Forensic oratory and the jury trial in nineteenth-century America

Simon Stern*

(Received 16 April 2015; accepted 1 September 2015)

At the beginning of the nineteenth century, the American jury trial was a form of popular amusement, rivalling the theatre and often likened to it. The jury’s ability to find law, as well as facts, was widely if inconsistently defended. These features were consistent with a view of forensic oratory that emphasized histrionics, declamation and emotionally charged rhetoric as means of legal persuasion. By the end of the century, judges had gained more control of the law-finding power and various questions of fact had been transformed into questions of law. Many of the details that would have aided the lawyers’ dramatic efforts were screened out by a host of new exclusionary rules. These changes in forensic style may have helped to facilitate the decline of the trial, by reorienting its function away from a broadly representative one and towards one that emphasized dispassionate analysis in the service of objectivity.

Keywords: jury; trial; advocacy; drama; forensic oratory; legal analysis

I.

The institution of the jury underwent radical change in the United States during the nineteenth century. At the beginning of the century, the jury trial was a form of popular amusement, rivalling the theatre and often likened to it. The jury’s ability to find law, as well as facts, was widely if inconsistently defended, with the result that both state and federal judges might have to conduct a trial without this important means of cabining the jury. The trial’s role as a source of entertainment, and the jury’s ability to nullify, were consistent with a view of forensic oratory that emphasized histrionics, declamation and emotionally charged rhetoric as means of legal persuasion. Lawyers were expected to play to the jury, the spectators in the courtroom and the wider public that enjoyed press reports of the whole performance. It was in the early nineteenth century, in fact, that ‘the court (or bar) of public opinion’ came into vogue as a way of

* Associate Professor, University of Toronto Faculty of Law and Department of English. Email: simon.stern@utoronto.ca


© Copyright of the Crown in Canada 2015 University of Toronto
expressing popular sentiment about criminal trials, in particular. By the end of the century many of these features had changed. Not only did judges gain more control of the law-finding power, but courts and legislatures went about transforming various questions of fact into questions of law (and occasionally vice versa), seemingly with little controversy. Many of the details that would have aided the lawyers’ dramatic efforts were screened out by a host of new exclusionary rules – prompted largely by concern about jurors’ inability to assess that evidence correctly. The overall effect of these changes was to afford much less scope for the emotional excesses that had figured so prominently in previous decades – and indeed to make those performances seem disreputable and outmoded.

Another aspect of the changing trial culture, related to these developments, was a product of the growing professionalization and specialization of the bar. The methods and structures of legal argumentation became increasingly sophisticated, developing in a fashion that was inconsistent with the theatrical tactics of the earlier nineteenth century. The prevailing style of legal inquiry became increasingly oriented around an analytical process in which each fact, issue or doctrine was carefully parsed into smaller units or elements, organized according to a coherent explanatory scheme and presented within a logical framework that served to keep the overall tenor of the argument in sight at each step. To be

---

2For a helpful discussion of this point in the British context, see Lindsay Farmer, ‘Criminal Responsibility and the Proof of Guilt’ in Markus D Dubber and Lindsay Farmer (eds), Modern Histories of Crime and Punishment (Stanford University Press, 2007) 42–65, 51–52.


sure, the distinction between ‘bench lawyers’ and ‘jury lawyers’ was not a new development in the nineteenth century,\(^7\) nor has the latter style vanished, even today. But increasingly, as the century wore on, lawyers regarded the ‘analytical’ style as the hallmark of professionalism. This change had great significance for the jury trial and for the public reporting of trials more generally: unless laypersons gained some appreciation for the more technical and methodical approach, they were at risk of losing interest in the trial. Moreover, insofar as lawyers saw this approach as a sign of their own professionalism, they were inclined to treat it as beyond the abilities – and perhaps even the comprehension – of laypersons. This tendency led to a growing disinclination to try certain cases before juries and a growing scepticism about the value of the jury more generally. While US courtrooms did not see the kind of radical decline in jury trials that occurred in England during this period,\(^8\) American commentators criticized the institution in a fashion that would have been unthinkable at the beginning of the century.

