supra*. See also Elton, *The Rule of Law in Sixteenth-Century England*, in *TUDOR MEN AND INSTITUTIONS* 265, 293 (A. Slavin ed. 1972).

rule of law. To say that such events had no effect on the general development of legal institutions is to ignore the purpose of using trial procedures as justifications for political acts. The use of trials in the treason cases of Tudor England illustrates an important feature of the Tudor view of law and legal institutions and provides additional insight into the relationship of law to politics, a relationship that can be understated as much as it can be exaggerated. If two of the purposes of a trial are to determine the facts and to do justice in accordance with law, then the use of a trial for other purposes is far from irrelevant. Indeed the use of trials to serve political goals casts doubt upon the underlying premises of the entire legal system. A trial that takes place for the sole purpose of legitimizing a political act of the sovereign decreases confidence in legal institutions generally, an effect that would not occur were the same political results produced without resort to the machinery of legal institutions. When law is used as "an engine of state,"⁴ it explains as much about law as about the state.

Moreover, the state trials only exemplify cases in which legal procedures are designed or modified to reflect varying underlying substantive values.⁵ When the interest of the state in conviction is higher than the interest in protecting against the wrongful conviction of the innocent and when procedures are designed to accommodate this distortion of values from ordinary criminal trials, the relationship of procedure to more basic values is evident. Thus, the procedures used in the state trials are instructive not only in

4. "The forms of law became the engines for the perpetration of judicial murders" T. PLUCKNETT, *TASWELL-MEAD'S ENGLISH CONSTITUTIONAL HISTORY* 232 (11th ed. 1960).

5. Thus, the rules of criminal procedure reflect the relative weight given by society to the harm of acquitting the guilty and convicting the innocent. This concept most commonly is attributed to Blackstone, who said "that it is better that ten guilty persons escape, than that one innocent suffer." 4 W. BLACKSTONE, *COMMENTARIES* * 358. In fact, this principle of comparative error has earlier origins. See text accompanying note 155 *infra*. The principle has been applied most often in burden of proof situations. See *In re Winship*, 397 U.S. 358 (1970). See generally Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 *YALE L.J.* 165 (1969); Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880 (1968); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 *HARV. L. REV.* 1187 (1979). This type of comparative weighing of harm influences not merely burden of proof but a wide range of procedural and substantive legal rules as well. See Schauer, *Fear, Risk, and the First Amendment: Unraveling the First Amendment*, 58 *B.U.L. REV.* 685 (1978).

the values that obtained in prosecutions for treason, but also in the largely different values that prevailed in other criminal prosecutions.

The trial of Anne Boleyn, second wife of Henry VIII, demonstrates these themes perhaps more clearly than any of the other state trials. Although much has been written about Anne Boleyn⁶ and the circumstances that led to her execution,⁷ little attention has been paid to the details of the trial which in effect ended her life. This deficiency is attributable partly to the paucity of firsthand accounts of that trial.⁸ Yet, a relatively accurate picture of the trial can be constructed from the records and studies that do exist. As a result, the focus on this particular state trial serves a dual purpose. It fills a gap in existing legal history, while providing the vehicle for analyzing the jurisprudential effect of the major

6. Among the general references are E. BENDER, *MEMOIRS OF THE LIFE OF ANNE BOLEYN*, I *THE HISTORICAL WORKS OF MISS BENDER* (1828); M. BRUCE, *ANNE BOLEYN* (1972); F. CHAMBERLIN, *THE PRIVATE CHARACTER OF HENRY THE EIGHTH* (1932); H. CHAPMAN, *ANNE BOLEYN* (1974); W.H. DIXON, *HISTORY OF TWO QUEENS* (1874); P. FRIEDMANN, *ANNE BOLEYN, A CHAPTER OF ENGLISH HISTORY* (1884); 1-2 J. FROUDE, *HISTORY OF ENGLAND* (1856-1870); J. SCARISBRICK, *HENRY VIII* (1968); P. SERGEANT, *ANNE BOLEYN: A STUDY* (rev. ed. 1934); P. SERGEANT, *THE LIFE OF ANNE BOLEYN* (1923); 2 A. STRICKLAND, *LIVES OF THE QUEENS OF ENGLAND 176-271* (1875); Wyatt, *Some Particulars of the Life of Queen Anne Boleigne*, in G. CAVENDISH, *THE LIFE OF CARDINAL WOLSEY* (S. Singer ed. 1827).

7. For general historical accounts and analyses, see E. BENDER, *supra* note 6, at 390-420; M. BRUCE, *supra* note 6, at 293-335; F. CHAMBERLIN, *supra* note 6, at 346-51; H. CHAPMAN, *supra* note 6, at 188-219; G. ELTON, *REFORM AND REFORMATION 250-56* (1977); P. FRIEDMANN, *supra* note 6, at 270-83; J. SCARISBRICK, *supra* note 6, at 348-50; 2 A. STRICKLAND, *supra* note 6, at 245-71; J. STRYPE, *ECCLESIASTICAL MEMORIALS 430-38* (Oxford 1822); Ives, *Faction at the Court of Henry VIII: The Fall of Anne Boleyn*, 57 *HIST.* 169 (1972).

8. One of the firsthand accounts is found in 1 *THE REPORTS OF SIR JOHN SPELMAN* 59, 70-71 (J.H. Baker ed. 1977). 1 COBBETT'S ST. TR. 409-34 (1809), reconstructs an account from relevant portions of the Harleian Manuscript at the British Museum, from 1 G. BURNET, *HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND 197-203* (1679), and from J. STRYPE, *ECCLESIASTICAL MEMORIALS* (1721). Cobbett also provides references to other early sources. Burnet's account is valuable because it also draws on the firsthand account of Anthony Anthony, a surveyor of the ordnance of the Tower. Anthony's report itself no longer exists. 1 G. BURNET, *THE HISTORY OF THE REFORMATION OF THE CHURCH OF ENGLAND 396-416* (Oxford 1829). The most complete collection of primary sources (including everything in the Public Record Office and the accounts of Eustace Chapuys, the Spanish Ambassador) is in J. GAIRDNER, *LETTERS AND PAPERS, FOREIGN AND DOMESTIC, OF THE REIGN OF HENRY VIII* (1887) [hereinafter cited as *LETTERS AND PAPERS*]. Volume 10 of this set contains many of the documents that are relevant to the trial. The narrative descriptions of the trial in this article are, except where otherwise noted, from the sources cited in this note, in conjunction with descriptions of the trial contained in the sources cited at notes 6 and 7 *supra*.

state trial on the law of Tudor England. By looking at the trial procedures in the context of the function that the trial was designed to serve, the relation among the law of treason, the common law, and the political process becomes apparent. This interaction is as much a part of the history of law as it is of the history of politics.

In order to do justice to these dual themes of the interrelationship between law and politics and the relationship between the law of the state trial and contemporaneous legal developments, it is necessary to understand their setting. Therefore, we will begin with the political background so that the purposes behind this particular trial can more clearly be understood. This will be followed by a description of the trial. The succeeding section analyzes the trial procedures, focusing on relevant similarities and differences between this trial and other trials of the period, both treason and otherwise. Finally, we offer an analysis of the function of the treason trial in Tudor England and an explanation of how the procedures at trial supported this function.

THE RISE AND FALL OF ANNE BOLEYN

Born in 1507,⁹ Anne Boleyn was a daughter of the English nobility. At the age of seven, she was sent to France, where she remained for the next seven years.¹⁰ In France, she served two queens before becoming an attendant to the sister of King Francis I. Anne was intelligent, vivacious, clever, arrogant, ruthlessly ambitious, nervously energetic, and what today would be called amoral. She returned from France to the court of Henry VIII, where she was placed as a lady-in-waiting to Queen Katharine. Her calculating coldness enabled her to exploit her sexual magnetism while keeping her virginity intact.

Anne's graceful French manners and fashions inevitably came to

9. The historical accounts that follow are, except as otherwise noted, from the authorities cited at notes 6 and 7 *supra*.

The date of Anne Boleyn's birth is the subject of some historical controversy. For the best evidence, see Gairdner, *The Age of Anne Boleyn*, 10 BRIT. HIST. REV. 104 (1895); Gairdner, *Mary and Anne Boleyn*, 8 ENG. HIST. REV. 53 (1893).

10. On the childhood and education of Anne Boleyn, see generally M. Stone Schauer, *Touch Me Not: The Early Years of Anne Boleyn* (1979) (unpublished manuscript in possession of the author).

the attention of Henry VIII. He was burdened with a visibly aging wife who was past the years when she might give Henry the sons the kingdom and he wanted and needed. The more Anne Boleyn refused to become the King's mistress, the more his desire for her increased, until he finally determined that she should be his wife and bear his sons. Divorcing the Spanish Katharine of Aragon should have been routine,¹¹ but the political situation was such that the Pope could not oblige. The ensuing six-year struggle, which has been amply chronicled elsewhere, saw the coming and going of ministers who failed to find the formula that would give the King his divorce. During those years, the Boleyn faction steadily rose in position and power, and Anne acquired the stature of Queen of England in everything but title. The long struggles of this impatient and explosive woman made her so irritable and nasty that the English people, as well as her own relatives and supporters, hated her.

Ultimately Anne Boleyn took direct action. Knowing beyond doubt that the Pope would not grant Henry's divorce and that she alone could force the King to break with Rome, she surrendered to Henry and became pregnant. Henry could not risk having an illegitimate son, and on or about January 25, 1533, a not-yet-divorced Henry VIII secretly married Anne Boleyn. Several months later Thomas Cranmer, Archbishop of Canterbury, proclaimed that the marriage of Henry and Katharine had been void *ab initio*,¹² rendering legitimate the marriage to Anne, who was promptly and officially crowned Queen of England. The marriage, however, was far from universally accepted, because many resented Anne or maintained their loyalties to Katharine, the Pope, or both.

After Anne's marriage, her failure to give birth to a son weakened her already shaky political position. First there was the birth of the future Elizabeth I, then one or two miscarriages, and finally

11. See generally M. ALBERT, *THE DIVORCE* (1965); G. MATTINGLY, *CATHERINE OF ARAGON* (1941).

12. At the time, all matrimonial matters, including questions as to the validity of a marriage, were exclusively in the hands of the ecclesiastical authorities. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 621-22 (7th ed. A. Goodhart & H. Hanbury 1956); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 303-04 (5th ed. 1956). See also J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 112, 391 (2d ed. 1979); G. RADCLIFFE & G. CROSS, *THE ENGLISH LEGAL SYSTEM* 232 (6th ed. G.J. Hand & D.J. Bentley 1977).

the premature birth of a stillborn boy, on the day of Katharine of Aragon's funeral. This failure to produce a male heir, more than anything else, led to Anne Boleyn's trial and execution. She had few supporters other than the King. When she lost Henry's protection, she was doomed. Because the marriage was no more fruitful than his first, Henry had to be released from it, and his expedient conscience and tendency toward mystical beliefs told him that the marriage was invalid. He is reported to have said that the marriage was "seduced by witchcraft, and for this reason he considered it null; and that this was evident because God did not permit them to have any male issue"¹³ Henry's loathing for the woman who had once so obsessed him combined with his current interest in Jane Seymour to make a quick end to the marriage all the more necessary.

