

REVIEW

Reasonable Doubt and the History of the Criminal Trial

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*The Origins of Reasonable Doubt:
Theological Roots of the Criminal Trial,*
James Q. Whitman. Yale, 2008. Pp ix, 276.

INTRODUCTION

On July 7, 1784, a young man named Richard Corbett stood in London's main criminal court, the Old Bailey.¹ He was not there as a spectator or witness. He was the accused, indicted for arson. The evidence was presented, then the judge summarized the case for the jury. At the end of the summary, the judge gave the jury this instruction: "[I]f there is a reasonable doubt, in that case that doubt ought to decide in favor of the prisoner."²

To modern Americans, the instruction will be familiar. We take pride in the presumption of innocence and in the rule that the defendant must be acquitted if the prosecution does not establish the facts of guilt beyond a reasonable doubt. Indeed, the concept of reasonable doubt and the judge's instruction to the jury of the prosecution's burden to

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¹ The Old Bailey was the principal criminal court for cases of serious crime arising in the city of London and the adjacent county of Middlesex. For background, see Allyson N. May, *The Bar and the Old Bailey, 1750–1850* 16–17 (North Carolina 2003). The proceedings of the Old Bailey from 1674 to 1913 are available on the Internet. See *The Proceedings of the Old Bailey: London's Central Criminal Court, 1674 to 1913* (Old Bailey Proceedings 2008), online at <http://www.oldbaileyonline.org> (visited Apr 14, 2009).

² Trial of Richard Corbett (t17840707-10), *The Proceedings of the Old Bailey* (July 7, 1784), online at <http://www.oldbaileyonline.org/browse.jsp?ref=t17840707-10> (visited Apr 14, 2009).

satisfy the reasonable doubt standard are hallmarks of our criminal law.³ Yet what is the history of this reasonable doubt instruction?

Professor James Q. Whitman, an expert in legal history and comparative law, offers an answer in this new book, which brings together the history of the Anglo-American trial by jury and of Continental inquisitorial criminal procedure to shed light on the mystery of the reasonable doubt standard. The book is wide ranging in time and scope, and it is deeply learned. The argument is well articulated and intriguing. The book, in sum, makes an important contribution to our understanding.

This Review proceeds in three main parts. Part I outlines the book's argument. Part II highlights four significant aspects of the book meriting high accolades. Part III raises four questions prompted by the book's thesis.

I. THE BOOK'S ARGUMENT

The book begins with a mystery. The concept of reasonable doubt is "fundamental and universally familiar . . . but in practice it is vexingly difficult to interpret and apply" (p 1). So what exactly does reasonable doubt *mean*? In the Anglo-American legal tradition, phrases are traditionally given content through the accumulation of precedent; yet this has been impossible for reasonable doubt, because judges at common law were "forbidden to explain the meaning of the phrase" (p 2). This prohibition remains in force in some American jurisdictions, such as Illinois, where the state supreme court declared in 1992 that "neither the court nor counsel should attempt to define the reasonable doubt standard."⁴ The result is that modern jurors are "understandably baffled" (p 1) when trying to apply the standard to the facts at hand.

Resolving the mystery requires a proper understanding of history. Reasonable doubt is "the last vestige of a vanished premodern Christian world" (p 2). Reasonable doubt was originally a protection not for criminal defendants, but rather for the "souls of *the jurors*" (p 3). Reasonable doubt was "designed to make conviction easier" by reassuring anxious jurors that they would not be damned for voting to spill the defendant's blood (p 4 (emphasis omitted)). Jurors could safely convict as long as their hesitations did not rise to the level of reasonable doubt.

Chapter 1 ("Of Factual Proof and Moral Comfort") emphasizes the dangers of rendering judgment in a premodern Western European

³ See *In re Winship*, 397 US 358, 363 (1970) (emphasizing that the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure"); Wayne R. LaFare, Jerold H. Israel, and Nancy J. King, 5 *Criminal Procedure* § 24.8(c) at 573 (West 2d ed 1999) (describing the jury instruction regarding the prosecution's burden of proof beyond a reasonable doubt as "basic[]" and "always [] included").

⁴ *People v Speight*, 606 NE2d 1174, 1177 (Ill 1992).

criminal trial. Judges and witnesses were targets of “clan vengeance” (p 11) by the defendant’s kin; and in at least one time and place, medieval Italy, incorrect judgments rendered the judges “subject to civil and criminal liability” (p 10). Beyond earthly hazards, there were “moral and spiritual” (p 11 (emphasis omitted)) consequences to a guilty verdict. “God, or the fates,” (p 11) might seek corrective vengeance. Capital punishments were especially risky, lest the judges and witnesses commit the sin of murdering the defendant.

To lessen the dangers of rendering judgment, Western European legal systems developed procedures to provide “moral comfort” (pp 12–13). Two categories of these procedures are emphasized by Professor Whitman: responsibility-shifting and agency denial. *Responsibility-shifting* procedures “comfort the judge by forcing some other agent to assume all or part of the responsibility” (p 16). An example is the Anglo-American jury, which, in the words of a nineteenth-century commentator, “saves judges from the responsibility . . . of deciding simply on their own opinion upon the guilt or innocence of the prisoner.”⁵ *Agency denial* “allow[s] the judge to disclaim meaningful personal agency even while entering a capital verdict” (p 17). An example here is a maxim from the twelfth-century *Decretum* attributed to the canonist Gratian:⁶ as long as proper procedures are followed, *lex eum occidit, non tu*—“it is the law that kills him, not you” (p 17).

Moral comfort procedures “were a universal and multifaceted feature of premodern law,” in contrast to the modern emphasis on procedures aiming to provide “factual proof” (p 18). Indeed, “one of the master themes in the making of modern law” is that “[m]oral comfort has been playing a steadily declining role in procedure over the past two centuries, while factual proof has grown steadily more important” (p 18 (emphasis omitted)). In earlier times, Professor Whitman argues, jury trial was more about moral comfort than factual proof. There were “occasionally factual puzzles that the jurors had to solve” (p 19), but more often the central question was whether the jurors would be willing to confirm “what everybody already knew, or strongly suspected” (p 19).

The distinction is important between factual proof and moral comfort as procedural objectives. A well-functioning factual proof procedure “also provides a measure of moral comfort,” but “many good moral comfort procedures do not function at all well as factual proof procedures” (p 20). The doctrine of reasonable doubt was not a

⁵ James Fitzjames Stephen, 1 *A History of the Criminal Law of England* 573 (Macmillan 1883), quoted on pp 16–17.

⁶ For a groundbreaking analysis of the composition of the *Decretum*, see generally Anders Winroth, *The Making of Gratian’s Decretum* (Cambridge 2000).

“factual proof procedure by design” (p 25). Rather, it was aimed at the jury’s moral comfort.