In a discussion of American jury trials during the first half of the nineteenth century, Renée Lettow Lerner remarks on the centrality of the lawyers’ theatrics in the process. Particularly in the Southern and Western US, she notes, there was ‘a tidal wave of popular emotional oratory that proved very difficult for … judges to control. Lawyers there were entertainment stars.’\(^9\) Whereas in England, courtroom drama tended to derive its appeal from the public’s interest in the testimony of witnesses, Americans during this period ‘came mainly to hear the lawyers’, whom Lerner likens to ‘religious revivalists’, skilled in ‘elevat[ing] emotional intensity over intellect or traditional doctrinal authority’.\(^10\) Borrowing a phrase from Sarah Barringer Gordon’s work on early-nineteenth-century trials involving religious freedom, Lerner describes these lawyers’ efforts as ‘emotional speechifying’.\(^11\) Indeed, Lerner shows that trials sometimes became participatory events in which the audience might be ‘so swept away by a lawyer’s speech that they started shouting and stamping on the floor.’\(^12\) In this respect, again, the trial is reminiscent of contemporaneous theatre. In a study of nineteenth-century ‘sensation theater’, Lynn Voskuil observes that one of the functions of popular drama, during this era, was to allow the audience to form a common identity through ‘their shared, somatic responses’, which created

\(^7\)Stern, ‘William Blackstone’ (n 3) 23–27.
\(^9\)Lerner (n 4) 234.
\(^10\)ibid.
\(^12\)Lerner (n 4) 238.
‘a kind of affective adhesive that massed [the spectators] to each other’. To that end, they ‘frequently interacted with players on … and commented loudly and publicly on performances in progress’, enacting a ‘flamboyant exhibitionism [that mimicked] the melodramatic acting styles they [saw] on stage’. The jury trial, it would appear, served a similarly communal function at this time, with the jury – designated as a representative of the community – merely serving a more official role than the spectators in responding to the arguments and evaluating the parties. Lay participation in the trial would thus have extended beyond the jury, so that the trial created an opportunity for members of the community to develop affective relations to each other, practicing the ‘cultivation and self-conscious management of … feelings and sensations’ that Voskuil associates with theatrical audiences. Concomitant with the shift towards a more analytical style of advocacy, the increased screening of evidence and the withdrawal of certain issues from the jury’s domain, the jury trial’s ability to serve this kind of communal function diminished. To some extent, this function might have been displaced onto press reports, but insofar as the changing procedures limited the opportunities for lawyers’ emotional appeals and the spectators’ responses, the trial simply offered less scope for communal involvement and the active, visible process of identity-formation that it would foster.

In what follows, I explore the shift away from the emotionally-charged oratory of the earlier nineteenth century, using evidence drawn primarily from press reports. I use newspaper stories, rather than transcripts of trial arguments or articles published in professional journals, because my focus is on public perceptions of the trial. Of course, journalists may attempt to mould public perceptions as well as reflecting them, but in both cases the newspaper is providing an account it believes readers will find appealing. For that reason, journalistic accounts of ‘analytical’ legal arguments are particularly significant, because their inclusion suggests a belief that the public either accepted, or could be educated into appreciating, a cooler and more technical style of argument than the ‘emotional speechifying’ that once had been so effective.

Even in the earlier part of the nineteenth century, journalistic reports of trials sometimes applauded lawyers for the ‘logic’ and ‘purity’ of speech, but while this language might appear to describe the kind of thorough, methodical, dispassionate analysis that would later become a sign of professionalism, these commendations generally turn out, on closer scrutiny, to celebrate the passionate logic of a moving performance, and the purity of an eloquent emotional appeal. An 1808 article in a

---

13 Lynne M Voskuil, *Acting Naturally: Victorian Theatricality and Authenticity* (University of Virginia Press, 2004) 64, 66. Voskuil notes that trial scenes in plays were particularly affective in fostering this dynamic: see *ibid* 62–86. Thus when a newspaper review of a play affirmed that ‘the spectator feels as if present at an actual trial’, the distinction was, in some sense, an artificial one: *ibid* 62, 85.