For reasons discussed later in this Article,¹⁴ only a *legal* solution would suffice. Henry could not institute action on his own because he had to appear as the innocent and injured party. Thomas Cromwell, Henry's chief minister, would have to initiate the action on his own. As a member of Gray's Inn and as the former Chancellor of the Exchequer and Master of the Rolls, Cromwell fully appreciated the necessity and method of solving Henry's problem within the bounds of the law.¹⁵ The fates of Cromwell's predecessors who had failed to gratify Henry's wishes reminded Cromwell that ministers, as well as wives, could be replaced, and finding a lawful way to end Henry's marriage was as important to him as it was to Henry. Cromwell first approached the Bishop of London, who suggested that Anne Boleyn's precontract with the now Earl of Northumberland might be used as grounds for an annulment.¹⁶ But

13. The Spanish Ambassador is the source of this observation. Letter from Chapuys to Charles V (Jan. 29, 1535), reprinted in *LETTERS AND PAPERS*, *supra* note 8, no. 199, at 69-70. See also R. SETH, *STORIES OF GREAT WITCH TRIALS* 5 (1967), which documents Henry's pervasive belief in sorcery and witchcraft.

14. See text accompanying notes 154-73 *infra*.

15. On Cromwell, see generally, E. FOSS, *A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND* 207-09 (1870); 5 E. FOSS, *THE JUDGES OF ENGLAND* 146-56 (1857); R. MERRIMAN, *LIFE AND LETTERS OF THOMAS CROMWELL* (1968); Elton, *The Political Creed of Thomas Cromwell*, 6 *TRANSACTIONS OF THE ROYAL HIST. SOC.* 69 (5th ser. 1956). Cromwell himself had little liking for Anne Boleyn, official duties apart. See *LETTERS AND PAPERS*, *supra* note 8, at xxiv.

16. It had been suggested that nine years earlier Anne had either married or agreed to

Northumberland, perhaps fearful for himself, denied under oath that there had been such a contract,¹⁷ and the Bishop refused to become further involved unless specifically ordered to do so by the King.¹⁸

No one was eager to go through another divorce for Henry, and an alternative remained. With Anne dead, no one could dispute the legitimacy of another marriage. Cromwell placed his spies everywhere in the Queen's court and interrogated her servants with a combination of bribes and threats. Anne Boleyn's unpopularity led many to cooperate with Cromwell. A Lady Wingfield reportedly had confessed, on her deathbed, that the Queen was not chaste. Lady Wingfield's confidant was unknown, but that was a minor detail, as was the fact that Lady Wingfield's words had not been repeated immediately. There was also the story that a certain gentleman spoke of reproving his sister for her light behavior, only to have her retort that she was merely following the Queen's example.

This "evidence" was sufficient to commence the judicial process. Henry was apprised of the results of the preliminary investigation, and on April 24, 1536, he signed a royal commission empowering the leading nobles, officers of the royal household, and nine judges to enquire into a long list of treasonable acts "by whomsoever committed" and to try the offenders.¹⁹ This was a commission of *oyer* and *terminer* ("hear" and "determine"). Such commissions were by no means unusual at the time.²⁰ Employed as early as Magna Carta²¹ and common in the time of Henry I,²² the commissions were used frequently in the investigations of "treasons, felonies, and misdemeanors."²³ The use of these commissions was most

marry Northumberland. They may have had a verbal agreement, which under ecclesiastical law would have permitted an annulment. Letter from Chapuys to Charles V (May 2, 1586), reprinted in *LETTERS AND PAPERS*, *supra* note 8, no. 782, at 330.

17. Letter from Northumberland to Cromwell, reprinted in Wyatt, *supra* note 6, at 464-65.

18. J. SCARISBRICK, *supra* note 6, at 348.

19. Hamilton, *Introduction* to C. WRIOTHESLEY, *A CHRONICLE OF ENGLAND DURING THE REIGNS OF THE TUDORS FROM A.D. 1485 TO 1559*, at xxxii (Hamilton ed. 1875).

20. 1 W. BLACKSTONE, *COMMENTARIES* * 266-68; E. COKE, *FOURTH INSTITUTE* * 163; 2 M. HALE, *PLEAS OF THE CROWN* * 10-31; 3 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 23-36 (7th ed. T. Leach 1795); 1 W. HOLDSWORTH, *supra* note 12, at 274, 277-78.

21. T. PLUCKNETT, *supra* note 12, at 164.

22. *Id.* at 103.

23. 4 W. BLACKSTONE, *COMMENTARIES* * 269-71.

common in cases, such as this one, involving crimes against the King.²⁴ Also, it was routine to have judges as members of the commission.²⁵ Heading the commission for this enquiry were Cromwell and the Duke of Norfolk. The former was chiefly responsible for instituting this investigation. The latter was Anne Boleyn's uncle, but the tensions of the preceeding years had dissipated whatever affection had ever existed between them, and he was particularly anxious that their blood relationship now be forgotten.

PRELIMINARY PROCEEDINGS

Three women were the principal accusers of the Queen. The Countess of Worcester, one of Anne Boleyn's very few close friends, must have known whatever there was to know. The others were Nan Cobham, about whom history is silent, and Lady Rochford, the Queen's sister-in-law. Lady Rochford was a bitter and jealous woman, resentful of her husband's closeness to his sister. Although she was later pronounced mad, in 1536, when she accused Anne Boleyn of having committed incest with her brother, Lord Rochford, her accusation was accepted as reliable by the commission.

By now the commission was bringing to light other evidence. Mark Smeton, a lowborn musician, was said to have been alone with the Queen in her chamber. He was arrested and, under either torture or the threat of torture,²⁶ confessed to having had carnal knowledge of the Queen. He also may have implicated others under threat of torture or by promise of a gentleman's quick death rather than the vastly more unpleasant procedure reserved for commoners.²⁷

On May 1, 1536, the King approached Sir Henry Norris, one of his most trusted servants, and promised Norris his freedom if he

24. T. PLUCKNETT, *supra* note 12, at 155, 166.

25. See authorities cited at note 20 *supra*. See also J. BAKER, *supra* note 12, at 20; G. RADCLIFFE & G. CROSS, *supra* note 12, at 191-92.

26. M. BRUCE, *supra* note 6, at 302; J. SCARISBRICK, *supra* note 6, at 350; 2 A. STRICKLAND, *supra* note 6, at 260; P. THOMSON, SIR THOMAS WYATT AND HIS BACKGROUND 33 (1964); Amyot, *Memorial from George Constantyne to Thomas Lord Cromwell*, 23 *ARCHAEOLOGIA* 56, 64-65 (1831). In addition, it seems that Smeton was the only prisoner placed in irons. J. STRYPE, *supra* note 7, at 435.

27. See text accompanying note 111 *infra*.

would confess to adultery with the Queen.²⁸ A few days earlier, Norris apparently had had a conversation with the Queen, the details of which may have been reported to Cromwell. Why, Anne had asked Norris, did he not marry her cousin, Madge Shelton, as he had agreed earlier to do? He replied, "I will tarry a time." Although he could not say as much to Anne, he probably was reluctant to marry a Boleyn now that the wind was blowing in another direction. But Anne responded by saying, "Then you look for dead men's shoes. If aught come to the King but good, you would look to have me."²⁹ While this seems on its face neither a wish nor a prophecy of the King's death, Norris still protested, "If I should have any such thought I would my head were cut off." Norris then warned the Queen of rumors that she had been unfaithful. She begged him to speak against such rumors, and on April 30 he told the Queen's almoner that the Queen was a good woman.³⁰ Cromwell heard of this and reasoned that Norris wished to defend the Queen because he was one of her lovers. This information found its way to Henry, who confronted Norris on May first. Norris admitted to nothing and was arrested almost immediately.³¹

By now Anne sensed that she was in considerable trouble, and she showed little surprise when Cromwell, the Duke of Norfolk, the Lord Chancellor Thomas Audley, and the Constable of the Tower, Sir William Kingston visited her the following day. They informed

28. Smeton had already confessed to adultery with the Queen. Although it was not yet a statutory requirement, two witnesses to a treasonous act or acts were still thought important. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 99-101 (1968). See generally Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83 (1901). In practice, only at the trial of Thomas More was there only one witness. G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 81.

Norris had served Henry since his youth. He was the chief gentleman of the King's privy chamber and held other honorary offices. M. BRUCE, *supra* note 6, at 299-300. On Norris, see also D. STARKEY, *THE KING'S PRIVY CHAMBER 1485-1547*, at 232 (1973). On the functions of the various people who surrounded the King, see *id.* at 135, 164-88.

29. M. BRUCE, *supra* note 6, at 300; 1 J. STRYPE, *supra* note 7, at 433.

30. This act may have sealed his doom. See M. BRUCE, *supra* note 6, at 300.

31. A. POLLARD, *HENRY VIII* 345 (1925). No evidence exists that either the conversations between Anne and Norris or Norris's subsequent statements to his almoner were overheard. Anne herself related them after her arrest, and William Kingston, Constable of the Tower, reported them to Cromwell. See *Letters from Kingston to Cromwell*, reprinted in Wyatt, *supra* note 6, at 451-61. Norris's offense may have been misprision of treason, rather than treason itself. *LETTERS AND PAPERS*, *supra* note 8, no. 782, at 330.

her of their mission, which was to take her to the Tower, and then commenced an impromptu interrogation, led primarily by Norfolk. The men told her that she had committed adultery with three men, that Smeton and Norris had already confessed, and that she had best also confess. Anne refused to confess and was taken to the Tower.³² The name of her third alleged lover was not at this time revealed to her. It was her brother, Lord Rochford, who was already in the Tower.

