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"For Words Only": From Treason Trial to Liberal Legend in Early Modern England

Annabel Patterson

This article is part of my reassessment of the theoretical importance of "Holinshed's" *Chronicles*, the huge Elizabethan chronicle that appeared in two editions a decade apart (1577 and 1587). The *Chronicles* are unusually pertinent to negotiations now taking place between disciplines that earlier proceeded in partial ignorance or disdain of each other—law, political history and theory, economics, anthropology, and literary studies. The *Chronicles* convey significant information in all of these areas and on their convergences, which may have been greater in early modern England than they later were perceived to be in modern academic thought.

I would argue that the *Chronicles*, which were collaborative projects, were compiled according to several protocols that run counter to certain modern historiographical ideals. These protocols may be summarized as follows. First, one of the functions of a national history was to discover, salvage, and preserve in print ephemeral, manuscript, or otherwise endangered records. In other words, the *Chronicles* were conceived from the start as "documentary history," as much a part of the national archive as were the enrolled statutes stored in the Tower of London. Among ephemeral records, apparently, were previously published pamphlets, such as Sir John Cheke's *Hurt of Sedicion* (1549) or Thomas Churchyard's account of the 1578 festivities for Elizabeth on her progress to Suffolk and Norfolk, which, the chronicler tells us, "it were better to record . . . than . . . to let it perish in three halfe penie pamphlets, and so die in oblivion."¹

1. *Holinshed's Chronicles of England, Scotland, and Ireland*, (London: J. Johnson et al., 1808; reprint, New York: AMS Press, 1965), 4:375. The *Chronicles* was first published in 1577 and was then largely the work of Raphael Holinshed, though with the assistance of William Harrison and Richard Stanyhurst, and the archival resources of John Stow. After Holinshed's death, a new edition was produced in 1587 by a group of five antiquaries, including John Stow, but with Abraham Fleming as chief editor. A "Continuation" extended the history of England through 1586, up to the moment of publication, but there was also heavy supplementation in early parts of the history, especially in the reigns of the previous Tudor monarchs. This edition had a complex history of censorship. For the reader's convenience, parenthetical references in the text are to the early nineteenth-century edition rather than the three-volume sixteenth-century one.

Second, given the nature of post-Reformation experience, which set Protestants and Catholics against each other in changing patterns of domination and repression, a national history should not and could not be univocal, but had to shoulder the responsibility of representing diversity of opinion. Wherever possible, moreover, diversity should be expressed as multivocality, with the *Chronicles* recording verbatim what they found in earlier historians and contemporary witnesses.

The third and most important protocol was “the right to know.” The chroniclers were extremely interested in what we now call rights theory, specifically in constitutional and legal rights, and in some abstract conception of justice; included in this theory were the conjoined rights of writing and reading, which in the late sixteenth century were unduly constrained. The chroniclers had, as they frequently testify, good reason to believe that what they were doing teetered on the edge of the illegal—that the general restrictions on public expression had particular relevance to English historiography. That they chose to test the limits of the allowable in this arena of Elizabethan policy by carrying the second edition up to the minute, relating events almost as they happened, and that the 1587 edition was consequently called in by the Privy Council and “castrated” before being released again to the booksellers, are both proofs of the brinkmanship they managed. Their motives were to make available to the reading public enough of the complex texture of the national history that the middle-class reader could virtually become his own historian—that is to say, a thoughtful, critical, and wary individual.

This conceptual frame highlights the significance of the “document” I propose to discuss. Into his account of Mary Tudor’s reign, Holinshed inserted what appears to be a verbatim transcript of Sir Nicholas Throckmorton’s trial for treason in 1554. The question of whether it could have been in fact a verbatim transcript, and if so by whom, is one to which we will return in some detail. It also appears to be a reprinting of a pamphlet; like Cheke’s *Hurt of Sedicion*, published just a few years before this trial took place, its presentation in the *Chronicles* typographically mimics the title page of a pamphlet. Holinshed introduces the Throckmorton account into his narrative of Sir Thomas Wyatt’s rebellion against Mary for the good reason that Sir Nicholas had been implicated in that rebellion. However, the length of the Throckmorton trial is entirely disproportionate to its importance when compared to the much smaller space allotted to Wyatt’s trial and execution, unless one were to posit that it was precisely Throckmorton’s surprising acquittal, and the defeat thereby given to Mary’s neophyte government, that justified its inclusion and its length.

Holinshed introduced this material with explanatory and apologetic language:

But nowe for as much as a copy of the order of Sir Nicholas

Throckmorton's arraignment hath come into my hands, and that the same may give light to the history of that dangerous rebellion I have thought it *not impertinent* to insert the same (4:31; emphasis added).

Whether it was indeed "not impertinent" to readers in 1577 is a question that can only be answered by careful study of the document's intended effect.

This is the only instance in the *Chronicles* of a major political trial in which both prosecution and defence are fully represented. In the second edition of the *Chronicles*, readers could compare, with some irony, Throckmorton's trial for complicity in a Protestant conspiracy with its ideological converse, the 1584 treason trial of Sir Nicholas's nephew, Francis Throckmorton, for engaging in a Roman Catholic conspiracy. The source for this trial was a government pamphlet published in June of that year (with similar typographical indications of its pamphlet origins). Sir Francis's trial, which resulted in his execution, is told in consecutive narrative. An insistently editorial voice asserts the defendant's guilt, the rectitude of the proceedings, and the necessity of torture. We are told that the commissioners' questions are "for the more brevity . . . omitted," and Sir Francis's various confessions are relayed by the editor ("Item, hath also confessed . . ."), though the pamphlet also included his "submission Verbatim written with his owne hand" (4:543). The trial of Sir Nicholas, however, is presented in what we would now recognize as dramatic form, complete with speech prefixes and occasional stage directions. This convention undoubtedly allows Sir Nicholas to represent himself with extraordinary freedom and cleverness.

What makes this fullness of representation theoretically important is that, unlike his nephew, Sir Nicholas was tried for treason "by words alone." For Sir Nicholas, words are of the essence; they are both the conceptual core of his defence and, in terms of his rhetorical skills, the secret of his survival. Because of the fullness of representation, this trial as recorded in the *Chronicles* became a model for the reporting of subsequent trials in the sixteenth and seventeenth centuries. In the longer perspective, it was awarded the status of a historical document, if at least partly for lack of other records. Holinshed's record is the only source of our detailed knowledge of the trial, and was consequently reprinted in all the various collections of *State Trials* that began to be published in the early eighteenth century.²

2. The Throckmorton trial was included in the first series, Thomas Salmon, ed., *A Complete Collection of State Trials*, 4 vols. (London: Timothy Goodwin, 1719); it is more accessible in the nineteenth-century series, William Cobbett and T.B. Howell, eds., *A Complete Collection of State Trials*, 33 vols. (London: R. Bagshaw, 1809-26), Vol. 1. David Jardine, *Criminal Trials* (London: C. Knight, 1832), 1:39, 62, both regarded this as "the earliest trial reported with sufficient fullness to be adapted for the purpose in view," and mysteriously declared that the report is "very imperfect." He did not explain what he regarded as missing. "Unfortunately," he added, "there are no means of

The record of this trial makes significant contributions to several arenas of legal-historical and cultural-historical interest. The first concerns the status of the text itself, which I have provisionally called a transcript. Just as notarial transcripts of political trials and ecclesiastical examinations clearly existed and were used as the basis of official accounts, one can also adduce evidence for the existence of unofficial reporting and unauthorized publication as a strategy not only arising out of local conflicts but underwritten by an embryonic theory of the public's right to know.

Second and most central to the argument, Sir Nicholas Throckmorton's strategies of self-defence reveal a wary and intelligent understanding that treason law is, and was then, peculiarly vulnerable to historical and political contingency. His success in pointing this out to the jury constituted an exercise in what we might call, not facetiously, early modern critical legal theory. To restate this in terms of cultural history's focus on *mentalités*, Throckmorton's defence shows that in the middle of the sixteenth century it was possible for a thinking person to develop a critical perspective on "Law" as a set of socially and politically constructed rules, rules that, particularly at this stage in history, were subject to sudden and continuous change. Donald Kelley has argued that the Reformation, with the rival loyalties it spawned, threw into relief the ambiguities of "law" as an absolute concept and made it possible for the Marian exile John Ponet, for example, in his *Short Treatise of Politike Power* (1556), to exclaim: "Wo be unto you . . . that maketh unryghteous lawes."³ William Harrison, who wrote the first part of the *Chronicles*, the "Description of England," slipped into it a sardonic account of common law, as "so variable, & subject to alteration and change, that oft in one age, diverse judgements doo passe upon one maner of case." And, he added, "these words; In such a yeare of the prince, this opinion was taken for sound law; doo answer nothing else, but that the judgement of our lawiers is now altered, so that they saie farre otherwise," (1:302).