14 *ibid* 64.
Baltimore newspaper could praise one of the prosecuting attorneys in a criminal libel case for ‘passing through the evidence, [with] comments [that] were concise and pointed. His argument was logical, nervous, and apposite; and his style flowing, figurative and manly.’\textsuperscript{15} The description might seem to imply that the lawyer presented his case in an orderly and dispassionate fashion, but it quickly becomes clear that the author is praising the lawyer’s ability to elicit sympathy. The already gendered characterization of his ‘manly’ energy turns out to find a worthy object in the defendant’s ‘abominable work of detraction’, which, though ‘directed against a single individual … deeply wounded the peace of others – the happiness of age and innocence’, threatening to bring about ‘his final ruin’ and to ‘involve them also in the same destruction’.\textsuperscript{16} If the ‘concise and pointed’ comments are ‘logical’ and vigorous (the contemporaneous meaning of ‘nervous’), these terms speak to the rhetorical power of a stirring narrative about character assassination and its consequences, which provides an apt context for the lawyer’s ‘flowing’ and ‘figurative’ oratory. The second lawyer for the state, similarly, is praised for unfolding, in his closing argument, the ‘irresistible force of [his] reason, in language truly chaste, elegant, and variegated occasionally with beautiful metaphor’.\textsuperscript{17} Again, his ‘reason’ proves to be commendable for its emotional power, which ‘touch[ed] the chords of the heart’ so movingly ‘that the audience could scarcely suppress their sensibility’ and ‘gave vent to an open expression of applause’.\textsuperscript{18} Given the nature of the accusation, the communal appeal of the lawyers’ arguments is hardly surprising: the ruinous effects of the libel extend from a single individual to the aged and innocent people around him, and by implication to others in their vicinity, doubtlessly including some in the courtroom. The article’s general effect is to suggest not that the lawyers have combined a systematic and methodical approach with an emotional appeal, but that their system and method are entirely informed by the emotional resonances for which the case provides an occasion. In praising the lawyers’ logic and reasoning, the journalist is not describing a dispassionate style of explanation, but is using terms that evidently could have been associated, at that time, with emotional force.

Similarly, an 1819 article in a Hudson, NY paper, discussing an action of ‘trespass and ejectment’, commended the plaintiff’s counsel in terms that might sound, to modern ears, as if the argument combined intellectual power and emotive force:

\begin{quote}
The playfulness of his wit, the pungency of his satire, the drollery of his ridicule, and the purity of his eloquence, were acknowledged by spontaneous bursts from the bar and the auditory which the dignity of the bench and the gravity of the place, could not
\end{quote}

\textsuperscript{15}‘Communication,’ \textit{North American Mercantile Daily Advertiser} (Baltimore, 28 July 1808) 3.
\textsuperscript{16}\textit{Ibid.}
\textsuperscript{17}\textit{Ibid.}
\textsuperscript{18}\textit{Ibid.}
restrain. Every passion of the soul was awakened and subdued at the speaker’s pleasure; and every chord was so chastely and so faithfully touched, that the vibration was a grand and continued harmony … It was the human mind traveling in its greatness, matchless and irresistible. 19

The lawyer exhibits his wit and purity of eloquence not in the service of logical analysis but to foster an emotional appeal: wit, satire and ridicule are treated together as products of the intellect that can exemplify rhetorical power, moving the audience to applaud, while chaste means can be used to elicit passion, according to a musical metaphor of harmonious vibration that speaks at once to conceptions of coherence and lucidity on the one hand, and emotional sensitivity on the other. Here, again, the case appears to have been significant for the broader community: the plaintiffs sought to ‘recover certain lands as heirs at law’, and the dispute turned on

the competency of the testator … at the advanced age of ninety-six years, to execute a will. … The cause excited considerable interest; and … the numerous witnesses … occupied the court [for] two days. 20

The article says nothing about the substance of the arguments, but given the implication that the plaintiffs’ lawyer indulged in personal attacks on the defendants, one may guess that the grand harmony of his rhetoric had more to do with their character than with the irresistible power of an air-tight legal structure. A dispute among members from two generations of a large and well-established family, over property evidently valuable enough to prompt such extensive litigation – the case has the makings of a major episode in the community, and it is not surprising that the trial would draw numerous spectators eager to participate. 21

