

## The Origins of “Reasonable Doubt”

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No person in our country can be convicted of a crime unless there is absolute certainty about his guilt. That is the theory, at least. If the accused does not willingly plead guilty, all the essential elements of guilt must be proven to a jury, and they must be proven “beyond a reasonable doubt.”<sup>1</sup> To be sure, the phrase “reasonable doubt” does not actually appear anywhere in the Constitution. In fact, the Supreme Court has expressed the view that the reasonable doubt rule only “crystalliz[ed] . . . as late as 1798.”<sup>2</sup> Nevertheless, in 1970 the Court read the familiar standard of proof into our constitutional law.<sup>3</sup> Since then, the Court has insisted unwaveringly on the fundamental importance of the requirement of proof “beyond a reasonable doubt,” even at the cost of throwing American sentencing law into “far reaching and . . . disturbing” confusion.<sup>4</sup> The words “reasonable doubt” may not appear in the Constitution; but it is inconceivable that we could abandon our American commitment to the “reasonable doubt” standard of proof—so much so that Supreme Court does not shy away from creating chaos our criminal justice system in its name.

Yet this fundamental commitment can be uncomfortably difficult to explain and justify. The formula “reasonable doubt” is, after all, hardly easy to interpret. How exactly are you supposed to know when your doubts about the guilt of the accused are

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<sup>1</sup> In *Re Winship*, 397 U. S. 358, 374 (1970) (citing C. McCormick, *Evidence* § 321, pp. 681-682 (1954); see also 9 J. Wigmore, *Evidence* § 2497 (3d ed. 1940);

<sup>2</sup> *Id.*, 373; *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

<sup>3</sup> *In re Winship*, 357 U.S. 358 (1970); *sim. Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000).

<sup>4</sup> *Blakely v. Washington*, 2204 U.S. Lexis, 4573 (O’Connor Dissent at IV a).

“reasonable”? Jurors are sometimes understandably baffled<sup>5</sup>: Even some of the most sophisticated members of the legal profession find the question too difficult to answer.<sup>6</sup> In fact, there is a considerable corpus of case law in which judges flounder unhappily over the definition of “reasonable doubt.” Courts in several states are forbidden even to try to explain the standard, according to one study,<sup>7</sup> and a majority of the federal circuits treat it as so elusive that trial courts cannot be required to define it.<sup>8</sup> The Supreme Court, for its part, has not been much help. The Court took a crack at the problem in 1990, holding that the “reasonable doubt” instruction could not include another venerable historical phrase, “moral certainty.”<sup>9</sup> Four years later, however, the Court backtracked, declaring that “moral certainty” could be used in some circumstances after all, and otherwise declining to elucidate the meaning of the standard.<sup>10</sup> The Court has made it clear that an error in defining “reasonable doubt” is never harmless<sup>11</sup>; the rule is too fundamentally important for that. At the same time, the Court’s decisions leave it at best unclear whether courts are obliged to define the “reasonable doubt” standard for confused jurors or not.<sup>12</sup>

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<sup>5</sup> See e.g. the discussion of *People v. Redd*, 266 A.D.2d 12, 698 N.Y.S.2d 214 (1st Dep’t 1999), cited and discussed in Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brooklyn L. Rev. 1081, 1087 (1999).

<sup>6</sup> For the views of an eminent federal judge, see Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 NYU L Rev. 979, 982-990 (1993); and for a sharply worded account by a sitting Justice of the Rhode Island Supreme Court, see Stephen J. Fortunato, *No Uncertain Terms*, Legal Affairs (January/February 2004), 16-18. For an account of the current state of affairs, see John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1187 (2002).

<sup>7</sup> See Jessica Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 Am. J. Crim. L. 677, 687-688 (1995). According to Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 Tenn. L. Rev. 45, 87 (1999), one state moved out that category since Cohen’s study.

<sup>8</sup> Cohen, *The Reasonable Doubt Jury Instruction*, 682-686; Power, *Reasonable and Other Doubts*, 86.

<sup>9</sup> *Cage v. Louisiana*, 498 U.S. 39 (1990).

<sup>10</sup> *Victor v. Nebraska*, 511 U.S. 1 (1994).

<sup>11</sup> *Sullivan v Louisiana (US)* 124 L Ed 2d 182, 113 S Ct 2078 (1993).

<sup>12</sup> *Victor v. Nebraska*, 511 U.S. 23-28 (1994) (Justice Ginsburg, Concurring in part and concurring in the judgment).

All this makes for an unsettling state of affairs. The “reasonable doubt” standard is undeniably a fundamental part of our law. Yet a majority of our judiciary seems to have come to the conclusion that the phrase “reasonable doubt” can be assigned no definitive meaning. A cynic or post-modern philosopher might point to this situation, gleefully, as evidence for the deep incoherence of the most basic propositions of the law.

It is not my purpose in this Article to offer any such cynical or post-modern account. We *can* understand our law. But in order to understand it, we sometimes have to dig deep into its history, and that is the case here. As I want to show, the “reasonable doubt” formula seems mystifying today because we have lost sight of its original purpose. The origins of “reasonable doubt” lie in a forgotten world of pre-modern Christian theology, a world whose concerns were quite different from our own.

At its origins, as this Article aims to show, the familiar “reasonable doubt” rule was not intended to perform the function we ask it to perform today: It was not primarily intended to protect the accused. Instead, it had a significantly different, and distinctly Christian, purpose: The “reasonable doubt” formula was originally concerned with protecting the souls of *the jurors* against damnation. Convicting an innocent defendant was regarded, in the older Christian tradition, as a potential mortal sin. The purpose of the “reasonable doubt” instruction was to address this frightening possibility, reassuring jurors that they could convict the defendant without risking their own salvation, as long as their doubts about guilt were not “reasonable.” It is only if we see the rule in this original context that we can grasp its significance: The rule was simply never designed to protect the accused, nor even to serve as a standard of proof in the proper sense of the term.

Historians have sometimes come tantalizingly close to grasping this basic truth about the origins of “reasonable doubt.”<sup>13</sup> Indeed, in many ways it is a truth that is simply obvious. We all know that jurors are supposed to decide “according to conscience”; and everyone with a basic knowledge of Christian doctrine understands that questions of “conscience” are questions that involve peril for the soul of the individual Christian. It should not be entirely surprising to learn that the problems of jury trial are in part problems involving risks to the souls of Christian jurors: Of course it is the case that Christian jurors who vote falsely to convict do so at the risk of their own salvation. Nevertheless, historians have never grasped the magnitude of the theological problems of “conscience” and salvation in the structure of jury trial, and they have not rightly understood the connection between those problems and the concept of “reasonable doubt.” Indeed, some historians—notably John Langbein—have denied that Christian moral theology of conscience has anything to do with the “reasonable doubt” rule at all.<sup>14</sup> And while other scholars, such as James Franklin and Barbara Shapiro, have looked through the literature of moral theology in the hunt for the origins of “reasonable doubt,” they have not recognized how critically important the question of salvation was.<sup>15</sup> The consequence is that we find ourselves far more confused about the state of our law today than we need to be.

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<sup>13</sup> Especially Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: U. of California, 1991), 1-41; James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore: Johns Hopkins Press, 2001), 1-101; Margaret Sampson, *Laxity and Liberty in seventeenth-century English political thought*, in Edmund Leites, ed., *Conscience and Casuistry in Early Modern Europe* (Cambridge, England, 1988), 85-87.

<sup>14</sup> Langbein, *Historical Foundations of the Law of Evidence: The View from the Ryder Sources*, 96 *Col. L. Rev.* 1168, 1199 n. 152 (1996).

<sup>15</sup> The most important of these accounts remains Shapiro’s admirable effort to show that the origins of the rule lie in “satisfied conscience” standard of the seventeenth century. Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 1-41. The shortcoming of this fine work lies in its failure to grasp that proof as such was not the issue: Instead, the deep problems involved, not the satisfied conscience, but the *safe* conscience. I offer fuller discussion below, Sections VII and VIII.

In the effort to put an end this confusion, this Article traces the historical link between the “reasonable doubt” formula and the problem of juror salvation. The story revolves around aspects of pre-modern Christian theology that are likely to seem strange to the modern reader. In particular, it revolves around the moral theology of judging. Medieval and early modern Christians experienced great anxiety about the dangers that acts of judgment presented for the soul of the judge. As all readers of Dante know, medieval office-holders faced the risk of damnation if they committed sin in the course of their official acts. Those risks confronted judges just as they faced to all officeholders. Indeed, the problems of judges were considered exceptionally important, and commanded considerable attention. As medieval church lawyers put it, any sinful misstep committed by a judge in the course of judging “built him a mansion in Hell,”<sup>16</sup> and rules had to be developed to shield the judge from the consequences of his own official acts. This was especially true any time a judge imposed “blood punishments”—i.e., execution and mutilation, the standard criminal punishments of pre-nineteenth-century law.

Now, when it came to inflicting blood punishments, pre-modern Christian theology turned in particular on the problem of “doubt.” “Doubt” about the facts presented a real danger to the soul of the individual judge: “Doubt” was the voice of an uncertain conscience, and in principle it had to be obeyed. Such was the rule laid down in particular by the standard “safer way” school of Christian moral theology: “In cases of doubt,” as the “safer way” formula ran, “the safer way is not to act at all.”<sup>17</sup> This doctrine was applied to judging as it was to all other acts involving the individual

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<sup>16</sup>Thus my slightly poetic translation of “edificat in Gehennam.” The phrase is quoted and discussed in Knut Wolfgang Nörr, *Zur Stellung des Richters im gelehrten Prozeß der Frühzeit: Iudex secundum allegata non secundum conscientiam iudicat* (Munich: Beck, 1967), 50 n.1.

<sup>17</sup> Discussed below, Section

conscience: As a typical French “dictionary of conscience” explained the standard Christian law in the eighteenth century, “In every case of doubt, where one’s salvation is in peril, one must always take the safer way. . . . A judge who is in doubt must refuse to judge.”<sup>18</sup> A judge who sentenced an accused person to a blood punishment while experiencing “doubt” about guilt committed a mortal sin, and thus put his own salvation at risk. These were injunctions that were applied to judges in every part of western Christendom, from Spain to Germany, from Italy to England.

The history of the “reasonable doubt” rule is the history of English struggles with these universal western Christian challenges. Common law jurors were Christians, and they were Christians who engaged in acts of judgment. During the Middle Ages English criminal jurors did not yet face the worst dangers involved in such acts: Medieval criminal juries were not compelled to enter the general verdict of “guilty,” and therefore were not compelled to put their souls at risk. But in the early modern period, the moral dangers of judging became acute for English criminal jurors. As an eighteenth-century guide to the Englishman’s civic duties ominously reminded its readers: “The Office and Power of these Juries is *Judicial*, they only are the Judges from whose Sentence the Indicted are to expect Life or Death.”<sup>19</sup> Yet within the Christian tradition this was an “Office and Power” fraught with danger. To be a juror was potentially to “build yourself a mansion in Hell”—“to pawn [your] Soul,” as a famous seventeenth-century pamphlet put it.<sup>20</sup> There is plenty of evidence that Christian jurors took this quite seriously, especially at the end of the eighteenth century. As the moral philosopher William Paley

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<sup>18</sup> Collet, *Abrégé du Dictionnaire des Cas de Conscience de M. Pontas*, Paris : Libraires Associés, 1767, 1 : 467-468.

<sup>19</sup> [Anon.], *A Guide to the Knowledge of the Rights and Privileges of Englishmen* (London: Printed for J. Williams and W. Bingley, 1771), 95-96.

<sup>20</sup> Hawles, *Englishman’s Right*, 122.

described the situation in 1785, jurors experienced “a general dread lest the charge of innocent blood should lie at their doors.”<sup>21</sup> Jurors simply did not want to convict, Paley complained: In their “weak timidity,” they held it “the part of a *safe* conscience not to condemn any man, whilst there exists the minutest possibility of his innocence.”<sup>22</sup>

It was in response to such juror “timidity” and “dread” that the “reasonable doubt” standard introduced itself into the common law in the 1770s and especially 1780s. Paley’s 1785 description of jurors who wished to preserve a “*safe* conscience” was exactly correct: English Christian jurors of the 1780s, following the standard precepts of “safer way” theology, often wished to take the “surest side”<sup>23</sup> or the “safer way,”<sup>24</sup> refusing to convict the accused where they experienced “any degree of doubt.”<sup>25</sup> The same was true on the American side of the Atlantic: As John Adams reminded the jurors in the Boston Massacre trials in 1770, repeating language of moral theology that dated back to the Middle Ages: “[w]here you are doubtful never act: that is, if you doubt of the prisoner’s guilt, never declare him guilty; that is always the rule, especially in cases of life.”<sup>26</sup> It was in the face of such religiously motivated reluctance to convict that the “reasonable doubt” rule arose, taking its now-familiar form during the 1780s. Christian moral theology had always left some room to ignore doubts that were not “reasonable.” English criminal justice embraced this, aiming to persuade jurors that they could convict without risk to the safety of their salvation, as long as their “doubts” were not “reasonable.”

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<sup>21</sup> Paley, *The Principles of Moral and Political Philosophy* (Indianapolis, 2002), 391-392 (1785). For “innocent blood”: Matt. 27:4 (Judas).

<sup>22</sup> Id.

<sup>23</sup> Trial of John Shepherd (Theft) (1789). THE PROCEEDINGS OF THE OLD BAILEY REF: T17890603-43

<sup>24</sup> Trial of Henry Harvey (Deception, Perjury) (1785) THE PROCEEDINGS OF THE OLD BAILEY REF: T17850914-187

<sup>25</sup> Trial of John Shepherd (Theft) (1789). THE PROCEEDINGS OF THE OLD BAILEY REF: T17890603-43

<sup>26</sup> 3 L. Wroth and H. Zobel, *Legal Papers of John Adams* (1965), 243.

Such is the origin of “reasonable doubt.” As it suggests, the “beyond a reasonable doubt” standard was not originally designed to make it more difficult for jurors to convict. As thoughtful historians have sometimes recognized, it was designed to make conviction *easier*, by assuring jurors that their souls were safe if they voted to condemn the accused.<sup>27</sup> In its original form, it had nothing to do with maintaining the rule of law in the sense that we use the phrase, and nothing like the relationship we imagine to the values of liberty. It was the product of a world troubled by moral anxieties that no longer trouble us much at all. All of this makes it unsurprising that our law should find itself in a state of confusion today. We are asking the “reasonable doubt” standard to serve a function that it was not originally designed to serve, and it does its work predictably badly.

Those are the simple outlines of the history this Article recounts. In its full detail the story is inevitably more complex. The theology and jurisprudence of “doubt” and blood punishments developed principally in continental Europe. It began developing during the twelfth century, particularly during the great campaign against ordeals. Accordingly, I will spend some time discussing ordeals, and explaining continental developments. Inevitably, I will also have to spend time describing Christian theology—not only the theology of “doubt,” but also about questions concerning the judge’s use of his “private knowledge,” and the nature of Catholic confession and its Calvinist alternatives.

I will also spend some time, at the beginning of the Article, developing a basic, but little explored, jurisprudential distinction: the distinction between *proof procedures*

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<sup>27</sup> Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have Weakened the Presumption of Innocence*, 78 *Notre Dame L. Rev.* 1165, 1169 (2003); Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 *B.U. L. Rev.* 507 (1975).

and what I will call *moral comfort procedures*. As I hope to convince the reader, this is a fundamentally important distinction for understanding the original meaning of the “reasonable doubt” rule, and indeed for understanding pre-modern law more broadly. Proof procedures, as the name suggests, aim to achieve proof in cases of uncertainty. Moral comfort procedures, by contrast, aim to relieve the moral anxieties of persons who fear engaging in acts of judgment—persons such as early modern criminal jurors. As the opening Section of this Article will argue, these two different kinds of procedures are easily confused. Indeed, the errors of our “reasonable doubt” historiography almost all grow out of a failure to distinguish proof procedures from moral comfort procedures.

This Article proceeds as follows. Section I lays out the distinction between proof procedures and moral comfort procedures. Section II begins an exploration of Christian moral theology, discussing the medieval concept of blood guilt and its application to the judicial ordeal. Sections III and IV describe the pre-modern theology of judging, including the ban on the judge’s use of his “private knowledge” (Section III), and the application of the theology of “doubt” to the problems of criminal procedure (Section IV). Section V turns more specifically to the common law, explaining how general western theological precepts were applied to judges and jurors in England. In Section VI, the treatment of the medieval criminal jury is described. In particular, Section VI emphasizes the importance of the special immunities enjoyed by medieval criminal juries. In Section VII, the Article describes the seminal events of the seventeenth century, as criminal jurors escaped the coercion that had been their lot during the Tudor period, and faced the moral dilemmas of conscience. Section VIII explores the final

emergence of the “reasonable doubt” standard in the moral theology and law of the eighteenth century, and Section IX concludes.

### I. Two Kinds of Procedures: Proof and Moral Comfort

There already exists a large and very fine literature on the history of “reasonable doubt,” and it may seem improbable that there is anything left to say. Nevertheless, confusion about the origin of the rule continues to reign. To appreciate the depth of this confusion, one need only glance at the two most recent books to address the problem. On the one hand, we have The Origins of Adversary Criminal Trial, a 2003 book by John Langbein, the most learned and penetrating of common law historians at work today. To Langbein, it seems clear that the “reasonable doubt” developed in England in the mid-1780s, and equally clear that it developed as part of a larger effort to create procedural protections for the accused, “in association with the ripening adversary system.”<sup>28</sup> In particular, Langbein associates the rule with the “lawyerization” of the common law trial, a process by which defense counsel gradually introduced procedural protections for the accused over the course of the eighteenth century.<sup>29</sup>

On the other hand, we have The Science of Conjecture, a 2001 book by James Franklin, a historian of science and epistemology. To Franklin, it is clear that the “reasonable doubt” standard dates, not the eighteenth, but to the sixteenth century; and equally clear that it was not produced by lawyers at all. According to Franklin, the

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<sup>28</sup> John H. Langbein, The Origins of Adversary Criminal Trial (Oxford, 2003), 33.

<sup>29</sup> Langbein, Origins of Adversary Criminal Trial, 261-266.

phrase “reasonable doubt” was first coined by the Spanish moral theologian Francisco Suarez.<sup>30</sup> As Franklin sees it, the history of the phrase does not by any means belong exclusively to the history of the law. It belongs to a much larger history of the search for certainty, a search that preoccupied scientists, theologians and philosophers as much as it did lawyers. Nor is Franklin the only historian to say this sort of thing. Barbara Shapiro is an even better known advocate of the same position. Shapiro finds the origins of “reasonable doubt” in the seventeenth century. For her too, the legal rule is to be seen alongside the similar rules found among scientists,<sup>31</sup> as well as among divines like Bishop Wilkins, who spoke of the search for “moral certainty”<sup>32</sup>: For Shapiro as for Franklin, “reasonable doubt” was the product of a grand early modern intellectual effort to find certainty in the world. There are other claims in the literature, too: Anthony Morano has tried to show that the “reasonable doubt” rule grew up during the Boston Massacre trials of 1770, as part of a debate over “the traditional English concept that it is better to acquit the guilty than to convict the innocent.”<sup>33</sup>

Can these views be reconciled? What, if anything, does the version of “reasonable doubt” that we find among sixteenth-century Spanish moral theologians have to do with the version of “reasonable doubt” that we find in the criminal trials of the Old Bailey in the 1780s, or the Boston Massacre trials in 1770? This is the key question for

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<sup>30</sup> Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (Baltimore: Johns Hopkins Press, 2001), 63.

<sup>31</sup> Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law and Literature* (Princeton, 1983), 167-193

<sup>32</sup> Barbara J. Shapiro, "To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850, 38 *Hastings L.J.* 153 (1986). This line of argument was first explored by Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, *J. History of Ideas* 20:3 (1959): 299-316, and has most recently been reviewed by Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have Weakened the Presumption of Innocence*, 78 *Notre Dame L. Rev.* 1165, 1171-1195 (2003).

<sup>33</sup> Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 *B.U. L. Rev.* 507, 517 (1975).

understanding the history of “reasonable doubt.” Answering it requires us to immerse ourselves in a forgotten world of pre-modern adjudication and theology.

Indeed, our difficulties in understanding the “reasonable doubt” rule are the result of a failure of historical memory. We have forgotten that legal procedures in the pre-modern world were not like legal procedures today. They did not always aim only at achieving certainty and proof in cases where the guilt of the offender was uncertain. Nor did they aim only at providing procedural safeguards for the accused. Instead, they were often designed to help relieve the judge’s own anxieties about the dangers surrounding the act of judging. As James Fitzjames Stephen, the pioneering nineteenth-century historian of the criminal law, famously put it, pre-modern judges often dreaded “the responsibility—which to many men would appear intolerably heavy and painful—of deciding . . . upon the guilt or innocence of the prisoner.”<sup>34</sup> They dreaded this responsibility so much that they avoided entering verdicts if at all possible, or else sought to diminish their personal responsibility in other ways. They were not seeking *proof* so much as they were seeking *moral comfort*.

To understand this, we must begin by recognizing how authentically disquieting the act of judgment could seem in the pre-modern world. Pre-modern judges did indeed face “heavy and painful” dangers. Not all of these dangers were spiritual. Sometimes they were legal: In medieval Italy, for example, judges were subject to civil and criminal liability for incorrect judgments.<sup>35</sup> English jurors faced similar legal threats until 1670.<sup>36</sup> On a grosser level, the physical well-being of a judge was sometimes threatened in the

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<sup>34</sup> James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Routledge, repr. 1996) (orig. 1883), 1: 573.

<sup>35</sup> Schmoekkel, *Humanität und Staatsraison*, 265 and 265 n. 553 for bibliography.

<sup>36</sup> Below, Section VII.

past, just as it is still sometimes threatened today: The pre-modern judge who condemned a person might easily become the target of vengeance by that person's family or associates. The world of today, in which most judges can simply leave the courtroom behind with comparatively little fear for their lives or livelihoods, is a very modern world.

But lives and livelihoods were not all that was at stake. For understanding the rise of the "reasonable doubt" standard, it is especially important to recognize that a judge might, as Stephen implied, dread the *moral* and *spiritual* responsibilities of judgment. This was particularly true where capital punishment was concerned. Lending one's hand to the killing of another person is widely regarded as a frightening business in human societies. As anthropologists and historians of religion have shown, anyone in the pre-modern world involved in the killing of another person subjected himself to the risk of bad luck, bad karma, bad fate<sup>37</sup>; and when it comes to capital cases, judges (and jurors) are, after all, persons who can be thought of as cooperating in the collective killing of another human being.

This may sound bizarre to the modern reader. We are accustomed to the idea that the judge's professional identity puts him in a different kind of moral position from that of a person "cooperating in a collective killing"; modern judges succeed in maintaining a psychic distance from the raw results of the judgments they enter, seeking only proof and certainty. So for that matter do most (though certainly not all) modern jurors. But the capacity to maintain that kind of psychic distance developed only very slowly. Judges were not by any means always clearly exempted from the risk of spiritual responsibility

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<sup>37</sup> For reflections by three eminent scholars, see Walter Burkert, René Girard, and Jonathan Z. Smith, *Violent Origins*, ed. Robert G. Hamerton-Kelly (Stanford, 1987).

for the killings over which they presided, whether in the western or the non-western worlds, and they sometimes displayed considerable anxiety.

Indeed, it is helpful to begin with a non-western example, which will offer a useful foil for the Christian tradition that eventually produced the “reasonable doubt” rule. This example is drawn from the world of the Theravada Buddhist tradition as described by Andrew Huxley. It involves judging and “kamma,” the Pali word for *karma*, and it features the infant who would grow up to be the Buddha:

In the Tennyia Jataka the future Buddha at one month old, sitting with the king, his father, in court, witnesses his father sentencing criminals to death. Instantly he remembers that in a past life he too condemned men to death, and that as a result he endured the pains of hell for 80,000 years. To escape inheriting the throne, the Future Buddha pretends to be autistic. In the face of this canonical warning that inflicting punishment can damage your kamma, the devout Buddhist prince should refuse to become king.<sup>38</sup>

This passage offers us a paradigmatic example of the moral anxieties attached to judging in the pre-modern world. Judging is dangerous—not just to the accused, but also to the judge. It is dangerous to the judge regardless of the merits of the case: Note that there is no suggestion here that the King was condemning *innocent* persons to death; the dangers to his kamma were dangers presented by *any* act of condemnation. As Huxley observes, this was an attitude that pushed Theravada Buddhists toward a radical antinomianism, which at the limit preached a collapse of all social institutions.<sup>39</sup>

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<sup>38</sup> Andrew Huxley, Sanction in the Theravada Buddhist Kingdoms, in Recueils de la Société Jean Bodin pour l’Histoire Comparative des Institutions 58: La Peine (Brussels, 1991), 4 : 345.

<sup>39</sup> Id.

Western Christian thinkers were never quite so radically antinomian: Western fears have mostly involved condemning the innocent, not the guilty. Nevertheless, Christianity had its own antinomian streak, and its own anxieties about the afterlife, and there are closely related passages and practices in western law as well, passages and practices that betray a real anxiety about the spritual risks associated with judging. *Beware the act of judging*, theologians declared all through the Middle Ages: *You risk making yourself into a murderer*.<sup>40</sup> Or as the most famous text on jury trial of the seventeenth and eighteenth centuries, Sir John Hawles' The Englishman's Right, put it, echoing the medieval theological tradition: let the conscientious jurymen "tremble," lest he be "guilty of [the defendant's] Murther."<sup>41</sup> If most of us have forgotten these anxieties, they were still very much alive for late eighteenth-century jurors, as they remain alive for some jurors in capital cases today.

So how can you judge in a capital case without becoming a "murtherer" yourself? The response given by the Tennyia Jataka offers essentially no hope: Judging, according to this Theravada tale, is quite simply synonymous with killing. But the western Christian tradition has typically taken a more forgiving approach, creating institutions that allow judges to condemn offenders to death without suffering crippling personal anxiety. Indeed, throughout western legal history we find many procedures designed to ease or eliminate the burden of moral responsibility for judges, soldiers, executioners, or persons who join in a group killing from necessity. These are what I will call *moral comfort procedures*, procedures designed to guarantee that judges in capital cases, and

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<sup>40</sup> Below, Section II.

<sup>41</sup> Id., 22

people like them, can take away a necessary dose of moral comfort, even while participating in a death.

The idea that legal procedures might sometimes serve such a moral comfort purpose is not completely unfamiliar. It is an idea we find in particular among critics of the American death penalty, who have often tried to show that American law is structured in a way that allows participants in the death penalty system to deny their moral responsibility. These critics often analogize the American system to a firing squad. Firing squad procedure is well known: One member of the squad is chosen to receive a blank, but no member of the squad is permitted to know precisely which of them is the chosen one. The purpose of this procedure is easy to discern: It is intended to relieve the individual squad members of a burdensome sense of moral responsibility, by allowing each one to doubt that it was he who fired the fatal shot. It offers, as we might say, a kind of moral safe harbor for the conscience of each individual fusilier. Critics of American capital punishment, most probingly Laura Underkuffler,<sup>42</sup> have often seized on this example in their efforts to capture the immorality of American law.<sup>43</sup> As they see it, the American criminal justice system works like a kind of gigantic firing squad—a system in which every actor manages to find a way to disclaim his disquieting personal responsibility for the death of the offender.

Doubts can be raised about this as a description of America. It is not clear that modern American officials involved in inflicting the death penalty really feel a need for

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<sup>42</sup> Underkuffler, *Propter Honoris Respectum: Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 *Notre Dame L. Rev.* 1730-1732 (1999).

<sup>43</sup> For this common topos in the death penalty literature, see e.g. Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, *Jury Responsibility in Capital Sentencing*, 44 *Buffalo L. Rev.* 339, 339 (1996); Laura S. Underkuffler, *Propter Honoris Respectum: Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 *Notre Dame L. Rev.* 1713, 1730-1732 (1999); Joanthan Bridges, *Hooding the Jury*, 35 *U.S. F. L. Rev.* 651, 658 (2001).

moral comfort. In particular, is not at all certain that American death penalty jurors really feel meaningful moral qualms.<sup>44</sup> But if modern American jurors do not clearly feel such qualms, pre-modern jurors most definitely did, as we shall see; and so did pre-modern judges and others involved in collective killings. Pre-modern legal systems really were structured, for some purposes, like gigantic firing squads, with numerous procedures designed to provide the agents of killing with ways of denying or diminishing their sense of moral responsibility.

Many of those procedures were directed at executioners or other ordinary killers from necessity such as soldiers.<sup>45</sup> Firing squad procedure does indeed offer one example. Another example is the traditional rule on cannibalism among shipwrecked sailors—the rule that was rejected in the famous case of Regina v. Dudley and Stephens. According to this traditional rule, starving seamen could kill and eat one of their number, but only provided that they drew lots to determine which of them would be the victim.<sup>46</sup> As all first-year law students know, the Dudley and Stephens court could not see any sense in this procedure, which it described drily as “somewhat strange.”<sup>47</sup> Yet this procedure makes perfect sense, given the anxieties about killing that are so widespread in human societies. Drawing lots makes it possible to assert that God, or Fate, or Chance has made the decision to kill, thus lifting the moral responsibility from the participants in the

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<sup>44</sup> The results of Eisenberg, Garvey, and Wells, *Jury Responsibility in Capital Sentencing*, 44 *Buffalo L. Rev.* 339, 367 (1996), are complex and effectively ambiguous: They find that the “average juror,” while aware of his moral responsibility, “does not think it likely that any death sentence he imposes will actually ever be carried out.”

<sup>45</sup> For Saint Augustine on soldiers, see below Section II.

<sup>46</sup> *United States v. Holmes*, 26 F. Cas. 360, 1 Wall. Jr. 1 (C.C.E.D. Pa. 1842), cited and discussed in *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

<sup>47</sup> *Id.*

killing.<sup>48</sup> Indeed, when it comes to cannibalism, we can all grasp the reassuring spiritual logic of this sort of procedure: Any of us driven to cannibalism would be glad for the chance to claim that the decision had been made by chance or God, not by ourselves.

Pre-modern judges, too, were provided with chances to disclaim their moral responsibility for their acts. In particular, there were two types of common moral comfort procedures for judges. First, there are *responsibility-shifting* procedures—rules that aimed to comfort the judge by forcing some other agent to assume all or part of the responsibility for making the final judgment. Stephen interpreted jury trial in exactly this way:

It is hardly necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community. It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner.<sup>49</sup>

The structure of jury trial, as Stephen interpreted it, was such that each of its two actors, judge and jury, could shift some of the more responsibility for judgment over to the other, thus diminishing the sense of responsibility for both. The same observation was made, in

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<sup>48</sup> Rabelais described the mentality involved: When you let difficult questions be decided by a throw of the dice, there is no evil in it. Instead, “the divine will” manifests itself to “man in his anxiety and doubt.” This was said à propos of Rabelais’ famous Judge Bridoye, who decided cases by a throw of the dice. See Rabelais, *Le Tiers Livre des Faicts et Dicts Héroïques du Bon Pantagruel* (Paris: Garnier-Flammarion, 1970), 191-211 (chaps. xxxix-xliv). The judge, says Pantagruel:

se recommanderoit humblement à Dieu, le juste juge, invocqueroit à son ayde la grace celeste, se deporteroit en l’esprit sacrosainct du hazard et perplexité de sentence definitive, et par ce sort exploreroit son decret et bon plaisir que nous appellons arrest, remueroient et tourneroient les dez pour tomber en chance de celluy qui, munny de juste complaincte, requeroit son bon droict estre par Justice maintenu, comme disent les talmudistes en sort n’estre mal aulcun contenu, seulement par sort estre, en anxiété et doubte des humains, manifestée la volonté divine.

Id., 210.

<sup>49</sup> James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Routledge, repr. 1996) (orig. 1883), 1: 573.

considerably more dramatic language, by our seventeenth-century pamphleteer Hawles, who described the dynamic of jury trial this way:

[T]he Guilt of the *Blood* or ruin of an Innocent man [is] *Bandyed* to and fro, and *shuffled off* from the Jury to the Judge, and from the Judge to the Jury, but really *sticks fast to both*, but especially *on the Jurors*.<sup>50</sup>

To Hawles, jury trial was something akin to a children's game, in which judge and jury each tried to see to it that the other ended up "it." Many pre-modern procedures took such forms: Pre-modern judges feared "the Guilt of *Blood*," and were eager to "shuffle it off" on to some other actor. The medieval ordeal offers a striking example of a procedure that could serve such a guilt-shuffling, children's-game-like purpose: As historians have recognized, ordeals were sometimes inflicted on persons whose guilt was already certain. The ordeal, in such cases, did not serve as a means of proof. Instead, its purpose was to force God to make the decision to convict the accused, thus shuffling what Peter Brown calls "the odium of human responsibility" off the shoulders of the community, and onto the shoulders of the Almighty Himself.<sup>51</sup> *Let God be the one who makes the decision to kill him!*

Such guilt-shuffling procedures are not the only ones we find. There is also a second, and especially important, approach to easing the judge's sense of moral responsibility, which involves what we may call *agency-denial*. Agency-denial procedures allow the judge to disclaim meaningful personal agency even while entering a capital verdict. A fine example of such agency denial, as we shall see, is the law of

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<sup>50</sup> [Hawles], *The English-mans Right. A Dialogue between a Barrister at Law, and a Jury-Man* (London: Printed for Richard Janeway, in Queenshead Alley in Paternoster-Row, 1680) (repr. New York, Garland, 1978).

<sup>51</sup> Peter Brown, "Society and the Supernatural: A Medieval Change," in *Brown, Society and the Holy in Late Antiquity* (California, 1982), 313. This point is discussed more fully below, footnote.

evidence that developed on the medieval continent. Medieval canon lawyers insisted that the judge should convict the accused pursuant to a highly rule-bound heuristic. By so doing, they aimed to guarantee that the judge would incur no personal moral responsibility: In a perfectly rule-bound system, the canonists declared, it was *the law* that made the decision, and not *the judge*. Or, to quote the starker language of the great twelfth-century canonist Gratian: In a perfectly rule-bound system, “it is the law that kills him, not you,” “*lex eum occidit, non tu.*”<sup>52</sup> This idea too would reappear among English jurors: As one of the leading moral theologians of the seventeenth century described it, jurors were eager to avoid the moral “agency” for judgment by declaring “*It is the Law that doth it, and not we.*”<sup>53</sup>

Now, these sorts of procedures, involving what to us seem infantile efforts to evade moral responsibility, stand in a complex relationship to proof procedures. By “proof procedures” I mean nothing complicated or elusive. Proof procedures are procedures intended to aid in the discovery of the truth in cases of uncertainty. Take, for example, a rule holding that a confession by the accused cannot support a conviction unless that confession is corroborated by independent evidence. The purpose of such a rule is obviously to guarantee that the trial procedures will arrive at the truth, given the inherent unreliability of any confession. There are of course many other examples of truth-finding rules, from rules requiring proper authentication of evidence to rules about the evaluation of witness demeanor.

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<sup>52</sup> Discussed below, Section II.

<sup>53</sup> Richard Baxter, *A Christian Directory or a Summ of Practical Theologie and Cases of Conscience* (London: Printed by Robert White for Nevill Simmors at the Princes Armes in St. Pauls Churchyard, 1673), 149.

There is indeed nothing complex about the idea that some procedures are intended to ascertain the truth. The complexities begin to multiply, though, when we turn to the relationship between proof and moral comfort. Often the same procedure can serve both purposes. This is largely for the simple reason that the pursuit of the truth can always serve as a means of easing the sense of moral responsibility: If we can claim that our decision was dictated by “the truth,” we can disclaim our personal responsibility for making it. We can say something like what the medieval church lawyers said about their highly rule-bound procedures: that *the law* made the decision. We can declare ourselves to be simple servants of the truth, rather than judges with undiluted moral responsibility.

Indeed, there are many examples of procedures that can serve either to provide proof or to provide moral comfort. The treatment of uncorroborated confessions is one. If we allow convictions to be based on uncorroborated confessions, we may be doing so for two independent reasons: first, because we believe that confessions prove the truth even if they are not supported by independent evidence (a dubious proposition); or second, because we prefer to convict only where the accused has been compelled to take the responsibility for his punishment upon himself.<sup>54</sup> Not least, jury trial can serve both a moral comfort function and a proof function. To the extent that the use of the jury serves to “shuffle the guilt of Blood and ruin” from the shoulders of the judge to the shoulders of the jurors, it serves to ease the judge’s sense of responsibility. To the extent the jury, in cases of uncertainty, acts as a “lie-detector,” in George Fisher’s phrase, distinguishing true testimony from false testimony, it serves a proof function.

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<sup>54</sup> For this as a function of the French *amende honorable*, see Schmoeckel, *Humanität und Staatsraison*, 206 and 206 n. 134.

In many instances, it will indeed be impossible to say whether a given procedure serves the end of proof or moral comfort. Nevertheless, there is one important class of cases in which we can be certain that procedures are serving exclusively the end of easing the sense of moral responsibility: cases in which the guilt of the accused is already known before trial. This was by no means a small class of cases in the pre-modern world, as we shall see: It was not at all uncommon to hold trials of one sort or another in which the accused was already known to be guilty. Indeed, even in the modern world, common sense tells us that almost all criminal defendants are guilty. Yet if the accused is already known to be guilty, trial does not serve any truth-finding purpose.

Why then do we hold a trial? There is more than one possible answer. In the modern world, it may be that we try persons already known to be guilty in order to achieve what Luhmann calls “legitimation through procedure”—in order to make our decision acceptable to all persons involved, or to reinforce the values of due process that we regard as fundamental of justice in society.<sup>55</sup> But the procedures of the pre-modern world, as we shall see, often call for a different answer. In the pre-modern world, it is clear that trials of the manifestly guilty were often held in order to avoid or mitigate the sense of moral responsibility of the persons charged with entering judgment. This is true whether we are speaking of ordeals, of the continental law of evidence, of compelled confessions—or of jury trial.

