PARLIAMENTARY ATTAINDER FOR TREASON IN LIEU OF TRIAL DURING THE REIGN OF KING HENRY VIII

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"Now for King Henry the Eight: if all the pictures and patterns of a mercilless prince were lost in the world, they might all again be painted to the life, out of the story of this King. For how many servants did he advance in haste (but for what vertue no man could suspect) and with the change of his fancy ruined again, no man knowing for what offence? To how many others of more desert gave he abundant flowers, from whence to gather Hony, and in the end of Harvest burnt them in the Hive."[1]

Introduction

So wrote the pen of the great adventurer, sailor and pirate, Sir Walter Raleigh at the beginning of the seventeenth century. Raleigh, under sentence of death in the Tower of London, filled in his days by writing a history of the world. Unfortunately he did not manage to progress any further than 130 AD, but his introductory comments on the time in which he lived are nevertheless instructive. His opinion on King Henry VIII forms part of our corpus of knowledge on how the King was perceived during and immediately after his reign. Generally, the consensus was that he was a ruthless and capricious tyrant. Modern scholars agree with the first characterisation, but have reservations over the second. Over the past half-century a number of revisionist historians have challenged the interpretations of Raleigh and his contemporaries that the Henry's reign was defined by arbitrary personal power. These scholars, such as G.R. Elton and John Bellamy, acknowledge that this epoch of history was bloody but assert that the King shed blood within the framework of a semi-modern legal system which adhered to the Rule of Law.

Perhaps the most notorious manifestation of the King's malevolence was his contribution to the English law of treason. Under

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[1] Sir Walter Raleigh, *The History of the World* (London, 1687) viii, quoted in Joel Hurstfield, "Was There A Tudor Despotism After All" (1967) 17 *Transactions of the Royal Historical Society*, 83.

his rule the law of treason expanded explosively, ensnaring and destroying hundreds if not thousands of people. But there was a method to Henry's madness. The King believed that only through the judicious use of terror could he steer the great ship of state through the tempests of the age. And, indeed, Henry's reign was chaotic. It saw breach with Rome, the Reformation of the English Church under the Crown, the dissolution of the monasteries and a succession of royal marriages. Each of these upheavals generated resistance to Henry's government, both foreign and domestic, which had to be quelled. And at the same time Henry faced enemies on other fronts. Ambitious noblemen with competing claims to the Throne of England conspired against the King and sought to defeat his plans for the succession. Confronted by these threats, Henry turned to the general law to curb dissent and maintain the Tudor peace.

Although many scholars have written extensively on the Tudor law of treason,[2] comprehensive discussion of the use of a special kind of Act of Parliament, an Act of Attainder, to punish conduct deemed treasonous is lacking. Both G.R. Elton and John Bellamy inaccurately calculate the number of people attainted for treason in lieu of trial to be fewer than ten, and although they condemn the government's actions little analysis is offered.[3] More recently Stanford Lehmberg and William Stacy have shed some more light on Attainder for treason in lieu of trial, and have provided a platform for further research.[4] It is the goal of this paper to build on the labours of these historians. It will examine Henry VIII's approach to Attainder and hopefully offer some insight as to what it means for current perceptions of the existence (or absence) of the Rule of Law during this period. Ultimately, it may be that efforts of revisionist historians to

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[2] See for example, S. Rezneck, *The Trial of Treason in Tudor England, Essays in Honour of C.H. McIlwain* (Cambridge University Press Cambridge 1936); I. D. Thornley, "The Treason Legislation of Henry VIII (1531-1534)" (1917) 11 *Transactions of the Royal Historical Society* 87; Lacey Smith, "English Treason Trials and Confessions in the Sixteenth Century" (1954) 15 *Journal of Historical Ideas* 417; John Bellamy, *The Tudor Law of Treason* (University of Toronto Press, Toronto, 1979) ["*Tudor Law of Treason*"]; G. R. Elton *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge, 1972) ["*Policy and Police*"].

[3] Bellamy, *Tudor Law of Treason* ibid, 211-212; Elton, *Policy and Police* ibid, 390-391.

[4] See Stanford Lehmburg, "Parliamentary Attainder in the Reign of Henry VIII" (1975) 18 *The Historical Journal* 675 ["Parliamentary Attainder"]; William Stacy, "Richard Roose and the Use of Parliamentary Attainder During the Reign of Henry VIII" (1986) 29 *The Historical Journal*, 1.

rehabilitate Henry and his era have been in vain. Indeed, perhaps Sir Walter's portrait of the King as a paranoid madman unconstrained in practice by man, law, or God, remains the most faithful after almost five centuries.

I.

Historically the term "Act of Attainder" has been used to describe a piece of legislation which deemed an individual, or an ascertainable class of individuals, guilty and "attainted" of an offence. A punishment was usually prescribed, but this was not strictly necessary. An attainted person was outside the protection of the law; he or she was not legally a 'person' and could be killed or otherwise dealt with in any way by anyone.[5] The lands and possessions of the attainted were forfeit to the king and his or her blood 'corrupted' and 'disabled'. Corruption of blood ensured that property could not be passed to the attainted by inheritance and that he or she could not pass property to anyone.[6] It also meant that no person could inherit property from an ancestor if he or she possessed that ancestor's blood only by inheritance from the attainted.[7]

Although the early history of Attainder is rather opaque, it was probably first used in the early fourteenth century[8] and evolved as an offshoot of the common law procedure of indictment by notoriety. Indictment by notoriety is a modern name given to the practice whereby local people would indict a person by a crime before a sheriff or a royal judge based purely on his or her poor reputation. But in sufficiently serious cases this practice could transcend its procedural roots and operate to convict a person of a crime without more.[9] Therefore, it seems likely that Attainder, which constituted a judgment of guilt by the Commons Lords and King combined, was the notoriety procedure writ large.[10] However, while the procedure of notoriety

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[5] William Blackstone, *Commentaries on the Law of England*, volume 4 (1769), 373-374.
[6] William Blackstone, *Commentaries on the Laws of England*, volume 2 (1766), 254.
[7] Ibid, 254.
[8] Posthumously against Piers Gaveston in 1308 and the Elder and Younger Despenser in 1321. L W Vernon-Harcourt, *His Grace the Steward and Trial of Peers* (Longmans, London, 1907), 388
[9] T. F. T. Plucknett, "The Origin of Impeachment" (1942) 24 Transactions of the Royal Historical Society 47, 60-61 ["Origin of Impeachment"].
[10] John Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge University Press, Cambridge, 1970), 179-180 ["Law of Treason"].

waned over the centuries, becoming obsolete in the reign of Richard II,[11] Attainder transcended its origins and became a legislative tool of considerable use.