In the mid-1820s, a New York City paper, reporting on a trial for fraud and conspiracy after the failure of a large insurance company, hinted at a more deliberate effort to combine legal logic with an appeal to popular sentiment, but nevertheless placed more emphasis on the latter. The trial followed the failure of the Life and Fire Insurance Company, which precipitated a financial panic. 22 At trial, one of the plaintiffs’ counsel, in his summing up of the evidence, began ‘with a close and argumentative speech that appealed more to the reason than the passions’. Here indeed we see a distinction between formal legal reasoning and the emotional atmospherics of the case – but the article said nothing about the content of this argument or the response it engendered, instead observing that he was succeeded

19 ‘Greene County Circuit’ Northern Whig (Hudson, NY, 21 December 1819).

20 Ibid.

21 For more details on the case and its ultimate resolution, see ‘An Act for the Heirs of John M. Van Loon, Deceased’, 1820 New York Sessions Laws 22.

by a colleague whose speech ‘resembled one splendid piece of eloquence which warmed as it went along, and leaped into feeling and high passion’. The newspaper’s real admiration, however, was reserved for the two lawyers representing the defendants: ‘Mr. Emmet was, as usual, great, learned, original, and highly passionate and powerful. His peroration was a splendid piece of forensic oratory. … Mr. Maxwell … commenced with evident feeling’, and, ‘knowing that the public prejudice was against [his client]’, he revealed ‘his skill in working upon the prejudices of people’, inciting the ‘crowd of spectators [to] express their applause in spite of the remonstrances of the Court’. 23 In this account, reason and passion are differentiated, but the most effective advocate, again, is the one whose eloquence provokes the spectators to ‘indicate to the jury what they felt’. 24 As one may surmise from the details surrounding the case, the trial’s significance derived from the widespread havoc resulting from the insurance company’s collapse. In these circumstances, a New York audience was evidently prepared to greet the trial in the same kind of spirit that we have seen in the other two cases described above.

These examples are notable in part because they do not come from the South or West, as with the many examples that Lerner gives when describing early-nineteenth-century forensic theatrics. Even the trial set in Baltimore is significant, when we consider that her examples of revivalist-style audience responses at trials are drawn largely from states such as Alabama and Missouri. The participatory response that she discusses, and the communal dynamic that it engendered, may have been more pronounced outside of the North East, but the phenomenon evidently was not limited to those areas. While the nature and extent of that response doubtless varied in different parts of the US, the jury trial evidently offered one of the means by which local residents, in a culture of forensic sensation, could extemporaneously fashion and enact a sense of communal identity.

The more analytical style of argument was not, of course, unheard of during this period, but those who commended it tended to suggest that the bench, not the jury, was the proper audience for this approach. A New York paper, eulogizing a distinguished lawyer in 1824, could praise his ‘calm and deliberate’ mode of presentation, precisely because it was fit for the bench:

[His] style of eloquence … was perfect in its kind; logical, argumentative, investigating; never cold or languid, always earnest and engaging, and accompanied with that genial warmth which gives life and flow to thought and expression. His language was pure and correct, and often elegant; his words were so happily chosen and arranged, and his sentences so well constructed and finished, that it was easy to note down every expression, and his arguments might have been sent to the press as they were delivered, without correction … it was delightful to contemplate the order and precision with which he stated and unfolded the points of his cause, his

24ibid.
luminous exposition of legal principles … In addressing himself to the Bench … mere declamation could have no effect. The understanding, not the heart, was to be subdued. Ingenious sophistry can avail little before those … who take days, weeks, or months for deliberation.25

This account is replete with terms that would later appear much more often in commendations of legal arguments – ‘well constructed’, ‘order and precision’, ‘luminous exposition’ – and the suggestion that his speech, in its well-crafted order and measured cadences, resembled a printed text had already become a conventional way of praising a consummate elucidation of the law.26 Yet this kind of rhetorical ‘purity’, as against the kind we have been examining, is said to be apposite precisely because it speaks to ‘the understanding, not the heart’ – because it is addressed to the bench, not a jury.