The desire for proof and the desire for to avoid responsibility have, finally, something else in common as well. They both tend to raise the bar against conviction. If the truth of the allegations against the accused must be adequately proven, it is of course more difficult to convict. By the same token, if judges are reluctant to judge, that

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<sup>55</sup> Niklas Luhmann, *Legitimation durch Verfahren* (Neuwied am Rhein, 1969).

reluctance too may make it more difficult to convict. In this sense, both the commitment to finding the truth and the urge to avoid moral responsibility for judgment can lie at the foundation of a system of procedural protections for the accused.

## II. The Medieval Theological Tradition (I): The Judge, the Ordeal and the Taint of Blood

With those distinctions in hand, we can turn to the rise of the “reasonable doubt” rule. That rule emerged, not as a standard of proof, but as a means of providing moral comfort to English and American jurors—as a way of reassuring them, to quote Hawles once again, that they were not making themselves guilty of the “Murther” of the defendant. The rule emerged over the course of the seventeenth- and eighteenth centuries. The full history of this moral comfort rule begins, though, well before the seventeenth century. The theology that underlay the “reasonable doubt” rule that had emerged by the 1780s was very old, dating back into the central Middle Ages. This medieval theology was applied to the case of English criminal juries only at a very late date. For a simple reason: Until the sixteenth century, English criminal juries were never forced to take moral responsibility for condemning the accused. Medieval criminal juries were not compelled to perform the most spiritually dangerous act: entering the general verdict of “guilty.” It was only in the early modern period, after the Tudor Crown began to coerce criminal juries into entering guilty verdicts, that the moral dangers for English jurors began to become acute.

Thus the narrowly English part of my story does not really begin before the sixteenth century. Nevertheless, to understand the English history fully, we must begin

with the medieval continental background. In particular, we must be familiar with the medieval theology on three topics: The theology of blood punishments; the theology of the judge's "private knowledge"; and finally, the theology of doubt. We must also understand some of the arguments that surrounded the seminal event in the making of the western legal tradition, the abolition of the judicial ordeal.

Let us begin with the problem of the blood punishments. Pre-modern Christian observers did not regard all cases as equally risky for the salvation of the judge. The cases that were by far the most dangerous to the judge's soul were those that resulted in a blood punishment. This was not by any means a small class of cases. "Blood punishments"—execution and mutilation—were the ordinary forms of punishment everywhere in the western world until the nineteenth century, at least for low-status persons.<sup>56</sup> When Christian theologians and jurists declared that the judge's soul was in peril in any case ending in a blood punishment, what they meant was that the judge's soul was in peril essentially any time he judged a criminal matter.

Scripture set the basic terms of discussion about this peril—though not necessarily the scripture one might expect. There are certain scriptural passages that might seem to have obvious relevance to problem of judicial ethics. Pontius Pilate's attempt to wash his hands of the guilt of Christ is one.<sup>57</sup> Another is the famous New Testament injunction, "Judge not, lest ye be judged."<sup>58</sup> Nevertheless, most Christian discussions turned on other texts. First, there was the familiar Sixth Commandment, "Thou shalt not kill." Then, alongside the Sixth Commandment, came a much less well-

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<sup>56</sup> Discussion in Whitman, *Harsh Justice* (Oxford, 2003).

<sup>57</sup> Matthew 27: 24-25. For references to this story in the blood guilt tradition, see below (Bracton and Hawles).

<sup>58</sup> Matthew 7:1.

known, but particularly important text, 1 John 3: 15: “Whosoever hateth his brother,” declared this passage, alluding in an obvious way on the tale of Cain and Abel, “is a murderer: and ye know that no murderer hath eternal life abiding in him.” This last was especially important: These verses were frequently quoted by authorities on the ethics of judging, and they set the basic terms for discussion: The question was how to avoid becoming a “homicida,” a “murderer,” thus losing one’s hope of eternal life. This was the question that would still be troubling Hawles in the 1670s.

For western Christendom, the seminal discussions of these themes are to be found in the great Latin Church Fathers of Late Antiquity, Saint Augustine and Saint Jerome. Both took kindred approaches, rejecting any sort of extremism that would make the administration of criminal justice impossible. As these Church Fathers explained, killing, while always morally troubling, was nevertheless sometimes justified—but only as long as it was done pursuant to the law. Thus Saint Jerome spoke of some killings as “the ministry of the laws.” In particular, he held, there was no ban on fiercely punishing criminals or those guilty of sacrilege. Such punishments, Jerome insisted, did not really amount to shedding blood at all: “To punish murderers, and those who commit sacrilege and poisoners, is not to shed blood. It is the ministry of the laws.”<sup>59</sup> This was frequently quoted by Jerome’s Christian successors looking for moral comfort in the execution of the criminal law in subsequent centuries. As for Augustine, in his Commentary on the Ten Commandments, he too used a phrase that would be repeated for centuries: “cum

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<sup>59</sup> PL 24, col. 811 : « Homicidas enim et sacrilegos et venenarios punire, non est effusio sanguinis, sed legum ministerium. »

homo iuste occiditur, lex eum occidit, non tu,”<sup>60</sup> “when a man is killed justly, it is the law that kills him, not you.”

It was this approach that permitted these great Church Fathers to avoid the radicalism of the Tennyia Jataka, developing a Christian theology that permitted judges to contribute their efforts to killing criminals, without themselves suffering the loss of eternal life as “murderers.” In effect, this approach allowed Christians to deny their own meaningful personal agency: They could declare themselves to be acting, not in their own persons, but merely as “ministers of the law.” Augustine offered the classic account in his tract On the Free Will. Judges, he strikingly explained, were akin to soldiers: Both killed. This was disturbing on its face. Yet it had to be understood that both judges and soldiers were permitted to kill. In justifying the special license to kill of judges and soldiers, Augustine first offered an argument from ordinary language: Neither the soldier nor the judge, he noted, was ordinarily called “a murderer.”<sup>61</sup> Second, Augustine emphasized once again that judges and soldiers, unlike true “murderers,” killed pursuant to “the law.” Augustine’s tract is framed as a dialogue between the himself and his interlocutor Evodius:

*Evodius.* If “murder” means killing a man [Si homicidium est hominem occidere],

nevertheless sometimes a killing can be done without sin: After all, a soldier can

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<sup>60</sup> PL 34, p. 707.

<sup>61</sup> This argument from ordinary language would be repeated for centuries afterward. Indeed down to the present day, the law is sometimes framed as the question of who may be called “murderer.” For a medieval example, see Agobard of Lyon, quoted and discussed below this Section. The fundamental Augustinian attitude can arguably still be seen in the German Criminal Code. StGB § 211 (2) is still concerned, as Augustine was, with defining what persons can be characterized as “murderers.” Rather than framing the question as one of defining the offense, it (quite uncharacteristically for German criminal law) focusing on describing who may be called a “murderer”:

StGB §211 (2): Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebes, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet.

kill an enemy; and a judge, or the judge's minister, can kill a malefactor. Or again a person may unintentionally let his spear fly from his hand. These do not seem to me to sin when they kill a man. *Augustine*. I agree. But they are not ordinarily called "murderers." But in that case tell me: Suppose somebody kills his master, because he is afraid of being punished brutally. Do you think he should be counted among those who kill in man in such a fashion as not to deserve the name "murderer"? *Evodius*. His case seems to me to be very different indeed: After all, the others kill pursuant to the law, or at least not against the law; whereas his misdeed is not approved by any law.<sup>62</sup>

A few pages later, Augustine elaborated by explaining that those who killed pursuant to the law, did not sin, because they killed without passion or personal interest, "libido." Indeed, the absence of personal interest or passion was what distinguished the just government from the unjust one:

Now a soldier killing the enemy is a minister of the law, because he can easily perform his office without any passion. . . . Those who repel the forces of the enemy with equal force in order to keep the citizenry safe, are capable of obeying the law, by which they are commanded to act, without passion; and the same can be said of all ministers who are properly subject to the powers that be.<sup>63</sup>

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<sup>62</sup> PL 32 p. 1225:

*E.* Si homicidium est hominem occidere, potest occidere aliquando sine peccato: nam et miles hostem, et iudex vel minister ejus nocentem, et cui forte invito atque imprudenti telum manu fugit, non mihi videntur peccare, cum hominem occidunt. *A.* Assentior: sed homicidae isti appellari non solent. Responde itaque, utrum illum qui dominum occidit, a quo sibi metuebat cruciatus graves, in eorum numero habendum existimes, qui sic hominem occidunt, ut ne homicidarum quidem nomine digni sint? *E.* Longe ab eis istum differre video: nam illi vel ex legibus faciunt, vel non contra leges; hujus autem facinus nulla lex approbat.

<sup>63</sup> PL 32, p.1227:

Jam vero miles in hoste interficiendo minister est legis; quare officium suum facile nulla libidine implevit. Porro ipsa lex, quae tuendi populi causa lata est, nullius libidinis argui potest. Siquidem

The just state was one whose officials always acted as impersonal ministers of the law, never yielding to passion or personal interest. Only such officials could be certain of avoiding the name of “murderer.”

These late antique Church Fathers established the basic doctrines that would eventually underlie the “reasonable doubt” rule centuries later. But to follow the detailed application of those doctrines, we must turn to the lawyers and theologians of the Middle Ages. Most especially, we must understand how the ideas of the Church Fathers were embraced and elaborated by the medieval scholars who were largely responsible for creating modern law: the canon lawyers of the twelfth century and afterwards. And we must see how the canon lawyers applied those ideas to the most important campaign in the early development of western law: the campaign against the judicial ordeal.

Canon law, the law of the Christian Church, was once relatively neglected by historians, and it may still seem a distant and irrelevant corpus to Americans. Yet today scholars know that it is a body of profound importance for the development of the western legal tradition, one whose concepts and analyses lie at the foundation of much of the common law as well as of continental law.<sup>64</sup> Canon law is largely a creation of the centuries after 1000 A.D. Early medieval canon law was a chaotic body, based on a

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ille qui tulit, si Dei jussu tulit, id est quod praecepit aeterna justitia, expers omnino libidinis id agere potuit: si autem ille cum aliqua libidine hoc statuit, non ex eo fit ut ei legi cum libidine obtemperare necesse sit; quia bona lex et a non bono ferri potest. Non enim si quis, verbi causa, tyrannicam potestatem nactus, ab aliquo cui hoc conducit, pretium accipiat, ut statuat nulli licere vel ad conjugium feminam rapere, propterea mala lex erit, quia ille injustus atque corruptus hanc tulit. Potest ergo illi legi quae tuendorum civium causa vim hostilem eadem vi repelli jubet, sine libidine obtemperari: et de omnibus ministris, qui jure atque ordine potestatibus quibusque subjecti sunt, id dici potest. Sed illi homines lege inculpata, quomodo inculpati queant esse, non video: non enim lex eos cogit occidere, sed relinquit in potestate

<sup>64</sup> For a survey, see Javier Martínez-Torrón, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition* (Berlin, 1998); and e.g. R. H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European *Ius Commune**, 65 N.Y.U. L. Rev. 962 (1990); Charles Donahue, Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in M. Arnold, T. Green, S. Scully and S. White, eds., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, 127-158.

scattered and contradictory assemblage of church councils, papal pronouncements and more, all difficult to locate and difficult to interpret. Lawyers of the period after about 1020 A.D. effectively created canon law by bringing order to these sources. There were two important canon compilations produced during the eleventh century, one by Burchard of Worms early in the century, and a second by Ivo of Chartres at the very end of the century, sometime before 1096. But the great leap forward in learned canon law came with the completion of the so-called *Decretum* of the monk Gratian, in Bologna around 1140.<sup>65</sup>

These were the men who created western law, in many ways. All of these figures were concerned with the ethics of judging and the dangers of blood guilt, and all of them drew eagerly on the writings of the Church Fathers, especially those of Augustine. Thus Ivo of Chartres, who produced the second of the great canon compilations of the reform in the 1090s, cribbed from Augustine's *Free Will*, endorsing the distinction between "murderers," on the one hand, and soldiers and judges on the other. The great difference was that judges, like soldiers, followed "the law," and acted without "passion."<sup>66</sup>

Gratian, the great scholar who definitively initiated the modern tradition of canon law

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<sup>65</sup> For a general introduction, see e.g. James Brundage, *Medieval Canon Law* (New York, 1995).

<sup>66</sup> Ivo Carnotensis, PL 161. (23, q. 5. c. *Si homicidium.*):

Si homicidium est hominem occidere, potest occidere aliquando sine [col. 723A] peccato. Nam et miles hostem, et iudex vel minister ejus nocentem, vel cui forte invito atque imprudenti telum manu fugit, non mihi videntur peccare cum hominem occidunt. Respondet Evodius: Assentior; sed homicidae isti appellari non solent. *Item, ibid. cap. 5* Militi jubetur lege ut hostem necet, a qua caede si temperaverit, ab imperatore poenas luit. Num istas leges injustas, vel potius nullas dicere audebimus? Nam mihi lex esse non videtur, quae justa non fuerit. *Augustinus, paulo post.* Legem quidem satis video esse munitam contra hujuscemodi accusationes, quae in eo populo quem regit, minoribus malefactis, ne majora committat [committerentur,] licentiam dat, multo mitius [minus] enim est eum qui alienae vitae insidiatur quam [col. 723B] eum qui suam tuetur, occidi; et multo immanius vitium hominem stuprum perpeti quam eum a quo illa vis infertur ab eo cui ferre conatur, interimi. Jam vero miles in hoste interficiendo minister est legis, quare officium suum facile nulla libidine implevit. Porro ipsa lex quae tuendi populi causa lata est, nullius libidinis argui potest. Siquidem ille qui tulit, si Dei jussu tulit, id est quod praecipit aeterna justitia, expers omnino libidinis id agere potuit

fifty years later, also quoted the classic texts of Augustine, editing them down to a pithy and powerful statement:

If “murder” means killing a man, nevertheless sometimes a killing can be done without sin: After all, a soldier can kill an enemy; and a judge, or the judge’s minister, can kill a malefactor. Or again a person may unintentionally let his spear fly from his hand. These do not seem to me to sin when they kill a man. Nor indeed are they ordinarily called “murderers.” When a man is killed justly, it is the law that kills him, not you.<sup>67</sup>

So it was that the basic doctrines of western law were founded on late antique theology.

Those canon doctrines were more than just otherworldly theology, though. By the late twelfth and thirteenth centuries, they became a basic part of western law, both on the Continent and in England. In particular, they played a fundamental role in the event that all scholars regard as marking the beginning of the distinctively western legal tradition, the abolition of the judicial ordeal; and to understand the full impact of the theology of bloodshed—even for jury trial in the late eighteenth century—we must know something about the role of these canon doctrines in the debates surrounding the abolition of the ordeal in the late twelfth and early thirteenth centuries.

Ordeals, frightening and seemingly barbaric procedures that went by the name of the “*judicium dei*,” the “judgment of God,” were in widespread use in western Europe throughout the eleventh and twelfth centuries. Most important of them were two. The first of these was the ordeal of the hot iron, by which the accused was forced to grasp a

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<sup>67</sup> Si homicidium est hominem occidere, potest occidere aliquando sine peccato. Nam et miles hostem, et iudex uel minister eius nocentem, et cui forte inuito atque imprudenti telum manu fugit, non michi uidentur peccare, cum hominem occidunt. Sed nec etiam homicidae isti appellari solent. Idem in questionibus Leuitici: [quest. 68.ad cap. 19.] §. 1. Cum homo iuste occiditur, lex eum occidit, non tu.

red hot iron. After three days, under this particular ordeal, the bandages were removed from the accused's hand, to see whether the burn wound was healing (taken as a sign of innocence) or not (taken as a sign of guilt.) The second was the ordeal of the cold water, by which the accused was thrown into a body of water. An accused person who sank was regarded as innocent; one who floated was guilty. These ordeals, and others like them, were typically surrounded with awe-inducing religious ceremony. The person destined to suffer the ordeal was sanctified in various ways; and the ordeal itself took place commonly in church, after a blessing pronounced by a priest.

Scholars have argued that these riveting proceedings were central to the functioning of early medieval society: Horrific as they may sound, they held the precarious little societies of medieval Europe together, by allowing the community to join together in acts of communal re-affirmation.<sup>68</sup> But beginning in the 1160s, church reformers embarked on a major campaign against them. After several decades of reform agitation, priests were forbidden to participate by the Fourth Lateran Council in 1215. This effectively amounted to the abolition of the ordeals, though they hung on in certain cases, such as some involving witchcraft.<sup>69</sup> The result of the effective abolition of the ordeal in 1215, as scholars have long understood, was a formative crisis in western adjudication, which yielded different responses in England and on the continent. In England, where an early form of the jury had been introduced in the late twelfth century, it was the jury that took the place of the old ordeals. On the Continent, by contrast, where inquisitorial procedure had been developing over the course of the twelfth century,

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<sup>68</sup> Esp. Peter Brown, *Society and the Supernatural : A Medieval Change,* in Brown, *Society and the Holy in Late Antiquity* (California, 1982), for this interpretation.

<sup>69</sup> For discussion, see Matthias Schmoeckel, *Ein sonderbares Wunderwerck Gottes: Bemerkungen zum langsamen Rückgang der Ordale nach 1215,* *Ius Commune* 26 (1999), 123-164.

something else happened: The ordeals were replaced by so-called “romano-canonical” procedure, a form of inquisitorial procedure governed by elaborate canon law rules. So it was that, after 1215, the English common law split off decisively from the law of the Continent. The abolition of the ordeals thus marks the beginning of modern western legal history.

Every scholar writing about the making of western law has focused on the campaign against ordeals, and the interpretive literature is voluminous and complex. Consequently there is much more to be said about the abolition of ordeals than I will try say here.<sup>70</sup> What I do wish to emphasize, for purposes of this Article, is that the great

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<sup>70</sup> In order to keep this Article to a reasonable length, I avoid mounting a full-scale discussion of the interpretation of ordeals in the text. Nevertheless, I should note that there is more to be said on the tension between proof and moral comfort in ordeals than I will say here. Most of the literature on ordeals has focused on the problems of proof: Scholars have generally supposed that the right question to ask was whether ordeals contributed to a correct determination of guilt or innocence. The older view was that ordeals were wholly “irrational” procedures, which could never have aided in uncovering the truth. Recent decades, by contrast, have seen a scholarly reaction: A number of historians have tried to demonstrate that ordeals could in fact have served a “rational” truth-finding purpose in the relatively simple societies in which they were used. For citations and some discussion, see R.C. van Caenegem, *Reflexions on Rational and Irrational Modes of Proof in Medieval Europe*, 58 *Tijdschrift voor Rechtsgeschiedenis* 263 (1990).

Nevertheless, there have always been a few sharp-eyed scholars who have seen that is not clear that the question of proof was always the critical question at all. To be sure, it is undeniably the case that ordeals were sometimes used as a means of proof, in cases in which the guilt of the accused was uncertain. At the same time, though, it is critically important that the ordeals were sometimes inflicted on persons who were already known to be guilty, or at least very likely guilty. This is something that we know must be true partly by hypothesis, because ordeals were commonly used in communities that were very small—villages of perhaps a few dozens of persons. This implies, as two leading social historians noted some years ago, that there must frequently have been little uncertainty about the guilt or innocence of the proband:

Essentially, in all small-scale societies, people know what is going on; they know who is untrustworthy, who may be a thief, who has farmed his land, just as they know who is sleeping with whom. And that basic knowledge (generally accurate, although it may for the outcast, the weak or the unlucky, only be prejudice) underlies all the procedures, rational or irrational, of local dispute settlement, just as it is the basis too of collective judgment: the ordeal and the jury alike draw on it.

Davies and Fouracre, *Conclusion*, in Wendy Davies and Paul Fouracre, eds., *The Settlement of Disputes in Early Modern Europe* (Cambridge U.P., 1986), 222. The most important evidence for this comes, though, not from social history, but from the literature of canon law. In particular, it comes from the concept of “tempting God,” which, as Baldwin showed forty years ago, underlay the standard argument of canon critics who denounced ordeals. The concept of “tempting God” was drawn from a passage of Augustine’s commentary on Genesis, in which the great fourth-century Saint condemned those who remitted matters to God’s judgment in cases where men were capable of uncovering the truth themselves. *Quaest. in Heptateuchum*. Qu. 26: XXVI. [*Ib. XII, 12, 14.*]=PL vol.34, col 554]. To late twelfth-century canonists, ordeals were dangerous forms of “tempting God”—precisely because they were used, at least some of the

campaign was largely framed in terms of the theology of bloodshed: The ordeals were abolished precisely because they subjected those who participated in them to the taint of bloodshed. In particular, the clergy who presided over the ordeals, in the eyes of key reformers, could not claim the privilege that judges could claim: Unlike judges (or soldiers), they were not immune from the moral danger associated with joining in a collective killing.

As early as the ninth century, Agobard of Lyon, the first leading critic of ordeals, had denounced them precisely because they involved the spilling of blood, in ways that made everyone involved a “murderer,” whose eternal life was in danger.<sup>71</sup> Eleventh-century critics of the ordeal continued to see the problem in the same terms. This was true in particular of Peter the Chanter, an especially influential critic whose role was

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time, when men were perfectly capable of determining the truth themselves. John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, *Speculum* 36 (1961): 620-621. This too implies clearly that ordeals were used in cases in which the guilt of the accused was already essentially clear.

The critical question is thus why an ordeal would be used in cases in which the guilt of the accused was already clear. The right answer was given in a famous article by Peter Brown. The function of the ordeal was less to determine guilt, than to shift the responsibility for conviction from the shoulders of the community to the shoulders of God, thereby forestalling the dangers of feud, and eliminating “the odium of human responsibility.” Brown pointed to the Latin terminology current throughout the Middle Ages. The ordeal was everywhere called a form of “iudicium dei,” “judgment of God.” But as Brown notes, it was not a procedure *per* iudicium dei, but a procedure *ad* iudicium dei; the ordeal “is not a judgment *by* God; it is a remitting of the case *ad iudicium Dei*, ‘to the judgment of God.’” What does this imply? As Brown contended, it suggests that the concern, at least in part, was not so much with the certainty of the judgment, as with the responsibility for the judgment: “By being brought to the judgment of God, the case already stepped outside the pressures of human interest [in a society threatened with clan conflict], and so its resolution can be devoid of much of the odium of human responsibility.” Peter Brown, *Society and the Supernatural: A Medieval Change*, in Brown, *Society and the Holy in Late Antiquity* (California, 1982), 313.

<sup>71</sup> Agobardus Lugdunensis, *Liber contra iudicium dei* (= PL 104) :

Sanguinem enim animarum vestrarum requiram de manu cunctarum bestiarum, et de manu hominis: de manu viri et fratris ejus requiram animam hominis. Quicumque effuderit humanum sanguinem, fundetur [col. 263C] sanguis illius; ad imaginem quippe Dei factus est homo. Haec prima lex, a Deo data hominibus, prohibet attentissime humanum sanguinem fundere *Non omnis qui hominem occiderit, corporaliter occidetur. Sed secundum illud accipiendum est quod Dominus in Evangelio dicit: Omnis enim qui gladium acceperit, peribit. Et Apostolus ait: Quoniam omnis homicida non habet vitam aeternam in se manentem. Quare autem hunc reatum tanta poena sequatur, haec causa est, quoniam ad imaginem Dei factus est homo.*

For a broader collection of early medieval passages, see Charlotte Leitmaier, *Die Kirche und die Gottesurteile* (Vienna, 1953), 44-62.

investigated forty years ago in pioneering studies by the medievalist J. W. Baldwin. For Peter, as Paul Hyams has written, “the ordeal was a kind of obsession”; and when faced with it “he concentrated as much on its connection with sin and bloodshed as on his attempted ‘scientific’ refutation.”<sup>72</sup> Indeed, there was little by way of “scientific” argument in Peter’s attack at all. What Peter wrote was the clerics should not “lend their ministry to the spilling of blood, *and thereby make themselves in a certain fashion into murderers.*”<sup>73</sup> In this statement, which has never received quite the attention it deserves from historians, we can hear the the clear echo of Augustine, Ivo and Gratian on “murder.” What concerned Peter was the same old core fear associated the moral responsibility of judging, the fear of blood taint. “They deceive themselves perilously,” as the canonists declared, “who believe that the only murderers are those who kill a man with their own hands.” On the contrary, anyone who counseled or exhorted murder was guilty too, just as the Jews made themselves guilty when they cried “crucify Him!”<sup>74</sup>

The great issue, for men who thought this way, was escaping blood guilt; and the ordeal did not permit anyone involved to escape blood guilt. It was this belief that drove the ultimate abolition of the ordeals. The key date is 1215, the year in which the Fourth Lateran Council, summoned by the lawyer-Pope Innocent III, forbade priests to participate in “judgments of God.” In issuing its ban, the Council followed precisely the

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<sup>72</sup> Paul Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in M. Arnold, T. Green, S. Scully and S. White, eds., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, 102 [91-126].

<sup>73</sup> Peter the Chanter, *Summa*, quoted in Baldwin, *Intellectual Preparation*, 632 n. 113: “quodam modo homicide efficiantur.”

<sup>74</sup> Burchard of Worms, *Decretum* Bk. 6, Chap. 31:

Periculose se decipiunt, qui existimant eos tantum homicidas esse, qui manibus hominem occidunt, et non potius eos, per quorum consilium, et fraudem, et exhortationem homines extinguuntur. Nam Judaei Dominum nequaquam propriis manibus interfecerunt, sicut scriptum est: Nobis non licet interficere quemquam, sed tamen illis Domini mors imputatur, quia ipsi eum lingua crucifixerunt, dicentes: Crucifige eum.

Sim. Ivo Carnotensis, *Decretum* Pars 10, chap. 160; Gratian, *Decretum* Pars Secunda, c. 33, q. 3, dist. 1, c. 23.

line of argument that Peter the Chanter had pursued in his denunciation of ordeals a couple of decades earlier: Priests who participated in ordeals, held the eighteenth canon of the Council, were involving themselves in an activity akin to pronouncing death sentences or otherwise shedding blood. This was forbidden:

No cleric may pronounce a sentence of death, or execute such a sentence, or be present at its execution. . . . Nor may any cleric write or dictate letters destined for the execution of such a sentence. Wherefore, in the chanceries of the princes let this matter be committed to laymen and not to clerics. Neither may a cleric act as judge in the case of . . . men devoted to the shedding of blood. No subdeacon, deacon, or priest shall practice that part of surgery involving burning and cutting. Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing; the earlier prohibitions in regard to trial by combat remain in force.

Participation in ordeals was only one of many ways of becoming involved in the shedding of blood; and priests, as sacred persons, were not to become involved in the shedding of blood, even if only by performing surgery. This had, needless to say, nothing to do with the problems of proof. Indeed, it is worth emphasizing that this canon shows no concern with issues of guilt or innocence at all. Its concern is to guarantee only that clerics not become involved, at any remove, in the unsavory and polluting business of shedding blood—except in one capacity: as *judges*, who acted as properly dispassionate servants of “the law.”

### III. Conscience and the Judge (1): The Spiritual Dangers of “Private Knowledge”

The moral drama of bloodshed was thus the great issue that hovered behind the canon law of the twelfth century, whether the issue was the license to kill of the judge, or the legitimacy of ordeals; and the moral drama of bloodshed would still be the great issue with the rise of the “reasonable doubt” rule centuries later. The link between acts of judgment and the fear of bloodshed was crucial. The consequence of the fateful legal transformation that took place from roughly 1140 to 1215 was this: In light of the grave moral dangers of bloodshed, the trial acquired a morally privileged status over the ordeal. As leading reformers saw it, participating in ordeals created blood guilt for everybody involved, priests included: It made them, in Peter the Chanter’s phrase, “ministers of bloodshed.” Participating in a proper trial, by contrast, was different, in the eyes of the canon lawyers: A proper trial permitted the judge to escape blood guilt, as long he remained emotionally aloof from the proceedings, acting as a dispassionate “minister of the law.”

This made it clear enough that a morally acceptable system of justice must be based, not on ordeals, but on trials. Nevertheless, the developments of the period 1140-1215 did not make it clear what form of judging was to replace the ordeal. Nor did they make it clear precisely what was involved in maintaining proper attitude of judicial “ministry.” It is in the answer to those questions that we can find the ultimate origins of the “reasonable doubt” rule.

Judges could be safe from the becoming “murderers” if they acted somehow as mere “ministers of the law.” But how? The answers to this pressing question of judicial

ethics were offered by a body of law little remembered today, but one of great importance for understanding all forms of western adjudication: the canon law of conscience. This distinctive body of medieval law developed two striking solutions to the basic problems of judicial moral responsibility. First, it held that judges in criminal matters must never make use of their “private knowledge.” In order to maintain a properly cool distance from the proceedings before them, they were to judge purely on the record developed in court, ignoring any extrinsic information they happened to possess. Second, it held that judges were to avoid the dangers of judging when in “doubt.” These were injunctions that applied equally on both sides of the English Channel, as the common law and continental traditions evolved in the wake of the abolition of ordeals.

To see how, let us now turn to some of the details of the continental law and the common law, the two great western systems that now dominate the law everywhere in the world. Historians have long interpreted both of these systems in light of the experience of the twelfth-century campaign against ordeal. Both have been understood as two deeply different efforts to continue the functions of the ordeal by other means.

Deeply different the two systems certainly were. The Continental system that grew up after Lateran IV employed highly rationalized procedures, which aimed to guarantee both professionalization and transparency in judgment. Under this continental system, the judge was to apply a set of elaborate rules, following a detailed schedule that assigned different weights to different pieces of evidence.<sup>75</sup> This was not, as has sometimes been said, a purely mechanical system, designed to eliminate judicial

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<sup>75</sup> The system is acutely analyzed, on the basis of recent scholarship, by Schmoeckel, *Humanität und Staatsraison*, 187-294.

discretion.<sup>76</sup> In fact, judges retained considerable discretionary wiggle-room under the continental system.<sup>77</sup> This is particularly because continental judges, like common law jurors, had to make their decision “according to conscience.” As recent scholarship has emphasized, the obligation to judge “according to conscience” created an ineliminable residue of subjective evaluation in the task of judging.<sup>78</sup> It is true that the continental judge was guided by an elaborate law of evidence; but in the end, he had to make an authentic conscientious decision, through what canon lawyers called a “*motus animi*,” a “movement of the mind.”<sup>79</sup>

Nevertheless, though the system was by no means mechanical, it was certainly highly rule-bound, providing the judge with detailed, scripted guidance every step of the way, and carefully delimiting the sorts of evidence he could consider.<sup>80</sup> It was also a system that emphasized the careful creation of a written dossier, explaining and evaluating all of the evidence. In these senses, the continental system replaced the impersonal voice of God with the impersonal voice of the professional judge, expressed in that most impersonal of forms, the bureaucratic file. The Fourth Lateran Council thus brought a revolution in favor of professionalization and bureaucracy to the Continent.<sup>81</sup>

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<sup>76</sup> This view was famously presented by John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago, 1977), 6. See also, in a more extreme formulation, Shapiro, *Probability and Certainty*, 174 (continental judge “an accountant”).

<sup>77</sup> See especially the discussions, disagreeing with Langbein, of Richard Fraher, *Conviction According to Conscience: The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 56-64 (1989); Schmoeckel, *Humanität und Staatsraison*, 267-294 ; and Susanne Lepsius, *Von Zweifeln zur Überzeugung : Zum Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato* (Frankfurt a.M., 2003), 167-175.

<sup>78</sup> Schmoeckel, *Humanität und Staatsraison*, 286-287.

<sup>79</sup> For discussion of this terminology, and its parallels in the Romanist writings of Bartolus, see Lepsius, *Von Zweifeln zur Überzeugung*, 169-175.

<sup>80</sup> *Id.*, 288-289

<sup>81</sup> Cf. the interpretation of Richard Fraher, *IV Lateran’s Revolution in Criminal Procedure*, in *Studia in Honorem Eminentissimi Cardinalis Alphonsi M. Stickler (=Studia et Textus Historiae Iuris Canonici 7)* (Rome, 1992), 97-111.

The common law cousin of the continental law took a different path. Instead of introducing judges of the continental type, the common law developed jury trial, within a few years after 1215. It is important not to exaggerate the difference between the common law juror and the continental judge: The juror too made his decision in the confrontation with his “conscience.”<sup>82</sup> But unlike contemporary Continental law, the common law never produced dossiers, giving reasoned explanations for its decisions. Historians often describe this unbureaucratic English response to the abolition of the ordeals by saying that jury trial, unlike continental trial, retained the “inscrutability” of the judgment of God: There was no way of saying why God judged as He did, and no way of saying why the jury did either.<sup>83</sup> Nor was the decision-making process of the common law juror guided by the kind of careful script that governed the decision-making of the Continental judge. All this made the post-ordeal common law world very different from the world across the Channel.

Yet different as these two western systems were, both can and must be understood as responding, in part, to the same moral dilemmas of judging that played such a large role in the agitation of the period 1140-1215: For both put new burdens on persons obliged to enter judgment “according to conscience.” To understand those burdens properly, we must turn to the medieval law of conscience, an aspect of canon law that began to take form during the same decades in which the ordeal went into decline, and that shaped both the continental and the common law traditions.

What is “conscience”? “Conscience” has a long history in the West, extending back both to the Stoic philosophers and to Saint Paul. The original form of the word

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<sup>82</sup> See the texts assembled below, text at note.

<sup>83</sup> S.F.C. Milsom, *Law and Fact in Legal Development*, 17 *U. Toronto L. J.* 1 (1967); Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, 118-119.

“conscience” is Greek: This is Saint Paul’s “syneidesis,”<sup>84</sup> upon with the Latin “conscientia” was modeled. It is important to linger for a moment over these ancient words. Both terms are built from roots meaning “knowledge of facts”—“eidesis” in Greek, “scientia” in Latin. Literally “syn-eidesis” and “con-scientia” mean something like “shared knowledge” or perhaps better “deepened knowledge.” This has important consequences for the meaning of the word “conscience.” In Latin (as in modern-day Romance languages) the term is ambiguous, in a way important for the history I recount here. On the one hand, “conscientia” can signify a form of *moral* perception—an ability to distinguish between right and wrong. It is in that sense, of course, that we use the word “conscience” in English today. But the Latin “conscientia”—like the modern French “conscience” or the modern Italian “coscienza”—can also mean “awareness of certain facts,” or “the state of being informed.”<sup>85</sup> This ambiguity matters a great deal for the history of Christian judicial ethics: Both senses of the term played important roles in Christian thinking about the proper role of the conscientious judge: “The conscience of the judge” can refer both to the judge’s moral convictions, *and* to the judge’s knowledge of particular facts—to what canon lawyers would call his “private knowledge.”<sup>86</sup>

The problem of conscience was always centrally important to Christian thought throughout the later Middle Ages and the early modern period. Sometimes it was the problem of “knowledge of facts.” But it was first and foremost the problem of “conscience” conceived as an inner moral voice—an inborn sensitivity to the danger of sin, implanted by God. Our conscience was the voice of our “internal forum,” the voice,

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<sup>84</sup> Also in Philo of Alexandria: Padoa-Schioppa, *Sur la conscience dans le Ius Commune Européen*, 105.

<sup>85</sup> See G. Krieger, *Gewissen, -freiheit*, in *4 Lexikon des Mittelalters* (Munich, 1989), cols. 1424-1426.

<sup>86</sup> Nörr, *Zur Stellung des Richters*, 13.

implanted by God, of the “little judge” who sits within us, passing upon the rightness and wrongness of our every act.

In the medieval tradition, though, the governance of conscience was not left entirely to the inner voice. The regulation of conscience was also associated with a particular institutional structure: The conscience of the individual Christian was supervised within the confessional. Confession probably has a long history in the Christian world. But it is especially associated with the same Fourth Lateran Council of 1215 that forbade priests to participate in the shedding of blood. Alongside its ban on clerical association with the shedding of blood, the Fourth Lateran Council promulgated the famous canon “omnis utriusque sexus”—“perhaps the most important legislative act in the history of the Church,” as Henry Charles Lea declared in his classic History of Auricular Confession.<sup>87</sup> This canon required that “all the faithful of both sexes shall after they have reached the age of discretion faithfully confess all their sins at least once a year to their own (parish) priest . . . otherwise they shall be cut off from the Church (excommunicated) during life and deprived of Christian burial in death.” As for the priest taking confession: He was enjoined, upon hearing the sins confessed to him, to administer penance, pouring “wine and oil into the wounds of the one injured after the manner of a skilful physician, carefully inquiring into the circumstances of the sinner and the sin, from the nature of which he may understand what kind of advice to give and what remedy to apply.” The priest was also sternly warned never to reveal any of the sins revealed to him in the confessional.<sup>88</sup>

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<sup>87</sup> Lea, *History of Auricular Confession*, 1: 230.

<sup>88</sup> <http://www.fordham.edu/halsall/basis/lateran4.html>

With this, confession, which existed in some form from the early years of the Church, became indisputably a major part of Catholic practice. As for the “wine and oil” of penance, the “remedies” to be applied to the sinner: These became the stuff of the law of conscience. The rules that determined the gravity of various sins, and the proper approach to chastising them, were developed in great casuistic detail by medieval canon lawyers. In time, the medieval canon law of conscience was made available to priests through an important species of semi-popular legal literature called “confessors’ manuals.” Thus in the medieval Catholic tradition the work of the “internal forum” was not exclusively entrusted to the inner voice of the individual Christian. Instead, the inner voice of conscience was supplemented, or perhaps (as Calvinists would later insist) replaced, by the voice of the confessor; and the internal forum was supervised, or perhaps supplanted, by the bench of the confessional.<sup>89</sup>

Now, within the developing rules of conscience, the problem of judging featured prominently from a very early date. Indeed, the problem of judging appeared in the canon law of conscience contemporaneously with the twelfth-century attack on ordeals. And from the beginning, the problem was approached in a way centrally important for our understanding of jury trial, as a problem of “private knowledge.”

