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Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development

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Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development

RANDOLPH N. JONAKAIT *

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I. INTRODUCTION

The prosecution must prove every element of the crime beyond a reasonable doubt for a valid conviction. The Constitution nowhere explicitly contains this requirement, but the Supreme Court in *In re Winship*¹ stated that due process commands it.² Justice Brennan, writing for the Court, noted that the Court had often assumed that the standard existed,³ that it played a central role in American criminal justice by lessening the chances of mistaken convictions,⁴ and that it was essential for instilling community respect in criminal enforcement.⁵ The reasonable doubt standard is fundamental because it makes guilty verdicts more difficult. As *Winship* said, the requirement “protects the accused against conviction”⁶

Justice Harlan’s eloquent concurring opinion in *Winship* elaborated by noting that “a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for

1. 397 U.S. 358 (1970).

2. *See id.* at 364 (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“The government must prove beyond a reasonable doubt every element of a charged offense.”).

3. *See In re Winship*, 397 U.S. at 362 (“Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.”).

4. *See id.* at 363 (“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.”).

5. *See id.* at 364 (“[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.”).

6. *Id.* at 364.

a particular type of adjudication.”⁷ Incorrect factual conclusions can lead either to the acquittal of a guilty person or the conviction of an innocent one. “Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.”⁸ Society views the harm of convicting the innocent as much greater than that of acquitting the guilty. Thus, Harlan concluded, “I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”⁹

The reasonable doubt standard was constitutionalized because of the societal function it now serves. *Winship* did not find it constitutionally required because the original meaning of a constitutional provision required it. Indeed, the Court indicated that the standard had not fully crystallized until after the Constitution was adopted.¹⁰ Even so, the reasonable doubt standard provides a fertile field for examining the methodology of finding the original meaning of constitutional criminal procedure rights. First, its status seems secure.

7. *Id.* at 370 (Harlan, J. concurring).

8. *Id.* at 371.

9. *In re Winship*, 397 U.S. at 372.

10. *See id.* at 361 (“The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.”); *see also Apodaca v. Oregon*, 406 U.S. 404, 411 (1972), where Justice White, writing for the plurality stated, “As the Court noted in the *Winship* case, the rule requiring proof of crime beyond a reasonable doubt did not crystallize in this country until after the Constitution was adopted.” White continued that scholars had concluded that

the requirement of proof beyond a reasonable doubt first crystallized in the case of *Rex v. Finny*, a high treason case tried in Dublin in 1798 Confusion about the rule persisted in the United States in the early 19th century . . . ; it was only in the latter half of the century . . . that American courts began applying it in its modern form in criminal cases.

Id. at 412 n. 6; *see also Victor v. Nebraska*, 511 U.S. 1, 8 (1994) (noting that the 1850 formulation of the standard by Massachusetts Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850), “is representative of the time when American courts began applying [the beyond a reasonable doubt standard] in its modern form in criminal cases.”) (quotations omitted).

No debate questions the constitutional requirement that an accused can only be convicted if the crime is proven beyond a reasonable doubt. Its original meaning can be explored uncolored by the partisanship often engendered when present seekers of original meaning hope to define a new contour to a constitutional guarantee.

Furthermore, serious scholars have studied the reasonable doubt standard's early development and its original meaning, purposes, and intent. An examination of those scholarly sources, methods, and conclusions provides a number of valuable insights that should affect the search for finding the original meaning of other American criminal procedure guarantees. These are first that the seeker of original meaning of evolved criminal procedure rights has to go beyond traditional legal sources and explore the broader epistemological developments in religion, philosophy, and science that affected the development of the right. Second, conclusions about original meaning drawn primarily from English and other European sources can be misleading without a consideration of American developments. What might seem like a sound conclusion when English sources are examined may look suspect when viewed in the light of American developments. Finally, the reasonable doubt scholarship reveals that definitive conclusions about the original meaning of American constitutional rights will often be impossible to find both because the necessary American record is absent and because evolved rights never really had a definitive original meaning.

The starting point here is with the scholars who have concluded that the original purpose of the reasonable doubt standard was not, as the Court now has it, to protect the accused, but instead emerged to make convictions easier.

II. REASONABLE DOUBT AS A REPLACEMENT FOR ANY DOUBT

Anthony Morano's path-breaking article in 1975 maintained that the reasonable doubt requirement emerged not as a protection for the accused, but to make it easier for prosecutors to get convictions.¹¹ He concluded that juries were not instructed about a burden of per-

11. Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975).

suasion until the seventeenth century, with courts then usually stating that jurors should convict only if they were satisfied in their consciences that the accused was guilty. Although Morano did not point to any authoritative explication of the term, he speculated that the satisfied conscience test

probably required jurors to vote for acquittal if they entertained any doubt. It implied that, unless they were morally certain of the correctness of a guilty verdict, they would violate their oath if they failed to acquit. It is probable that moral certainty was defined during this period as requiring proof beyond any doubt.¹²

The eighteenth century produced no uniform instruction about the burden of persuasion, but most frequently, Morano maintained, judges stated that jurors should acquit “if they had *any* doubt of the accused’s guilt.”¹³ This was not a new standard but only “crystallized the standard of persuasion that had been applied in English criminal trials for centuries.”¹⁴ And this burden, he stressed, “did not require that a doubt be ‘reasonable’ or ‘rational’ to be a sufficient basis for an acquittal.”¹⁵

English philosophers of the late seventeenth century, however, realized that absolute certainty was not attainable in various human endeavors but that “moral certainty” could be reached about these matters. This “required only that one have no reasonable doubts about one’s beliefs.”¹⁶ Furthermore, because the law began both to limit the evidence that prosecutors could present and to allow criminal defendants to present more evidence, it became harder for the prosecutor “to overcome a juror’s irrational or fanciful doubts. . . . One way to minimize this [defense] advantage . . . was to reduce the degree of certainty necessary to justify a guilty verdict.”¹⁷ As a result of these intellectual and legal developments, the reasonable

12. *Id.* at 512.

13. *Id.*

14. *Id.* at 513.

15. *Id.*

16. *Id.*

17. Morano, *supra* note 11, at 514–15.

doubt standard replaced the any doubt rule. Morano maintained “that the reasonable doubt rule was actually a prosecutorial innovation that had the effect of *decreasing* the burden of proof in criminal cases. Prior to the rule’s adoption, juries were expected to acquit if they had *any* doubts—reasonable or unreasonable—of the accused’s guilt.”¹⁸

Morano also challenged the conventional history on the standard’s earliest appearance. That history then had the rule’s first articulation in a series of treason trials in Dublin in 1798.¹⁹ Morano, however, not only found reasonable doubt charged a generation earlier, but across the Atlantic “in the famous Boston Massacre Trials of 1770—*Rex v. Preston* and *Rex v. Wemms*. There is reason to believe that *Wemms* was the first case to specifically and purposefully distinguish between the any doubt and the reasonable doubt standards of persuasion.”²⁰

Since Morano wrote, scholars have found that English courts as early as the 1780s instructed juries about reasonable doubt,²¹ but the Boston Massacre trials remain the first known legal use of the standard. Whether the Massachusetts court was truly the first to articulate it, however, cannot be known. Sources for what happened in eighteenth century English courts are limited,²² and we know even less about what occurred in American proceedings. In eighteenth century America, cases were not regularly reported. Trial transcripts were

18. *Id.* at 508; *see also id.* at 515 (“[I]t is clear that the rule helped to reduce the potential for irrational acquittals and to that extent operated to the prosecution’s advantage.”). *But see id.* (“It is not clear whether judges and prosecutors were actually aware of the prosecutorial benefits of the reasonable doubt rule as contrasted with the any doubt test.”).

19. Morano writes that an article by Judge May is the source for the conventional view. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876). This assertion was influential, for, as Morano notes, “[b]oth Dean Wigmore and Dean McCormick accepted Judge May’s thesis. The United States Supreme Court referred to Judge May’s theory in *Apodaca v. Oregon*.” Morano *supra* note 11, at 515 (citing *Apodaco*, 406 U.S. at 412 n. 6; 9 J. Wigmore, *Evidence* § 2497 (3d ed. 1940); C. McCormick, *Law of Evidence* § 341 (2d ed. 1972)).

20. Morano, *supra* note 11, at 516.

21. *See* WHITMAN, *infra* note 27 and accompanying text at note 39.

22. *See* Gallanis, *infra* note 49 and accompanying text at note 54.

seldom made.²³ Furthermore, the avenues of appellate review of criminal convictions in early America were constrained²⁴ and, thus, few early judicial considerations of the burden of persuasion can be found.²⁵

The available historical record, however, does find that the first use of the reasonable doubt standard was in the 1770 Boston trial. This has great importance in considering the origins of the rule. It means that we cannot presuppose that America simply inherited the standard from English law.²⁶ We have to consider the possibility

23. See Morano, *supra* note 11, at 520 (“One obstacle is the general lack of extant trial transcripts from 1750 to 1830. Another problem is that the trial court proceedings in many criminal cases were never recorded.”).

24. *Id.* at 526 (“The avenues for appellate review of convictions were severely restricted in early America because the English appellate procedures, which the colonies inherited upon independence, were themselves very limited. For example, the writ of error, although generally employed in early America, provided a means for reviewing neither the sufficiency of the evidence nor the correctness of the trial judge’s instructions. The bill of exceptions, which was the proper procedure for obtaining review of such matters [sic] was not recognized in English criminal law or in the federal courts of the United States. It was not available in America until it was established by state statutes. In some states, appeals from convictions were virtually nonexistent.”)

25. See *id.* at 520 (“[O]ne must often search for jury instructions in criminal appellate reports. These reports often do not reproduce the instructions or even allude to them. . . . Moreover, very few appellate courts directly considered whether the reasonable doubt standard had to be charged in all criminal cases.”).

26. The development of the reasonable doubt standard in America may have influenced its emergence elsewhere. English interest in the Boston Massacre trials was high. HILLER B. ZOBEL, *THE BOSTON MASSACRE* 300 (1970) (“In England, the Massacre and its aftermath had attracted wide attention. Even before word of the soldiers’ acquittals had reached home, a demand had built up for information about Preston’s trial. One bookseller said that if he had a report of the testimony, he ‘could soon sell a thousand copies of it.’”). Certainly, the trial’s participants thought that the proceedings would get a wide audience. For example, in the *Wemms* case, defense attorney Josiah Quincy in his opening statement urged the jury to be dispassionate and said, “We must steel ourselves against passions, which contaminate the fountain of justice. We ought to recollect, that our present decisions will be scann’d, perhaps thro’ all Europe.” 3 *LEGAL PAPERS OF JOHN ADAMS* 166 (L. Kinvin Wroth & Hiller B. Zobel, ed. 1965) [*hereinafter* ADAMS PAPERS]. A report of the proceedings was published in 1771, and it quickly became available in both the colonies and England. See Morano, *supra* note 11, at 518–19; ADAMS PAPERS, at 38 n. 70. This widespread availability, coupled with the fact that the reasonable doubt standard emerged at almost the same time in far

that it developed in America before it did in England; indeed, the available historical record indicates precisely that. Consequently, we cannot assume that if we understand the origins of the English standard, we truly understand the original meanings and purposes of the American one. It is, of course, possible that similar currents in both places produced the standard in each. If so, understanding the development of the English standard aids in understanding the American development, but certainly, assertions about the birth of the English reasonable doubt standard should also be examined under an American light to test their likely validity for understanding the American origins of the rule. As such, an examination reveals that some claims about reasonable doubt's development look dubious when American conditions and developments are considered.

III. REASONABLE DOUBT TO EASE JURORS' SPIRITUAL ANXIETIES (AND TO MAKE CONVICTIONS EASIER)

James Q. Whitman, in his 2008 study, *The Origins of Reasonable Doubt: The Theological Roots of the Criminal Trial*, also concludes that the standard appeared to make convictions easier, not harder, by supplanting the rule that jurors could acquit if they had any doubt. Whitman finds the burden of persuasion's emergence rooted firmly in religion.²⁷

Whitman stresses that not merely the fate of the accused was at stake in early trials, but also the souls of those who judged. This was so because "convicting an innocent defendant was regarded, in

flung places, led Morano to suggest that the Massachusetts proceedings were an important impetus for the rule's general development. He states,

By the mid-1790s, reasonable doubt charges appeared in English, Canadian and American cases. It is at least as likely as not that, because of their notoriety, the Boston Massacre Trials influenced these other courts in their employment of the reasonable doubt standard and thus significantly contributed to the rule's development as the accepted burden of persuasion in criminal cases.

Morano, *supra* note 11, at 519. *But see id.* at 518 ("[T]he impact of the Boston Massacre Trials on subsequent cases is not altogether clear.").