At the Tower Anne Boleyn was attended by Lady Kingston, her hated aunt Lady Boleyn, a Mistress Cosyns, and a Mistress Stoner. Lady Boleyn and Mistress Cosyns remained with the Queen constantly, noted everything she said, and attempted to extract a confession. All of her statements were reported to Lady Kingston, who passed them on to her husband, who in turn reported to Cromwell. Anne steadfastly refused to confess, but her protestations of innocence included the observation that Sir Francis Weston had expressed affection for her. Weston was consequently arrested, as was William Brereton, although no one knows precisely why Brereton was involved.³³

By this time the commissioners were prepared to ask for the return of indictments in the counties of Middlesex and Kent, where the crimes were said to have occurred.³⁴ Some commissioners felt there was not enough evidence. Sir Edward Baynton, the Queen's Vice-Chamberlain, wrote that "[t]here is much communication that no man will confess anything against her, but only Marke [Smeton] of any actual thing. It would, in my foolish conceit, much touch the King's honor if it should no further appear."³⁵ Neverthe-

32. E. BENDER, *supra* note 6, at 391-92.

33. See J. STRYPE, *supra* note 7, at 433. Brereton was steward of Holt castle and one of the stewards of the King's privy chamber. Cromwell's Remembrances, *reprinted in* LETTERS AND PAPERS, *supra* note 8, at 359 n.*. Of all of the defendants, Brereton had the least incriminating evidence against him. See Amyot, *supra* note 26, at 56, 65; Ives, *Court and County Palatine in the Reign of Henry VIII: The Career of William Brereton of Malpas*, 123 *TRANSACTIONS OF THE HIST. SOC. LANCASHIRE & CHESHIRE* 1 (1972); Ives, *supra* note 7, at 171. Some confusion exists about Brereton's title. *Id.* at 169 n.5. Weston was a steward of the King's chamber and a favorite card partner of Anne Boleyn. M. BRUCE, *supra* note 6, at 298.

34. Although these commissioners had been specifically empowered to investigate in Middlesex and Kent, commissioners of *oyer* and *terminer* generally held extensive powers to travel in their investigations. T. PLUCKNETT, *supra* note 12, at 103.

35. Letter from Sir Edward Baynton to Mr. Treasurer Fitzwilliam, *reprinted in* LETTERS

less, such support for the Queen was futile.

The prisoners were cut off from any possible assistance.³⁶ They were kept in secret confinement until the time of their trial. A lawyer at Gray's Inn, whose brother was a friend of Norris, sent a message to his brother, who was in Wales at the time, informing him of the danger in which Norris was placed. The messenger, however, was intercepted and jailed, and the letter forwarded to Cromwell.³⁷ Far from being able to intercede with the King on Norris' behalf, his friend did not even know of his plight until it was too late.

On May 9, the justices on the commission issued precepts for the return of grand juries at Middlesex and Kent.³⁸ Indictments were found at both locations, but because some of the accused were of the nobility and others were commoners, the proceedings at this point became separate. The indictments were sent "before the Duke of Norfolk as steward of England, *hac vice*, as regards all matters touching the Queen and Lord Rochford."³⁹ These cases were to be tried in the Court of the Lord High Steward, an institution derived from the assurance in Magna Carta that peers would be tried only by other peers.⁴⁰ The Lord High Steward's court sat only when Parliament was not in session; otherwise trial was before the full House of Lords.⁴¹ The first prominent use of such a court

AND PAPERS, *supra* note 8, no. 799, at 338.

36. See text accompanying notes 139-42 *infra*.

37. P. FRIEDMANN, *supra* note 6, at 258.

38. The grand jury was by this time an established institution. See 1 W. HOLDSWORTH, *supra* note 12, at 321, 323.

39. Trial of Weston, Norris, and others (May 12, 1536), *reprinted in* LETTERS AND PAPERS, *supra* note 8, no. 848, at 331.

40. On the Court of the Lord High Steward, see generally A. CARTER, *OUTLINES OF ENGLISH LEGAL HISTORY* 76-80 (1899); L. HARCOURT, *HIS GRACE THE STEWARD AND THE TRIAL OF PEERS* (1907); L. PIKE, *CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS* 209-34 (1894); Harris, *The Trial of the Third Duke of Buckingham—A Revisionist View*, 20 *AM. J. LEGAL HIST.* 15 (1976); Levine, *The Fall of Edward, Duke of Buckingham*, in *TUDOR MEN AND INSTITUTIONS* 32 (A. Slavin ed. 1972).

41. Harcourt argues that Henry VIII or those working on his behalf forged precedents in order to establish the court of the Lord High Steward and thus avoid trial by Parliament. This interpretation has in turn been vigorously disputed. Compare L. HARCOURT, *HIS GRACE THE STEWARD AND THE TRIAL OF PEERS* (1907) with Pike, *The Trial of Peers*, 23 *L.Q. REV.* 442 (1907). Because there is no evidence that the peers in the trial of Anne Boleyn were selected on any basis other than their proximity to London, any advantage to the Crown by this method of proceeding seems both inconsequential and fortuitous. It does not appear

was by Henry VII in 1499 against Edward, Earl of Warwick. Because trial in the Court of the Lord High Steward was before peers selected by the Steward, rather than before the full House of Lords, there was the clear possibility of a packed court.

The others accused were to be tried in more mundane fashion before commissioners of *oyer* and *terminer*, and the Constable of the Tower was ordered to bring up "Sir Fras. Weston, Hen. Noreys, Will. Bryerton, and Mark Smeton, at Westminster, on Friday next after three weeks of Easter."⁴² Their trial opened at Westminster on May 12. Presiding was the Lord Chancellor, Thomas Audley. Audley had studied law at the Inner Temple and spent most of his career in various legal positions under the Crown, including twelve years as Lord Chancellor.⁴³ These twelve years saw many of Henry's most ruthless acts, including some of the most prominent state trials, and Audley has been criticized for his zeal in carrying out the King's business.⁴⁴ For his loyalty he was amply rewarded, both in wealth and in title, but Audley was little more than a man of his times.⁴⁵ Had he not satisfied the King, he would have been retired, and others would have done the work. No evidence condemns Audley as unnecessarily harsh. Harshness was part of the job, and he did his job well.

Of the sitting commissioners, two are noteworthy: one of these was Thomas Earl of Wiltshire, the father of Anne Boleyn; the other was Sir John Spelman, whose notes may comprise the only firsthand accounts of this trial and that of Anne Boleyn herself.⁴⁶

The jury consisted of twelve knights, and some have argued that

that there was a desire to proceed with haste. See G. ELTON, *REFORM AND REFORMATION: ENGLAND 1509-1558*, at 253 (1977).

The advantage of selective summons in treason cases ended with 7 Will. 3, c. 11 (1695) conferring jurisdiction for treason on the entire body of peers, regardless of whether Parliament was then in session.

42. LETTERS AND PAPERS, *supra* note 8, no. 848, at 331.

43. On Audley, see generally 2 J. CAMPBELL, *LIVES OF THE LORD CHANCELLORS 78-113* (4th ed. 1856); 5 E. FOSS, *supra* note 15, at 26-34.

44. 1 T. FULLER, *THE HISTORY OF THE WORTHIES OF ENGLAND 507-08* (1840).

45. Lehmborg, *Sir Thomas Audley: A Soul as Black as Marble?*, in *TUDOR MEN AND INSTITUTIONS* (A. Slavin ed. 1972).

46. See note 8 *supra*. Burnet relies on a written account by Anthony Anthony, Surveyor of the Ordnance of the Tower, but does not indicate whether Anthony was actually present at the trials. 1 COBBETT'S ST. TR. 409 (1809).

the jury was packed.⁴⁷ The majority of the jurors were royal officials,⁴⁸ and the others had served in the government either as sheriff or justice of the peace in their counties.⁴⁹ Whether the jury was selected specifically is of little moment, because it was virtually impossible to be acquitted of treason, especially where, as here, the King's wishes, although publicly unvoiced, were no secret. Recently however, there had been the remarkable verdict of not guilty in the treason trial of Lord Dacres,⁵⁰ and a reliable jury was insurance against a similar result.

Kingston brought his prisoners before the jury, where the four men heard the specific charges against them for the first time.⁵¹ Smeton pleaded guilty to carnal knowledge of the Queen and not guilty to the charge of conspiring the King's death. Norris, Brereton, and Weston pleaded not guilty to all charges.⁵² The burden of proof was on the accused to prove their innocence of the charges contained in the indictment,⁵³ and this the men could not do. Dates were given for each incident of adultery. It was also charged, as an outgrowth of Anne's statement to Norris that he wanted to marry her, that she had promised to marry one of her lovers after the King's death, which they hence all sought to bring about. The four were found guilty on all counts and sentenced to death.

47. P. FRIEDMANN, *supra* note 6, at 270-71. G.R. Elton argues that "constructed" courts were a vital feature of treason trials wherever tried. G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 80.

48. Sir Thomas Wharton, comptroller in the North; Sir Richard Tempest, steward of Wakefield and constable of Sandale, as well as a close relation to Anne's enemy, Lady Boleyn; Sir William Musgrave, constable of Bewcastle (Musgrave had also signed a bond, payable on demand, to Cromwell); Sir Thomas Palmer, an usher of receipts in the exchequer; Sir Edward Willoughby, keeper of Hendley Park; Sir William Sidney, ex-keeper of the great scales of London. In addition, there was Sir Walter Hungerford, who had just been summoned to the House of Lords by royal favor and the son-in-law of Lord Hussey, whose hostile letters toward the Queen have been preserved; and Sir Giles Allington, the son-in-law of Sir Thomas More's widow. Anne Boleyn was generally held responsible for More's death. P. FRIEDMANN, *supra* note 6, at 270-71.

49. Sir William Askew, Robert Dormer, William Drewry, and John Hampden. *Id.*

50. 1 COBBETT'S ST. TR. 407-08 (1809).

51. This was standard practice in all criminal charges. See text accompanying notes 133-34 *infra*.

52. See Trial of Weston, Norris, and others (May 12, 1536), reprinted in *LETTERS AND PAPERS*, *supra* note 8, no. 848, at 351 (giving a brief summary of this trial).

53. See text accompanying notes 114-16 *infra*.

THE TRIAL OF ANNE BOLEYN

On May 13, the day after the four men were sentenced to die, the Duke of Norfolk, as Lord High Steward of England, issued a precept to twenty-six peers living in or near London. They were summoned to appear at the Tower two days hence to serve as jurors at the trials of Queen Anne Boleyn and her brother Lord Rochford or, as one commentator says, "to decide . . . between Anne and Lord Rochford on the one hand and the king on the other."⁵⁴ There is no evidence that the particular jurors chosen⁵⁵ were selected in any partial manner, although virtually all of the peers owed their wealth and position to the Crown. There were over fifty peers in England at the time,⁵⁶ and the twenty-six appear to have been chosen by Norfolk solely on the basis of their proximity to London.

On May 15 Anne Boleyn was brought to trial within the precincts of the Tower.⁵⁷ She was, after all, still Queen of England, and it was not considered wise to lead her through the streets to Westminster as a criminal. Thus, the great hall adjoining the royal apartments in the White Tower became a courtroom for the occasion. A platform was erected, benches made for the peers, a dais provided for the Lord High Steward's chair, and barriers set up to restrict the crowds, because the proceedings were open to the public.⁵⁸ The Duke of Norfolk took his seat upon the dais, holding in

54. P. FRIEDMANN, *supra* note 6, at 274.

55. The practice of jurors chosen by the prosecution was not a general feature of the trial of crimes at common law but was at the time a universal practice in *all* treason cases. See Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 316 (1973). This was consistent with what was perceived to be a much greater interest in conviction in treason cases. See text accompanying notes 164-66 *infra*.