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<sup>89</sup> There is growing literature on the connection between conscience, confession and law. See Miriam Turrini, *La coscienza e le leggi. Morale e diritto nei testi per la confessione della prima Età moderna* (Bologna, 1991); Paolo Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (Bologna, 2000); Adriano Prosperi, *Tribunali della coscienza: inquisitori, confessori, missionari* (Turin, 1996); Pierre Legendre, *Aux sources de la culture occidentale: L’ancien droit de la pénitence*, *Settimane di studio del Centro italiano di studi sull’alto medioevo*, XXII: *La cultura antica nell’Occidente Latino dal VII all’XI secolo* (Spoleto, 1975), 575-595, reproduced in Legendre, *Ecrits Juridiques du Moyen Age occidental* (London, 1988).

The basic tale was told almost forty years ago by Knut Wolfgang Nörr.<sup>90</sup> It is a tale of judicial efforts to avoid the moral responsibility for judgment—efforts that often strike the modern reader as bizarre, and ones in which the themes of blood taint and private knowledge played the dominant role. The key formula for medieval canon lawyers read as follows: “iudex secundum allegata non secundum conscientiam iudicat,” “the judge judges according to the evidence presented, not according to his ‘conscience.’” What the formula did was to forbid judges to use their independent knowledge of the case—their “private knowledge.” It was a formula that led to strange moral paradoxes for the judges of the Continent, and severe moral dilemmas for the criminal jurors of early modern England.

As Nörr demonstrated, the ban on the use of “private knowledge” began to develop over the course of the twelfth century, the same period in which clerical agitation against ordeals was gathering momentum, and the same period in which Ivo and Gratian were exploring the distinction between the judge, the soldier, and the “murderer.” The key text for the lawyers who developed the ban on “private knowledge” came from the Gospels; and the key example was that of Jesus himself, in the matter of the woman taken in adultery:

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<sup>90</sup> K. W. Nörr, *Zur Stellung des Richters im gelehrten Prozess der Frühzeit : Iudex secundum allegata non secundum conscientiam iudicat* (Munich: Beck, 1967). For other literature on this problem, which is well-known to specialists in continental legal history, see Jacques Delanglade, S.J., *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique*, 10 *Revue de Droit Canonique* 141, 151-153 (1960) ; Domenico Maffei, *Il Giudice Testimone e una « Quaestio » de Jacques de Revigny* (MS. Bon. Coll. Hisp. 82), 35 *Tijdschrift voor Rechtsgeschiedenis* 54-76 (1967) ; Richard Fraher, *Conviction According to Conscience; The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23 (1989); Laurent Mayali, *Entre Idéal de Justice et Faiblesse Humaine: Le Juge Prévaricateur en Droit Savant in Justice et Justiciables*, *Mélanges Henri Vidal* (Montpellier, 1994), 95-103 ; Antonio-Padoa-Schioppa, *Sur la conscience du juge dans le ius commune européenne*, in Jean-Marie Carbasse and Laurence Depambour-Tarride, eds., *La conscience du juge dans la tradition juridique européenne* (Paris, 1999), 95-129.

John 8:2 Early in the morning he came again to the temple; all the people came to him, and he sat down and taught them. The scribes and the Pharisees brought a woman who had been caught in adultery, and placing her in the midst they said to him, “Teacher, this woman has been caught in the act of adultery. Now in the law Moses commanded us to stone such. What do you say about her?” This they said to test him, that they might have some charge to bring against him. Jesus bent down and wrote with his finger on the ground. And as they continued to ask him, he stood up and said to them, “Let him who is without sin among you be the first to throw a stone at her.” And once more he bent down and wrote with his finger on the ground. But when they heard it, they went away, one by one, beginning with the eldest, and Jesus was left alone with the woman standing before him. Jesus looked up and said to her, “Woman, where are they? Has no one condemned you?” She said, “No one, Lord.” And Jesus said, “Neither do I condemn you; go, and do not sin again.”

As medieval commentators on this famous and beautifully rendered story observed, Jesus did not concern Himself with His own knowledge of the accused woman’s guilt. Instead, He affected a posture that was something like a caricature of the studied indifference of a Roman bureaucrat. Writing unperturbedly with his finger, too busy even to glance up for more than a moment at the crowd of petitioners before him, He asked only whether she had been formally accused—and let her free because she had not been: “the Lord said,” read an early text from the twelfth-century revival of Roman law, “Go, woman. Since

nobody accuses you neither shall I condemn you.’ From which it manifestly follows that a judge must never supplement the record with facts from his own knowledge.”<sup>91</sup>

The judge, like Jesus, was to confine himself to inhabiting his official role, busying himself with his dossiers while awaiting proper proof of the guilt of the accused. Such was the ban on “private knowledge,” the key means by which, in the canon law of conscience, the judge was afforded the chance to avoid the moral responsibility for judgment, maintaining the studied professional distance of a mere “minister of the laws.”

Modern readers may doubt that this ban had much practical significance. How often did judges really have “private knowledge”? Yet to appreciate the authentic impact of the ban, we must begin by recognizing that it was very common indeed for medieval judges to bring “private knowledge” to the case before them, especially on the Continent. This was in part because continental judges were local officials who lived and worked in small medieval communities. As scholars have observed, it cannot have been a rare occurrence for judges in a medieval town to have some knowledge of cases before them,<sup>92</sup> and even to have been eyewitnesses. Indeed, medieval jurists often discussed the problem of the judge who personally witnessed a crime—as the jurists liked to say, “while looking out his window.”<sup>93</sup> This was something that they regarded as perfectly possible even in relatively large cities. For example, Guillaume Durantis, the leading late thirteenth-century authority on criminal procedure, began a learned disquisition on the problem of “private knowledge” like this: “Suppose the judge is looking out his window,

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<sup>91</sup> “dominus dixit, vade mulier, quia nemo est qui te accuset, nec ego te contempnabo.’ Unde manifeste colligitur, qui iudex nequaquam debet de facto supplere.” Gloss on C. 2.10 un., quoted and discussed in Nörr, *Zur Stellung des Richters*, 17-18; Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 98.

<sup>92</sup> Emphasized by Nörr, Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 101.

<sup>93</sup> For this topos, see Schmoeckel, *Humanität und Staatsraison*, 192.

and sees a certain nobleman kill somebody in the public square in Bologna.”<sup>94</sup> This was by no means a fanciful example: Nobles did indeed kill people in the public square in medieval Italian cities, as readers of Italian history<sup>95</sup> (and Romeo and Juliet<sup>96</sup>) will know; and an Italian judge’s window did indeed typically look out on that same public square.<sup>97</sup> But it was of course in smaller communities that judges must most commonly have acquired knowledge independent of the record in court.

The fact that continental judges lived in relatively small communities was not, however, the only reason that they were likely to bring “private knowledge” to their decisions, or even the most important reason. The most important reason, as scholars like Nörr and Antonio Padoa-Schioppa have emphasized, brings us back to a fundamental datum of medieval law: Continental judges were commonly priests; and as priests, they would frequently have taken confessions that bore on the case they were deciding. The problems of the priest/judge had been present for some time in the Christian world. From late Antiquity onward, Bishops acted as judges. Even before the Fourth Lateran Council, priest/judges were taking confession.<sup>98</sup> But of course after the Council, with its introduction of an annual obligation to confess, judges were even more likely to have done so. This had the obvious consequence that a judge-confessor was likely to have “private knowledge,”<sup>99</sup> whether because the accused had confessed to him, or because

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<sup>94</sup> Spec. 2.3. de Sententia § qualiter sit ferenda. Quoted and discussed in Nörr, Zur Stellung des Richters, 78.

<sup>95</sup> For a fifteenth-century Florentine example, in which a vendetta agreement required the wrongdoer to “sally forth once every eight days, unarmed and unaccompanied, on the streets of Florence and go at least as far as the Mercato Vecchio,” see Thomas Kuehn, *Law, Family & Women: Toward a Legal Anthropology of Renaissance Italy* (Chicago, 1991), 147.

<sup>96</sup> *Romeo and Juliet*, Act 3, Scene 1 (set in “a public place”).

<sup>97</sup> Most famously to tourists in Siena, where the Palazzo Pubblico, which housed the Podestà, looks out on the Campo. In Bologna too, the Palazzo Comunale does indeed look out on the Piazza Maggiore.

<sup>98</sup> Nörr, Zur Stellung des Richters, 13.

<sup>99</sup> Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 101 (discussing of Stephen of Tournai).

other parties had done so. The judge/priest was likely to know a great deal about the case before him: Confessors and confessands shared much of their lives. As John Bossy has observed, “medieval confession . . . was a face-to-face encounter between two people who would probably have known each other pretty well . . . [and] the average person was much more likely to tell the priest about the sins of his neighbours than about his own.”<sup>100</sup> This stifling intimacy of the world of confession was also the stifling intimacy of the world of the continental trial.

These problems were, as we shall see, less pressing for English judges: English judges (though not English jurors) probably had independent knowledge much less frequently than continental judges did. Nevertheless, even English judges certainly sometimes had “private knowledge”; and scholars have long been aware that the same canon rules applied in England “from an early date.”<sup>101</sup> The “private knowledge” problem was a common western problem, addressed through a common western body of law.

So when you appeared before a judge in most small communities during the Middle Ages, there was every chance that he already knew something about your case, and perhaps a lot. Could your judge make use of his private knowledge? If the judge knew the accused was innocent, could he use his private knowledge to acquit? Conversely, if he knew the accused to be guilty, could he use his private knowledge to convict? With regard to medieval English criminal jurors, the answer would be Yes: Jurors would not only be permitted to use their “private knowledge,” they would be

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<sup>100</sup> John Bossy, *The Social History of Confession in the Age of the Reformation*, *Transactions of the Royal Historical Society*, 5<sup>th</sup> Series, 25 (1975): 24 [21-38].

<sup>101</sup> Holdsworth, *History of English Law*; and the discussion below, Sections V and VII.

obliged to do so. But when it came to professional judges, whether in England or on the Continent, the canon law of judging gave exactly the opposite answer.

Indeed, canon lawyers, citing the example of Christ and the woman taken in adultery, arrived, over the course of the twelfth and thirteenth centuries, at a momentous, and morally paradoxical, conclusion: Judges simply could never make use of their private knowledge, *even if it meant convicting the innocent*. This was in part because of the peculiar problems of confession: It was a solemn rule that the secret of the confessional could not be violated.<sup>102</sup> But the rule went beyond the treatment of knowledge acquired in the confessional, and it had a different purpose than protecting the confidentiality of matters confessed. Its purpose was to protect the judges themselves. It was by refusing to use their “private knowledge,” the jurists held, that judges could escape personal moral responsibility for entering judgment, and so escape the threat of “building themselves a mansion in Hell.” The ban on “private knowledge” was a moral comfort rule, a way for professional judges to assure themselves that they had maintained a safe distance from the bloody consequences of the case they were judging.

When this ban first began to develop during the twelfth-century, jurists did not fully agree on its reach. In particular, they often tried to distinguish between civil and criminal matters. It was, they most frequently held, only in *criminal* matters that the judge must not make use of his independent knowledge.<sup>103</sup> As Nörr observed, this seems

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<sup>102</sup> Nörr, *Zur Stellung des Richters*, 39.

<sup>103</sup> This view was represented in particular by Martinus of Gosia, a famous twelfth-century lawyer whose views often aimed to christianize the doctrines of Roman law. Nörr, *Zur Stellung des Richters*, 18-19, 25.

M[artinus] dicit, quod si iudex sciens veritatem negotii, de quo iudex et testis est, quod potest sententiam ferre, secundum quod noverit in civili causa, sed non in criminali, ubi sine accusatore iudicare non potest, exemplo Christi, qui mulierem accusatam de adulterio absolvit, dicens: Mulier, non est qui te accuset, nec ego te condemnabo. Alii contra: dicunt enim et in civili et in criminali causa iudicem secundum quo scit iudicare posse . . . .

perverse to the modern continental lawyer: Modern continental lawyers think of the problem of criminal justice as a problem of proof. Considering the high stakes in a criminal trial, modern continental jurists hold that all available evidentiary means must be deployed in order to determine whether the accused is in fact guilty. It is in civil trials, where less is at stake, that there is more room for evidentiary play. So why did twelfth-century take the opposite point of view? As Nörr showed, it is because for them, the problem was not a problem of proof at all, but a problem of *conscience*. Medieval jurists were worried about protecting the soul of the judge—of a judge who, as Peter the Chanter had worried, might too easily “make himself into a murderer.” For such a judge, it was of course criminal matters that presented the gravest threat; for it was criminal matters that involved blood.

Indeed, to feel the full meaning of the ban on “private knowledge,” we must recognize that blood taint was, throughout the central centuries of the Middle Ages, still the dominant concern. We can see this in the first classic formulation of the “private knowledge” problem—“is the judge to judge only according to the evidence offered, or according to his conscience?”—probably offered in Paris around 1160, around the same time that the first proto-juries were being assembled in England.<sup>104</sup> This was a period during which the literature of Canon law was forming rapidly, after the completion of Gratian’s standard *Decretum* around 1140. It was in reliance on Gratian that the anonymous Parisian author attacked the problem of the “private knowledge” of the judge:

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Dissensio on C. 41.21.13, quoted and discussed in Nörr, *Zur Stellung des Richters*, 22. Not every twelfth-century jurist, it should be said, saw things the way Martinus did. Yet another early opinion held, sensibly enough, that the judge could use his own knowledge to benefit the case of the accused, but not that of the complainant. Pillius, in Nörr, *Zur Stellung des Richters*, 27. For a rapid survey of the criminal/civil distinction in later centuries, see Jacques Delanglade, S.J., *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique*, 10 *Revue de Droit Canonique* 141, 151-153 (1960).

<sup>104</sup> Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 99-100.

It may happen either in a criminal matter, or in some other transaction, that an innocent person is convicted by false witnesses, while a criminal or wrongdoer is claimed to be innocent. The judge knows the truth of what happened. Query whether he should judge according to his knowledge [secundum conscientiam], or according to the evidence presented before him [vel potius secundum allegata]. The question permits of little doubt. The guilty person should be absolved, according to the evidence he has offered, if nothing, or only trivial matters, are have been offered in proof against him. In doing so I act against “conscience,” that is to say contrary to what I know he deserves, but I do not act against “conscience,” that is to say what I know I ought to do. After all, any prudent judge must be aware othat he is obliged to judge according to the evidence offered before him, if it is unrebutted. It cannot be said that he is the one who acts. Rather it is the law that acts. See *C. XXIII, q. 5, c. si homicidium; et C. XXXIII, q. 2, c. quos.*<sup>105</sup>

This passage deserves to be read closely. Scholars have interpreted it as calling for a complete ban on the judge’s use of any “private knowledge.”<sup>106</sup> But its ban is not clearly quite so absolute. The judge, according to this author, was not to make use of his own knowledge—even if it meant letting the guilty go free. The author’s argument, we should

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<sup>105</sup> Quaestiones Dominorum Bononiensium, in Giovanni Palmerio, *Scripta Anecdota Glossatorum*, 1, additions, 237 (Bologna: Azzoguidiana, 1913):

Tam in crimine, quam in negotio innocens falsis testibus vincitur, et criminosus, vel obnoxius, innocens astruitur. Iudex scit veritatem negotii. Queritur an secundum conscientiam, vel potius secundum allegata iudicare debeat. Solutio: Ultimus questionis articulus non multum habet dubietatis. Solvendum enim puto nocentem, secundum quod allegatum est a parte sua, si nulla vel minus frivola contra ipsum allegantur. Et facio contra conscientiam, idest contra id quod scio eum mereri, non tamen facio contra conscientiam, idest contra id quod scio me facere debere. Debet enim quisque prudens iudex scire secundum testimonia inducta se debere iudicare, si ea nullatenus posit repellere. Nec dicitur ipse hoc facere, sed lex, *ut C. XXIII, q. 5, c. si homicidium; et C. XXXIII, q. 2, c. quos*

<sup>106</sup> Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 99-100

note, thus paralleled exactly the argument of contemporary critics of the ordeal: His concern was with cases in which the *guilt* of the accused was clear. It was in those cases that he insisted the judge should not use his own certain knowledge.

And why did the author conclude this? To answer that question, we must read the authority that he cited. If the judge simply followed the dictates of the evidence developed before him, our Paris author wrote, then “it cannot be said that he himself” had condemned the accused. Instead, “the law” had done so. His citation for this proposition came from Gratian; and it is of course the same passage I have already quoted, the passage on how to avoid becoming a “murderer”:

If “murder” means killing a man, nevertheless sometimes a killing can be done without sin: After all, a soldier can kill an enemy; and a judge, or the judge’s minister, can kill a malefactor. Or again a person may unintentionally let his spear fly from his hand. These do not seem to me to sin when they kill a man.

Nor indeed are they ordinarily called “murderers.” When a man is killed justly, it is the law that kills him, not you.<sup>107</sup>

Like Peter the Chanter, the author was worried about the classic danger of judging: that the judge might “make himself into a murderer.” His response was to shield the judge from responsibility by insisting that the law make the decision, rather than the judge himself. After all, in that case, as Augustine and Gratian had said, “lex eum occidit, non tu.”<sup>108</sup>

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<sup>107</sup> Latin text above, note.

<sup>108</sup> The author also cited C. XXXIII, q. 2 c. quos: “C. XVIII. Non homo separat quos pena condemnat. Quos Deus coniunxit homo non separet.” Queris quomodo? subaudis uiolenter, sine lege, absque ratione quos Deus coniunxit homo non separet. Non enim homo separat quos pena dampnat, quos reatus accusat, quos

*As long as you do not use your private knowledge, it is the law that kills him, and not you.* Judges were not to use their “private knowledge” in order to avoid making themselves “murderers,” and thus endangering their eternal life. In subsequent years, the doctrines banning “private knowledge” developed rapidly. By the late 1170s, they had taken a classic, and charming, medieval form: Canon lawyers declared that judges could judge without peril to their souls because they had more than one “body.” In this, the judge was akin to the King: The King had two bodies, his private person and his royal one.<sup>109</sup> The judge went this one better: *He* was a triple person. The judge might know some things from the confessional. There were things known to him “ut Deus,” “as God.” Other things were known to him in his professional role as judge, “ut iudex.” Finally things were known to him as a witness, as a private person—“ut homo,” “as a man”<sup>110</sup> or (as later canonists would put it) “ut privatus,” as a private person.<sup>111</sup> Of the three, only the judge was permitted to judge.<sup>112</sup> During the twelfth century, there was as yet no general agreement on these doctrines.<sup>113</sup> After the early thirteenth century, though, the law of conscience came into clearer focus. This is unsurprising: After the Fourth Lateran Council the need for a law of conscience became pressing. Once confession was universalized and regularized, the difficulty of judicial knowledge became an intense one.

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maleficium coartat.

Gratian. Verum hoc pro his dictum intelligitur, quos iudices seculi pro suis sceleribus legum seueritate percullunt, quos uel morte puniunt, uel deportari iubent.”

<sup>109</sup> For the comparison: Nörr, *Zur Stellung des Richters*, 71.

<sup>110</sup> Nörr, *Zur Stellung des Richters*, 45 n. 37.

<sup>111</sup> Nörr, *Zur Stellung des Richters*, 50.

<sup>112</sup> Nörr, *Zur Stellung des Richters*, 40; Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 103. For civilians like Azo, there were naturally only two persons: *ut iudex*, and *ut privatus*. Padoa-Schioppa, *Sur la conscience dans le Ius Commune Européen*, 107.

<sup>113</sup> Nörr, *Zur Stellung des Richters*, 28.

And indeed, it was in the early decades of the thirteenth century the rule became clear, that the judge could never deploy his knowledge as a “private” person.<sup>114</sup>

But with this, medieval moral theologians found themselves facing a paradoxical and disturbing result, famous in the Middle Ages, both on the Continent and (as we shall see) in England. Judges were never permitted to use their “private knowledge.” To do so would be to confuse their three separate “bodies.” But this meant that, in the name of conscience, judges would sometimes end up convicting persons they knew to be innocent. Let me emphasize that, in the social setting of the age, this cannot have been an entirely rare problem. How could one deal with this quandary? Much of the mature canon law of conscience, as it emerged during the thirteenth century and after, turned precisely on this question. Some jurists thought the judge could simply find ways to prod the witnesses toward creating a record that reflected what he knew to be the truth. Most insisted that a judge in possession of private knowledge should refer the case to a judicial superior.<sup>115</sup> Some thought the judge should testify himself publicly, describing what he had seen.<sup>116</sup> Failing these expedients, though, the common view held that the judge was simply under an obligation to judge according to the proofs offered by the parties—even if it meant condemning an innocent person.<sup>117</sup>

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<sup>114</sup> Nörr, *Zur Stellung des Richters*, 32 (discussing Azo).

<sup>115</sup> On these and other expedients: Jacques de Langlade, S.J., *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique*, 10 *Revue de Droit Canonique* 141, 143-144 (1960); Nörr, *Zur Stellung des Richters*, 51-84.

<sup>116</sup> This was the view of Thomas de Cajetan, *Secunda Secundae Partis Summae Theologicae S. Thomas de Aquino, cum Camentariis* (Venetiis: Apud Iuntas, 1638), 163v, marginal commentary bottom right (judge must declare publicly “vidi in tali loco, &c.”).

<sup>117</sup> There was also a tradition, notably in France, that held that the King was not bound by any such moral dilemma. Only inferior magistrates were bound to judge exclusively on the record. Nörr, *Zur Stellung des Richters*, 86-88; and the “Quaestio” of Jacques de Révigny published in Domenico Maffei, *Il Giudice Testimone e una « Quaestio » de Jacques de Revigny* (MS. Bon. Coll. Hisp. 82), 35 *Tijdschrift voor Rechtsgeschiedenis* 54, 74-76 (1967). It is conceivable that this has some bearing on the English tradition, to the extent juries were conceived as “judges without a superior.”

That, for example, is how no less a figure than Saint Thomas Aquinas saw the matter. In a manner typical of the tradition I have been tracing, Aquinas treated the problem of conscientious judging as part of his larger discussion of murder: The question was precisely how a judge might avoid “making himself a murderer.” Aquinas’ answer summarized the wisdom of the Continent, while introducing a new variation on Gratian’s approach:

If the judge knows that man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounces sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty.<sup>118</sup>

*It is*, said Aquinas in effect, deviating from Gratian, *the witnesses who kill him, and not you*. If this sort of argument seems unpalatable, the answer lay to hand for medieval casuists: “*multa cum conscientia contra conscientiam fiunt*,” “doing things in good conscience often requires doing things against one’s conscience.”<sup>119</sup> It might seem that a judge who condemned an innocent committed a mortal sin, but in fact he did not condemn the accused in his private person, but in his official person as judge.<sup>120</sup> At any rate, it was necessary at all costs to maintain a strict role-separation between judges and witnesses.<sup>121</sup> The alternative was to build oneself “a mansion in Hell.”

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<sup>118</sup> Aquinas, *Summa Theologica*, 2-2 q. 64 n. 7, at <http://www.newadvent.org/summa/306406.htm>. Cf. Raymond de Penafort, counseling the judge to try to prevent the false witnesses from testifying, but insisting that the judge must otherwise delegate the case. See Nörr, *Zur Stellung des Richters*, 66 n. 1.

<sup>119</sup> Nörr, *Zur Stellung des Richters*, 52; Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 100-101 (*Summa Colonensis*).

<sup>120</sup> Nörr, *Zur Stellung des Richters*, 52-53 (Alanus).

<sup>121</sup> Nörr, *Zur Stellung des Richters*, 77, with citations to further literature.

As we shall soon see, this great debate in moral theology too was not confined to the Continent. Max Radin demonstrated seventy years ago that the English were full participants from the Middle Ages onward.<sup>122</sup> Indeed, the English moralists of the seventeenth and eighteenth centuries were all still immersed in the same debate: In this too, English justice did not develop independently of wider western trends. But as we shall also see, English justice presented peculiar problems, problems faced by no one on the Continent. The continental law solved the moral challenge of judging by insisting on a strict role-separation between judges and witnesses in cases of blood. Yet this was precisely the role separation that would prove impossible for the common law criminal juror.

#### IV. The Conscience and the Judge (2): The Problem of “Doubt”

During the great centuries of medieval Church reform, the ban on “private knowledge” thus developed as a fundamental bulwark of the law—but not as a bulwark protecting the accused against false conviction. Instead, it developed as a bulwark protecting the soul of the judge against the dangers of judging. Indeed, so far was the ban from being a protection for the accused, that jurists expressly condoned the conviction of the innocent. Medieval jurists concluded that there was no other way to keep the judge safe from damnation than to allow him sometimes to send the innocent to the gallows.

This same strange constellation of ideas also shaped the development of criminal procedure both on the Continent and in England after 1215. Anxieties about blood taint,

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<sup>122</sup> Radin, *The Conscience of the Court*, 192 *Law Quarterly Review* 506 (1932) (506-520).

and the desire to minimize the moral risks of judging, informed procedure on both sides of the Channel. To understand how, we must begin once again on the Continent.

This is not the place to investigate all the details of continental development. Nevertheless, it is essential that we understand some of the basic outlines of continental criminal procedure in order to understand the common law. This is above all because it was on the continent that ideas of criminal justice came to be framed in terms of the moral theology of “doubt”; and it was in the language of the moral theology of “doubt” that the problems of judging were ultimately analyzed both on the Continent and in England.

Let us begin by briefly reviewing the famous romano-canonical rules of proof, which lay at the foundation of continental law through the eighteenth century.<sup>123</sup> Continental criminal procedure, post-1215, was a system that continued to turn on the infliction of “blood punishments,” the principal concern of the Fourth Lateran Council. When it came to blood punishments, the procedures that developed over the course of the thirteenth century set sharp limits. Blood punishments could only be administered if there was perfect certainty about the guilt of accused: as the canon lawyers put it, there could be no blood punishment unless there were proofs “*luce meridiana clariores*,” “clearer than the light of the midday sun.”<sup>124</sup> To that end, the continental system adopted a measure also to be found in other pre-modern systems, such as Islamic law and traditional Chinese law: It declared that perfect certainty should ideally be attained

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<sup>123</sup> For important recent studies, see Richard Fraher, *Conviction According to Conscience; The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 24 (1989).

<sup>124</sup> Giorgia Alessi Palazzolo, *Provo Legale e Pena. La crisi del sistema tra evo medio et moderno* (Naples, 1979), 3-5 ; and in the older literature Paul Fournier, *Les Officialités au Moyen Age: Etude sur l’Organisation, la Compétence et la Procédure des Tribunaux Ecclésiastiques Ordinaires en France, de 1180 à 1328* (Paris: Plon, 1880), 247.

through the testimony of two unimpeachably trustworthy eye-witnesses. Such testimony constituted “full proof”—“plena probatio” in the Latin of the Middle Ages.

Of course, the testimony of two unimpeachably trustworthy eyewitnesses is rarely available. What was to be done if full proof was impossible? Failing full proof, Continental law sought a different means of certainty: It sought a confession. That confession was to be obtained through the most notorious of Continental practices, one that, until recently, we all thought had vanished from the western world: judicial torture. Torture could not, however, be ordered in all cases. Persons of high social standing—members of the nobility and the like—could not be tortured at all. Even with regard to lower status persons, moreover, judges were forbidden to order torture unless there were “half-full proof”—“sempilena probatio.”<sup>125</sup> And how was a judge to determine whether there was half-full proof? He was to follow a kind of script for the weighing of evidence. The technical term for such evidence was “indicium,” “hint” or “proof,” and what judges were commanded to find were “indicia indubitata,” “proofs that did permit of any doubt.”

Such was the continental law of evidence. Common law commentators have regarded this law with contempt and horror since the Middle Ages, condemning its use of torture in particular.<sup>126</sup> Yet historians have amply demonstrated that the continental rules were known, studied and absorbed in England as well from the Middle Ages onward. The English regularly borrowed the continental vocabulary of concepts, if often without acknowledgement.<sup>127</sup> It can be argued that the English even had their own form of

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<sup>125</sup> See the fuller discussion in Schmoekkel, *Humanität und Staatsraison*, 212-213, 219-228. At 212-213, Schmoekkel emphasizes the extent to which Enlightenment critics caricatured this system.

<sup>126</sup> See the classic passage in Sir John Fortescue, *De Laudibus Legum Anglie*, ed., S.B. Chrimes (repr. Holmes Beach, Fla., 1986), 42-53.

<sup>127</sup> E.g. Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 120-121.

torture.<sup>128</sup> In any case, in various ways and forms, English lawyers drew intellectual sustenance from the magnificent body of continental scholarship<sup>129</sup>—as indeed one might expect. The brilliant work of the continental jurists too was a common western possession.

This is not the place to review the full brilliance of romano-canonical proof, though.<sup>130</sup> For my purposes here, I want to focus on only one, neglected, aspect of this system: its connection with the theology of “doubt.” For the carefully elaborated rules of the continental law of evidence, in their effort to regulate the use of blood punishments, turned precisely on the question of “doubt,” in ways that were intimately bound up with the law of conscience, and that were fateful for the shaping both of continental judging and of common law criminal jury trial. Leading historians of the common law—notably again John Langbein,<sup>131</sup> James Franklin,<sup>132</sup> and Barbara Shapiro<sup>133</sup>—have all seen that some aspect of the continental concept of “doubt” must have had some influence on the making of “reasonable doubt.” Nevertheless, the story has not been properly understood or rightly told.

Let us turn then to the theology of “doubt.” Within the law of conscience, “doubt” was a term of central importance. Indeed, any reader with a good Catholic

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<sup>128</sup> This was the *peine forte et dure*, frequently compared to continental torture. For this procedure, used as late as 1726, see Cockburn, *History of English Assizes*, 117, see the survey in Fisher, *Jury’s Rise as Lie-Detector*, 588-589.

<sup>129</sup> For examples from a leading eighteenth-century text, see Sir Geoffrey Gilbert, *The Law of Evidence* (repr. New York: Garland, 1979) (1754), at e.g. 104-106 (discussing problems of probability in terms drawn both from “the Common and Civil Law”); 110-112 (“weighing” of evidence); 191 (English rules “in Conformity to the Rules of the Cannon Law”).

<sup>130</sup> For recent surveys see Matthias Schmoeckel, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter* (Cologne, 2000), 187-506;

<sup>131</sup> Langbein, *Historical Foundations of the Law of Evidence: The View from the Ryder Sources*, 96 *Col. L. Rev.* 1168, 1199 n. 152 (1996) (discussing rule “in dubio pro reo”).

<sup>132</sup> Below.

<sup>133</sup> Below.

education is likely to know this, since “doubt” remains a term of central importance in Catholic moral teaching. The Catholic Encyclopedia explains how “doubt” is understood down to this day, in phrases that date back to the Middle Ages:

### **Doubt**

(Lat. *dubium*, Gr. *aporia*, Fr. *doute*, Ger. *Zweifel*).

A state in which the mind is suspended between two contradictory propositions and unable to assent to either of them. . . . Doubt is either *positive* or *negative*. In the former case, the evidence for and against is so equally balanced as to render decision impossible; in the latter, the doubt arises from the absence of sufficient evidence on either side. . . . Again, doubt may be either *theoretical* or *practical*.

The former is concerned with abstract truth and error; the latter with questions of duty, or of the licitness of actions, or of mere expediency. A further distinction is made between doubt concerning the existence of a particular fact (*dubium facti*) and doubt in regard to a precept of law (*dubium juris*). *Prudent* doubts are distinguished from *imprudent*, according to the reasonableness or unreasonableness of the considerations on which the doubt is based.

Every reader of this passage will notice instantly that the question of “doubt,” in Catholic moral theology, is particularly framed as the question of when doubts are *reasonable*.

Every reader will also notice that, according to that theology, unreasonable doubts are imprudent ones, ones we must not follow. With this we have nothing other than a “reasonable doubt” standard: Indeed, we have the very “reasonable doubt” standard that is still applied in American criminal trials, as I want to show in the balance of this Article. But to see how “reasonable doubt” crept from Catholic moral theology into

American criminal procedure, we must once again burrow into the history of the Christian theory of adjudication as it developed in the Middle Ages, and especially on the medieval Continent.

The moral theology of doubt began taking shape during the same reformist centuries we have been discussing all along. To understand its place in criminal procedure, we must begin from an oft-quoted principle laid down by the early medieval Pope Gregory the Great: “Grave satis est et indecens, ut in re dubia certa detur sententia”: “It is a serious and unseemly business to go giving certain judgments in doubtful cases.”<sup>134</sup> That principle was picked up by reforming lawyer-popes of the later twelfth and early thirteenth centuries, in ways that would affect legal analysis for many generations on both sides of the Channel. It also became associated with another intellectual creation of those same reforming Popes: the so-called “safer path” doctrine, which would still be guiding moral theologians in eighteenth century England.

Let us begin with the “safer path.” The first statements of the “safer path” doctrine, like so much of what we have seen, involved efforts to guarantee the ritual purity of clergy faced with possible blood taint. Clement III, Pope very briefly from 1187-1191, presented the doctrine in a decision involving a cleric and an arguably accidental death:

A certain priest wished to punish a member of his family using the belt that he ordinarily wore, and tried to flog the fellow. However it happened that his knife slipped out of the sheath that was attached to the belt, and gave the man something of a wound in the back. The wounded fellow lived for a while, and the

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<sup>134</sup> Jaffé-Ewald, 1779, quoted and discussed in Nörr, *Zur Stellung des Richters*, 41-42; Schmoeckel, *Humanität und Staatsraison*, 195.

wound was healing, but then matters took a turn for the worse, and he went the way of all flesh. This created some doubt about whether the priest in question should be suspended from his office.<sup>135</sup>

The question was thus whether the cleric in question had so polluted himself through a fatal shedding of blood that he could no longer perform his sacramental duties. The answer to that question was of course doubtful. Clement responded by the kind of injunction that is common in many legal systems committed to norms of ritual purity.<sup>136</sup> When in doubt, it was necessary to take “the safer path,” avoiding any risk of pollution:

Since we must choose the safer path in cases of doubt [cum in dubiis semitam debeamus eligere tutiorem], it is proper to tell this priest not to involve himself further in sacred orders; but having done penance he should content himself with ministering to the minor orders.<sup>137</sup>

Such was the “safer path” doctrine: In cases of doubt, “in dubiis,” one should act in such a way as to minimize the possibility of pollution. The doctrine was reiterated in famous form a few years later by Innocent III, the lawyer-Pope who presided over the Fourth

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<sup>135</sup> Clemens III, PL vol 204 [note (10)] [col. 1485D] :

Ad audientiam apostolatus nostri ex parte vestra pervenit quod quidam presbyter volens corrigere quemdam de familia sua eo cingulo, quo cingi solebat, illum verberare tentavit: et contingit quod cultellus de vagina, quae cingulo adhaerebat, elapsus eum in dorso aliquantulum vulneravit. Postmodum vero cum ille vulneratus aliquandiu vixisset, et jam convaluisset a vulnere, graviori, ut creditur, infirmitate percussus, cum sana mente, [col. 1487A] ac devotione debita viam est universae carnis ingressus. Quia vero utrum occasione vulneris decessisset dubium habebatur, [eodem presbytero ab omni officio, beneficioque suspenso,] quid super hoc vobis esset agendum apostolicam sedem consultare voluistis.

<sup>136</sup> E.g. Lingat, Classical Hindu Law; Talmud

<sup>137</sup> Clemens III, PL vol 204 [note (10)] [col. 1485D]:

Nunc itaque vestrae discretionis industriae duximus respondendum, quod, cum in dubiis semitam debeamus eligere tutiorem, vos convenit injungere presbytero memorato, ne de caetero in sacris ordinibus administrare accedat; injuncta tamen poenitentia congruenti potestis ei concedere, ut sit contentus in minoribus ordinibus ministrare. Si vero [vobis legitime constiterit, quod] ex alia infirmitate obierit, de vestra licentia poterit, sicut erat solitus, divina officia celebrare

Lateran Council.<sup>138</sup> Innocent produced the classic formulation of the “safer path” doctrine: *In dubiis via eligenda est tutior*, “When there are doubts, one must choose the safer path.” This phrase, which English moralists would still be repeating seven centuries later, became standard.<sup>139</sup>

One must choose the safer path, since “doubtful matters” presented a serious danger to the soul. But what was a “res dubia,” a “doubtful matter”? And how was one to stay on the “safer path”? Theologians addressed this urgent moral question by dividing judgment into four famous degrees of certainty. A Christian concerned about the salvation of his soul was enjoined to seek certainty of the highest degree. Certainty of this highest degree was called—note well the phrase—“moral certainty.” Below moral certainty lay three lower degrees. These were, in order, *opinion*, *suspicion* and *doubt*. “Doubt” was thus the technical term for the lowest degree of certainty in judgment. Doubt took a variety of forms, of which “practical doubt”—doubt about whether or not to engage in a particular act—posed especially pressing problems. To act when one was uncertain about the rightness or wrongness of the action in question was to engage in an act evil in itself, and so to commit a mortal sin. Thus with regard to “practical doubts,”

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<sup>138</sup> Innocent too was concerned, unsurprisingly, with the ritual purity of clerics. The details of the case are not worth repeating.