Chapter 2 (“The Christian Judge and the Taint of Blood: The Theology of Killing in War and Law”) explores the history of the “theology of judicial bloodshed” (p 31). Judges occupied an uneasy moral position in Christian Europe. The uneasiness had two sources. First, the scriptures of the New Testament contained texts giving Christians pause about judging, most prominently the injunction against judging in the Gospel of Matthew: “[J]udge not, lest ye be judged” (pp 3, 7, 33). Second, some early Christian theologians viewed any bloodshed as a pollution requiring purification. Basil the Great (d 379), for example, “declared that Christians who killed, even as legitimate soldiers, had to abstain from communion for three years” (p 34). Cyprian of Carthage (d 258) made the same point, but in reverse order: “Those who had taken communion had to avoid the shedding of blood” (p 34).

The danger of judicial bloodshed became real in the fourth century. After Constantine’s Edict of Milan in 313, Christianity moved from an outsider faith to a state-approved religion. Christianity subsequently became the official religion of the Roman Empire in 380 under Theodosius I.⁷ As a result, “Christians, and especially Christian bishops, began to assume powers of judging and administration” (pp 35–36). Theologians in the late fourth and early fifth centuries, such as Jerome (d 420) and Augustine (d 430), confronted the problem of whether inflicting blood punishments polluted the Christian judge (pp 38–40). They resolved the problem by concluding it was the law, not the judge, shedding the defendant’s blood. In a famous passage, Augustine wrote, “Cum homo iuste occiditur, lex eum occidit, non tu” — “When a man is killed justly, it is the law that kills him, not you” (p 39). Repeated verbatim centuries later in Gratian’s *Decretum*, this passage became “the basis of numerous canon texts” (p 47), perhaps most prominently the *Summa* of Raymond de Peñafort (d 1275). As Raymond explained, the judge does not sin if the criminal is “justly condemned,” meaning, among other things, that the judge must “observe the procedures of the law” — *iuris ordine servato* (p 48). The stain of judicial bloodshed was avoided by correct procedure.

Chapter 3 (“The Decline of the Judicial Ordeal: From God as Witness to Man as Witness”) begins the story of “the birth of jury trial” (p 52). The critical moment came in 1215, when the Fourth Lateran Council of the Christian Church (Lateran IV) prohibited clerics from assisting in the judicial ordeal. The ordeal was a procedure for invok-

⁷ See Averil Cameron and Peter Garnsey, eds, 13 *The Cambridge Ancient History: The Late Empire, A.D. 337–425* 103 (Cambridge 1998).

ing the *judicium Dei*—“judgment of God”—to determine the fate of a person accused of a criminal offense.⁸ The typical ordeals involved “cold water” or “hot iron” (p 53). The ordeal of cold water required the accused to be lowered into a body of water or a pit of water constructed for the purpose.⁹ If the accused floated, the water had rejected him, thereby indicating he was to be punished. If he sank, he was to be acquitted, but first had to be quickly rescued. The ordeal of hot iron required the accused to carry a piece of red-hot iron. The burnt hand was bound, then examined three days later. If the wound had festered, the accused was to be punished. If it had begun to heal, he was to be acquitted. In each case, the ordeal depended on the participation of the clergy. A priest was present during the procedure and would pray aloud to God to bless the water or hot iron and to deliver his judgment.¹⁰ But in 1215, the Church declared in Canon 18 that no cleric shall “in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing” (p 49). This canon was designed “to safeguard the purity of [members of] the clergy” (p 53) by forbidding them to participate in, and become polluted by, judgments of blood.

The decline of the ordeal has been the subject of “two leading lines of scholarly interpretation” (p 55). One line of interpretation “supposes that the judicial ordeal was about factual proof” (p 55) and that the ordeal’s decline involved a change “in the nature of fact-finding” (p 56) from facts found by God to facts found by man. The second line maintains that “factual proof was not the issue at all, for the most part” (p 56) because the facts of innocence or guilt were essentially known prior to an ordeal. Instead, “primarily at stake was the moral responsibility for judgment” (p 56). Professor Whitman argues that the first line of interpretation is “deeply misleading,” whereas the second line is “correct” (p 55). The ordeal spared judges the burden of rendering judgment and spared witnesses “the spiritually perilous business of taking an oath” (p 75). But the ordeal did so at the cost of polluting clerics with the stain of the defendant’s blood. After Canon 18 prohibited the participation of the clergy, the “burden of judgment” fell squarely on “witnesses and judges” (p 90).

Chapter 4 (“Salvation for the Judge, Damnation for the Witnesses: The Continent”) examines the Continental European response to Canon 18: namely, the development of inquisitorial criminal procedure. Canon 8 of Lateran IV gave official recognition to an ecclesiastical procedure known as the action *per inquisitionem*—“by in-

⁸ See notes 40–58 and accompanying text.

⁹ This paragraph draws on my entry Thomas P. Gallanis, *Ordeal: English Common Law*, in Stanley N. Katz, ed, *Oxford Encyclopedia of Legal History* (Oxford forthcoming 2009).

¹⁰ *Id.*

quiry”—which determined the guilt or innocence of clerics suspected of certain crimes against Church law. This procedure was devised by Pope Innocent III circa 1199 and elaborated in 1206.¹¹ Expanded in the course of the thirteenth century into secular criminal law, the action *per inquisitionem* enabled judges to act against suspected offenders without the need for an accuser (p 99). This was advantageous because accusers were often hesitant to come forward, and understandably so: “Accusation was hazardous for the accuser, because if he failed to prove his allegations he became liable to punishment himself” (p 98). The steps in the inquisitorial criminal proceeding rested within the control of the judge, from the decision to initiate the action to the investigation of facts to the determination of innocence or guilt (pp 99, 115). As the procedure developed, the use of torture was also authorized in certain circumstances to obtain the defendant’s confession. In seeking a replacement for trial by ordeal, many Continental jurisdictions looked to the action *per inquisitionem* and the use of torture.¹²

Inquisitorial procedure put the judge in charge, but thereby also put him in moral danger: “If the ordeal threatened to involve a priest in bloodshed, the [Continental] trial threatened to do exactly the same thing to the judge” (p 105). Theologians and jurists responded to the danger “by scrupulously distinguishing [the judge’s] role from the role of the witness” (p 105). The principle developed by the medieval canon law was “[i]udex secundum allegata non secundum conscientiam iudicat”—“the judge judges according to the evidence presented, not according to his ‘conscience’” (p 105). The word “conscience” here referred “both to the judge’s moral convictions and to the judge’s knowledge of particular facts” (p 106 (emphasis omitted)). On the latter, the medieval jurists emphasized that “a judge must never supplement the record with facts from his own knowledge” (p 108 (quoting “an early text from the twelfth century”)). This prohibition on the use of 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” (p 110).

Even without the use of private knowledge, the evaluation of the evidence still posed a moral danger for the judge. Continental criminal procedure had developed a “highly rule-bound” (p 115) law of proof, but the system was not purely mechanical. It still had “considerable discretionary wiggle room” (p 115), hence creating judicial dilemmas. For example, judges were instructed to find *indicia indubitata*—“proofs that did not permit of any doubt” (p 115)—but what did this mean? Drawing

¹¹ James A. Brundage, *Medieval Canon Law* 147 (Longman 1995).