A similar eulogy, published in the following decade, was unusually self-conscious about the relation between these two rhetorical modes, and the improbability of finding a lawyer equally gifted in both. ‘Sketches by a Briefless Lawyer’ notes that while the ‘jury lawyer and [the] bar lawyer’ are usually two distinct breeds, occasionally ‘the facult[ies] of arousing the imagination and convincing the judgment, [are] united in the same individual’.27 The lawyer memorialized in the article – Thomas Addis Emmet – is said to have been capable of exhibiting ‘fervor and vehemence … [and a] melting pathos’ that appealed to juries, while his ‘power of analysis and reasoning … entitled him to the first rank as a bar pleader’. Finally, to complete the picture, the author observes that besides alternating between these styles, depending on the occasion, Emmet could make the two conspire together. In a dispute involving ‘the distinction between detinue and replevin’, he had to explain a question so abstruse that ‘even a lawyer’ would be hard pressed to imagine one ‘more strictly technical’; indeed, it was a topic almost unrivalled in its inability to inspire any ‘interest in itself’, and yet Emmet managed to capture all the jurors’ attention, presenting ‘a model of legal reasoning’ that cast off ‘the restraint of forms and technicalities’ so that ‘the understanding was forced to yield no less to the conclusive reasoning of the lawyer, than to the indescribable magic of the orator’. Notably, despite this enthusiasm for a kind of forensic magic that might recall the crowd-pleasing powers of the lawyers described above, the article does not claim that Emmet’s performance elicited any response from the spectators, nor even the jurors other than ‘rivet[ing]’ their gaze.28 While it is of course possible to present doctrinal material in a way that is accessible and perhaps even interesting to laypersons, such an argument is unlikely to be capable of enlisting audience participation, let alone provoking

28 ibid.
the kind of sensation that accompanied the emotional appeals that early nineteenth-century courtroom audiences enjoyed.

II.

Around the middle of the century, we see a growing level of interest in the analytical approach and a growing appreciation of its value. A helpful index of the changing climate may be found in the New York Herald’s report of the arguments in the Girard will case, argued in the US Supreme Court in 1844. Though the case was obviously not tried before a jury, the arguments drew a large audience. Daniel Webster adopted the ‘oratorical’ style typical of earlier nineteenth-century jury trials, arguing against the validity of the will in a speech that ‘evoked applause and even tears’ from the spectators – though not the bench.29 Horace Binney, on the other hand (according to the Herald’s report of the arguments), made ‘no attempt at fine speaking or declamation’ and opted instead for a ‘slow, cautious, logical analysis of every thing that could possible bear on his case’, in a ‘perfectly well constructed, highly polished law argument, calculated to rivet a lawyer, as it has the Judges; but rather caviare to the multitude’. The effect, the newspaper affirmed, recalled the movement of ‘a huge screw, slowly turning on its threads, [and] at last coming down on the object to be squeezed with irresistible force’.30 One might say that this report merely points up the distinction between two styles of advocacy and their proper spheres. However, it must be remembered that Webster was hardly a novice, having enjoyed a number of important successes in the Supreme Court. Indeed, when he had argued the Dartmouth College case there, in 1818, it was reported that ‘[v]irtually the entire audience dissolved into tears’, including the Chief Justice.31 Moreover, Webster was apparently successful in stirring the passions of some of his observers. The Herald even acknowledged that Binney had ventured into a ‘district of the law as dry as African deserts’, boring most of his hearers: ‘The ladies departed, and a gentleman by a pillow yawned.’32 Yet his slow and logical analysis, tedious though it may have been to the non-professionals, was the one that elicited the journalist’s praise, which presumably was offered on the assumption that readers would understand why Binney’s style of advocacy was so persuasive, while Webster’s speech could be dismissed as ‘a mere pettifogger’s argument’.33

A Connecticut paper, reporting in 1845 on a trial for malicious prosecution – which could easily have furnished material for high-flown oratory and indignation – congratulated the counsel on both sides for their analytical prowess. One lawyer