<sup>139</sup> In *Decretalium Gregorii Papae IX, Compilationes, Liber V, Titulus XXVII . De clerico excommunicato, deposito vel interdicto ministrante, Chapter V*. Available at [http://www.fh-augsburg.de/~harsch/Chronologia/Lspost13/GregoriusIX/gre\\_5t27.html](http://www.fh-augsburg.de/~harsch/Chronologia/Lspost13/GregoriusIX/gre_5t27.html):

*Quod autem, postquam se novit excommunicatum a nobis, divina sibi fecerit officia celebrari, et fidelium communioni se ingesserat frequenter, id non in contemptum sedis apostolicae vel tanti etiam sacramenti, sed spe veniae assertit se fecisse, ne videlicet induresceret amplius, vel durius eius animus proterviret, si nunquam divinis officiis interesset; licet in diebus sollemnibus se nunquam celebrationi divinorum ingesserit, sed cum paucis in angulo alicuius ecclesiae occulte non festivis diebus divina sibi fecerit interdum officia celebrari. Licet autem in hoc non videatur omnino culpabilis exstitisse, quia tamen in dubiis via est tutior eligenda, etsi de lata in eum sententia dubitaret, debuerat tamen potius se abstinere, quam sacramenta ecclesiastica pertractare.*

the rule of Innocent III held with special force: “In dubiis practicus tutor via est eligenda,” “in cases of practical doubt, one must take the safer path.”<sup>140</sup>

These teachings came to involve immense and fascinating complications, particularly as the doctrine reached its maturity in the writings of sixteenth-century Spanish moralists<sup>141</sup> and their seventeenth-century French successors.<sup>142</sup> As historians of epistemology and science have shown, the theology of doubt was especially important for the making of western epistemology. The famous four degrees of certainty—moral certainty, opinion, suspicion, and doubt—could be thought of as representing a scale of *proof* as well as a scale of *moral responsibility*. So it was that, in the early modern period, scientists and philosophers concerned with epistemological proof drew directly on the terminology of the theology of doubt. Philosophical programs like Descartes’ exercise in “radical doubt” grew out of this theological tradition. So did many of the basic terms of the scientific search for certainty.<sup>143</sup>

Indeed, the fact that the moral theology of doubt influenced early modern science is at the root of some of the most troubling confusion in our literature on the history of “reasonable doubt.” It is precisely because the theology of doubt worked its way into the philosophy of science that historians of science like Franklin and Shapiro could come to the conclusion that the “reasonable doubt” rule had something to do with the search for scientific certainty—had something to do with an early effort to create a standard of proof. This has led them into important misinterpretations. When Shapiro studied the

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<sup>140</sup> E.g. Enciclopedia Cattolica (Città del Vaticano, 1950), 4: col. 1945 (s.v. “dubbio”).

<sup>141</sup> Jacques de Langlade, S.J., Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique, 10 Revue de Droit Canonique 141, 153-156 (1960)

<sup>142</sup> Franklin, Science of Conjecture.

<sup>143</sup> For brief general accounts, see see Pietro Palazzini, Dubbio, in Enciclopedia Cattolica (Florence, 1950), 4: cols. 1944-1948; and J.M. Harty, Probabilism, in New Advent Catholic Encyclopedia, available at <http://www.newadvent.org/cathen/12441a.htm>.

law of “satisfied conscience,” for example, she studied it as a law of evidence, epistemology and proof, not as a law of the moral responsibility of the judge—she studied it as the law of the *satisfied* conscience, not the law of the *safe* conscience.<sup>144</sup> Similar things are true of Franklin.<sup>145</sup>

Yet if the terminology of doubt could be used for the philosophy of knowledge, it never lost its connection with the moral problematics of judging, and it is a mistake to focus too much on the epistemological puzzles of science if we want to understand the rise of “reasonable doubt.” The theology of doubt was not just about achieving scientific certainty; it always concerned itself with doubt in moral matters, and indeed with “reasonable doubt” in “moral matters.”<sup>146</sup> Precisely because it remained a *moral* theology, it applied quite directly to the moral dilemmas of criminal justice. If we fail to understand this, we condemn ourselves to permanent confusion about the history of “reasonable doubt.”

In fact, the moral theology of doubt lay at the very foundation of criminal procedure as the continental jurists developed it, in ways we must understand if we are to

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<sup>144</sup> Thus while Shapiro has understood that the “reasonable doubt” rule was a rule of conscience, and that the Continental parallels deserve to be explored, she has nevertheless not investigated the passages in the literature of conscience that bear directly on the moral dilemmas of judging. Many of those passages are discussed below, Section VII. For Shapiro’s efforts, see her *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: U. of California, 1991), at e.g. 14-16, and the discussion of Jeremy Taylor at 263-264 n. 57 (discussing Taylor on knowledge but not on judging). To Shapiro, the questions of law remain those an historian of science naturally asks: questions about fact, epistemology and assumptions. See Barbara Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca, 2000), 8-16.

<sup>145</sup> Franklin has lengthy discussions both about the law of evidence, Franklin, *The Science of Conjecture*, 1-63, and about “the doubting conscience and moral certainty,” *id.*, 64-101. Nevertheless, he does bring his wide and learned treatment together in the right way. These excellent scholars have focused too much on the modern concept of “reasonable doubt” as a standard of proof, failing to catch sight of its pre-modern meaning. The best account in the literature on moral theology that I have seen is in the two pages of Margaret Sampson, *Laxity and Liberty in seventeenth-century English political thought*, in Edmund Leites, ed., *Conscience and Casuistry in Early Modern Europe* (Cambridge, England, 1988), 85-87.

<sup>146</sup> E.g. Margaret Sampson, *Laxity and Liberty in seventeenth-century English political thought*, in Edmund Leites, ed., *Conscience and Casuistry in Early Modern Europe* (Cambridge, England, 1988), 78.

understand our own common law history.<sup>147</sup> To follow the development of criminal procedure as an aspect of the theology of doubt, we must start once again with Ivo of Chartres, the brilliant and influential reformer of the late eleventh century. In his Decretum, his compilation of canon texts, Ivo recorded the text of a letter from the second-century Pope Sixtus II. This letter addressed the ticklish question of when one could condemn sinners. The answer Sixtus gave was reminiscent of the theology of “private knowledge”: God, he declared, was the only judge who could always judge with certainty. For humans it was different. When humans confronted “incerta”—uncertain allegations—they could not condemn an accused person unless it was by “indiciis certis,” evidence sufficient to create certainty.<sup>148</sup> The key phrase here, “certis indiciis,” was to become a standard in Continental criminal procedure, always associated with the concept of “doubt.”

That association was made in particular by Gratian, in a passage that, as scholars have observed, definitively introduced the doctrine of “doubt” into canon criminal law. In two consecutive passages, Gratian echoed first Gregory the Great’s declaration on doubt, “ut in re dubia certa detur sententia”; and then Ivo:

**C. LXXIV. A decision that purports to be certain does not resolve a doubtful matter.**

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<sup>147</sup> For a discussion that highlights the moral challenge of judging as medieval jurists saw it, see Palazzolo, *Prova Legale e Pena*, 41-42, and esp. 110-111 n. 23, which presents the basic connection between the structure of moral theology and the structure of criminal procedure traced here.

<sup>148</sup> Ivo, *Decretum*, PL 161, col. 399B:

Justo enim iudicio Dei plerumque peccatoribus potestas, qua sanctos ipsius persequuntur, conceditur, ut qui Spiritu Dei juvantur et aguntur fiant per laborum exercitia clariores. Illi tamen qui hoc agunt nullatenus evadunt poenam; quia, ut ait Dominus: *Vae illi per quem scandalum [col. 399C] venit (Matth. XVIII). Item. Paulo post. Incerta non iudicemus quoadusque veniat. Dominus, qui et illuminabit abscondita tenebrarum, et manifestabit consilia cordium (I Cor. IV).* Et quamvis vera sint, non tamen credenda sunt, nisi quae certis indiciis comprobantur, nisi quae manifesto iudicio convincuntur, nisi quae iudiciario ordine publicantur. Nullus ergo humano potest condemnari examine, quem Deus suo iudicio reservavit

It is a serious and unseemly business to go giving certain judgments in doubtful cases

C. LXXV. **Things that are not proved through certain evidence are not be believed.**

. . .

Even though certain things may be true, nevertheless they are not to be believed by the judge, unless they are proved by certain evidence.<sup>149</sup>

Thus were the two key terms—“indicia,” “evidence” and “dubia,” “doubts”—linked in canon law. By the end of the twelfth century, the connection between the theology of doubt and the technicalities of criminal procedure had been clearly drawn, in ways that linked it just as clearly with the moral problems of “private knowledge.” Thus the late twelfth-century canonist Huguccio analyzed the problems of criminal procedure as follows: A “doubtful matter,” was a matter “not proven by witnesses, or documents, or evidence such as a confession.” A “doubtful matter” was a matter “known to the judge in some other way.”<sup>150</sup> To Huguccio, the question of doubt was thus identical with the question of “private knowledge.” Conversely, obeying the rules of evidence was no different from declining to use one’s “private knowledge.”

As continental criminal procedure developed over the subsequent centuries, jurists never lost sight of the connections among “doubt,” “proof” and “private knowledge”:

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<sup>149</sup> Decreti Pars Secunda, C.11, q.3 c.74:

C. LXXIV. **Res dubia non diffiniatur certa sententia.**

Graue satis est et indecens, ut in re dubia certa detur sententia.

C. LXXV. **Non credantur que certis iudiciis non demonstrantur.**

Item Augustinus in libro de penitencia. [c. 3.]

Quamuis uera sint quedam, tamen iudici non sunt credenda, nisi certis iudiciis demonstrantur

See the discussion in Schmoeckel, *Humanität und Staatsraison*, 195-196.

<sup>150</sup> In Nörr, *Zur Stellung des Richters*, 42

Criminal procedure was about “doubt”; and the great task of a criminal justice system was to arrive at “indicia indubitata,” evidence that permitted no doubt.<sup>151</sup> It was precisely in the course of wrestling with “doubt,” for example, that Albertus Gandinus, a leading thirteenth-century criminal law scholar, developed the basic hierarchy of proofs in criminal procedure, explaining how evidence was to be weighed.<sup>152</sup> Many other medieval proceduralists could be cited. I will simply summarize the mature version of the law as we find it in the writings of a leading scholar of the sixteenth century, Prosper Farinacci.<sup>153</sup>

As we open Farinacci’s standard Practice and Theory of Criminal Law, and turn to the chapter “de indiciis et tortura,” “on proofs and torture,” we find a wealth of the moral theology of doubt. Indeed, we find that mature continental criminal procedure adopted the moral theology of doubt as its very framework.<sup>154</sup> The problem of proof, as Farinacci presented the standard learning, was nothing other than the problem of “rei dubiae,” “doubtful matters,” in the phrase that dated back to Gregory the Great and Gratian.<sup>155</sup> Faced with such “doubtful matters,” one needed proof. But what was a “proof,” an “indicium”? A proof, explained Farinacci, was a kind of probable guess: It was a “conjecture” that was so probable that it “compelled the conscience of the judge to

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<sup>151</sup> See the discussion in Schmoeckel, *Humanität und Staatsraison*, 187-189, beginning from the formula of Azo, “probatio est rei dubie per argumentum ostensio.”

<sup>152</sup> See the discussion in Peter Holtappels, *Die Entwicklung des Grundsatzes ‘in dubio pro reo’* (Hamburg: Cram, de Gruyter, 1965), 9.

<sup>153</sup> For Farinacci as an example of the connection between moral theology and criminal procedure, see Palazzolo, *Prova Legale e Pena*, 110-111 n. 23.

<sup>154</sup> Specialists in continental legal history are in the midst of exploring the relationship between theology and law. See most recently the stimulating discussion of Lepsius, *Von Zweifeln zur Überzeugung*, at e.g. 244-297. I do not attempt to offer any full account here. I simply give the examples in the text in order to set the stage for the discussion of the moral theology of doubt in the common law. A detailed investigation of the relationship between the moral theology of doubt and the structure of criminal procedure on the Continent would burst the bounds of this Article.

<sup>155</sup> Prosper Farinacci, *Praxis et Theoricae Criminalis Partis Primae Tomus Secundus* (Lyon: Sumptibus Iacobi Cardon, 1634), 157 (=De Indiciis & Tortura, Titulus V, Quaestio xxxvi, nos. 5,6, 9).

judge according to it.”<sup>156</sup> And how was one to evaluate the probability of one’s “conjectures”? Farinacci’s answer was drawn in the most straightforward way from moral theology: One was to apply the familiar scale of certainty developed by the moral theologians. Thus some conjectures gave rise to “opinions”; while some gave rise to “suspicions”; and others gave rise to “doubt.” Farinacci presented all this in the classic language of the moral theologians. Farinacci’s account paints a lovely picture of the continental doubting mind, flitting back and forth from possible conclusion to possible conclusion, until the final decision is seized by a movement of the mind:

At times the judge, faced with the evidence presented before him, feels doubt, now leaning to the one party, now to the other, and his mind is not able to come down on one side, as when the proofs are equal or there some obscurity about them. Now after this period of doubting, the judge begins to incline to one party more than the other. At that point, doubt ends, and suspicion begins. And if this suspicion is the result of grave proofs [si ista suspicio oritur ex gravibus indiciis], then suspicion ends, and opinion begins. . . . Now properly speaking, we say that the judge “doubts,” when no reason or cause is present [quando nulla adest ratio, nullaque causa], which inclines him more to one party than the other . . . and a person is “in doubt” when his mind does not incline more to the plaintiff than it does to the defendant. But if after doubting, the judge is moved by some piece of evidence or argument to lean in the direction of the other party, then he is no longer said to “doubt” but to “have a suspicion.”<sup>157</sup>

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<sup>156</sup>Id., p. 157, no. 28: “Indicium esse coniecturam ex probabilibus & non necessariis ortam, à quibus potest abesse veritas, sed non versimilitudo, & quae quandoque iudicantis mentem ita perstringit, ut cogat Iudicis conscientiam secundum eam iudicare.”

<sup>157</sup> Id., 164, no. 198:

It was in these movements of the doubting mind that the fundamental decisions of criminal procedure were to be made: Only if there were “*indicia indubitata*” “proofs permitting no doubt,” could the judge proceed to the next step in continental justice: ordering torture.<sup>158</sup>

Even once the judge proceeded to torture, though, he was by no means done with moral theology. For the decision to torture a defendant itself presented the familiar problem of “private knowledge.”<sup>159</sup> Already in the thirteenth century it was understood that the problems of private knowledge dictated the very details of the regulation of torture: As Nörr has shown, medieval jurists insisted that tortured persons could not be asked leading questions, probably because doing so would effectively inject the judge’s own “private knowledge” into the proceeding.<sup>160</sup> Those same problems continued to haunt the understanding of torture thereafter. We can take a summary of the mature position of continental law from a seventeenth-century Italian handbook of criminal procedure. The author cited Farinacci among many others to make the point that a judge could never use his “private knowledge” in proceeding to torture:

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quando iudex ex deductis coram eo dubitat modò ad unam partem, & modò ad aliam, nec ad unam potiùs quam ad aliam animum applicat, ut est quando probationes sunt aequales vel quando habent aliquando obscuritatis. Et advertete, quòd si post hanc dubitationem Iudex inclinare incipiat in unam partem potiùs, quam in aliam, tunc cessat dubitatio, & intrat suspicio. Et si ista suspicio oritur ex gravibus indiciis, tunc cessat suspicio, & intrat opinio. . . . tunc propriè dubitare Iudicem dicimus, quando nulla adest ratio, nullaque causa, ex qua magis in unam partem quàm in alteram inclinet . . . & dubius is dicitur, quando non magis animum suum ad actorem, quàm an reum inclinat. At si Iudex post dubitationem aliquo motus indicio, vel argumento in alteram partem flectat, licèt cum dubitatione, & tunc non ampliùs dubitare, sed suspicari dicitur.

<sup>158</sup> *Id.*, 158, no. 42.

<sup>159</sup> This was already true in the thirteenth century. I have quoted before the thirteenth-century scholar Durantis, who spoke of the judge who, looking out his window onto the public square, saw a nobleman committing murder. What troubled Durantis in that case was precisely the question of torture. Nobles could not ordinarily be tortured. So could this rule be abrogated, since the judge had certain “private knowledge” of the noble’s guilt? Durantis held that it could not. *Spec. 2.3. de Sententia § qualiter sit ferenda*. Quoted and discussed in Nörr, *Zur Stellung des Richters*, 78.

<sup>160</sup> Nörr, *Zur Stellung des Richters*, 21 (discussing Placentinus). Indeed, leading questions were frowned upon, for this reason, in all phases of adjudication. *Id.* The ban on leading questions was older, though, already to be found in the Roman sources. See Schmoeckel, *Humanität und Staatsraison*, 262.

**Whether Torture can be ordered on the basis of the Knowledge [Conscientia] of the Judge.**

*Summary.*

*I Tortura cannot be ordered solely on the basis of the judge's knowledge [conscience], even if the judge is empowered to exercise discretion, & even if he is of strongest opinion.*

\* \* \*

The judge is warned that he must not proceed to torture on the basis of his own knowledge, since it is a well-worn rule, repeated by everyone, that the judge must judge according to the dossier, and evidence properly developed on the record.<sup>161</sup>

Torture was a problem of “conscience”—which, given the ambiguities of the word “conscience,” meant that it was a problem of the judge’s “private knowledge.”

In all this, continental criminal procedure was built on the foundations of the moral theology of doubt. Jurists understood this, and so did moral theologians. Indeed, moral theologians took an active and continuing interest in the dilemmas of the judge throughout the later Middle Ages and early modern period. For example, Leonard

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<sup>161</sup> Sebastiano Guazzini, *Tractatus ad Defensam Inquisitorum, Carceratorum, Reorum, & Condemnatorum super quocunque crimine* (Venice: Apud Bertanos, 1699), Bk. 2, 98-99 (= *Defensio XXX*, Cap. XXIX):

**Tortura an inferri possit ex conscientia iudicis.**

*Summariū.*

*I Tortura non potest inferri ex sola conscientia iudicis, quod procedit etiam in iudice habente arbitrium in procedendo, & si iudex esset optimae opinionis.*

\* \* \*

*Iudex caveat in ista materia, ne procedat ad torturam ex sola sua conscientia, cum regula sit satis trita, & in ore omnium, quod iudex debeat secundum acta, & et allegata iudicare . . .*

Et in specie, ut non possit inferri tortura ex sola iudicis conscientia, Boss. Tit. de indic. Numero 141. *Speculat.* In tit. de sent. §. qualiter, versic. item debet ferri, Marsil. d. sing. 266. in fin. Iul. Clar. q. 8. num. 5. vers. & licet, ubi testatur, quod ita teneant Doct. & q. 66. num. 2. Farin. cons. 83. ubi concludunt, quod si iudex viderit Seium committere delictum, & non adsint alia indicia contra eum, non posset iudex illum toquere, licet Dec. d. c. 14. num. 3. & sub vers. prior opinio videatur isto casu tenere contrarium, & ibi allegat aliquas rationes.

Lessius, a leading Flemish theologian of the later sixteenth and early seventeenth century, offered the same sort of analysis that Farinacci did. Lessius too reviewed the standard four-part scale of certainty: doubt, suspicion, opinion and firm judgment. He then explained how the scale of certainty bore the question of “indicia”:

These degrees [of certainty] are so constituted, that greater proofs are required to arrive at suspicion, than at simple doubt, and greater proofs for the definitive determination of guilt [“sententia”] than for a mere judgment. . . .<sup>162</sup>

A judge who judged in a state of doubt,<sup>163</sup> always committed a mortal sin, Lessius added ominously.<sup>164</sup> Such warnings were found in abundance among the moral theologians, notably the great figures at work in sixteenth-century Spain,<sup>165</sup> and they would continue to be found right through the eighteenth century. We may cite, for example, a standard French “dictionary of conscience,” used from the early eighteenth through the early nineteenth century to guide priests:

In every case of doubt, where one’s salvation is in peril, one must always take the safer way: *In dubiis via eligenda est tutior*, as Innocent III says. . . .

A judge who is in doubt must refuse to judge, whether the doubt has to do with the person, the law or the fact.<sup>166</sup>

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<sup>162</sup> Leonardus Lessius, *De Iustitia et Iure* (Venice: Apud Andraeam Baba, 1625), Lib. 2 Cap. 29, 6-8. [= p. 275]: *Hi gradus ita se habent, ut maiora indicia requirantur ad suspicionem, quam ad simplicem dubitationem, & maiora ad sententiam quam ad iudicium.*

<sup>163</sup> Leonardus Lessius, *De Iustitia et Iure* (Venice: Apud Andraeam Baba, 1625), Lib. 2 Cap. 29, 6-8. [= p. 275] (“iudicium temerarium”—defined as judging in a state of doubt at top of column)

<sup>164</sup> Leonardus Lessius, *De Iustitia et Iure* (Venice: Apud Andraeam Baba, 1625), Lib. 2 Cap. 29, 6-8. [= p. 275].

<sup>165</sup> Jacques de Langlade, S.J., *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique*, 10 *Revue de Droit Canonique* 141, 153-156 (1960)

<sup>166</sup> Collet, *Abrégé du Dictionnaire des Cas de Conscience de M. Pontas*, Paris : Libraires Associés, 1767, 1 : 467-468 :

Dans tous les doutes, où il s’agit du péril du salut, il faut toujours suivre le parti le plus sûr: *In dubiis via eligenda est tutior*, dit Innocent III, cap. 3 *de Clerico excomm.* Clément III enseigne la même maxime, ainsi qu’Eugene III, cap. 3 *de sponsalib. & matrim.* . . .

“A judge may never judge, when he is in doubt.”

The structure of continental criminal procedure was thus modeled on the structure of the theology of doubt, in ways that implied that a judge’s salvation was at stake in every evidentiary decision he made. Correspondingly, the old theological language rang through some of the leading texts right to the end of the Middle Ages: For example, Aegidius Bossius, a leading authority of the fifteenth century, still spoke about the dangers of “passion,” about judges who hastened too merrily to punishment: “si iudex gloriatur in morte hominis sicut nonnulli faciunt nostra tempestate, homicida est,” “if the judge glories in the death of a man, as no small number do in our age, he is a murderer.”<sup>167</sup>

Despite that, though, it would probably be a mistake to imagine that most continental judges were terribly worried about the safety of their souls by the sixteenth century. As Nörr observed forty years ago, the real drama in the development of this law was the drama of the emergence of a distinctive professional identity. By the sixteenth century, continental judges—unlike common law jurors—were hardened professionals, who probably treated adjudication as a matter of routine, rarely suffering from conscientious qualms or any lesser form of moral indigestion. Scholars have recognized that sixteenth century continental jurists took a toughened attitude, displaying more of an interest in proof than in charged moral dramas of the criminal law that had preoccupied the Middle Ages.<sup>168</sup> Indeed, when we browse in the juristic literature of the sixteenth

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Un juge ne peut jamais juger, lorsqu’il est dans le doute, soit que son doute regarde la personne, le droit ou le fait.

<sup>167</sup> Aegidii Bossii Patricii Mediolanensis . . . Tractatus Varii (Lyons: Apud Antonium de Antoniis, 1562), 457.

<sup>168</sup> See the discussion of sixteenth century changes in Paolo Marchetti, *Testis contra se: L’Imputato come fonte di Prova nel Processo Penale dell’Età Moderna* (Milan, 1994), 27-38 (noting diminished focus both

century and after, we do not find the jurists repeating the warnings of their contemporary moral theologians. To be sure, there is plenty of vitriol on the subject of malfeasant judges. Farinacci, for example, declared that judges who tortured without proper proof were “dogs,” who should be criminally prosecuted.<sup>169</sup> This is violent language, from a man who thought the the criminal justice systems of his day were doing evil. (This may have something to with the fact that Farinacci himself was an ex-convict.) But it is not precisely the language of conscience.

No, for most professional continental judges by the sixteenth century, it is undoubtedly the case that the continental rules had become merely a means of proof—as a way of determining what had really happened in cases of uncertainty. The old moral comfort function of the rule probably withered away for most continental judges after the fifteenth century. Their world was one in which the old anxieties about blood taint had been fully absorbed into a professional judicial ethos by the end of the Middle Ages. But for English jurors of the same period, the situation was different.

Before turning directly to English jurors, though, we must review one more aspect of “doubt” in continental law. This is the famous continental rule, “in dubio pro reo,” “in doubt you must decide for the defendant.” This celebrated rule represented the continental form of the presumption of innocence.<sup>170</sup> John Langbein has already noted

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on the soul of the accused and on the relative discretion in decision of the judge); and his discussion of later centuries in *id.*, 169-208.

<sup>169</sup> Farinacci, 183 (nos. 110 and 111).

<sup>170</sup> See Peter Holtappels, *Die Entwicklung des Grundsatzes ‘in dubio pro reo’* (Hamburg: Cram, de Gruyter, 1965); and for the place of the maxim in modern law, e.g. Jan Zopfs, *Der Grundsatz “in dubio pro reo”* (Baden-Baden, 1999).

that it must have some connection with the “reasonable doubt” standard<sup>171</sup>; and as we shall see, he is entirely right.

The maxim “in dubio pro reo,” whose history was traced by Peter Holtappels forty years ago, is yet another a rule that grew more or less directly out of “safer path” doctrine. Albertus Gandinus, a leading thirteenth-century jurist, described the rule this way:

When there are doubts and the evidence is uncertain [in talibus dubiis et incertis probationibus] it is better to leave the malefactor’s misdeed unpunished than to convict an innocent, since in cases of doubt [in dubiis] punishments are better made milder than harsher.<sup>172</sup>

This rule was in counterpoise to the rule of “private knowledge.” Maybe judges who had “private knowledge” were obliged sometimes to convict the innocent. But when judges judged on the basis of the evidence produced before them, they were obliged to making the contrary error, leaning to the side of innocence. The “in dubio pro reo” rule was indeed a rule of moral theology just like the “private knowledge” rule: It too offered counsel about how to act when you found yourself, in Innocent III’s constantly cited phrase, “in dubiis,” “facing cases of doubt.” Indeed, as the standard juristic writing of the early modern Continent explained, “in dubio pro reo” was the other side of the procedural coin that required proof “clearer than the midday sun” before sending a person to blood punishment.<sup>173</sup> Thus it is no surprise that Aegidius Bossius, who was the first to turn the

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<sup>171</sup> Langbein, *Historical Foundations of the Law of Evidence: The View from the Ryder Sources*, 96 Col. L. Rev. 1168, 1199 n. 152 (1996).

<sup>172</sup> In Holtappels, 10:

Et in talibus dubiis et incertis probationibus melius est facinus impunitum relinqui nocentis quam innocentem damnare, et quia in dubiis pene sunt potius molliende quam exasperende

<sup>173</sup> E.g. Holtappels, 43 (quoting Gaill).

phrase “in dubio pro reo,”<sup>174</sup> in the fifteenth century, spoke in terms that echoed the moral theology whose history I have traced:

First of all, you should know that judge must not be quick to punish, but must consider everything carefully: Err in haste, repent at leisure. . . He must follow proper procedures, and try to determine the truth, only judging after he has done so . . . the judge must be brought to punish only in sorrow . . if the judge glories in the death of a man, as no small number do in our age, he is a murderer.<sup>175</sup>

“In dubio pro reo” was a rule that created a form of protection for the accused that grew out of the familiar fear that the judge might make himself into a “murderer.”

This is not the place for a full-scale survey of the continental literature of “in dubio pro reo,” which is very rich. It is important, though, to note two of its characteristic themes, both of which would play important roles in later English jurisprudence.

First, continental jurisprudence framed the question of “in dubio pro reo” as one involving “benignity” and “mildness”: When faced with “doubts,” the literature held, the judge must choose the “more benign” and “milder” path.<sup>176</sup> Second, the jurists who

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<sup>174</sup> See the article “In dubio pro reo” in Detlef Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, 6<sup>th</sup> ed. (Munich, 1998). On Bossius, an unoriginal but faithful reporter of the state of the doctrine of his time, see Palazzolo, *Prova Legale e Pena*, 81-85.

<sup>175</sup> Aegidii Bossii Patricii Mediolanensis . . . *Tractatus Varii* (Lyons: Apud Antonium de Antoniis, 1562), 457 :

1. Et in primis sciendum est, quòd iudex non debet esse manu promptus in puniendo, sed prius omnia cautè considerare, quod enim incautè factum est cautè evitandum est, c.j. & fin. de sacra.non.reiter. nec debet facilè se movere iudex, nec literis in alterius detrimentum adhibere.c.inquisitionis.§.j.extrà, de accusat. Sed secundum iuris ordinem procedere, & veritatem inquirere, & rectè postea iudicare, ut not.per Ioan.Fab. in rubr.instit.de publi.iudi. ubi dicit quod cum dolore iudex trahi debet ad poenam infligendam & invitus.xxiiij.q.v. quasi per totum maximè in c.miles.& in c.cum minister. Et si iudex gloriatur in morte hominis sicut nonnulli faciunt nostra tempestate, homicida est, ubi aliàs minister Dei dicitur, ut per Io.Fab.ubi suprà, & per Angel. ibi, & vera iustitia habet compassionem, ut ait Gregor.xlv.distinct.c.vera iustitia

<sup>176</sup> E.g. Holtappels, *In Dubio pro Reo*, 42 (quoting Fichard: “in poenis benignior interpretatio facienda”); 50 (quoting Carpzov: “in dubio semper in mitiorem partem sit praesumendum.”)

created the “in dubio pro reo” rule were not unaware that their creation presented dangers for the management of public justice. Indeed, continental jurists understood full well the danger in any rule of lenity: the danger that criminal justice might break down. The demands of conscience were in conflict with “the wellspring of thirteenth-century criminal jurisprudence: ‘it is a matter of public interest that crimes no go unpunished.’”<sup>177</sup> As Albertus Gandinus put it, it was perfectly clear that there was a “public interest” that misdeeds should not go unpunished. Yet this “public interest” was in unavoidable tension with any rule that counseled mildness.<sup>178</sup> This medieval conflict would be fought and re-fought repeatedly in subsequent centuries, as jurists reflected on the tensions between private conscience and the role of the judge as a “public person.”<sup>179</sup> In particular, it was a conflict that English observers would still be fighting out four centuries later, and in urgent tones.

## V. The Common Law World (I): The Judge, the Jury, and Moral Theology

With that background, we can at last turn to England, in the damp northwestern corner of Christendom. There is an old habit of praising the English common law as a tradition that stood nobly aloof from the Continent, and it is a habit that undoubtedly still matters a lot for the self-consciousness of many Americans. Nevertheless, historians

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<sup>177</sup> Richard Fraher, *Conviction According to Conscience; The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof*, 7 *Law & Hist. Rev.* 23, 24 (1989).

<sup>178</sup> Quoted and discussed in Holtappels, 11.

<sup>179</sup> E.g. Thomas de Cajetan, *Secunda Secundae Partis Summae Theologicae S. Thomas de Aquino, cum Cannentariis* (Venetiis: Apud Iuntas, 1638), 163r (marginal commentary bottom left) (judge a “persona publica”).

have been well aware, for a very long time, that the teachings of continental law, and especially of canon law, were well known and regularly applied in England. Indeed, all of the doctrines whose continental history I have traced, from the law of “private knowledge” to the principle of “in dubio pro reo,” were embraced and embroidered by English lawyers.<sup>180</sup> When it comes to conscientious judging, though, there were distinctively English problems: The institutional structure of jury trial changed the calculations about the teachings of canon law should be applied. It was this that gave rise to the “reasonable doubt” rule.

As we have seen, the Christian theological tradition had created, by the end of the thirteenth century, elaborate measures intended to protect the judge against the spiritual dangers of judging in cases involving blood punishments. All of those measures can be thought of as ways of giving flesh to ideas originally proposed by Saint Jerome and Saint Augustine in late Antiquity: The judge could keep himself safe from the taint of blood as long as he acted strictly as “the minister of the laws.” This meant that he must refrain assiduously from deploying his own “private knowledge” or acting with “passion.” It also meant that he was to hew to the “safer path,” carefully following procedures intended to guarantee that his judgment would never be polluted by unvetted “doubt.”

Holdsworth recognized long ago that these canon rules were familiar in England, and were applied to judges there just as they were on the Continent:

It was an old question among the civilians and canonists “*utrum iudex secundum allegata iudicare debeat an juxta conscientiam.*” In other words, could a judge have recourse his private knowledge to decide cases judicially before him? It was

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<sup>180</sup> See the discussion above,

well established from an early date in English law that the judge must decide, not upon his own private knowledge, but upon the matters proved before him.<sup>181</sup> Indeed, the familiar canon formulas were known and cited for centuries in England.<sup>182</sup> Knowledge of the canon tradition dated well back into the twelfth century, the era when both canon law and the common law were in the first heat of formation. In fact, among the leading schools of thought on the problems of conscience in judging was the circle of the Anglo-Norman canonists of the later twelfth and early thirteenth centuries.<sup>183</sup> Recent has even shown that jury trial itself, when it developed in the late twelfth century, was based on canon law concepts of evidence.<sup>184</sup>

England was thus not by any means outside the circle of western Christian cultures, and by the fifteenth century at the latest the English had their own body of precedent digesting the fundamental canon teaching on “private knowledge.” A much-cited case of 1406 offered an English version of the standard canon learning. The case presented a dialogue between Tirwhitt, J, and Gascoigne, CJ:

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<sup>181</sup> Holdsworth, *History of English Law*,

<sup>182</sup> For mid-nineteenth-century examples: *Aldridge v. Great Western Railway* 3 Man. & G. 516, 521 (1841) (ER 1249); *Gautret v. Jones* [L R], 2 C P 371 (1867) [CITATION FORM?]; *Hallows v. Fernie* [L R] s Ch App 467 (1868) [CITATION FORM?]. In these cases, though, the formula is used purely to create a rule of evidence, with any notion of the older function of the rule. E.g. *Hallows v. Fernie*: “But whatever may be the fair meaning of the prospectus, and even if the Plaintiff’s construction of it is correct, he can only be entitled to succeed *secundum allegata et probata*. But he has not alleged, and he has failed to prove, that he read the prospectus in a sense which involved an untruth . . .” For a Connecticut example of this use of “*secundum allegata*” as a purely evidentiary rule, see *Treat v. Barber*, 7 Conn. 274, 1828 Conn. LEXIS 38 (1828). The rule also mutated into a rule on damages. See, *The Sarah Ann*, 21 F. Cas. 432, 1835 U.S. App. LEXIS 288, 2 Sumn. 206 (Circ. Court D. Mass. 1835); *Richard v. Clark*, 43 Misc. 6222, 88 N.Y.S. 242, 1904 N.Y. Misc. LEXIS 216 (1904); *Wilson v. Kelso*, 115 Md. 162, 80 A. 895, 1911 Md. LEXIS 13 (1911).

<sup>183</sup> This was the period of a vigorous and lively culture of the study of the canon law, “well abreast” of the latest learning, especially from France at first, Stephan Kuttner and Eleanor Rathbone, *Anglo-Norman Canonists of the Twelfth Century*, *Traditio* 7 (1949-1951): 279, 288-290, and later from Italy. *Id.*, 327. This is not substantially affected by the palinode sung in Kuttner, *Studies in the History of Medieval Canon Law*. Texts like the *Cologne Summa* “*Elegantius in iure divino*,” which included an important discussion of the problems of judicial conscience, Nörr, *Zur Stellung des Richters*, 52; Padoa-Schioppa, *Conscience dans le Ius Commune Européen*, 100-101, were known to the English. Kuttner and Rathbone, *Anglo-Norman Canonists*, 298-299. The basic canon formulas continued to be cited into the nineteenth century.

<sup>184</sup>

Tirwhitt : Sir, Suppose a man killed another in your presence and actual sight, and another who is not guilty is indicted before you and found guilty. You ought to respite the judgment against him, for you know the contrary, and to inform the King he may pardon (faire grace). . . Gascoigne: Once the King himself questioned me as to this case which you put, and asked me what the law was; and I told him as you say. And he was well please that the law was so.<sup>185</sup>

Despite his private knowledge, the English judge, like his continental counterpart, was to go ahead and enter judgment, seeking to evade the resulting injustice by engineering a pardon for the offender. This case was mis-cited in later years, by jurists who believed that Gascoigne, CJ, was describing a personal experience. This is clearly incorrect: Gascoigne was discussing a familiar chestnut, a moral poser known all through western Christendom, not retailing a personal anecdote.<sup>186</sup> But in any case the precedent was there, and was well-known.

Yet if conscience and canon teaching were around from the earliest date in the history of the common law, they could not possibly have had the same significance that they did in continental Europe. There was undoubtedly the occasional moment when an English judge brought personal knowledge to a case; and we do have some evidence of

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<sup>185</sup> 7 Hy IV, Pasch. Pl. 5 (p. 41):

Tir. Sir, mittom[us] que un home occist un auter en votre presence vous veiant, & un auter q~ n'est culp~ est endict devant vous, & trove culp~ de m~ la mort, vous duisses respiter le judgement devers luy, p~ c~ vous estes sachant del contrary, & faire ouster relation a Roy p~ fair~ grace, nient plus deves vous don~ judgement en c~ case, avant c~ q~ ceux p~ q~ maines le Roy fuit pay (ut supra) soient faits venire, & p~ c~ q~ vous estes apris de record q~ le Roy fuit accept Sñr immediate p~ eux, ut supra. ¶ Gas. Un foits le Roy mesme dda de moy m~ ceo case, que vous aves mis, & moy dda q~ fuit la ley, & jeo luy disoie sicome vous dites; & il fuit bien please q~ la ley fuit tiel.

I have taken the translation given by Thayer, Preliminary Treatise on Evidence at the Common Law, 291.