During its early history Attainder was primarily used to affirm pre-existing convictions at common law or under the law of arms. In 1415 the convictions of the Earl of Cambridge, Lord Scrope of Masham and Sir Thomas Grey for imagining the king's death contrary to the Treason Act 1352 were impeached.[12] The earl of Cambridge and Sir Thomas Grey conspired to kill the king, which was clearly within the ambit of the Statute. But Lord Scrope merely knew of the plot and failed to reveal it, a crime which was arguably only misprision, or concealment, of treason. If Scrope's relatives had challenged the conviction it may have been quashed and the Crown may have had to disgorge his confiscated lands. An Act of Attainder was deemed to be an appropriate panacea and one was promulgated which confirmed the convictions of all three men.[13]

Nevertheless, on a number of occasions people were convicted of treason by Act of Attainder alone. They were generally rebels engaged in open warfare against the king who could not be brought before a court, or dissidents who had fled the realm. Usually the Attainder would be conditional on the subject failing to cease resistance and answer for their crimes. In 1394 Sir Thomas Talbot raised a rebellion against King Richard II in Lancashire and Cheshire. In retaliation Parliament declared his conduct treasonable via the declaration proviso of the Treason Act 1352.[14] This notwithstanding, until Talbot could be found and presented before a court he remained an innocent man at law. To surmount this inconvenience Parliament attainted him of high treason, but provided that this sanction would not come into effect if he presented himself before the King's Bench

[11] T. F. T. Plucknett, "Origin of Impeachment", supra note 9, 70-71.
[12] 25 Edward III, stat. 5, c. 2.
[13] Bellamy, *Law of Treason*, supra note 10, 195.
[14] 25 Edward III, stat. 5, c. 2.After enumerating the statutory treason offences the original statute went on to state that: "Inasmuch as divers other cases of like character may arise in time to come, which at present one can neither think of nor declare, it is, therefore, agreed that if any other case, which is supposed to be treason, but which is not specified above, shall come for the first time before any justice, the said justice shall stay without giving judgment of treason, until the matter has been exhibited before our lord the King in his Parliament, and declaration made as to whether it shall be adjudged treason or other felony".

within three months.[15] A virtually identical act was passed against another rebel, Sir Thomas Mortimer, in 1398.[16]

In an age when central government was conspicuously weak, Acts of Attainder were used to convict criminals *in absentia* out of desperation. During the medieval period penury dogged the Crown and royal servants were few in number, and consequently criminals frequently escaped the long arm of the law. Brigands and gangs roamed the countryside, making a mockery of the king's peace. Faced with the need to stymie a deteriorating law and order situation without the practical power to enforce the law, royal governments turned to the somewhat metaphysical sanction of Attainder. It was thought that formal exclusion from the law's protection of a few rebels and hoodlums might persuade some of them to throw themselves at the king's mercy or deter others from joining them.[17] Therefore, even though during the early history of Attainder men and women were attainted without benefit of a trial it may not be said that the instrument effected judgment by means of legislation or was a political tool. Attainder was used not to supplant the ordinary legal system but to augment its effectiveness.[18]

II.

In some ways Henry VIII's use of Attainder was consistent with the policies of his forebears. Statutes were used to confirm the common law convictions of traitors like the Duke of Buckingham in 1523 and Rhys ap Griffith in 1532 and affirm Crown title over their forfeited estates.[19] However even a cursory overview of this period shows that under Henry the Crown's attitude towards Attainder in lieu of trial shifted dramatically. At least 57 people were condemned by statute alone.[20] What is more, only a few of these people can be considered to have been rebels in flight. Sir Thomas Fitzgerald and his supporters were attainted in 1534 for their part in the Irish Rebellion, and Cardinal Reginald Pole[21] and several of his acolytes earned the same treatment in

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[15] Bellamy, *Law of Treason*, supra note 10, 182.
[16] Ibid.
[17] Ibid, 190.
[18] Ibid, 204.
[19] Lehmburg, Parliamentary Attainder, supra note 4, 678, 679.
[20] See Stacy, supra note 4.
[21] Pollard, *Henry VIII* (3 ed, Lowe & Brydone, London, 1970), 287.

1539 for fermenting rebellion against the King while abroad in Europe.[22] Two renegade priests who had fled England, Richard Pate and Seth Holland, were also convicted *in absentia* by statute in 1542.[23] But most of those attainted of treason in lieu of trial during the reign of Henry VIII were alive and within the physical and legal jurisdiction of the king's courts. The government had the option of proceeding against them with indictment and trial but, for a variety of reasons, elected to use the blunt instrument of parliamentary Attainder instead.

The unfortunate victims of Crown policy can be divided into three rough categories:

1. Common criminals;

2. Religious and political opponents; and

3. Those who threatened Henry's dynastic policies or otherwise became casualties of the vicissitudes of high politics.

The most important cases of each category will be examined in order to form some conclusions about Henry's approach to Bills of Attainder.

The first group of victims contains only two members, Richard Roose and John Lewes. Roose was a cook employed in the household of a man who was to become one of Henry's most vociferous opponents, Bishop John Fisher. In mid-February of 1531 Roose mixed poison into the porridge prepared for the Bishop's household. Fisher, who fortunately chose to forgo the meal, emerged unscathed, but others were not so lucky. Many members of Fisher's household became violently ill and two people died. Roose was immediately uncovered as the culprit, arrested and examined. He confessed to poisoning, "as a jest" but claimed he had intended no wrong.[24]

It is odd that the Crown would chose to interfere in this matter because it appears a simple case of felony murder. As his actions were purportedly in "jest", Roose could have argued that he lacked the

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[22] *Letters and Papers, Foreign and Domestic of the Reign of Henry VIII* (2008) British History Online <http://www.british-history.ac.uk/period.aspx?period=6&gid=126> (at 26 August 2008),xiv, i, 867 ["LP"].

[23] Ibid, xvi, 119, 140, 446, 448-9, 535, 981, 1139.

[24] Stacy, supra note 4, 2, K. J. Kesselring, "A Draft of the 1531 'Acte for Poysoning" (2001) 116 *English Historical Review*, 894.

requisite *mens rea* for murder. As intent to kill had become an essential component of the offence of murder by the sixteenth century such a plea could have resulted in an acquittal.[25] However the sources make no mention of any perceived difficulty in convicting Roose for murder so it can be assumed that such a defence was untenable on the facts. Understandably, Henry had an interest in the punishment of murderers, but there is every reason to believe that the ordinary processes of justice would have been sufficient in this case.

Even though Roose could have been brought to justice in the ordinary fashion Henry judged the case so abhorrent as to require his personal intervention. The King himself brought the matter to the attention of the House of Lords in a lengthy speech which emphasised his love of justice and determination to keep the peace.[26] A Bill of Attainder was sent to Parliament to convict Roose of high treason and quickly became law. Instead of the usual punishment for treason – hanging, drawing and quartering – Roose was sentenced to be boiled alive.[27]

The most likely reason for legislative action was the government's desire to roundly and publicly condemn the offence by giving it the epithet of "treason".[28] Poison was a historical instrument of regicide and its attempted use on as prominent a person as Bishop Fisher would have scared and angered the King. Decisive intervention was required to deter those who wished to harm other magnates or even Henry himself in such a fashion. Attainder also allowed the King to select a penalty which he considered appropriate: if Roose had merely been prosecuted for felony no punishment but hanging could have been metered out.[29] Boiling was probably selected because it added another layer of deterrence to mere death. It was not only unusually pitiless but mirrored Roose's crime as well. He delivered the poison through porridge, a substance created by boiling oats in water, and in turn he was boiled himself. Such a fate would be permanently associated with Roose's crime in the public mind.[30]

Several years latter in 1536 the precedent of Richard Roose was invoked when the rebel John Lewes came to the attention of the

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[25] H Potter, *English Law* (4 ed, Sweet & Maxwell, London, 1958), 355.
[26] Stacy, supra note 4, 2.
[27] 22 Henry VIII c. 9.
[28] Stacy, supra note 4, 4.
[29] Stacy, supra note 4, 5.
[30] Ibid.