27. *See* JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 2* (2008) ("This is a book about the forgotten theological roots of the criminal trial.").

the older Christian tradition, as a potential mortal sin.”²⁸ This concern was especially high for “‘blood punishments’—that is, execution and mutilation, the standard criminal punishments of pre-nineteenth-century law.”²⁹ Consequently, those fearing God’s retribution were reluctant to enter legal condemnations, and this fear drove the evolution of the reasonable doubt standard. Whitman asserts that “there is no way to explain ‘reasonable doubt’ unless we focus resolutely on the *spiritual* anxieties of judging”³⁰ To understand how that standard came about, “knowledge of the broader world of Latin Christendom” is necessary.³¹

That Christian doctrine provided a sanctuary for judges. The soul of the judge who authorized a blood punishment was safe as long as he strictly followed the legalities and did not use his personal knowledge to condemn, for then, theologians had concluded, it was not he but the rule of law that was responsible for the judgment.³² Jurors, however, did not have this theological loophole. A wrong decision condemning another to a blood punishment endangered the jurors’ soul.

According to Whitman, the jurors were especially spiritually endangered because “well into the early nineteenth century, jurors were still expected to make use of their private knowledge of the case, at least occasionally. . . . This deserves to be underlined, since histori-

28. *Id.* at 3.

29. *Id.*

30. *Id.* at 151 (emphasis in original).

31. *Id.* at 126. Whitman notes that others have also recognized that the actors in common law trials were afraid of making the legal judgments and refers to historians citing fears of vengeance, criminal liability, and making mistakes that could damage a career. Whitman concedes, “There is undoubtedly some truth in all of these explanations of the dangers of judging. In particular, there is no doubt that fear of vengeance was strong in the Middle Ages, though it had faded by the eighteenth century.” *Id.* at 151. Whitman, however, maintains that these explanations largely miss the mark because they “explain premodern fears by anything except the fear of damnation.” WHITMAN, *supra* note 27, at 151; *see also id.* at 186 (noting that the likelihood of retaliation had ebbed by the late eighteenth century, but “the fear of moral responsibility had not. The risk to the soul still shadowed the trial.”).

32. *Id.* at 93–94; *see also id.* at 151 (“[T]he role of the judge was to be kept separate from the role of the witness. Judges were not to use their private knowledge.”).

ans have not got the history quite right.”³³ Those historians maintain that jurors stopped using their personal knowledge of an accused and the crime to reach a judgment by the sixteenth century, after the jurors began to hear witness testimony. But, Whitman maintains, this conclusion “is clearly false.”³⁴ Blackstone and other eighteenth century writers still asserted that jurors could decide issues based on private knowledge as long as they testified in open court. Whitman concludes that while it may have been rare in the eighteenth century for jurors to render verdicts on personal knowledge, especially in large cities such as London, it still happened. That rarity, however, was the not the real issue for the spiritually anxious.

[F]rom the point of view of moral theology . . . , 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.³⁵

Moreover, the spiritual concerns of jurors were magnified because an eighteenth century trial, according to Whitman, was not a “whodunit” or a what-happened determination, but a proceeding to declare formally what was already known. “[A] trial was not to solve factual riddles, but to *confirm* truths.”³⁶ Guilt was generally clear,³⁷ and the law’s goal was not to have triers of fact but jurors “willing to cooperate in the process of inflicting punishment. To put it a little differently, the primary role of the ‘witness,’ in Christian

33. *Id.* at 151–52.

34. *Id.* at 152.

35. *Id.* at 152–53.

36. WHITMAN, *supra* note 27, at 195.

37. *See id.* at 203 (noting that a trial “did not involve any great mystery about the particular facts: it was assumed that the guilt of the accused would be more or less clear, much or most of the time, to the ‘neighbours’ who were called upon to judge them.”).

moral theology, was not to provide factual clues but to take moral responsibility.”³⁸

Jurors could avoid the spiritual anxiety of wrongly imposing blood punishments, of course, by simply refusing to convict. Even so, and even though such punishments decreased in England in the 1700s,³⁹ “the fear of divine vengeance remained strong.”⁴⁰ This fault line—guilty defendant, but jurors concerned for their souls in authorizing blood punishments—forced out the reasonable doubt rule. Whitman concludes, “It was the resulting tensions that produced the reasonable doubt formula at the end of the eighteenth century: ‘Reasonable doubt’ emerged as formula intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty.”⁴¹

The moral literature of the eighteenth century, according to Whitman, lit the path out of the spiritual thicket by distinguishing

38. *Id.* at 203.

39. Blood punishments diminished in eighteenth century England because transportation to the American colonies substituted for many harsher punishments and because jurors “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.” *Id.* at 187. Whitman says that if all blood punishments had been eliminated, “there would have been much less need for the reasonable doubt instruction. . . . Nevertheless, these changes in punishment practices were not enough to eliminate all moral concerns.” *Id.* Of course, the fact that juries indulged in pious perjury undercuts Whitman’s arguments about the strength of the spiritual anxieties jurors faced. “Such acts of mercy . . . suggest that oaths were not always taken literally and that jurors in such instances did not anticipate divine retribution.” BARBARA J. SHAPIRO, *A CULTURE OF FACT: ENGLAND, 1550–1720* 21 (2000).

40. WHITMAN, *supra* note 27, at 204.

41. *Id.* at 186. Whitman also maintains that the same dynamic produced the jury unanimity rule. He stresses, again, that the purpose of trials was not fundamentally to determine facts but to obtain moral judgments that could imperil jurors’ souls. He continued:

There is no reason to suppose that an uncertain fact is more securely established because twelve out of twelve laypeople agree on it, rather than nine out of twelve, or ten out of twelve. The unanimity rule serves a different purpose: it allows the twelve to share the heavy moral responsibility for judgment, and therefore to diffuse it among themselves. The unanimity rule is a moral comfort rule . . .

Id. at 204.

between “doubts” and “scruples.” “Christians were to stay upon the safer path, which meant that they were to listen to their doubts. . . . Doubts were legitimate and had to be obeyed; scruples were foolish and had to be ignored.”⁴² The distinction was grounded in reason. “In particular, the moralists held, the good Protestant was always to use his ‘reason,’ wherever possible, in order to remove his doubts. . . . Doubts were, as they always had been, subject to a test of reason”⁴³ Scruples, on the other hand, “were dangerously irrational impulses.”⁴⁴ Following such scruples “might easily lead the Christian into a terrible error, the error of sins of omissions.”⁴⁵ When applied to criminal trials, this distinction meant that a juror should acquit if he had doubts based in reason, not because of any irrational reluctance.⁴⁶

Whitman accepts that the standard’s initial appearance is unknown, but maintains that even so, examination of early instances is fruitful.⁴⁷ He briefly discusses its first known articulation in the Boston Massacre trial. Those proceedings will be explored more fully later in this article, but Whitman concludes that they support his thesis: “The Boston Massacre trial arguments, like everything else we have seen from the period, were framed in the language of the safer path theology.”⁴⁸

Whitman, however, focuses more on the next discovered reasonable doubt cases, which come from London’s Old Bailey in the 1780s.⁴⁹ He sees these trials mirroring older ones in that they were

42. *Id.* at 190.

43. *Id.*

44. *Id.* at 179.

45. WHITMAN, *supra* note 27, at 180.

46. *See id.* at 192 (“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.”).

47. *See id.* at 193 (“To hunt for the first case use of the rule would be misguided; . . . the reasonable doubt rule was quite simply in the air in the later eighteenth century. Nevertheless, it is revealing to look closely at the earliest cases in which the formula does turn up.”).

48. *Id.* at 194.

49. *See* Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 941 n. 1 (2009) (“The Old Bailey was the principal

not proceedings to find facts, but to make moral judgments.⁵⁰ It was a time when “the reluctance of jurors to convict could infuriate critics of English criminal justice. . . . [For some commentators,] English criminal jury trial seemed a wayward institution in the latter decades of the eighteenth century—a setting in which unduly ‘merciful’ jurors ignored obvious truths.”⁵¹

The Old Bailey judges responded in the 1780s by instructing jurors to acquit if they had a *reasonable* doubt. For Whitman it is clear that “[t]he underlying concern [of the instruction] was not with protecting the defendant at all. It was with protecting the jurors.”⁵²

Whitman goes on to consider more specific reasons “why the standard established itself in the Old Bailey when it did, in the mid-1780s.”⁵³ Whitman suggests that the reasonable doubt standard then emerged because American independence made transportation of

criminal court for cases of serious crime arising in the city of London and the adjacent county of Middlesex.”).

50. Whitman states that eighteenth century

[j]urists still sometimes spoke of the trial in the way their medieval forebears had done—as an event involving a solemn moral decision to condemn a clearly guilty defendant. . . . [A] trial was not to solve factual riddles but to *confirm* truths. We find the same assumptions in the reports of Old Bailey.

WHITMAN, *supra* note 27, at 195. Whitman says that pre-1800 courts did not have plea-bargaining. With nearly every case going to trial, guilty defendants were “paraded before the court for ceremonious condemnation.” *Id.* at 19. Today a trial is, in essence, the final chapter of a detective story with the jury charged with finding the facts, but in the past it was different.

Instead, they often thought of the trial as a solemn event in which the court and the community formally took responsibility for inflicting punishment on a defendant who was fairly clearly guilty. . . . Certainly there were occasionally factual puzzles that the jurors had to solve. But frequently the toughest question in such a trial was whether the defendant’s neighbors would be willing to take the momentous step of giving their formal, unanimous, ‘confirmation.’

Id.; see also *id.* at 209 (“Because the old moral theology assumed that the facts would typically be pretty straightforward, and that the accused was usually guilty, its moral focus was not on the problems of fact-finding. Instead, its focus was on the morality of punishment itself.”).

51. *Id.* at 197.

52. *Id.* at 194.

53. *Id.* at 199.

convicted criminals to the American colonies, which had reduced blood punishments, impossible.⁵⁴ After 1783, when American independence was formally recognized, jurors had to be especially concerned that a conviction would lead to an execution.

The first cases using the reasonable doubt formula in the Old Bailey crop up during that same period [when transportation punishment was unavailable]—indeed, they crop up in the year [1783] 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 somewhat diffidently—this raised the punishment stakes sufficiently that jurors needed more coaxing to convict than had been the case in previous decade. Seventeen eighty-three was the year when no one could be quite certain where the future of punishment lay.⁵⁵

While Whitman does mention the Boston Massacre trials, his study concentrates on English and continental developments, and even if he has correctly identified the original purposes for the emergence of the English reasonable doubt standard, it should not be assumed that his conclusions truly inform us about the original American meaning of the standard. As we have seen, the available histori-

54. Gallanis, *supra* note 49, at 962 (“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. 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.”).

55. WHITMAN, *supra* note 27, at 200; *see also id.* at 187 (“[T]o the extent that 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 (the criminal court of London) in the early 1780s, precisely the years when the system of transportation had collapsed in the wake of the American Revolution.”).

cal record indicates that Americans did not simply inherit reasonable doubt from England, but used it earlier than did the English. Instead, his history is valuable only if the forces and currents he identifies as producing the standard operated in a similar manner in America to the way they did in England. His conclusions need to be examined under an American light, and this focus makes it dubious that his assertions can be applied to the original American meaning and purposes of reasonable doubt.

IV. EXAMINING THE CLAIMS UNDER AN AMERICAN LIGHT

A. *Transportation*

Clearly, the suspension of English transportation in the 1780s cannot explain the presence of the standard in the 1770 Boston Massacre trial. Perhaps that punishment's hiatus forced out the rule in England;⁵⁶ clearly, it did not in America. Instead, Whitman's history

56. Cf. Gallanis, *supra* note 49, at 963 ("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."). Whitman relies on the Old Bailey Session Papers (OBSP), "pamphlet accounts of criminal trials, printed and sold to members of the public." *Id.* at 962. Reports of the reasonable doubt instruction first appear in the OBSP in the 1780s. As Thomas Gallanis points out, however, this source has limitations. The OBSP concentrated on the proceeding's aspects that were most likely to catch a layperson's interest. For cost reasons, the reports were often minimal, especially before 1778. Gallanis notes that the period of 1782 to 1790 brought lengthier reports and states, "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." *Id.* at 962; see also George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L. J. 575, 639 (1997) ("For now it is safe to assume, . . . that what the Sessions Paper reports probably did happen, but what it omits to mention might have happened too."); c.f. Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established At The Time Of the Founding"*, 13 LEWIS & CLARK L. REV. 605, 618 n. 7 (2009) ("Because case reporting was quite unsystematic in earlier times, it is certainly possible that a doctrine could have developed in cases that were never reported and are now lost in time . . . [O]ur knowledge of legal evolution is dependent on the happenstances of when doctrines were preserved in reported cases.")

has a bearing on the American development of reasonable doubt only if the forces other than transportation's interruption that he identifies had the same effect in the colonies that he asserts that they did in England.

B. *Spiritual Anxieties*

Whitman's central assertion, however, is not about transportation, but that because jurors had such strong spiritual anxieties in imposing blood punishments, jurors, acquitted if they had any doubts, rational or not, with the resulting acquittals forcing out the reasonable doubt standard. It allowed for convictions that kept jurors' souls safe. There are reasons, however, to doubt that this dynamic much affected American jurors.