<sup>186</sup> As observed by Radin, The Conscience of the Court, 192 Law Quarterly Review 506, 507-508 (1932).

such cases.<sup>187</sup> Nevertheless, the dangers that dogged continental judges could never have been as grave for English ones, and it is not surprising that Gascoigne had no personal anecdote to retail. In part this was because English judges were less frequently residents of the locality in which events took place: Unlike continental judges, so often local clerics or local royal officials, the judges of the common law sat in Westminster, traveling to an alien and somewhat hostile “country” on eyre or on circuit.<sup>188</sup> When in need of local knowledge, they depended on local jurors. They were thus less likely to have direct exposure to the facts of the cases they judged. Moreover, since they were not clerics, they did not take confession.

But most important of all, English common law judges were unlikely to face the continental dilemmas of conscience because they, unlike their continental counterparts, were not charged with entering verdicts. Indeed, from the point of view of the English judge, it could be described as a special glory of the common law that, by leaving the job of the verdict to the jury, it avoided putting the souls of its professional judges in any jeopardy.

So indeed English judges seem to have regarded the matter, as familiar passages from the literature of the common law show. One striking early statement comes from Sir Thomas More. More was Lord Chancellor from 1529-1533. As such, he had charge

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<sup>187</sup>Note the evidence of Jeremy Taylor, *Ductor Dubitantium*, of *The Rule of Conscience in all her General Measures; Serving as a great Instrument for the determination of Cases of Conscience* (London: Printed by R. Norton, for R. Royston, Bookseller to the King’s Most Sacred Majesty, 1676), 65: “[H]ow if [the judge] sees the fact done before him in the Court? A purse cut, or a stone thrown at his brother Judge, as it happened at Ludlow not many years since?”—evidence not only of what judges might know, but of what the atmosphere in seventeenth-century assizes was like. For a description—including the throwing of a brickbat at a judge—see J.S. Cockburn, *A History of English Assizes, 1558-1714* (Cambridge, 1972), 110. For private knowledge among jurors see John H. Langbein, *The Criminal Trial Before Lawyers*, 45 *U. Chi. L. Rev.* 263, 288 n. 74 (1978); *id.* 290, and the discussion below, text at note.

<sup>188</sup> See generally J. H. Baker, *An Introduction to English Legal History*, 3d ed. (London, 1990), 14-26. For a broad survey of “the Age of the Travelling Justices,” see Alan Harding, *The Law Courts of Medieval England* (London, 1973), 32-123.

of Chancery—itself, as English lawyers understood it, a repository of “conscience”<sup>189</sup>—and as Chancellor, he granted the occasional injunction against the enforcement of a judgment at common law. The result, his biographer reports, was some revealing conflict with the common law judges. When common law judges complained about interference from Chancery, More offered them the opportunity to take over the job of “conscience” themselves. Here is the report of More’s biographer:

[A]s few injunctions as he granted while he was Lord Chancellor, yet were they by some of the judges of the law misliked . . .

[H]e invited all the judges to dine with him in the Council Chamber at Westminster. Where, after dinner, when he had broken with them what complaints he had heard of his injunctions, and moreover showed them both the number and causes of every one of them in order,—so plainly that upon full debating of those matters, they were all enforced to confess that they in like case could have done no otherwise themselves. Then offered he thus unto them: that if the justices of every court—unto whom the reformation of the rigour of the law, by reason of their office, most especially appertained—would upon reasonable considerations, by their own discretions—as they were, as though, in conscience bound—mitigate and reform the rigour of the law themselves, there should from thence forth by him, no more injunctions be granted. Whereunto they refused to condescend.

Then said he unto them: “Forasmuch as yourselves, my Lords, drive me to that necessity for awarding out injunctions to relieve the people’s injury, you cannot

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<sup>189</sup> Baker, Introduction to English Legal History, 122-128. For the connection with conscience as administered in the confessional, *id.*, 127 and 127 n. 59.

hereafter any more justly blame me!” After that he said secretly unto me, “I perceive, Son, why they like not so to do. For they see that they may by the verdict of the jury, cast off all quarrels from themselves upon *them*, which they account their chief defense. And therefore am I compelled to abide the adventure of all such reports.”<sup>190</sup>

Sixteenth-century common-law judges were eager to “cast the quarrels upon the jury,” since the jury “by its verdict” took the responsibility for judgment—so much so that they refused the opportunity More offered them to escape interference from Chancery.

Historians have long used this passage as evidence that common law judges were eager to avoid the “agonies of decision.”<sup>191</sup>

Even more telling descriptions of the attitude of English judges come from the 1660s and after—a time when, as we shall see, the conflict over the moral responsibility for judgment was growing intense. First is a quote from Matthew Hale, writing in the 1660s when he was Chief Baron of the Exchequer. Juries, Hale assumed, made use of “their own knowledge”—something that, as we shall see, was quite normal. And because they used their own knowledge, they relieved the judge of much of the “peril”<sup>192</sup> of judgment:

[T]he jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge . . . and it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.

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<sup>190</sup> William Roper, *The Lyfe of Sir Thomas Moore, Knighte*, ed. James Mason Cline (New York: Swallow Press and William Morrow, 1950), 43-44.

<sup>191</sup> J.H. Baker, *The Oxford History of the Laws of England*, Volume VI: 1483-1558 (Oxford, 2003), 47-48.

<sup>192</sup> On “peril,” see the discussion below footnote.

And to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.<sup>193</sup>

The advantage of jury trial was precisely that it made it unnecessary for the judge to engage in the perilous business of “rul[ing] the matter of fact” and pronouncing the perilous verdict of “guilty.” A few years later John Hawles said much the same thing, in a much less familiar passage to which I will return:

[T]he *Judges* [can put] the *Burthen* . . . upon the Jurors, for *we*, may they say, *did nothing but our duty according to usual Practise, the Jury his Peers had found the Fellow Guilty upon their Oaths of such an Odious Crime, and attended with such vile, presumptions, and dangerous Circumstances. They are Judges, we took him as they presented him to us, and according to our duty pronounced the Sentence, that the Law inflicts in such Cases, or set a Fine, or ordered Corporal punishment upon him, which was very moderate, Considering the Crime laid in the Indictment or Information, and of which they had so sworn him Guilty; if he were innocent or not so bad as Represented, let his Destruction lye upon the Jury &c.* At this rate if ever we should have an *unconscionable Judge*, might he Argue; And thus the Guilt of the *Blood* or *ruin* of an Innocent man when 'tis too late shall be *Bandyed* to and fro, and *shuffled off* from the Jury to the Judge, and from the Judge to the Jury, but really *sticks fast to both*, but especially *on the Jurors* . . . .<sup>194</sup>

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<sup>193</sup> Hale., *Historia Placitorum Coronae* (Clark, N.J.: Lawbook Exchange, rep. 2003) (orig. 1736), 2: 313.

<sup>194</sup> Hawles, *English-Man's Right*.

Like so many other authors, Hawles saw the moral drama of jury trial as a struggle over the “burthen” of the responsibility for judgment—a struggle in which the judges had the upper hand.

Most of these passages are well-known indeed to historians of the common law. Indeed, in light of them, it has become part of our orthodox teaching that jury trial seemed advantageous in part because it spared judges the responsibility for judgment. Thus Pollock and Maitland, the pioneers of the history of the common law, observed that judges sought to avoid, not only “moral” responsibility, but also the dangers of vengeance. The rise of jury trial, they observed, had to be seen against the background of the decline of the ordeal; and it had to be seen as part of an effort to avoid the responsibility for judgment. “[T]he justices are pursuing a course,” they noted:

which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal or successfully made his law, the due proof would have been given; no one could have questioned the dictum of Omniscience. The *veredictum patriae* is assimilated to the *iudicium Dei*. English judges find that a requirement of [jury] unanimity is the line of least resistance; it spares them so much trouble. We shall hardly explain the shape that trial by jury very soon assumed unless we take to heart the words of an illustrious judge of our own day:-  
-“ It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner.” It saved the judges of the middle ages not only from this moral responsibility, but also from enmities and feuds. Likewise it

saved them from that as yet unattempted task, a critical dissection of testimony.”<sup>195</sup>

Most recently, J. H. Baker, made much the same observation: “The judges sought refuge from the agonies of decision,” as he put it; and aimed to make certain that “the ultimate responsibility for a conviction rested on jurors’ consciences.”<sup>196</sup>

Yet if historians have long understood this great advantage of jury trial from the point of view of the judges, they have not really reckoned with the other side of the coin: the consequent discomfort of the jury. To be sure, historians all know that “juror timidity” must have played some role in the dynamic of English criminal justice.<sup>197</sup> But they have not put this in the context of the moral theology whose importance for judges is so well understood. Historians have not grasped the gravity of the moral challenge faced by jurors; and as consequence they have not grasped the original sense of the “reasonable doubt” rule.

Why is this? In large part, it is because historians have been victims of a process of historical forgetting: They have gradually lost the memory of the moral anxieties of judging that haunted our ancestors. James Fitzjames Stephen still well understood those anxieties in the later nineteenth century. But Pollock and Maitland were already perhaps beginning to lose sight of them: To explain the dangers of judging, they felt the need to speak, not only of moral responsibility, but also of “enmities and feuds.” In subsequent decades historians became less and less conscious of the old moral world. There have

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<sup>195</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Union, N.J.: Lawbook Exchange, repr. 1996), 2: 627.

<sup>196</sup> Baker, *Reports of Sir John Spelman*, 2: 43, 138; *sim.* Baker, *Oxford History of the Laws of England*, Volume VI, 47.

<sup>197</sup> Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Jury Trial, 1200-1800* (Chicago, 1985), 65.

certainly always been scholars who understood the old moral dramas, including Radin, and Fraher. But most historians have tried to explain pre-modern fears by anything except the fear of damnation. Some scholars, following Pollock and Maitland, have been able to explain the fears of jurors only by calling them fears of vengeance violence.<sup>198</sup> Other have thought that the fears of jurors were the fears of criminal liability,<sup>199</sup> or a desire to avoid “the perils of undue influence.”<sup>200</sup> Most recently, George Fisher has described the fear of judging as a fear of making “false steps” that could end a career.<sup>201</sup> There is undoubtedly some truth in all of these explanations of the dangers of judging. Nevertheless, in the end all these explanations of the anxiety of pre-modern judging miss the large story. As we shall see, there is no way to explain “reasonable doubt” unless we focus resolutely on the *spiritual* anxieties of judging, as most historians since Stephen have failed to do.

There is another reason, too, why historians have not appreciated the dilemmas of the criminal jury. The moral anxieties of judging are not the only aspect of jury trial that historians have forgotten. There is also critical institutional fact that has been forgotten or misunderstood: Well into the early nineteenth century, jurors were still expected to make use of their private knowledge of the case, at least occasionally.

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<sup>198</sup> David Seipp, Jurors, Evidence and the Tempest of 1499, in John W. Cairns and Grant McLeod, eds., “The Dearest Birth Right of the People of England”: The Jury in the History of the Commonj Law (Oxford, 2002), 91 (fear of “reprisal” and “vengeful litigant[s]”). This is also, surprisingly, the explanation offered by Peter Brown, Society and the Supernatural : A Medieval Change,” in Brown, Society and the Holy in Late Antiquity (California, 1982), 313.

<sup>199</sup> Morris Arnold, Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind, 18 Amer. J. Legal Hist. 267, 268 (1974), and the discussion below, footnote.

<sup>200</sup> Baker, Oxford History of the Laws of England, Volume VI, 47; id., 352.

<sup>201</sup> Fisher, The Jury’s Rise as Lie Detector, 107 Yale L. J. 575, 706. J. H. Baker speaks of “pressures [the judges] would sooner avoid”—pressures, that is, from the interested parties. J. H. Baker, Introduction, in Baker, ed., 2 The Reports of Sir John Spelman (London: Selden Society, 1978), 106.

As we have seen, continental moral theology rested on a core prohibition: Judges were not to use their “private knowledge.” Indeed, it was by scrupulously avoiding any recourse to their “private knowledge” that continental judges could keep themselves safe from the perils of judgment, speaking in their “body” as judge, never in their “body” as witness, maintaining the cool distance of a mere “minister of the laws.”

Yet from the earliest period, juries were not in a position to affect any such stance. On the contrary, they were expected to serve not only as judges but also as witnesses. “Inquests” of various kinds can be dated far back into the Middle Ages, especial ones convoked for purposes of gathering fiscal information. These all involve juries gathered in order to be canvassed about their knowledge of facts. When the great leap in the development of jury trial came sometime during the 1160s and after, this did not change. That great leap came when the monarchy of Henry II established certain proto-juries. These were gatherings of local witnesses from “the vicinage,” the neighborhood, both to resolve property disputes and to serve as a panel of accusing witnesses in criminal matters. The juries convoked for all these purposes were, historians agree, “self-informing”: That is to say, they were understood to be witnesses to the events in issue, capable of making decisions from their direct personal knowledge. It was these early forms of jury trial were generalized, after a brief period of hesitation, as the normal form of English adjudication after the effective abolition of the ordeal in 1215.<sup>202</sup>

As anyone familiar with the canon tradition can immediately see, this created a morally delicate situation: Early English jurors, once they were charged with the

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<sup>202</sup> Baker, Introduction to English Legal History, 86-90; Green, Verdict According to Conscience, 3-4; Roger de Groot, The Jury of Presentment before 1215, 26 AJLH 1 (1982); Mike MacNair, Vicinage and the Antecedents of the Jury, Law and History Review 17 (1999): 537-90. For literature and debate on the character of the medieval self-informing jury, see Daniel Klerman, Was the Jury ever Self-Informing?, 77 S. Cal. L. Rev. 123 (2003).

obligation of entering verdicts, mixed the two “bodies,” serving both as judges and as witnesses. Indeed, as Mike MacNair has shown, early jurors were defined as “witnesses” through the technical vocabulary of canon law.<sup>203</sup> Moreover, and more importantly, they would continue to be witnesses for many centuries. This deserves to be underlined, since historians have not gotten the history quite right.<sup>204</sup> Historians have generally supposed that jurors ceased making use of their private knowledge before the end of the Middle Ages. Thus historians have observed that jurors began to hear witness testimony in court by the fifteenth century, and especially by the sixteenth.<sup>205</sup> On the basis of this fact, and on the basis of a seriously misinterpreted passage from Saint Thomas More,<sup>206</sup> they have

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<sup>203</sup> Mike MacNair, *Vicinage and the Antecedents of the Jury*, *Law and History Review* 17 (1999): 537-90. Green, *Verdict according to Conscience*, 11, also makes the important observation that Angevin already put jurors in a more difficult position to the extent it substituted blood punishments for an earlier system of feud compensation.

<sup>204</sup> Notably John H. Langbein, *The Criminal Trial Before Lawyers*, 45 *U. Chi. L. Rev.* 263, 299 n. 105 (1978). See the further discussion below, n.

<sup>205</sup> Green, *Verdict According to Conscience*, 108-110.

<sup>206</sup> J. H. Baker, for example, writes: “Sir Thomas More stated quite explicitly in 1533 that jurors were not be regarded as witnesses, but as judges of fact.” J. H. Baker, *Introduction*, in Baker, ed., *2 The Reports of Sir John Spelman* (London: Selden Society, 1978), 109; *sim.* Baker, *Oxford History of the Laws of England*, Volume VI, 361-362. This is a misinterpretation. More’s tract, written as a response to Christopher St. German, turned entirely on the question of what sorts of witnesses could properly testify before courts investigating heresy through the use of inquisitorial procedure. See generally John Guy, Ralph Keen, Clarence Miller and Ruth McGugan, *The Complete Works of St. Thomas More* (New Haven: Yale, YEAR), lxxviii-xciv. The question in particular was whether accused heretics could be compelled to undergo purgation, rather than being tried by juries. *Id.*, liii-lvii. St. German defended jury trial, holding that jurors’ “conscience” offered adequate guarantees: “that al his honest neighbors wene that he were one [i.e. a heretic], and therefor in their conscience dare not swere, that he is any other.” *Id.*, Appendix, 356. More disagreed, and it was in this context that he insisted that jurors were not “witnesses.” They were not the sort of witnesses it was necessary to examine in a case of heresy, for which More viewed inquisitorial procedure as proper. More’s passage says nothing whatsoever about whether jurors might have private knowledge. It simply says that they cannot be closely examined with regard to their knowledge of particular facts, as would be the case with witnesses subject to inquisitorial procedure. Instead, their verdict, qua general verdict, must be accepted:

[B]ycause I spake in myne apolyge of such witnesses in felonye: thys good man [i.e. St. German] maketh here a doute/ what manner wytnesses I mene/whyther I mene y<sup>c</sup>.xii. men that are the iury, or other wytnessys that are brought into the court for to enforme them. . . . But veryly as for me, I shal put hym out of that dowt, that I ment not them. For I neuer toke the .xii. men for wytnessys in my lyfe. For why shold I call them witnesses, whose verdycte the iudge taketh for a sure sentence concernynge the facte, without any examynacyon of the cyrcumstaunces, wherby they know or be ledde to byleue theyr verdicte to be trew?

*Id.*, p. 149. Within the context of More’s argument, this had the important implication that jury trial was inappropriate in heresy cases, where close examination of the testimony was, to More’s mind, essential. It

generally concluded that jurors ceased in any sense to be witnesses by the early modern period.

Yet this is clearly false. Even once the jurors started hearing witnesses in court, they were still expected to make use of their own independent knowledge of the case, at least occasionally. Thus in 1768 Blackstone could still declare, matter-of-factly, that “evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowlege.”<sup>207</sup> If jurors had any independent knowledge of the case, Blackstone explained, they should simply testify to what they knew in open court, so that everyone present could evaluate it.<sup>208</sup> The eighteenth-century moralist literature continued to assume that jurors might have private knowledge. Thomas Gisborne’s 1771 Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain, for example, explained how jurors were to treat evidence—including evidence they had from their own “private knowledge”: “The special juror is not less obliged in conscience than the grand juror to diligence in investigating all the circumstances of the matter at issue; *to promptness and accuracy in disclosing additional facts known to himself*; and to incorruptible integrity in pronouncing upon the whole evidence.”<sup>209</sup> This may not have happened frequently in places like eighteenth-century London. But then again it may: We have reports of such cases from

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had minimal bearing, though, on the structure of ordinary jury trial in his time, beyond confirming the point that a general verdict was a general verdict, and that jurors were not individually examined.

<sup>207</sup> Bl.Comm. 3:368.

<sup>208</sup> It is worth noting that this was the same solution famously proposed on the Continent by Cajetan. See above, text at note.

<sup>209</sup> Thomas Gisborne, An Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain, 4<sup>th</sup> ed., 2 vols. (London: Printed for B. and J. White, and Cadell and Davies, 1771), 2:460. An interesting passage in Gisborne explores the problems of commercial matters in particular: “In deciding on mercantile proceedings, let him be guided by law, and not by what may have been the practice, perhaps the reprehensible practice, of himself or his friends in a similar instance.” Id.

both the seventeenth and eighteenth centuries.<sup>210</sup> Well into the nineteenth century, there were reported cases in which jurors did make use of the extrinsic knowledge, and were even instructed by the court to do so.<sup>211</sup>

Jurors thus potentially judged on the basis of “private knowledge” from the beginning, and would potentially do so for a long time. Yet the law of conscience made it clear that the safer path for the soul lay in studiously abjuring any judgment on the basis of “private knowledge.” Indeed, from the point of view of moral theology, as we shall see in Section VII, it did not matter all that much whether jurors only *potentially* had such knowledge. What moral theology required was a kind of spiritual exercise: a determined effort to keep the “body” of the judge separate from the “body” of the witness. The very structure of the office of the juror made this spiritual exercise impossible.

Nor could anxious jurors take refuge in the other spiritual strategy adopted by continental judges: They could not claim that their decision was dictated by a strictly rule-bound heuristic; they could not assert, with Gratian, that they were mere “ministers of the law,” and that it was the law that killed the defendant. On the contrary: They were personally charged with entering the perilous verdict of “guilty,” and they were charged with doing so “according to conscience.” “[S]ay what is right according to your

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<sup>210</sup> For the seventeenth century: Bennet and the Hundred of Hartford (1650), in Style, *Narrationes Modernae* (1658), 233 (Mich.1650) (CORRECT CITATION); Fitz-James v. Moys (1675) in Siderfin, *Reports*, 133 (Pasch. 15 Car.II) (CORRECT CITATION); for the eighteenth century: Langbein, *Criminal Trial Before Lawyers*, 263, 288 n. 74 (1978); *id.* 290.

<sup>211</sup>[GET WIGMORE FOR ENGLISH CASE]. For American examples: *Parks v. Boston*, 32 Mass. 198, 1834 Mass. LEXIS 4, 15 Pick. 198 (1834) (court instructed jury to make use of its private knowledge); *Sam v. State*, 31 Tenn. 61, 1851 Tenn. LEXIS 17, 1 Swan 61 (1851) (juror made use of private knowledge). Nor is this surprising: Most communities were still small enough that it cannot have been unusual for jurors sometimes to possess extrinsic knowledge of the case.

conscience,” jurors were told as early as 1185.<sup>212</sup> Or as fifteenth- and sixteenth-century jury instructions put it: “[D]o in this matter as God will give you grace, according to the evidence and your conscience”<sup>213</sup>; “[D]oe that which God shall put in your mindes to the discharge of your consciences”;<sup>214</sup> or even more simply “Doe in it as God shall put in your hearts.”<sup>215</sup> Everything for jurors rested on whether they had properly heeded the voice of God within them; and if they had not, they risked mortal sin.

The result was a peculiarly English dilemma. Common law *judges* could feel entirely safe from the spiritual dangers of pronouncing verdicts on the basis of the knowledge and evaluation of facts. Indeed, they were in far more advantageous moral perch than their continental counterparts. After all, the common law lodged the power to find facts and enter verdicts, not in them, but exclusively in the jurors. But the jurors, by contrast, were in a difficult position: It was well understood that they might indeed

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<sup>212</sup> The case in question involves an interesting figure, Abbot Samson of Bury St Edmunds, who, as Susan Reynolds notes, “had studied the liberal arts and scriptures before he become abbot in 1182, [and] was then able to learn enough different kinds of law on the job to serve as a judge delegate, astound an undersheriff by his knowledge, and be labeled a barrator.” Reynolds, *The Emergence of Professional Law*, *Law and History Review* 21 (2003): 362. Here is the report as it comes down to us:

But when the church of Boxford was vacant and a recognition [i.e. a jury] had been summoned to deal with the matter, five knights came, tempting the abbot and asking him what they should swear concerning it. The abbot, however, refused to give or promise them anything, but said: “When it comes to making oath, say what is right according to your conscience.” But they retired in indignation, and by their oath deprived him of the advowson of that church. . . .<sup>212</sup>

Raoul C. van Caenegem, *English Lawsuits from William I to Richard I* (London: Selden Society, 1991), 2: 615 (no. 568). Discussed in Raoul C. van Caenegem, *La Conscience du Juge dans l’Histoire du Droit Anglais*, in Jean-Marie Carbasse and Laurence Depambour-Tarride, *La conscience du juge dans la tradition juridique européenne* (Paris: P.U.F., 1999), 274. An early use of the word “conscience,” in L. J. Downer, *Leges Henrici Primi* (Oxford, 1972), 264 (chap. 87, 3a), is of no relevance. It is not entirely clear whether “conscience” in this passage means “knowledge” (as would have been the case earlier in the twelfth century) or “the exercise of moral judgment.” What is clear is that concern with conscience was present from an early date, and that juries were self-informing.

<sup>213</sup> Quoted in J. H. Baker, Introduction, in Baker, ed., *2 The Reports of Sir John Spelman* (London: Selden Society, 1978), 112 (1465).

<sup>214</sup> Smith *De Republica Anglorum*, ed. Dewar, 114.

<sup>215</sup> Quoted in Langbein, *Prosecuting Crime*, 50. The “heart” and the conscience were associated in the language of the day: “*conscientia* is *cordis scientia*” wrote William Fulbeck. Fulbeck, *Direction or Preparative to the Study of the Law*, ed. Peter Birks (Brookfield, VT, 1987), 87 (1599). For the role of “conscience” in later medieval English Law, see Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge, England, 1990), 132-154.

sometimes judge on the basis of “private knowledge”; and at the end of the trial they were to pronounce the perilous words “guilty.”

## VI. The Immunity of the Medieval Criminal Jury

By the seventeenth and eighteenth centuries, this resulted in a kind of moral crisis of jury trial—a moral crisis that produced the “reasonable doubt” standard. The crisis did not in fact arrive until the seventeenth and eighteenth centuries, though. This was because during the Middle Ages criminal jurors were not compelled to enter general verdicts in the morally fraught business of inflicting blood punishments.

There *were* important conflicts in the Middle Ages, but they almost all involved the civil jury, not the criminal jury.<sup>216</sup> Indeed, medieval civil juries seemed to have cared a lot about this issue: They often resisted entering verdicts. As David Seipp has observed, surveying the evidence of the fourteenth and fifteenth centuries, jurors regularly tried to “shift the responsibility [of entering verdicts] to the person of the

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<sup>216</sup> The conflicts begin in the thirteenth century, and they begin over the assize of novel disseisin. The assize was in a sense a quasi-criminal procedure, since it presumably involved lawless seizures of real property. Nevertheless, it did not involve blood punishments, and thus did not belong among the classic criminal actions of the pre-modern world. Despite that there were intense conflicts over jury verdicts in the assize of novel disseisin during the thirteenth century. Those conflicts involved, in particular, the attain. As early as 1202, we have a record of jurors in the assize of novel disseisin being subjected to the attain, Curia Regis Rolls, 2: 97-98. and the same happened repeatedly thereafter. H.G. Richardson and G.O. Sayles, *Select Cases of Procedure without Writ under Henry III* (SS 60) (London, 1941), lxxxvii-lxxxix. Some kind of conflict lay behind this whose terms are not entirely clear to us now: Jurors for some reason were giving verdicts unacceptable to the Crown. In 1285, though, the massive legal reforms of Edward I brought relief. The Second Statute of Westminster, in that year, permitted jurors in the assize of novel disseisin to offer special verdicts, finding the facts in the case while praying the justices to arrive at the actual verdict. 13 Edw. I Stat. West. Sec. 30 (1285), in *Statutes of the Realm*, Vol. I: 86. After 1285, juries ceased the chance given to them by the Statute of Westminster, repeatedly entering special verdicts in the Assize of Novel Disseisin. Morris Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 *ASLH* 267, 269-271 (1974). The coercion of jurors thus took place outside the assize of novel disseisin thereafter.

judge.”<sup>217</sup> In particular, civil jurors sought an important privilege: Instead of entering the general verdict, they sought to enter special verdicts, making mere findings of fact while forcing the judge to pronounce the perilous judgment on ultimate liability. Civil jurors were very eager to acquire this privilege: Indeed, Parliament petitioned the King in 1348 to allow jurors in all civil cases to enter special verdicts rather than general verdicts.<sup>218</sup> That petition was brusquely denied, though<sup>219</sup>: In most civil cases,<sup>220</sup> medieval jurors were compelled to enter the general verdict, even though they did so, in the language of medieval law, “at their peril.”<sup>221</sup> In fact, civil juries that refused to enter the general

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<sup>217</sup> Seipp, *Jurors, Evidences and the Tempest of 1499*, 90.

<sup>218</sup> 34 Edward III, c. 7.:

21. [Petition]: ITEM prie la dite Commune, q~ en chescun Enquest jurre, & grant Assise, les Jurours puissent dire la verite du faite si veullent come en Assise de novele disseisine.

[Royal response] : Soit tenez la Lei q’ad estez usez en ce cas cea en arere.

<sup>219</sup> Although the King denied essentially all the requests put the commons with regard to the management of justice, no other was denied so categorically. The other formulas of denial were milder, as in petition 12: “Il serroit a faire nouvelle Ley, dont le Roi n’est pas avys unqore.”

<sup>220</sup> That is, outside the Assize of Novel Disseisin. See above note.

<sup>221</sup> The interpretation of this phrase, while not easy, is important for the argument of this Article.

Nevertheless, in the hope of keeping the text to a readable length, I place the discussion here in the margin. The language of the Statute of Westminster included a term that would remain at the center of debates for centuries thereafter: Jurors in the Assize of Novel Disseisin entered the general verdict, the Statute explained, at their “peril.”:

And also it is Ordained, That the Justices assigned to take Assises shall not compel the Jurors to say precisely whether it be Disseisin or not, so that they do shew the Truth of the [Deed,] and require Aid of the Justices; but if they of their own head will say, that it is Disseisin, their Verdict shall be admitted at their own Peril [sub suo periculo].

13 Edw. I Stat. West. Sec. 30 (1285), in *Statutes of the Realm*, Vol. I: 86. But what “peril” was it that the jurors faced? Scholars generally interpret this passage to refer to the “peril” that they would be attainted. Morris Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 *Amer. J. Legal Hist.* 267, 268 (1974). This certainly may be right: What thirteenth-century jurors feared may simply have been the danger of prosecution. Nevertheless, it is important to observe that “peril” may have had another aspect already in the thirteenth century, as it clearly would later. The “peril” in question may also have been not the peril of attain in this world, but the peril of damnation in the next. There is some evidence for this in Bracton, the treatise-writer of a couple of decades earlier. To Bracton, the issues of the assize of novel disseisin were the familiar ones of moral theology. Here is how he described the judge’s evaluation of the jury. Everything depended on whether what they said was “certum” or “incertum.” This was the familiar language of moral theology, dating back to Gregory the Great. See above, Section. In cases in which the judgment was certain, Bracton explained, there were two possibilities: Either the jurors were correct, in which case their judgment stood; or else they had perjured themselves, in which case they were vulnerable to the attain. In the second case, though, the case in which judgment was uncertain, matters were different. Then there was “doubt,” which was “perilous.” Here, he explained, the judge must examine the jurors carefully:

verdict were subject to harsh measures: They could be prosecuted through the attaint. This was a criminal procedure for perjury, which by the end of the Middle Ages subjected jurors to imprisonment and the loss of all their goods. Indeed, from the fourteenth century onward, the Crown progressively tightened the screws on civil juries, forcing them to enter the general verdict.<sup>222</sup> Only in the sixteenth century did civil juries acquire the privilege of entering special verdicts.<sup>223</sup>

With criminal juries, however, the story was different. Medieval criminal juries were not threatened with the attaint; and they acquired a privilege that they retained until

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Si autem incertum dixerunt iudex examinare debet, ut de incerto faciat certum, de obscuro clarum, de dubio verum: alioquin anceps et periculosum erit sacramentum et inde sequi poterit fatuum iudicium.

Bracton, III: 74. If we read the Statute of Westminster against the background of this passage, we can surmise that the English drama of 1285 was not different from the contemporary continental dramas. In cases of uncertainty, jurors did not want the “peril” of judgment. Yet if jurors were dispensed from it, the “peril” would pass to the judges instead.

The question of “peril” was particularly associated, as we might expect, with giving the general verdict.

Cf. Coke’s report of Rawlyns’s Case (Mich. 29 & 30 Eliz.):

And Wray, C.J. said, that it was adjudged in Pleadal’s case, in 8 Eliz. that because a jury did not find such a lease by deed indented which took its operation only by conclusion, intending that they being sworn *ad veritatem dicendam*, and that estoppels conclude the parties, but not the jurors, to say the truth, were therefore attainted and had judgment accordingly: for the justices in the same case held, that the interest of the land as to parties and privies was in a manner by such conclusion bound, and no conclusion shall be by such deed indented after the term ended, as Wray, C.J. held; and in such a case the jury ought, if they will not find the special matter, and leave it to the judgment of the law, to find “at their peril” according to law.

4 Co. Rep. 53b. This was also true of Hale, in the passage quoted below, text at note.

“Peril” remained a standard term thereafter, in ways that may deserve their own history. Baker notes that “[t]he years books are full of references to the ‘peril’ or ‘ambiguity’ of the ‘lay gents’ who constituted the jury . . . .” J. H. Baker, Introduction, in Baker, ed., 2 The Reports of Sir John Spelman (London: Selden Society, 1978), 103. Baker interpreted the “peril” in question as the peril of favoritism, *id.* 103-104, and that again may certainly have been part of it. See also Baker, Oxford History of the Laws of England, Volume VI, 351-352. There is no reason why such an open-ended term should have had no ambiguity.

<sup>222</sup> For the denial of food and drink during their deliberations, see Baker, Oxford History of the Laws of England, Volume VI, 365-369; for the later medieval attaint,

<sup>223</sup> Baker, Introduction to English Legal History, 99; Baker, Oxford History of the Laws of England, Volume VI, 400-403; S.F.C. Milsom, Historical Foundations of the Common Law, 2d ed. (Toronto, 1981), 77 (Slade’s Case). The relationship between special and general verdicts raises issues that I do not discuss in this Article. Historians recognize that the doctrinal development of the common law depends on the rise of the special verdict, which allows room for the judges to discuss nice questions of law. This too could be related in revealing ways to the problem of avoiding moral responsibility for judgment, but I leave that issue aside.

the nineteenth century<sup>224</sup>: the medieval system spared criminal juries the “peril” of delivering judgment by allowing them to enter special verdicts.<sup>225</sup>

The medieval criminal jury’s immunity to the attaint has always been regarded as somewhat mysterious<sup>226</sup>: In theory, the attaint did apply to criminal juries, in an asymmetrical form: As the treatise-writer Bracton explained it in the thirteenth century, the defendant could not bring an attaint if he was convicted.<sup>227</sup> The Crown by contrast was entitled to bring an attaint, in theory, in case of an acquittal. However, as Thayer demonstrated a century ago, there is essentially no evidence that the Crown ever did so.<sup>228</sup> Medieval criminal juries were simply not attained. Indeed, the criminal attaint had to be introduced by separate statue in 1534, when the Tudor Crown was beginning to crack down on criminal juries, and even then it was introduced only “in Wales and its Marches.”<sup>229</sup>

So why were medieval criminal juries not attained? Thayer spent many pages on this problem, but could only propose an explanation that is obviously wrong.<sup>230</sup> Yet the

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<sup>224</sup> See 2 William Hawkins, *A Treatise of the Pleas of the Crown* 619 (London: Sweet, 1824) (“It is settled . . . that a jury may give a special verdict in any criminal case . . . .”)

<sup>225</sup> Certainly the jury did sometimes enter the general verdict. Green, *Verdict According to Conscience*, 17-18.

<sup>226</sup> Green, *Verdict According to Conscience*, 19.

<sup>227</sup> There was a technical reason for this: The accused, by “putting himself upon the country,” had offered the jurors as his witnesses, and could not therefore subsequently raise doubts about their credibility.

<sup>228</sup> James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (New York, 1969) (ORIGINAL DATE), 156-162.

<sup>229</sup> Statute of 26 H. VIII. c. 4.

<sup>230</sup> The Crown, Thayer argued, enjoyed overwhelming procedural advantages. In particular, only the Crown could offer witnesses. In light of this immense procedural leg up, the medieval Crown had no need of the attaint in the Middle Ages; it could be sure of winning anyway. Thayer, *Preliminary Treatise on Evidence*, 157-162. This explanation is hardly convincing, though. As Green has shown, it is not in fact the case that only the Crown could offer witnesses. Green, *Verdict According to Conscience*. In any case, is not obvious why a party with some legal advantages would refrain from using others. Indeed, there is an odd element of illogic in Thayer’s argument: The Crown would only have needed the attaint in cases in which its other procedural advantages had not given it victory at trial. Finally, and perhaps most important, Thayer’s explanation cannot account for later developments. As we shall see, the Crown *did* begin prosecuting criminal juries in the sixteenth century, through Star Chamber. Yet its other procedural

right answer is not all that difficult to identify. Thomas Green offers it: “[T]he fact that the defendant’s life was at stake” made the attainder seem somehow inappropriate in criminal cases, Green suggests.<sup>231</sup> Just so: As we have seen, in Christian moral theology, the infliction of blood punishments raised special concerns; and criminal trials resulted in theory in blood punishments.<sup>232</sup> If we keep this moral theology in mind, we have no difficulties in explaining why the medieval criminal jury would have been treated differently: Forcing jurors to enter verdicts in cases of blood would have put the system under intolerable moral pressure.

Cases of blood created moral pressure. This fact also helps account for the second privilege of medieval criminal juries: They were spared the “peril” of the general verdict by being allowed to enter special verdicts. Green has traced the rise of special verdicts in criminal trials in elegant detail. It was through permitting special verdicts that medieval law dealt with matters of diminished responsibility. In cases of homicide, the jury might desire to bring in a verdict of manslaughter or self-defense. Yet the indictment permitted only the verdict of murder. The law of the fourteenth century thus offered jurors a way out: It allowed them to enter special verdicts, often finding demonstrably fictitious facts.<sup>233</sup>

Entering special verdicts was a significant privilege, denied to most civil juries: In the equivalent cases, most civil juries were forced to enter the general verdict. And

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advantages were no less imposing then. There must have been some other reason why the medieval Crown declined to prosecute criminal juries.

<sup>231</sup> Verdict According to Conscience, 20. At 66, however, Green leaves the same question unanswered.

<sup>232</sup> Indeed, as Green has pointed out, the introduction of the power of the Crown through the jury of presentment changed the calculus. In earlier periods, homicides could be dealt with through money compensation. But once the Crown became involved, mutilation and execution became the natural consequence of a criminal conviction. Green, Verdict According to Conscience, 9-10. This meant that the stakes were indeed especially high—not just for the defendant, but also for the jurors.