56. C. WRIOTHESLEY, *supra* note 19, at 38 n.6. The task of selecting the peers seems to have been delegated to Ralph Felmingham, serjeant-at-arms. Trial of Anne Boleyn & Lord Rochford (May 15, 1536), *reprinted in* LETTERS AND PAPERS, *supra* note 8, no. 876(5), at 361. This is inconsistent with the suggestion of a carefully rigged jury, which would have required jurors to have been selected by someone close to the center of power.

57. For the chronology and pleas at the trial, see LETTERS AND PAPERS, *supra* note 8, no. 876, at 361. See also P. FRIEDMANN, *supra* note 6, at 274-75, who concludes from the actual membership of the court that the jury was not packed.

58. Virtually all English trials of the time were fully open to the public. Note, *Legal History: Origins of the Public Trial*, 35 IND. L.J. 251, 253 (1960). This is consistent with the desire of Henry and other English monarchs to create the appearance of strict legality in all of their actions. E. JENKS, *THE BOOK OF ENGLISH LAW* 45 (5th ed. 1953). See text accompa-

his hand the white staff signifying the office of Lord High Steward. At his feet was his son the Earl of Surrey, the Queen's cousin, no more her friend than was his father, holding the golden staff of the office of Earl Marshall of England. At Norfolk's right sat Lord Chancellor Audley, who as assessor and director of the proceedings was charged with the responsibility of ensuring that the trial was conducted in accordance with the law.⁵⁹ At Norfolk's left was the Duke of Suffolk, followed by the voting marquesses, earls, and lords, arranged according to rank.

When the lords had been officially apprised of the purpose of the court and the ritualistic opening ceremonies, described by Coke,⁶⁰ had been completed, the Constable of the Tower, Sir William Kingston, and the Lieutenant of the Tower, Sir Edmond Walsingham, led in the prisoner, who was accompanied by two attendants. The Queen was provided with a chair and remained seated throughout the entire proceedings. The peers then answered to their names,⁶¹ took their places, and sat down. Once all the parties were present, the Lord High Steward explained the proceedings to the prisoner, after which the indictments were read aloud by the Clerk of the Crown. The first was the indictment found at Westminster on May 10, charging that

she, despising her marriage, and entertaining malice against the

nying note 169 *infra*. Over 2000 spectators reportedly were in attendance. Letter from Chapuys to Charles V, reprinted in *LETTERS AND PAPERS*, *supra* note 8, no. 908, at 376.

Moreover, a public trial made it possible to convince people of the wrongs done to the King. See C. OGILVIE, *THE KING'S GOVERNMENT AND THE COMMON LAW 1471-1641*, at 104-05 (1958). Thus, the trial was a valuable method of propaganda. In this particular case, Anne's unpopularity made it doubly desirable to have present as many people as possible, so as to spread the word that the wicked Anne Boleyn had received her due.

59. Audley was not yet a peer and thus could not have served as Lord High Steward, which otherwise would have been expected because of his position. Nothing indicates that Audley participated to any significant degree in the proceedings.

60. E. COKE, *THIRD INSTITUTE* * 28-29. Coke provides a detailed account of the procedures in the Court of the Lord High Steward.

61. Charles Duke of Suffolk, Henry Marquis of Exeter, William Earl of Arundel, John Earl of Oxford, Henry Earl of Northumberland, Ralph Earl of Westmoreland, Edward Earl of Derby, Henry Earl of Worcester, Thomas Earl of Rutland, George Earl of Huntingdon, John Lord Audley, Thomas Lord La Ware, Henry Lord Montague, Henry Lord Morley, Thomas Lord Dacre, George Lord Cobham, Henry Lord Maltraves, Edward Lord Powers, Thomas Lord Mount Egle, Edward Lord Clynton, William Lord Sandes, Andrew Lord Wyndesore, Thomas Lord Wentworth, Thomas Lord Burgh, and John Lord Mordaunt. *LETTERS AND PAPERS*, *supra* note 8, no. 876(6), at 361.

King, and following daily her frail and carnal lust, did falsely and traitorously procure by base conversations and kissings, touchings, gifts, and other infamous incitations, divers of the King's daily and familiar servants to be her adulterers and concubines, so that several of the King's servants yielded to her vile provocations; viz., on 6th Oct. 25 Hen. VIII., at Westminster, and divers days before and after, she procured, by sweet words, kisses, touches, and otherwise, Hen. Noreys, of Westminster, gentleman of the privy chamber, to violate her, by reason whereof he did so at Westminster on the 12th Oct. 25 Hen. VIII.; and they had illicit intercourse at various other times, both before and after, sometimes by his procurement, and sometimes by that of the Queen.⁶²

The indictment continued in the same manner, naming each of the accused men and giving dates for each offense. The indictment found in Kent was the same, except for the times and places. These were the same indictments that had been used for the previous trial, at which Smeton, Norris, Brereton, and Weston had been found guilty.⁶³

The indictments continued with the charges of conspiracy to cause the King's death:

And further the said Queen and these other traitors, 31 Oct. 27 Hen. VIII., at Westminster (8 Jan. 27 Hen. VIII at Elthem), conspired the death and destruction of the King, the Queen often saying she would marry one of them as soon as the King died, and affirming that she would never love the King in her heart.⁶⁴

Even Smeton had not confessed to this, and it appears to be merely an elaboration of the reckless, but not treasonous, conversation with Norris.

Further, continued the indictment, "And the King having a short time since become aware of the abominable crimes and treasons against himself, took such inward displeasure and heaviness,

62. *Id.* at 361. A biography of the last century omitted the indictment on the grounds that such a document as this "cannot be permitted to sully the pages of any work intended for family reading." 2 A. STRICKLAND, *supra* note 6, at 254.

63. LETTERS AND PAPERS, *supra* note 8, no. 876, at 361.

64. *Id.*

especially from his said Queen's malice and adultery, that certain harms and perils have befallen his royal body."⁶⁵ There is no elaboration of these "harms and perils."

After the reading of the indictments, the Clerk asked Anne Boleyn to plead. She raised her hand and pleaded not guilty.⁶⁶ After the peers were charged to try the prisoner according to the evidence,⁶⁷ the presentation of the evidence began.

Sir Christopher Hales, Attorney General, was the chief prosecutor for the King.⁶⁸ Hales was educated at Gray's Inn and was a member of a family of lawyers. He rose to be Attorney General after having served as Solicitor General, and two months after the trial of Anne Boleyn he succeeded Thomas Cromwell as Master of the Rolls.⁶⁹ He had previously represented the Crown at the trials of Cardinal Wolsey, Sir Thomas More, and Bishop Fisher. Like Audley, he performed his duties conscientiously and with neither undue harshness nor undue charity. Cromwell, who also had legal training,⁷⁰ assisted with the prosecution. The words spoken by these men in prosecuting the case have not been preserved, but it is known that they presented no witnesses. In this sense the entire case for the prosecution was much like a prosecutor's opening statement: describing the evidence and the results of the investigation but offering no "live" evidence to support the conclusions.⁷¹

65. *Id.* at 362.

66. Unlike cases of felony, a failure to plead in a treason case was treated as a guilty plea. Black, *Torture Under English Law*, 75 U. PA. L. REV. 344, 346 (1927).

67. "Then the high steward giveth a charge to the peers, exhorting them to try the prisoner indifferently according to the evidence." E. COKE, *THIRD INSTITUTE* * 29. This concept of trying the defendant according to the evidence was new to England because the period when jurors were both entitled and expected to use their own personal knowledge and investigate findings in determining the facts was recent history. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 439 (1904); see Langbein, *supra* note 55, at 314-15. But see 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 622-25 (2d ed. reissued 1968).

It is significant that the peers did not take an oath, as would jurors in conventional criminal trials. See Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND 1550-1800*, at 15, 23 (J.S. Cockburn ed. 1977).

68. The use of a prosecuting attorney on behalf of the King was not the general practice and the use of one with legal training even rarer. This was, however, standard procedure in virtually all of the state trials. See Langbein, *supra* note 55, at 315-16.

69. On Hales, see E. Foss, *supra* note 15, at 322; 5 E. Foss, *supra* note 15, at 183-84.

70. See note 15 *supra* & accompanying text.

71. See text accompanying notes 117-25 *infra*.

In the usual trial of this nature, someone whom the powerful wanted destroyed was accused of having said or done something that according to law was treason, and witnesses were found to swear to it. In this case, however, treason was constructed from the words that the Queen admittedly had spoken; these words were embellished until they constituted treason under three different statutes.⁷² Anne had discussed marriage with Norris, and this could not be denied; but alone it meant nothing. It was reasoned, however, that since she had spoken of marriage to Norris, she wanted to marry him. It followed that she must have wanted the King dead, and therefore she must have contrived to kill him. This last step in the reasoning may have been unnecessary. To wish the King dead in itself could be treason. Under the most important of the treason statutes, the 1352 law of Edward III,⁷³ it was treason to "compass . . . or imagine . . . the death of the King, his consort, or his eldest son."⁷⁴ Some dispute has existed whether this statute required some overt act or whether it allowed the punishment of treason committed by words alone.⁷⁵ Authority does support the view that even by the end of the fifteenth century, treason by words alone was sufficient.⁷⁶ Thus even under the 1352 statute, the words of Anne Boleyn, if construed as argued by the prosecution, would support a charge of treason.

In addition, two recent statutes made even clearer the statutory

72. 26 Hen. 8, c. 13 (1534); 25 Hen. 8, c. 22 (1533); 25 Edw. 3, st. 5, c. 2 (1352). On the substantive law of treason, see generally J. BELLAMY, *THE TUDOR LAW OF TREASON* (1979); J. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970); Elton, *The Law of Treason in the Early Reformation*, 11 *HIST. J.* 211 (1968); Reznick, *The Trial of Treason in Tudor England*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF C.H. McILWAIN* 258 (C. Wittke ed. 1936); Simon, *The Evolution of Treason*, 35 *TUL. L. REV.* 669 (1961); Smith, *English Treason Trials and Confessions in the Sixteenth Century*, 15 *J. HIST. IDEAS* 476 (1954); Note, *Treason in Legal History*, 161 *L. TIMES* 115 (1926).

73. 25 Edw. 3, st. 5, c. 2 (1352). This statute has been the source of nearly all of English treason law. Thornley, *The Act of Treasons, 1352*, 6 *HIST.* 106 (1921); Note, *Treason in Legal History*, 161 *L. TIMES* 115 (1926). See also authorities cited in note 72 *supra*.

74. 25 Edw. 3, st. 5, c. 2(2) (1352). Both "compass" and "imagine" in this context referred to a plan, plot, or contrivance, but it seems that the words of the statute would support a finding of treason for a purely personal plan, plot, or contrivance.