First, religion in general may not have had a particularly strong hold in eighteenth century America. Thus, historian Stephen Prothero maintains, "Christianity was not particularly popular in the New World colonies. Spiritual indifference was the rule" ⁵⁷ This did change somewhat in the mid-eighteenth century, but, according to Prothero, many have misperceived the true extent of the religious fervor.

The celebrated Great Awakening of the 1740s powerfully reversed that decline in many locales, but its revivals were not as widespread as many historians have claimed On the eve of the Revolution, only 17 percent of adults were church members, and spiritual lethargy was the rule. ⁵⁸

57. STEPHEN PROTHERO, AMERICAN JESUS: HOW THE SON OF GOD BECAME A NATIONAL ICON 43 (2003).

58. *Id.* at 44. *But see* John E. Smith et. al., *Introduction* in A JONATHAN EDWARDS READER vii (John E. Smith, Harry S. Stout & Kenneth P. Minkema, ed. 1995) (noting that the early eighteenth century in America was "an age when religion predominated.").

And however extensive the revivals, their effect on jury trials can be doubted since at a time when jurors were male, women were apparently more swept up in these religious awakenings than men.⁵⁹

Furthermore, the predominant theology in eighteenth century America seems to be fundamentally different from the religious teachings that Whitman describes as having produced the spiritual angst that resulted in reasonable doubt. The beliefs he finds so influential stem from medieval Catholicism.⁶⁰ While we may not always recognize the influences that compel us to act, it should give pause if the argument is that eighteenth century Americans, the Puritans, the Presbyterians, the Baptists, the Anabaptists, the Quakers, and even the Anglicans as well as the Deists and the nonbelievers, were acting under ancient Catholicism's power. If they were, surely they were not consciously doing so.

The concern over blood punishments and the safer way theology is based on the belief that salvation was won or lost by a person's deeds. This is at odds with much that was preached in eighteenth century America. For example, Jonathan Edwards,⁶¹ America's most prominent theologian of that era, said time and again that salvation came through faith and God's grace, not through good deeds.⁶² Edwards stressed that man's nature was inherently evil, and only the magnanimity of God's mercy prevented a person from being

59. In a 1737 letter to Benjamin Colman, pastor of Boston's Brattle Street Church, Jonathan Edwards stated, "I hope that 300 souls were savingly brought home to Christ in this town in the space of half a year (how many more I don't guess) and about the same number of males as females; which, by what I have heard Mr. Stoddard say, was far from what has been usual in years past, for he observed that in his time, many more women were converted than men." *Id.* at 65.

60. See WHITMAN, *supra* note 27, at 3.

61. See John E. Smith et. al., *Introduction* in JONATHAN EDWARDS READER, *supra* note 58, at vii ("Jonathan Edwards (1703–1758) is colonial America's greatest theologian and philosopher. During his life, he served as teacher, pastor, revivalist, missionary, and college president, in the process established himself as one of the most influential churchmen in the Anglo-American religious world.")

62. *E.g.* JONATHAN EDWARDS READER, *supra* note 58, at 47 ("And thus it is that we are said to be justified by faith alone: that is, we are justified only because our souls close and join with Christ the Savior, his salvation, and the way of it; and not because of the excellency or loveliness of any of our dispositions or actions, that moves God to it.")

plunged into the abyss.⁶³ Redemption was not earned by a person's deeds as a desired good can be bought by money. Salvation came through God, and man could only hope to obtain it through faith and being born again in Jesus.⁶⁴ Good deeds, in this Protestant view, were secondary to faith and God's grace.⁶⁵ A person's soul was fundamentally put in jeopardy not because of a bad deed, but because the person lacked the requisite faith. Edwards was not alone; the theology of faith over good deeds was the dominant theme of the eighteenth century revivals.⁶⁶ We might hope that in all eras jurors

63. *See e.g., id.* at 96 (“Your wickedness makes you as it were heavy as lead, and to tend downward with great weight and pressure towards hell; and if God should let you go, you would immediately sink and swiftly descend and plunge into the bottomless gulf, and your healthy constitution, and your own care and prudence, and best contrivance, and all your righteousness, would have no more influence to uphold you and keep you out of hell, than a spider’s web would have to stop a falling rock.”). *See also id.* at 224–25 (noting that man has an “innate sinful depravity of the heart . . . [which is man’s] natural or innate disposition . . . without the interposition of divine grace. Thus, that state of man’s nature, that disposition of the mind, is to be looked upon as evil and pernicious, which as it is in itself, tends to extremely pernicious consequences, and would certainly end therein, were it not that the free mercy and kindness of God interposes to prevent that issue.”).

64. *See, e.g., id.* at 100–02 (“If you cry to God to pity you, he will be so far from pitying you in your doleful case, or showing you the least regard or favor, that instead that he’ll only tread you under foot . . . How dreadful is the state of those that are daily and hourly in danger of this great wrath, and infinite misery! But this is the dismal case of every soul in this congregation, that has been born again, however moral and strict, sober and religious they may otherwise be.”).

65. *See, e.g., id.* at 47 (“And we are justified by obedience or good works, only as a principle of obedience or a holy disposition is implied in such a harmonizing or joining [with Christ the Savior], and is a secondary expression of the agreement and union between the nature of the soul and the gospel, or as an exercise and fruit and evidence of faith . . .”). *See also id.* at 170–71 (“Christian practice is the most proper evidence of the gracious sincerity of professors, to themselves and others; and the chief of all the marks of grace, the sign of signs, and evidence of evidences, that which seals and crowns all other signs. . . . Not that there are no other good evidences of a state of grace but this. . . . [B]ut yet this is the chief and most proper evidence.”).

66. For example, the English evangelist, George Whitefield was on his seventh American revival tour when he died in Boston September 30, 1770, shortly before the Boston Massacre trials. “Whitefield had by his fiery preaching in the 1740s infused with ascetic zeal a whole generation.” ZOBEL, *supra* note 26, at 237. And the basic message he presented from Georgia to New York was similar to Edwards’. Whitefield stated, “[G]ood works have nothing to do with our justification

have had a concern over wrongly convicting an accused, but the more immediate spiritual concern of eighteenth century Americans, if they listened to those who preached to them, was that their innate, sinful natures would provoke God to sunder the spider's web and plunge them into perdition. One would think with that view of eternal life that concern over blood punishments would be well down on the list of spiritual anxieties.

C. *The Acquittal Crisis*

Whitman's thesis contends that the reasonable doubt instruction came in response to the jurors' reluctance to convict. This suggests that something like an acquittal crisis must have existed in the years preceding the emergence of the standard. Whether an eighteenth century American acquittal crisis existed, however, seems impossible to determine. Thus, nothing has been found to indicate that Massachusetts not-guilty rates precipitately increased, or increased at all, in the period immediately before the Boston Massacre trials. Nothing has been found to indicate that they did not. The evidence, one way or the other, just does not seem to exist.

Early American criminal trial records are incomplete. Douglas Greenberg made an extensive study of criminal practice in colonial New York and examined surviving records of 5,297 cases, adding, however, that "as is readily apparent, this represents only a portion of all the cases that actually came before the courts."⁶⁷ Jack D. Marietta and G.S. Rowe have similarly studied criminal practice in early Pennsylvania. They "undertook to count every crime recorded

in [God's] sight. We are justified by faith alone Notwithstanding, good works have their proper place: they justify our faith, though not our persons; they follow it, and evidence our justification in the sight of men." SERMONS OF GEORGE WHITEFIELD 24 (2009); *see also id.* at xx ("[R]emember that you are fallen creatures; that you are by nature lost and estranged from God; and that you can never be restored to your primitive happiness, till by being born again of the Holy Ghost. . . .").

67. DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776 37 (1974). Greenberg later discusses a New York case described by another historian and then says, "It is interesting to note, moreover, that this case never appears in any of the surviving court records—another indication that mine is but a partial sampling of criminal defendants." *Id.* at 82 n. 9.

in the extant justice records and other public sources.”⁶⁸ But, of course, other documents might not have survived.

Greenberg indicates that the limitations of his data make suspect comparisons across time periods. He states, “A serious problem of chronological comparability is thereby built into this study, since there is no period for which there are surviving records for every court.”⁶⁹ On the other hand, Marietta and Rowe do present decade-by-decade information about Pennsylvania criminal cases. A striking fact is that only a minority of accusations, from any of the decades, ended with the formal disposition of conviction or acquittal. Most dispositions could be labeled “other.” Some were like civil cases and ended by formal or informal arbitration or mediation. Some were resolved when a judge imposed a bond on a defendant to guarantee future good behavior. Some cases faded away for lack of resources or interest. Some ended when an accused escaped from custody.⁷⁰

Greenberg’s study found something similar for New York. He found that 48% of the cases ended with a conviction and 15% in acquittals. “The missing 37% of the 5,297 cases were never resolved at all They simply disappear from the records entirely before a verdict is recorded. This is an essential point to keep in mind.”⁷¹

In light of these dispositions, patterns, and the possibility of missing data, maybe the best way to analyze the information on what jurors were doing is to examine Marietta and Howe’s calculation for what they call the “simple conviction rate (SCR), which is the percent of convictions among all charges brought to trial.”⁷² Those figures show a lower conviction rate in mid-eighteenth century Pennsylvania than at the end of the seventeenth century.⁷³ They also show the 1730s conviction rate of 76.3% dropping to 67.5% in the 1740s.⁷⁴ Perhaps, although we have no evidence of anyone arguing

68. JACK D. MARIETTA & G.S. ROWE, *TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682–1800* 2 (2006).

69. GREENBERG, *supra* note 67, at 37.

70. *See* MARIETTA & HOWE, *supra* note 68, at 44–47.

71. GREENBERG, *supra* note 67, at 71.

72. MARIETTA & HOWE, *supra* note 68, at 45.

73. *Id.* at 46.

74. *Id.*

this, that drop fueled a contention that there were too many “wrong” acquittals which helped lead to a pro-prosecution reasonable doubt standard decades later. On the other hand, the conviction rate in Pennsylvania rose to 71.3% in the 1750s and stayed basically steady at that level for the rest of the century. In other words, the conviction rate had rebounded well before we know of any articulation of the reasonable doubt standard anywhere.⁷⁵ All in all, it is hard to see this data as indicating an “acquittal crisis” that brought about a new standard for the burden of proof.

D. *Other Explanations for “Wrong” Acquittals*

If there were early American “wrong” acquittals, the cause may have been something other than spiritual anxiety over blood punishments. Religious people with differing beliefs can be reluctant to have their actions result in an execution; the non-religious can feel the same. Certainly, empathy for a defendant can be a factor in acquittals, and this factor seems to have affected colonial jurors, as indicated by Pennsylvania infanticide prosecutions.

A woman charged with killing a newborn could be tried for infanticide. The law presumed that a child was born alive, and the punishment was death. The defendants were almost always young, single women, and indictments for the crime rose steady, especially after 1750. Convictions, however, did not keep pace. “Juries balked at assigning young women to death in infanticide cases and effectively thwarted the law.”⁷⁶ If the defendant showed that she had grieved for the death of the child or prepared for its birth, acquittals often followed.⁷⁷

Something other than spiritual anxieties over mistaken impositions of blood punishments was operating. If the driving force was

75. *Id.* at 46. Indeed, the lowest reported conviction rate was in the 1710s of 59.7%, thirteen points below the rate for the previous decade. The 1720s, however, saw the rate rebound to 74.6% with no change in the burden of proof as far as we know. *Id.*

76. *Id.* at 116–17.

77. *See id.* at 117 (“If defendants in infanticide cases shed tears or were found to have prepared in any way for the coming of the child (‘benefit of linen,’ it was called), acquittal ordinarily followed. Tears and ‘linen’ indicated to jurors that the woman presumably loved the child and regretted its demise.”).

the jurors' concern for their own souls, the acquittals would not have been affected by the defendants' characteristics. The remedy for this acquittal crisis was not to change the burden of proof. No matter what that burden, the sympathy for the defendants would have remained, and in all likelihood, so would have the "wrong" acquittals. Instead, the remedy was to alter the punishment, and that is what happened with imprisonment replacing death. With this change and further reforms that allowed for greater prosecutorial flexibility in charging and for greater jury discretion in determining the punishments, the conviction rate increased without any apparent change in the burden of proof.⁷⁸

E. *American Jurors as Finders of Fact*

Whitman views almost all eighteenth century acquittals as wrongful. He maintains that trials were not about finding facts since it was clear that the defendants were guilty. The proceedings only sought to have society, as represented by juries, render moral judgments in order to punish those who had broken the law.⁷⁹ Even if this were true for England, the situation in America appears different and appeared differently to eighteenth century Americans.

For example, Douglas Greenberg's examination of early New York criminal cases found that women were frequently accused of theft, a crime with a high acquittal rate.⁸⁰ Many of these were unmarried women, who had difficulty in supporting themselves and were often seen as a threat to traditional family life.⁸¹ Greenberg maintains that, "the single woman was more likely than others of her sex to be an object of suspicion and antagonism—the natural social pariah."⁸² These conditions provide an explanation for the large number of acquittals—many of those women were wrongly accused.