King. Lewes was a confederate of the Welsh merchant James ap Griffith ap Howell, and Howell was an accomplice of the rebel Rhys ap Griffith, executed in 1531 for raising an insurrection at Carmarthen.[31] At that time Howell had bought his life with a ransom of £500,[32] but the government later changed its mind and sought to arrest him. Fearing for his safety he fled the country, forcing the government to be content merely with the skins of his supporters. Lewes was arrested on suspicion of treason in Gloucestershire and ordered to be taken to the Marshalsea, but murdered his sleeping escort at Hounslow and escaped.[33] Henry, shocked at this impudence, directed Parliament to attaint him of high treason. As in the case of Roose an unusual penalty was prescribed: Lewes was to suffer abscission of the hands and then be hanged, drawn and quartered.[34]

Lewes was clearly guilty of murder and would have faced trial, conviction and execution if the Crown had left him to the common law. The reasons why Henry was not content to let justice take its course are probably similar those which moved him in Roose's case. He felt that this crime was so shocking that deterrence required it to be called treason.[35] As in the case of Roose, Parliament sought to provide additional deterrence by making the punishment a metaphor for the act: in slaying the King's servants Lewes severed the hands of the State, and in retaliation the State deprived Lewes of his.[36] While Lewes was not in custody at the time the Attainder was passed, it does not seem that his Attainder can be considered analogous to those historically used against rebels in flight because Lewes was not well armed and did not have any support. The government would have considered itself capable of apprehending him.

Henry tended to turn to Attainder when confronted by a particularly abominable violent crime in order to buttress his existing law and order policies. By directing Parliament to deem such conduct treasonous and proscribing particularly cruel and striking punishments, the King felt that he could strengthen the deterrence value of the ordinary sanctions of the law. These cases also show that Henry was not wedded to a specific definition of treason, but regarded the crime

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[31] LP, supra note 22, v, 563.
[32] Ibid, 657.
[33] Lehmburg, Parliamentary Attainder, supra note 4, 680.
[34] 27 Henry VIII c. 59.
[35] Stacy, supra note 4, 9.
[36] Ibid, 9-10.

as anything he especially abhorred. Crimes similar to those of Roose and Lewes which attracted the Monarch's attention were only saved from the label of treason because of the King's arbitrary judgment. For example John Wolfe, his wife Alice and John Litchfield were attainted of felony for murdering and robbing a number of foreign merchants in 1533[37] and Charles Carew was awarded the same penalty for armed robbery in 1540.[38]

Henry's religious and political opponents composed the largest group of people attainted for treason in lieu of trial. The Reformation and Henry's frequent marriages generated a significant amount of opposition to the Crown from a number of areas of society. Much of this hostility manifested itself in seditious and slanderous speech which had the potential to stir emotions and produce violent resistance. The government recognized the perniciousness of such conduct and sought to quell it through the law of treason and a vigorous system of enforcement.[39] Statute law, the ordinary courts and the co-operation of local worthies with the Crown proved reasonably successful in controlling public opinion.[40] However, in a number of instances opponents could not be convicted by ordinary judicial procedure due to legal or evidential difficulties. Where the person in question was viewed as particularly dangerous the government fell back on parliamentary Attainder to ensure that 'justice' was done.

The first and most famous critic of Henry's religious policy to feel the axe of Attainder was Elizabeth Barton, the Nun of Kent. Barton was a prophetess who resided near Canterbury who habitually raised the hue and cry over many matters, spiritual and temporal. Initially her ravings were tolerated by the government because they supported the status quo; however the tone of her prophesies changed as Henry drifted away from Rome. She began to publicly foretell that if Henry divorced Catherine of Aragon he would die: a serious threat to the integrity of the government.[41] In an age where God and magic were perceived to directly shape events prophesy of a royal death could cause a serious problem to public order. If convinced that God was going to smite Henry for turning his back on Rome, the people might

[37] 25 Henry VIII c. 34.
[38] LP, supra note 22, xv, 953.
[39] See Elton, Police and Police, supra note 2.
[40] Ibid, chapter 8, 'Police'.
[41] Pollard, supra note 21, 244.

reason that they were excused from their oath of allegiance and support another claimant to the throne.[42]

The government first sought to proceed against Barton at common law, but was advised that her conduct was not treasonable. The King called his most senior judges and lawyers to a three day conference and impressed upon them his view that Barton and her adherents were traitors.[43] The judges readily agreed that to prophesise the King's death amounted to imagining his death under the 1352 Treason Act, for this proposition was well supported by precedent. In October 1440 Roger Bolinbroke, on behalf of Eleanor Cobham, Duchess of Gloucester, predicted that the King would soon die and was rewarded with a treason conviction.[44] However Barton had only made a conditional prophesy, that Henry would die if he divorced Catherine and married Anne, which was deemed by the judges to be insufficient. This seemingly amounted to an about face, for in 1509 a conditional threat to take the King's life was considered "imagining". In that year Sir Richard Empsom and Edmund Dudley, Henry VII's unpopular taxmen, were convicted for treason because they had plotted to destroy the young Henry VIII should he refuse to be governed by their faction.[45] Either the judges distinguished prophesy from threat or they considered the precedent to be wrong in law. With conviction under common law impossible, the King turned instead to Parliament. In March 1534 Barton and her accomplices William Maister, Edward Bocking, John Derying, Hugh Rich, Richard Risby and Henry Gold were attainted of treason.[46]

The Barton Attainder allowed Cromwell to turn the government's defeat into a victory. Although the King had been rebuffed by the judiciary, Cromwell soon perceived that an Act of Attainder could solve the Barton situation. He also reasoned that such an instrument, when properly used, could prove as decisive at destroying an opponent's public standing as a guilty verdict from a jury.[47] Cromwell phrased the Attainder as a petition to the King from both Houses of Parliament who, pressured by the public, had urged

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[42] Thomas Keith, *Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth and Seventeenth Century England* (2 ed, Oxford University Press, New York, 1997), 113-50.
[43] LP, supra note 22, xv, 1445; viii, 48.
[44] Bellamy, *Tudor Law of Treason*, supra note 2, 29.
[45] Ibid.
[46] 25 Henry VIII c. 12.
[47] Lehmburg, Parliamentary Attainder, supra note 4, 683.

him to intervene. It gave detailed reasons for the government's intervention,[48] arguing that that Henry VIII's divorce from Catherine of Aragon was valid and charged that the subjects named, being:[49]

> Maliciously fixed in a contrary opinion ayenst the pure jugment of the kynges own conscience, [had] set forth and put in the heddes of a greate number of subjectes of this Realme aswell noble as other Spirytuall and temporall persones that they had knowledge by revelacion from Almighty God and holy Sayntes that God shuld be displeased with our seid Soveraigne Lorde for his procedynges in the seid divorce.

The Act declared that the message of the condemned was fraudulent, malicious and contrary to the conscience of the King, God's chosen ruler. Moreover, it accused Barton and her followers of filling the heads of many subjects with pernicious thoughts by calling into question Henry's divine mandate, thus endangering the realm. To further undermine Barton's message the Act directed that all books mentioning her be delivered to Cromwell, Chancellor Audley or the King's Council.[50] Furthermore, in order to guarantee that his instrument would have maximum efficacy, Cromwell ordered that the Act be printed and read aloud in each shire and corporate town.[51]

It was the Barton case which precipitated the expansion of the English law of treason which defined the Tudor era. Refusal on the part of the judges to broadly construe the Treason Act 1352 made it clear to Cromwell and others that the judiciary could not always be relied upon to be of one mind with the government.[52] In order to tame the turbulence unleashed by the Reformation a broader law of treason would be needed which criminalized a greater variety of slanderous and incendiary speech. And although initially the government struggled against strong currents of parliamentary resistance, by the end of the 1530s virtually every kind and form of religious dissent fell within the ambit of the expanded law of treason. Yet the Crown still faced evidentiary difficulties in securing convictions in cases of treasonous words. Its solution was Attainder, the weapon which had proved itself

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[48] Ibid, 682.
[49] Ibid.
[50] 25 Henry VIII c. 12.
[51] Lehmburg, *Parliamentary Attainder*, supra note 2, 682.
[52] Bellamy, *Tudor Law of Treason*, supra note 2, 23.

so useful in the destruction of Barton and her confederates. A statute of 1539 attainted 53 people, most of whom had already been convicted at common law.[53] Some, however, had not been brought to trial and were deemed traitors without even being afforded a cursory opportunity to defend themselves. The Act named four men, C. Joyce, R. Buckingham, Henry Phillippes and James Prestwhiche. These malefactors had allegedly affronted the King by naming the Pope as the head of the Church of England,[54] conduct which was probably treason under the Treason Act 1534. The Treason Act prescribed that it was treason to deny any of the Monarch's titles, one of which was "Supreme Head of the Church of England".[55] As an assertion that the Pope was the head of the Church of England was by implication a denial that Henry was, the rash words of these men brought them under the ambit of the 1534 Act. Although it was legally possible for the Crown to bring proceedings, Attainder was used because insufficient evidence was available to secure a conviction. The Crown felt that a jury would not accept its case that the accused had in fact uttered the treasonous words.