Throckmorton's distinctive contribution to this early modern relativism was his understanding that if the laws governing treason, the most serious offence recognized by law, could change arbitrarily to accommodate the policies of particular regimes, then the relation between man-made law and justice was brought into even sharper focus than that provided by the clash between one's duties to God and to the state, or between one judicial decision and another. In the case of treason law, other specifically jurisprudential questions followed. Was parliament or

rendering it more complete and intelligible; for no other account of the proceedings is to be found, nor are the examinations of the seven witnesses, or of Throckmorton himself, at the State-Paper office."

3. Donald Kelley, "Ideas of Resistance before Elizabeth," in *The Historical Renaissance: New Essays on Tudor and Stuart Literature and Culture*, eds. Heather Dubrow and Richard Strier (Chicago: University of Chicago Press, 1988), 51.

the common law the likeliest source of rules protective of the individual, as well as of the state? Were judges capable of "objectivity" (which in Throckmorton's vocabulary was rendered as "indifference") when their own political self-interest was at stake? And what was the role, both in usual practice and ideally, of the jury?

The importance of this trial for the history of jury behavior, and perhaps more significantly for the political-legal theory of juries, will provide one of two brief concluding sections. In the second, I shall argue that, at an historical juncture when professionalization was taking on a new intensity and visibility, Throckmorton staged a public confrontation over the layman's access to the law, a confrontation which, because it was dramatically if only momentarily successful, became a conceptual model for John Lilburne and the Leveller *Agreement of the People* a century later. Nor should it be forgotten that the law reforms proposed unsuccessfully in that *Agreement* were held in the cultural memory until they could, another century and a half later, be instantiated in the 1791 Amendments to the American Constitution, exactly half of whose protections to the citizen concern those rights about trial procedure that for Throckmorton and Lilburne were conspicuously unavailable.

I. TUDOR TREASON LAW

In the trial for treason, as in no other legal confrontation, the defendant is accused of the most complete alienation from his society conceivable, challenging the base of its government. We now prefer to blur the political edge of a treason trial by defining the crime as "betrayal of one's country," an ideological ploy that barely conceals the conflicts of loyalties and principles that underlie such stark and asymmetrical confrontations between state and individual. In early modern England, where the confrontation was posed as between monarch and subject, and hence implicitly between the subject and God, it was still possible to perceive where the veil of ideology stopped and the story of interests began.

John Bellamy demonstrated that the Throckmorton case occurred at one of several crisis points in the early Tudor period when law and politics merged so dramatically that their collusion became visible. During the late medieval period, scarcely an untroubled era politically, the Yorkist and Lancastrian dynasties were able to manage fairly well, and reasonably fairly, with the basic treason statute devised by Edward III in 1352 (25 Edw. 3 ch. 2). However, the coming of the Reformation to England and still more the bizarre marital history of Henry VIII inaugurated a period of rapid and arbitrary legal innovation, during which the definition of treason expanded to meet the local and contingent needs of particular monarchs. The result was a widespread confusion about what did and did not count as treason; in Bellamy's words, a confusion "fortuitous for the government, dangerous for the subject." As he observed,

the problems in the law were exacerbated by the heightened political and religious tensions of the era, which “tended to make men curb their tongues for fear of being regarded as betrayers of their prince, church and realm.” As compared to the magnates of the fourteenth and early fifteenth century, whom Bellamy characterized as “great experts on illegal accusations and precedents in general,” and willing to oppose any monarchical incursions upon justice as they understood it, “all those with a good knowledge of the law” in the sixteenth century “seem to have been in thrall to the crown.”⁴

The Henrician Treason Act of November 1534 (26 Hen. 8 ch. 13), which identified three brand-new treasons, including treasonable words that were merely spoken, reinforced this tendency to hold one’s tongue. In G. R. Elton’s summary, it was now treason either to express maliciously in speech or writing a desire or intention to endanger or depose the monarch and his immediate family, or “to call the King, in express writing or words, slanderously and maliciously, a heretic, schismatic, tyrant, infidel, or a usurper of the crown.”⁵ The saving word “maliciously” had been insisted upon and possibly inserted by the House of Commons. However, as Elton pointed out, it was precisely spoken objections to Henry’s policies, to the Boleyn marriage and the break with Rome—what we perceive as ordinary political criticism or grumbling—that, being rather widely reported around the country in 1534, had motivated the new legislation in the first place. Political and religious dissent, which to modern eyes is scarcely *de facto* malicious, was now explicitly labelled treason; the failure to report it was misprision of treason.

Bellamy also pointed out that, whereas each of the Tudors expanded the scope of treason during the course of their reigns to deal with specific problems, expansion was not continuous. On the contrary, contractions tended to occur at the beginnings of reigns, “when a new monarch, probably in search of additional popularity, . . . removed the most disliked features of the treason law which his predecessor had operated.”⁶ One can reasonably infer that such expressions of leniency, even more than their opposite, and especially when they themselves imply or articulate a critique of more repressive policies, would create a climate of skepticism.

In 1547, at the opening of Edward VI’s reign, a number of concepts were circulated that could not thereafter be withdrawn. The Edwardian treason statute (1 Edw. 6 ch. 12) began by describing the laws of the king’s father as “verie streighte, sore, extreme and terrible.” The act

4. John Bellamy, *The Tudor Law of Treason* (London: Routledge and Kegan Paul, 1979), 82-83.

5. G. R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1972), 287, 399-400. It is all the more useful to supplement Bellamy’s account of Tudor treason law with that of Sir Geoffrey Elton, because the latter’s account of this topic is generally apologetic and marked by admiration for Thomas Cromwell’s regime.

6. Bellamy, *Tudor Law of Treason*, 47.

claimed to be a return to that of 1352, a sort of legal primitivism, but in fact it retained certain provisions of the treason act of 1534, as well as the succession act of 1543, with respect to challenging the royal supremacy over the church or the king's legitimacy. On the other hand, if these challenges were only *verbal*, and not written or translated into overt action, they were only to be treasonable on the third offence—a move obviously designed to counteract widespread fear that, in a political environment rendered even more than usually hazardous by recent events, a man might endanger his life in casual conversation.

When Mary Tudor came to the throne in 1553 amid the flurry of factional activity in support of Lady Jane Grey, her first opponents, especially Northumberland, were tried under the treason acts of Edward III and Edward VI. However, a new treason act soon followed. Perhaps in order to mitigate the sense of horror at the recent executions, Mary proceeded to outdo her brother in juridical leniency, at least in theory. The act opened with a preamble declaring the queen's pity for the fate of the noble victims of the trials just concluded and her commitment to abide by the treason law of Edward III alone. In particular, the preamble focused on the fact that under her predecessors men had been convicted of treason "many times, for woordes onelye without other facte or dede doone or perpetrated," a clear slap in her father's face.

In the case before us, "treason" referred to the charge that Sir Nicholas Throckmorton had been a moving spirit, without actually lifting a hand, in the uprising led by Sir Thomas Wyatt the younger against the newly-crowned queen, a movement explicitly motivated by her stated determination to return the realm to Roman Catholicism and to marry Philip II of Spain, an act which many feared would bring England under Spanish domination. In fact, Throckmorton was one of a group of eight members of the gentry who were charged with conspiring with Wyatt and others in London to seize the Tower and levy war against the Queen. Of these, as David Loades has pointed out, two had already escaped to France, and four were never brought to trial. Only Throckmorton and Sir James Croftes stood to the indictment. According to Loades, their examinations (none of which has survived) may have been conducted primarily for the purpose of incriminating the princess Elizabeth and Edward Courtenay, Earl of Devon, and once Throckmorton and Croftes were in custody the Council's interest in the rest of them may have waned.⁷

Throckmorton, who was thirty-seven at the time of his trial, had thus far had a significant career, part courtier and part parliamentarian. During Edward VI's reign he had been knighted and appointed to the privy

7. David Loades, *Two Tudor Conspiracies* (Cambridge: Cambridge University Press, 1965), 96-97.

chamber. Although this period of favor was inevitably short-lived, dependent as it was on Protector Somerset and the young king, Throckmorton seems to have played his political cards reasonably well, surviving Somerset's fall and the chaotic transition to the new reign. His signature appears on the letters patent of June 7, 1553, which limited the succession to Lady Jane Grey; however, on the day of the king's death, he sent a messenger to Mary informing her that, because of her brother's death, she needed to act fast and defensively against Northumberland. In other words, Throckmorton acted for a brief, prudential period as a double agent.⁸ Nevertheless, on February 20, 1554 he was sent to the Tower, due to the testimony of one of Wyatt's lieutenants that he and Throckmorton had discussed plans for the insurrection. He was tried in the Guildhall on April 17 by a special commission of oyer and terminer, after fifty-eight days of close imprisonment.