78. See MARIETTA & HOWE, *supra* note 68, at 116 ("In the first ten prosecutions following the law's revision on infanticide, juries voted seven convictions.").

79. See *supra* text accompanying note 50.

80. GREENBERG, *supra* note 67, at 79.

81. See *id.* at 80 ("Unlike single men, they often had no legitimate means of supporting themselves. Moreover, they seemed to pose a threat to the stability of family life, since they might seduce husbands from the home and hearth to the tavern and bawdy house.").

82. *Id.*

Greenberg concedes that not every such verdict came from an impartial consideration of the evidence, but that still

[t]he high percentage of acquittals among women . . . is less mystifying if one takes into account the disproportionately high percentage of single women accused of crime, and the strong possibility that some of those accusations were unwarranted by the facts and closely related to the social anxieties of eighteenth-century life. . . . [T]he marital status of the accused provides the most persuasive available explanation . . . [of why more women were acquitted of theft than men.]⁸³

Greenberg draws a similar conclusion from data showing that there were more acquittals in New York City than the rest of the colony. He states, “Apprehension of suspects was easier in the city than elsewhere, but it was also less likely that those arrested would be guilty. The process of accusation and arrest probably tended to be more arbitrary in New York.”⁸⁴ He reasons that outside the city arrests could be arduous, and constables were unlikely to apprehend people unless the officials were fairly sure of guilt. In contrast, arrests were made in the city on more tenuous grounds.

Because constables were not required to travel long distances to make arrests, and because individuals were more easily located in the city, law-enforcement officers could be less selective about whom they apprehended . . . In other words, it was less important in New York City to be certain that an individual taken into custody was guilty.⁸⁵

The acquittal rate was greater in New York, not because jurors had more spiritual anxiety than jurors elsewhere about convictions, but because more of the charges in the city were dubious. The trials, at

83. *Id.* at 82–83.

84. *Id.* at 86.

85. *Id.*

least in Greenberg's eyes, were often about determining the facts and weighing the evidence, and verdict patterns indicate that all defendants were not clearly guilty.

Furthermore, those familiar with American law in the era when the reasonable doubt standard emerged, at least as indicated by James Wilson, saw trials as proceedings not merely to confirm what was already known with a guilty verdict, but to determine disputed facts. Wilson, perhaps the most important legal thinker in eighteenth century America, was one of only six people to sign both the Declaration of Independence and the Constitution, and his contributions at the constitutional convention were second to only those of James Madison. He came to America in 1765 after being born and schooled in Scotland and was one of the best-educated people in the New World.⁸⁶ Wilson had a large and successful legal practice in Philadelphia,⁸⁷ was regarded as the father of the Pennsylvania Constitution of 1790, and was an original justice of the Supreme Court.⁸⁸

He was appointed to the first law professorship at the College of Philadelphia, and, starting in 1790, he gave lengthy legal lectures that he hoped would lay the foundation for an American system of law.⁸⁹ Although the lectures do not expressly discuss any controlling burden of proof, they do extensively discuss juries and trials. In Wilson's view, juries resolved guilt and innocence by determining facts. Wilson said it was "of immense consequence . . . that jurors should possess the spirit of just discernment, to discriminate between the innocent and the guilty. . . ."⁹⁰ Jurors "will be triers not only of facts; but also the credibility of the witnesses. They will know whom and what to believe . . ."⁹¹ Jurors were to use their reasoning to weigh the evidence.

The testimony of one witness will not be rejected merely because it stands single; nor will the testimony of

86. See Robert Green McCloskey, *Introduction* in 1 THE WORKS OF JAMES WILSON 9 (1967) [*hereinafter* WILSON].

87. *Id.* at 18.

88. *Id.* at 2.

89. *Id.* at 28–29.

90. *Id.* at 74.

91. *Id.* at 332.

two witnesses be believed, if it be encountered by reason and probability. These advantages of a trial by jury are important in all causes: in criminal causes, they are of peculiar importance.⁹²

Wilson realized that facts often would not be clear because not all witnesses would tell the truth, and he gave “reasons for suspecting or rejecting testimony.”⁹³ America entrusted jurors to make such determinations. “In no case . . . does [the law] order a witness to be believed; for jurors are triers of the credibility of witnesses, as well as of the truth of facts.”⁹⁴

F. *The Importance of Juries to Americans*

If the spiritual terror among those who might serve as jurors was as strong as Whitman maintains, we might expect to find significant resistance to the jury system. The opposite, of course, was true. Eighteenth century Americans embraced the system as central to their freedoms and derided and fought English denials or abridgement of jury trials.⁹⁵ The newly independent states guaranteed criminal jury trials in their fundamental charters. The main body of the

92. *Id.*

93. WILSON, *supra* note 86, at 386.

94. *Id.* at 383. While Whitman and Morano see this era as one limiting jury power, Wilson saw that judges were increasingly granting jurors more discretion in weighing credibility. Wilson noted that “every intelligent person, who is not infamous or interested” could testify and that the judge applied these competency rules. *Id.* at 545. Wilson continued, however, that the line that made a person incompetent to testify was not clear. Often that interest only affected the credibility of a witness. Wilson, recognizing a legal trend that would continue, stated, “In doubtful cases of this description, the judges especially of late years, presume in favor of the province of the jury. This is done with great reason.” *Id.*

95. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 681 (1996) (“No idea was more central to our Bill of Rights than the idea of the jury. The only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases”); see also Eben Moglen, *Consider Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COL. L. REV. 1495, 1520 (1994) (“British North Americans were willing to respond with organized violence when jury trial was interfered with by an asertedly sovereign Parliament in the 1760s and 1770s.”).

Constitution guarantees criminal jury trials as, of course, does the Sixth Amendment. Juries were considered essential.⁹⁶ Our political history does not show the rabid fear of making the kinds of judgments that Whitman maintains many jurors had. Instead, Americans wanted juries, insisted upon juries, fought for juries, and counted juries a fundamental right.

G. *An American Reluctance to Convict*

All this does not mean that American jurors did not dread convicting an accused, especially in a capital case. James Wilson certainly recognized that reality, but his response was not to suggest making convictions easier. Instead, he found the answer in his view of jury unanimity.

Wilson asserted that the “conviction of a crime—particularly of a capital crime” required jury unanimity.⁹⁷ On the other hand, in what might be a surprise to modern readers, acquittals required only one juror. He stated:

If a single sentiment is not for conviction; [sic] then a verdict of acquittal is the immediate consequence. . . . For by the law, as it has been stated, twelve votes of conviction are necessary to compose a verdict of conviction: but eleven votes of conviction and one against it compose a verdict of acquittal.⁹⁸

Wilson then asked a series of rhetorical questions aimed at the natural reluctance of jurors.

96. See JACK N. RAKOVE, ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 293 (1997) (“Americans [gave] two rights preeminent importance. If the rights to representation and to trial by jury were left to operate in full force, they would shelter nearly all the other rights and liberties of the people.”).

97. WILSON, *supra* note 86, at 503; see also *id.* at 525 (“[W]e shall find no authority to conclude, that, in civil causes, the verdict of a jury must be founded on unanimous opinion.”).

98. *Id.* at 531.

Under this disposition of things, can an honest and conscientious juror dread or suffer any inconvenience, in discharging his important trust, and performing his important duty, honestly and conscientiously? Under this disposition of things, will the citizens discover that strong reluctance, which they often and naturally discover, against serving on juries in criminal, especially capital cases?⁹⁹

Wilson was aware of jurors' fears of rendering criminal judgments, but he showed no concern that juries would acquit when they ought not. He approvingly stressed the juror's power to acquit. "The jury retain[s] an indisputable, unquestionable right to acquit the person accused, if, in their private opinions, they disbelieve the accusers."¹⁰⁰ Wilson did not present arguments to rein in jury discretion to produce more convictions but, instead, stated that America's unanimity rule favored acquittals. The notion that this was an age when American jury powers were being circumscribed to make convictions easier is not supported by, and runs counter to, these eighteenth century views from a learned, knowledgeable, and experienced commentator.¹⁰¹

99. *Id.*

100. *Id.* at 383.

101. No doubt acquittals could be found to support the notion that early American jurors were reluctant to impose blood punishments. But then, contrary instances should also be considered. For example, the Portland, (now) Maine newspaper, Eastern Herald, of July 9, 1792, reported a murder conviction under the headline, "Trial and Condemnation of Joshua Abbot, Jun." Abbot, the story said, was in his sixties, a husband, and the father of six. *Trial and Condemnation of Joshua Abbot, Jun.*, E. HERALD, July 9, 1792. The previous February Moses Gubtail went to Abbot's house and argued over a tool. *Id.* "Gubtail appeared to be in a violent passion, and told Abbot that he was 'damn'd disobliging old fellow' but that notwithstanding this, he should have had the flax break had it not been for his 'damn'd old bitch of a wife.'" *Id.* Abbot ordered Gubtail out of the house, but Gubtail stood outside and yelled several times that he would "cuff" Abbot if Abbot came out. *Id.* An "exasperated" Abbot picked up a piece of an ox sled and struck Gubtail on the head. *Id.* Urged by his brother Benjamin, "who was present during the whole transaction, and who was the only witness of any importance in the cause," Gubtail finally went home where he died within two days. *Id.* The resulting conviction came in spite of a vigorous defense. Each of Abbot's two attorneys

V. THE BOSTON MASSACRE TRIALS

Perhaps the best crucible for testing out assertions about the origins of reasonable doubt, however, is to examine them in the context of the Boston Massacre trials. If claims do not seem to make sense or ring true in the context of the first known use of the standard, they ought to be considered suspect. And the Boston Massacre Trials do not support many of the assertions made about reasonable doubt's development.

The editors of John Adams' legal papers, L. Kinvin Wroth and Hiller B. Zobel, present the basic facts of the shootings that led to the trials:

British troops had been garrisoned in Boston since 1768; thereafter friction between inhabitants and soldiers had increased steadily; this friction generated heat and even occasional sparks of violence; in the evening of 5 March 1770, the lone sentry before the Custom House on King Street became embroiled with a group of people as he stood his post; he called for help; in response, six soldiers, a corporal, and Captain Thomas Preston marched down to the Custom House from the Main Guard; the tumult continued; the soldiers fired, their bullets striking a number of persons, of whom three died instantly, one shortly thereafter, and a fifth in a few days.¹⁰²

gave a lengthy summation. *Id.* "During which time, if the most clear and judicious statement of evidence—if the profoundest knowledge of law—and if the utmost ingenuity in the application of it, could have prevailed, Abbot had escaped death." *Id.* On the other hand, the prosecution summation "was short; but pointed, and fatal." *Id.* After the trial judges gave instructions that "were lengthy in their observations—in which they discovered great ability, with a tincture of legal severity[,]” the jury received the case at one in the morning and pronounced the conviction at eight. *Id.* This was not a jury reluctant to impose a blood punishment, even though the verdict came as a shock to the community. The newspaper reported, "There were nearly two thousand persons present at the trial—not two individuals of whom, perhaps, expected this bloody verdict." *Id.*

102. ADAMS PAPERS, *supra* note 26, at 1.

A. Jurors Determining Disputed Facts

About the resulting trials, Whitman asserts “that there was once again no uncertainty about the facts.”¹⁰³ If he means that no one doubted that the eight particular British soldiers were involved in a shooting that left five dead, he is correct. If, however, Whitman means that the guilt of the eight was clear, he is just wrong.

Captain Preston was tried separately from the others, and his trial centered on whether he gave the order to fire. Witnesses testified that he did so, but defense testimony disputed those assertions.¹⁰⁴ Hiller Zobel, in his study of the trials, states that the rebuttal evidence was so strong that an acquittal became assured not because the defense’s case made it clear what happened, but because it created “a picture of confusion, noise and verbal threats. . . . [It] raised serious doubts that the order to fire came from Preston.”¹⁰⁵ The acquittal came not because every one knew what happened, but the opposite—because this was “a case so full of factual uncertainty and evidentiary conflict.”¹⁰⁶ The facts were in doubt even after the trial, and whatever the burden of proof, the acquittal was correct.¹⁰⁷

The second trial, *Rex v. Wemms*, the trial of the soldiers, contains the first recorded instance of an attorney arguing the reasonable doubt standard and its first recorded judicial instruction.¹⁰⁸ The issue of guilt was closer than in Preston’s trial.¹⁰⁹ Under controlling law, once it was proved that a soldier killed a particular person, the

103. WHITMAN, *supra* note 27, at 193.

104. ZOBEL, *supra* note 26, at 249–50.

105. *Id.* at 255–56.

106. *Id.* at 256; *see also id.* at 198 (“Like most of the events during the confusion in King Street, the rate of firing is clouded with uncertainty.”).

107. The prosecution probably did not know this before the trial. The prosecutorial office was a part time position, and no money was allocated for investigation. His job was solely to make the trial presentation. “In other words, he was strictly a litigator, not an investigator.” *Id.* at 105.