¹² See generally Gallanis, *Ordeal* (cited in note 9).

on pronouncements from Popes Clement III (d 1191) and Innocent III (d 1216) exhorting clergy to avoid the stain of blood by choosing the “safer path” (p 117), canon lawyers developed the rule “in dubio pro reo” — “in doubt you must decide for the defendant” (p 122). This rule “created a form of protection for the accused that grew out of the familiar fear that the judge might make himself into a murderer” (p 123).

Chapter 5 (“Salvation for the Judge, Damnation for the Jury: England”) shifts the discussion from Continental law to the common law of England. After Canon 18 of Lateran IV prohibited the participation of the clergy in ordeals, the ordeal in England was effectively dead. Less clear was what would replace it. In 1219, the council of the young King Henry III (d 1272) issued provisional guidelines, suggesting that some persons accused of serious crimes be placed in prison awaiting further procedures, while others be permitted to quit the realm.¹³ After some experimentation, the king’s justices settled on using men from the vicinity of the offense to speak on oath (hence, these men were known as *juratores*—persons who have been sworn) about the accused person’s innocence or guilt.¹⁴ This procedure became known as trial by jury.

The modern historians of criminal jury trial have “not fully reckoned” with the “moral challenge faced by jurors” (p 150). Unlike the judge, the jurors had to render a verdict, thereby bearing the “moral anxieties of judging” (p 151). Moreover, the jurors, until recent times, were both decisionmakers and witnesses. Early jurors were chosen from the vicinity of the crime precisely so they could bring information to trial (p 152). Even after the jurors ceased regularly to be self-informing, their use of some private knowledge was expected “well into the early nineteenth century . . . at least occasionally” (p 151).

The moral pressures on jurors, however, were not as acute in the Middle Ages as in later centuries, due to three features of the medieval criminal trial that offered significant protection. First, jurors in medieval criminal trials were permitted to enter a “special” verdict rather than a “general” verdict, “making mere findings of fact while forcing the judge to pronounce the perilous judgment on ultimate liability” (p 154). Second, criminal trial jurors were immune from the attainder, a procedure at common law to punish civil trial jurors for committing perjury (p 154). Third, medieval criminal procedure “could avoid inflicting blood punishments in some instances by allowing the accused the benefit of clergy” (p 156). This was “a device by which accused persons were treated as fictive members of the clergy,” and thus “neither ex-

¹³ Id.

¹⁴ Id.

ecuted nor mutilated” (p 156). These three features of the medieval criminal trial “effectively shielded criminal jurors from much moral pressure” (p 157). In later centuries, the pressure would intensify.

Chapter 6 (“The Crises of the Seventeenth Century”) turns to the sixteenth and seventeenth centuries, when the Tudor and Stuart monarchies subjected criminal trial jurors to “wholly new pressures” (p 161). They used “harsh discipline [on] criminal juries that refused to enter the general verdict” (p 162), including punishment by the Star Chamber, “the most notorious instrument of Renaissance royal power” (p 162), and fines and imprisonment imposed by “the judges of the common law courts” (p 162). In addition, the government “steadily cut back on the range of offenses for which benefit of clergy was available” (p 162). These were “moral hard times for English criminal jurors” (p 162).

Relief for the jurors arrived in the late seventeenth and eighteenth centuries, when the “English government took a critical turn away from the princely practices of the Continent” (p 162). Two legal developments in this period are emphasized by Professor Whitman. First, the principle of juror independence was established in 1670 by the “celebrated decision” in *Bushel’s Case*,¹⁵ which held that a juror could not be fined or imprisoned “for a verdict given according to his conscience” (p 176).¹⁶ Second, benefit of clergy was “effectively extended in various ways from the later seventeenth century onward” (pp 162–63), thereby reducing the frequency of blood punishments. After 1718, indeed, the “ordinary punishment” was “transport[ation] to the American colonies” (p 163).

Chapter 7 (“The Eighteenth Century: The Rule Emerges”) finishes Professor Whitman’s historical account¹⁷ by bringing it up to the late eighteenth century, when the reasonable doubt instruction emerged “as a formula intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty” (p 186). The “first examples that scholars have found” (p 193) of English cases using the reasonable doubt formula “come from the [court of the] Old Bailey [in London] in the mid-1780s” (p 194). In the 1786 trial of Joseph Rickards, for instance, the Old Bailey judge instructed the jury: “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” (p 199).¹⁸ Analyzing the cases, Professor John Langbein has theorized

¹⁵ 84 Eng Rep 1123 (KB 1670).

¹⁶ See id at 1125.

¹⁷ After Chapter 7, the book has a brief conclusion addressing the present state and possible future of the doctrine of reasonable doubt and of jury trial.

¹⁸ Trial of Joseph Rickards (t17860222-1), *The Proceedings of the Old Bailey* (Feb 22, 1786), online at <http://www.oldbaileyonline.org/browse.jsp?ref=t17860222-1> (visited Apr 14, 2009). The jury found Rickards guilty of murder, and he was sentenced to death. Id.

that the reasonable doubt instruction may be connected to the emergence in the ordinary criminal trial of defense lawyers, who “developed evidentiary and other practices intended to protect the defendant” (p 194).¹⁹ But this connection is rejected by Professor Whitman, who maintains instead that the “underlying concern . . . was with protecting the jurors” (p 194). The reasonable doubt formula reassured jurors that while “[d]oubts were legitimate and had to be obeyed[,] scruples were foolish and had to be ignored” (p 190).

This line of analysis raises the question of “why the standard established itself in the Old Bailey when it did, in the mid-1780s” (p 199). Professor Whitman provides a tentative answer by invoking my own scholarship, which draws attention to the effect of the American Revolution on English criminal justice.²⁰ The Revolution stopped the use of transportation to the American colonies as a punishment, causing a “real crisis of English justice,” at least until 1787 when transportation to Australia was introduced (p 200). The “first cases using the reasonable doubt formula in the Old Bailey crop up” during the gap, when it “remained uncertain what was otherwise to be the fate of those convicted” (p 200). The loss of transportation—a sanction that was not a blood punishment—as an option had the effect of “rais[ing] the punishment stakes sufficiently that jurors needed more coaxing to convict than had been the case in previous decades” (p 200), hence the appearance of the reasonable doubt instruction.

II. FOUR ACCOLADES

There is much to praise in Professor Whitman’s book. In this Part of the Review, I concentrate on four achievements meriting enthusiastic accolades. Doubtless there are also others. The four are: (1) the integration of Continental and English legal history, (2) the emphasis on religion’s influence on legal development, (3) the sensitivity to the moral anxiety of legal decisionmaking, and (4) a thought-provoking hypothesis. Let me say more about each in turn.

¹⁹ For this point, the book cites John H. Langbein, *The Origins of Adversary Criminal Trial* 261–66 (Oxford 2003). The best summary of Professor Langbein’s view is that “[o]ur sources [] leave us unable to say how the emergence of the beyond-reasonable-doubt standard was related to the growing lawyerization of Old Bailey trials in these years.” *Id.* at 265. Rickards did not appear to have a lawyer and did not call any defense witnesses; it is not surprising that he was convicted. See Trial of Joseph Rickards (cited in note 18).