In the sixteenth century the rights and protections afforded to a person accused of treason were extremely limited: the accused could not cross-examine Crown witnesses or call his own, he was not permitted counsel, and could not see his indictment before trial.[56] But, to a degree, the petty juries which generally acted as finders of fact during criminal trials provided a counterbalance to the law's failings. By the sixteenth century juries had virtually acquired their modern role of acting as an objective finder of fact in criminal proceedings.[57] In criminal trials they usually took their role seriously and jealously scrutinized the Crown case. An accused could secure an acquittal if he could raise doubt in a jury's mind about his guilt.

This proved easier than usual in cases of treason by slanderous words because often the Crown only had one witness, the accuser. Such people could usually be portrayed as having a motive to lie. In May 1537 two men, Levenyng and Lutton were acquitted of treason because of insufficient evidence. The jury had cause to

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[53] 31 Henry VII c. 15. The Act was never printed, but there is a summary of it in LP, supra note 22, xiv, 867. Lehmburg, Parliamentary Attainder, supra note 4, 686.
[54] LP, supra note 22, xiv, 867.
[55] 26 Henry VIII c. 13.
[56] Bellamy, *Tudor Law of Treason*, supra note 2, 144, 161, 155-154.
[57] Ibid, 177.

disbelieve the lone witness, Sir Ralph Ellerker, who had allegedly been promised part of Levenyng's lands by the King should he be convicted.[58] And in September of the same year Lord Audley reported to Cromwell that Thomas Nevill, the brother of Lord Latimer, had been accused of traitorous words, but lamented that there was only one witness, a woman.[59] It also seems likely that jurors were particularly sensitive about condemning a person to the brutal penalties of treason for merely speaking words. During the trial of William Freeman one of the jurors asked the court whether he might in good conscience "cast a man awaie for speakinge a word in jest".[60] Englishmen believed that it was an ancient, God-given right to voice one's opinions and would often err on the side of the accused in slanderous words trials. Thus, in the case of Joyce, Buckingham, Phillippes and Preswhiche the Crown relied on a Bill of Attainder to compensate for its lack of evidence and defeat the common sense and mercy of the jury.

During the reign of Henry VIII Acts of Attainder were used by the Crown to purge men and women who became entangled in the high politics of the realm. These people sought to interfere with the King's dynastic ambitions, were viable candidates for the throne, or found themselves on the wrong side of power struggles within the King's Council. The first of these Attainders took place in 1536 and was directed against Lord Thomas Howard, the half-brother of the Duke of Norfolk. Howard had contracted to marry Lady Margaret Douglas, daughter of Henry's sister Margaret, Queen of Scots, and Archibald Douglas, the Earl of Angus. This marriage posed a unique problem for the Crown because Margaret was at the time the highest ranking woman in England and had the best claim to the succession aside from King James V of Scotland.[61] Until Jane Seymour produced a child Margaret Douglas was the heir apparent.[62] If Thomas Howard married her and Henry died without producing an heir Howard could

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[58] LP, supra note 22, xii, 731.
[59] Bellamy, *Tudor Law of Treason*, supra note 2, 153.
[60] Ibid, 178.
[61] Lehmburg, *Parliamentary Attainder*, supra note 2, 691. But James was unpopular in England and an unlikely candidate for the throne. Lord Thomas Howard's Act of Attainder acknowledged this, stating that the English people would resist James "to the uttermost of theyre powers". 28 Henry VIII, c. 24.
[62] Following the fall of Anne Boleyn, Elizabeth was declared illegitimate and removed from the succession. David Head, "'Beyng Ledde and Seduced by the Devyll': The Attainder of Lord Thomas Howard and the Tudor Law of Treason" (1982) 13, *Sixteenth Century Journal*, 7.

claim the Crown through his wife. Alternatively, he could wait until Margaret gave birth to a son or daughter and then rule as Regent in the infant's place.[63] The Attainder enunciated Henry's suspicions:[64]

> The said Lord Howard false craftely and trayterously hath imagined and compassed, that in case oure said Sovereign Lord shuld die wythout heyres of his bodye, whiche God defend, that then the said Lord Thomas, by reason of a maryage in so highe a blodde, and to one suche whiche pretendeth to be a laufull doughter to the said Quene of Scottes eldest suster of oure seid Sovereign Lord, shuld aspire by her to the Dignyte of the said Imperyall Crowne of this realm…

It seems likely that Henry's need to create a dynasty motivated this Attainder. The King was obsessed with continuing the Tudor line; the production of a legitimate male heir had consistently influenced his policies in a number of areas. It is probable that this ambition, to a greater extent even than his avarice towards the riches of the monasteries and his lust for Anne Boleyn, prompted the break with Rome.[65] The notion that a Howard could claim the kingdom by a marriage contract should he fail and die without heirs would have proven unpalatable to the King.

As in the case of Elizabeth Barton, Attainder was relied on in this situation because Howard's actions were not legally treasonous. Contracting to marry the King's niece could not possibly have been construed to fall within the Treason Act 1352, the First Succession Act or the Treason Act 1534. Although such conduct might have been contrary to the Second Succession Bill, which by June 1536 was working its way through Parliament, it was felt that a conviction could not be obtained under it. The Second Succession Bill provided that marriage to a member of the royal family, if it imperilled the succession of the children of Henry and Jane Seymour, was treason.[66] However, the Bill had not been passed by the time the marriage contract was made and there was no guarantee that it could become law before the marriage was consummated.[67] By this time the King's judges were

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[63] Ibid, 7-8.
[64] 28 Henry VIII c. 24.
[65] G.R. Elton, *England under the Tudors* (2 ed, Methuen, London, 1974) ["England Under the Tudors"].
[66] 28 Henry VIII c 7.
[67] Head, supra note 62, 9.

beginning to refuse to construe statutes retrospectively, a fact evidenced by an opinion given by Chancellor Audley in 1535 concerning the application of the Treason Act 1534:[68]

> The words spoken in March last… touching appeals will hardly bear treason, but misprision; for there is no express mention made of the King or the Queen/ And the words spoken of the King and the Queen… at Christmas last or afore February 6th last had been treason without doubt if they had been spoken since the first day of February [when the Act took effect]; but afore that day they be no treason by the act, they be misprision by the Act of Succession.

Perhaps more importantly, it is dubious whether, even had the Second Succession Act become law before the marriage was consummated, Lord Howard would have committed treason by marriage. For in 1536 it was not strictly possible to interfere with the succession of Jane and Henry's children: their first was not born until 1537. At best the marriage would have created the possibility that a child would be born which would have a claim to the throne in derogation of the claims of future children of Jane and Henry. But it seems unlikely that the courts would have interpreted the statute as meaning interference with the rights of future royal children in light of the stricter approach to statutory interpretation which marked this period. Moreover, it is questionable whether the mere potential that a marriage would produce a child who would have far weaker claim to the throne than a child of the royal marriage would have invoked the Act.