108. This does not mean that the reasonable doubt standard did not appear in the Preston trial. The surviving records of *Preston* are slenderer than for *Wemms*. While enough exists for a reasonably confident picture of much of what happened in *Preston*, only abbreviated notes are available for the attorneys’ summations and the judges’ instructions. *See id.* at 249; ADAMS PAPERS, *supra* note 26, at 89–97.

109. ZOBEL, *supra* note 26, at 268 (“[T]he question of guilt in the soldiers’ case was much closer than in Preston’s.”).

burden was on him to show that the killing was justified, that is, that he acted in self-defense.¹¹⁰ *Wemms* focused on whether the soldiers justifiably feared for their safety before they fired. The facts, however, were and remain murky. The jurors' job was not to confirm what was clear, but to make determinations about whether testimony was correct. Thus, John Adams, in his defense summation, stated that witnesses could be, and were, mistaken.¹¹¹ Judge Trowbridge instructed the jurors that they ought to reconcile testimony if they could, but if that were not possible, "settle the fact as you verily believe it to be."¹¹² Later, he noted that testimony indicated that one soldier did not fire and another fired at a boy and missed, but "the witnesses are not agreed as to the person who fired at the boy, or as to him who did not fire at all."¹¹³ Similarly, that judge highlighted that all the evidence could not be correct. For example, testimony indicated, "that there are *two* guns of *eight* not discharged and yet it is said *seven* were fired. This evinces the uncertainty of some of the testimonies."¹¹⁴

Zobel concludes:

Somehow it seems fitting that an event so historically inevitable and yet so basically insignificant should have taken place on a moonlit, night before scores of people,

110. *Id.* at 242 ("Underlying both cases was the legal principle that, once the fact of killing had been proved, the killer bore the burden of convincing the jury that the homicide was legally justified.") Samuel Quincy in addressing the jury for the prosecution in *Wemms* stated, "It is a rule of law Gentleman, when the fact of killing is once proved, every circumstance alleviating, excusing, or justifying, in order to extenuate the crime must be proved by the prisoners, for the law presumes the fact malicious, untill [sic] the contrary appears in evidence." ADAMS PAPERS, *supra* note 26, at 156.

111. *See* ADAMS PAPERS, *supra* note 26, at 261. ("[I]t is apparent, that witnesses are liable to make mistakes . . . I am sure that you are satisfied by this time, by many circumstances, that [Mr. Bass] is totally mistaken in this matter . . ."); *see also id.* at 265 (explaining that the witness Langford "is however most probably mistaken in this matter, and confounds one time with another, a mistake which has been made by many witnesses, in this case, and considering the confusion and the terror of the scene, is not to be wondered at.").

112. *Id.* at 295

113. *Id.* at 298.

114. *Id.* at 308.

without leaving any two witnesses able to give the same account of what happened. If the trials were attempts to establish the truth, they failed; no one yet knows what really happened.¹¹⁵

What we do know is that the jury acquitted six soldiers and convicted two of only manslaughter.¹¹⁶

B. *Jurors' Private Knowledge*

Unlike what Whitman suggests about eighteenth century trials, the jurors could not use their private knowledge in the Massacre trials.¹¹⁷ Thus, defense attorney Josiah Quincy told the jury in an opening statement:

But let it be borne deep upon our minds, that the prisoners are to be condemned by the evidence *here in Court* produced against them, and by nothing else. Matters heard or seen abroad, are to have no weight: in general they undermine the pillars of justice and truth.¹¹⁸

Justice Trowbridge instructed the jurors that if any of them had relevant knowledge of the case, they should be sworn and testify.¹¹⁹ He

115. ZOBEL, *supra* note 26, at 303.

116. ADAMS PAPERS, *supra* note 26, at 312–14. Those two “prayed the *Benefit of Clergy*, which was allowed them, and thereupon they were each burnt in the hand, in open Court, and discharged.” *Id.* at 314.

117. *Id.* at 166.

118. *Id.* Quincy acknowledged that apparently damaging information had appeared about the defendants, but Quincy gave lack of confrontation as a reason for the jurors to disregard it. He said:

It should be remembered, that we were not present to cross examine: and the danger which results from having this publication in the hands of those who are to pass upon our lives, ought to be guarded against. We say we are innocent, by our plea, and are not to be denounced upon a new species of evidence, unknown in the *English* system of criminal law.

Id.

119. *Id.* at 290 (“That if any of the jurors are knowing of the facts, they ought to inform the Court of it, be sworn as witnesses, and give their testimonies in Court,

went on to state that the verdict was to be based on the evidence presented in court.

Therefore as by law, you are to settle the facts in this case, upon the evidence given you *in Court*: you must be sensible, that in doing it, you ought not have any manner of regard to what you may have read or heard of the case *out of court*.¹²⁰

C. Jurors' Spiritual Anxieties

The spiritual concerns that Whitman identifies as leading to wrongful acquittals and forcing out the reasonable doubt rule had no discernible role in the Massacre trials. Nothing indicates that jurors were concerned about their souls for wrongly imposing a blood punishment. Instead, Bostonians were told something quite different. The cry heard again and again was that the righteous should convict, not acquit, a cry supported by Biblical injunctions that in effect demanded blood. Souls were at stake, not for imposing a blood punishment, but if one were not imposed.

These views started to pervade the atmosphere even earlier than the *Preston* and *Wemms* trials. Several weeks before the Boston Massacre, the increasing tensions in Massachusetts produced a confrontation between Ebenezer Richardson and an angry crowd. Richardson fired his musket, wounding several and killing an eleven-year-old boy.¹²¹ Within days, a board with biblical quotations was publicly posted. To anyone who might later sit on Richardson's jury, two of the sacred quotations were particularly applicable: "Thou shalt take no satisfaction for the life of MURDERER—he shall surely be put to death." And "Though Hand join in Hand, the Wicked shall not pass unpunish'd"¹²²

to the end that it may be legal to their fellows, and the Court may know on what evidence the Jury's verdict is founded.").

120. *Id.* at 291. Trowbridge gave a similar injunction about the law. *See ADAMS PAPERS, supra* note 26, at 291. ("[Y]ou must also be sensible, that you are to take the law from the Court, and not collect it from what has been said by People of Court, or published in the newspapers, or delivered from the pulpits.").

121. *See ZOBEL, supra* note 26, at 176.

122. *Id.* at 178.

Shortly after the Massacre, Boston clergy urged neither hesitancy nor mercy in condemning, but vengeance and convictions.

The Sunday after the shootings, the young Reverend John Lathrop preached a violent sermon in the Old North Church on Genesis 3:10: ‘The voice thy brother’s blood crieth unto me from the ground.’ He spoke of ‘sorrow for the dead, who fell victims to the merciless rage of wicked men; indignation against the worst of murderers. . . .’ Another zealous divine, the Reverend Charles Chauncy, tried to convince one of the wounded to sue Preston for damages. The man refused Chauncy was unimpressed. ‘If I was to be one of Jury upon his trial,’ he said, ‘I would bring him in guilty, *evidence or no Evidence*.’¹²³

Bostonians were citing Genesis 9:6, where God enjoins Noah, “Whoever sheds man’s blood, By man his blood shall be shed; For in the image of God He made man.” At Richardson’s trial, held between the Massacre shootings and the resulting trials, the shorthand version of this verse was shouted out to Richardson’s jury as deliberations began: “Blood requires blood.”¹²⁴

Appeals to this biblical blood injunction and other similar ones urging a killer’s condemnation were so prevalent that they were repeatedly addressed in the Massacre trials. Thus, in the *Wemms* trial, Josiah Quincy’s defense summation acknowledged them, but stressed that the defendants “are *not* to be tried by the *Mosaic* law: a law, we take it, peculiarly designed for the government of a peculiar nation, who being in a great measure under a theocratical form of government, it’s [sic] institutions cannot, with any propriety, be adduced for our regulation in these days.”¹²⁵

Quincy argued that the verse, “[w]hosoever sheddeth blood, by man shall his blood be shed” stated a general rule that could not be

123. *Id.* at 216.

124. *Id.* at 225. The courtroom crowd said more to the jury. “As the jury began filing out, the shouts increased. ‘Remember, jury,’ someone yelled, ‘you are upon oath. . . . Damn him, don’t bring in manslaughter.’ ‘Hang the dog! Hang him!’ Damn him, hang him! Murder no manslaughter.” *Id.*

125. Josiah Quincy, *Josiah Quincy’s Argument for the Defense*, in ADAMS PAPERS, *supra* note 26, at 234 (quotations omitted).

literally applied because otherwise a person “killing another in self-defence, would incur the pains of death . . . a doctrine that certainly never applied under the *Mosaical* institution.”¹²⁶ Quincy felt compelled to address two more apparently condemnatory biblical passages, stressing that the defendants were only to be judged by the evidence and law presented in court.¹²⁷

John Adams’ summation indicated that a potential juror had been excused because that person thought that God’s words to Noah had to be followed.¹²⁸ Adams, not surprisingly, was concerned that the biblical passages might still affect those on the jury and went on to say, “I am afraid many other persons have formed such an opinion . . . but this is not the law which does not punish many kinds of killings, including those in self defense.”¹²⁹

The judges’ concern about the Old Testament passage was so strong that they also felt the need to address it. Judge Trowbridge stated that jurors in the course of the year had heard the precept given to Noah about shedding blood and explicated:

Whence it has been inferred, that whosoever *voluntarily* kills another, whatever the inducement, or

126. *Id.* at 235.

127. *See id.* He said that “the *murderer* shall flee to the pit,” which begged the question whether the defendants were murderers “in the sense of our laws; for you recollect, that what is murder and what is not, is a *question of law*, arising upon facts stated and allowed.” Similarly, his statement: “You shall take no satisfaction for the life of a *murderer*, which is guilty of death,” begged the same question. Quincy went on to state that the defense had no objection to this when properly applied. “If we have committed a *fault*, on which *our laws* inflict the punishment of *death*, we must suffer. But what fault we have cummitted [sic] you are to enquire: or rather you, Gentlemen, are to find the *facts proved in Court against us*, and the Judges are to see and consider what the law pronounces touching our offence, and what punishment is thereby inflicted as a penalty.” *Id.*

128. *See John Adams, Adams’ Argument for the Defense, in ADAMS PAPERS, supra* note 26, at 255 (“I take notice of this, because one gentleman nominated by the sheriff, for a Juryman upon this trial, because he said, he believed Capt. *Preston* was innocent, but innocent blood had been shed, and therefore somebody ought to be hanged for it, which he thought was indirectly giving his opinion in this cause.”). The editors of the *Adams Papers* noted, “The individual has not been identified.” *Id.* at 255 n.219.

129. *Id.* at 255–56.

provocation may be, is a *murderer*, and as such ought to be put to death. But surely not only the avenger of blood, and he who killed a thief breaking up an house in the night, were exceptions to the general precept, but also he who killed another in his own defence. Even the Jewish Doctors allowed this and that justly; because the right of self-defence is founded in the law of nature.¹³⁰

Trowbridge stressed and repeated that the defendants were not being tried under Jewish law, but under the common law.¹³¹

Justice Oliver told the jurors that the command given to Noah that “hath lately been urged in the most public manner very indiscriminately, without any of the softenings of humanity.”¹³² Oliver noted that Moses mentioned a similar precept, but

that *Moses* was the best Commentator on his own laws, and he hath published certain restrictions on this law [T]o construe that law to *Noah* strictly, is only to gratify a blood thirsty revenge, without any of those allowances for human frailties which the law of nature and the *English* law also make.¹³³

130. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 288.

131. *Id.* at 284 (“[I]t may not be improper, considering what has in the course of this year been advanced, published, and industriously propagated among the people, to observe to you that none of the indictments against the prisoners are founded on the act of this province, or the law given to the *Jews*, but that, all of the indictments are at common law. The prisoners are charged with having offended against the common law, and that only; by that law therefore they are to be judged, and by that law condemned, or else they must be acquitted.”). *See also id.* at 288 (“[T]hese rules of the common law, are the result of the wisdom and experience of many ages. However, it is not material in the present case, whether the common law is agreeable to, or variant from, the law given to the *Jews*, because it is certain, the prisoners are not in this Court to be tried by *that* law, but by the common law, that is according to the settled and established rules, and antient customs of the nation, approved for successions of ages.”).

132. *Id.*

133. *Id.* at 304.

The contention at the heart of Whitman's analysis, that reasonable doubt emerged to aid convictions by salving jurors' souls terrified of wrongly convicting, is simply not supported by the Boston Massacre trials. Whatever effect that spiritual anxiety had on the standard's development in England, it does not seem to have had that effect on the first known use of the standard, which was in America. Instead, the spiritual anxiety at work when the standard was first articulated was just the opposite—that God-fearing jurors would feel religiously compelled to condemn, even if the facts and the applicable law did not support a conviction. The judicial concern in the Boston Massacre trials was that religion would produce an unreasoning conviction, not an acquittal.