75. See generally 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 492-500 (1924); Reznick, *supra* note 72, at 264.

76. See G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 59-60. See also Thornley, *Treason by Words in the Fifteenth Century*, 32 *ENG. HIST. REV.* 556 (1917); Thornley, *Treason Legislation of Henry VIII*, 11 *TRANSACTIONS OF THE ROYAL HIST. SOC.* 87 (3d ser. 1917).

basis for treason by words alone. A statute of 1533 provided that anyone slandering the issue of the King by writing, printing, or other overt act would be guilty of treason⁷⁷ and that anyone slandering the issue by spoken words should be guilty of misprision of treason.⁷⁸ A 1534 act provided that words alone could be treason where those words would "maliciously wish, will or desire . . . or by craft imagine, invent, practise or attempt any bodily harm to be done or committed to the King's most royal person."⁷⁹ It is unclear as to exactly which of these statutes were cited. In Spelman's report of the trial, he says that her words "slandered the issue which was begotten between her and the king, which is made treason by the statute of the twenty-sixth year of the present king."⁸⁰ This reference to the later statute seems mistaken, since slander of issue was covered by the 1533 statute and not by the 1534 statute. Yet under the 1533 statute words alone would not be treason, but misprision of treason;⁸¹ the fact that it was treason and not misprision that was charged supports the view that the prosecution indeed relied upon the 1534 statute although it may not have been the sole basis for the charges.

Evidence presented regarding Anne Boleyn's extramarital activities supports the conclusion that another part of the statute of Edward III was used to comprise part of the treason charge. This statute made it treason to "violate" the King's wife.⁸² It does not, however, state that it is treason for the King's wife to allow herself to be violated.⁸³ But if she consented to the treasonous act, she was

77. 25 Hen. 8, c. 22, § 8 (1533). (The date of the statute is variously reported as either 1533 or 1534). Ironically, this statute was enacted for Anne Boleyn's protection. See R. DEANS, *THE TRIALS OF FIVE QUEENS* 81 (1909); Ives, *supra* note 7, at 169, 172. Deans and Ives, however, repeat the confusion in citation attributable to Spelman. See notes 79-80 & accompanying text *infra*.

78. 25 Hen. 8, c. 22, § 9 (1533).

79. 26 Hen. 8, c. 13 (1534).

80. 1 *THE REPORTS OF SIR JOHN SPELMAN* 71 (J.H. Baker ed. 1977).

81. See note 108 *infra*.

82. 25 Edw. 3, st. 5, c. 2(3) (1352). See G. BURNET, *supra* note 8, at 407.

83. The statutes of 1533 and 1534, unlike the statute of 1352, contain language seemingly broad enough to encompass a conspiracy to commit any of the enumerated treasonous acts. By 28 Hen. 8, c. 7 (1536) this defect was explicitly cured, suggesting that this *had* been an issue during Anne's trial. See also 28 Hen. 8, c. 10 (1536) (relating to the King's sisters and children and making clear that the woman is also guilty of treason); 1 M. HALE, *supra* note 20, at * 128. If there had been no doubt about Anne's guilt under the 1352 statute, this part

an accomplice, or at least an accessory, and thus equally guilty of treason.⁸⁴

It was important to Henry that the world and the English people approved the execution of the Queen of England. To insure that support, Anne had to appear criminal beyond imagination. On the day preceding the trial, Cromwell had written to the English ambassadors in France that "[t]he Queen's incontinent living was so rank and common that the ladies of her privy chamber could not conceal it . . . I write no particularities, the things be so abominable that I think the like was never heard."⁸⁵ John Husee had written to Lady Lisle that

I think verily, if all the books and chronicles were totally revolved, and to the uttermost persecuted and tried, which against women hath been penned, contrived, and written since Adam and Eve, those same were, I think, verily nothing in comparison of that which hath been done and committed by Anne the Queen . . . so abominable and detestable that I am ashamed that any good woman should give ear thereunto.⁸⁶

Spelman says that "all the evidence was of bawdery and lechery, so that there was no such whore in the realm."⁸⁷ Spelman seems not only to be describing the evidence, but also by his last words to be suggesting that the evidence was exaggerated.⁸⁸ Thus, the case for the King relied upon numerous alleged acts and instances of treason, all presented in the form of a narrative description of everything that the investigation had unearthed,⁸⁹ including the death-bed statement of Lady Wingfield, which was particularly relied upon by counsel for the Crown.⁹⁰

of this statute would have been superfluous.

84. C. LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* 209 n.33 (1962).

85. Letter from Cromwell to Gardiner and Wallop, *reprinted in LETTERS AND PAPERS*, *supra* note 8, no. 873, at 359.

86. Letter from John Husee to Lady Lisle (May 13, 1536), *reprinted in LETTERS AND PAPERS*, *supra* note 8, no. 866, at 357.

87. SPELMAN, *supra* note 80, at 71.

88. We are indebted to John Baker, editor of SPELMAN'S REPORTS, for suggesting this interpretation.

89. G. BURNET, *supra* note 8, at 396-416; P. FRIEDMANN, *supra* note 6, at 276-77.

90. SPELMAN, *supra* note 80, at 71; G. BURNET, *supra* note 8, at 397-98. Burnet criticizes the use of this evidence, but he seems to assume the acceptance of a hearsay rule not then in existence.

After having been presented with the case for the King, the peers heard Anne Boleyn's defense. She was unassisted, and there is no indication that she made what would have been a futile request for counsel.⁹¹ The Queen might have been permitted to present the testimony of others on her behalf, but in light of her lack of knowledge before the trial of the specific charges against her and her imprisonment prior to trial, the granting of this request would have done her little good.⁹² Furthermore, it is unlikely that anyone would have been willing to speak on her behalf, thereby assuming the risk of the defendant's witnesses being implicated with the defendant. In *Throckmorton's Case*⁹³ eighteen years later, the court rejected a witness, presumably for the witness' own good. "Go your ways, Fitzwilliams, the court hath nothing to do with you; peradventure you would not be so ready in a good cause."⁹⁴ In any event, the defense in the trial of Anne Boleyn consisted only of her own speech, in which she eloquently protested her innocence of all the charges.⁹⁵ Because Anne had not seen the indictment in advance,⁹⁶ she could not reply to each specific charge by producing an alibi for each date. Despite her lack of evidence, Anne's defense persuaded many spectators, including magistrates of London, that there was no evidence against her, but that it had been decreed that she must be disposed of once and for all.⁹⁷

After the Queen had spoken the judges conferred for an unknown period of time.⁹⁸ Thereafter, Norfolk, as Lord High Steward, asked each peer in turn, from the lowest to the highest in rank, for his verdict.⁹⁹ This procedure ideally was intended to pre-

91. See text accompanying notes 139-42 *infra*. The accused in a treason prosecution gained the right to counsel in 1696. See Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 309 (1978).

92. See text accompanying notes 133-38 *infra*.

93. 1 How. St. Tr. 868 (1554). See Glazebrook, *The Making of English Criminal Law: (3)—The Reign of Mary Tudor*, 1977 CRIM. L. REV. (Eng.) 582, 586-88.

94. 1 How. St. Tr. at 884. See also *Udall's Case*, 1 How. St. Tr. 1271, 1281 (1590).

95. Anne's speech has not been preserved.

96. See text accompanying note 133 *infra*.

97. Letter from Chapuys to Charles V, reprinted in *LETTERS AND PAPERS*, *supra* note 8, no. 908, at 376-80.

98. Coke reports that in trials before the Court of the Lord High Steward, the prisoner was taken away during the deliberations, and the peers who were deliberating were also taken to another place. E. COKE, *THIRD INSTITUTE* * 29.

99. The order of polling the jury was reversed, perhaps to his detriment, in Buckingham's

vent peers from being influenced by the votes of those senior to them. A simple majority was sufficient to convict in the Lord High Steward's Court, consistent with the established procedures of a court designed to ensure conviction.¹⁰⁰ In this case every peer in turn answered "guilty," for a unanimous verdict.¹⁰¹ Norfolk then read the sentence, that Anne Boleyn was to be burned or beheaded, at the King's command.¹⁰²

Thereafter the Queen turned to the judges and made the following speech in calm words and manner:

I believe you have reasons . . . upon which you have condemned me: but they must be other, than those that have been produced in court, . . . I have always been a faithful and loyal wife to the king. I have not, perhaps, at all times shewed him that humility and reverence, that his goodness to me, and the honour to which he raised me, did deserve. I confess, I have had fancies and suspicions of him, which I had not strength nor discretion enough to manage: but God knows, and is my witness, that I never failed otherwise towards him: and I shall never confess any other, at the hour of my death. Do not think that I say this, on design to prolong my life¹⁰³

She went on to voice regrets that her brother and the others must die with her, although her brother had not yet been tried. She then asked time to prepare herself for death and was led back to her

trial. Harris, *supra* note 40, at 20. This was also the procedure employed in the Star Chamber. See G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 168.

100. Arguably, this is the most significant difference between proceedings at common law and those in the Steward's court. See Baker, *supra* note 67, at 23; Harris, *supra* note 40, at 19. Related to this is the absence of any opportunity to challenge jurors, either peremptorily or for cause, a right available, even in capital cases, at common law. Baker, *supra* note 67, at 36. But this right was rarely exercised, *id.*, and it thus appears that in practice, it was only a minor distinction.

101. *LETTERS AND PAPERS*, *supra* note 8, no. 876, at 363.

102. *Id.* The sentence in the disjunctive was apparently without precedent and occasioned some comment by the judges. G. BURNET, *supra* note 8, at 407.

103. 1 COBBETT'S ST. TR., *supra* note 8, at 424-25. There is no indication, however, that she ever entertained any thought that she might be acquitted. *LETTERS AND PAPERS*, *supra* note 8, at xxvi; E. BENDER, *supra* note 6, at 396; Letter from Cromwell to Kingston, reprinted in Wyatt, *supra* note 6, at 452. Nor did others have doubts about the outcome. See Letter from Sir John Duddleley to Lady Lisle (May 10, 1536), reprinted in *LETTERS AND PAPERS*, no. 837, at 348; Letter from John Husee to Lord Lisle (May 12, 1536), *id.* no. 855, at 353; Letter from John Husee to Lady Lisle (May 13, 1536), *id.* no. 866, at 357.

apartment.¹⁰⁴

The court remained in session, and almost immediately thereafter¹⁰⁵ her brother, Lord Rochford, took his sister's place at the bar. The same judges sat, except for Northumberland, who had been taken ill.¹⁰⁶ The charges against Rochford were presented, and he pleaded not guilty. The charge of adultery was supported by statements that he had once remained in the Queen's chamber with her alone for a long time and that he had been seen leaning over her bed. From this it had been deduced, and written into the indictment, that "[the Queen] procured and incited her own natural brother, Geo. Boleyn, lord Rocheford, . . . to violate her, alluring him with her tongue in the said George's mouth, and the said George's tongue in hers, and also with kisses, presents, and jewels; whereby he, . . . violated and carnally knew the said Queen, his own sister . . ." ¹⁰⁷ There were several other, similar charges. The final charge against Rochford, omitted from the state trials account, was of such a delicate nature that it could not be read aloud. The charge was written and handed to Rochford on a piece of paper. It alleged that Lady Rochford had told him that the Queen had said the King was impotent. Rochford was ordered not to read this charge aloud, but he did so anyway, without helping his already slim chances of acquittal.¹⁰⁸

The case against Rochford was weak on facts, and spectators were betting ten to one in favor of his acquittal.¹⁰⁹ He is reported to have defended himself well and with some spirit, but he was still

104. P. FRIEDMANN, *supra* note 6, at 278.

105. There must have been some short delay, since Rochford was brought in by the same men who took Anne Boleyn back to her apartment.