An Act of Attainder passed in 1539 provided for the destruction of a number of people who were deemed threats to the Crown, including Gertrude Courtenay and Margaret, Countess of Salisbury.[69] Gertrude Courtenay, Marchioness of Exeter, was one of the noblest women of the realm. She was the widow of Henry Courtenay, the Marquis of Exeter, who was a grandson of Edward IV and Elizabeth Woodville. Until he mounted the scaffold he was the most senior member of the White Rose dynasty: heir to the throne if the Tudor line failed.[70] With blood of such a pedigree he was an obvious target for the King's paranoia and was under periodic suspicion of

[68] Elton, *Policy and Police*, supra note 2, 302.
[69] 31 Henry VIII c. 15. The Act was never printed, but there is a summary of it in LP, supra note 22, xiv, 867. Lehmburg, *Parliamentary Attainder*, supra note 4, 686.
[70] Pollard, supra note 21, 300.

treason throughout the 1530s. Over the years the Marquis' implacable enemy, Thomas Cromwell, gathered evidence of his conduct, which was perhaps more foolish than treacherous, and in 1539 felt strong enough to bring him to trial for treason. Exeter was duly convicted of conspiring to kill the King, largely on the strength of the correspondence with Pole.[71]

Why Gertrude Courtenay was attainted with her husband is unclear. It is likely that the Government felt that she was part of the Exeter conspiracy but could not assemble the evidence needed to convict her. The King and Cromwell would have reasoned that the Marquis' wife either advised him on his course of action, or merely failed to dissuade him. This proposition is supported by the fact that six of the Marquis' servants, Bishop Cuthbert William Kendall, Guy Keime, James Griffith ap Howell, John Griffithe, vicar of Wandsworth, and Henry Mogson were also attainted by the Act.[72] The government seemingly used Attainder to destroy anyone whom they even suspected of being part of the conspiracy. An ancillary explanation for Courtenay's Attainder is that Henry decided to seize an opportunity to prune the last of the Yorkist royalty so as to further diminish the possibility that their dynasty might revive. With the name of Courtenay disgraced the Crown had no reason to fear resistance from Parliament.

It is likely that the Countess of Salisbury fell victim to the Act because of this latter reason. Like Gertrude Courtenay, the Countess was imbued with the finest blood. She was a daughter of George Plantagenet and thus an invaluable weapon to anyone seeking to take the throne and establish a dynasty.[73] For the government 1539 must have seemed the perfect time to move against her. Her sons, Henry Pole, Baron Montague and Sir Geoffery Pole, were indicted for conspiring to kill the King in 1538. Henry was found guilty in January 1539 and executed, while Geoffrey was granted a pardon for pusillanimously turning king's evidence against his brother.[74] Reginald Pole, the Countess' other son, was at this time abroad in France and considered an incorrigible traitor.[75] The Countess shared the guilt of her sons in the eyes of the dominant forces in Parliament. When the

[71] Ibid.
[72] LP, supra note 22, xiv, 867.
[73] Pollard, supra note 21, 299.
[74] Ibid, 299-300.
[75] Ibid, 299.

Crown was presented with a window of opportunity to remove a longstanding threat it seized it.

Cromwell's strategy was to portray the Countess as hand-in-glove with the Exeter conspirators and he struck a decisive blow in May 1539 when he produced a white silk tunic in Parliament. The tunic had been found by the earl of Southampton amongst the Countess' belongings, and was endowed with the following embroidery:[76]

> On the syde off the cote there was the Kyngys Grace ys armes of Ynglonide, that ys the lyons without the flowar delysses, and abowte the holl armys was made pancys for Powll, and marygoldes for my lady Mary… And betwyxt the marygolde and the pancy was made a tree to rys yn the myddes, and on the tree a cote off purpell hangyng on a bowgh, yn tokynnyng off the cote of Cryste, and on the other syde of the cote all the Passchyon of Cryste.

Allegedly the embroidery demonstrated that the Countess envisaged that her son, Cardinal Reginald Pole, would marry Mary Tudor and return England to Roman Catholicism. The Countess was thus part of a wider conspiracy to defeat the gains of the Reformation and subjugate the realm once more to the papist yoke, and was deserving of death. But the meaning alleged was not treason under any statute and in any case it places a highly artificial construction on the embroidery.[77] Nevertheless, in the circumstances Cromwell's threadbare accusations were enough for a Parliament so sensitive to Henry's interests.

Ironically, the next magnate to be destroyed solely by an Act of Attainder was the man who had played a leading role in augmenting the role of these instruments. Thomas Cromwell, one of the most powerful and feared men in the kingdom, finally fell from grace on 10 July 1540 and was committed to the Tower on suspicion of treason.[78] Since 1532 he had held the country in his sway. Cromwell was the architect of the Reformation, the executor of England's foreign policy and Henry's security tsar. While the King was an adept survivor and a man of relentless energy and drive, he was neither a strategic thinker nor a talented administrator. Cromwell was both. For the better part of

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[76] LP, supra note 22, xiv, i, 980. The description is contained in a letter to from John Worth to Lord Lisle, who was informed by Sir George Speke. Probably Cromwell or another councilor had displayed the tunic in the Commons, where Speke saw it. Lehmburg, *Parliamentary Attainder*, supra note 4, 687, n. 1.

[77] Ibid, 687.

[78] Lehmburg, *Parliamentary Attainder*, supra note 4, 692-693.

a decade he took his master's sometimes inchoate wishes and transformed them into coherent state policy. However Cromwell could be an abrasive man who made enemies quickly.[79] Ultimately, by the end of the 1530s, his enemies managed to gain the upper hand over him by emphasizing his association with extreme Protestantism and exploiting a number of foreign policy calamities.

The government chose not to proceed against Cromwell in the courts, but decided instead to convict him of treason with an Act of Attainder, an expedient Cromwell had counseled the King to use many times previously. Cromwell's Attainder was cast as a petition and was probably intended to suggest Cromwell's fall was precipitated by a general outcry against his tyrannical rule. It was thus quite similar to the Act which Cromwell himself drafted to destroy Elizabeth Barton. The Act outlined a series of trumped-up charges, none of which amounted to statutory treason and none of which could be satisfactorily proven in a court of law.[80] This indicates that the government probably had little real evidence against Cromwell and that if he was placed on trial a conviction could not be guaranteed.

It can also be inferred that Cromwell was denied a trial because his principal enemies, the Duke of Norfolk and Bishop Steven Gardiner, were afraid that if Cromwell was granted a chance to defend himself he would not only defeat the case against him, but counterattack. Henry was in many ways a fickle man, periodically rotating royal favor among his servants. If Cromwell was to demonstrate that the King had been lied to and that Norfolk and Gardiner were inferior counselors he could have turned the tables on them and sent them to the scaffold.[81]

With the destruction of Cromwell the conservative faction came to prominence in the realm. Gardiner and Norfolk had the King's ear and executed their policy of Catholic reaction, although their influence was never as great as Cardinal Wolsey's or Cromwell's. Norfolk was perhaps the closest to the King because his niece, Catherine Howard, had become Henry's Queen and, as a result, Norfolk enjoyed a degree of authority wholly inconsistent with his limited talents.[82] But by 1542 the fortunes of these men had begun to wane. Gardiner had fallen out

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[79] G.R. Elton, "Thomas Cromwell's Decline and Fall" in Elton, *Studies in Tudor and Stuart Politics and Government*, vol. 1 (Cambridge University Press, London, 1974) 189-190 ["Cromwell's Decline and Fall"].