²⁰ See T.P. Gallanis, *The Mystery of Old Bailey Counsel*, 65 *Camb L J* 159, 168–73 (2006).

A. Continental and English Legal History

The book deserves high praise for integrating English and Continental legal history. Scholars working on the legal history of one side of the Channel too often fail to look across the water,²¹ resulting in analyses that are as myopic as they are incomplete. Even within England, legal historians must be sensitive to the multiple English jurisdictions—regnal, manorial, urban, and ecclesiastical, to name a few—that competed and collided. Good legal history gives us the broader view, and Professor Whitman’s book readily succeeds on this point. The passages on the emergence of Western European legal institutions (pp 52–54), in particular, should be required reading at all American law schools.

There is an ongoing debate about the extent of Continental influence on English common law. The pioneering historian F.W. Maitland described the common lawyer as someone who “knew nothing and cared nothing for any system but his own.”²² The unique features of English legal development have also been stressed in the scholarship of Professors R.C. Van Caenegem and S.F.C. Milsom.²³ Yet there are other scholars, most notably Professor R.H. Helmholz, who have rightly emphasized the points of influence or connection between the law of England and the Roman-canon law of the Continent.²⁴

Professor Whitman’s book keeps its pan-European perspective while simultaneously being mindful of differences between the Continent and England. In the aftermath of Lateran IV, “the common law . . . displayed its characteristic emphasis on lay justice and its weak bureaucratic tradition, whereas the civil law had already begun to opt for incipient forms of bureaucratic control of the law” (p 54). These choices were shaped by national or regional factors; yet the developments are also part of Europe’s common legal past,²⁵ as Western Christendom experienced its intellectual and legal renaissance, enabling the “profound institutional transformation” (p 53) of law, state, and society between 1000 and 1250.

²¹ For a recent welcome exception, see generally Charles Donahue, Jr., *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts* (Cambridge 2007).

²² F.W. Maitland, *Why the History of English Law is Not Written*, in H.A.L. Fisher, ed, 1 *The Collected Papers of Frederic William Maitland* 480, 488 (Cambridge 1911).

²³ See R.C. Van Caenegem, *The Birth of the English Common Law* 85 (Cambridge 2d ed 1988); S.F.C. Milsom, *A Natural History of the Common Law* 1–2 (Columbia 2003).

²⁴ See generally R.H. Helmholz, *The Ius Commune in England: Four Studies* (Oxford 2001); R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 *Duke L J* 1207.

²⁵ For further treatment of the theme, see generally Manlio Bellomo, *The Common Legal Past of Europe: 1000–1800* (Catholic 1995).

B. Religion's Influence on Legal Development

A second feature of the book meriting high praise is the perceptive treatment of the influence of religion on legal development. Many of the distinctive features of the common and civil laws emerged in the Middle Ages, a period for which the importance of Christianity and the Christian Church cannot be overstated. The effect of Canon 18 of Lateran IV on criminal procedure is one example of ecclesiastical influence on medieval secular law, and there are others. Some provisions of the Magna Carta, for instance, derive from the law of the Church, as Professor Helmholz has persuasively argued.²⁶ Further, and more broadly, the use of oaths in a variety of legal proceedings throughout medieval Europe depended upon the gravity of swearing to God. This is one reason why there is a “common heritage” shared by the English and canonical procedures—known respectively as “wager of law” and “compurgation”—that relied on oaths to resolve legal disputes.²⁷

Religion's influence on English law extended well beyond the Middle Ages. The seventeenth century saw the emergence of the maxim that Christianity itself was part of the common law. Sir Matthew Hale (d 1676), serving as Lord Chief Justice of England, declared in *Taylor's Case*²⁸ that “Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.”²⁹ The maxim was later repeated in court by other judges, including Lord Mansfield,³⁰ and by Sir William Blackstone in his *Commentaries*.³¹

The distinction is often made, rightly, between internal and external legal history. Succinctly described by Professor David Ibbetson, the distinction is this. Internal legal history “deals with law on its own terms, its sources are predominantly those thrown up by the legal process—in England, that is, the records of courts, law reports, and legal treatises—and its practitioners are as often as not trained law-

²⁶ Helmholz, 1990 Duke L J at 1210–14 (cited in note 24).

²⁷ Helmholz, *The Ius Commune In England* at 83 (cited in note 24).

²⁸ 86 Eng Rep 189 (KB 1676). See also another report of the case at 84 Eng Rep 906 (KB 1676) (declaring that slander of Christ and the Church is a crime and that religion is “part of the law it self”).

²⁹ 86 Eng Rep at 189.

³⁰ See John Lord Campbell, 2 *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* 513 (John Murray 1849) (noting that “the essential principles of revealed religion are part of the common law”).

³¹ See William Blackstone, 4 *Commentaries on the Laws of England* *59 (Chicago 1979) (“[C]hristianity is part of the laws of England.”).

yers, or at least scholars whose discipline is law.”³² External legal history, in contrast,

is the history of law as embedded in its context, typically its social or economic context. It[s] sources are not, or not simply, those thrown up by the legal process; nor, commonly, is its focus the law. In so far as it might be said to be the history of law in action, it is the action that matters.³³

Professor Whitman’s book combines internal and external approaches. The analysis reflects the author’s grounding in the institutions and sources of doctrinal—in this case, procedural—legal history. Yet the analysis goes well beyond the traditional sources of law, examining the influence of Christian moral theology on judges, witnesses, jurors, and defendants. “The seas of religion have receded, after many centuries,” Professor Whitman rightly observes, “[b]ut the landscape of the law still includes many of its older diluvian features” (p 7). The book succeeds in reminding us that the development of law and legal institutions is shaped, at least in part, by factors external to the legal system. For the history of law in medieval and early modern England, we must not forget the role of religion.

C. The Moral Anxiety of Decision

A third point of success is the book’s sensitivity to the moral anxiety of decisionmaking in criminal cases following the decline of the ordeal. Judges, as “agent[s] of bloody justice, faced a real moral predicament” (p 93). They were “obliged to administer blood punishments” (p 93), yet with this responsibility judges feared making themselves into murderers (p 123). Partial solutions emerged in the form of responsibility-shifting—to witnesses (on the Continent) and jurors (in England)—and in protective doctrines connected to the theology of the “safer path” (p 117), such as the maxim *in dubio pro reo*—“in doubt you must find for the defendant” (p 122).

It must be observed that the anxiety of medieval English judges was not limited to criminal punishment. In civil litigation, the judges of the central common law courts tried mightily “to avoid making decisions.”³⁴ During pretrial pleading, for example, the judges strongly dis-

³² David Ibbetson, *What is Legal History a History of?*, in Andrew Lewis and Michael Lobban, eds, 6 *Law and History: Current Legal Issues 2003* 33, 34 (Oxford 2004).

³³ Id at 33. See also Janet Senderowitz Loengard, *Beyond Maitland: The Maturing of a Discipline*, 34 *J Brit Stud* 529, 530 (1995) (“Many scholars are less concerned with the purely institutional (and certainly with the constitutional) and more interested in the economic and social components of law.”).