D. *The Reasonable Doubt Instruction as an Aid to Acquittals*

The conclusion that the purpose of the first known articulation of the reasonable doubt standard was to aid convictions comes by parsing some trial participants' words. John Adams' summation told the jury, "[T]he best rule in doubtful cases, is, rather to incline to acquittal than conviction Where you are doubtful never act; that is, if you doubt of the prisoners guilt, never declare him guilty; that is always the rule, especially in cases of life."¹³⁴

The prosecutor, Robert Treat Paine, seemingly responded by stating that English law was benign, a proposition which could best be understood by Coke's observation that the law was

the last improvement of Reason which in the nature of it will not admitt any Proposition to be true of which . . . there remains a doubt; if therefor in the examination of this Cause the Evidence is not sufficient to Convince beyond reasonable Doubt of the Guilt of all or 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 their Guilt beyond reasonable Doubt the Justice of the Law will require you to declare them Guilty and the Benignity of the

134. John Adams, Adams' Argument for the Defense, in ADAMS PAPERS, *supra* note 26, at 243.

Law will be satisfied in the fairness and impartiality
of their Tryal.¹³⁵

Anthony Morano concluded that Adams was stating the existing law. The jury should “acquit if it doubted that the defendant was guilty.”¹³⁶ Paine, in reply, however, was making a “novel plea” that a doubt compelling an acquittal had to be reasonable.¹³⁷ Thus, Paine was urging the replacement of an any doubt standard with the reasonable doubt standard, and in Morano’s version, Paine’s midwifery had some success. “Paine’s innovation did influence one justice to break with tradition.”¹³⁸ Justice Oliver instructed the jury that “if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent.”¹³⁹

Whitman finds Paine not so much an innovator, but an importer, bringing an idea into the law that had long been accepted elsewhere. Paine was expressing “the basic tension between certainty and doubt [that] had been intimately associated with moral theology for centuries”¹⁴⁰ Paine was merely enunciating the “safer path theology” going back more than a century.¹⁴¹ “That literature held that 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 not be allowed prevent the satisfactory workings of public justice.”¹⁴²

If Whitman is correct that it was well accepted that doubts had to conform to reason, then Adams may have been saying the same thing as Paine. Adams’ “doubt” may have been synonymous with Paine’s “reasonable doubt.” If so, this reasonable doubt standard was not something new, invented to aid the prosecution, but just another formulation for what already existed.

135. Robert Treat Paine, Paine’s Argument for the Crown, in ADAMS PAPERS, *supra* note 26, at 271.

136. Morano, *supra* note 11, at 517.

137. *Id.*

138. *Id.* at 518.

139. Edmund Trowbridge, Trowbridge’s and Oliver’s Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 309.

140. WHITMAN, *supra* note 11, at 194.

141. *Id.*

142. *Id.* at 193.

What we can be reasonably certain about, however, is that no matter what Adams and Paine meant, the judge who gave that first known reasonable doubt charge was not giving a charge to make convictions easier. While Justice Oliver's language about reasonable doubt might appear as prosecution friendly if it is viewed in isolation, it does not when viewed in its context. The jury instructions containing the reasonable doubt charge were not pro-prosecution but, really, commands to acquit.

The prosecution had faced the difficulty that no witness had testified as to which particular soldier killed three of the victims.¹⁴³ The prosecutor offered two theories why, even so, each defendant was still guilty of murder.¹⁴⁴ First, Paine contended that the soldiers were an unlawful assembly, and each soldier was responsible for the assembly's deeds.¹⁴⁵ Paine also maintained that each defendant was liable as a principal if the defendant aided, assisted, and abetted another to do an unlawful act.¹⁴⁶ Paine urged that the rapid firing supported the aiding and abetting theory because it indicated a prior agreement to shoot. And even if the shooting did not show that, it was evidence of abetting "as one by firing encourages the others to do the like."¹⁴⁷

Justice Trowbridge, who gave the first set of instructions, in essence told the jury to reject Paine's arguments. The rapid firing did not indicate a prior agreement if the defendants were defending themselves.¹⁴⁸

143. See Robert Treat Paine, Paine's Argument for the Crown, in *Adams Papers*, *supra* note 26, at 279.

144. *Id.*

145. See *id.* ("But which of the other 5 prisoners killed the other 3 of the deceased appears very uncertain. But this operates nothing in their favour if it appears to you what they were an unlawful Assembly for it has been abundantly proved to you by Numerous Authoritys produced by the Council for the Prisoners, that every individual of an Unlawful Assembly is answerable for the doings [of] the rest.")

146. See *id.* ("[A]ll that are present aiding assisting and abetting to the doing an unlawful act as is charged in the Several Indictments against the Prisoners are also considered as Principals.")

147. Edmund Trowbridge, Trowbridge's and Oliver's Charges to the Jury, in *ADAMS PAPERS*, *supra* note 26, at 297.

148. See *id.* ("The Council for the Crown insist, that the firing upon the people was an unlawful act, in disturbance of the peace, and as the party fired so near together, it must be supposed they previously agreed to do it; that agreement made

If each of the party had been at the same instant so assaulted, as that it would have justified his killing the assailant in defence of his own life, and thereupon each of them had at that same instant fired upon and killed that person assaulted him, surely it would not have been evidence of a previous agreement to fire, or prove them to be an unlawful assembly¹⁴⁹

Even if, the Justice continued, that provocation only mitigated murder to manslaughter, the rapid shooting would not indicate a prior agreement or an unlawful assembly.¹⁵⁰ Then, Trowbridge stressed that there was plenty of evidence of an assault that explained the rapid firing.

You will therefore carefully consider what the several witnesses have sworn, with regard to the assault made upon the party of soldiers at the *Custom house*, and if you thereupon believe they were, before, and at the time of, their firing attacked by such numbers, and in such a violent manner, as many of the witnesses have positively sworn, you will be able to assign a cause for their firing so near together, as they did, without supposing a previous agreement so to do.¹⁵¹

The judge addressed whether the shooting by one aided and abetted the others by pointing out that since no soldier fired more than

them an unlawful assembly, if they were not so before, and being so when they fired, all are chargeable with the killing by any one or more of them. However just this reasoning may be, where there is no apparent cause for their firing, yet it will not hold good where there is.”).

149. *Id.*

150. *See id.* (“nor would it have been evidence of such agreement though the attack was not as would justify the firing and killing, if it was such an assault as would alleviate the offence, and reduce it to manslaughter, since there would be *as apparent* a cause of the firing in one case as in the other”).

151. *Id.*

once, the one who fired last could not by that act have encouraged those who fired before.¹⁵² Furthermore, Trowbridge told the jury that a defendant did not unlawfully abet if he had a proper justification for shooting,¹⁵³ and the same held even if the provocation only mitigated a killing to manslaughter.¹⁵⁴ He then stressed that soldiers not proven to have aided or abetted others could only be convicted if it were proved that a specific soldier killed a particular person.¹⁵⁵ There was only that kind of proof about two of the five victims and two of the defendants. Thus, this instruction told the jurors that they should acquit all but two of the defendants if the soldiers had been under an attack that allowed for self-defense or mitigated a murder to manslaughter. Finally, the judge, who had already pointed out the many witnesses who had testified to such provocation, dismissed any notion that a jury could not find such an attack.¹⁵⁶ These jury instructions were, therefore, in essence a command to acquit six of the eight defendants. Trowbridge said, “And as the evidence does not shew which three killed the three, nor that either of the six in particular killed either of the three, you cannot find the either of the six guilty of killing them or either [*of*] them.”¹⁵⁷

152. *See id.* (“As neither of the soldiers fired more than once, it is evident that he who fired last, could not thereby in fact, abet or encourage the firing of any of those who fired before him, and so it cannot be evidence of such abetment.”).

153. Edmund Trowbridge, Trowbridge’s and Oliver’s Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 297–98 (“And if he who fired first and killed, can justify it, because it was lawful for him so to do, surely that same lawful act cannot be evidence of an unlawful abetment.”).

154. *See id.* at 298 (“[Y]et if it appears he had such a cause for the killing as will reduce it to Manslaughter, it would be strange indeed if the same act should be evidence of his abetting another who killed without provocation, so as to make him who fired first guilty of murder. The same may be said as to all the intermediate firings . . .”).

155. *See id.* (If the soldiers were a lawful assembly and did not unlawfully abet each, “they cannot be said to have *in consideration of law* killed those five persons or either of them, but must rest on the evidence of the actual killing: and, if so, neither of the prisoners can be found guilty thereof, unless it appears not that he was of the party, but that he in particular *in fact* did kill one or more of the persons slain.”).

156. *See id.* (“[A]nd as the evidence stands, I don’t think it necessary to say how it would be in case the first person fired with little or no provocation.”).

157. *Id.*

Prosecution evidence, however, showed that William Montgomery and Matthew Killroy each killed a particular victim. Justice Trowbridge stated that a murder conviction for those two was proper only if they had fired without first being assaulted. If there had been an assault that had immediately threatened the soldiers' lives and they fired to preserve their safety, they should be acquitted. If the assault did not place the soldiers' lives in danger, then a verdict of manslaughter was appropriate. Trowbridge continued by stressing that evidence allowed the jury to find self-defense,¹⁵⁸ and the evidence definitely allowed for no more than a manslaughter conviction. He said:

But you must know, that if this part of soldiers *in general* were pelted, with snow-balls, pieces of ice and sticks, *in anger*, this, without more, amounts to an assault, not upon those that were in fact struck, but upon the whole party; and is such an assault as will reduce the killing to manslaughter.¹⁵⁹

This was not an instruction offering a spiritually safe path that led to a conviction for a blood punishment. Instead, these were instructions that almost commanded an acquittal of murder. Of course, Trowbridge is not the judge who gave the reasonable doubt instruction. Justice Oliver did, but Oliver's charge, which primarily adopted Trowbridge's remarks, sought even more than the earlier instructions to have acquittals of all charges.

Oliver started by castigating those in the community who had sought to prejudice the defendants,¹⁶⁰ and urged the jury "to divest your minds of every thing that may tend to bias them in this

158. *See id.* (If you believe some of the witnesses, "it will be sufficient to show, that his life was in immediate danger, or that he had sufficient reason to think so.").

159. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 299.

160. Oliver specifically referred to a newspaper article, which also insulted the court, and said, "I think I never saw a greater malignity of heart expressed in any one piece." *Id.* at 302.

cause.”¹⁶¹ He then said that because of Justice Trowbridge’s thoroughness, he had little to add to the homicide definitions,¹⁶² and recommended that the jurors first consider whether the soldiers or those confronting the soldiers were an unlawful assembly.¹⁶³ His summary stressed the lack of doubt on a key issue:

It would be too tedious to recite the numbers of testimonies to prove a design to attack the soldiers . . . there are no less than *thirty-eight* witnesses to this fact, *six* of whom the council for the King have produced. Compare them Gentlemen, and then determine whether or not there is any room to doubt of the numbers collected around the soldiers at the *Custom house*, being a riotous assembly.¹⁶⁴

Evidence instead showed that the crowd had committed provocative acts that justified the firing.¹⁶⁵ He, again, echoed Trowbridge by noting that the lack of proof as to which particular defendant killed three of the victims was an evidentiary absence that required acquittals. “[T]his maxim of law cannot be more justly applied, than in this case, *viz.* That it is better that *ten* guilty persons escape, than *one* innocent suffer”¹⁶⁶

Oliver conceded that Montgomery had killed one of the victims. While Trowbridge left open the possibility of a manslaughter conviction for that soldier, Oliver indicated that Montgomery should be

161. *Id.* at 303.

162. *See id.* (“I should have given to you the definitions of the different species of homicide, but as my brother hath spoke so largely upon this subject, and hath produced so many and so indisputable authorities relative thereto, I would not exhaust your patience which hath so remarkably held out during this long trial.”)

163. *Id.* at 304 (“I would recommend to you, *Gentlemen*, in order to your forming a just verdict in this cause, to satisfy yourselves in the *first* place, whether or not the prisoners at the bar were an unlawful assembly when they were at the *Custom-house*, for on that much depends their guilt or innocence.”)

164. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 306.

165. *Id.* at 307–08.

166. *Id.* at 308.

totally acquitted.¹⁶⁷ Oliver asserted that the attacks on Montgomery provided a legal justification for the killing.¹⁶⁸ “[H]ere take the words and the blows together, and then say, whether this *firing* was not justifiable.”¹⁶⁹ He concluded his evidence summary by downplaying the importance of the proof against Killroy.¹⁷⁰ Oliver, as he had in the Richardson trial, indicated that the jury should acquit entirely.¹⁷¹

Oliver’s reasonable doubt instruction came after this recital of the reasons why all should be acquitted. He said that if the jury found that the soldiers were acting lawfully and only fired when

there was a necessity to do it in their own defence, which I think there is a violent presumption of: and if, on the other hand, ye should find that the people who were collected around the soldiers, were an unlawful assembly, and had a design to endanger, if not take away their lives, as seems to be evident, from blows succeeding threatnings; ye must, in such case acquit the prisoners; or if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent.¹⁷²

167. *See id.*

168. *Id.*

169. *Id.*

170. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 308–09.