106. LETTERS AND PAPERS, *supra* note 8, no. 876, at 363.

107. See note 62 *supra*.

108. M. BRUCE, *supra* note 6, at 326. The implication is that Rochford was liable for misprision of treason for not reporting this. See Anne Boleyn (May 2, 1536), reprinted in LETTERS AND PAPERS, *supra* note 8, no. 784, at 331. But if this was misprision, then Lady Rochford was no less guilty. On misprision, see generally Claybrook, *Misprision of Felony—Shadow or Phantom*, 8 AM. J. LEGAL HIST. 189, 283 (1964). On misprision of high treason, see also M. DALTON, COUNTRY JUSTICE 211-12 (P. Glazebrook ed. 1973) (1st ed. n.p. 1619).

109. Letter from Chapuys to Charles V, reprinted in LETTERS AND PAPERS, *supra* note 8, no. 908, at 378. Another translation of the same letter, which was originally in code, gives the odds at two to one. 5 CALENDAR OF LETTERS, DESPATCHES, AND STATE PAPERS, RELATING TO NEGOTIATIONS BETWEEN ENGLAND AND SPAIN no. 55, at 126 (P. de Gayangos ed. 1888).

the Queen's brother and ally and could not be counted upon to remain silent after the trials.¹¹⁰ He too was unanimously found guilty and sentenced to a traitor's death—to be drawn through the streets of London to the gallows at Tyburn, to be hanged and cut down while still alive, to have his members cut off and the bowels taken out of his body and burnt before his still-conscious eyes, and then to have his head cut off and his body quartered.¹¹¹ But the sentence was commuted to beheading, as it was for the other men, all of whom were executed on May 17.

Norris said nothing before his execution, but the others confessed to deserving death, although not to the specific charges.¹¹² Such confessions were common, for if the condemned were to attack the King's justice, his goods and land could be seized, and other forms of retribution visited upon his family. He also could be taken unharmed from the scaffold, to be preserved for a less pleasant death.

Anne Boleyn was taken to the scaffold on the morning of May 19, before a select group of witnesses. Although English headsmen used a crude axe, Anne was to have a more merciful death, that of beheading by the expert swordsman of Calais, who was brought to England for the occasion by the King's order. Anne said nothing against the sentence, but only kind words about the King, and she asked the spectators to pray for her. After being blindfolded, Anne Boleyn bowed her head, said "To Christ I commend my soul," and was killed by one stroke of the sword.¹¹³

A FAIR TRIAL?

There is a temptation to evaluate the fairness of a sixteenth century trial by twentieth century standards. It may be uncomfortable to say that fairness is relative, but it is unacceptable to condemn

110. Anne Boleyn's father quietly retired to the country after her execution. Although a peer, he did not sit as a judge at her trial. 1 COBBETT'S ST. TR. 417 n.(a) (1809).

111. This was the standard method of execution for treason, although other gruesome deaths were occasionally employed. Simon, *The Evolution of Treason*, 35 TUL. L. REV. 669, 673 (1961). See also Note, *Torture in English Law*, 158 L. TIMES 234 (1924).

112. For Rochford's scaffold speech, see THE CHRONICLE OF CALAIS IN THE REIGNS OF HENRY VII AND HENRY VIII 46 (Nichols ed. 1846).

113. LORD HERBERT OF CHERBURY, THE LIFE AND RAIGNE OF KING HENRY THE EIGHTH 381-85 (1649). See also Amyot, *supra* note 26, at 64-66.

an age for failing to apply procedures of whose existence they were unaware and whose importance they could not have comprehended. If the trial of Anne Boleyn is viewed not through the eyes of twentieth century American justice, but in terms of the procedural devices that were accepted at the time, then the justness of this trial can be appraised. This inquiry can be divided into three segments: first, those procedures that are now accepted but were not a part of Tudor criminal jurisprudence; second, those procedures which were at the time accepted for use in some types of criminal trials, but were not part of treason trials or the general law relating thereto; third, those procedures which were normally available in treason trials, but were not employed in the trial of Anne Boleyn. Only by separating the inquiry in this manner can this particular trial be intelligently evaluated for fairness. And only by first looking at fairness in these three ways can we fully understand the nature of the treason trial in Tudor England.

This analysis must begin by excluding from consideration those contemporary notions of procedural justice that would have been totally incomprehensible to the lawyer of 1536. There was no clear notion of the burden of proof or a presumption of innocence.¹¹⁴ In present day terms, the burden of proof at Anne Boleyn's trial was on the defendant. Guilt was presumed, and it was laid to the defendant to prove her innocence. More specifically, the preliminary findings of either a grand jury or commission were taken to raise a strong presumption of guilt.¹¹⁵ The idea of a trial commencing with a clean slate in respect of evidence against the defendant would have been thought bizarre by any court in 1536.¹¹⁶

The same observations apply to the prosecution's general method of proceeding. To call witnesses in person, although not unheard of, was unusual at the time.¹¹⁷ Presenting the witness' testimony by way of written deposition under oath, or the prosecu-

114. Glazebrook, *supra* note 93, at 587; T. PLUCKNETT, *supra* note 12. See also M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 229 (1936); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 550-76 (1898).

115. Glazebrook, *supra* note 93, at 587. See also Baker, *supra* note 67, at 39. Extensive pre-trial interrogation of witnesses was at the time a regular feature of criminal justice. Langbein, *supra* note 91, at 280-82.

116. Glazebrook, *supra* note 93, at 587. See also T. PLUCKNETT, *supra* note 12, at 438.

117. See note 123 *infra*. See also J. THAYER, *supra* note 114, at 92.

tor's description of previous investigations was the most common practice.¹¹⁸ Perjury was not taken to be a problem because the oath was considered a virtual guarantee of truth.¹¹⁹ Statements made under oath were enforced by the threat of divine retribution, the likelihood of which was irrelevant because those taking the oath tended to believe it. If this belief as a guarantee of truth now seems extraordinarily naive, it was nonetheless generally accepted at the time.¹²⁰

The personal appearance of witnesses is not an end in itself. It is possible that the prosecutor could change or distort the original testimony when reporting it in court, and it is likely that this often happened. There is no indication, however, that this was the case in the trial of Anne Boleyn. The problem was not whether the witnesses had said what it was claimed they had said, but rather that what they said might be false and that, even if true, the interpretation was at the least creative. Eventually, the value of confronting and cross-examining witnesses was realized and personal appearances became available to help ensure that the witnesses told the truth. Such refined notions of fact-finding, however, were yet to appear in English law.¹²¹ While personal appearance was coming to be accepted, an adversary notion of determining the truth in this way was only just emerging.¹²² Not until the beginning of the seventeenth century did live evidence become the predominant form of courtroom testimony.¹²³

118. The first major change in this practice seems to have come with a statute of 1553, 5 Edw. 6, c. 12, § 22, requiring that witnesses in treason trials who had made statements under oath must be produced at trial. See also 1 & 2 Phil. & M., c. 10, § 11 (1554). See Bishop Burnet's argument in Fenwick's Case (1696), 13 How. ST. TR. 537, 752. These statutes, however, were often ignored. See Wigmore, *supra* note 67, at 449-50.

119. "He is sworn, there needeth no more proving." Trial of the Duke of Norfolk (1751), 1 JARDINE'S CRIM. TR. 178. See Wigmore, *supra* note 28, at 88-89. "In actions of debt and detinue the defendant could choose to 'wage his law,' swearing on oath that he owed no legal obligation instead of resorting to a jury." See J. BAKER, *supra* note 12, at 64-65.

120. Wigmore, *supra* note 28, at 89. See also Note, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 MICH. L. REV. 1681, 1684-85 (1977).

121. See generally Wigmore, *supra* note 67, at 437.

122. Production of witnesses was more frequent when a conflict among oaths appeared. See Letter from Chapuys to Charles V, reprinted in LETTERS AND PAPERS, *supra* note 8, no. 908, at 378. See also Bryson, *Witnesses: A Canonist's View*, 13 AM. J. LEGAL HIST. 57 (1969).

123. Wigmore, *supra* note 67, at 441. In the early 1500's, there was "no appreciation at all

The lack of live testimony is not surprising once it is realized that the hearsay rule only made its first appearance in any form in the mid-1500's¹²⁴ and that the exclusion of hearsay was not common until well into the seventeenth century.¹²⁵ Wigmore chronicled all of this in great detail.¹²⁶ Restricting evidence to that presented in court is a relatively recent phenomenon. As late as 1499, jurors were permitted to make their own investigations into the facts.¹²⁷ By 1536 some changes had occurred, but notions of personal appearance, confrontation, cross-examination, and the exclusion of hearsay were rare or unheard of in any English court.

The use of Anne's own statements after her imprisonment as part of the evidence against her¹²⁸ may seem odd but this too was typical. The privilege against self-incrimination was yet to be established.¹²⁹ It was also typical for the judges actively to influence the outcome of the trial.¹³⁰ The extensive judicial functions carried out by the King's Council and the Privy Council are but examples of the absence of an independent judiciary.¹³¹ There was no sepa-

of the necessity of calling a person to the stand as a witness in order to utilize his knowledge for the jury." *Id.* at 438. See also 5 W. HOLDSWORTH, *supra* note 1, at 193.

124. Wigmore, *supra* note 67, at 448. The unreliability of hearsay evidence, however, had been recognized earlier. 2 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 622 (2d ed. 1959). The absence of any hearsay rule is just one example of the lack of any modern rules of evidence in 1536. See 5 W. HOLDSWORTH, *supra* note 1, at 177; Baker, *supra* note 67, at 39-55; Langbein, *supra* note 55, at 313, 317.

125. Wigmore sets the "fixing" of the hearsay doctrine between 1675 and 1690. Wigmore, *supra* note 67, at 445.

126. *Id.* at 437.