³⁴ J.H. Baker, *An Introduction to English Legal History* 80 (Butterworths 4th ed 2002).

couraged the use of special pleading or the demurrer, either of which would have called for judicial pronouncements on questions of law, and instead sought to channel disputes into the “general issue, leaving [the questions of law and fact] all to the jury.”³⁵ After the verdict, the judges were similarly reluctant to speak. Post-trial motions were permitted prior to the late fifteenth century only for “badly joined issues [known as ‘jeofails’] or formal defects in the trial, such as misconduct by jurors.”³⁶ Other grounds would not suffice, and the verdict would stand.

Still, there was likely something distinctive about making decisions that could cause death or the shedding of blood. These punishments were the subject of theological, as well as legal, concern. The choices to be made required that someone wrestle not only with innocence and guilt but also with sin and responsibility. The English judges did not want this aspect of the job. They “sought refuge from . . . the agonies of decision” and ensured that “the ultimate responsibility for a conviction rested on the jurors’ consciences.”³⁷ Professor Whitman has rightly reminded us that having to make the choice between conviction and acquittal is a moral burden, one that has been borne by human actors in the legal drama since the decline of the *judicium Dei*.

D. A Thought-provoking Hypothesis

A fourth feature of the book deserving high praise is the author’s willingness to proffer a thought-provoking hypothesis. Professor Whitman has an intriguing argument. The reasonable doubt instruction, he maintains, was designed not to protect the accused but rather to make it easier for jurors to reach a verdict of guilt (p 3). Jurors needed the reassurance, for they feared divine vengeance if they condemned improperly. In England, the reasonable doubt instruction became established in the 1780s, because by then transportation to the American colonies was no longer available as a noncapital sanction. This “raised the punishment stakes sufficiently that jurors needed more coaxing to convict” (p 200).

Scholarship with a thesis is refreshing. Many of the conference papers I hear, or manuscripts I review, contain little more than a narrative of past events, with no attempt at an argument or hypothesis. Perhaps these authors, like reluctant jurors, are taking the safer path. But it is also the boring path. A thesis that turns out to be wrong—or,

³⁵ Id at 79–80.

³⁶ Id at 83.

³⁷ J.H. Baker, ed, 2 *The Reports of Sir John Spelman* 43, 138 (Selden Society 1978). The same point is made in Sir John Baker, 6 *The Oxford History of the Laws of England* 47 (Oxford 2003).

more likely, incomplete, for even Homer nods—is better than no thesis at all.

The legal historian is a detective, seeking to resolve mysteries from the past. The puzzles are difficult because the unrecorded assumptions of earlier ages are hard to recover. For example, the twelfth-century treatise known as *Glanvill* “describes pleas as either civil or criminal; but [*Glanvill*’s] distinction is not ours.”³⁸ As Professor Milsom has recently reminded us, “[L]egal history, more than most kinds of history, depends upon the assumptions with which the materials are read. . . . And when everybody has forgotten what everybody once knew . . . there is nothing to put the historian on his guard.”³⁹ The work of uncovering the history of the law, or the history of the law in action, takes scholarly effort and imagination. This book is the evident product of both.

III. FOUR QUESTIONS

The book, like all good scholarship, both answers and raises questions. This Part of the Review focuses on four questions prompted by Professor Whitman’s thesis. The questions are: (1) Was the ordeal’s purpose in England to decide innocence or guilt, to provide moral comfort in advance of punishment, or both? (2) How did jurors’ moral anxieties evolve from the Catholic Middle Ages to the Anglican late eighteenth century? (3) What is the connection between the English reasonable doubt instruction and the Continental law? (4) Why did the recorded use of the reasonable doubt instruction emerge in England in the 1780s?

A. The Ordeal in England: Proof or Comfort?

The first question is: was the ordeal’s purpose in England to decide innocence or guilt, to provide moral comfort in advance of punishment, or both? Professor Whitman argues for the second to the exclusion of the first. He rejects the “line[] of scholarly interpretation . . . that the judicial ordeal was about factual proof” (p 55). For him, “factual proof was not the issue” (p 56). Rather, “primarily at stake was the moral responsibility for judgment” (p 56).

Some background on the use of the ordeal, and its alternatives, in twelfth-century England is in order.⁴⁰ Ordeals were the most common

³⁸ S.F.C. Milsom, *Historical Foundations of the Common Law* 285 (Butterworths 2d ed 1981). See also G.D.G. Hall, ed and trans, *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* 3 (Oxford 1965).

³⁹ Milsom, *Natural History* at 76 (cited in note 23).

⁴⁰ This paragraph draws on my entry Gallanis, *Ordeal* (cited in note 9).

form of *judicium Dei*, the other forms being battle and oaths. Trial by battle had been introduced into England after the Norman Conquest, but it was considered appropriate only in some instances of what was known as “appeal of felony,” the private accusation of serious crime.⁴¹ As explained by Professor Milsom, “If the accuser was himself witness to the fact, he could in certain kinds of case swear an affirmative oath which would be tested by battle.”⁴² If an accusation was not brought by a witness in this way, the alternative was for the accusation to be initiated from “the suspicion of neighbors (the ancestor of the grand jury).”⁴³ This procedure became known as presentment or, later, indictment.⁴⁴ Through the middle of the twelfth century, “an accusation arising from the suspicion of neighbors . . . would put the accused to answer by swearing an oath of denial, and that oath would be tested in one of two ways depending on what we should call corroboration.”⁴⁵ If there was some further proof to support the allegation—“something like a corpse or a wound to back the accusation up”⁴⁶—then the accused person would be put to the ordeal. But if there was no such proof, then the oath of denial would itself be tested by oath, in the procedure known as “wager of law.”⁴⁷ The ordeal would also be used, in place of wager of law, if “the accused was not of good character.”⁴⁸ The reforms announced by King Henry II (d 1189) in the Assize of Clarendon (1166) ended the use of wager of law in presentment cases, leaving only the ordeal.⁴⁹

As the procedure in all criminal matters initiated by presentment, and in some appeals of felony,⁵⁰ the ordeal was used to determine, at least in part, the fact of the accused’s innocence or guilt.⁵¹ In the ab-

⁴¹ Id.

⁴² Milsom, *Natural History* at 6 (cited in note 23).

⁴³ Id.

⁴⁴ See Baker, *English Legal History* at 503, 505–06 (cited in note 34).

⁴⁵ Milsom, *Natural History* at 6 (cited in note 23).

⁴⁶ Id.

⁴⁷ For a comparison and description of compurgation and wager of law, see id; Helmholz, *The Ius Commune in England* at 82–134 (cited in note 24).

⁴⁸ Margaret H. Kerr, Richard D. Forsyth, and Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 *J Interdiscipl Hist* 573, 574 (1992). These scholars suggest that the ordeal may have been “an instrument of mercy,” permitting persons who were probably guilty to escape death or mutilation. See id at 574, 578–80, 588.

⁴⁹ See Naomi D. Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 *Eng Hist Rev* 374, 396–97 (1941). In many but not all instances, the communal accusation would need to be supported by the presenting jurors in order for the accused to be put to the ordeal. See Roger D. Groot, *The Jury of Presentment before 1215*, 26 *Am J Legal Hist* 1, 2, 10, 15 (1982).