[80] Ibid, 222-223. The Act itself does not survive.

[81] Lehmburg, *Parliamentary Attainder*, supra note 4, 693.

[82] Elton, *England Under the Tudors*, supra note 65, 193-195.

of favour for an unknown reason[83] and Norfolk was undone by one of his nieces for a second time.[84]On 2 November 1541 suspicion of Catherine Howard's infidelities reached the King's ears and was soon confirmed by the confessions of her lovers. Under torture Henry Mannox and Francis Dereham admitted to a sexual relationship with Catherine before she became Queen, Thomas Culpeper to one after her marriage to Henry.[85] The King was embarrassed, betrayed, and vengeful and resolved to destroy Catherine and her accomplices.

While Catherine's lovers and co-conspirators faced trial and were handed down convictions for treason and misprision, Catherine herself was not permitted her day in court and convicted solely by an Act of Attainder.[86] Once again the expedient was resorted to because the object of the King's attentions had probably not committed statutory treason. The government could have argued that she should be convicted under the 1352 Act: by consenting to intercourse with Culpeper she had aided and abetted someone who "violated" the King's companion. On the other hand "violation" has a connotation of unconsensual sex and Catherine was a willing participant.[87] While Anne Boleyn had been convicted of treason for almost exactly the same offences as Catherine had allegedly committed, the former's case constituted the high-water mark of judicial construction of treason. From mere adultery the court spelled out causing bodily harm to the King contrary to the Treason Act 1534 (by cheating on the King she knew she would disturb his equanimity and consequently cause him physical harm).[88] It seems probable that the King's judges had retreated from such a loose interpretation of the 1534 Act by 1542 and, as such, a Bill of Attainder remained the government's only option.

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[83] Peter Moore, "The Heraldic Charge Against the Earl of Surrey, 1546-1547" (2001) 116 *The English Historical Review*, 557.

[84] The first time being when Anne Boleyn fell out with the King and greatly diminished the influence of the Howard family.

[85] Pollard, supra note 21, 323.

[86] 33 Henry VIII c. 31.

[87] Indeed it is impossible for a rape victim to be charged as a part to her own "violation", for if she was not consenting how could she be said to have aided and abetted?

[88] Bellamy, *Tudor Law of Treason*, supra note 2, 41. Boleyn's affairs were also treason under the First Succession Act because they imperilled the succession of the King's daughter, Elizabeth, by giving people opportunity to question whether she was in fact of royal descent. Ibid, 40. Catherine could not have been convicted on this point because she had not born Henry a child.

It is also possible that the instrument of Attainder was chosen because Henry was so injured by Catherine's betrayal that he wished her to be quietly snuffed out and he did not have the stomach for a protracted trial.[89] Credence is lent to this proposition by the unusual level of grief the King suffered. Marrilac, the French ambassador, wrote that "he took such grief that of late it was thought he had gone mad".[90] Another significant point is that Henry did not give assent to the Bill of Attainder in person by commission: he selected a Lord Commissioner to proclaim that assent had been granted. Traditionally, the royal assent was always given by the Monarch in person in the House of Lords after a Bill was read out in full. But to Henry the prospect of being forced to listen to a comprehensive record of Catherine's betrayals in front of his entire Court must have seemed too much to bear. And if this is so, it follows that he could not have seriously entertained the idea of bringing Catherine to trial and having her indiscretions aired to the world.

Despite the considerable pressure which was brought to bear on Parliament for a speedy resolution of the matter, Catherine's Attainder took some time to become law. It was introduced on 28 January 1542 but was not passed until February 11, having had two second readings.[91] It seems that Henry had more trouble with this Attainder than with most because elements of Parliament recoiled from condemning a Queen without trial. The Howards were still powerful in the House of Lords and had allies within the King's Council. They attempted to stall the Attainder for long enough for the King to change his mind.[92] Catherine was even offered an opportunity to defend herself before Parliament, one which she curiously refused.[93] Perhaps she had accepted her guilt and resolved to accept her punishment.

III.

Some general conclusions can be drawn from the above analysis of the use of Bills of Attainder to punish treason in lieu of trial by Henry's government. It is clear that Henry dramatically broke with precedent by attainting so many people of treason when they were available for trial by common law. To a greater extent than any other English monarch,

[89] Pollard, supra note 21, 323.
[90] Ibid.
[91] Lehmburg, *Parliamentary Attainder*, supra note 4, 696.
[92] Ibid, 695-696.
[93] LP, supra note 22, xvii, 124.

he succumbed to the allure of judgment by legislation. Nevertheless, the King generally preferred to obtain conviction by common law if possible. Only when the law of treason did not encompass Henry's personal definition of it, or when the government had insufficient evidence to prove a case, was Attainder relied on. And indeed, the fact that in many cases the courts would not acquiesce to the government's wishes is a comforting sign. It shows the growing independence of the judiciary and their increased regard for the sanctity of black-letter law. It also reveals that jurors had a sense of fair play and conceived their role was to genuinely judge the guilt or innocence of the accused, not merely operate as a rubber stamp for the Crown. Conviction for treasonous words proved particularly difficult because jurymen felt it was an Englishman's right to speak his mind and would only convict on compelling evidence. Consequently the government began to rely heavily on Bills of Attainder to punish especially dangerous malefactors.

In some instances to attempt to secure conviction at common law was not the government's first instinct. If the King wished to inflict an innovative punishment which was alien to the common law, as in the cases of Roose and Lewes, Parliament was naturally the first port of call. In the case of Cromwell it was quite reasonably feared that if he was presented with a podium from which to deliver an oration he could snatch victory from the jaws of defeat. As such it is unlikely that Norfolk or Gardiner contemplated a trial. Regarding Catherine Howard, it is possible that the King never would have allowed her to stand trial because of heartache.

Generally the common law was the preferred method of enforcing the King's will because it conferred legitimacy in a way that Attainder did not. If someone was arraigned before a court and proved to have transgressed a written law then people understood and accepted his fate, even when the law itself was unjust. This belief in the sanctity of law was the bedrock of the English State for centuries, for it was neither bureaucratic nor backed by a standing army. Its powers rested largely on consent rather than coercion.[94] But conviction through Bill of Attainder evoked an entirely different reaction. Although the burgeoning doctrine of parliamentary supremacy held that such legislation was lawful, it was not seen to be just. In *The Fourth*

[94] For a discussion of this phenomenon in the eighteenth century, see E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1977) 262.

Part of the Institutes of the Laws of England Chief Justice Coke related a discussion between the King and his judges on the subject:[95]

> King H. 8. commanded him to attend the chiefe justices, and to know whether a man that was forth-coming might be attainted of high treason by Parliament, and never called to his answer. The judges answered, that it was a dangerous question and that the high court of parliament ought to give examples to inferior courts for proceeding according to justice, and no inferior court could do the like; and they thought that the high court of parliament would never do it. But being by the expresse commandement of the king, and pressed by the said earle [of Essex, i.e. Cromwell] to give a direct answer: they said, that if he be attainted by parliament, it could not come in question afterwards whether he were called or not called to answer.