Throckmorton conducted his own defence. This was usual procedure in the sixteenth century, since felons were not permitted legal counsel, but were required to speak for themselves. This rule persisted in treason cases until it was altered by a statute of William III in 1696, and in all other capital cases until well into the eighteenth century.⁹ Facing a capital charge, the defendant came face to face with what Hobbes would later define as the second "Fundamentall Law of Nature . . . By all means we can, to defend our selves."¹⁰ In the real world of the early modern treason trial, as distinct from an imaginary state of nature, self-preservation meant refusing alienation (refusing to be represented as an outcast from the society conducting the trial). It also meant proving one's innocence conceptually and rhetorically, literally living by one's wits. There were very few defendants who managed to turn the legal procedure of self-defence to such advantage. Throckmorton was, however, unusually well-informed, both about legal procedure and about the history of treason law. He managed not only to infuriate the prosecution lawyers by his procedural sophistication, but also to persuade the jurors that the law was being unjustly manipulated. In short, Throckmorton was acquitted, to the fury of the queen and the embarrassment of her commissioners. His jurors were subsequently imprisoned in the Tower and the Fleet, and fined exorbitantly.

8. Sir Sidney Lee's article on Throckmorton in the *Dictionary of National Biography* is heavily indebted to David Jardine's "Memoir" in his edition of the *Criminal Trials*, 1:40-62. In addition, there exists a peculiar poem about Throckmorton's life, which may have been written by a member of his family. This was first edited by Francis Peck, under the following title: *The Legend of Sir Nicholas Throckmorton, Kt. Chief Butler of England & Chamberlain of the Exchequer; who died of Poison, A.D. 1570, an Historical Poem: By (his Nephew) Sir Thomas Throckmorton of Littleton . . .* (1736).

9. See Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (Chicago: University of Chicago Press, 1985), 135.

10. Thomas Hobbes, *Leviathan*, ed. C.B. Macpherson (London: Printed for Andrew Crooke, 1668; reprint, Harmondsworth, Middlesex: Penguin, 1968), 190.

II. UNOFFICIAL REPORTING

In introducing Holinshed's record of the trial, I used the term "transcript" provisionally but seriously. We do not know who produced it, nor how Holinshed would have acquired it, but we can make an educated guess. Bellamy assumed that the account of the trial was probably compiled by Throckmorton himself after Mary's death, though "based on notes taken at the time."¹¹ But it does not read like the protagonist's reconstruction after the event, which is more likely to have been told in the first person. Rather, the *vraisemblance* of the dialogue and its air of completeness demands one of three possibilities: very extensive notes made at the time, by another interested party or parties, since Throckmorton could scarcely have been scribbling while he spoke; subsequent fabrication by someone with a great ear for dialogue and a lively political imagination, a political playwright, as it were; or some combination of the two. G. Kitson Clark, who challenged Sir Leslie Stephen's naivete in the *Dictionary of National Biography* on the topic of the truth-content of the "transcript," admitted that "the trial certainly reads as if it were taken down verbatim," and, as one of the possible explanations for its existence, that "it may very well have been reconstructed from the memories of people who had actually been present in the Guildhall at the time of trial, possibly assisted by their notes, possibly assisted by the recollections of Sir Nicholas himself."¹² Clark distrusted its documentary status, on the grounds that the much later writer Daniel Defoe could achieve "the language of real men" in a manifestly fictional form; however, Clark could not rule out as a possibility that which I here offer as the compromise view.

Official transcripts of trials did not come into existence before the eighteenth century. But in the early fifteenth century ecclesiastical examinations were taken down in detail by official notaries, as in the case of Sir John Oldcastle's examination in 1413, recorded in Archbishop Arundel's *Magnus Processus*, for which Thomas Netter served as one of the notaries.¹³ Kitson Clark remarked that "if people speak slowly it is possible to take down what they say in long hand," using as an example the detailed records of clerical interrogations in sixteenth-century Catalonia.¹⁴ It is reasonable to assume that someone who intended that his friends could take notes would indeed speak slowly. Books on how to write swiftly were published in England from 1588 onwards, and may

11. Bellamy, *Tudor Law of Treason*, 246.

12. G. Kitson Clark, *The Critical Historian* (New York: Basic Books, 1967), 95.

13. These records are preserved in the *Fasciculi Zizaniorum*, a collection of documents relating to Wycliffe that once belonged to John Bale. See the edition by W.W. Shirley (London: Rolls Series, 1858), 435-42. For Netter, see J.H. Wylie, *The Reign of Henry V*, 3 vols. (Cambridge: Cambridge University Press, 1914-1929), 1:238-41.

14. Kitson Clark, *The Critical Historian*, 86.

well refer to methods in use before then.¹⁵ But shorthand as such was obviously not considered crucial to the Tudor government when it placed Thomas Norton, the Queen's printer, in a favored spot in the Guildhall so that he might write an official account of the trial of Thomas Howard, duke of Norfolk, which also happens to be recorded in dialogue or dramatic form.¹⁶

It is also important to grasp that the motive for note-taking derived from the existence of an opposition, whether religious, political, or both. Kitson Clark's notion that during the four years between Throckmorton's trial and Elizabeth's accession the climate "would not be propitious to any account of this trial being preserved, least of all published,"¹⁷ is clearly as naive in its own way as Sir Leslie Stephen's uncritical acceptance of its documentary status. Well before Throckmorton's case, as Duncan Derrett has shown, unofficial manuscript accounts of Sir Thomas More's 1534 trial were generated, from which several pamphlets were printed, all by continental presses. All of these can be traced to a single account, now lost, compiled perhaps by an eyewitness, perhaps by someone who, in Derrett's words, "avidly took down what was brought to him from the scene of the trial."¹⁸ Derrett reconstructs the profile of this witness as someone with antigovernmental sympathies, concerned with the trial "from a technical, even juridical standpoint," and with the means to convey "this highly-skilled précis" to Paris within a fortnight of the execution—someone, perhaps, with diplomatic immunity. More's trial would have been particularly pertinent to Throckmorton, since he was tried under that notorious Henrician Treason Act of 1534. At the same time the religious content of the questions put to him placed him squarely, if ironically, in the line of those, from Oldcastle to Lady Jane Grey, who were interrogated by the ecclesiastical authorities, and to whose supporters it was of the utmost importance that their version of events should reach the public. It is also unlikely that those who themselves held a strong (doctrinal) concept of truth, and believed that they were required to promulgate it at whatever cost to themselves, would have consciously distorted the record.

But the account of More's trial was still, as Derrett acknowledged, a précis. The other side of the frame for Throckmorton's trial, speaking both chronologically and technologically, is supplied by the trial of John Lilburne in 1649. Here we have stronger information as to how this case entered the archives. An apparently verbatim account of Lilburne's trial, even longer than that of Throckmorton's, was published in London

15. See Robert Latham and William Matthews, eds., *The Diary of Samuel Pepys*, 11 vols. (Berkeley: University of California Press, 1979), 1:xlix.

16. Kitson Clark, *The Critical Historian*, 87.

17. Kitson Clark, *The Critical Historian*, 94.

18. Duncan Derrett, "Neglected Versions of the Contemporary Account of the Trial of Sir Thomas More," *Bulletin of the Institute of Historical Research* 33 (1960): 204.

almost instantly after his dramatic acquittal, which had caused huge public demonstrations of joy.¹⁹ It was published by "Theodorus Verax," the pseudonym of the radical Clement Walker, whose hostility to the Long Parliament was as great as Lilburne's.²⁰ Halfway through the pamphlet, Walker asked the reader "to take notice" that the record is not quite complete:

that in the Indictment itself there was a *great many other things than in this is expressed . . . that were more neglected to be taken* [i.e. taken down] *than the pleadings*; because it was not supposed, but the Indictment (being a record) a true copy of it might easily be had; considering that by law all records ought freely to be used by any freeman of England, and copies of them denied to none that desire to take them. But that privilege being in this cause already disputed and denied; in which regard, the Reader must at present accept of *the best imperfect notes that the publisher could pick up*.²¹

Walker's point that legal records ought "freely to be used by any freeman of England" indicates that he thought he was contributing to that freedom by assisting the public's right to know, a staunchly polemical purpose. But this also implies that Walker believed that the pleadings (Lilburne's self-defence) had the same documentary status as the indictment. More important still, we can be reasonably sure from this apology that his account of the trial was based on notes taken at the time by someone other than Walker himself. This transcript was, apparently, checked by Lilburne in person, as indicated in a "Certificate" at the end: "At the earnest desire of the Printer, I have read this following Discourse, and cannot say but that I do verily believe, the penman of it hath done it with a very *indifferent* hand betwixt the Court, and myself the Prisoner: And so far as in me lies, I am for my part willing the world should see it" (4:1421; emphasis added). The presence of the word "indifferent" in this certificate implies an ideal of historiographical accuracy along with a theory of fairness, and historians of the Leveller tracts have concluded that Walker worked "under Lilburne's direction, from documents provided by him and a *stenographic report* of the trial."²²

I suggest that at least some of these conditions pertained also in the case of Throckmorton: that one or more persons deeply interested in this

19. *The Triall of Lieut. Collonel J. Lilburne . . . Unto which is annexed a necessary Appendix. Published by Theodorus Verax.* (Southwark: H. Hills, 1649).