⁵⁰ See Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-century England*, 19 *L & Hist Rev* 1, 12 (2001) (“Battle, however, was only an option if the appellant was a healthy, nonminor male.”).

⁵¹ See Hurnard, 56 *Eng Hist Rev* at 397 (cited in note 49).

sence of a witness ready and able to prosecute, the charge would arise from neighborhood suspicion. This suspicion, evaluated by the presenting jurors,⁵² would result in the accused being put to the ordeal. In many instances, suspicion was not the same as certainty. An example can be found in the 1198 assize roll for Norfolk.⁵³ The roll states that the presenting jury accused a woman of a homicide. She was put to the ordeal and cleared. The jury then reported the *fama patrie*—“rumor of the country”—that three men committed the killing. Two of the three died in prison. The third was put to the ordeal.⁵⁴ From this account, the presenting jury cannot have been certain about the guilt of the woman, otherwise after her acquittal the matter would not have continued with the presentments of the three men.

Uncertainty about the identity of the criminal would have been even more prevalent in prosecutions for theft than for homicide. As Professor Whitman rightly observes, “In cases of theft, it may well be that God was sometimes the only witness” (p 73). And it must be remembered that theft was a more common crime than homicide.⁵⁵

The ordeal’s use as a procedure of proof does not necessarily mean that it was always trusted. Henry II, for example, was wary of its reliability. He decreed in the Assize of Northampton (1176) that a person accused by the community and by the knights of the countryside of “murder or some other base felony” but acquitted by the ordeal of water (the most common form of ordeal⁵⁶) would nonetheless be required to abjure the realm.⁵⁷

In addition to proof, the ordeal surely also provided moral comfort. Delivering judgment is a weighty responsibility. The abolition of the ordeal in England transferred the burden from God to men, ultimately the men of the jury. For them, the change cannot have been welcome. In the words of Professor Milsom,

⁵² For examples, see Groot, 26 Am J Legal Hist at 9–10 (cited in note 49).

⁵³ The following sentences rely on Doris Mary Stenton, ed, 2 *Pleas before the King or His Justices: 1198–1202* 9 (Selden Society 1952).

⁵⁴ *Id.*

⁵⁵ For data from the thirteenth century, see C.A.F. Meekings, ed, *Crown Pleas of the Wiltshire Eyre 1249* 58 (Devizes 1961) (noting fifty-three presentments of homicide); *id* at 63 (noting forty-seven instances of murder, defined here as “cases in which persons are presented as having been killed by unknown evildoers”); *id* at 74 (noting nineteen appeals of homicide, eight appeals of robbery, and four of burglary); *id* at 95 (noting, in the *privata* (private report to the justices), 205 instances of larceny, 35 of homicide, and 3 of burglary). See also Barbara A. Hanawalt, *Crime and Conflict in English Communities: 1300–1348* 66 (Harvard 1979) (reporting that of 15,952 indictments between 1300 and 1348, 38.7 percent were for larceny, 24.3 percent were for burglary, 10.5 percent were for robbery, and 18.2 percent were for homicide).

⁵⁶ See Kerr, Forsyth, and Plyley, 22 J Interdiscipl Hist at 581 (cited in note 48).

⁵⁷ See David C. Douglas, ed, 2 *English Historical Documents: 1042–1189* 411 (Oxford 1968).

The ancient comfortable reliance on God to test an oath sworn by the defendant was at an end, and mortal men, with their own souls to worry about, would have to swear not just to his credibility but directly to his guilt or innocence. It must have been an upset beyond modern imagination.⁵⁸

The point here is that we need not exaggerate the dichotomy between proof and moral comfort. Both were at work in the ordeal. Professor Whitman is right to observe that a proof procedure “also provides a measure of moral comfort” (p 20). The two are intertwined. We do not need to deny the one as “deeply misleading” (p 55) to give recognition to the other.

B. Moral Anxieties from Medieval to Modern?

There is a second question raised by Professor Whitman’s book: how did English jurors’ moral anxieties evolve from the Catholic Middle Ages to the Anglican late eighteenth century? The book’s first five chapters concentrate on medieval Europe, both England and the Continent. The sixth and seventh chapters turn to seventeenth- and eighteenth-century England. In a book covering so many centuries, not every development can be fully explored. Yet the period saw two transformations about which more investigation would have been welcome. One is the decline of the self-informing jury. The other is the changing theology of blood in the aftermath of the Protestant Reformation.

The longstanding conventional wisdom has been that the early jury, composed of men from the vicinity of the dispute, was substantially self-informing.⁵⁹ Verdicts were based primarily on information obtained by the jurors before the trial, either from their personal knowledge or by investigation.⁶⁰ In Professor Langbein’s felicitous phrase, the early jury “came to court more to speak than to listen.”⁶¹ Some scholars, such as Professor Edward Powell, have questioned this account, doubting whether the jury was ever truly self-informing.⁶² The recent work of Professor Daniel Klerman provides strong support for the conventional wisdom, at least through the thirteenth century.⁶³

⁵⁸ Milsom, *Natural History* at 7 (cited in note 23).

⁵⁹ This paragraph and the next draw on my entry Thomas P. Gallanis, *Evidence: English Common Law*, in Katz, ed, *Oxford Encyclopedia of Legal History* (cited in note 9).

⁶⁰ *Id* at *4.

⁶¹ John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* 125 (Harvard 1974).

⁶² See Edward Powell, *Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400–1429*, in J.S. Cockburn and Thomas A. Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* 78, 115–16 (Princeton 1988).

⁶³ See Daniel Klerman, *Was the Jury Ever Self-informing?*, 77 S Cal L Rev 123, 126 (2003).

By the end of the seventeenth century, and probably earlier, jury trial was transformed. Most of the details are unknown, but the result is well agreed: the jury had ceased to be self-informing.⁶⁴ Verdicts were based not on juror knowledge or investigation but instead on the presentation of evidence in court. We can see this principle in the words of Chief Justice Robert Raymond of the Court of King's Bench in the case of *Constable v Nichols*:⁶⁵ “[I]f a jury man knows anything of his own knowledge he ought not to acquaint his fellows with it privately, but must be sworn in open court, for he is a witness.”⁶⁶

The evolution of the juror from an active neighbor-witness into a passive judge of proof⁶⁷ must have affected the nature and degree of the jury's moral anxiety. Professor Whitman deflects the point by arguing that the jurors' use of their own information continued into and past the decade crucial to his overall hypothesis, the 1780s. He writes: “[W]ell into the early nineteenth century, jurors were still expected to make use of their private knowledge of the case, at least occasionally” (p 151). Yet he also concedes that such cases “were rare after the central Middle Ages” (p 152). This raises the question: to what extent was the theoretical possibility of private knowledge a source of moral anxiety? In almost all cases, personal knowledge was not at issue. The production of evidence rested with the prosecution and defense, with the juror as a kind of umpire, evaluating whatever proof was provided. This passive role would not have eliminated moral anxiety, for the jurors bore the burden of deciding the weighty issue of innocence or guilt. But in the absence of private knowledge, the anxiety must have been reduced.