171. In this portion of his charge where he urged a complete acquittal, Oliver was acting as he had in the *Richardson* trial. *See ZOBEL*, *supra* note 26, at 224–25 (explaining that the judges “agreed that Richardson, having acted in self-defense, could be held for nothing more than manslaughter Oliver went farther than the other judges; Richardson, he said, had committed no offense at all, not even manslaughter.”). Opprobrium was heaped upon Oliver for his role in the Richardson trial, which drew the judge’s comment in the Preston trial. Oliver “also reminded the [Preston] jury of the contempt he had personally received during Richardson’s trial.” *Id.* at 265.

172. Edmund Trowbridge, *Trowbridge’s and Oliver’s Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 309.

Justice Oliver, a Royalist and Tory, opposed to what he saw as the Boston mob,¹⁷³ did not mention reasonable doubt to aid the prosecution. Oliver's instructions stated that there was a "violent presumption" in favor of justification, but even if the jurors did not agree with what was "evident," that the defendants had proved self-defense, the jurors still had to acquit if the jurors had a reasonable doubt about their guilt.¹⁷⁴ The reasonable doubt instruction was not given to make a conviction easier, but was another arrow that told the jury that they should acquit.¹⁷⁵

VI. REASONABLE DOUBT AS ENLIGHTENMENT THINKING

Barbara Shapiro and James Franklin present accounts of the reasonable doubt's development that are similar to each others and differ from Whitman's. In their views, the true driving force for the rule's evolution came not from concerns over blood punishments, but instead from a complex interrelationship between legal developments and the epistemological advances in other disciplines, including religion, philosophy, and science.¹⁷⁶ These disciplines all shared a concern with determining when knowledge derived from the senses "yield conclusions which were sufficiently true to serve as the basis for conduct of human affairs."¹⁷⁷

The legal system first led the way. Franklin, in *The Science of Conjecture: Evidence and Probability Before Pascal*, notes that seventeenth century English law rejected the rigid notion that facts could be established by merely using presumptions or adding togeth-

173. See ZOBEL, *supra* note 26, at 4 ("the Tory Peter Oliver"); see also *id.* at 4 ("Royalist").

174. Edmund Trowbridge, *Trowbridge's and Oliver's Charges to the Jury*, in ADAMS PAPERS, *supra* note 26, at 309.

175. *Id.*

176. See BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 2 (1991) ("[T]he judges confronted twin sources of epistemological guidance. One was the English religious tradition, particularly the casuistical tradition, which sought a rational method of decision making in everyday life. The other was the scientific movement of Bacon, Boyle, and especially Locke and the empirical philosophers, who sought to establish scientific truth from the evidence they gathered.").

177. *Id.* at 7.

er partial proofs.¹⁷⁸ Instead, that law recognized that trial proof was a matter of probabilities and that facts could not be established with absolute certainty or without doubt. Even so, a high degree of certainty could and should be demanded. Shapiro states that this English legal culture was “a widely admired mode of establishing correct beliefs in the world of ‘fact.’ During the early modern era the English legal system had produced a well-accepted epistemological framework and a method of implementing it that worked reasonably well in reaching judgments of ‘fact’ necessary to make important social decisions.”¹⁷⁹ Because this jury system was highly regarded in English society, other fields took note of the methods for reaching “moral certainty” in the legal field.¹⁸⁰ While the nomenclature varied among the disciplines, they all concluded that “[t]here were three subcategories of knowledge, each possessing a different kind of certainty: physical, derived from immediate sense data; mathematical, established by logical demonstration such as the proofs in geometry; and moral, based on testimony and secondhand reports of sense data.”¹⁸¹ In this last category, knowledge could not be absolutely proved but still could be raised to a level much above mere opinion and form the basis for human conduct.¹⁸² “All the discourses of fact

178. See JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* 62 (2001) (“[S]ubtle distinctions among grades of presumptions, and fractions of proof, were ill adapted to explanation to juries.”).

179. SHAPIRO, *supra* note 39, at 32.

180. “[T]he absorption and spread of ‘fact’ in England was facilitated by widespread familiarity with and esteem for lay fact finding juries. Efforts by naturalists, historians, rationalizing theologians, and even novelists to rely on the credible testimony of firsthand witnesses thus built and were assisted by an already existing, legitimate, widely shared, and often glorified cultural practice.” See *id.* at 209. For example, a basic principle of the judicial system spread, and “[a]ll the fact-oriented disciplines exhibited a preference for personal observation and a belief that the testimony of credible witnesses under optimum conditions could yield believable, even morally certain ‘facts.’” *Id.* at 211.

181. SHAPIRO, *supra* note 176, at 7–8. Cf. *id.* at 41 (“[T]here are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration In the other, which is the empirical realm of events, absolute certainty of this kind is not possible.”).

182. See *id.* at 7 (“The attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion, was made by an overlapping group of theologians and naturalists.”); see also *id.* at 41 (“[J]ust because

emphasized the quest for evidence of facts sufficient to reach ‘moral certainty.’¹⁸³

A crucial step in reasonable doubt’s emergence was the development of the “satisfied conscience” test, which, according to Shapiro, was the first English legal standard explicitly used for the evaluation of facts and testimony.¹⁸⁴ The concept came from the English Protestant tradition that “insisted that the conscience involved an act of the intellect, not the will . . . [, and] each person to be his own strictest judge. The judgment of conscience thus could not involve deferring to the authority or the wishes of another person.”¹⁸⁵

This English religious tradition was concerned with the overly scrupulous conscience since such a “doubtful conscience which substituted excessive suspicion for care would never find itself at rest.”¹⁸⁶ Conscience, however, was a product of rationality and understanding and not of the passions or feelings. Since conscience was a product of reason,¹⁸⁷ however, a person seeking the solace of a right conscience did not have to reach mathematical certainty. A satisfied conscience was achieved if the conscience was without reasonable or rational doubt. Shapiro says that the connection between the English religious formulations and the later legal development of

absolute certainty is not possible, we ought not to treat everything merely as a guess or opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of evidence available to us increase.”).

183. SHAPIRO, *supra* note 39, at 211. *See also id.* at 46–47 (“History and law both were disciplines committed to determining the truth of past events In history as in law, moral certainty was the highest certainty available for matters of fact.”).

184. *See* SHAPIRO, *supra* note 176, at 13, 14 (“The ‘satisfied conscience’ standard became the first vessel into which were poured the new criteria for evaluating facts and testimony. . . . Satisfied conscience is central to the development of the beyond reasonable doubt standard.”). *See also id.* at 41 (“The earliest standards we have identified were ‘satisfied belief’ and ‘satisfied conscience.’”).

185. *Id.* at 15.

186. *Id.* at 16.

187. *See id.* at 16 (“It is important for us to emphasize that the judgment of conscience was a rational decision [Religious figures] repeatedly insisted that conscience is a function of the understanding, not the passions. To go against conscience is to go against reason.”).

reasonable doubt can be seen in the words of Robert South, an Anglican cleric who, like others,

insisted that mathematical certainty of demonstration was not necessary in order to be assured of the rightness of one's conscience. It was sufficient 'if he know it upon the grounds of a convincing probability, as shall exclude all rational grounds of doubting it.' The language of rational or reasonable doubt was thus part of the language of the right and sure conscience in England before it entered the legal sphere.¹⁸⁸

This notion of conscience spread from moral theology to philosophy and science where it appeared most notably in the thinking of John Locke, who "links conscience with the understanding, not passions."¹⁸⁹ Locke's work had a central role in formulating the philosophical concept of fact,¹⁹⁰ and he drew on legal processes to advance his arguments.¹⁹¹ The crucial insight of this Enlightenment age, as embodied in the work of Locke and others, was that knowledge could be advanced not merely through deductive thought, but also by induction; that knowledge could be gained not merely through mathematical logic, but also by applying reason to experience.

The inductive approach, based ultimately on experience, had a special appeal in the age of Enlightenment. Basically, it implied an experiential test of knowledge or of system, the same kind of criterion of truth that in the sciences had become Newton's 'Proof

188. *Id.* at 16–17 (quoting HENRY R. MCADOO, *THE STRUCTURE OF CAROLINE MORAL THEOLOGY* 77 (1949) (quoting Robert South, *WORKS*, sermon 23 (Oxford, 1828)).

189. SHAPIRO, *supra* note 39, at 17.

190. *See id.* at 189 ("Locke's *Essay on Human Understanding* (1690) played a central role in generalizing the concept of fact and giving it philosophical form and status.").

191. *Id.* at 191 (For Locke, "[l]egal practice and concepts clearly had philosophical application.").

by Experiments' or a reliance on critical observations.¹⁹²

The intellectual flow between law and the other disciplines reversed.¹⁹³ "During the seventeenth century, legal concepts played an important role in shaping empirical philosophy. Now empirical philosophy as formulated by Locke and his successors came to influence legal writing, creating a symbiosis between epistemology and the law of evidence."¹⁹⁴ For example, the first legal treatise on evidence appeared in 1754. This work, written by Sir Geoffrey Gilbert, who also wrote an abstract of Locke's work, presented the law of evidence in a Lockean framework. "The rules of evidence did not change substantially with Gilbert. Instead of appearing as a series of ad hoc professional norms, however, they are now presented as built on a sound and systematic epistemological foundation," which drew on the formulations of Locke and others.¹⁹⁵

When English judges started to formulate rules or burdens for resolving disputed matters of fact, according to Shapiro they turned to the other intellectual fields that were already developing or accepting such standards. As a result, the law concluded that "[w]hen the . . . jurors reached a state of a 'satisfied conscience' or 'moral certainty,' conviction was appropriate."¹⁹⁶ These two terms were synony-

192. BERNARD COHEN, SCIENCE AND THE FOUNDING FATHERS: SCIENCE IN THE POLITICAL THOUGHT OF THOMAS JEFFERSON, BENJAMIN FRANKLIN, JOHN ADAMS & JAMES MADISON 58 (1995).

193. See SHAPIRO, *supra* note 39, at 214 ("If the direction of influence in the seventeenth century ran from law to natural history, it appears to have reversed in later centuries as writers on legal evidence began to draw on the authority of scientific fact finding."). Cf. FRANKLIN, *supra* note 178, at 365 ("By 1700 law had served its purpose for the mathematical theory of probability. The service was never returned. Legal probability has continued to exist, and it is accepted in legal theory that such notions as proof beyond reasonable doubt involve probability. But all attempts to quantify the concept have been resisted.").

194. SHAPIRO, *supra* note 39, at 193. See also *id.* at 192 ("Locke's *Conduct of the Understanding* perhaps provides the best summary of my argument for the appropriation of legal and historical fact determination by the virtuosi. . . .").

195. *Id.* at 193.

196. *Id.* at 23.

mous,¹⁹⁷ and judges also used related formulations that were meant to convey the same standard.¹⁹⁸ But, the satisfied conscience and moral certainty tests always conveyed a reasonable doubt standard.¹⁹⁹

Over time judges became increasingly likely to mention doubts on the part of the jury. From the mid-eighteenth century the now familiar ‘beyond reasonable doubt’ terminology of modern Anglo-American law was added to its cognates, ‘satisfied conscience’ and ‘moral certainty.’ The meaning of all these phrases was identical and they were used together.²⁰⁰

In contrast to the assertion that the reasonable doubt rule was a new standard that made convictions easier by replacing an any doubt rule that permitted acquittals based on irrational or frivolous beliefs or feelings, Shapiro maintains reasonable doubt was merely a new formulation for the well-settled test.

The term ‘moral certainty’ was taken to mean proof beyond a reasonable doubt. If one had real doubts, moral certainty was not reached. The term ‘beyond reasonable doubt’ was, I believe, not a replacement

197. *See id.* at 23 (“The ‘satisfied conscience’ standard was synonymous with the term ‘moral certainty.’”).

198. *See id.* (“Late-seventeenth-century judges often used expressions such as ‘if you are satisfied or not satisfied with the evidence’ or ‘if you believe on the evidence.’ . . . During the early eighteenth century there was increasing reference to the understanding of jurors. . . . Understanding and conscience were concerned with the same mental processes.”); *see also* SHAPIRO, *supra* note 176, at 20 (Early cases used a satisfied conscience formulation, but this satisfaction came “only when the reasoning faculties were exercised upon the evidence.” Over time, courts referred less to conscience and more to mind and belief. “A guilty verdict was appropriate if the jurors ‘believed,’ an acquittal if they were not ‘satisfied.’”).

199. *See* SHAPIRO, *supra* note 39, at 23 (When jurors “entertained reasonable doubts, they were to acquit.”).