31Jenab and Hoeflich (n 11) 460.
32ibid.
33‘Mr. Webster’s Argument in the Girard Will Case’, New York Herald (New York, 16 February 1844) 2.
was praised for being ‘expert and successful in threading the avenues of testimony, and bringing the points to bear’; another, commendably, made ‘no attempt at oratorical flourish and display … [or at] a flippant, flowery, ad captandum style’, instead choosing ‘to manage a case where facts and principles [are] concerned, than to invent plausibilities and weave butterfly phrases’. A third exhibited ‘a discriminating mind’ and made arguments that were ‘wisely arranged and powerfully enforced … follow[ing] his opponents through all their windings’. He eschewed ‘the embellishments of rhetoric, [and] the gilded wings of fancy’, and ‘fail[ed] to carry conviction in the minds of a jury’ only where ‘the very ablest may not hope to succeed’. In short, all three were praised for the subtlety and logical organization of their arguments and counterarguments, in a discussion that treats ‘oratorical flourish’ as an outdated and ineffective ploy, seemingly unlikely to sway a jury.

For some, these traits were easier to find in England than in the United States. A Maine journalist, writing around the same time, observed in the London courts an admirable kind of focus and concision that was difficult to find at home.

The arguments of counsel, whether addressed to the court on questions of law or to a jury are remarkable for brevity and point. There is no wandering from the question at issue, no waste of labor upon irrelevant or inconsequential points, no personalities, no bombast, no high-flown flourishes of rhetoric, no long winded and pointless stories, no wearisome iteration and re-iteration of the common-place axioms of the legal profession.

When facts need to be stated, they are

always [presented] succinctly and very briefly. The art of condensing into a nutshell, a statement of facts which an American lawyer would feel justified in spending half an hour in narrating, seems to be perfectly understood and almost university practised.

At the same time ‘very little attention [is] given to the cultivation of a good style of speaking’, and yet ‘[t]he argument is never lost sight of’, whereas American lawyers, the author suggests, speak well at the expense of argumentative clarity: ‘With many of our speakers … it would be difficult to collect the fragmentary morsels of argument which float upon the rushing tide of their mellifluous eloquence.’ The author suggests that American lawyers (even those in Maine, apparently) have not mastered the arts of concision and careful organization, but that audiences might find this style more appealing than the ‘high-flown flourishes of rhetoric’ they are accustomed to. (That English and American

---

advocacy was understood to be different, in this regard, is also borne out by the American editor’s addition of a chapter on ‘forensic eloquence’ to the 1870 edition of Samuel Warren’s *Popular and Practical Introduction to Law Studies.*

Yet American lawyers could soon be praised for these traits. During the murder trial of Harvard Professor John White Webster, in 1850, his lawyer was commended for presenting an opening argument with ‘brevity, clearness, and impartiality’, and for making ‘no attempt to enlist the passions of the jury, no rhetoric, no vehement bursts of indignation or of eloquence’. Indeed, journalists were becoming increasingly critical of the excesses they associated with ‘eloquence’. During the 1859 trial of Daniel Sickles, who was charged with killing his wife’s lover (the first American case to raise a ‘temporary insanity’ defence on this ground), a commentator for the New York *Evening Post* observed that the prosecution was ‘not as severely chaste and effective as it might have been’ and both lawyers, although ‘capable of a close, pertinent, and judicious address to a jury’, flew into ‘redundancies and extravagance’. The author of the article, by contrast, clearly and soberly sets out the legal burden on each party without fanfare, and proceeds to expose the ‘weak point[s]’ raised on both sides – adopting an approach that assumes the audience will follow and appreciate this calm exposition. The article hints not only at changing perceptions of suitable forensic styles, but also at the possibility that patterns of journalistic consumption might also have been changing, such that readers who never heard the arguments would nevertheless prefer this dispassionate examination over a verbatim rehearsal of the arguments that the author criticizes. Indeed, in titling the article ‘Forensic Eloquence at Washington’, the author sarcastically condemns the same traits that would have merited enthusiastic praise a few decades earlier, and that would have justified the reprinting of the lawyers’ arguments over several columns.

III.