The second development about which I would have encouraged more discussion is the Protestant Reformation and its effect on the theology of blood. The book is rightly focused on legal, not religious, history, but given the central role to the narrative of jurors' moral anxieties about *blood* punishments (not just capital punishments), the theology of blood is important.

The book's jump from the Middle Ages to the seventeenth century leaves only a brief opportunity to mention the Protestant Reformation. The Reformation makes an appearance on page 164,⁶⁸ where Professor

⁶⁴ See John Marshall Mitnick, *From Neighbor-witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 Am J Legal Hist 201, 205 (1998).

⁶⁵ (KB 1726) (MS 1017, folder 83, Harvard Law School Library).

⁶⁶ James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* 35 (NYU 2006), quoting *Nichols*.

⁶⁷ I draw these terms from the title of John Marshall Mitnick's article, *From Neighbor-witness to Judge of Proofs: The Transformation of the English Civil Juror*. See Mitnick, 32 Am J Legal Hist at 201 (cited in note 64).

⁶⁸ See the book's index under “Reformation” (p 275).

Whitman bridges the gap in time by observing that the early seventeenth century saw the publication of books of conscience by the English Calvinists William Ames and William Perkins, and that these books “differed little in substance from the medieval canon law of conscience” (p 164). Later seventeenth-century authors on conscience in the same vein, though writing within the Church of England, included Joseph Hall (pp 169–71) and Jeremy Taylor (pp 171–72). These writers discussed the role of private conscience in determining an accused’s guilt or innocence, but they did not speak to the theology of blood.

Protestant theology differed from the Catholic on at least some matters of blood and bloodshed. One illustration comes from the denominations’ respective understandings of the Eucharist. The Catholic doctrine, affirmed in the Council of Trent (1551), has long been transubstantiation: the wine substantively changes into the blood of Christ.⁶⁹ The liquid element of the Eucharist *is* blood. The view of the Church of England, as stated in the *Thirty-nine Articles of Religion* (1563), has been that transubstantiation is “repugnant to the plain words of Scripture.”⁷⁰ A second illustration points to the denominations’ views on absolution from sin, including the sin of shedding blood. In the Catholic tradition as articulated by the Council of Trent, absolution comes through the sacrament of penance⁷¹ administered only by a bishop or priest,⁷² followed by “works of satisfaction.”⁷³ The doctrine of the Church of England, expressed in the *Thirty-Nine Articles*, is that penance is not a sacrament⁷⁴ and that “good works . . . cannot put away our sins.”⁷⁵

Differences were likely between the medieval Catholic and early modern Anglican views on the “taint of blood,” the topic of the first chapter and discussed in other chapters concerning the Middle Ages. The subject of the theology of blood, unfortunately, is then dropped,⁷⁶

⁶⁹ See Rev J. Waterworth, ed and trans, *The Canons and Decrees of the Sacred and Ecumenical Council of Trent* 78 (C. Dolman 1848) (“[B]y the consecration of the bread and of the wine, a conversion is made . . . of the whole substance of the wine into the substance of [Christ’s] blood; which conversion is, by the holy Catholic Church, suitably and properly called Transubstantiation.”).

⁷⁰ *Thirty-nine Articles of Religion* Art XXVIII (1563), reprinted in *The Book of Common Prayer* 402 (Oxford 1815).

⁷¹ Waterworth, *Canons and Decrees* at 93 (cited in note 69) (defining penance as a sacrament).

⁷² Id at 100 (“[T]he holy Synod declares all these doctrines to be false, and utterly alien from the truth of the Gospel, which perniciously extend the ministry of the keys to any others soever besides bishops and priests.”).

⁷³ Id at 95 (defining the three parts of penance as “contrition, confession and satisfaction”); id at 104 (describing “works of satisfaction” as the punishment undertaken voluntarily for sins, punishment imposed by a priest, and punishment in the form of “temporal scourges inflicted by God”).

⁷⁴ *Thirty-nine Articles* Art XXV at 401 (cited in note 70) (defining the two sacraments as “baptism, and the supper of the Lord”).

⁷⁵ *Thirty-nine Articles* Art XII at 399 (cited in note 70).

⁷⁶ See the book’s index under “Bloodshed, theology of” (p 272).

even though the subject of blood seems to be of continuing import. Jurors' anxieties in the seventeenth and eighteenth centuries are explicitly linked to the duty to impose "blood punishments" (pp 162, 200). It is true that one book can do only so much. Still, an exploration of the English theology of blood in the sixteenth to eighteenth centuries would have been welcome, given the connection in Professor Whitman's argument between jurors' moral anxieties about blood punishments and the reasonable doubt instruction.

C. Continental Law and England?

A third question is raised by Professor Whitman's book: what is the connection between the English reasonable doubt instruction and the Continental law? As noted in Part II.A, there is a longstanding debate among legal historians about the extent to which the Roman-canon law of Continental Europe had an influence on the common law of England.⁷⁷ Professor Whitman, an expert in comparative legal history, is well positioned to contribute to this debate. Indeed, the history of the doctrine of reasonable doubt provides a valuable case study. So, to what extent was the English doctrine of reasonable doubt affected or shaped by the law of the Continent?

The book argues for a "connection" between the reasonable doubt standard in England and the Continental maxim *in dubio pro reo*—"in doubt you must decide for the defendant" (p 122). Yet the nature of this connection is not made entirely clear. Piecing together different parts of the book, I think the argument runs as follows. The *in dubio* maxim "grew more or less directly out of the safer path doctrine" (p 123). This doctrine held that "when faced with 'doubts,' . . . the judge must choose the 'more benign' and 'milder' path" (p 123). In England, the safer path doctrine appeared in some seventeenth- and eighteenth-century theological and legal writings, including Sir Matthew Hale's *History of the Pleas of the Crown*⁷⁸ (published in 1736, sixty years after Hale's death in 1676⁷⁹): "[W]hen you are in doubt, do not act, especially in Cases of Life"⁸⁰ (p 174); and William Paley's *Principles of Moral and Political Philosophy* (1785):⁸¹ "I apprehend much harm to have been done to the community, by the overstrained scrupulousness, or weak timidity, of juries . . . which holds it the part of a

⁷⁷ See notes 22–25 and accompanying text.

⁷⁸ Sir Matthew Hale, 1 *History of the Pleas of the Crown* (Professional 1971) (P.R. Glazebrook, ed).

⁷⁹ Baker, *English Legal History* at 190 (cited in note 34).

⁸⁰ Hale, 1 *History of the Pleas* at 300 (cited in note 78).

⁸¹ William Paley, *The Principles of Moral and Political Philosophy* (Mussey & Co Boston School ed 1852) (John Frost, ed).

safe conscience not to condemn any man, whilst there exist the minutest possibility of his innocence”⁸² (p 192). The reasonable doubt standard “grew out of” these writings (p 192). Therefore, there is a connection between the *in dubio* maxim and the reasonable doubt standard in the sense that they both stem from the moral theology of the safer path, but there is not a stronger link between them.