<sup>233</sup> Green, Verdict According to Conscience, 53-59; Baker, Introduction to English Legal History, 95-96.

indeed, to understand why criminal jurors had this privilege, we must read the history of criminal juries alongside that of their civil counterparts. The leading case permitting criminal juries to enter special verdicts dates to 1329. The date is significant. The early fourteenth century was generally a time of crisis and change for jury trial.<sup>234</sup> The year 1329 in particular comes in the midst of a period when the new regime of Edward III was clamping down steadily on civil juries, with one statute enhancing the threat of attain in 1326-27, and one further enhancing the attain in 1331.<sup>235</sup> There is evidence of criminal jurors too being browbeaten when they refused to give the general verdict in 1321.<sup>236</sup> It was thus in an atmosphere of real tension that it was held that the criminal jury could

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<sup>234</sup>The early fourteenth century saw “a major readjustment of the Crown’s administration of criminal justice.” This involved the decline of the Eyre and the rise of special commissions of trailbaston and oyer et terminer. See Green, *Verdict According to Conscience*, 20-21; Hunnisett, *Medieval Coronor*, 114-115; Richard Kaeuper, *Law and Order in Fourteenth-Century England: The Evidence of Special Commissions of Oyer and Terminer*, *Speculum* 54 (1979): 738-742 [734-784]. Alan Harding, *Early Trailbaston Proceedings from the Lincoln Roll of 1305*, in R.B. Hunnisett and J.B. Post, eds., *Medieval Legal Records edited in memory of C.A.F. Meekings* (London, 1978): 130-138. By 1352, it also resulted in a clear distinction between the jury of presentment and the trial jury. Stat. 25 Edw. 3, stat. 5, c. 3. Green, *Verdict According to Conscience*, 21-22.

The evidence of Bracton suggests that in the thirteenth century criminal inquiries were being conducted in more or less the continental way. Bracton describes a judge acting very much like a romano-canonical inquisitor, investigating “fama,” local rumors and reputation:

*Iustitarius igitur si discretus sit, cum propter famam et suspicionem per patriam debeat veritas inquiri an indicatus de crimine ei imposito culpabilis sit vel non, imprimis debet inquirere, si forte dubitaverit et jurata suspecta fuerit, a quo vel a quibus illi duodecim didicerint ea quae veredicto suo proferunt de indictato, et audita super hoc eorum responsione de facili perpendere poterit si dolus subfuerit vel iniquitas. Dicit forte aliquis vel major pars iuratorum, quod ea quae ipsi proferunt in veredicto suo didicerunt ab alio tali, et sic descendere poterit interrogation et responsio de persona in personam usque ad aliquam vilem et abiectam personam, et talem cui non erit fides aliquatenus adhibenda.*

Bracton II: 404. If judges were taking the active role in examining jurors implied by this passage, then criminal juries were not confronted with giving the general verdict in the full sense. The responsibility for finding the facts in such a case would rest with the judge. Indeed, Bracton implied exactly that. If the judge did not carefully examine the jury, he warned, he would be adopted the morally dangerous position of Pontius Pilate: “Et ita inquirat ne dicatur Ihesus crucifigitur et Barrabas liberator.” *Id.* The later thirteenth-century judge as Bracton presents him seems to have shared in the task of entering judgment, and therefore in the ominous moral responsibility.

<sup>235</sup> ST. 1 Edw. III c. 6; 5 Edw. III c. 7. For the general chronology, see 1 Holdsworth, *A History of English Law* 161-165 (1903) [UPDATE EDITION!]

<sup>236</sup> *Lacer v. John, servant of Serjeant Cambridge* (1321), 86 Selden Society 142, 143. Quoted and discussed in Baker, *Introduction to English Legal History*, 95 and 95 n. 38.

avoid the general issue by entering a special verdict.<sup>237</sup> The fact that criminal juries acquired this privilege at the height of a period in which civil juries were being disciplined suggests the same conclusion suggested by the criminal jury's immunity to the attain: The English Crown was conscious of the special moral problems of the criminal jury.

The immunity of the criminal jury to attain, and its privilege of entering special verdicts, were perhaps enough to guarantee that medieval criminal jurors would not face any of the worst dilemmas of the Christian law of conscience. The story is not complete, though, without mentioning one further aspect of medieval justice that offered criminal jurors some measure of moral comfort: Courts could avoid inflicting blood punishments in some instances, by allowing the accused the benefit of clergy. Benefit of clergy was a device by which accused persons were treated as fictive members of the clergy. This meant that they were subject only to the punishments inflicted by the Church. Yet the Church was forbidden to inflict blood punishments, which meant that defendants accorded benefit of clergy would neither be executed nor mutilated. Benefit of clergy was became "a regular means of escape from the mandatory death penalty" during the fourteenth and fifteenth centuries,<sup>238</sup> especially beginning in 1352<sup>239</sup>—that is to say, within a couple of decades after criminal juries acquired the privilege of giving special verdicts. This measure too would have eased the moral pressures on the criminal

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<sup>237</sup> 3. E. 3. *Intinere North*. Fitz. Coron. 284. The jury found facts that presented a classic case of self-defense. For the pattern of fourteenth-century self-defense cases, see Green, *Verdict According to Conscience*, 36. The fact findings in these special verdicts may often have been false, as Thomas Green argued. *Id.*, 35-46. The court accepted the special verdict, then entered judgment for murder. Thereafter the King pardoned the offender. This solution—the King's pardon—was thus the same one offered by Gascoigne seventy years later as a remedy for the case in which the judge convicted despite his private knowledge of innocence.

<sup>238</sup> Baker, *Introduction to English Legal History*, 587.

<sup>239</sup> Statute of 25 Edw. c. 4.

jury; and it too may in some measure reflect a concern about the moral dilemmas of the criminal judging.

There is in short no way to understand the medieval criminal jury unless we remember the intensity of the moral pressures felt by anyone deciding cases of blood. To be sure, moral pressures were not the only kind that medieval criminal jurors experienced. There were certainly other pressures as well. As historians have shown, there were the dangers of vengeance.<sup>240</sup> Historians have also amply shown that jurors were also susceptible to financial inducements and threats—especially jurors who were not themselves persons of substance in the community.<sup>241</sup> Both medieval and early modern legislation show considerable eagerness to keep poor men off juries, so as to keep the trial process safe from corruption.<sup>242</sup> Such concerns were certainly present: It would be quite wrong to explain every aspect of medieval criminal jury trial by reference to the moral dangers of bloodshed.

Nevertheless, there remain fundamental aspects of jury trial that cannot be understood unless we focus on the specifically moral dangers felt by jurors. Financial inducements and physical threats would have been just as much a danger in civil trials as criminal ones. Yet criminal matters were treated specially. The threat of juror corruption was especially a threat were jurors were low-status persons: It “varied in inverse proportion to wealth.”<sup>243</sup> Yet as the evidence of later centuries will show, there was plenty of anxiety about the pressures even felt by the most upstanding and substantial

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<sup>240</sup> Seipp, *Jurors, Evidences and the Tempest of 1499*.

<sup>241</sup> E.g. J. H. Baker, Introduction, in Baker, ed., *2 The Reports of Sir John Spelman* (London: Selden Society, 1978), 107; Cockburn, *History of English Assizes*, 113-114; Green, *Verdict According to Conscience*, 22.

<sup>242</sup> *Id.*

<sup>243</sup> Baker, *Oxford History of the Laws of England*, Volume VI, 353-355.

members of the community; and those pressures were, as we shall see, very clearly moral ones.<sup>244</sup> Criminal trial mattered because it was *criminal* trial; and that meant that it was a moral trial for the Christian juror, as well as a legal trial for the accused.

At any rate, at the end of the Middle Ages, the common law had developed mechanisms that effectively shielded criminal jurors from moral pressure. William Staunford summarized the standard medieval law in his mid-sixteenth-century guide to criminal law. Staunford spoke in the familiar language of moral theology: the key question was whether the verdict in murder cases was “dowtful”:

As for the verdict “not guilty”: It is not always necessary to give the general verdict, since if the fact is such, that it is doubtful [dowtful] to the members of the jury, they are permitted to disburden themselves [pour lour mieulx discharge], by giving a special verdict, or as it is known a verdict at large, just as much in cases of felony as in the assize [of novel disseisin] or trespass, and this appears in the verdict that finds that the defendant has killed in self-defense. . . . And just as they can give a special verdict in a case of self-defense, so can they do it in the case of a homicide *per infortunium* . . . [or] chance medley . . .<sup>245</sup>

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<sup>244</sup> Below, Section VIII.

<sup>245</sup> Sir William Staunford, *les Plees del Coron* (repr. New York: Garland, 1979), 165:

Sur lissue de rien culpable: nest tous foits requisit daver un general verdit, quar si le fact est tiel, que il est dowtful a eux del iurre, silsoit felonie ou non : ils posent pour lour mieulx discharge, doner un special verdit, cestascavoir verdit a large, auxibien in cas de felonie, come in assise ou trespass, et ceo apiert in le verdit que trova que un tuast auter in son defens. Quar cestuy qui est arraigne, ladoit pleder de rien culpable, et unquore in le verdit : le iurie peut exprimer tout le circumstance del fact, & concluder que il luy tuast in son defense, & ceo apiert, titulo Coron in Fitz. P. 226. P. 284. P. 286. & P. 287, & H.44.E.3.P.94. Auxi la apiert, que le court requirast de eux plus special verdit, que a dire que il luy tuast in son defence.s. le court examinast le iurre del circumstance del fact, quel quant le iurie aver disclose : ilz ceo [aiugoient ?] contrarie a ceo que le iure aver trove. s. que il ne luy tuast se defendendo, eins come felon quod nota. Et come ilz poient doner un special verdist del tuer dun in son defens : issint poient ilz doner special verdit del tuer dun per misfortune, ou que le person qui tua ou fist le homicide de fuist de non sane memorie, al temps que il luy tuast, ou auter tiel matter : que prova que le fact ne fuist felonie come sils trovont le chose emblee : destre in value forsque.10.d.& que il fuist emblee del person de cestuy qui fuist

Death and doubt: These were the great issues. Coke too cited the same doctrine at the end of the century. For him too, the need for special verdicts arose in cases where the jury experienced “doubt”: “[N]ote, reader, in all cases when jurors find the special matter doubtful in law pertinent and tending to the issue which they are to try, there the Court ought to accept it. . . .”<sup>246</sup> Death and doubt presented the great challenges for the criminal jury.

## VII. The Crises of the Seventeenth Century

If matters had rested as they were in the Middle Ages, there would have been little need to apply the law of conscience to criminal jurors in cases of blood. But beginning in the sixteenth century, things changed, and starkly. Princely governments in every part of sixteenth-century Europe embarked on tough crackdowns on crime. The Tudor Revolution in Government, as G.E. Elton famously called it, made efforts typical of the age, and in particular sought to discipline criminal juries. “A virtual revolution was underway from the mid-fifteenth century,” as the English Crown set out to bring criminal juries to heel.<sup>247</sup> In particular this involved harsh discipline for criminal juries that refused to enter the general verdict.<sup>248</sup> By 1516, a new actor came in: Star Chamber.<sup>249</sup>

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owner de ceo, per que il fuist pendus, & unquore lenditment ne conteina ascun robberie fait al person. Mesme ley est si un arraine de murder, pleda de rien culpable, et est trove que il luy tua per chance medley, ou in son defense, et nemy de malice prepense, come apiert.T.26.H.8.f.6. ou si deuz sont enditz come principalx, & est trove qu lun fist le felonie per le procurement lauter, mes que cestui qui procure, ne fuist pas present al fesance del felonie. Et issint cases home purrost imaginer sauns number, in queux special verditz, sur le general issue tendu : serront bons.

<sup>246</sup> 9 Co. Rep. 14a. (=English Reports 752).

<sup>247</sup> Green, Verdict According to Conscience, 105, and generally 113-118.

<sup>248</sup> In part, this effort involved raising the property qualifications for jury service, so that jurors would be less subject to pressure. Green, Verdict According to Conscience, at e.g. 114.

Star Chamber took cognizance of criminal jury misconduct for the next century and a quarter. Juries were bound over to Star Chamber for punishment throughout the sixteenth century, and sometimes punished by judges as well.<sup>250</sup> Star Chamber actively disciplined recalcitrant criminal juries until it was abolished in 1641. Even after 1641, the judges of the Common Law Courts continued fining and imprisoning criminal jurors,<sup>251</sup> probably with increasing frequency during the 1660s in particular.<sup>252</sup> The solutions of the medieval common law to the problems of conscience were thus radically rejected during the first period of the rise of the early modern state, as criminal juries would subjected to the same pressures that civil juries had been a couple of centuries earlier.

Meanwhile, another factor too would have increased the moral pressure on early modern criminal juries in the sixteenth and seventeenth centuries: The state steadily cut back on the range of offenses for which benefit of clergy was available. Especially from the mid-sixteenth-century onward, more and more offenses were exempted from the privilege of benefit of clergy.<sup>253</sup> This too was part of the princely crackdown of the early modern period. Its consequence was that throughout the seventeenth century, criminal juries would have faced the burdensome obligation of sentencing offenders to blood punishments more frequently than their medieval predecessors had done.

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<sup>249</sup> Michael Stuckey, *The High Court of Star Chamber* (Holmes Beach, FLA, 1998), 49-50; J.A. Guy, *The Court of Star Chamber and its records to the reign of Elizabeth I* (London: Public Record Office, 1985), 53.

<sup>250</sup> Green, *Verdict According to Conscience*, 140-143; Cockburn, *History of English Assizes*, 123-124; Baker, *Oxford History of the Laws of England*, Volume VI, 372-373.

<sup>251</sup> Holdsworth, 1<sup>st</sup> ed., 1: 164. See Leach's case (1664), Th. Raym. 98.

<sup>252</sup> Green, *Verdict According to Conscience*, 209 and 209 n. 31.

<sup>253</sup> Generally chronology in Baker, *Introduction to English Legal History*, 588; Green, *Verdict According to Conscience*, 117-118, 120-121. The criminal justice of the period also created a growing summary jurisdiction for non-blood cases. See the survey in John M. Murrin, *Trial by Jury in Seventeenth-Century New England*, in David Hall, John Murrin and Thad Tate, *Saints and Revolutionaries: Essays on Early American history* (New York: Norton, 1984), 152-206, here 155-156.

The sixteenth and seventeenth centuries was thus moral hard times for English criminal jurors. Only beginning in the later seventeenth century did relief gradually arrive. Over the period from 1660 to 1800, the great period of the solidification and creation of common law “liberties,” English government took a critical turn away from the princely practices of the Continent. During this period of slow liberalization, criminal jurors recovered the privileges they had enjoyed in the Middle Ages.

Thus the 1660s saw tense conflict over whether jurors could be punished for refusing to enter general verdicts as directed. Finally, in 1670, *Bushel’s Case* held that they were in principle immune from coercion.<sup>254</sup> This was moreover only part of the shift of the period 1660-1800. In the decades after *Bushel’s Case*, the nature of English punishment changed, too. Benefit of clergy was effectively extended in various ways from the later seventeenth century onward.<sup>255</sup> Between 1706 and 1718, some offenders who pleaded benefit of clergy were subjected to hard labor; and after 1718, offenders were routinely transported to the American colonies. Transportation remained the ordinary punishment until the American Revolution broke out. After a hiatus from 1775 to 1787, it was resumed, with offenders now transported to Australia. Mid-eighteenth-century English criminal jurors thus found themselves in a position much like that of their medieval predecessors: They did not generally need to experience moral anxiety over their verdicts they handed down. The only exception came during the period of uncertainty from 1775 to 1787, when it was unclear whether transportation could be resumed as the ordinary non-blood punishment. As we shall see, it was precisely toward the end of that uncertain period, after American victory in the Revolution made it clear

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<sup>254</sup> Full discussion below, this Section.

<sup>255</sup> 3 and 4 Will. and M. c. ix, x 5 (admitting women to the privilege); 5 Anne c.vi (abolishing the [by then meaningless] requirement of demonstrating literacy.)

that transportation to America was no longer an option, that the “reasonable doubt” rule introduced itself into English criminal justice.

At any rate, it was during the period 1660-1800, the period during which the sixteenth-century pressures gradually came off the criminal jury, that the “reasonable doubt” instruction slowly emerged. When it did, it emerged in an atmosphere rich in references to the classic moral theology of doubt and blood. It is to that period that we must now turn.

To follow what happened during these critical decades, we must read two different kinds of literature. One is the familiar literature of the common law itself: in particular the famous decisions in *Wagstaffs’ Case* (1665) and *Bushel’s Case* (1670); the trial of Chief Justice Kelyng before the House of Commons in 1667; the Boston Massacre trials of 1770; and numerous English criminal cases from the Old Bailey dating from 1782 into the mid-1790s. These are all familiar sources to legal historians. But we will not understand these familiar common-law texts unless we read them alongside a different body of literature, much less well known to legal historians: What was called the literature of “cases of conscience.” It is in the literature of “cases of conscience” that we find the old Christian moral theology, with some new English slants, presented to the English reader, in ways that deeply colored the great debates about criminal justice.

The “cases of conscience” literature is the Protestant, and especially Calvinist, repository of the law of conscience whose history I have traced since the twelfth century.<sup>256</sup> It is indeed a distinctly Protestant literature. In the medieval Catholic world, as we have seen, the law of conscience had a close link with the sacrament of confession.

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<sup>256</sup> See Paolo Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (Bologna, 2000), 363-370 (the Protestant world), and throughout for the fundamental tension between law and conscience in the western tradition.

The canon law of conscience, developed by sophisticated jurists, was communicated to confessors through “Confessor’s Manuals.” Following those manuals, confessors were to pour “wine and oil into the wounds of the one injured after the manner of a skilful physician,” ministering to the souls of their congregants. The Catholic law of conscience thus supplemented the inner voice of conscience by the trained voice of the priest.

This historic link between conscience and confession was inevitably shaken during the Reformation, as confession faded in importance within the Protestant world. In the eyes of leading Protestant sects—though certainly not of all of them—the individual sinner did not need the intermediation of a priest in order to hear the inner voice of conscience. On the contrary, the practice of confession seemed, especially to Calvinists, a prime example of Catholic perversion of the original Christian impulse—a prime example of an evil corruption by which a priest was interposed between the believer and God. Accordingly, in varying degrees and different ways, the Protestant sects eliminated confession.

That does not mean, however, that the old literature of conscience vanished in the Protestant world. While there was neither confession nor confessors’ manuals, there was nevertheless a semi-popular *Protestant* literature that purveyed the classic canon law of conscience in its own fashion. This Protestant literature took the form of books of “cases of conscience,” of which the two most famous early versions were produced by two English Calvinists, William Ames and William Perkins, in the early seventeenth century. These books differed little in substance from the medieval canon law of conscience: They contained much the same simplified version of the canon law of conscience that was found in the old confessor’s manuals. But unlike the old confessors’ manuals, Protestant

books of “cases of conscience” were meant to be read by the individual Christian himself. Indeed, to read the cases of conscience literature is to get a taste of the early modern Protestant experience in its most morally astringent form: Protestants who read cases of conscience books were Protestants who found themselves alone with their consciences, forced to act as their own judges, without the supervision of a confessor able to dispense penance, able to pour “wine and oil into [their] wounds.” The cases of conscience literature was the instrument of some of the most anxiety-inducing aspects of early modern Protestant life.

It is only by reading the anxiety-inducing cases of conscience literature that we can understand the seminal developments of the late seventeenth century and after. Throughout the seventeenth and eighteenth centuries, “cases of conscience” books kept all of the traditional canon-law problems of conscience in the English vernacular literature—with certain striking English differences, attesting to a distinctive and somewhat radical English tradition of moral theology. English authors were conscious that their thought represented a distinct strain.<sup>257</sup> (“We are freed,” declared the leading seventeenth-century author Jeremy Taylor, in a most English way, “from the impositions and lasting errors of a tyrannical spirit, and yet from the extravagances of a popular spirit too.”<sup>258</sup>) There were indeed distinctly English ways of talking about the problems of conscience. One distinctive feature was that English authors did not focus exclusively on blood punishments, as their continental counterparts did. To be sure, most of the English analysis did concern cases of blood; and we shall see that cases of blood were always the most important in English eyes. Nevertheless, from an early date, English authors also

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<sup>257</sup> See generally H.R. McAdoo, *The Structure of Caroline Moral Theology* (London, 1949), 1-13.

<sup>258</sup> Quoted in *id.*, 3.

regarded questions of property as raising problems of conscience. Indeed, as we have seen, medieval English civil juries strongly resisted giving the general verdict. Perhaps we can detect in this evidence that property rights mattered more in the English tradition than they did in the continental tradition.

The attachment to property rights was, however, only one of the striking differences between the English and the continental traditions of conscience. Another great, and particularly important difference, was that the English moralists insisted more strongly than continental casuists that judges were not permitted to act against “conscience.”<sup>259</sup> As we have seen, medieval Catholic moralists did not shy before the great moral paradox posed by the ban on “private knowledge.” Even when a judge’s private knowledge told him that the accused was innocent, he must nevertheless convict if the record developed in court so dictated, and he could not find some way to evade the result. As the paradoxical medieval conclusion ran: “Many things must be done against conscience for the sake of conscience.” The English tradition resisted this. Already in fourteenth-century England, the fiery reformer Wyclif rejected this moral paradox.<sup>260</sup> So did Christopher St. German in the early sixteenth century.<sup>261</sup> Wyclif’s and St. German’s seventeenth-century English successors took the same stand, deeming it unacceptable that judges should contemplate convicting accused persons in the face of their “private

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<sup>259</sup> There were of course some continental moralists too who took this view, notably Nicolas of Lyra. See Jacques de Langlade, S.J., *Le Juge, Serviteur de la Loi ou Gardien de la Justice selon la Tradition Théologique*, 10 *Revue de Droit Canonique* 141, 149-151 (1960)

<sup>260</sup> Discussed in Radin, *Conscience of the Court*, 517.

<sup>261</sup> As Christopher St. German put it, judges could “sometimes give judgment against their own knowledge, and also against the truth, and yet no default to be in them, as it is in all trials.” However he denied the applicability of the rule in capital cases. St. German, *Little Treatise*, ed. Guy, 124. Cited and discussed in Baker, *Oxford History of the Laws of England*, Volume VI, 47 and 47 n. 246, without reference to the continental parallels,

knowledge” of innocence. The English were characterized by a distinctive kind of rigorism, one that would do much to deepen the moral dilemma of criminal jurors.

That English moral rigorism ran throughout the literature of the seventeenth century, as moral theologians created the literature that would guide Christian jurors of the formative era in the English law of liberty. Thus William Ames, the leading authority of the early seventeenth century, held that the judge must simply lay down his office rather than convict a person whom he knew of his own “private knowledge” to be innocent. Ames presented the issue in terms that harkened back to the Middle Ages, but that resonated with the conflicts over governmental power of his own century. Medieval jurists had distinguished between the body of the “judge” and the body of the “man.” Within the “in dubio pro reo” literature, they had pointed to the conflict between the “public interest” and the moral requirement of lenity. These were still the terms in which Ames spoke. For Ames, the question was whether it was legitimate to distinguish between the judge as a “public person,” the embodiment of the “Common-wealth”; and the judge as a man with a “private conscience.” Ames held that it was not. In the classic manner of the casuistic literature, Ames presented the arguments for and against:

Of Publique Judgements

Quest 5. *Whether the Judge ought always to give sentence according to the things alleaged and proved?*

20. A. 1. The Iudge ought not to passe sentence against the things alleaged and proved, whatsoever there bee in his private knowledge.

For first, the Iudge sentenceth as a publique person, and instead of the Common-wealth . . . But if the Common-wealth should sentence, it could not proceed, but upon publique knowledge. . . .

If the Iudge could sentence either against, or beside things alleaged and proved, there would from thence follow great discommodities, and the perversion of judgements: when unjust Iudges would easily condemne the innocent, and quit the guilty, under pretext of a private knowledge, which disageeth from the things alleaged and proved.

Thirdly, there can be no other way, by which the Common-wealth may remaine in quiet.

21. A.2 Yet the Iudge is not so retrained to things alleaged and proved, that he must condemne him to death, whom hee knoweth plainely to bee innocent.

First, Because things alleaged and proved, are onely means of manifesting the truth, and therefore ought not to prevaile with any against the truth which is certainly knowen . . .

Secondly, Because a Iudge which pronounceth that to bee true which certainly hee knoweth to bee false, would bee a lyer, and sinne against his owne conscience.

22.A. 3. Neither is the argument solved by that distinction, betweene the publique and private conscience of a Iudge.

For first, the private conscience ought not to be violated at any time. . .

Thirdly, Because to slay an innocent, is a fact intrinsecally evill . . .

23.A.4. If the Iudge would but doe his duty in procuring the manifestation of the truth, so much intricatenesse would seldome happen. But if it should happen after hee hath tried all things for the delivery of the innocent, hee is bound to leave his office of Iudge rather than to condemne him.<sup>262</sup>

This was the standard English view, which authors on conscience frequently contrasted with what they found to be the ugly casuistry of the Catholic world, and especially of the Spanish. As one example among many, we may take Joseph Hall's 1654 Cases of Conscience, Practically Resolved. To Hall, the judge who convicted in the face his exculpatory private knowledge was "guilty of blood"; if such a judge was honest, he would heed the voice of his conscience, "the bird in his bosome," which would tell him that he had made himself a "murtherer":

Case VI. Whether a Judge may upon allegations, proofes, and evidences of others, condemn a man to death, whom he himself certainly knows to be innocent. The question hath undergone much agitation; The streame of all ancient Divines, and Casuists runs upon the affirmative; their ground is, that the Judge, as he is a publique person, so in the set of Judicature, he must exercise a publique authority; and therefore waving his private knowledge and interest, must sentence according to the allegations and proofes brought before him; since he is a Judge of the cause, not of the law; whereof he is to be the servant, not the master: There he sits not to speake his own judgement; but to be the mouth of the law, and the law command him to judge according to the evidence; the evidence therefore being cleare and convictive, the doome can be no other than condemnatory.

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<sup>262</sup> William Ames, *Conscience with the Power and Cases Thereof* (London: Printed by Edw. Griffin, for John Rothwell; and are to be sold at his Shop at the Sign of the Sun in Paul's Churchyard, 1643), 281-283.

For my part, I can more marvell at their judgement herein, than approve it . . . .

It is an evident and undeniable law of God which must be the rule of all Judges;  
*The innocent and the righteous slay thou not, Exod. 23.27* This is a Law neither to be avoided, nor dispensed with: Accusations and false witnesses cannot make a man other than innocent; they may make him to seeme so; in so much as those that know not the cause exactly, may perhaps be mis-led to condemne him in their judgments: But to the Judge, whose eyes were witnesses of the parties innocence, all the evidence in the world cannot make him other than guiltlesse; so as that Judge shall be guilty of blood, in slaying the innocent, and righteous.

Secondly, the law of judging according to allegations and proofs is a good generall direction in the common course of proceedings; but there are cases wherein this law must vaile to an higher, which is the law of Conscience: Woe be to that man who shall tye himselfe so close to the letter of the law, as to make shipwrack of conscience; And that bird in his bosome will tell him, that if upon what ever pretences, he shall willingly condemne an innocent, he is no better than a murtherer. . . .

Let no man now tell me, that it is the law that condemnes the man, and not the Judge; This excuse will not serve before the Tribunall of heaven; The law hath no tongue; It is the Judge that is *lex loquens*; If he then shall pronounce that sentence which his owne heart tells him is unjust and cruell, what is he but an officious minister of injustice? But, indeed, what law ever said, Thou shalt kill that man whom thou knowest innocent, if false witsesse will sweare him guilty?

This is but a false glosse set upon a true text, to countenance a man in being an instrument of evil.

Hall did not deny the difficulties of the matter. He recognized that his world was one of severe disorder, in which the public interest might seem to require loyalty from the public servants charged with carrying out a severe criminal justice. He even struggled to give some credit to the Spanish moral theologians:

What then is in this case to be done? Surely, as I durst not acquite that Judge, who under what ever colour of law should cast away a known innocent, so I durst not advise against plaine evidences and flat dispositions, upon private knowledge, that man to be openly pronounced guiltlesse; and thereby discharged; for as the one is a grosse violation of justice; so were the other a publique affront to the law; and of dangerous consequence to the weale publique: Certainly, it could not but be extreame unsafe, that such a gappe should bee opened to the liberty of judgement, that a private brest should be opposed (with an apparent prevalence) against publique convictions: our Casuists have beaten their braines to finde out some such evasions as might save the innocent from death, and the Judge from blood guiltinesse: Herein therefore they advise the Judge to use some secret meanes to stop the accusation, or indictment; a course that might be as prejudiciall to justice, as a false sentence) to sift the witnessse apart, as in *Susanna's* case, and by many subtile interrogations of the circumstances to find their variance or contradiction. If that prevaile not, *Cajetan* goes so farre, as to determine it meet (which how it might stand with their law, he knowes, with ours it would not) that the Judge should before all the people give his oath, that hee knowes the party

guiltlesse; as whom he himselfe saw at that very hyoure in a place far disant from that wherein the fact is pretended to bee done: Yea\* *Dominicus à Soto* could be content (if it might be done without scandall) that the prisoner might secretly be suffered to slip out of the geaole, and save himselfe by flight. Others think it the best way, that the Judge should put off the cause to to a superiour Bench, and that himselfe should (laying aside his scarlet) come to the Bar, and as a witnessse avow upon oath the innocence of the party, and the falsity of the accusation: Or lastly, if he should out of malice, or some other sinister ends (as of the forfeiture of some rich estate) be pressed by higher powers to passe the sentence on his own Bench, that he ought to lay downe his Commission, and to abdicate that power he hath, rather than to suffer it forced to a willing injustice.

But despite all that, Hall rejected the view of the Spanish moral theologians, even the best of them:

And truly were the case mine, after all faire and lawfull indeavours to justifie the innocent, and to avoid the sentence, I should most willingly yield to this last resolution: yea, rather my selfe to undergoe the sentence of death, than to prounounce it on the knowne guiltlesse; hating the poore pusillanimity of *Dominicus à Soto*\* . . . .<sup>263</sup>

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\* Dom. à Sot. De Jure, &c. C.1.5.qu.4.

\* *Etenim quod homo, qui officio suo vivit, debeat tantam jacturam facere, durum creditu est.* Dom. Sot. Ubi supra.

<sup>263</sup> Joseph Hall, *Cases of Conscience, Practically Resolved*. (London: Printed by R.H. and J.G. and are to be sold by Fr: Aglesfield at the Marigold in S. Paul's Churchyard, 1654), 117-129

Hall's dislike (and grudging respect) for Spanish moral casuistry was typical of the English world.<sup>264</sup> So was his insistence that judges must rigorously avoid violating their consciences.

This was notably true of the most influential text of the late seventeenth century: Jeremy Taylor's 1660 Ductor Dubitantium (The Guide for Those in Doubt). Taylor is indeed a particularly important figure, since he remained highly influential throughout the eighteenth and even nineteenth centuries.<sup>265</sup> Early on in his long text, Taylor turned to the problem of judging. Like other English moralists, he rejected the canon law approach that permitted a judge to condemn the innocent. In his charming baroque style, he decorated his discussion with an anecdote drawn from the literature of classical Antiquity:

But then what shall a Judge do, who knows the witnesses in a criminal cause to have sworn falsly? The case is this: *Conopus* a *Spartan* Judge, walking abroad near the [garden?] of *Onesicritus*, espies him killing of his slave *Asotus*; who to palliate the fact, himself accuses another of his servants [*Orgilus*] and compell'd some to swear it as he affirmed. The process was made, advocates entertain'd by *Onesicritus*, and the poor *Orgilus* convict by testimony and legal proof. *Conopus* the Judge knows the whole process to be injurious, but he knows not what to do,

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<sup>264</sup>For an ironic example, see [Anon.], TO 'EN APXH: Or an Exercitation upon a Momentous Question in Divinity, and Case of Conscience, viz. Whether it be lawfull for any Person to act contrary to the Opinion of his own Conscience, formed from Arguments that to him appear very Probable, though not Necessary or Demonstrative (London: n.p., 1675), 12:

In dubiis animae tutior pars est eligenda . . .

That is is Lawful for a Man to act contrary to the Opinion of his own Conscience, which he judgeth safest, according to the Opinoin of others, which he judgeth less probably true, and less safe. Of this mind besides Vasquez and Medina (before mentioned by us) he saith are Mercado, Velentia, Julier, Suarez, Enriquez, Azorius, Bennes, Navarrus, Arragon, Salon, Lopez, Ledesma, Sala, Sairus and Leonardus. More than a full Jury, were they all good Men and true: But let us hear their Reason. . . .

<sup>265</sup> On Taylor's general approach, see McAdoo, *Structure of Caroline Moral Theology*, 37-57.

because he remembers that he is bound to judge according to allegation and proof, and yet to do justice and judgment, which in this case is impossible. He therefore inquires for an expedient, or a peremptory resolution on either hand: Since he offends against the Laws of *Sparta*, if he acquits one who is legally convicted; and yet if he condemns him whom he knows to be innocent, he sins against God, and Nature, and against his own Conscience.

That a Judge not only may, but is oblig'd to proceed according to the process of Law, and not to his own private Conscience, is confidently affirmed by *Aquinas*, by his *Master*, and by his *Scholars*, and of late defended earnestly by *Didacus Covarruvius* a learned Man indeed and a great Lawyer . . . .

But if after all this you inquire what shall become of the Judge as a man, and what of his private conscience? these Men answer; that the Judge must use what ingenious and fair artifices he can to save the innocent . . . . yet I answer otherwise, and I suppose, for Reasons very considerable.

Taylor too understood the question as one that opposed the public interest to the private conscience:

Therefore, To the Question I answer, That a Judge in this case may not do any publick act against his private conscience; he may not condemn an innocent whom he knows to be so, though he be prov'd criminal by false witnesses.

And what if Titius be accused for killing Regulus, whom the Consul at that time hath living in his house, or hath lately sent abroad; would not all the world hoot at him, if he should deliver Titius to the Tormentors for killing the man whom Judge knows to be at home, it be dressing of his dinner, or abroad gathering his

rents? . . . Of how if he sees the fact done before him in the Court? A purse cut, or a stone thrown at his brother Judge, as it happened at Ludlow not many years since? . . .

I conclude therefore with that rule of the Canon Law, *Melius est scandalum nasci quam ut veritas deseratur*; It is better that a scandal should be suffered, and an offence done to the forms and methods of judicial proceedings, than that truth should be betrayed and forsaken . . . .<sup>266</sup>

By the 1660s and 1670s, then, it was well established in the English literature of conscience that judges must not convict against their “private knowledge,” despite their status as public persons. Indeed, in the 1650s and 1660s it was presented as a mark of a distinctively high English standard of morality to reject the classic Catholic theology, and most especially Spanish theology. This literature would have been fresh in the mind of every believing Englishman called to serve on a jury; and unless it is fresh in our minds as well, we will not understand the seminal events of the later seventeenth century.

With that, let us turn to the crises of the 1660s and 1670s. The most famous conflicts of those years were cases that did not involve blood punishments: These were the prosecutions of Quakers, of whom the most prominent was William Penn. But there were also homicide cases, which cannot be neglected in describing the events of the time.

We begin with the Quaker cases. After the Stuart Restoration in 1660, the Crown attempted to forbid gatherings that might foster political or religious sedition, through the Conventicles Act of 1664.<sup>267</sup> This measure was resisted in particular by Quakers, who

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<sup>266</sup> Jeremy Taylor, *Ductor Dubitantium*, of The Rule of Conscience in all her General Measures; Serving as a great Instrument for the determination of Cases of Conscience (London: Printed by R. Norton, for R. Royston, Bookseller to the King’s Most Sacred Majesty, 1676), 62-67.

<sup>267</sup> Stat. 16 Chas. 2, c. 4 (1664).

continued to gather.<sup>268</sup> The Conventicles Act, importantly, did not threaten any blood punishments, merely imprisonment, fines, or in extreme cases transportation.<sup>269</sup> Juries in the Quaker cases thus did not face the gravest moral challenges. Nevertheless, when Quakers were prosecuted, conflict arose: Jurors sought to deliver “not guilty” verdicts.

What could be done to discipline such recalcitrant jurors, forgetful of their role as “public persons”? Star Chamber had been abolished. But the judges of the common law had assumed its disciplinary powers, and were fining and imprisoning criminal juries that refused to convict as they had been directed to do. The question was thus framed as one of whether common law judges could exercise such powers, coercing criminal jurors as they had never been coerced before the sixteenth century. Wagstaff’s Case presented a first important test in 1665.<sup>270</sup> That case produced a complex result. Nevertheless, the decision made it clear that King’s Bench could make use of its well-established authority to fine jurors who refused to enter guilty verdicts as directed.

Yet a storm of change was gathering, which would end juror coercion within a few years. It was in response to Wagstaff’s case that Matthew Hale, then first Baron of the Exchequer, and a critic of the practice of fining and imprisoning jurors,<sup>271</sup> laid out his important views on the moral responsibility of judges.

Hale was a man knowledgeable in the continental traditions. His History of the Pleas of the Crown, offering his views as of the mid-1660s,<sup>272</sup> presented much of the continental learning. Margaret Sampson has shown that Hale drew directly upon the

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<sup>268</sup> See generally Green, *Verdict According to Conscience*, , 200-264.

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<sup>270</sup> 1 Keble 934, 83 Eng Rep. 1328; 1 Keble 938, 83 Eng Rep. 1331; Sir T. Raym. 138, 83 Eng. Rep. 75; 1 Sid. 273, 82 Eng Rep. 1101 (1665).

<sup>271</sup> Green, *Verdict According to Conscience*, 210, citing Hale, 2. P.C. 160.