20. Clement Walker is best known as the author of the *History of Independency* (1648-49), which is hostile to the Independents. Although at the beginning of the civil war he joined the parliamentary side, by 1647 he was suspected of being one of the instigators of the London riots, and in 1648 he voted in favor of an agreement with Charles I and was consequently expelled from the House of Commons in Pride's Purge. Like Lilburne himself, Walker was an indefatigable publicist, and from 1643 to 1651 he used the press to promote and defend his opinions.

21. See *State Trials*, 4:1328 (emphasis added).

22. William Haller and Godfrey Davies, eds., *Leveller Tracts* (Gloucester, Mass.: P. Smith, 1964), 31 (emphasis added).

political trial took notes; that the notes were conflated; and that after the event the “transcript” was compared with those that Throckmorton had obviously taken to prepare for his defence. The pamphlet that Holinshed claims came into his hands, and whose appearance is mimicked on the pages of the *Chronicles*, could, like thousands of others, have disappeared without trace; its clear opposition to Mary’s government made it peculiarly vulnerable.²³

Other still later examples can be adduced to explain the relation between unofficial note-taking and unauthorized publication. At the trial of William, Lord Russell in July 1683, Lady Russell was seated beside her husband in order to handle his papers and take notes for him. Whether or not she was the only note-taker, which seems unlikely, at least six unofficial accounts of his trial and execution were published, notwithstanding an explicit government ban on such pamphlets, including *The Whole Tryal and Defence of William Lord Russel, Who Dyed a Martyr to the Romish Fury, in the Year 1683, with the Learned Arguments of the Council on both sides*.²⁴

Lilburne himself explicitly drew the connection between Throckmorton’s trial and his own, which he had apparently studied with care as a model for his own self-defence. Lilburne’s use of the Throckmorton model may support my inferences as to Holinshed’s intentions in including it. Early in his testimony, Lilburne states:

Throgmorton, in queen Mary’s time, who was impeached of higher Treason than now I am; and that in the days of the commonly accounted bloodiest and cruellest prince that this many hundred of years hath reigned in England: . . . Throgmorton was in this place arraigned as a Traitor, and enjoyed as much, if not more [procedural] favour, than I have now enjoyed, although his then judges and prosecutor were bent to take away his life (4: 1288).

And Walker’s edition carried, at the place where Lilburne remembered Throckmorton, this telling marginal annotation: “Whose remarkable and

23. There is one independent manuscript witness, British Library Stowe 280, once owned by Algernon Capell, Earl of Essex. On fols. 75 ff. there appears “Tharraignemente of Sir Nycholas Throgmorton in the Gyeldehall at London, the xviith daie of Aprill, anno dni. 1554, expressed in a dialogue for the better understanding of every mans parte.” The manuscript has many spelling differences, including “Throgmerton” throughout, many changes of word order, different versions of the jurors’ names (e.g. Katerwane instead of Cater, fol. 76r.), including two first names that do not appear in the *Chronicles*, and is generally a slightly more expansive text. This would suggest that the *Chronicles* and the manuscript derive from *separate* transcripts. There is also a set of manuscript notes on the case (B.L. Add. Ms. 39838) in the papers of Sir Thomas Tresham (1543-1605), who would have been about eleven years old at the time of the Throckmorton trial. The papers were found hidden in a wall in 1828 at Rushton Hall, Northants. The notes on the Throckmorton trial are in Tresham’s own hand, and are written on the same paper as those he prepared for his defence before the Star Chamber in November 1581 for harboring Edmund Campion. This would be consistent with my claim that the Throckmorton trial became a model of the strategies of self-defence.

24. See Lois G. Schworer, *Lady Rachel Russell* (Baltimore: Johns Hopkins University Press, 1988), 114, 142, 279-80, n29. I owe this reference to James Epstein.

excellent Defence you may at large read in Hollingshead's Chronicle, in the Life of Queen Mary, *which discourse is excellently well worth the speedily reprinting, especially seeing men are made traitors for words; which cruelty Queen Mary abhorred, as may clearly be read in that excellent statute of her's, made in the first year of her reign.*"²⁵ That men were indeed still being made traitors for words in 1649 is demonstrated by Walker's own fate. Thanks to the appearance of the second part of his *History of Independency*, and to his determination to enter Lilburne's trial in the public record, Walker himself was arraigned on a charge of treason on November 13, 1649 and placed in the Tower, where he died in 1651, never having come to trial. In other words, Walker's fate illustrated the necessity of his campaign for educating the public about the workings of treason trials, and at the same time it demonstrated that campaign's inefficacy at this stage. And if Lilburne learned from Throckmorton, others would later learn from Lilburne. As Olivia Smith has demonstrated, William Hone, on trial for blasphemous libel in 1817, drew on the arguments and tactics of Lilburne's defence, a single sheet of which he had serendipitously discovered, and then tracked down the original.²⁶ And so the chain continued.

III. THE TRIAL: THE MNEMONICS AND HERMENEUTICS OF SURVIVAL

I shall now discuss the "transcript" as though it had been arrived at by the compromise method described above, and was therefore, like Walker's account of Lilburne's trial, closer to truth than fiction. In one sense, it does not matter whether Sir Nicholas actually spoke all the words attributed to him, was possessed of the legal and mnemonic skills here evinced, or dominated the proceedings as completely as he here appears to have done. What matters is the structure of thought articulated in his defence, the legal strategies employed to validate it, and the fact that the transcript reappeared in the *Chronicles*. With regard to the issue of truth-content or documentary status, the likelihood that he did conduct his defence as recorded in the *Chronicles* is supported both by the fact that he won his acquittal (a rare result in major political treason trials) and that he subsequently had an important career as a diplomat under Elizabeth, including negotiating on her behalf in Scotland and France throughout the 1560s, where he maintained his strongly Protestant stance.

25. *The Triall of Lieut. Collonel J. Lilburne*, 21 (emphasis added).

26. Olivia Smith, *The Politics of Language 1791-1819* (Oxford: Oxford University Press, 1984), 176-201. I owe this reference too to James Epstein, whose chapter on T. J. Wooler, "Narrating Liberty's Defense: T. J. Wooler," in *Radical Expression: Political Language, Ritual and Symbol in England, 1790-1850* (forthcoming), systematically explores the politics and the mechanics of unofficial accounts of trials in the late eighteenth and early nineteenth centuries.

Throckmorton was a striking exception to Bellamy's description of a tongue-tied generation. When Holinshed introduced the trial transcript into the *Chronicles*, its disproportionate length was remarkable in itself, but Holinshed, stepping out of character, alerted his readers that the case required their special attention. Having indicated his serendipitous discovery of the record (without identifying from whom he had received it) he proceeded to encourage a particularly active form of interpretation:

I have thought it not impertinent to insert the same: not wishing that it should be offensive to anie, sith *it is in every mans libertie to weie his words uttered in his owne defense, and likewise the dooings of the quest [jury] in acquitting him*, as maie seeme good to their discretions, sith I have delivered the same as I have it, without prejudicing anie mans opinion, to thinke thereof otherwise than as the cause maie move him (4:31; emphasis added).

At this moment, the stance of editorial neutrality universally adopted and sometimes proclaimed in the 1577 edition of the *Chronicles* reveals its prior assumption: that the readers in question had the same capacity for fairness based on reason as was ideally assumed of jurors. As we shall see, Throckmorton sought to develop this capacity in his own jurors, particularly with respect to their educability in the most intricate details of the law. Replaying his game for another purpose, Holinshed sought to educate his readers in "indifference," or independent judgment based on knowledge.