During the last third of the century, journalists increasingly criticized lawyers who played on the jurors’ emotional reactions, and commentators began to question the value of a jury that could be swayed by these ploys. An 1870 article in a Cincinnati paper gave a sarcastic portrait of ‘The Great Criminal Lawyer’, a character who

---

36 Jenab and Hoe (n 11) 454, n16.
37 ‘Professor Webster’s Trial,’ *Daily Globe* (Washington DC, 26 March 1850) 4. For a fuller discussion of the defence arguments, see Jenab and Hoe (n 11) 465–69. They suggest that Webster’s lawyer was so immersed in the ‘particulate exhibit of evidence’ that he lost track of the narrative structure, and hence that his argument could have ‘communicate[d] effectively only to those systematically trained in … the practice of law’, whereas ‘a jury … require[s] … something else’: *ibid* 469.
seeks to hoodwink the jurors and to play to their sympathies. His success stems from the problem that ‘jurymen … lay aside their common sense the instant they are sworn’. Rather than presenting the case soberly and honestly, he indulges in ‘gestures suggestive of bayonet thrusts or broadsword exercises, at the “twelve good men and true” in the jury-box, who are … apt, at his suggestion, to make asses of themselves’. Accusing the prosecution of bad faith, ‘he solemnly assures the soft-hearted, soft-headed jury, that there is a deadly, wide-spread conspiracy’. Finding his ‘impertinent’ and ‘irrelevant’ questions ‘ruled out’ by the judge, he even seeks to turn the exclusionary rules to his advantage, insisting that ‘there are many facts, not permitted to be proved, which, if shown, would establish the title of the accused to canonization’. His dust-throwing, and his use of argument by implication, reliably confuse the jurors, who ‘at last, bewildered and befogged, accept his assertions as proved’. The result is that ‘the dozen Noodles in a box’ acquit his client, ‘the rabble applaud’, and the ‘carrion-hunting Bohemians of the sensation press report his vile performances, and gabble with admiring headlines’. Here indeed we see (at least in the author’s imaginary portrait) an audience who respond in the same spirit as an earlier generation – but their reaction only discredits them, just as the jurors have displayed their weak and easily manipulated intellects. The implication is that without the impanelled noodles, the conduct of criminal trials in general would be reformed. The lawyer would have to argue to the judge, and consequently would have to change the whole tenor of his argument. The only remaining forensic sensation – the one promulgated by the ‘sensation press’ – would also vanish, once the lawyer was forced to abandon his headline-worthy performance.

Towards the end of the century, the jury’s lack of professional training would figure increasingly as a reason for eliminating jury trials. While numerous lawyers, in law journals and at bar association meetings, questioned the use of the jury, an 1886 article by William L Scott in the American Law Review offers an especially useful summation of this view. The son of a Tennessee colonel, Scott was educated in Knoxville, and had practised there and in Memphis, before fighting for the South in the Civil War. At the war’s end, he resumed his law practice in Memphis, and then moved to St Louis, where he ‘built up a very respectable business’ and was ‘connected with some of the largest insurance … suits ever tried’ there. Half a century earlier, he would have been one of the Southern lawyers who specialized

---

40. William L Scott, ‘Should Trial by Jury in Civil Cases be Abolished?’ (1886) 20 American Law Review 661. For other examples of the tendency, see, eg, James V Campbell, ‘Some Hints on Defects in the Jury System’ (1878) 4 Southern Law Review 521; Seymour D Thompson, Charging the Jury (WH Stevenson, 1880) vi. On opposition to the jury in England at this time, see Hanly (n 8). An English sceptic about the value of the jury could write in 1859 that it was ‘time … [for] the trial by jury … itself [to] be tried’, and he ‘accuse[d] it of incapacity, of ignorance, of partiality, of cumbersomeness, of barbarism’: Joseph Brown, The Dark Side of Trial by Jury (Maxwell, 1859) 7.
in the ‘emotional speechifying’ that Gordon and Lerner describe. In the post-war era, he cultivated the kind of respectability associated with the increasing professionalization of the bar. In his article proposing the abolition of the jury, Scott began by emphasizing the typical juror’s lack of education. The jury, he explained, was ‘composed of men ignorant of the law as a science, inexperienced in the matter of weighing testimony, and unskilled in the application of the law to the facts’.  