Parallel development is entirely plausible. When we observe a similarity between Continental and English law, we must determine whether it is an instance of influence or, instead, merely of parallel evolution. There are many examples in each category. As Professor Helmholz has recently written, “In some cases . . . the *ius commune* did have demonstrable effects upon the common law. In other situations . . . it is equally obvious that little substantial influence occurred.”⁸³

I understand Professor Whitman to be arguing in favor of a common theological heritage for, but no direct legal connection between, the *in dubio* maxim and the reasonable doubt standard. Clarification here would be welcome. Yet even if I am correct in this reading, there is another uncertainty. The book does not connect the dots between the safer path theology of the Middle Ages and its appearance in English texts of the seventeenth and eighteenth centuries. Important to the book’s overall narrative, this strand of intellectual history merits a fuller treatment.

D. Why the 1780s?

The fourth and last question I want to raise is: why did the recorded use of the reasonable doubt instruction emerge in England in the 1780s? Professor Whitman observes that the “first examples that scholars have found” (p 193) of English cases using the reasonable doubt formula “come from the Old Bailey in the mid-1780s” (p 194). He rejects any significant link between the instruction and the rise of defense counsel (p 194). Instead, Professor Whitman argues that the “underlying concern . . . was with protecting the jurors” (p 194). The American Revolution stopped the use of transportation as a nonblood punishment, thereby “rais[ing] the punishment stakes sufficiently that jurors needed more coaxing to convict than had been the case in previous decades” (p 200). In short, judges at the Old Bailey began using the reasonable doubt instruction in the mid-1780s to reassure anxious jurors.

While delighted that Professor Whitman has drawn attention to the part of my scholarship on the effect of the American Revolution

⁸² Id at 170.

⁸³ Helmholz, *The Ius Commune in England* at 6 (cited in note 24).

on English criminal justice,⁸⁴ I am not convinced by the argument on the reasonable doubt instruction. In part, my doubts come from the nature of the available source, the *Old Bailey Sessions Papers* (OBSP). The OBSP are pamphlet accounts of criminal trials, printed and sold to members of the public. The reports are often compressed, containing the aspects of the trials most of interest to lay readers: “[T]he circumstances of crime, detection, and punishment.”⁸⁵ They are “frustrating” for the legal historian interested “in the institutions, procedures, and personnel of the criminal justice system.”⁸⁶ This is especially true for the OBSP of the early and middle 1770s, which were kept thin “in order to hold down . . . the cost of publishing the series.”⁸⁷ Beginning in 1778, the stenographic reporter Joseph Gurney “reversed the trend to compression, increasing the size of [each] session’s issue.”⁸⁸ Gurney was followed by Edmund Hodgson, who “reported many cases in exceptional detail.”⁸⁹ Hodgson’s reportership, from 1782 to 1790, has been called the “short golden age” of the OBSP.⁹⁰ Given the changes in size and detail of the OBSP, it is often hard to tell whether something first perceived in the mid-1780s is truly new or simply the result of fuller reporting. For this reason, Professor Langbein has rightly written about the reasonable doubt instruction that “[t]he sources do not allow us to say whether the novelty in these cases of the mid-1780s is the articulation of the beyond-reasonable-doubt standard, or merely the disclosure of it (as a result of the greater detail of the *Sessions Papers* of the period).”⁹¹

My doubts also reflect skepticism that the emerging use of the reasonable doubt instruction was primarily prompted by the unavailability of transportation to the American colonies as a nonblood punishment. After American transportation ended in 1775, England responded initially by ordering hard labor in hulks on the river Thames and in houses of correction, and later by beginning an ambitious program of prison construction and initiating transportation to Australia.⁹² These noncapital punishments were likely more severe than the prior regime of transportation to the established colonies in America, but the punishments did not involve blood.

⁸⁴ See generally Gallanis, 65 Camb L J 159 (cited in note 20).

⁸⁵ Langbein, *Origins* at 186 (cited in note 19).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 188.

⁸⁹ Langbein, *Origins* at 188 (cited in note 19).

⁹⁰ *Id.*

⁹¹ *Id.* at 264.

⁹² See Gallanis, 65 Camb L J at 170–71 (cited in note 20).

Lacking better primary sources, I cannot warrant that there is no connection between the rising harshness of punishment and the use of the reasonable doubt instruction. But the link between them remains to be proven.

The solution to the puzzle is likely to be multifaceted. I think it probable that the answer is connected in some way to the primary development in the felony trial during this period: its transformation into an adversarial contest increasingly dominated by lawyers.⁹³ The criminal trial for felony (serious crime) was sharply different from the summary proceedings for misdemeanor, where, as Professor Bruce Smith has demonstrated, there was instead a “presumption of guilt.”⁹⁴ In the trial for serious crime, the late eighteenth century saw the emergence of “a series of procedural and evidentiary protections benefiting defendants tried at the Old Bailey, including the right to counsel, the notion of the prosecution’s ‘case,’ and the ‘beyond-reasonable-doubt’ standard of proof.”⁹⁵ The precise connection among these is still unknown. Professor Whitman’s book commendably reminds us that there is an aspect of the reasonable doubt standard that protects the juror, providing a safe harbor for conviction. Jurors should feel free to convict if their doubts are so excessively scrupulous as to be unreasonable. Yet there is also an aspect of the standard that protects the accused.

All we can safely say, given the state of the evidence, is that something changed in the 1780s—or earlier, but was recorded in the 1780s—to prompt the use of the reasonable doubt instruction. Frustratingly, we do not know more. On this aspect of the trial’s history, the jury is still out.

CONCLUSION

F. W. Maitland described the Norman Conquest as a “catastrophe which determines the whole future history of English law.”⁹⁶ For European criminal procedure, the same can be said of the Christian Church’s decision in 1215 to prohibit clerical participation in the ordeal. Lacking clerical blessing, the ordeal fell into disuse. The end came more quickly in England than on the Continent but was profoundly felt on

⁹³ See generally J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L & Hist Rev 221 (1991).

⁹⁴ Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 L & Hist Rev 133, 135 (2005).

⁹⁵ *Id.* at 134–35. See also May, *Bar and Old Bailey* at 235 (cited in note 1) (referring to the “development of the concept of the presumption of innocence in the eighteenth century”).

⁹⁶ Sir Frederick Pollock and Frederic William Maitland, 1 *The History of English Law before the Time of Edward I* 79 (Cambridge 2d ed 1898, reprinted 1968).

both sides of the Channel. Indeed, it is fair to say that the disappearance of the ordeal affected European legal history more significantly than its use. The important distinction between the Anglo-American trial by jury and the Continental inquisitorial system can be traced to the search across Europe for alternative criminal procedures.

Professor Whitman's book makes an important contribution to our understanding of the history of Western European criminal procedure and Anglo-American jury trial. The argument challenges the conventional wisdom and prompts fresh thinking about seemingly well-understood legal institutions and doctrines. The thesis is not bulletproof and leaves some questions insufficiently answered. But the questions do not undermine the significance of the accomplishment. This is a groundbreaking book that deserves a broad readership.