Two minutes into the trial, we suddenly realize that we are not only latter-day jurors, but also the audience of a theatrical production, the ending of which we already know. There is one moment during the trial when Throckmorton himself not only draws the analogy between the real-life drama of the courtroom and literary conceptions, but also reminds us that this play of state could have turned out very differently. In the course of a dispute about jury packing (to be discussed below), Throckmorton refers to an earlier trial he had personally witnessed in which packing not only took place, but was blatantly discussed by the judges, including Cholmley. "I trust," he said,

You have not provided for me this daie, as in times past I knew an other gentleman occupieng this wofull place was provided for. It chanced one of the justices upon gelousie of the prisoners acquitall, for the goodnesse of his cause, said to an other of his companions a justice, when the jurie did appeare; I like not this jurie for our purpose, they seeme to be too pitifull and too charitable to condemne the prisoner. No no, said the other judge (to wit Cholmeleie)²⁷ I warrant you, they be picked fellowes for the nonce, he shall drinke

27. The reference is to Sir Roger Cholmley, one of the commissioners, who had been Lord Chief Justice until 1553, when he was dismissed from that post on Mary's accession because he had witnessed the will of Edward VI in favor of Lady Jane Grey.

of the same cup his fellowes have doone. *I was then a looker on of the pageant as others be now here: but wo is me, I am a plaier in that wofull tragedie.* Well, for these and such other like the blacke ox hath of late troden on some of their feet: but my trust is, I shall not be so used (4:33; emphasis added).

The black ox, in fact, did not come for Throckmorton, whose refusal to be passive in his own courtroom drama had the effect of transforming a tragedy of state into a comedy of legal manners.²⁸

Indeed, a large part of Throckmorton's strategy in the opening moments of the trial consisted in a struggle for control over procedure:

Sendall [Clerk of the Crown]: [lists the charges] Of all which treasons and everie of them in manner and forme &c: art thou guiltie or not guiltie?

Throckmorton: Maie it please you my lords and maisters, which be authorised by the queenes commission to be judges this daie, to give me leave to speake a few words, which dooth both concerne you and me, before I anser to the indictment . . .

[Sir Thomas] Bromley [Lord Chief Justice]: No, the order is not so, you must first plead whether you be guiltie or no

Throckmorton: But things spoken out of place, were as good not spoken.

Throckmorton's concept of "out of place" was, of course, the very opposite of that assumed by his judges, as based on established procedure.²⁹ But his determination to raise in the minds of the jury another conception of procedure—that which would give the accused the greatest opportunity to explain himself—had the secondary advantage of making his judges impatient, a fatal error that impugned their assumed objectivity, if it were assumed at all.

Bromley: These be but delaies to spend time, therefore answer as the law willeth you.

Throckmorton: My lords I praie you make not too much hast with me, neither thinke not long for your dinner, for my case requireth leasure, and you have well dined when you have doone justice trulie. Christ said, Blessed are they that hunger and thirst for righteousnesse.

Bromley: I can forbear my dinner as well as you, and care as little peradventure.

[Francis Talbot, Fifth Earl of] Shrewsbury: Come you hither to checke us Throckmorton? We will not be so used, no no, I for mine owne part have forborne my breakefast, dinner, and supper to serve the queene.

28. It may, however, be Cholmley's dismissal from the position of Lord Chief Justice that Throckmorton here naughtily alluded to.

29. For "the definitive proceedings in causes criminal!" see Sir Thomas Smith, *De Republica Anglorum*, ed. Mary Dewar (Cambridge: Cambridge University Press, 1982), 110-16.

Throckmorton: Yea my good lord I know it right well, I meant not to touch your lordship, for your service and pains is evidentlie knowne to all men . . . so I will answer to the indictment, and doo plead not guiltie to the whole, and to everie part thereof.

When Sendall asked him the next question, "How wilt thou be tried?" the only proper answer was "By God and the Countrie."³⁰ But Throckmorton continued his strategy of willful misunderstanding:

Throckmorton: Shall I be tried as I would, or as I should?

Bromley: You shall be tried as the law will, and therefore you must saie by God and the countrie.

Throckmorton: Is that your law for me? It is not as I would, but sith you will have it so, I am pleased with it, and doo desire to be tried by faithfull just men, which more feare God than the world (4:32).

In this opening sally, Throckmorton assumed the high moral ground, the highest religious sanction, with remarkable ease and adroitness. Continually thereafter he would imply that God was watching the proceedings, virtually in his corner. He also deftly established the tone as a debate among equals, forcing his opponents not only onto the defensive (by the invocation of the Beatitudes), but also into the picayune. The anticipatory echo of Pope's sardonic line in *The Rape of the Lock*, "and wretches hang, that jurymen may dine," shows both that Throckmorton takes his place in a long tradition of anti-legal satirists, and that the social valence is very different in this case, in that jurymen will be the heroes. The choices those jurymen will face are already established, before any evidence has been heard, in the simple contrasts between "tried as I should, or as I would," between procedural formalism and fairness, and between those who fear God and those who fear their political masters.

Along with his attacks on the restrictive formalism of accepted courtroom procedure, Throckmorton had clearly decided to take aim at the heart of jurisprudence, at legal interpretation itself. Accordingly, in the guise of appealing to the commissioners for ethical conduct of his trial, he explained to the jury what to expect:

I praie you remember I am not alienate from you, but that I am your christian brother; neither you so charged, but you ought to consider equitie; nor yet so privileged, but that you have a dutie of God appointed you how you shall doo your office; which if you exceed, will be greevouslie required at your hands. It is lawfull for you to use your gifts which I know God hath largelie given you, as your learning, art, and eloquence, so as thereby you doo not seduce the minds of the simple and unlearned jurie, to credit matters otherwise than they be. For master sergeant, I know how by persuasions,

30. See Smith, *De Republica Anglorum*, 110-16, where this formality, among others, is explained.

inforcements, presumptions, applieng, implieng, inferring, conjecturing, deducing of argument, wresting and exceeding the law, the circumstances, the depositions and confessions, that unlearned men may be enchanted to thinke and judge those that be things indifferent, or at the woorst but oversights to be great treasons; such power orators have, and such ignorance the unlearned have. Almightye God by the mouth of his prophet dooth conclude such advocates be cursed, speaking these words: Cursed be he that dooth his office craftilie, corruptlie, and maliciously. And consider also, that my bloud shall be required at your hands, and punished in you and yours, to the third and fourth generation. Notwithstanding, you and the justices excuse alwaies such erronious dooings, when they be after called in question, by the verdict of the twelve men: but I assure you, the purgation serveth you as it did Pilat, and you wash your hands of the bloudshed, as Pilat did of Christs (4:33-34).

At the ethical level the point of this speech lay in its refusal of alienation ("I prairie you remember I am not alienate from you, but that I am your christian brother"). But Throckmorton's jurors were thereby also instructed in the hermeneutics of suspicion ("applieng, implieng, inferring, conjecturing . . . wresting and exceeding the law") and warned to be on their guard against such tactics.

Throckmorton proceeded to argue that the law was being wrested and exceeded in two crucial respects. First, he had effectively been indicted under a statute no longer in force. The indictment claimed that Throckmorton and ten other gentlemen, in the company of certain traitors, "had compassed to deprive the queen of her crown" (which had been made treason in 1534 and again in 1547, but repealed in 1553) and that he had also "compassed" to levy war against her, which (as distinct, of course, from actually levying it) was not treason by any act. Bellamy inferred that those lawyers who drew up the indictment against Throckmorton "did so without having the recent amendments to the treason laws in mind," a quite remarkable supposition. He also supposed that the crown's lawyers worked from the indictments of Northumberland and his adherents, which had preceded the Marian statute of repeal.³¹ In fact, a charge of imagining the queen's death would have been treasonable under the statute of 1352 and sufficient (leaving aside the question of its truthfulness) to incriminate Throckmorton as merely one of a group of conspirators. This would be so regardless of whether he had subsequently supported the "imaginings" by overt act, but by drawing the indictment incorrectly the crown's lawyers made, from their perspective, a fatal mistake, one which permitted Sir Nicholas to claim illegal procedure. It also permitted him to claim injustice in a wider sense.

31. Bellamy, *Tudor Law of Treason*, 55.

The second aspect in which the judges might be found “appling, implieng, inferring, conjecturing, deducing of argument, wresting and exceeding the law” must be understood, paradoxically, in terms of the sixteenth-century expansion of the doctrine of equity, the territory in which “interpretation” makes its first appearance in a legal sense to describe the judicial handling of *statutes*. By the mid-sixteenth century, as acts of Parliament begin to acquire the force of modern legislation, and as Plowden’s *Commentaries* and the mid-century *Discourse upon the Expositcion & Understandinge of Statutes* witness, judges began to argue that even statutes needed to be restricted or extended by equity. There also appeared the secondary doctrine of interpretation according to the original intention of the lawmakers.³²

We can tell from the *Discourse* that this issue of original intention, so hotly contested in our own contemporary constitutional debates, was already perceived as problematic. In the first place, the concept of reading *ex mente legislatorum* must be subject to the knowledge that the makers of statute law (the members of previous parliaments) were not of a single mind: “so manie heades as there were, so many wittes; so manie statute makers, so many myndes; yet, notwithstanding, certen notes there are by which a man maie knowe what it was.” Second, the task of the careful interpreter is “not onlie to knowe where a statute shall be taken by equitie, but also where it shall be taken straightelie accordinge to the naked & bare letter.”³³ The first context in which strict or literal application of statutes must apply is “when the law is penall, for in those it is true that Paston saiethe, *Poenas interpretatione augere non debere*: for the lawe alwaies favoureth hym that goeth to wracke, nor it will not pulle hym on his nose that is on his knees.”³⁴ In the main part of his defence Throckmorton developed an anti-interpretive position, in which he too appealed to the “naked & bare letter” of the law as determined by parliamentary majority.