127. Y.B. 14 Hen. 7, 29, 4, cited in J. THAYER, *supra* note 114, at 132. See also 2 F. POLLOCK & F. MAITLAND, *supra* note 124, at 625; Wigmore, *supra* note 67, at 439-40. See generally J. BELLAMY, *CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES* 121-61 (1973).

128. See text accompanying note 33 *supra*.

129. See generally Kemp, *The Background of the Fifth Amendment in English Law: A Study of Its Historical Implications*, 1 WM. & MARY L. REV. 247 (1958); Langbein, *supra* note 91, at 283. Kemp claims that the privilege dates from the middle of the seventeenth century. Holdsworth dates it from "after the restoration." 5 W. HOLDSWORTH, *supra* note 1, at 193-94. There is a reference in 1619 to "neither was a mans fault to be wrung out of himselfe (no not by examination only) but to be proved by others." M. DALTON, *supra* note 108, at 273.

130. On judicial influence in criminal prosecution, see Cockburn, *Trial By the Book?—Fact and Theory in the Criminal Process, 1558-1625*, in *LEGAL RECORDS AND THE HISTORIAN* 60, 69-71, 74 (J. Baker ed. 1978). See also Reznick, *supra* note 72, at 282.

131. C. OGILVIE, *supra* note 58, at 11.

ration of executive and judiciary, and the extent to which the judges helped to assure conviction would not have been considered outrageous in any criminal trial of the time.¹³²

Similar observations apply to the Queen's defense. She had not seen a copy of the indictment prior to the trial, but this was a disability again shared by all criminal defendants of the time.¹³³ Indeed, many defendants would have been in more ignorance than was she as to the charges against them. Even if Anne had been aware of the specific charges, she could have done little. To allow a defendant accused of a major crime to have access to outside sources in order to prepare a defense would have been without precedent. Imprisonment prior to trial, without visitors, was standard.¹³⁴

The disabilities carried over to the actual trial were not exceptional. No compulsory process for witnesses existed until 1563,¹³⁵ and no statutory right to present witnesses appeared until 1589,¹³⁶ so any witnesses for the defense would have to appear voluntarily. Apart from the doubtful proposition that anyone would have been so foolish as to testify on Anne's behalf, it is quite likely that such witnesses would have been excluded¹³⁷ or at best, they would have testified without having been sworn.¹³⁸ It should not be forgotten that of those who might have come forward as witnesses for Anne

132. *Id.*

133. See 2 W. HAWKINS, *supra* note 20, at c. 39, § 13; 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 615 (4th ed. 1935); M. RADIN, *supra* note 114, at 228; 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883). Indeed, in earlier years it was an offense to reveal the accusation to the accused prior to trial. Kaye, *The Making of English Criminal Law: (1) The Beginnings—A General Survey of Criminal Law and Justice down to 1500*, 1977 CRIM. L. REV. (Eng.) 4, 9. As late as 1684 it was said that no precedent for showing the accused the indictment in a trial for high treason existed. R. V. Rosewell, 10 How. ST. TR. 266, 267 (1684).

134. See 1 J. STEPHEN, *supra* note 133, at 350. Bail was never available for those charged with treason or murder. Baker, *supra* note 67, at 33.

135. 5 Eliz. 1, c. 9, § 6 (1563).

136. 31 Eliz. 1, c. 4 (1589). "It does not appear that the prisoner was allowed to call witnesses on his behalf; but it matters little whether he was or not, as he had no means of ascertaining what evidence they would give, or of procuring their attendance." 1 J. STEPHEN, *supra* note 133, at 350.

137. J. THAYER, *supra* note 114, at 157. See the description of the incident in Throckmorton's Case, text accompanying notes 93-94 *supra*; Baker, *supra* note 67, at 38.

138. M. DALTON, *supra* note 108, at 274; M. RADIN, *supra* note 114, at 229; J. THAYER, *supra* note 114, at 157; Baker, *supra* note 67, at 38.

Boleyn, four (Rochford, Brereton, Weston, and Norris) were hardly in a position to do so, and two others, notably Sir Thomas Wyatt, had been committed to the Tower upon some pretext and were not released until after her death. Although Wyatt still is reputed to have been Anne Boleyn's lover before her marriage, at the time of her trial he was useful to the King, and it is thought that he was not accused with her, but only temporarily imprisoned, lest he attempt anything in her behalf.

In these respects the plight of Anne Boleyn was one shared with everyone so unfortunate as to be charged with a crime in early sixteenth century England. In other respects, however, those charged with major crimes, such as treason or felony, were allowed less than would have been available to a defendant charged only with a misdemeanor. Chief among these differences was the right to counsel. Defendants were permitted counsel to assist them in misdemeanor cases, but not in felony or treason trials.¹³⁹ In those cases where counsel was permitted, it was only to present certain carefully defined legal defenses, not to contest the prosecution's view of the facts or to present the defendant's view of the facts.¹⁴⁰ To the extent that a defendant in a treason or felony trial had rights under the law, these were to be preserved by the presiding judges, in this case the Lord High Steward and the Lord Chancellor, whose function was to insure that the proceedings were lawful.¹⁴¹ There is little evidence of such concern for Anne Boleyn in her trial, but no other defendant in her position reasonably could have expected anything more. Sir John Holt, sitting 150 years later, is said by Holdsworth to be the first judge who actually put theory

139. See Cockburn, *supra* note 130, at 64, which makes clear that the presence of counsel might well have affected the outcome in many cases of the time. See also T. PLUCKNETT, *supra* note 12, at 434-35; J. THAYER, *supra* note 114, at 157; Baker, *supra* note 67, at 37; Pound, *The Legal Profession in England from the End of the Middle Ages to the Nineteenth Century*, 19 NOTRE DAME LAW. 315 (1944).

140. See T. PLUCKNETT, *supra* note 12, at 435. See also E. COKE, *THIRD INSTITUTE* * 29; S.F.C. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 361 (1969); Baker, *supra* note 67, at 37.

141. "Secondly, the court ought to be in stead of councell for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of any thing that may make the proceedings erroneous." E. COKE, *THIRD INSTITUTE* * 29.

into practice and helped prisoners with the law.¹⁴²

Much of the formal procedure used at the trial was exclusive to major state trials. One example is the use of prosecuting counsel, a feature only of the state trials.¹⁴³ When the use of prosecuting counsel, normally able, was combined with the defendant's lack of counsel, it was hardly an even battle. Another distinction is that the trial took place before the Court of the Lord High Steward. The chief danger of such a proceeding is that it allowed for a hand-picked jury, thus preventing the risk of an overly independent House of Lords.¹⁴⁴ There is no evidence, however, that the jurors in the trial of Anne Boleyn had been in any way carefully selected. Presumably that was thought to be a superfluous precaution. For a jury to be punished (summarily or at a later proceeding) by fine or imprisonment for delivering what was thought to be the wrong verdict was not unknown.¹⁴⁵ The jurors who acquitted Throckmorton of treason in 1554 were imprisoned, some for up to eight months.¹⁴⁶ This, however, was not the most significant threat. There was little doubt as to the outcome desired by the King, and

142. "His predecessors had sometimes defended the rule which denied the help of counsel to prisoners accused of treason or felony, by saying that the judge was counsel for the prisoner. Holt was the first judge to put this theory into practice." W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 158 (1938). Any careful look at Tudor criminal processes must take into account the frequent divergence between theory and practice. See Cockburn, *supra* note 130, at 67.

143. Baker, *supra* note 67, at 37; Langbein, *supra* note 55, at 315-16. Counsel for the Crown did not become an established institution until later. See Pound, *supra* note 139, at 325.

144. Professor Langbein points out that juries were hand-picked even in treason prosecutions at common law. Langbein, *supra* note 55, at 316. Trial in the Court of the Lord High Steward thus gave the prosecution its "normal" advantage, which would be lacking *only* in a trial before Parliament.

145. W. HOLDSWORTH, *supra* note 142, at 84. "Despite Sir Thomas Smith's pious disclaimer, Elizabethan jurors were regularly bound over to appear in the Star Chamber for returning verdicts 'contrary to the evidence.' Judicial bullying and less overt forms of coercion, such as sending a jury back to reconsider an unacceptable verdict, are well attested." Cockburn, *supra* note 130, at 72 (footnotes omitted). See also G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 169; J. THAYER, *supra* note 114, at 138-39, 162-63; Baker, *supra* note 67, at 23-24. Under 26 Hen. 8, c. 4 (1534) the fining and imprisonment of jurors was allowed in "Wales and the Marches thereof." The implication from the statute is that this was impermissible at the time anywhere else, see *Bushell's Case*, Vaugh. 135, 146, 124 Eng. Rep. 1006, 1011-12 (Comm. Pl. 1671), although Thayer reports that it was nonetheless a frequent practice. J. THAYER, *supra* note 114, at 163.

146. Glazebrook, *supra* note 93, at 588.

no member of the jury was entirely independent of the favors that the King could bestow or the punishments he could deploy, within or without the legal system. The nature of the offense, the position of the defendant, and the lack of independence of the jury made it almost unthinkable that Anne Boleyn would be acquitted. To alter the procedures in order to ensure such a result was not necessary. The result was built into the procedures routinely used not only in the state trials, but for any trial of treason.

The only way in which Anne Boleyn's trial seems questionable, by the standards of the times, was in the probable but unconfirmed torture (or threat thereof) of Mark Smeton.¹⁴⁷ Torture for the purpose of extracting evidence was quite common in the fifteenth century¹⁴⁸ and again in the latter part of the sixteenth century¹⁴⁹ but was not so prevalent when Anne Boleyn was tried.¹⁵⁰ Torture was an available procedure under the law, but only by the King's written authority,¹⁵¹ or by the Council in the Marches of Wales.¹⁵² Smeton's torture clearly would have violated the law in force at the time. If Smeton was tortured, this is the only aspect of the trial that one could call "illegal," and a look at the entire proceedings hardly suggests that Smeton's torture or confession were dispositive of the result, helpful as they may have been.

Whether Anne Boleyn received a fair trial depends upon the meaning of "fair." If fairness means a trial designed to ascertain the facts, do justice, give the defendant an equal chance, convict the guilty, and acquit the innocent, then the answer must be "no." If the question is framed in this way, however, then few other criminal defendants of the time received anything close to a fair trial and certainly not anyone accused of something more than a

147. It is important to distinguish torture as a method of extracting evidence from torture as a method of punishment. Only the former calls into question the reliability of the trial.

148. Note, *supra* note 111.

149. G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 412-13.

150. See generally J. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977); Black, *supra* note 66, at 344.

151. Torture was never part of the common law but was derived from the Royal prerogative. Note, *supra* note 111. On the necessity of a written warrant of the King, with signature by hand, and requiring a "vehement suspicion of guilt," see Black, *supra* note 66, at 344-45. There is no indication that these procedures were followed for Mark Smeton.