Nevertheless Parliament usually acquiesced to Bills of Attainder, with varying degrees of enthusiasm. This was predominantly because of the Crown's influence over the legislature. In both Houses the Crown possessed a nucleus of loyal placemen who would reliably vote for the government. The House of Lords was relatively easy to dominate because the civil strife of the previous century had greatly thinned the ranks of the hereditary nobility. Those which Henry VII and his son ennobled to replace them were generally restrained from independent action by gratitude and self-interest. They were tightly bound to the Crown and did not have the resources or social standing to maintain their position without royal favour.[96]

Control over the House of Commons proved a more difficult task owing to its greater size and because its members were elected. However, the King and his servants overcame these obstacles. Electors could be influenced to choose 'appropriate candidates' for the House of Commons by the offering of incentives such as sinecure positions and cash advances. In 1539 Cromwell boasted to the King that "I and other your dedicate counseillers be aboutes to bring all things so to passe that your Maiestie had never more tractable parliament".[97] Later

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[95] Coke, *The Fourth Part of the Institutes of the Laws of England* (1681) Early English Books Online, <http://eebo.chadwyck.com.ezproxy.auckland.ac.nz/search/full_rec?ACTION=ByID&SOURCE=pgimages.cfg&ID=V41386pp> (accessed 28 August 2008), 37-8.

[96] Thomas Taswell-Langmead, *English Constitutional History: From the Teutonic conquest to the present time* (6 ed, Riverside Press, Cambridge, 1905), 292.

[97] LP, supra note 22, xiv, i, 869.

he mused that one Richard Morisson would prove useful to the Crown if he was to become an MP: "no doubte he shalbe redy to answer and tak up such aswold crak or face with literature of lernyng or by Indirecte Wayes If any such chalbe, as I thinke there shalbe few or none".[98] Some of the King's greatest servants maintained a strong presence in the Commons to guide the Crown's Bills through. Cromwell was an imposing figure during the years of the Reformation Parliament, and two of Henry's Chancellors, Sir Thomas More and Sir Thomas Audley held the office of Speaker of the House of Commons.[99]

Fear of anarchy and the unknown was another reason which underlay the ease with which Parliament acquiesced to Bills of Attainder. While only the oldest of the nobility and 'middle classes' who composed the House of Commons could personally remember the Wars of the Roses, its spectre had shaped their upbringing. These men were brought up in a country which had only recently slid out from under decades of violence, uncertainty and economic chaos.[100] At times Henry Tudor and his son behaved tyrannically and impiously, but they had brought order and stability to a devastated and confused realm. Many of the elite willingly gave consent to an expansion of the royal prerogative and of the Crown's control over Parliament in exchange for a return to order.[101] One piece of prose produced in 1547 for educating unreliable or disloyal clergy succinctly articulates the prevailing mood:[102]

> Take away kings, princes, rulers, magistrates, judges, and such states of God's order, no man shall ride or go by the highway unrobbed, no man shall sleep in his own house or bed unkilled, no man shall keep his wife, children and possessions in quietness, all things shall be common, and there must needs follow all mischief and utter destruction both of souls, bodies, goods and common wealths.

Parliament acquiesced to Henry's Bills of Attainder because of a perception that only a strong Crown stood in the way of anarchy and

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[98] Ibid.
[99] See Stanford Lehmburg, *The Reformation Parliament, 1529-1536* (Cambridge University Press, London, 1970, 28-30, 79-80, 119.
[100] See Elton, *England Under the Tudors*, supra note 65, 1-17.
[101] Hurstfield, supra note 1, 83.
[102] F. Van Baumer, *The Early Tudor Theory of Kingship* (Yale University Press, New Haven, 1940), 104-05.

chaos. If the King believed that a religious or political dissenter or an ambitious nobleman was too dangerous to be left alive then usually parliamentarians conceded to his wishes. Fear that an unchecked fiend would thrust the realm into full-blown civil war once again weighed heavily on the minds of England's elites. Rather than think independently, parliamentarians usually preferred to trust the man who safeguarded their lives, children and property from the dangers of the unknown.

But Parliament could show a significant degree of independence and at times delayed controversial Attainders, as in the case of Catherine Howard. And it even refused to attaint Sir Thomas More when charges of misprision were initially laid against him.[103] Another example can be found in the case of the King's lieutenants at Calais, Lords Lisle and Grey. They were included in a Bill of Attainder in 1540 for failing to quash religious dissent in their satrapy[104] and by May 1540 their deaths seemed a foregone conclusion. Lisle had been accommodated in the Tower of London and the French ambassador wrote that only a miracle could save him.[105] Nevertheless, on the Bill's third reading both Lisle and Grey were granted a reprieve.[106]

Generally Parliament would only defy the Crown's wishes in special circumstances. The subject had to be prestigious and well-liked and only slim evidence of wrongdoing could exist. More was a former Chancellor, a leader of the Commons and of the Lords and one of the great thinkers of the day. Moreover, it was clear that he was innocent of any complicity with Barton or her confederates. When she approached More he counselled her to avoid talking of 'eny suche maner thinges as perteyne to princes' afferis, or the state of the realme".[107] The Lords refused to give the Barton Bill a second reading while More's name remained on it, and rather than have the Crown case against him exposed as a fraud by a Star Chamber inquiry, the King retreated.[108] Lisle and Grey were high born nobles, the former being a bastard son of Edward IV. Moreover, little evidence existed of malfeasance.[109]

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[103] Lehmburg, *Reformation Parliament,* supra note 99, 194-196 ["*Reformation Parliament*"].
[104] LP, supra note 22, xv, 830; xvi, 304.
[105] Lehmburg, *Parliamentary Attainder*, supra note 4, 689.
[106] Ibid, 689-690.
[107] Lehmburg, *Reformation Parliament*, supra note 99, 194.
[108] Ibid, 185.
[109] Lehmburg, *Parliamentary Attainder*, supra note 4, 690.

Usually, however, Parliament operated as a rubber stamp. Attainder of non-entities such as Roose and Lewes did not attract much resistance, nor did the destruction of those whose family name was disgraced. It is likely that Henry would have had more trouble with Gertrude Courtenay and the Countess of Salisbury but for their association with convicted traitors. Those who were generally unpopular or possessed only fair-weather friends did not give the Crown significant difficulties either. Cromwell accumulated a noteworthy tally of allies over his years as the King's chief minister, but these men were drawn to him only by self-interest. Their support evaporated once the King's favour began to run against him and not one voted against the third reading of Cromwell's Attainder.[110]

In light of all this, now may be the time to revisit some conclusions about the Tudor law of treason and the constitutionality of the Henrician regime. Elton finds that under Henry "the most heinous offence of all, so political in its implications, had been firmly reduced under the supremacy of 'due process', with all its technicalities, with its use of indictment and jury".[111] This statement is patently false. In some ways the law of treason was more arbitrary than before: although statute was more strictly adhered to, Attainder cast a giant shadow over the land. More fundamentally, the above analysis of the use of Attainder seems to render Elton's central thesis on Henrician society and government unsteady. His bold claim that "Tudor thinking and practice on the law subordinated everybody, the king included, to the rule of law which defined rights and duties and defined the processes by which these could be obtained or enforced"[112] now seems entirely disingenuous. The 'Rule of Law' did not exist during the Henrician period.

This term has become highly nebulous through over-use and constant redefinition by scholars, judges and politicians and this article is certainly not the place to attempt a truly authoritative definition. It will suffice to borrow F.A. Hayak's assertion that:[113]

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[110] Ibid, 694.

[111] Elton, *Policy and Police*, supra note 2, 292.

[112] G.R. Elton, "The Rule of Law in Sixteenth Century England" in Elton (ed) *Studies in Tudor and Stuart Politics and Government*, vol. 1 (Cambridge University Press, London, 1974), 277 ["Rule of Law"].

[113] F.A. Hayek, *The Road to Serfdom* (Dymock's Book Arcade, Sydney 1944), 54.