The characterization of law as a science, though hardly innovative at this time, signals Scott’s embrace of an attitude that was gaining increasing currency following Langdell’s reformation of the Harvard curriculum in the 1870s. Scott continued to elaborate the same theme as he explained that the jury’s ignorance was fatal for an enterprise that ‘demands a more than ordinary exercise of the reasoning faculties; and if it does not require, at any rate will be greatly aided by mental discipline, and mental training in this character of intellectual work.’  

These were tasks better left to a judge, ‘whose mind has … become trained … to logical processes of thought, and to the ready detection of fallacies’.  

Indeed, the jury instructions, themselves a product of the judge’s ‘close thinking … [and] exercise of the reasoning powers’, were likely to perplex the typical juror:

They are, usually, a series of legal propositions, the one having its bearing upon another; in which case it is not only necessary that the whole series, but also that each separate ‘Instruction’ in its relationship to another, and to the whole, should be clearly comprehended.

In short, the jury instructions, as an expression of the legal-scientific method and an expression of intricate legal reasoning, could be implemented only by someone equipped with the same talents that produced them. The configuration that Scott describes has the architecture of a legal doctrine or even a field of law. It must be grasped at once in its entirety and also in its separate components, which in their mutual relations serve to define the larger structure. It is as if a judge, in issuing the jury instructions, must fashion a new and intricate doctrinal arrangement each time, like a lawyer creating a new contract that cannot be correctly understood except by one equally skilled in the craft.

---

41 The Bench and Bar of St Louis, Kansas City, Jefferson City, and Other Missouri Cities (American Biographical, 1884) 33–34.
42 Scott (n 40) 661.
43 ibid 665.
44 ibid.
45 ibid 666. Scott found support for his view in a recent decision of the Missouri Supreme Court, which had observed that ‘it is not safe in a series of instructions to trust largely to the continuity in reasoning, and the logical analysis of “the panel of twelve.” They are liable to be misled by the assertion of apparently distinct propositions in separate instructions, which might to the professional mind be cognate and harmonious’: Scovill v Glasner, 79 Mo 449, 457 (1883).
An 1894 article in the *Trenton Evening Times* could criticize the histrionics of the earlier nineteenth century, observing that ‘[a] generation ago the oratory of the bar was of the perfervid kind, or else the lawyers were elaborate … in their mastery of rhetoric and elocution’, some going so far as to imitate a celebrated advocate famous for ‘writing out and committing to memory his speeches, and even practicing his gestures before a full-length mirror’. This whole approach, the author explained, had gone out of fashion: ‘Today such oratory as that would be thought artificial, and it would bore a jury.’ Modern lawyers preferred to be ‘plain spoken, simple and without especial rhetorical flourish when speaking either to the court or the jury’. In this account, purity and eloquence are associated not with passion but with a judicious and persuasive lack of passion: the consummate lawyer’s ‘pure diction’ is the sign of ‘a masterly trained mind … occupied in the attempt to convince the court and jury’. In the earlier part of the century, this kind of mastery would have been seen as appropriate for the bench, but the author of this article pronounces it fit for both, casually observing that a jury would be bored by the ‘perfervid’ style.

The nineteenth century witnessed a radical change in the style of forensic argument in jury trials. The ‘emotional speechifying’ that invited participation not just from the jurors but also from the wider courtroom audience, and that enhanced a more general sense of communal involvement, gave way to a style of argument that emphasized dispassionate analysis in the service of objectivity and technical exactitude, appealing to a rather different community, made up of professional lawyers and those laypersons who could appreciate their values. Nevertheless, as an institution, the trial continued to figure as a significant feature in American culture through the first three decades of the twentieth century. Numerous factors conspired to weaken the trial’s prominence after that time, and although these changes in forensic style have not usually been considered as a part of that narrative, they may have helped to facilitate the decline of the trial, by reorienting its function away from a broadly representative one, and towards one aligned with the bureaucratic virtues of a small part of the community.

**Disclosure statement**

No potential conflict of interest was reported by the author.

---