<sup>272</sup> *Id.* The text is dated to 1676 by D.E.C. Yale, Introduction, in Sir Matthew Hale’s *Prerogatives of the Kind* (London, 1976), xxiv-xxiv.

continental law of conscience.<sup>273</sup> Thus Hale cited the hallowed “safer path” precepts: “quod dubitas, ne feceris,” he wrote, “when you are in doubt, do not act, especially in Cases of Life.”<sup>274</sup> This meant, he wrote, in language familiar from the continental literature,<sup>275</sup> that the judge must err in favor of “mildness” and “mercy.”<sup>276</sup> “The best Rule is in Dubiis,” he wrote, quoting the famous Latin of Innocent III, “rather to incline to acquittal than Conviction.”<sup>277</sup> Hale was a man of his Christian times—not only as a scholar, but also in his practical life: His biographer reported that “in matters of Blood, he was always to chuse the safer side.”<sup>278</sup>

In responding to Wagstaff’s Case, Hale wrote in the same long-familiar vein. The question was whether judges could effectively decide the question of guilt themselves. In the course of arguing against the practice of coercing jurors, Hale insisted that judges should want no such responsibility. After all, as Hale noted, the responsibility for judgment carried with it, in the old language of the medieval common law, “peril.” Hale, like all of the moral theologians of his day and of earlier centuries, emphasized the fact that jurors might possibly make use of their “private knowledge”:

And although the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the

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<sup>273</sup> Margaret Sampson, *Laxity and Liberty in seventeenth-century English political thought*, in Edmund Leites, ed., *Conscience and Casuistry in Early Modern Europe* (Cambridge, England, 1988), 85-87.

<sup>274</sup> Hale, 1 P.C. 300.

<sup>275</sup> But to some extent possibly coined by Hale himself: See Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* 257 (1931).

<sup>276</sup> 2 P.C. 290: “ex parte misericordiae”; 2 P.C. 305: “ex parte mitiori.”

<sup>277</sup> 1 P.C. 509.

<sup>278</sup> Gilbert Burnet, *Life of Death of Sir Matthew Hale* (London, 1682), 24.

witnesses to be such as they could not believe, and it is the conscience of the jury, that must pronounce the prisoner *guilty* or not *guilty*.

And to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by jury would be useless.<sup>279</sup>

Hale's argument did not carry the day in Wagstaff's Case, but opposition was growing.<sup>280</sup>

Over the next couple of years, the opposition centered in particular on Kelyng, Chief Justice, who favored fining jurors not only in the Quaker cases, but also, disturbingly, in cases of homicide.<sup>281</sup> Kelyng was an unbending representative of public power, who showed little patience for supposed English traditions of liberty that interfered with the administration of criminal justice. (He was denounced in particular for having called Magna Charta (quoting Cromwell<sup>282</sup>) "Magna Farta"<sup>283</sup>—words that Kelyng denied having spoken, though he truculently admitted that "it might be possible, Magna Charta being often and ignorantly pressed upon him, that he did utter that indecent expression."<sup>284</sup>) In a number of cases, Kelyng compelled criminal juries, not only to convict Quakers, but also to enter guilty verdicts in homicide cases.

Kelyng's position on these homicide cases was by no means entirely unsympathetic: To judge from the reports we have, he was especially eager to prevent juries from going easy on masters who brutally beat their apprentices to death:

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<sup>279</sup> Hale, 2 P.C. 313.

<sup>280</sup> Green, Verdict According to Conscience, 208-221.

<sup>281</sup> See the general account in Green, Verdict According to Conscience, 212-220.

<sup>282</sup> See R. Megarry, A Second Miscellany-at-Law 196-98 (1973); Langbein, Origins of Adversary Criminal Trial, 324 n. 347 [citing Eric Stockdale in Miscellanea 43 (1980) (vol. 59. Publications of the Bedfordshire Historical Record Society)].

<sup>283</sup> Howell's State Trials, 6: 995.

<sup>284</sup> Milward's Diary, 167.

[A] smith struck his prentice with a bar of iron, broke his skull, and the prentice died of the wound within two or three days. The jury would not find this murder at the first, whereupon [Chief Justice Kelyng] threatened them and made them go out again, and told them that they ought to find it murder, which accordingly they did. . . .<sup>285</sup>

[A] man was arraigned for killing a boy; this was the head man to a weaver. The master in his shop gave him power to oversee the rest and correct them if they neglected their work. This boy had neglected to wind some spindles of yarn, and therefore this man beat him about the head with a broomstaff, of which he died within a day or two. The jury found this manslaughter, and because they did not find it murder nor would be persuaded to alter their verdict [Chief Justice Kelyng] told them that if they would not go out again and find murder he would fine them £ 2 a man. The jury for fear went out again and found it murder and the man was hanged.<sup>286</sup>

When we read cases like these, we may find it a little easier to sympathize with the program of the early modern princely states: Not all of the “liberties” that Crown officials were attacking were ones that we would approve of. At any rate, Chief Justice Kelyng, who also disciplined jurors who found a homicide to be a case of self-defense,<sup>287</sup> as well as grand jurors who refused to indict in a homicide case,<sup>288</sup> was unapologetic: “I am very strict and severe against high-way robbers and in case of blood,” he quite simply

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<sup>285</sup> Milward’s Diary, 167-168.

<sup>286</sup> Milward’s Diary, 160.

<sup>287</sup> Id., 160.

<sup>288</sup> R. v. Windham, 2 Keble, 180; and the account in Milward’s Diary, 168-169.

declared.<sup>289</sup> He was also severe in cases of Quakers: When jurors refused to convict some of them, “he imprisoned and fined some of [the jurors] one hundred marks apiece.”<sup>290</sup>

Kelyng was a natural lightning-rod for the attacks of those who worried about the liberties of Englishmen. Eventually he was charged by the House of Commons with using “an arbitrary and illegal power, which is of dangerous consequences to the lives and liberties of the people of England; and tends to the introducing of an arbitrary government.”<sup>291</sup> What troubled the House, we should note, was not the Quaker cases, but the cases of blood: The action against Kelyng was initiated by a report to the House that “there have been some innovations of late in trials for men for their lives and deaths; and in some particular cases, restraints have been put upon juries, in the inquiries.”<sup>292</sup> The House called for Kelyng to suffer “condign punishment, lest every sessions produce the like tragical scenes of usurpation over the consciences of Juries.”<sup>293</sup> In the end, nothing came of the House’s call for Kelyng’s punishment; but his denunciation contributed to atmosphere of gathering crisis over the coercion of “the conscience of Juries.”<sup>294</sup>

That crisis came to a head in the famous Bushel’s Case of 1670, involving the prosecution of the Quakers William Penn and William Mead for violation of the Conventicles Act. The case is very famous one. The jurors in Penn and Mead’s case, put under severe pressure, insisted in standing upon their “conscience” and rendered a verdict of not guilty<sup>295</sup>—upon which the jurors were fined forty marks, for refusing to

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<sup>289</sup> Milward’s Diary, 168.

<sup>290</sup> Milward’s Diary, 160.

<sup>291</sup> Journal of the House of Commons, 9:35, col. 2.

<sup>292</sup> Judge Keeling’s Case, quoted in Howell, State Trials, 6: 992.

<sup>293</sup> Id., 996.

<sup>294</sup> Id.

<sup>295</sup> State Trials 6:961-970; for the imposition of the fine, 968.

acknowledge the “manifest evidence” of guilt. The case was rich in politically charged invective: Penn and Mead’s report declares that the Recorder of London, one of the presiding officials, chose once again to describe Magna Charta as “Magna f----”.<sup>296</sup> The report also shows the Recorder making a declaration that could have been calculated to scandalize pious Englishmen:

Rec[order]. Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the inquisition among them: And certainly it will never be well with us, till something like unto the Spanish inquisition be in England.<sup>297</sup>

Penn reacted indignantly to this: It was no wonder, he observed, as he was dragged out of court,<sup>298</sup> that the Recorder had no respect for “the fundamental laws of England,” “since the Spanish Inquisition hath so great a place in [his] heart. God Almighty, who is just, will judge you for all these things.”<sup>299</sup>

At any rate, the events of the trial gave rise to Bushel’s Case. Juror Edward Bushel, having been imprisoned, brought a writ of habeas corpus. Chief Justice Vaughan discharged him, in a celebrated decision that definitely established that “a juror cannot be fined for a verdict given according to his conscience.”<sup>300</sup> Scholars have found Vaughan’s decision puzzling: It was founded on the ground, very strange to modern readers, that jurors might use “private knowledge.”<sup>301</sup> Other arguments were certainly available to Vaughan. For example, he noted that an attain was technically available against the

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<sup>296</sup> Howells State Trials 6: 953.

<sup>297</sup> State Trials 6: 965.

<sup>298</sup> So we may conclude from the report that the Recorder said “Take him away, take him away, take him out of the Court.” Id. 969.

<sup>299</sup> Id., 969.

<sup>300</sup> Bushel’s Case, English Reports 84: 1123-1125. For a 1680 case in which a judge nevertheless fined a juror, see Langbein, *Origins of Adversary Criminal Trial*, 324 n. 346.

<sup>301</sup> For the puzzlement of Langbein and Green, see below note.

jurors in the case, since the offense charged was not capital.<sup>302</sup> Yet it was precisely where an attainder was available that fining jurors was unacceptable: “[I]f an attainder lies, and a fine may also be imposed, the jury would be twice punished for the same offence.”<sup>303</sup> This was a venerable technical argument, upon which the whole decision might presumably have rested.<sup>304</sup> Yet this technical argument was not sufficient for Vaughan. Nor was it enough for him simply to invoke the jury’s “conscience,” as he did notably in a phrase added at the last minute to his opinion: “though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are foresworn, at least *in foro conscientiae*.”<sup>305</sup>

Instead, like Hale a few years before him, Vaughan insisted on focusing upon the classic question of the jury’s private knowledge. What mattered was that juries might decide upon their “personal knowledge.” This meant that they could not be coerced:

It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

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<sup>302</sup> Howell’s State Trials 6: 1009; English Reports 84: 1123-1125.

<sup>303</sup> Bushel’s Case, English Reports 84: 1123-1125; cf. Howell’s State Trials 6: 1009.

<sup>304</sup> For this issue in the earlier debates over Star Chamber, see William Hudson, *A Treatise of the Court of Star Chamber*, ed. Francis Hargrave (Birmingham, 1986) (ORIGINAL DATE), 72: “And first of perjury; wherein I must first meet with that positive opinion 8. *Eliz. Dyer*, that there was no punishment for perjury before the statute of 5. *Eliz*, but against jurors only by way of attainder: and I cannot but marvel that so learned and reverend men should light upon so fond an opinion . . .” See the full discussion in *id.*, 72-73.

<sup>305</sup> For the addition of this phrase after the manuscript of the opinion had been drafted, see Green, *Verdict According to Conscience*, 244 and 244 n.175.

1. Being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.
2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court, is absolutely false: but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing.

True “private knowledge” must decide the case. In particular, because the general verdict mixed findings of fact and law, jurors could never be punished for entering it:

In special verdicts the Jury inform the naked fact, and the Court deliver the law . . . . But upon all general issues; as upon not culpable pleaded in trespass, 'nil debet' in debt, nul tort, nul disseisin' in assize, 'ne disturba pas' in 'quare impedit,' and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself. . . .

Because the jury mixed its fact-finding—partly on the basis of private knowledge—in its general verdicts, it could not be fined or imprisoned.<sup>306</sup>

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<sup>306</sup> Vaughan’s reasoning is presented in Howell’s State Trials 6: 1009-1019.

Why did Vaughan make so much of the jurors' possible private knowledge of the case? John Langbein has derided Vaughan's opinion as "wilfully anachronistic"<sup>307</sup>—"dishonest nonsense," in Langbein's most recent phrase.<sup>308</sup> As Langbein sees it, Vaughan's opinion simply harkened pointlessly back to a long-lost world in which juries were self-informing.<sup>309</sup> Yet this critique is strange. If the opinion was such obvious "nonsense" it is difficult to understand how it could have had the immense impact it had on its contemporaries. Surely Vaughan's audience would have recognized his argument as an irrelevant anachronism, if that is really what it was. The answer, as I hope I have shown, is that the "private knowledge" question *did* matter to Vaughan and his contemporaries—partly because juror private knowledge had not vanished, as Langbein himself has demonstrated<sup>310</sup>; but largely because of the implications of even potential "private knowledge" for the moral position of the juror. Vaughan was indeed only one of many figures of the time who took the issue very seriously indeed.

In any case, 1664-1670 were watershed years for juror independence. Let us note that the law of those watershed years laid heavy emphasis on the fact that jurors judged according to "conscience" in both senses of the word: They both exercised a moral faculty in ways that put their own salvations at risk; and they judged on the basis of "private knowledge." To fully grasp the significance of the traditions of the moral

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<sup>307</sup> John H. Langbein, *The Criminal Trial Before Lawyers*, 45 U. Chi. L. Rev. 263, 299 n. 105 (1978).

<sup>308</sup> Langbein, *Origins of Adversary Criminal Trial*, 324 n. 346.

<sup>309</sup> Langbein, *Criminal Trial Before Lawyers*, 299 n. 105, though also noting that Old Bailey juries did sometimes bring independent knowledge to the case.

<sup>310</sup> Langbein, *Criminal Trial Before Lawyers*, 288 n. 74 (1978); *id.* 290. See also Green, *Verdict According to Conscience*, 245 (arguing that jurors sometimes had knowledge of reputation). So also did Giles Duncombe, *Trials per Pais* (Buffalo, 1980) (1682), 274, describe it: "They may have other Evidence than what is shewed in Court. They are of the Vicinage, the Judge is a Stranger. They may have Evidence from their own personal Knowledge, that the witnesses speak false, which the Judge knows not of; they may know the witnesses to be stigmatized and infamous, which may be unknown to the Parties or Court."

theology of judging in these cases, though, we must look beyond the narrowly legal literature, bringing in the contemporary literature of moral theology.

In the aftermath of Bushel's Case, there was indeed a burst of literature on the moral burdens and moral glories of jury service, which set the terms of a debate that would continue into the 1780s.<sup>311</sup> Three years after Bushel's Case, a new leading Cases of Conscience text appeared. This was Richard Baxter's A Christian Directory or a Summ of Practical Theologie and Cases of Conscience, which appeared in 1673. Baxter was a major figure, a divine whose works who would be reprinted for two centuries.<sup>312</sup> Like other authors in the tradition, Baxter analyzed the classic claim, as old as Ivo and Gratian, that the judge could avoid moral responsibility by averring that it was not he himself who made the decision, but "the law." Writing in the wake of Bushel's Case, he addressed himself directly to jurors:

Quest. 12 *Must a Judge and jury proceed secundum allegata & probata, according to evidence and proof, when they know the witness to be false, and the truth to be contrary to the testimony; but are not able to evince it?*

*Answer.* Distinguish between the *Negative* and *Positive* part of the Verdict or Sentence: In the *Negative* they must go according to the evidence and testimonies, unless the Law of the Land leave the case to their private knowledge. As for example, They must not sentence a Thief or Murderer to be punished upon their secret unproved knowledge: They must not adjudge either Moneys or Lands to the true Owner from another, without sufficient evidence and proof: They must

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<sup>311</sup> Alongside the sources discussed in the text, see also Anon., *The Security of English-Mens Lives, of the Trust, Power, and Duty of the Grand Jurys of England* (London: Printed for T. Mitchel, 1681), quoted in the passage discussed below, text at note.

<sup>312</sup> For Baxter's fame, see Sampson, *Laxity and Liberty*, 87.

*forbear doing Justice*, because they are not called to it, nor enabled. But Positively they may *do no Injustice* upon any evidence or witness against their own knowledge of the truth: As they may not upon known false witness, give away any mans Lands or Money, or condemn the innocent; But they must in such a case renounce the Office: The Judge must come off the Bench, and the Jury protest that they will not meddle, or give any Verdict (what ever come of it) : Because God and the Law of Nature prohibit their injustice.

Object. *It is the Law that doth it, and not we.*

*Answ.* It is the Law and you: And the Law cannot justifie your agency in any unrighteous sentence. The case is plain and past dispute.<sup>313</sup>

Any potential juror reading Baxter's text would understand that knuckling under to a figure like Kelyng meant putting his own salvation at risk. Other texts made the same point: It was in 1682, for example, that Gilbert Burnet published his Death and Life of Sir Matthew Hale, declaring that the great judge had held that "in matters of Blood, he was always to chuse the safer side."<sup>314</sup>

But such moral rigorism did not settle the whole issue for jurors. As the moralist literature of the time explained to them, there were great spiritual complexities and traps, which could not easily be evaded. Particularly interesting is Benjamin Calamy, a preacher who would be still be cited a century later. Calamy was a protégé of the most hated judicial figure of the 1680s: Judge George Jeffreys, the servant of the Stuart King remembered ever after as the the most wicked and fearsome enemy of English liberties in

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<sup>313</sup> Richard Baxter, *A Christian Directory or a Summ of Practical Theologie and Cases of Conscience* (London: Printed by Robert White for Nevill Simmors at the Princes Armes in St. Pauls Churchyard, 1673), 149.

<sup>314</sup> Gilbert Burnet, *Life of Death of Sir Matthew Hale* (London, 1682), 24.

the years before the Glorious Revolution. In 1683, Calamy, who had been appointed to the perpetual curacy of St. Mary Aldermanbury through Jeffreys' patronage, published his "Discourse about a Doubting Conscience," subsequently republished as "Discourse about a Scrupulous Conscience."<sup>315</sup> In this Discourse, preached as a sermon to great acclaim, Calamy, explained how to the immense public importance of avoiding excessive moral rigorism.

Calamy, a champion of the public interest as understood by the Stuart Monarchy, laid out a method for dealing with doubts. In particular, he distinguished between doubts and *scruples*. This was a well-established distinction in moral theology. As Jeremy Taylor had explained in 1660, scruples were dangerously irrational impulses<sup>316</sup>:

Against a *doubting conscience* a man may not work but against a *scrupulous* he may. For a *scrupulous* conscience does not take away the proper determination of the understanding; but it is like a Woman handling of a Frog or a Chicken, which all their friends tell them can do them no hurt, and they are convinced in reason that they cannot, they believe it and know it, and yet when they take the little creature into their hands they shriek, and sometimes hold fast and find their fears confuted, and sometimes they let go and find their reason useless. . . .<sup>317</sup>

Calamy seized on this distinction: "Mind your plain and necessary Duty, and trouble not yourselves with scruples about little and indifferent things. . . ."<sup>318</sup> "[N]eedless

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<sup>315</sup> See the entry on Calamy in Dictionary of National Biography.

<sup>316</sup> For Taylor's place, with regard to this problem, within the larger theological tradition, see McAdoo, Structure of Caroline Moral Theology, 88-97.

<sup>317</sup> Taylor, Ductor Dubitantium, 160.

<sup>318</sup> Benjamin Calamy, **Error! Main Document Only**. A discourse about a scrupulous conscience, preached at the Parish-Church of St. Mary Aldermanbury (London: **Error! Main Document Only**. Printed for Rowland Reynolds, 1683), 4.

scruples”<sup>319</sup> might easily lead the Christian into a terrible error, the error of sins of omission. In particular, overly scrupulous Christians who did not understand “Duty” might fail to do their part to combat “what is really Evil”:

Now our Consciences cannot alter the nature of things: that which is our Duty remaineth so, and we sin by omitting it, notwithstanding we in our Consciences think it unlawful to be done, and what is really Evil continueth such, and is Sin in us, however our Consciences tell us it is our duty to do it and the fault is more or less compassionable and pardonable, as the causes of the Error are more or less voluntary and avoidable.<sup>320</sup>

In particular, one must not allow “Reasons and Exceptions” stand in one’s way:

When I speak of a Scrupulous Conscience, I suppose the Person tolerably well perswaded of the lawfulness of what is to be done, but yet he doth not like or approve of it, he hath some Reasons and Exceptions against it, it is not the best and fittest, all things considered.<sup>321</sup>

This bore particularly on the case of public officials like judges: “For all Government and Subjection would be very precarious and arbitrary, if every one that did not approve of a Law or was not fully satisfied about the reasonableness of it was thereby exempted from all obligations to obey it.”<sup>322</sup>

The conflict was thus framed as a battle between the moral rigorism of the “safe” conscience, on the one side; and the submission to “Duty” on the other. This was a conflict that mattered a great deal for the administration of justice: There was a real

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<sup>319</sup> Id.

<sup>320</sup> Id., 5.

<sup>321</sup> Id., 35-36.

<sup>322</sup> Id., 38.

danger that upstanding Christian jurors might resist serving, as indeed they seem to have done<sup>323</sup>; yet the system needed their service. The conflict was fought out through all the literature of the post-Bushel's-case period: The authors of the period clearly felt the need to reconcile conscience and duty. Like Baxter, the authors of the period accepted the severity of the moral challenge facing jurors. At the same time, like their continental predecessors, they worried over the consequences of this moral theology for the workable administration of justice. Indeed, Baxter himself fully agreed that "scrupulosity" was a danger.<sup>324</sup> Such indeed was the basic dilemma: After 1670 it was impossible to ignore the classic moral theology, in its rigorist English form. Yet at the same time, sensible Englishmen, like Chief Justice Kelyng, still wished to be "strict and severe against highway robbers and in case of blood."<sup>325</sup>

Thus Zachary Babington, a pamphleteer who addressed himself to grand jurors sitting on "cases of blood," in 1677, invoked moral reasoning that had been familiar since the twelfth century.<sup>326</sup> To Babington, as to Augustine, Gratian and Peter the Chanter long before him, the undeniable danger was that any person engaged in judging might "make himself a murderer." Grand jurors must take care "to keep themselves secure from the guilt of Innocent blood."<sup>327</sup> But Babington (like Chief Justice Kelyng<sup>328</sup>) was eager to insist that should not be taken too far. Did the righteous fear of the guilt of

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<sup>323</sup> For the familiar problem of respectable Englishmen avoiding jury-service, see e.g. Cockburn, *A History of English Assizes*, 111-112 (grand juries), 118-122 (petty juries); Green, *Verdict According to Conscience*

<sup>324</sup> For "scrupulosity" in the thought of the period, including in the thought of Baxter, see Sampson, *Laxity and Liberty*, 87-88.

<sup>325</sup> Milward's *Diary*, 168.

<sup>326</sup> For Babington in the context of conflicts between judge and jury, see Cockburn, *History of English Assizes*, 115.

<sup>327</sup> Zachary Babington, *Advice to Grand Jurors in Cases of Blood*. London: Printed for John Amery at the Peacock against St. Dunstan's Church in Fleet-street, 1677) (photographic repr. New York: Garland, 1978), [B7 (recto)].

<sup>328</sup> *R. v. Windham*, 2 Keble, 180; and the account in Milward's *Diary*, 168-169.

innocent blood mean that the Grand Jury was to refuse to indict, giving a no true bill? Not at all: A failure of the indictment in a case of murder would leave the “innocent blood” of the *victim* unavenged, and for that reason, the safer way was to indict: “[I]t is most prudent and safe for every wise and conscientious Grand Jury-man . . . rather to presume it probable, all other Circumstances may be true, as they are laid in the Indictment . . . and so to leave it fairly to the Court to judge thereof, and themselves free from the imputation of Blood by concealment . . . .”<sup>329</sup>

Babington was not the only author to say such things. The most important of the texts written along such lines was Sir John Hawles’ “The English-mans Right,” of 1680. Hawles’ much-reprinted pamphlet, read widely in the American colonies during the eighteenth century, has been described as disseminating the teachings of Bushel’s Case in pamphlet form.<sup>330</sup> This is right, up to a point: Notably, following Bushel’s case, Hawles insisted that juries, “being of the Neighbourhood,” might well acquit defendants on the basis of their independent knowledge of the case.<sup>331</sup> Yet, read in its full context, the pamphlet should be seen as more than a rehash of Bushel’s Case. It was an attempt to cope with the disturbing implications of Bushel’s Case. For, as Hawles understood, the new order that respected juror’s “consciences” was an order that threatened to undermine the workings of criminal justice.

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<sup>329</sup> *Id.*, 112-113.

<sup>330</sup> Green, *Verdict According to Conscience*, 252 (Hawles’ pamphlet long influential and “a gloss” on Bushel’s Case.) Green interprets Hawles’ pamphlet as a defense of the right of the jury to find law. *Id.*, 257. In my view, this does not quite capture the tenor of the pamphlet, which emphasizes all aspects of the jury’s responsibility as forms of *moral* responsibility.

<sup>331</sup> Hawles, 29.

Indeed, like Babington, Hawles was primarily eager to persuade jurors to serve despite their conscientious qualms. His pamphlet took the form of a dialogue between a barrister and a prospective jurymen:

Barrister. My old Client! A good morning to you, whither so fast? You seem intent upon some important affair?

Jurymen. Worthy Sir! I am glad to see you thus opportunely, there being scarce any person that I could at this time rather have wisht to meet with.

Barr. I shall esteem my self happy, if in any thing I can serve you. ---- The business I pray?

Jurymen. I am summon'd to appear upon a Jury and was just going to try if I could get off. Now I doubt not but you can put me into the best way to obtain that favour.

Barr. 'Tis probable I could. But first let me know the reasons why you desire to decline that service.

Jurymen. You know, Sir, there is something trouble and loss of time in it; and mens Lives, Liberties, and Estates which depend upon a Jury's Guilty, or Not guilty, for the Plaintiff or for the Defendant) are weighty things. I would not wrong my Conscience for a world, nor be accessory to any mans ruin. There other better skill'd in such matters. I have ever so loved peace, that I have forborn going to Law (as you well know many times) though it hath been much to my loss.<sup>332</sup>

The Barrister's response, like that of Calamy, acknowledged the claims of conscience, but opposed to them the claims of public duty:

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<sup>332</sup> [Hawles], *The English-mans Right. A Dialogue between a Barrister at Law, and a Jury-Man* (London: Printed for Richard Janeway, in Queenshead Alley in Paternoster-Row, 1680) (repr. New York, Garland, 1978), 1.

Barr. I commend your *tenderness* and *modesty*; yet must tell you, these are but general and *weak* excuses. As for your time and trouble, 'tis not *much*; and however, can it be better spent than in doing *justice*, and serving your Country? To withdraw your self in such cases, is a kind of *Sacrilege*, a robbing of the publick of those duties which you justly owe it; the more *peaceable* man you have been, the *more fit* you are. For the office of a *Jury-man* is, *conscientiously to judge his neighbour*; and needs no more *Law* than is easily learnt to direct him therein. I look upon you therefore as a man well qualified with *estate*, *discretion*, and *integrity*; and if all such as you, should use private means to avoid it, how would the King and Country be honestly served? At that rate we should have none but *Fools* or *Knaves* intrusted in this grand concern, on which (as you well observe) the Lives, Liberties, and Estates of all *Englishmen* depend.

Whatever the dangers of conscience, jurors still had “public” duties that they could not omit. The Barrister then offered an argument much like Babington’s before him:

Avoiding blood guilt required more than just avoiding public service; it meant avoiding sins of omission:

Your *Tenderness* not be necessary to any mans being wrong'd or ruin'd, is (as I said) much to be commended. But may you not incur it unawares, by seeking thus to *avoid* it? *Pilate* was not innocent because he washt his hands, and said, *He would have nothing to do with the blood of that just one*. There are faults of *Omission* as well as *Commission*. When you are *legally call'd* to try such a cause, if you shall *shuffle* out your self, and thereby persons perhaps *less conscientious* happen to be made use of, and so a *Villain* escapes justice, or an *innocent* man is

ruined by a *prepossest* or *negligent* Verdict; can you think your self in such a case wholly blameless? *Qui non prohibet cum potest, jubet: He abets evil, that prevents it not when he may.*<sup>333</sup>

Thus the troubling picture of the good Christian—one who generally forbore to go to law, and who when faced with the task of judgment, worried that he might “wrong his Conscience.” Yet this very good Christian, through his laudable qualms, threatened to do injustice by omission.

The rest of Dialogue presented the Barrister’s efforts to soothe the Jury-man’s moral fears, and to explain the role of jurors in the common law system. It was true that that role presented authentic dangers to the jurors’ souls. In particular, they might be bullied by the court into finding a defendant guilty in cases of seditious libel. Such cases endangered their souls.<sup>334</sup> Yet they could not avoid service:

Thus a **Verdict**, so called in Law, *quasi veritatis*, because it ought to be the **Voice** or **Saying** of **Truth** it self, may become composed in its *material* part of *Falshood*. Thus Twelve men ignorantly drop into a Perjury. And will not every conscientious man tremble to pawn his Soul under the sacred and dreadful solemnity of an Oath, to attest and justifie a Lie upon Record to all Posterity; besides the wrong done to the Prisoner, who thereby perhaps comes to hang’d (and so the Jury in foro conscientiae are certainly guilty of his Murther) or at least

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<sup>333</sup> Hawles, English-man’s Right.

<sup>334</sup> Seditious libel cases raised some significant issues that I do not deal with here. In these cases, the traditional role of the criminal jury was effectively reversed: Where criminal juries had taken it as a privilege to enter special verdicts, avoiding the responsibility of the general verdict, in seditious libel cases jurors tried to lay claim to the authority to enter verdicts, while judges tried to compel them to enter special verdicts. See generally the discussion of Green, Verdict According to Conscience, 318-355; Langbein, Origins of Adversary Criminal Trial, 329; and the background in Philip Hamburger, The Development of the Law of Seditious Libel and the Control of the Press, 37 Stanford L. Rev. 661 (1985). Here as elsewhere the relationship between special and general verdicts demands a much deeper treatment than I give it in this Article.

by Fine or Imprisonment) undone with all his Family, whose just Curses will fall heavy on such unjust Jurymen and all their Posterity, that against their Oaths and Duty occasion'd their causeless misery. And is all this think you nothing but a matter of *Formality*?

Jurym. Yes really, a matter of *Vast Importance* and *sad* Consideration; yet I think you charge the mischiefs done by such Proceedings a little *too heavy* upon the *Jurors*; Alas good men! They *mean no harm*, they do but follow the *directions* of the Court, if any body ever happen to be to blame in such Cases it must be the *Judges*.<sup>335</sup>

Such were views were understandable, said the Barrister. Yet in the end they represented nothing but an effort to “shuffle off the blood guilt,” putting upon the judges instead. No such effort could ever succeed:

Barr. Yes, forsooth! That's the Jury-mens *common-plea*, but do you think it will hold good in the Court of Heaven? 'Tis not enough that we *mean no harm*, but we must *do none neither*, especially in things of that moment, nor will *Ignorance* excuse, where 'tis *affected*, and where duty obliges us to *Inform* our selves better, and where the matter is so *plain* and easie to be understood.

As for the *Judges* they have a fairer plea than you, and may quickly return the *Burthen* back upon the Jurors, for *we*, may they say, *did nothing but our duty according to usual Practise, the Jury his Peers had found the Fellow Guilty upon their Oaths of such an Odious Crime, and attended with such vile, presumptions, and dangerous Circumstances. They are Judges, we took him as they presented*

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<sup>335</sup> Id., 22

him to us, and according to our duty pronounced the Sentence, that the Law inflicts in such Cases, or set a Fine, or ordered Corporal punishment upon him, which was very moderate, Considering the Crime laid in the Indictment or Information, and of which they had so sworn him Guilty; if he were innocent or not so bad as Represented, let his Destruction lye upon the Jury &c. At this rate if ever we should have an *unconscionable Judge*, might he Argue; And thus the Guilt of the *Blood* or *ruin* of an Innocent man when 'tis too late shall be *Bandyed* to and fro, and *shuffled off* from the Jury to the Judge, and from the Judge to the Jury, but really *sticks fast to both*, but especially *on the Jurors*; because the very end of their Institution was to prevent all dangers of such oppression, and in every such Case, they do not only wrong their *own Souls*, and irreparably *Injure* a particular Person, but also basely betray the *Liberties* of their Countrey in General, for as without their *ill-compliance* and Act no such mischief can happen.

. . . .<sup>336</sup>

Dismaying advice for a Christian juror, who must fear to “wrong his soul,” but who must nevertheless serve, inevitably coming perilously close to having “the *Blood* or *ruin*” “*stick fast*” to him.

At the end of the seventeenth century, the basic moral tension of criminal jury trial was thus manifest: Jurors were legally free to resist entering judgments, and effectively free to resist serving as well. This was one of the consequences of the great English campaign for “liberties” of the late seventeenth century. But in a world of believing Christians, informed about the teachings of moral theology by a widely

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<sup>336</sup> Id.

circulating vernacular literature, this meant grave difficulties for the administration of criminal justice.

### VIII. The Eighteenth Century

These were the same tensions that produced the “reasonable doubt” rule a century later. To be sure, the eighteenth century was a period in which the great moral dilemmas of the Middle Ages began to dissipate. This is primarily because of a fundamental change in punishment practices. On both sides of the English Channel, blood punishments began to fall into disuse, in a process that would eventually culminate in the abolition of the death penalty at the end of the twentieth century in Europe. On the continental side, various forms of forced labor were slowly displacing execution and mutilation as the normal punishments in the eighteenth century.<sup>337</sup> In England too, the criminal justice system was reorienting itself: During most of the eighteenth century, the English system made use of transportation to the American colonies as a substitute for the older blood punishments.<sup>338</sup> Jurors also avoided inflicting blood punishments through the “pious perjury,” systematically undervaluing stolen goods in order to allow the accused to escape the most severe penalties of the law.<sup>339</sup>

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<sup>337</sup> Langbein has been a pioneer of the comparative study of the decline of blood punishments in the west. See already John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 *J. Legal Studies* 35-60 (1976). For a survey of liberalizing criminal procedure in eighteenth-century France, see Bernard Durand, *Déontologie du Juge et Droits de la Défense: Quelques pistes dans la procédure criminelle d’ancien régime*, in *Justice et Justiciables, Mélanges Henri Vidal* (Montpellier, 1994), 213-237.

<sup>338</sup> See generally J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, 1986), 500-519, 538-548, 592-601, 619-621.

<sup>339</sup> For a general survey of the devices of leniency, see Cockburn, *History of English Assizes*, 127-133.

To the extent blood punishments declined, all the old bets were off, as Langbein has recently insisted.<sup>340</sup> In particular, the old moral theology inevitably mattered somewhat less. That does not mean that the old theology entirely lost its relevance: Jurists still framed questions of punishment in the old theological terms. Thus on the Continent, the new punishments were known as “Verdachtstrafen,” “punishments on suspicion.” “Suspicion,” as we have seen, was a technical term in the moral theology of doubt: It was the degree of certainty one rank higher than “doubt” but still two ranks lower than “moral certainty.” Judges who had a “suspicion” of guilt had been authorized to order non-blood punishments since from an early stage in the development of the continental system.<sup>341</sup> The new system was thus one in which judges ordered lesser punishments on lesser degrees of certainty.<sup>342</sup> Because death and blood were not involved (at least in principle), the moral stakes in the administration of “suspicion punishments” were far lower.

In England too, to the extent transportation substituted for execution, or other mitigating devices were used, the moral stakes were lower. If blood punishments had been completely eliminated, there would have been much less need for the “reasonable doubt” instruction. Indeed, it is perhaps not surprising that the “reasonable doubt” instruction emerged in the Old Bailey in the early 1780s, precisely the years when the system of transportation had collapsed in the wake of the American Revolution.

Nevertheless, these changes in punishment practices were not enough to eliminate all moral concerns. Even though punishment practices were changing in the eighteenth

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<sup>340</sup> Langbein, *Origins of Adversary Criminal Trial*, 17, 334-336.

<sup>341</sup> Schmoeckel, *Humanität und Staatsraison*, 295-359.

<sup>342</sup> As Holtappels, *Entwicklung des Grundsatzes “in dubio pro reo,”* 67-74, pointed out forty years ago; see also the more detailed discussion of Palazzolo, *Prova Legale e Pena*.

century, there were always at least a few such cases, and the law on the books continued to speak of execution as the normal punishment. As long as Christian jurors cared about the fates of their souls, and knew some moral theology, something would have to be done to coax them into serving, and into entering the guilty verdict. And Christian jurors knew some moral theology. Christianity was by no means in decline in the Anglo-American eighteenth century: This may have been a century of Deism, but it was also a century of widespread religiosity and occasionally ecstatic revivals. For many prospective jurors, indeed, these were thunderous times of Christian belief: As the 1771 Connecticut Black Book of Conscience; or God's High Court of Justice in the Soul proclaimed, "O consider this, all ye that forget God, and make no conscience of your ways, you undermine your own salvation."<sup>343</sup> Judges who wanted to exercise control over jurors—as judges certainly did<sup>344</sup>—thus faced a difficult task: the task of controlling distinctly Christian jurors, whose beliefs could make them a hard herd to ride.

Here again, to make clear what was at stake for jurors, we must begin with the popular literature of conscience. The traditions of the literature of conscience were by no means forgotten in the eighteenth century. The texts of Ames, Perkins, Baxter and Taylor continued to circulate. Moreover the old teachings were presented by a new crop of eighteenth century moralists and popular legal writers. These men understood perfectly well what was at stake. For example, we may look at an anonymous 1771 Guide to the Knowledge of the Rights and Privileges of Englishmen. The author,

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<sup>343</sup> Andrew Jones, *The Black Book of Conscience; or God's High Court of Justice in the Soul* (New London: Timothy Green, 1771), 13.

<sup>344</sup> Famously observed by John H. Langbein, *The Criminal Trial Before Lawyers*, 45 U. Chi. L. Rev. 263, 284-287.

cribbing without citation from a 1681 pamphlet,<sup>345</sup> explained law that dated back to the fourteenth century:

The Office and Power of these Juries [i.e. the “Petit-Jury”] is *Judicial*, they only are the Judges from whose Sentence the Indicted are to expect Life or Death; upon their Integrity and Understanding, the Lives of all that are brought into Judgment do ultimately depend; from their Verdict their [sic] lies no Appeal, by finding Guilty or Not Guilty; they do complicatedly resolve both Law and Fact. As it hath been the Law, so it hath always been the Custom, and Practice of these Juries, upon all general Issues, pleaded in Cases Civil as well as Criminal, to judge both of the Law and Fact. So it is said in the Report of Lord Chief Justice *Vaughan*, in *Bushel’s Case*, that these Juries determine the Law in all Matters where Issue is joined and tried, in the principal Case, whether the Issue be about a Trespass or a Debt, or Disseizin in Assizes, of a Tort, or any such like, unless they should please to give a special Verdict with an implicit Faith in the Judgment of the Court, to which none can oblige them against their Wills.<sup>346</sup>

From the jurors only was the charged decision of “Life or Death” to be expected; and the common law tradition, as reaffirmed by *Bushel’s Case*, gave them a choice between entering the general verdict or the special verdict. Other moralists also faithfully explained the law of jury-duty to their readers, like Thomas Gisborne, who told them of their obligation “in conscience” to disclose their private knowledge, and to exercise

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<sup>345</sup> The passage is taken verbatim from Anon., *The Security of English-Mens Lives, of the Trust, Power, and Duty of the Grand Jurys of England* (London: Printed for T. Mitchel, 1681), 9-10.