> Stripped of all technicalities this [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

To this it should be added that the organ of government which exercises judicial power should be independent, and thus that rudimentary division of powers should exist. Particularly, the same body should not exercise judicial and legislative functions, for otherwise people cannot plan their affairs around the law. Men and women cannot have confidence that a body which exercises both of these powers will act impartially and consistently with principles of natural justice. When pronouncing judgement its members could be influenced by factors which are improper when acting judicially, such as personal interest or notions of 'the greater good'.[114]

In this most limited sense, the Rule of Law does not guarantee a just society. It is perfectly possible for a society ruled by law to be manifestly unjust. But the Rule of Law is a prerequisite for a just society. Without it a person is at the utter mercy of the sovereign power and is essentially in a condition of slavery. Life and property are subject to the arbitrary control of one's rulers, and one is scarcely better off than in Hobbes' state of nature.[115] In contradistinction the Rule of Law provides for freedom: people can avoid confrontation with the power of the State by behaving consistently with the law. They can choose whether to be interfered with by the State. Under the Rule of Law men and women are masters of their own destiny and are treated as autonomous, reasoning beings. Because of this the Rule of Law is essential for human dignity and respect for the individual. As the apostate Marxist E.P. Thompson declared, the Rule of Law is "an unqualified good" and a symptom of human progress.[116]

It is true that during the sixteenth century English society took huge strides towards being ruled by law. During the reign of Elizabeth I the judiciary felt confident enough to declare the law of the

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[114] *United States v Brown* 381 US 437, 445 (USSC, 1965).

[115] Individuals are in the worst condition possible when there is no government at all. Without the restraint of authority man's self-interest, diffidence and glory result in perpetual conflict between all humans. Thomas Hobbes, *Leviathan* ((Penguin Edition, Cambridge University Press, London, 1982), chapter 13.

[116] Thompson, supra note 94, 267.

realm applied to each and every denizen. In *Williams v Berkeley* Brown J. enunciated the doctrine of the supremacy of statute: "The Estate was the cause of the Act, and is restrained by the Act, which the King cannot enlarge by his Prerogative without another Act of Parliament, but in taking the Estate he is restrained along with the Estate".[117] By 1568, in the *Case of Mines*, the Queen's justices were able to categorically state that the royal prerogative was "allowed to the king by the law", and thus controlled by and subject to it.[118] Statute law was supreme and the royal prerogative was subordinate, limited, and constrained. Every individual was equally subject to the law, for no-one could pretend to be above Parliament's authority.

Moreover, during the reign of Henry VIII most legal disputes were funnelled through the ordinary courts and were subject to consistent and prescribed legal procedure. Judges began to adhere more strongly to the black letter of the law and would not adopt the expanded and fanciful meanings that the King's Council argued for. Nor would they construe statutes retrospectively, but would only judge people for conduct which was criminal at the time it was committed. But if these developments amounted to an advance towards legality, Henry's policy of Attainder resulted in a grand retreat.

The frequent use of Acts of Attainder to punish conduct which Henry deemed treasonable is wholly inconsistent with a finding that the Rule of Law prevailed during his reign. Each time Parliament passed a Bill of Attainder at the bequest of the Crown equality before the law ceased to exist. By enacting specific rather than general legislation and subjecting only the attainted to the law, Parliament actually expelled him or her from civil society and back into the state of nature. Deprived of the law's protection, he or she faced the Leviathan of Parliament utterly alone. This Leviathan was analogous to every other tyrant in history who condemned men and women to die by caprice and naked power. It can be distinguished from the likes of the Persian kings Xerxes and Darius or Attilla the Hun on only two points. First, the decision to destroy and individual did not lie with one man, but had to be agreed upon by a majority of both Houses and the King. Secondly, it did not rely for its authority on naked military power, but on the tacit consent of the people which was procured in part, ironically, by respect for the 'law'.

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[117] Elton, Rule of Law, supra note 112, 265.
[118] Ibid.

Obviously the attainted had no opportunity to plan his or her affairs around the law, for the law fell swiftly an often unforeseeably on them. As a matter of law Parliament declared that their alleged conduct could be treason and found that they were guilty in fact. But the use of Bills of Attainder not only removed the attainted's ability to be guided by the law, but everyone else's as well. The spectre of Attainder haunted the lives of Henry's subjects, for they could not predict when he would later take umbrage at their conduct. Men and women could not tell whether their actions would later be called treasonous, discern what level of proof Parliament would require before signing their death warrant, or ascertain what procedural benefits they would be afforded. Only one's instinctual awareness of imminent danger could save one from the law.

Throughout history nations have agreed that the use of Bills of Attainder is manifestly contrary to the Rule of Law. Retrospective criminal punishment, which is part and parcel of statutory Attainder, is universally condemned. Nations as diverse as France, South Africa and New Zealand have decried its use.[119] The Founding Fathers of the United States of America found the use of Bills of Attainder to be so abhorrent that they made specific provision for them. Article I, section 9, clause 3 of the United States Constitution provides that Congress shall have no power to pass a Bill of Attainder. Article I, section 10, clause 1 similarly limits the powers of state legislatures. The Framers of the Constitution felt that a society in which people live in fear that they will be tried for past, legal conduct by a 'court' not bound by the maxims of natural justice cannot be called "free".[120] Moreover, they considered that due process and the right to receive an impartial and fair hearing when charged with a crime is central to the Rule of Law. Thus, in order to guarantee the Rule of Law survived the Framers resolved to guarantee that no person would ever be tried by a legislature, a partisan body which can never offer these virtues.[121] Ultimately, Elton's conclusion that the Rule of Law prevailed in Henrician England seems extremely difficult to sustain.

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[119] See Art. 8 of the French Declaration of the Rights of Man and of the Citizen (1789); s35(3)(n) of the Constitution of the Republic of South Africa 1996; ss 26(1) and 25(g) of the New Zealand Bill of Rights Act 1990.

[120] ***US v Brown***, supra note 163, n 17.

[121] See the judgement of Mr Justice Black in ***US v Lovett***, 328 US 303 (USSC, 1946); ***US v Brown***, supra note 114, 442.

Conclusion

While the number of people destroyed solely by statute pales in comparison to the number sent to the scaffold by the King's courts, Attainder played a vital role in the 'justice' policy of King Henry VIII. With the aid of a virtually subservient Parliament, Henry transformed an almost administrative instrument into a weapon of death and confiscation in order to attack his enemies where the common law proved insufficient or inconvenient. The implications of these findings for historians and constitutional scholars are significant. For one, they show that although the edifices of a modern justice system existed, the Rule of Law did not prevail. Henry was not committed to the principle of legality, believing instead that black letter law, courts and parliaments were but means to an end. Scholars seeking to discern the first green shoots of constitutional government in England must look further forward in time. However, Henry's policy of Attainder is nevertheless connected with constitutional progress, for it can be interpreted as a symptom of the decay of the idea of absolute monarchy in England. While in previous centuries monarchs could expect for precedents and statutory language to bend under the royal will, during the sixteenth century judges took a much stronger line. Faced with this resistance, the King was forced to enlist the aid of Parliament to carry out his wishes. This retreat signifies a paradigm shift in the relationship between monarch and law and state and citizen. Historically, English governments were backed by neither a standing army nor a large bureaucracy, and could govern only through the idea of law. Nevertheless, while the idea of law and the will of the monarch were synonymous, the monarchy essentially wielded the power of a military or bureaucratic tyranny of the Continental and Oriental varieties. But much of this power evaporated when the courts began to view the law as something abstract and distinct from the expression of any one individual. Incrementally the powers of the monarch decreased and he became nothing more than the chief magistrate of the land – a powerful and important figure, but not "the sovereign" in the literal sense. His powers became limited and their exercise, in theory, predictable and subject to the law. One important point to take from Henry's policy of Attainder is that its mere existence shows that the condition precedent of the Rule of Law – the separation of law and man – prevailed during his reign.