The charge against Throckmorton asserted not only that he was an accessory in Wyatt’s conspiracy but “that he was a principall deviser, procurer, and contriver” and that Wyatt “was but his minister.” The evidence against Throckmorton consisted entirely of statements made by men involved in Wyatt’s conspiracy, some of whom were already dead. Significantly, Wyatt himself, who had before his execution taken sole responsibility for the conception and organization of the uprising, made no statement against Throckmorton. Neither did young Edward Wyatt, whose in-court testimony or examination Throckmorton had unsuccessfully requested. Some of the testimony that was adduced, such as Win-

32. See Samuel E. Thorne, ed., *A Discourse upon the Expositcion & Understandinge of Statutes With Sir Thomas Egerton’s Additions* (San Marino: Huntington Library, 1942), 3.

33. Thorne, *Discourse*, 151.

34. Thorne, *Discourse*, 155.

ter's statement that Throckmorton knew of Wyatt's plan to seize the Tower of London and "misliked" it, was trivial, not to say (as indeed Throckmorton did say) exculpatory; other testimony—notably the testimony of Cuthbert Vaughan, who was brought into court and sworn—Throckmorton simply challenged as lies extracted from a condemned man who thereby hoped for clemency. All of the testimony consisted in reports of conversations, sometimes secondhand. Throckmorton did not deny that such conversations had taken place—indeed, he had signed a statement to that effect—but he did deny that conversations alone were treasonable. He did not deny what his sympathies were; his strategy was to make those sympathies seem typical of a loyal Englishman rather than treasonable and eccentric: "I confesse," he said in court,

I did mislike the queenes mariage with Spaine, and also the coming of the Spaniards hither, and then me thought I had reason to doo so: for I did learne the reasons of my misliking of you master Hare, master Southwell, and others in the parlement house, there I did see the whole consent of the realme against it; and I a hearer, but no speaker, did learne my misliking of those matters, confirmed by manie sundrie reasons amongst you; but as concerning anie sturre or upore against the Spaniards, I never made anie, neither procured anie to be made (4:36).

Throckmorton hereby appealed to his fellow parliamentarians who had now become his judges—Sir Nicholas Hare, Master of the Rolls, and Sir Richard Southwell, Privy Councillor—to remember the debates in Mary's first parliament during which they themselves had expressed concern over the plans for the Spanish marriage. And his own description of his conversation with Vaughan becomes, in effect, a daring Protestant polemic:

We talked of the incommodities of the marriage of the queene with the prince of Spaine, and how grievous the Spaniards would be to us here. Vaughan said, that it should be verie dangerous for anie man, that trulie professed the gospell to live here, such was the Spaniards crueltie . . . Whereunto I answered it was the plague of God justlie come upon us; and now almightie God dealt with us as he did with the Israelites, taking from them for their unthankfulnessse their godlie kings, and did send tyrants to reigne over them. Even so he handled us Englishmen, which had a most godlie and vertuous prince to reigne over us, my late sovereigne lord and maister king Edward (4:41).

Throckmorton was unintimidated by the manifestly ludicrous charge that he was the *eminence grise* of the entire uprising, with Wyatt acting merely as his catspaw. He assumed he was being treated as a pawn in a greater game. He asked that his own confession be read aloud in full, rather than selectively, so that his "words be not perverted and abused to

the hurt of some others, and especiallie against the great personages . . . for I perceive the net was not cast onelie for little fishes, but for the great ones” (4:42), by which he was probably alluding to attempts to incriminate the princess Elizabeth. But he also, addressing the jury directly, mocked the nature of the testimony: “For what maner of resoning or prooffe is this, Wiat would have taken the tower, Ergo Throckmorton is a traitor” (4:35). He knew how to work the *reductio ad absurdum*: “Of all which treasons, to prove me guiltie, the queens learned councill hath given in evidence these points materiall . . . for the compassing or imagining the queenes death . . . that I should saie to the said sir Nicholas [Arnolds] in Glocestershire, that maister John Fitzwilliams was angrie with William Thomas” (4:44).

From the perspective of legal history and theory, however, the most significant part of the trial was yet to come. Throckmorton, in his determination to draw a distinction in the jury’s mind between conversations and “overt acts” of treason, asked that the lawyers read aloud in the courtroom both the Marian statute repealing all previous treason laws except that of Edward III, and that ancient Edwardian statute itself. Unsurprisingly, this request was refused: “No sir, there shall be no bookes brought at your desire, we doo all know the law sufficientlie without booke,” said Bromley (4:45), whereupon, despite his pose of legal ignorance, and with an extraordinary display of mnemonic power, Throckmorton proceeded to instruct the jury (accurately) in the precise *wording* of the then relevant statutes:

You seeme to give and offer me the law, but in verie deed I have onelie the forme and image of the law; neverthelesse, sith I cannot be suffered to have the statutes red openlie in the booke, I will by your patience gesse at them as I maie, and I praie you to helpe me if I mistake, for it is long since I did see them. The statute of repeale made the last parliament, hath these words: Be it enacted by the queene, that from henceforth none act, deed, or offense, being by act of parlement or statute made treason, petit treason, or misprision of treason, by words, writing, printing, ciphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged treason, petit treason: but onelie such as be declared or expressed to be treason, in or by an act of parlement made in the five and twentieth yeare of Edward the third, . . . that is to saie: Whosoever doth compasse or imagine the death of the king, or levie warre against the king in his realme, or being adherent to the kings enimies within this realme, or elsewhere, and be thereof probablie attainted *by open deed* by people of their condition; shall be adjudged a traitor. Now I praie you of my jurie which have my life in triall, note well what things *at this daie* be treasons, and how these treasons must be tried and decerned; that is to say, by open deed, which the lawes dooth at some time terme (Overt act.) (4:46; emphasis added).

At which point, we can still hear the voice of Sir Thomas Bromley raised in indignation:

Bromley: Why doo not you of the queenes learned counsell answer him? Me thinke, Throckmorton, you need not have the statutes, for you have them meetlie perfectlie.

With the text of the current statutes thus inscribed in the minds of the jurors, thanks to Throckmorton's canny direction of their attention ("note well what things at this daie be treasons"), the lawyers became desperate and invoked cases from the common law which, they said, showed that merely verbal complicity in or procurement of a crime was held fully as punishable as action. It was this move that elicited Throckmorton's personal version of legal literalism, which had two components: first, that statute law is superior to common law precisely because it is written and therefore capable of literal interpretation; and second, that statute law, precisely by implying the whole consent of the realm, is impersonal, whereas judges are subject to interest and political pressure.

In pressing these principles, Throckmorton returned to the fact that his present judges were once his colleagues—a powerful move which simultaneously denied his alienation from them and charged them at least with inconsistency:

I have remembered and learned of you maister Hare, and you maister Stanford in the parlement house, where you did sit to make lawes, to expound and explane the ambiguities and doubts of law sincerelie, and that *without affections*. There I saie I learned of you, and others my maisters of the law, this difference betwixt such [common law] cases as you remembred one even now, and the statute whereby I am to be tried. There is a maxime or principle in the law, which ought not to be violated, that *no penall statute maie, ought, or should be construed, expounded, extended, or wrested, otherwise than the simple words and nude letter of the same statute dooth warrant and signifie*. And amongst diverse good and notable reasons by you there in the parlement house debated (maister sergeant Stanford) I noted this one, whie the said maxime ought to be inviolable. You said, *considering the private affections* manie times both of princes and ministers within this realme, for that they were men, and would and could erre, it should be no securitie, but verie dangerous to the subject, to refer the construction and extending of penall statutes to anie judges equitie (as you termed it) which might either by feare of the higher powers be seduced, or by ignorance and follie abused: and that is an answer by procurement (4:48; emphasis added).