<sup>346</sup> [Anon.], *A Guide to the Knowledge of the Rights and Privileges of Englishmen* (London: Printed for J. Williams and W. Bingley, 1771), 95-96.

“incorruptible integrity in pronouncing upon the whole evidence.”<sup>347</sup> Informed Englishmen were supposed understand the challenges of jury duty.

Meanwhile eighteenth-century English moralists repeated all the old lessons of the cases of conscience literature. In particular, they repeated the venerable “safer path” doctrine. I offer two representative quotes:

Our rule is to follow our consciences steadily and faithfully, after we have taken care to inform them in the best manner we can; and where we doubt, to take the *safest* side, and not to venture to *do* any thing, concerning which we have doubts, when we know there can be nothing amiss in *omitting* it; and on the contrary, not to *omit* any thing about which we doubt, when we know there can be no harm in *doing* it.

Richard Price, *A Review of the Principal Questions and Difficulties in Morals* (1758)<sup>348</sup>

How is a *good* Conscience to be kept, when the *doubt* lies only on *one* side? I answer, by taking the *other* side of which there is no doubt, and which therefore is the more safe. *In dubiis Pars tutior est eligenda*. “In all doubtful cases choose the safer side,” is a maxim almost universally agreed upon. He that acts with a doubting Conscience falls under the *Apostolical* censure [citing Rom. 14:23], and

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<sup>347</sup> Thomas Gisborne, *An Enquiry into the Duties of Men in the Higher and Middle Classes of Society in Great Britain*, 4<sup>th</sup> ed., 2 vols. (London: Printed for B. and J. White, and Cadell and Davies, 1771), 2:460. An interesting passage in Gisborne explores the problems of commercial matters in particular: “In deciding on mercantile proceedings, let him be guided by law, and not by what may have been the practice, perhaps the reprehensible practice, of himself or his friends in a similar instance.” *Id.*

<sup>348</sup> Richard Price, *A Review of the Principal Questions and Difficulties in Morals* (London: Printed for A. Millar in the Strand, 1758), 311.

needlessly hazards the breach of a divine command, which cannot be done without sin.

Henry Grove, *A System of Moral Philosophy* (1749)<sup>349</sup>

These moralists were not ready to abjure the English rigorist tradition. Good English Christians serving in positions of public trust must always obey their consciences: There was to be no taking refuge in the concept of a “public conscience.” Yet at the same time, they acknowledged that the great challenge remained that of squaring “conscience” with “duty.” As Grove put it in 1749:

They who set up a *publick Conscience*, to which all private Consciences are to submit, must be forced to grant, whether they will or no, that a Man ought not to surrender up his Judgment to the publick Conscience till his private Conscience is satisfied, that the doing so is his duty. Now there are multitudes who will tell them, that upon the fairest Trial of the pretensions of this publick Conscience, their particular Conscience convinces them that they ought not to be governed by it; whom therefore they must excuse from acting by an implicit Faith, however they may esteem it their own duty to take this method. A public Conscience, that is to subsist by every Man’s renouncing his private Conscience, is much like the public Credit in a Community, where all the Members are Knaves and Bankrupts.<sup>350</sup>

Serving in a public capacity was a morally dangerous business, which required every Christian concerned with the salvation of his soul to proceed with extreme care. Yet good Christians must serve.

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<sup>349</sup> Henry Grove, *A System of Moral Philosophy*, 2 vols. (London: Printed and Sold by J. Waugh, 1749), 2:42-43.

<sup>350</sup> *Id.*, 2: 15-16.

So it was that the fundamental dilemma of the late seventeenth century hung on, opposing the safe conscience to the claims of public duty. In addressing this dilemma, the eighteenth-century moralists continued to insist on the old provisos. Christians were to stay upon the safer path, which meant that they were to listen to their doubts. But this was not to be taken too far. As Benjamin Calamy had said, a *doubting* conscience was not to be confused with a *scrupulous* conscience. Doubts were legitimate and had to be obeyed; scruples were foolish and should be ignored.<sup>351</sup> In particular, the moralists held, the good Protestant was always to use his “reason,” wherever possible, in order to remove his doubts. We may quote Grove again:

Where the Law is doubtful, and even where there is actually no doubt, the side of example cannot be warrantably taken, till *inquiry* has been first made concerning what the *Law* directs. *To the Law and to the Testimony*, not to Examples, is the rule of proceeding, where the knowledge of the Law is to be had. It will by no means justify a *Roman Catholick* who without consulting his own Reason, or endeavouring to acquaint himself with the doctrine of Scripture, readily gives in to absurdities of belief and practice, that he can plead the Authority of the Church, and follows men of Name for Piety and Learning; neither does his own Conscience make any objections against the way he is in. For no man is privileged from using all the means of informing his Conscience, which God hath

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<sup>351</sup> E.g., *id.*, 24-25:

With regard to the *Law* there is a *right*, an *erroneous*, a *doubting*, and a *scrupulous* Conscience. A *right* Conscience is that which decides aright, or according to the only Rule of Rectitude the *Law* of God. This is threefold, *well-informed*, *probable* and *ignorant*. A *well-informed* Conscience in all its decisions proceeds upon the most evident principles, demonstrative if the subject will supply them, or where these fail, on the surest foundation it can get. It is not more a duty to labour after such a Conscience as this, which renders the obedience we pay to God’s commandments a *reasonable Service*, than it is a happiness to enjoy it. The satisfaction of it being like that of a Traveller who is perfectly acquainted with his way, and though it lies among a thousand other paths, know himself not to be mistaken.

put in his power. And much more inexcusable is the person, who swims with the stream when his Conscience is doubting, and he takes no pains to remove his Doubts.<sup>352</sup>

Doubts were, as they always had been, subject to a test of reason.

Doubts were subject to a test of reason: To make this point, it is especially useful to quote one of the most influential of early modern English moralists, Jeremy Taylor.<sup>353</sup> As we have seen, Taylor presented, in a typical English way, a rigorist view on the judge's conscience: A judge was never to "do any publick act against his private conscience."<sup>354</sup> A few chapters later, Taylor went on to address the critical question of the nature of "the doubtful conscience." Here he began by citing the inevitable maxim of Innocent III, that in cases of "doubt" one was to choose "the safer part." The problem of "doubt," Taylor explained, was created by the existence of "reasons on either side":

When the Conscience is doubtful, neither part can be chosen till the doubt be laid down; but to chuse the safer part is an extrinsecal means instrumental to the deposition of the doubt, and changing the conscience from *doubtful* to *probable*. The Rule therefore does properly belong to the *probable conscience*: for that the conscience is *positively doubtful* is but accidental to the question and appendant to the person. For the reasons on either side make the conscience *probable*, unless fear, or some other accident make the man not able to rest on either side. . . .

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<sup>352</sup> Grove, *System of Moral Philosophy*, 2:

<sup>353</sup> For Taylor as "England's last great casuist," see Edmund Leites, *Casuistry and Character*, in Leites, ed., *Conscience and Casuistry in Early Modern Europe* (Cambridge, 1988), 124-125.

<sup>354</sup> Above, TAN

If the *conscience* be *probable*, and so evenly weighed that the determination on either side is *difficult*, then the safer side is ordinarily to be chosen . . . .<sup>355</sup>

“This also happens,” Taylor informed his readers, “in the matter of Justice very often.”<sup>356</sup>

Nevertheless, he held, “[i]t is lawful for the Conscience to proceed to action against a doubt that is merely speculative.”<sup>357</sup> And what sorts of circumstances were those? They were precisely circumstances in which there were “reasons” on both sides. In such cases, the doubting Christian was to employ “determination” in the effort to reach a decision:

Every little reason is not sufficient to guide the will, or to make an honest or a probable Conscience . . . but in a doubting conscience, that is, where there are seemingly great reasons of either side, and the conscience not able to determine between them, but hands like a needle between two load-stones and can go to neither, because it equally inclines to both; there it is, that any little dictate that can come on one side and turn the scale is to be admitted to *counsel* and to *action*; for a *doubt* is a disease in the *conscience*, like an *irresolution* in *action*, and is therefore to be removed at any just rate, and any excuse taken rather than have it permitted. . . . For in a *doubting conscience* the immediate cure is not *to chuse right*, that is the remedy in an *erring conscience*; but when the disease or evil, is *doubting*, or *suspension*, the remedy is *determination*; and to effect this, whatsoever is sufficient may be chosen and used.<sup>358</sup>

Doubts there might be; but one must try somehow to act. Taylor’s picture of the doubting mind is indeed much like that of Prosper Farinacci a century before him: The

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<sup>355</sup> Id., 136-138.

<sup>356</sup> 138.

<sup>357</sup> Id., 139.

<sup>358</sup> 142.

mind wavered, and could not decide. But at last there must be a decisive movement of the mind.

Such was the eighteenth-century moral literature. It is only if we remember it that we can understand the most revealing passage of all: William Paley's account of jury trial.<sup>359</sup> In 1785, during the very years when the "reasonable doubt" standard established itself in English justice, Paley, the leading moral philosopher of the day, described the problems of jury trial in the same terms that had been used for more than a century. Paley borrowed the well-established language of the conscience literature, explaining that the reluctance of jurors to convict grew, not out of legitimate *doubt*, but out of illegitimate *scruples*. He saw particular danger in the tendency of juror's to read too much into the centuries-old maxim requiring that in cases of doubt one choose the safer path. Paley's argument was little different from Calamy's a hundred years earlier:

I apprehend much harm to have been done to the community, by the over-strained scrupulousness, or weak timidity of juries, which demands often such proof of a prisoner's guilt, as the nature and secrecy of his crime scarce possibly admit of; and which holds it the part of a *safe* conscience not to condemn any man, whilst there exists the minutest possibility of his innocence. Any story they may happen to have heard or read, whether real or feigned, in which courts of justice have been misled by presumptions of guilt, is enough, in their minds to found an acquittal upon, where positive proof is wanting. I do not mean that juries should indulge conjectures, should magnify suspicions into proofs, or even that they should weigh probabilities in *gold scales*; but when the preponderation of

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<sup>359</sup> Paley's place in the debates of the time is described in Green, *Verdict According to Conscience*, 303-305, and for the larger context of the desire to crack down on crime, 290-310.

evidence is so manifest as to persuade every private understanding of the prisoner's guilt; when it furnishes that degree of credibility, upon which men decide and act in all other doubts, and which experience has shown that they may decide and act upon with sufficient safety; to reject such proof, from an insinuation of uncertainty that belongs in all human affairs, and from a general dread lest the charge of innocent blood should lie at their doors, is a conduct which, however natural to a mind studious of its own quiet, is authorized by no considerations of rectitude or utility. It counteracts the care and damps the activity of government: it holds out public encouragement to villany, by confessing the impossibility of bringing villains to justice. . . .<sup>360</sup>

All of this should make it completely unsurprising to discover that the “reasonable doubt” standard grew out of the old “safer way” moral theology of doubt, and the old fears that “public” justice would be endangered by the private conscience; and so it did.

Let us turn to the first examples of the use of the rule in the later eighteenth century. To hunt for the first case to use the rule would be misguided: As Barbara Shapiro has argued, the “reasonable doubt” rule was quite simply in the air in the later eighteenth century.<sup>361</sup> Nevertheless, it is revealing to look closely at the earliest cases in which the formula does turn up. The first examples that scholars have found are from the American colonies, and in particular from the closing arguments of John Adams and Robert Treat Paine in the Boston Massacre cases of 1770. Adams, a man quite familiar with the traditions of continental law, defending the British soldiers charged in the case,

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<sup>360</sup> 391-392.

<sup>361</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 22-25.

argued that jurors must take the well-worn “safer path.” Adams quoted the observations of Hale’s History of Pleas of the Crown:

The rules I shall produce to you from Lord Chief Justice *Hale*, whose character as a lawyer, a man of learning and philosophy, and as a christian, will be disputed by nobody living; one of the greatest and best characters, the English nation ever produced: his words are these. 2. H.H.P.C. *Tutius semper est errare, in acquietando, quam in puniendo, ex parte misericordiae, quam ex parte justitiae*, it is always safer to err in acquitting, than punishing, on the part of mercy, than the part of justice. The next is from the same authority, 305 *Tutius erratur ex parte mitiori*, it is always safer to err on the milder side, the side of mercy, H.P.P.C. 509, the best rule in doubtful cases, is, rather to incline to acquittal than conviction: and in page 300 *Quod dubitas ne feceris*, Where you are doubtful never act; that is, if you doubt of the prisoners guilt, never declare him guilty, though there is no express proof of the fact, to be committed by him; but then it must be very warily pressed, for it is better, five guilty persons should escape unpunished, than one innocent person should die.<sup>362</sup>

There was nothing novel about this: We have already encountered many continental and English moral theologians who had spoken, almost verbatim, in the same terms during the same years. “When you are doubtful, do not act!” Hale is not simply an authority on the law, in this passage. He is an expositor of wholly familiar Christian values.

On the other side, Paine, arguing for the Crown, himself responded by alluding to the moral theological literature. As we have seen, the traditions of moral theology had

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<sup>362</sup> 3 L. Wroth and H. Zobel, *Legal Papers of John Adams* (1965), 243. The discussion of Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 517 (1975), hid the quotations from Hale behind ellipses.

long resisted excessive radicalism. The continental tradition has described the dangers of the “benign” view since the thirteenth century. The same was true of the English literature on the problems of justice that had grown up since 1670. That literature held that the doubts that had to be obeyed were those that conformed to “reason.” Indeed, the moralist literature had insisted for a hundred years that qualms of conscience must not be allowed to prevent the satisfactory workings of public justice. It is in that context that we can understand the words of Paine that were cited by Anthony Morano thirty years ago:

[A] “Law all Mercy[”] would be an [unjustice] and therefore when we talk of the Benignity of the (English) Law We can understand nothing more than what is fairly Comprehended in Coke’s Observation on Our Law in General that it is *Ultima Ratio* the last improvement of Reason which in the nature of it will not admit any Proposition to be true of which it has not Evidence, nor determine that to be certain of which there remains a doubt.<sup>363</sup>

There was certainly something of Coke in this. But the basic tension between certainty and doubt had been intimately associated with moral theology for centuries, and continued to be intimately associated with moral theology in the British eighteenth century. The same was true of reason and doubt, Paine’s next topic:

If therefor in the examination of this Cause the Evidence is not sufficient to Convince you beyond reasonable Doubt of the Guilt of all or of any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of the Guilt beyond reasonable Doubt the

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<sup>363</sup> 3 L. Wroth and H. Zobel, *Legal Papers of John Adams* (1965), 271. Quoted and discussed in Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 517 (1975).

Justice of the Law will require you to declare them Guilty and the Benignity of the Law will be satisfied in the fairness and impartiality of the Tryal.<sup>364</sup>

The Boston Massacre trial arguments, like everything else we have seen from the period, were framed in the language of safer path theology.

The same is true of the next spate of “reasonable doubt” cases identified by scholars. These cases come from the Old Bailey, the criminal court of London, in the mid-1780s. John Langbein has emphasized the importance of these cases in his recent, magisterial, work on the “lawyerization” of the common law trial.<sup>365</sup> He has, however, conceded that he is “unable to say how the emergence of the beyond-reasonable-doubt standard was related to the growing lawyerization” that is his theme.<sup>366</sup> The answer, I believe, is that the emergence of the rule is not related to lawyerization, or at least not in any direct way. If anything, these Old Bailey cases show the presence, in the minds of all involved, of safer path moral theology, even more clearly than the Boston Massacre trial.

Again, there should be no surprise in this: Paley, commenting on English criminal justice in 1785, complained precisely that jurors hesitated to convict because they wished to preserve a “*safe*” conscience. So they did. Our records of what was said in the Old Bailey trials of the time is inevitably spotty. But they make it obvious enough that the moral theology of the safer path was guiding jurors. For example, we can look to a 1787 trial. The closing declaration of the judge in that case is framed in the same language used two years earlier by Paley. Paley spoke of jurors who wished to keep their consciences “safe,” and so did the judge in this case. He also made it clear that he himself, like public officials for a century, felt the need to compensate for the reluctance

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<sup>364</sup> Id.

<sup>365</sup> Langbein, *Origins of Adversary Criminal Trial*, 261-266

<sup>366</sup> Langbein, *Origins of Adversary Criminal Trial*, 265.

of jurors to convict, in order to show proper severity. The guilt of the three accused persons, in the judge's eyes, was "perfectly clear." Yet he acknowledged that he had to bow to juror "conscience":

Trial of John Ward, alias Spoony Jack, Alexander Bell, Thomas Porter (theft with violence: robbery) (1787)<sup>367</sup>:

The Jury retired for a quarter of an hour, and returned with a verdict

**ALL THREE NOT GUILTY.**

Court. Prisoners, you have been extremely fortunate in the caution that has been used by the Jury in this case, which I am far from blaming: for in a case where any degree of doubt occurs, whatever reason there may be to suspect the guilt of parties, it is always safest to lean on the side of mercy; where any real and substantial doubt occurs: but there are such circumstances proved, that whether you are or are not guilty of the robbery, it is perfectly clear, that you and your associate, that worthless woman there, decoyed this poor man, if not for the purpose of robbing, clearly for that of grossly and cruelly ill-treating him; that is an offence punishable by law, though in a different way; therefore I shall think it my duty, that you should be brought to punishment for that offence; and I shall therefore commit you to Newgate, till you can find bail for assaulting and ill-treating this man; in this case, for the encouragement of those who may have been guilty with their associates, but have shewn some compassion on the person whom they have robbed . . . .

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<sup>367</sup> The Proceedings of the Old Bailey Ref: t17870523-99

Other judges showed the same attitude, conceding the right of jurors to take the “surest side” in cases of doubt, but taking at the least the occasion to admonish the accused:

Trial of John Shepherd (Theft) (1789)<sup>368</sup>:

[Verdict]: NOT GUILTY.

Tried by the London Jury before Mr. RECORDER.

Court to Prisoner. You have had a very narrow escape indeed; the Jury have taken that which is always the surest side, if there is any degree of doubt; as they have spared your life, I hope it will be so conducted by you, as to make this verdict a benefit to yourself.

Other judges were more willing to accept the prospect that a jury might acquit because the jurors found the “safest” path, in a case where there was a “balance” of doubt, the “most pleasant” for themselves:

Alexander Gregory (Theft with Violence; Robbery) (1784)<sup>369</sup>:

[Court]: [I]n short, if any doubt at all hangs upon your minds, if you feel the least suspicions, any balance at all, you know it is much the safest way, and it must be most pleasant to you, to lean to the merciful side and acquit him. . . .

NOT GUILTY.

The mind in “balance” was a familiar topos from moral theology. So indeed were jurors who, like the jurors described by Hawles a century earlier, were concerned about what was “pleasant” for themselves as well as for the accused.

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<sup>368</sup> Trial of John Shepherd (Theft) (1789). THE PROCEEDINGS OF THE OLD BAILEY REF: T17890603-43

<sup>369</sup> THE PROCEEDINGS OF THE OLD BAILEY REF: T17840915-10.

The search for the safer path showed up in other ways too in the Old Bailey: In some cases, the court coaxed the jury to take the “safest” way by convicting of a lesser charge.<sup>370</sup> As on the Continent, moreover, the language of moral theology also colored the treatment of evidence. Judge’s commenting on the evidence for the jury also spoke reflexively of “the safer way”:

Trial of Henry Harvey (Deception, Perjury) (1785)<sup>371</sup>:

[G]entlemen, when I call your attention to the circumstance of the case, I am bold to say that her evidence cannot be true, if much of that evidence which has preceded it be true; therefore, wherever there are contradictions as they cannot be

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<sup>370</sup> Bridget Murphy, Margaret Murphy (Theft, Pickpocketing) (1783), THE PROCEEDINGS OF THE OLD BAILEY REF: T17830430-44:

Court to Jury. The circumstance of privacy seems to be personal, to the person that commits the fact, and that of the person who is present, aiding, and assisting, is guilty of the felony, yet as it depends very often upon the personal dexterity, it might not be fit perhaps to punish the person who means to be aiding and assisting in the general offence of stealing, with the same severity therefore the rule has been, to confine it to the individual hand that commits the fact; therefore, if it cannot be said, that both the prisoners were guilty of the private stealing, it is the safest way to acquit them altogether of the criminal charge.

MARGARET MURPHY, BRIDGET MURPHY,

GUILTY, Of stealing but not privately.

William Snaleham (theft: burglary) (1784). The Proceedings of the Old Bailey Ref: t17840421-8:

Court. Gentlemen of the Jury, As to breaking there is a difficulty which is not explained to your satisfaction or mine; nobody knows how they got into the house, there are no marks of violence any where; there is a small circumstance that goes to make it more probable that it should be at the parlour window, but that I rather think falls short of satisfactory proof that they did get in that way; they might have got in by some way which excludes the idea of force used to obtain admission; as for instance, if a garret window was open, and they got in by the leads, or if they got in at any other open window by a ladder: it therefore seems to me upon the whole evidence, if you should be satisfied that the prisoner was concerned in this robbery, the safest and properest verdict for you to give will be, that he is guilty of stealing the things, but not guilty of breaking and entering the dwelling house.

GUILTY Of stealing the goods, but NOT GUILTY of breaking and entering the dwelling house.

<sup>371</sup> Trial of Henry Harvey (Deception, Perjury) (1785) THE PROCEEDINGS OF THE OLD BAILEY REF: T17850914-187

both true, the safer way I take it, is to reject such evidence entirely; if the evidence of Goodman be true, the evidence of Brookes is not true; if Brookes's is true, Goodman's is not true; the safer way, and that which has always been taken, as I conceive, by every Jury, is, to reject that testimony entirely.

It is in the same light that we should interpret a 1783 case cited by Langbein, in which the judge told jury that if “considering the evidence that has been laid before you, and all the circumstances of the case, you should err on the innocent side of the question, I am sure you error will be pardonable.”<sup>372</sup> The question, of course, was whether what the *jurors* had done would be “pardonable.” The Old Bailey, like the rest of the Anglo-American world, was a world whose conversations casually assumed that wise heads sought “the safer way”; and judges spoke respectfully of the corresponding anxieties of jurors.

Yet as jurists had recognized since at least the thirteenth century, delicacy of conscience posed inevitable threats to the management of criminal justice. In the traditions of moral theology, such dangers to the “public interest” were met by insisting that doubts be reasonable, and that was true in the Old Bailey as well. We can see this in a series of cases that begin tentatively in 1782,<sup>373</sup> and more clearly 1783. In one 1783 trial we find the judge describing once again the classic conflict between private conscience and public duty, as it had been laid out by Calamy a century earlier:

Trial of John Clarke (Murder) (10 Dec. 1783)<sup>374</sup>:

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<sup>372</sup> Cited and discussed in Langbein, *Origins of Adversarial Trial*, 263.

<sup>373</sup> Trial of Thomas Hornsby (Theft with Violence; Highway Robbery) (1782), *THE PROCEEDINGS OF THE OLD BAILEY* REF: T17820911-56:

Court. Have you any reasonable doubt - I am partly sure it was the hanger; the lock of the pistol was found in the co next morning.  
NOT GUILTY

<sup>374</sup> *THE PROCEEDINGS OF THE OLD BAILEY* REF: T17831210-4

If from all these circumstances you are clearly satisfied that the wound was the cause of his death, and are also clearly satisfied with the truth of the rest of the evidence, and that the result of that evidence is proved clearly to your satisfaction, that the prisoner is the man that gave the wound, I am then obliged to tell you that I am of opinion there is nothing in this case that can reduce the crime below that aggravated crime of murder: and it will in that case be your duty to find the prisoner guilty of this indictment: If on the other hand you think there is any room to doubt the truth of the evidence, or that believing the truth of the evidence is not sufficient proof that the prisoner gave the wound, or that the wound was the cause of his death; in that case it is your duty to acquit the prisoner wholly; or if there appears any circumstances that would reduce the crime to manslaughter, in that case you may find that verdict; but there does not appear to me any sort of evidence to take that middle line: Therefore, give your verdict according to your own consciences, you must be clearly satisfied of the fact of a crime so heinous in its nature, and so penal in its consequences, and then it is your duty to the public and to justices, to find the prisoner guilty. If on the other you think there is any reasonable cause for doubt, either upon the fact of his warning the man, or of the wound being the cause of his death, you will acquit him.

Guilty of the wilful murder. Death.

In another, we find the judge speaking, as moral theologians had long done, in terms of “moral probability,” and of the public interest as well:

Trial of John Higginson (Theft; Embezzlement) (1783).<sup>375</sup>:

In almost every case that comes before you, there is a strict possibility where the positive fact itself is not proved by witnesses, who saw the fact, there is a strict possibility, that somebody else might have committed it: But that the nature of evidence requires, that Juries should not govern themselves, in questions of evidence, that come before them, by that strictness, is most evident, for if it were not so, it is not possible that offenders of any kind should be brought to Justice. Where there is reasonable probability, that notwithstanding the appearances a man may be innocent, it is very fair to make use of them: But if it goes further, and if there is nothing but absolute possibility, where all the moral probabilities of evidence are against the prisoner, where nothing can save but absolute possibility that he may be innocent, it would be going too far to conclude him innocent from that, that would make it impossible that public Justice should take its course. Therefore, the true question for your consideration is, whether judging of this fact, as you judge of all other facts, that happen in the course of your dealings with mankind, and your correspondence with one another, it appears to you be proved satisfactorily, and to moral demonstration, that this prisoner must have been the person that secreted this letter, and took these notes out of it, if that be the fair result of this evidence, then the prisoner is guilty, and it will be your duty to find him so. If on viewing the evidence any reasonable doubt remains on your minds, that he is the person that secreted this letter, and took the notes out of it, he will be entitled to your acquittal. The public justice of the country is extremely considered, on the one hand, if the charge is fairly brought home to the prisoner,

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<sup>375</sup> THE PROCEEDINGS OF THE OLD BAILEY REF: T17830430-67

that justice should be done upon him; while on the other hand, if there remains any distant hope of his innocence, he should have the same justice by being found not guilty.

GUILTY. (Death.)

The “reasonable doubt” language, while hardly yet a fast rule of law, was regularly repeated thereafter:

Trial of Richard Corbett (Arson) (1784).<sup>376</sup>:

But you gentlemen will weigh all these circumstances in your minds, in such a case you certainly will not convict the prisoner on a mere suspicion; but if you think his conduct such as can by no possibility be accounted for consistent with his innocence, you will be obliged to find him guilty; I do not mean to say that you are to strain against all evidence, or that if you are clearly and truly convinced of his guilt in your own minds you ought to acquit him, but I say if there is a reasonable doubt, in that case that doubt ought to decide in favour of the prisoner.

NOT GUILTY.

Trial of Joseph Rickards (Murder) (1786)<sup>377</sup>:

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<sup>376</sup> THE PROCEEDINGS OF THE OLD BAILEY REF: T17840707-10

If you are satisfied, Gentlemen, upon the whole, that he is guilty, you will find him so; if you see any reasonable doubt, you will acquit him.

Trial of George Crossley (Deception) (1796)<sup>378</sup>:

The first point, therefore, for you to consider is, whether this is the genuine will of Mr. Lewis, or whether it is a forgery; which, if we should establish beyond any reasonable ground of doubt, for you are not to expect mathematical demonstration in the proceedings of the administration of justice; but you are not to pronounce him guilty of a forgery, if a reasonable doubt can be entertained, by conscientious men upon their oaths, fairly considering the circumstances of the case.

Such was the origin of “reasonable doubt.”

The question remains why the standard established itself in the Old Bailey when it did, in the mid-1780s. I have already hinted at what I think may be the answer: If we can trust the records that we have, all of these cases—cases speaking not only of “reasonable doubt” but also of “the safer path,” “the surer side” and the like—date to the early 1780s, and most especially to the years 1783 and 1784. It was in 1785, too, that Paley addressed himself to jurors who worried too much about keeping their consciences “safe.” These seem to mark the critical moment.

If those were indeed the years in which the old moral theology was definitively introduced into English jury instructions, it worth noting a possible link with the history of punishment. As we have seen, blood punishments were primarily avoided through transportation to America during the eighteenth century. Once the American Revolution

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<sup>377</sup> THE PROCEEDINGS OF THE OLD BAILEY REF: T17860222-1

<sup>378</sup> THE PROCEEDINGS OF THE OLD BAILEY REF: T17960217-70

began, though, transportation was impossible. During the duration of the Revolution, convicts were put to hard labor, in the so-called “hulks” on the Thames. It remained unclear, though, what their ultimate fate would be. Only in 1787 was transportation re-introduced, now with Australia as its terminus. Within this period of uncertainty, 1783 is an important date: It was in September of 1783 that the Treaty of Paris was signed, formally recognizing American independence. The first cases using the “reasonable doubt” formula in the Old Bailey thus came in the year in which it became clear for the first time that transportation to America was an impossibility, while it remained uncertain what was otherwise to be the fate of those convicted. Perhaps—though I offer the suggestion only most diffidently—this raised the punishment stakes sufficiently that jurors needed more coaxing to convict than had been the case in previous decades. Seventeen-eighty-three was a year when no one could be quite sure where the future of punishment lay.

### IX. Conclusion

Over the course of the nineteenth century, the moral anxieties I have traced were gradually forgotten. They were certainly not forgotten immediately. We can follow the continuing importance of the old moral theology in the rise of the “moral certainty” formula, used alongside “reasonable doubt” for generations.

Steve Sheppard has recently traced much of this history.<sup>379</sup> Nor did educated lawyers forget the old anxieties at once. As we have seen, the power of the moral drama of judging was still strongly felt by James Fitzjames Stephen in 1883.<sup>380</sup>

Nevertheless, the old Christian culture that produced the “reasonable doubt” rule underwent a slow process of decline after 1800. Indeed, it was not just the old Christian culture that went into decline: More broadly, the old world of pre-modern anxieties, of which Latin Christendom was just one part, began to vanish. By the early or mid-twentieth century, few people still had the old vivid sense of the “heavy and painful” responsibilities of judging.

Unavoidably, this altered the moral structure of jury trial. Indeed, over the course of the nineteenth and twentieth centuries, the common-law world gradually underwent the same change that had probably already taken place in the culture of the judges of the sixteenth-century Continent. As we have seen,

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<sup>379</sup> Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have Weakened the Presumption of Innocence*, 78 *Notre Dame L. Rev.* 1165, 1181-1206 (2003).

<sup>380</sup> Above.

sixteenth-century continental jurists were already in a kind of modern condition: They betrayed little sense of any moral or spiritual anxiety in judging. By the sixteenth century, continental judges had probably already come fully to inhabit their professional roles. In consequence, the medieval theology of doubt, a theology of anxiety, gave way to something else on the Continent: It gave way to a continental law of proof that was just a law of proof, not a law of moral comfort.<sup>381</sup> Continental judges, fully professionalized and feeling a diminished need for moral comfort, could treat trial simply as a process of attaining certainty.

The same thing has happened in our own world over the last couple of centuries. Jurors have certainly not acquired a fully professionalized identity. But they have lost so much of the anxiety attached to judging that they feel a diminished need for moral comfort.<sup>382</sup> At the same time, the old moral theology of doubt has lost its currency: We no longer live in a world of Christian jurors experiencing fear and trembling every time they must act when “in doubt.” We

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<sup>381</sup> Above, Section IV.

<sup>382</sup> See the powerful and interesting study of the sense of responsibility among capital jurors by Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, *Jury Responsibility in Capital Sentencing*, 44 *Buffalo L. Rev.* 339 (1996).

no longer live in a world in which individuals feel the need to find their way to “the safer path.” Correspondingly, the old moral comfort rules have come to seem to us like proof rules—first and foremost among them, “reasonable doubt.”

Yet “reasonable doubt” was never designed to be a proof rule, and it cannot possibly work as one. Therein lies the heart of our current dilemma.

When the “reasonable doubt” formula was addressed to the moral anxieties of Christian jurors, as it was in its original form in the 1780s, it made sense: It was capable of achieving a practical goal. After all, Christians experiencing moral anxiety *can* be comforted. If they know the terminology and traditions of the moral theology of doubt, and if they are guided by judges who seem concerned and trustworthy, they can overcome their doubts, and vote to convict. By contrast, achieving complete certainty in criminal cases is not a practical goal.

There is no such thing as a procedure that will always produce objectively correct answers in a criminal trial; and there is no possible formula, in any jury instruction, that will meaningfully guarantee that the ends of proof have been

reliably attained. The formula “reasonable doubt,” in particular, is of no use in the pursuit of objective truth. It is a rule addressed to the subjective state of mind of the anxious Christian.

So it is that we find ourselves in a state of communal confusion, clinging to the “reasonable doubt” formula, a moral comfort formula, in a world in which we think criminal procedure is exclusively about proof. Indeed, we find ourselves in a world in which we cannot seem to figure out how to manage our criminal justice at all, with the Supreme Court jerking, in an unseemly and socially costly fashion, from upholding the Sentencing Guidelines to making them completely unworkable. There are many causes of that situation, of course. But one cause is that we asking the wrong question: We are asking the unanswerable question of whether guilt has been “proven beyond a reasonable doubt” to juries.

Does that mean we should abandon the “reasonable doubt” rule? That would be unthinkable. It has become much too deeply rooted in our legal culture.

But it does mean that we must approach “reasonable doubt” in a more historically informed, open-minded, and morally humane spirit.

How then should we approach “reasonable doubt”? First, there is no point in trying to be faithful to the original intent of the phrase. This is in part because there is no original drafter of the “reasonable doubt” rule: Not only does the phrase not appear in the Constitution, it was never crafted by anybody in particular. It emerged in a process of collective European rehashing of the precepts of Christian moral theology. It was created not only by English jurists, but also by English moralists—and by Italian and Spanish and French moralist and lawyers as well. There is thus no original intent to interpret. All that we can do is try to understand the rule in its original context, which is something different.

Second, there are better and worse ways to understand the rule in its original context. The worse way is to try to reformulate it in ways that somehow are intended to be faithful to its original purpose. There is more than one way to

make this mistake. It would be a mistake, for example, to begin by observing that the original purpose of the rule was to make conviction easier, not harder; and then to draw the nasty conclusion that a modern jury instruction should tell the jury to get over its qualms and convict. This would make little sense in our world, simply because the problems of our world are not the problems of the eighteenth century. Jurors today bring relatively few Christian qualms to the process of judgment, and we have no need for a rule intended to coax them into convicting.

It would make equally little sense to observe that the rule originally had to do with blood punishments, and therefore to restrict it to capital cases. While the rule undoubtedly has a place in capital cases—perhaps the last cases where jurors still fully feel some of the old anxieties—it has a place elsewhere as well, if it has any place at all. The world of punishment has changed since the early modern period. Unlike our ancestors, we no longer think of non-blood punishments as mild punishments. Indeed, in the current American atmosphere,

it would be a wholly tragic error to refuse to recognize the harshness of our non-blood punishments, and the correspondingly high moral stakes in inflicting them.

The right lesson to draw from the history of “reasonable doubt” is not a lesson about how to make sense of “reasonable doubt,” either in its original intent or in its original context. Those are senseless goals. The right lesson is a lesson about the consequences of the great moral changes of the last two centuries.

The real root of our dilemmas has to do with the fact that we have forgotten how morally fearsome the act of judging is. We have allowed ourselves to become people who condemn offenders precisely in the way Saint Augustine said

offenders must never be condemned: with “passion,” and most especially with the passion of self-righteousness. We have lost any sense that we should doubt our own moral authority when judging other human beings, forgetting what

Christian jurists knew in the fifteenth century: [I]f the judge glories in the death of a man, as no small number do in our age, he is a murderer.”<sup>383</sup> I say this not in order to preach, as the crazies of the 60s did, that we should honor criminals as

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<sup>383</sup> Aegidii Bossii Patricii Mediolanensis . . . Tractatus Varii (Lyons: Apud Antonium de Antoniis, 1562), 457.

“revolutionaries,” or anything of the kind. The old moral theologians were right:

We must condemn criminals. It is a part of our sober public duty. But we must condemn them in a spirit of humility, of dutifulness, of fear and trembling about our own moral standing. That is what our ancestors understood; and they were right. It is because they understood this that they spoke about “reasonable doubt.”

We can never return to the moral world of our ancestors: The theology that taught them the lesson of “reasonable doubt” is lost to us for good. But the lesson is one that we must find some way to re-learn. Most especially it, we must learn it when it comes to jury trial. Indeed, if there is any advantage to jury trial, it is that jurors have not fully come to inhabit the hardened, professionalized attitude of the sixteenth-century continental judge. Lay jurors can still find something shocking and fearful in what they do, at least in capital cases. Even in capital cases, though, jurors must be reminded of what is at stake: As Eisenberg, Garvey and Wells write, “it would be better to openly and routinely

instruct jurors that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final.”<sup>384</sup> It would indeed, and not just where death is involved. Instructing jurors forcefully that their decision is “a *moral* one” about the fate of a fellow human being, is, in the last analysis, the only meaningful way to be faithful to the original spirit of “reasonable doubt.”

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<sup>384</sup> Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, Jury Responsibility in Capital Sentencing, 44 Buffalo L. Rev. 339, 379 (1996)