152. G. ELTON, *TUDOR CONSTITUTION*, *supra* note 2, at 199. See generally P. WILLIAMS, *THE COUNCIL OF THE MARCHES IN WALES* (1958).

misdemeanor. To call this trial unfair in those terms is not to indict a court, or even a reign, but to indict the sixteenth century for not acknowledging eighteenth century or contemporary notions of justice. Therefore, if fair means, did Anne Boleyn receive as much in the way of "due process"¹⁵³ as anyone in similar circumstances, the answer to the question must be "yes." There is little if any evidence, apart from Smeton's possible torture, that the rules of the time were in any way bent in order to assure Anne Boleyn's conviction. There was no need to tamper with rules that guaranteed the desired result.

WHY A TRIAL?

The conclusion of the foregoing section appears at first glance paradoxical. If there was little if any chance of acquittal, regardless of the underlying facts and regardless of the evidence, and if such an outcome was the rule rather than the exception, then a trial would seem unnecessary. Because these trials were consistent with contemporary standards of procedural justice, the explanation becomes more complex, for it is then not possible to argue that a cruel despot merely rigged¹⁵⁴ what would otherwise have been a procedure designed to insure fairness for the defendant.

A significant part of the problem is that law in the early sixteenth century relied upon a concept fundamentally different from that now commonly accepted. Twentieth century views of law are largely functional. Law in general and laws in particular are evaluated as means to an end. In the context of a criminal trial, the end is viewed largely in terms of a concept of justice, which in turn often is defined by reference to the necessity of accurately determining the facts and fitting them into an existing statutory or common law standard. Certainly such a view was not totally foreign to sixteenth century jurisprudence. It was, after all, in the latter part of the fifteenth century that Chief Justice Fortescue said, "I should, indeed, prefer twenty guilty men to escape death

153. See note 161 *infra*. The phrase "due process of law" appears as early as 28 Edw. 3, c. 3 (1354).

154. See Elton, *supra* note 3, at 265, 293. For a conclusion similar to that reached here, see Harris, *supra* note 40. *But compare* Levine, *supra* note 40.

through mercy, than the innocent to be condemned unjustly."¹⁵⁵ This degree of insight, however, could hardly be called predominant. On the contrary, one of the overriding influences on fifteenth century law was scholasticism, treating fine verbal distinctions and deductive logic as far more important than any factual inquiry.¹⁵⁶ The scholastic tradition was embodied in a legal system in which logic and precision prevailed over equity and common sense,¹⁵⁷ in which formalism was glorified, and in which, therefore, legal procedures were valued not so much as a means to justice as an end in themselves. "If it was right legally it did not matter that it was often obviously unjust, any more than it mattered to the dialectician that his conclusion was practically absurd if it was, or appeared to be, syllogistically sound."¹⁵⁸ The scholastic tradition in the law reached its high point at the end of the fifteenth century and was well on the wane by 1536.¹⁵⁹ However, it still held some influence on Henry and his legal advisors, who sincerely believed that the essence of law lay in following legal procedures.¹⁶⁰ To them the state trials were not charades; they were unimpeachable lawful proceedings. Henry, as much as any monarch of the time, revered the law and would not have thought it proper in any sense to proceed outside it.¹⁶¹ But his reverence for the law, like that of most of his contemporaries, was oriented honestly more toward form and less toward substance than could comfortably be ac-

155. J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* c. 27, at 65 (S.B. Chrimess ed. 1942). This book was written between 1468 and 1471. See generally M. RADIN, *supra* note 114, at 228 (pointing out that the maxim originated as early as 115 A.D. and that at the time of Fortescue such protection remained "illusory").

156. C. OGILVIE, *supra* note 58, at 16.

157. *Id.* at 30.

158. *Id.* at 32. "[L]awyers were concerned with law, not with disputes about facts." Baker, *supra* note 67, at 37.

159. *Id.* at 45-46.

160. See T. PLUCKNETT, *supra* note 4, at 233; cf. Dworkin, *The Elusive Morality of Law*, 10 *VILL. L. REV.* 631, 632 (1965) (description of "Tex," who has bad aims but complies rigidly with the letter of the law).

161. W. HOLDSWORTH, *supra* note 142. The treason statute of 1534 provided that punishment could only be inflicted on defendants "lawfully convict according to the Laws and Customes of this Realm." 26 Hen. 8, c. 13 (1534). "There was obvious concern for the preservation of legal integrity regardless of how politically oriented a trial for high treason might become." Hill, *supra* note 28, at 99. "Despot as he was, [Henry VIII] was yet animated by a scrupulous regard for the letter of the law." T. PLUCKNETT, *supra* note 4, at 220. See generally Elton, *supra* note 3, at 265.

cepted today. Law was thought to possess divine qualities—to circumvent it would have been unthinkable.¹⁶² To follow the established procedures without risk of loss was not only acceptable, it was the application of law to its fullest.

Moreover, even when law was thought to have an ascertainable purpose, that purpose was not necessarily the same as it is today. Law in general was viewed as a *protecting* influence by the aristocracy and others with influence.¹⁶³ Law was not designed to protect the masses from the despots so much as it was to enshrine the established privilege of the aristocracy, to protect it *from* the masses.¹⁶⁴

This view is most apparent in the criminal law. The criminal law served primarily to protect the state from criminals, and the procedures were designed to carry out this purpose. A more modern view would separate the functions of the substantive law and the procedure. To view contemporary criminal procedure as a mechanism for protecting individuals from the dangers of excessive state power is not unreasonable. Nevertheless, such a view would have been hard to find in 1536. Punishing the guilty was more important than freeing the innocent,¹⁶⁵ and if a few innocent people were punished in order that the maximum number of guilty were convicted, this was of little moment.

From this perspective it is possible to understand that procedures were more skewed toward the state in felony, and especially treason, cases than in misdemeanor prosecutions. The greater the crime, the greater the threat to the state,¹⁶⁶ and the more impor-

162. C. OGILVIE, *supra* note 58, at 2.

163. "To anyone living in late-medieval England, laws and law courts formed a network designed to uphold a particular kind of proprietary and Christian order." Guth, *Enforcing late-Medieval Law: Patterns in Litigation During Henry VII's Reign*, in *LEGAL RECORDS AND THE HISTORIAN* 80, 95 (J. Baker ed. 1978). See also C. OGILVIE, *supra* note 58, at 6, 65-68.

164. C. OGILVIE, *supra* note 58, at 3-7.

165. There is, for example, Wolsey's often-stated desire to enforce law and order with particular vigor. See Guy, *The Early-Tudor Star Chamber*, in *LEGAL HISTORY STUDIES* 1972, at 122 (D. Jenkins ed. 1975). See also Cockburn, *supra* note 130, at 75 ("an overriding desire to convict"); C. OGILVIE, *supra* note 58, at 65-68; Letter from Wolsey to Henry VIII, reprinted in 2 *LETTERS AND PAPERS*, *supra* note 8, app. 38, at 1559.

166. Thus, the necessity of placing the political cases of the time in proper perspective and not generalizing from them about legal procedure can be understood. W. HOLDSWORTH, *supra* note 142, at 84.

tant it became to ensure that all the guilty were punished. Where the threat was treason by a person of influence, the state's interest reached its peak, and the procedures reflected this weighing of values. Anne Boleyn was convicted not because of her guilt, but because the charge against her was covered by a system designed to ensure that *no* treason occurred, and it was for that reason that she was charged with treason.

In this light the system of criminal procedure in Tudor England was very effective. Effect must be measured by purpose, and the purposes then bore little relation to what are now considered the purposes of the system of criminal justice.

Finally, it is important to realize that Henry's reign was not nearly so uncontrolled or entrenched as is often assumed. Kings possessed nothing like the modern standing army,¹⁶⁷ and their power depended in large part upon favorable public opinion.¹⁶⁸ One very important purpose of the trial of Anne Boleyn was to convince the people that she was guilty and that her fate was justified.¹⁶⁹ If the trial was not a complete success in this regard,¹⁷⁰ it nonetheless was more persuasive than the evidence itself could justify.

Henry also in large part depended for his power upon satisfactory relations with Parliament.¹⁷¹ On both legal and pragmatic grounds Henry's control over the country and the specific policies he supported required a cooperative Parliament. Henry ruled *with* Parliament every bit as much as he ruled over it. His greatest accomplishment was clearly the extent to which he used Parliament

167. T. PLUCKNETT, *supra* note 4, at 222.

168. "[I]n practice, this strong crown depended for the execution of all its notable powers on the willing cooperation of a large political nation . . . over whom it had very few physical means of control, and whom . . . it could only hope to retain cooperative by observing the rules of the game." Elton, *supra* note 3, at 292-93. *See also* Rezneck, *supra* note 72, at 282-86.

169. *See* note 58 *supra*.

170. *See* text accompanying notes 95-97 *supra*.

171. *See* C. LOVELL, *supra* note 84, at 239. "Henry VIII knew very well that he could not pursue his matrimonial and ecclesiastical policy unless he could gain the support of the House of Commons." W. HOLDSWORTH, *supra* note 142, at 98. Several of Henry's legislative proposals actually were rejected or amended, making clear that his power was far from unlimited. T. PLUCKNETT, *supra* note 4, at 220; Elton, *supra* note 3, at 280. Elton has argued, moreover, that Parliament was neither packed nor subservient. *Id.* at 291.

and made parliamentary legislation predominant.¹⁷² Difficult relations with Parliament would have jeopardized his aims as well as his position. It was therefore necessary that his actions not overly antagonize the members of Parliament. Because the position of Parliament largely depended upon the acceptance of law as an institution and because the common lawyers themselves had much influence in Parliament,¹⁷³ Henry would have been taking an unnecessary risk in publicly breaching established legal procedures. The trial of Anne Boleyn may have been nothing more than a formality to Anne Boleyn, but to Henry it was a procedure demanded by political necessity.

CONCLUSION

The above discussion shows that the trial of Anne Boleyn, as well as the other state trials, was inseparable from the power and politics of the state. Law, like armies, was an engine of state, not a mechanism for justice. The evil of the state trials is only in small part the problem of factually innocent people being frequently executed. The greater harm is that the trials established a connection between legal procedures and political power that could help only to reinforce scepticism about the law and the procedures it employed. When law is used as the agent of raw political will, law is weakened as political power is strengthened. By proceeding against Anne Boleyn by law rather than by unabashed force, Henry and his advisors weakened the very legal system that they so often sought, with good conscience, to strengthen.

172. See C. LOVELL, *supra* note 84, at 232; T. PLUCKNETT, *supra* note 4, at 219-20; Barraclough, *Law and Legislation in Medieval England*, 56 L.Q. REV. 75, 77 (1940); Elton, *supra* note 154, at 278.

173. W. HOLDSWORTH, *supra* note 142, at 98; C. OGILVIE, *supra* note 58, at 73.