It is perhaps not going too far to suggest that Throckmorton was not only citing law but also interpreting it in a direction that others could

follow. But his capacity to produce out of his memory the letter of the law was vital to his point. No doubt Southwell spoke for all the commissioners when he said at the end of this remarkable recapitulation: "You have a very good memorie" (4:49). Indeed, as is only appropriate for a national chronicle, during this trial memory becomes not only a theme but a principle. If the law is to justify itself by its *long* memory, it would be well, Holinshed implies by his loving attention to Throckmorton's "very good memorie," that we all had memories as good as his. There is a particularly telling statement at the climactic moment of the trial, which, however modestly, ironizes the unequal relationship between the defendant and the Crown. When Chief Justice Bromley completed his summary of all the evidence against Throckmorton, "and either for want of good memorie, or good will, the prisoners answers were in part not recited . . . the prisoner craved indifferencie, and did help the judges old memorie with his owne recital" (4:49; emphasis added).

But this is to leap ahead. Before the summation, and his own final speech to the jury, Throckmorton would play his ace: his detailed knowledge of the history of treason law in the last decade, and hence his perception of the contingency of treason law at any one time. First, he returned to the Marian treason act and its preamble, with its damning admission that the treason laws of Mary's predecessors had been unjust, and he implied that the very commissioners now engaged in his trial were responsible for the language of that preamble:

To what purpose serveth the statute of repeale the last parlement, where I heard some of you here present, and diverse other of the queenes learned councell, grievouslie inveie against the cruell and bloudie lawes of king Henrie the eight, and against some lawes made in my late sovereigne lord and masters time, king Edward the sixt. Some termed them Dracos lawes, which were written in bloud: some said they were more intollerable than anie laws that Dionysius or anie other tyrant made. In conclusion, as manie men, so manie bitter tearmes and names those lawes had. And moreover, the preface of the same statute dooth recite, that for words onelie, manie great personages, and other of good behaviour, have beene most cruellie cast awaie by these former sanguinolent thirstie lawes, with manie other suggestions for the repeale of the same (4:52).

In other words, Throckmorton's judges are now cast in the role of mere time-servers, who have conveniently forgotten their own reforming instincts of a few months ago. "And now," Throckmorton continued,

let us put on indifferent eies, and throughlie consider with our selves, as you the judges handle the constructions of the statute of Edward the third, with your equitie and extentions, whether we be not in much woorse case now than we were when those cruell laws [the statutes of Henry VIII and Edward VI] yoked us . . . For those

lawes did admonish us, and discover our sinnes plainelie unto us, and when a man is warned, he is half armed. These lawes, as they be handled, be verie baits to catch us, . . . for at the first sight they ascertain us we be delivered from our old bondage, and by the late repeale the last parlement, we live in more securitie. But when it pleaseth the higher powers to call anie mans life and saings in question, then there be constructions, interpretations, and extentions reserved to the justices and judges equitie, that the partie triable, as I am now, shall find himselfe in much woorse case than before when those cruell lawes stood in force (4:52; emphasis added).

The point was to show the jury that when jurisprudence reflects the turnings of the wheel of political power, nothing is certain. New mercies may turn out to be new tyrannies in disguise. Even unambiguous statutes may suddenly become pliable under the influence of the so-called "judges equitie." Turning to the jury, Throckmorton added: "honest men which are to trie my life, consider these opinions of my life, judges be rather agreeable to the time, than to the truth: for their judgements be repugnant to their own principle, repugnant to their godlie and best learned predecessors opinions, repugnant I saie to the proviso in the statute of repeale made in the last parlement." It was a masterly rhetorical, legal, and theatrical performance.

IV. THE JURY: THEORY AND PRACTICE

It took the jury about three hours to bring in a verdict of "Not Guilty,"³⁵ to the unrestrained fury of the lawyers and judges; as Holinshed had stated in his own preamble to the trial, "with which verdict the judges and councillors there present were so much offended, that they bound the jurie in the summe of five hundred pounds apeece," to appear before the Star Chamber. On April 21 they came before the Star Chamber judges, "from whence after certeine questioning, they were committed to prison, Emanuell Lucar and master Whetston [the two alternates who had been added after Dyer had made his challenges and who had emerged as the most courageous] to the tower, and the other[s] to the Fleet" (4:31). Four of them, under this pressure, submitted and confessed that they had erred in their verdict. Many pages later, Holinshed carefully recorded some information he had found in John Foxe's *Actes and Monumentes* (1563) about the fate of eight of "those honest men that had beene of Throckmortons quest," who refused, though imprisoned, to admit that their verdict was wrong. They were called back to the court of Star Chamber, where Lucar "said openlie before all the lords that they had doone in the matter like honest men, and true and faithfull subjects." Not surprisingly, the Star Chamber judges, "taking their words in mar-

35. Bellamy states that Throckmorton's jury may have been out for as long as five hours. *Tudor Law of Treason*, 170.

vellous evill part, judged them worthie to paie excessive fines" (4:64). Five of them were sentenced to pay 1,000 marks apiece, and the intransigent Whetston and Lucar £2,000 apiece. When Abraham Fleming augmented this section of the text in 1587, he added not one but three marginal notes drawing attention to the jury's intimidation: "Eight of maister Throckmorton's jurie appeere in the starchamber"; "The hard judgement of the lords against those eight honest men"; and "Further extremitie against Throckmorton's quest" (4:64). None of his Elizabethan readers, therefore, could have failed either to note the significance of the episode, or to understand what view the chroniclers took of it. Holinshed further recorded that, just before Christmas 1555, these fines were commuted to more realistic amounts, £220 in some cases and £60 in others, thereby confirming the ritual or intimidatory function (*in terrorem*) of the original penalties.

The Throckmorton jury's resistance to the state's agenda was recognized at the time, in David Loades's words, as "a hostile political demonstration."³⁶ In Elizabeth's reign, Sir Thomas Smith clearly alluded to Throckmorton's trial without mentioning it by name. In his *De Republica Anglorum*, Smith wrote that he had seen in his time (carefully adding in parenthesis "not in the reigne of the Queene nowe") "an enquest for pronouncing one not guiltie of treason contrarie to such evidence as was brought in . . . not onely imprisoned for a space but an houghe fine set upon their heads, which they were faine to pay," and he further recorded the public response to this episode: "those doinges were even then of many accounted verie violent, and tyrannical, and contrarie to the libertie and custome of the realme of England."³⁷

One would think, therefore, that this case should have acquired some status in recent analyses of the early modern trial by jury, but in fact it has been largely overlooked, if not actually suppressed. Neither Thomas Green nor J. S. Cockburn, the two major authorities on this topic, take any significant notice of it.³⁸ It may be that their focus on the large picture leads them to disregard the singular, symbolic instance, the one

36. Compare Loades, *Two Tudor Conspiracies*, 97. He added that the government only narrowly escaped a second defeat when Croftes was brought to trial on the 28th. In this case the accused "colde not be fonde of the Quest which was warned passing viii, so they were fayne to send for Hartopp and serten curryars and others." See *The Chronicle of Queen Jane and of Two Years of Queen Mary*, ed. J. G. Nichols (London: Camden Society, 1850), 76. This stacked jury duly brought in the required verdict, but Croftes was not executed, and was pardoned in February 1556.

37. Smith, *De Republica Anglorum*, 121.

38. See Green, *Verdict According to Conscience*, 141, where Throckmorton's case appears in a single footnote; J. S. Cockburn, *History of English Assizes: 1558-1714* (Cambridge: Cambridge University Press, 1972; reprint 1986), 123, where, again, Throckmorton's case appears in a single footnote. Both regard it as an exception to usual practice. See also Cockburn, "Twelve Silly Men? The Trial Jury at Assizes, 1560-1670," in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988), 158-81. It should be noted, however, that Cockburn's focus on assizes, or the out-of-London judicial circuit, distracted his attention from the major political trials.

observed at the time, precisely that for which a cultural historian is most grateful. Yet there seems no doubt that Throckmorton's trial was a signal instance of a defendant's appealing to the jury *within a theory* of the jury trial, as the sign and instrument of the individual's rights before the law, which in turn was nested implicitly in a larger theory of democratic principle. Accentuated by Holinshed's induction of his readers to that same task of supplying "indifferency" or independent judgment, Throckmorton's words would pass into Lilburne's equally successful alliance with the jury in his 1649 trial for treason. Throckmorton was perhaps not the first link in this chain, but he was certainly its earliest fully recorded link. Lilburne's successful appeal to the jury, another link in the chain, would again be celebrated in 1794, when Hardy, Thelwall, and Tooke were acquitted of treason, by the commemorative medal struck honoring the "integrity of the jury who are judges of law as well as fact."³⁹

V. THE LAYMAN'S ACCESS TO THE LAW

One of the more mysterious "documents" that has survived to tell us about Sir Nicholas Throckmorton is a peculiar poetic biography, *The Legend of Sir Nicholas Throckmorton*, which may have been written by a member of his family. It was edited in the eighteenth century by Francis Peck, whose Whig sympathies were clear: "The trials of Sir Nicholas Throckmorton & John Lilburne," wrote Peck, "are (for the prisoners excellent defence of themselves) the two most remarkable, I think, of any we have yet extant."⁴⁰ As I have already indicated, Lilburne's trial resembles Throckmorton's in more than "verbatim" form. Many of the tricks that Lilburne used in his own self-defence he clearly learned from Throckmorton: his constant procedural challenges, especially in the important opening moves,⁴¹ challenges which Lilburne himself presented as part of a larger argument that legal formalism is designed to confuse the ordinary defendant (4:1294-95); his insistence on the importance of two witnesses; and his recognition of the value of comedy in winning over the jury. There is even a moment of pure farce, when Lilburne declared he could proceed no further without access to a chamber pot, which was brought into the courtroom and filled accordingly. Whether or not Lilburne intended it, this episode, presented as if by a stage direction ("Whilst it was fetching, Mr. Lilburne followeth his papers and books close; and when the pot came, he made water, and gave it to the foreman" [4:1379]) is, as it were, the essence of the common touch.

39. See James Epstein, *Radical Expression* (forthcoming).

40. Peck, ed., *The Legend of Sir Nicholas Throckmorton*, 32.

41. To the question, "By whom wilt thou be tried?" Lilburne answered "By the known laws of England, I mean, by the liberties and privileges of the laws of England, and a jury of my equals legally chosen" (4:1294).

But what connects Lilburne to Throckmorton most firmly is the issue of the layman's access to the law, which is further connected to the denial of legal counsel. There were certain limited circumstances in which counsel was sometimes permitted, such as when the accused had already himself intuited some procedural irregularity and requested legal clarification. But Throckmorton evidently was not prepared to risk refusal of such an appeal, and so had made himself into a legal expert for the occasion, not only "in the parlement house," where he obviously took extensive notes, but probably also during his "eight and fiftie daies" in close prison, where, as he disingenuously told his judges, "I heard nothing but what the birds told me, which did flie over my head" (4:44). It was part of Throckmorton's strategy to pretend ignorance of the law ("I never studied the law, whereof I doo much repent me" 4:49) all the better to surprise his judges with his memory of it when his request for a reading of the statutes was refused. *The Legend of Sir Nicholas Throckmorton*, however, refers to "the mann who lent mee lawe of late, / To save my life, and putt himselfe in danger."⁴² In fact, the issue went beyond Throckmorton's own preparation for his defence. It gradually becomes clear, in retrospect, that he staged an encounter with his judges over the *public's* access to the law in more general terms, by emphasizing the importance of the *published* statutes, which, being in English, were the law's equivalent to a Reformation vernacular scripture. On the judges' part, it was made very clear that knowledge of the law by laymen was undesirable altogether, a dangerous impropriety. "I praie you my lords . . . let the statutes be read, as well for the queene, as for me," said Throckmorton. "You know it were indifferent that I should know and heare the law whereby I am adjudged, and forasmuch as the statute is in English, men of meaner learning than the justices can understand it, or else how should we know when we offend." "What would you do with the statute booke?" said Hare, "The jurie doth not require it, they have heard the evidence, and they must upon their conscience trie whether you be guiltie or no, so as the booke needeth not." "You ought not to have anie books read here at your appointment," said Cholmley, "for where dooth arise anie doubt in the law, the judges sit here to informe the court" (4:45-6).

In 1648 the Leveller *Agreement of the People* made law reforms a central aspect of its utopian constitution, including access to the law in English, the right of the accused to call witnesses on his own behalf, and the right against self-incrimination, rights which John Lilburne demanded, unsuccessfully, at his trial for treason in 1649.⁴³ Moreover, the impor-

42. See *The Legend*, ed. J. G. Nichols (London: The Roxburgh Club, 1874), 30.

43. That these rights were still not recognized in the early eighteenth century is registered in Thomas Salmon's preface to the first edition of *State Trials*, which compares Scots civil law procedures favorably to English common law: "it must be admitted, that the Party accused has in

tance of the jury, with its right to legal knowledge and its capacity to apply it, "represented one of the truly unifying themes of Interregnum radical political theory."⁴⁴ Throughout his 1649 trial, Lilburne thematized the problem of the layman's access to the law. He constantly referred to his own reading of such "good old English laws" as were written in English.⁴⁵ Lilburne was evidently not possessed of Throckmorton's magnificent memory, and he was also, evidently, treated with greater latitude, for he brought with him into the court bundles of notes, a copy of Coke's *Institutes*, of Coke's commentary on Littleton, and a statute-book, from which he read to the jury the statutes of Edward VI with respect to the need for two witnesses (4:1380-81). "Here is the statute-book, let the Jury hear it read," cried Lilburne (4:1396). While he thereby lost the value of surprise, he gained another point, that anyone could and should read the statutes, and that in capital cases knowledge of the law could literally be a saving knowledge, since it could save you from the executioner's block.

Let us now go back to Holinshed's *Chronicles*, since the issue of the public's access to the law cannot be unconnected to the business of writing a national chronicle. There is a strange insertion made by Holinshed himself at the end of his account of the trial:

Thus much for sir Nicholas Throckmorton's arraignment, wherein is to be considered, that the repealing of certeine statutes in the last parlement, was the chief matter he had to alledge for his advantage: whereas the repealing of the same statutes was meant notwithstanding for an other purpose (as before you have partlie heard) which statutes or the effect of the chief branches of them have beene since that time againe revived, as by the bookes of the statutes it maie better appeare, *to the which I referre the reader* (4:55; emphasis added).

On the one hand, Holinshed seems to be offering his readers a warning against any enjoyment of Throckmorton's escape, a reminder that he was able, and perhaps improperly, to take advantage of a loophole in the law that had now, under Elizabeth, been closed. On the other hand, not only does the mere presence of the trial in the *Chronicles* serve an educational function, the making of knowledgeable citizens and future jurors, but the reader is also explicitly directed to that very source of self-defensive knowledge that Throckmorton's judges wanted, behind the rising walls of professionalization, to withhold.

Scotland all the fair play imaginable: he has what Counsel he thinks fit; he has a Copy of his Charge in his own language; his Counsel are permitted to inspect the very Depositions against him before he is brought to Trial; and they are in so little haste to dispatch a State-Prisoner, that the Trial often lasts some months." Cited in *State Trials*, ed. Thomas, 1:21.

44. Green, *Verdict According to Conscience*, 160.

45. *State Trials*, 4:1283, 1288-9, 1293-4.

In conclusion, I return to the question of whether Holinshed's inclusion of this material was "impertinent" in 1577. Two decades after his acquittal, Throckmorton must have served as more than a memory of the bad old days of Mary's reign. The *Chronicles* appeared during that phase of Elizabeth's reign when the political temper of the times had irrevocably been changed by the papal bull of February 1570, excommunicating the queen and discharging her subjects from obedience towards her. In 1571, accordingly, a new act (13 Eliz. 1 ch. 1) made it treason to affirm *by writing* that the Queen should not be Queen, or that she was an infidel, tyrant, or usurper. In other words, she reinstated the most dangerously elastic provision of her father's notorious act of 1534, with the exception of words that were only spoken. The act goes unmentioned in the *Chronicles* of 1571, for it has already been noticed in Holinshed's reference many pages earlier: "which statutes or the effect of the chiefe branches of them have beene since that time againe revived" (4:55).

As for Throckmorton himself, he was implicated in the Northern Rebellion, the reprisals for which had been part of the provocation for the papal bull. In January 1572, Thomas Howard, Duke of Norfolk, was brought to trial for his part in the rebellion, in circumstances that replicated those of Throckmorton. As Penry Williams described it:

The play was loaded in favor of the Crown. Norfolk was allowed no access to a lawyer while awaiting trial, and when he did ask to be represented by a lawyer, was refused by the Court. Of all the witnesses who testified against him, only one was actually present in court to have his evidence publicly weighed. The other testimony was read out by prosecuting counsel.⁴⁶

On June 2, 1572, Howard was beheaded. The execution marked materially a change in the prevailing winds, since for this occasion a new scaffold had to be built beside the Tower of London, the previous one being "both rotten and ruinous," because, since "queene Elisabeth having with mercie governed hir commonwealth there was no punishment inflicted there upon anie for the space of fourteene yeares" (4:267). From that time onwards, however, the distinction between the two reigns, especially with regard to punishment for words, and even for words alone, would be harder and harder to make.

46. Penry Williams, *The Tudor Regime* (Oxford: Clarendon Press, 1979), 381. I owe this reference to Jane Strekalovsky.