200. *See id.*; *see also* SHAPIRO, *supra* note 176, at 20 (illustrating that the concept that jurors should convict only if “satisfied” or “fully satisfied” continued. “The requirement that the jury be ‘fully satisfied’ or ‘satisfied’ on the basis of the evidence continues as a common feature.”).

for the any doubt test but was added to clarify the notions of moral certainty and satisfied belief. . . . Reasonable doubt was simply a better explanation of the satisfied conscience standard that resulted from increasing familiarity with the moral certainty concept.²⁰¹

Franklin essentially agrees with Shapiro that the reasonable doubt concept had been the foundation of the law long before that term emerged. Franklin summarizes:

Eventually all probabilistic concepts in English law were reduced to one word, *reasonable*. The common understanding that the standard of proof in criminal trials should lie somewhere between suspicion and complete certainty came to be expressed solely in the formula ‘proof beyond a reasonable doubt.’ Gradually, any question on the evidential relation between facts became expressible in terms of what the reasonable man would think.²⁰²

The reasonable doubt formulation may have emerged around 1770, but the idea it expressed was the same as that contained in “moral certainty,”²⁰³ and that centuries-old moral-certainty term meant, as did the reasonable doubt standard which replaced it, to “a very high but not complete degree of persuasion.”²⁰⁴ The reasonable

201. SHAPIRO, *supra* note 176, at 21. *See also id.* at 41 (“The highest level of certainty in this empirical realm was called . . . ‘moral certainty,’ a certainty which there was no reason to doubt.”).

202. FRANKLIN, *supra* note 178, at 62–63.

203. *See id.* at 366 (“From around 1770, English law adopted the phrase ‘proof beyond a reasonable doubt’ (originally defined as equivalent to ‘moral certainty’) for the standard of proof required in a criminal case.”).

204. *Id.* at 69 (“Jean Gerson, chancellor of the University of Paris around 1400 . . . seems to have been the first to introduce the term, occasionally still heard in English, ‘moral certainty’ . . . to mean a very high but not complete degree of persuasion.”); *see also id.* at 371 (“Johnson’s *Dictionary* of 1755 defines *probability* as ‘Likelihood; appearance of truth; evidence arising from the preponderation of argument: it is less than a moral certainty’ . . .”).

doubt standard, then, did not make convictions easier by replacing the any doubt standard. Instead, reasonable doubt was just another formulation of a long-utilized standard that did not demand absolute certainty but did require a strong certitude based on reason.

VII. JURY REFORMS, NOT FROM THE ENLIGHTENMENT, BUT FROM POLITICAL DEVELOPMENTS

George Fisher's historical study of the jury's role in determining truth, however, casts a dubious eye on the assertion that epistemological advances in such fields as science, philosophy, and religion fueled jury developments. Instead, jury reforms were "the product of political conflict, not intellectual growth."²⁰⁵

As an example, Fisher cites the notorious treason trials in late seventeenth century England, where convictions were obtained through perjury. Parliament responded by providing treason defendants rights that the common law had not granted, including the authority to call sworn witnesses. Fisher concludes that the lawmakers did not primarily adopt the reforms because of any new intellectual outlook. He states:

It is true that an evolving epistemology of the sort that Barbara Shapiro describes, which could deal more comfortably with conflicting evidence in the courtroom, might have given the Parliamentarians courage in the change they undertook. . . . But for the religious strife and consequent spate of treason trials of the late Stuart reigns, and but for the sufferings that notorious perjurers . . . inflicted on eminent men of both political persuasions, Parliament would not have granted criminal defendants the right to call sworn witnesses at the end of the seventeenth century or, very likely, for decades to come.²⁰⁶

205. *See generally* Fisher, *supra* note 56, at 615.

206. *Id.* at 623–24.

Fisher does not suggest that every change in jury practice resulted from a particular political controversy,²⁰⁷ but the underlying force for reform was not advancing epistemologies. Instead, changes were made to keep the jury system appearing legitimate.²⁰⁸

Whitman's views to some extent coincide with the notion that a legitimacy concern brought changes to the jury. He sees the reasonable doubt standard emerging to counter the increasing illegitimacy that the system faced from wrongful acquittals. On the other hand, as we have seen, nothing indicates that the American jury system was under attack because the guilty were being acquitted.²⁰⁹ As the "constitutionalization" of jury trials indicates, juries in America were seen as essential. Furthermore, Fisher's history has the jury's legitimacy questioned because of wrongful convictions, not acquittals, with the response that more rights were granted to defendants, not more powers to the prosecution.

Fisher may be right about abrupt changes in the system, especially those coming through statutes. Such reforms may have had specific causes that produced political pressures, but the forces underlying evolutionary changes, such as the formulations of the burden of proof, are not as readily identifiable and are, no doubt, more subtle. Epistemological advances permeating society can be important forces for such transformations even if the intellectual developments have not left unambiguous blazes on the legal trail.

VIII. AMERICAN REASONABLE DOUBT AND ENLIGHTENMENT THINKING

Shapiro and Franklin's accounts largely focus on developments in England, but their views also lead to an explanation for reasonable doubt's first articulation across the Atlantic. Enlightenment thought

207. *See id.* at 703 ("It would be foolish to argue that each of these trends and events traces to a political or social controversy that operated outside the justice system.").

208. *See id.* at 704 ("I suggest that the most substantial force behind this enormous historical trend has been the system's concern with its own apparent legitimacy."); *see also id.* at 705 ("The jury . . . promised a remarkably reliable source of systemic legitimacy.").

209. *See supra text* at Part IV.A–G.

pervaded eighteenth century America. Bernard Cohen, in *Science and the Founding Fathers*, points out that

the American nation was conceived in a historical period that is generally known as the Enlightenment, or the great Age of Reason, and science was then generally esteemed as the highest expression of human rationality. . . . It is simply inconceivable that thinking men and women of the eighteenth century would be uninfluenced by the ideals, the concepts, the principles, and even the laws of the science that Newton created or by other achievements in the physical and life sciences and medicine.²¹⁰

Cohen contends that the inductive approach to knowledge of science was especially attractive to Americans.

The constant regard for the lessons of experience had to be significant to citizens of the New World in a way that was not the case for Europeans, simply because in the New World there was a consciousness of a frontier, even for those who lived in urban centers or on farms and plantations far removed from the boundaries of the wilderness and the domains of the Indians. Woe to anyone who was so wedded to theory or abstractions as to neglect the hard facts of brute experience.²¹¹

Certainly many eighteenth century Americans had knowledge of the twin beacons of the Enlightenment, John Locke and Isaac Newton.²¹² This came through formal education,²¹³ but the knowledge

210. COHEN, *supra* note 192, at 20.

211. *Id.* at 57–58.

212. *See id.* at 59 (“Two great intellectual heroes of that age were the philosopher John Locke and the scientist Isaac Newton, sometimes called the ‘twin luminaries’ of the Augustan Age.”).

213. *See id.* at 99 (“All students of science in the days of Jefferson’s youth would have studied Newton’s *Opticks* [T]he *Opticks* was literally a handbook of the

spread further because this was an American age that saw scientific findings being regularly reported in newspapers and presented in popular demonstrations and lectures.²¹⁴

Perhaps the strongest indication that Enlightenment precepts had permeated the society is that eighteenth century Americans could make references to the thinking of Newton and Locke without explanation. It was simply assumed that the audience would understand. For example, James Wilson, in his legal lectures, argued that society should be able to change its constitution. He addressed the contention that an alterable constitution could lead to political instability by stating:

The very reverse will be its effect. Let the uninterrupted power to change be admitted and fully understood, and the exercise of it will not lightly or wantonly assumed. There is a *vis inertiae* in publick bodies as well as in matter; and, if left to their natural propensities, they will not be moved without a proportioned propelling cause.²¹⁵

Wilson was referring, without further explanation, to the Newtonian principle that a body at rest remains that way without an external force.²¹⁶ Cohen says about this passage:

It is, I believe, significant that Wilson did not find a need for an explicit reference to Newton or for a mention of the *Principia* by name. He apparently assumed that his audience would be sufficiently

method of experiment, showing not only how to devise and perform experiments, but also how to draw conclusions from them.”).

214. *Id.* at 181 (“This was an age of great general interest in science, a subject reported regularly in the newspapers and brought to the attention of the curious through popular lectures and demonstrations.”).

215. WILSON, *supra* note 83, at 305.

216. See COHEN, *supra* note 192, at 36 (Wilson was “using Definition Three of Newton’s *Principia*, in which Newton introduced the concept of ‘vis Intertiae,’ or ‘force of inertia,’ an ‘inherent’ force that exists in every variety of matter that causes a body to resist any change in its state of rest or motion.”).

schooled in the Newtonian natural philosophy to recognize the source of his analogy.²¹⁷

The work of Jonathan Edwards further indicates the reach of Enlightenment principles in eighteenth century America. Edwards, who read widely in the philosophers and scientists of the age, “sought to reconcile piety with the new scientific and philosophical age demarcated by Newton and Locke.”²¹⁸ His sermons, which no doubt reached many societal strata, contained reference to Newton and Locke by name with little or no exegesis of what they said.²¹⁹ Edwards simply assumed that the congregants would understand.

Americans “believed science to be a supreme expression of human reason.”²²⁰ The sound methods of science could not only help explain the present world and make accurate predictions,²²¹ they, as trials seek to do, “could also retrodict past events”²²² In this culture, it would have been remarkable if the standards used to gauge scientific testimony and witnesses did not affect the standards used to assess trial proceedings.²²³

The effect of Enlightenment insights on American legal thinking are revealed when James Wilson’s legal lectures turned to the topic of obtaining knowledge from human affairs. Wilson started with the distinction that “evidence, which arises from reasoning, is divided into two species—demonstrative and moral.”²²⁴ Demonstrative evidence concerns abstract truths that are unchangeable. In this realm,

217. *Id.* at 38. Similarly, Thomas Jefferson’s *Notes on Virginia* incorporates rules obtained from Newton without finding “a need to mention either the name of Newton or the title of his book. [Jefferson] assumed that Newton’s rules were so well known to his readers that to mention either Newton’s name or the title of his treatise would be supererogatory, a breach of good taste in rhetoric.” *Id.* at 76–77.

218. John E. Smith et al., *Introduction to JONATHAN EDWARDS READER*, *supra* note 58, at viii.

219. *See* JONATHAN EDWARDS READER, *supra* note 58, at 15, 194, 205, and 206.

220. COHEN, *supra* note 192, at 279.

221. *See id.* (“Science . . . represented knowledge that was certain. . . . Scientific knowledge was based on sound method . . .”).

222. *Id.*

223. *See id.* at 60 (“In an age in which reason was venerated, science was esteemed as the intellectual manifestation of human reason in action.”).

224. WILSON, *supra* note 86, at 395.

there are no degrees, and demonstrations may vary in their ease of comprehension, but they cannot be opposed to each other. "If one demonstration can be refuted, it must be by another demonstration: but to suppose that two contrary demonstrations can exist, is to suppose that the same proposition is both true and false: which is manifestly absurd."²²⁵

Other truths, however, are not demonstrative, but moral. In this realm, conflicting proof can, and usually does, exist. "On both sides, contrary presumptions, contrary testimonies, contrary experiences must be balanced. . . . Moral evidence is generally complicated: it depends not upon any one argument, but upon many independent proofs, which, however, combine their strength, and draw on the same conclusion."²²⁶ A factual matter is not an area of absolute truth, but of probabilities that can lead to moral certainty. "In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty."²²⁷ Wilson clearly did not see moral certainty as a merely legal construct; it applied to all of human knowledge, and when it reached the highest level, it produced a certainty equivalent to that of demonstrative proof.²²⁸ What is important here is that Wilson's ap-

225. *Id.* at 396.

226. *Id.*

227. *Id.* Wilson also stated that when a consequence follows an object, the mind begins to anticipate that result when the object occurs. He continued:

If the consequences have followed the object constantly, and the observations of this constant connexion have been sufficiently numerous; the evidence, produced by this experience, amounts to a moral certainty. If the connexion has been frequent, but not entirely uniform; the evidence amounts only to a probability; and is more or less probable, in proportion as the connexions have been more or less frequent.

Id. at 389.

228. Wilson said that concurrent testimonies could lead to a probability so strong that it was like demonstrative proof.

When, concerning a great number and variety of circumstances, there is an agreement in the testimony of many witnesses, without the possibility previous collusion between them, the evidence may, in its effect, be equal to that of strict demonstration. That such concurrence could be the result of chance, is as one to infinite; or, to vary the expression, is a moral impossibility.

Id. at 386.

proach to matters of fact came not in response to some political event or from a concern that jurors too often acquitted. Instead, his thinking clearly followed the path lit by the Enlightenment. The same standards that applied to science applied to all matters of fact including those disputed at a trial. Wilson's views indicate that American legal thinking in the period when the reasonable doubt standard emerged was greatly influenced by Enlightenment thought about inductive reasoning and how and when to reach the necessary certainty to make decisions.

That reasonable doubt was not something devised to salve the consciences of conviction-reluctant jurors but a general epistemological standard is also indicated by its second known American articulation. In the 1790 case of *Cowperthwaite v. Jones*²²⁹ the Philadelphia branch of the Court of Common Pleas of Pennsylvania considered a motion for a new trial in a civil case.²³⁰ The presiding judge noted that the right of trial by jury required strong reasons to grant new trials so that judges did not replace jurors as the triers of facts.²³¹ The judge continued:

A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But, whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages [a court should grant a new trial].²³²

The court's use of reasonable doubt, here, was not in a jury instruction, but was addressed to the judges themselves, and this early use could not have had the purpose of making convictions easier for jurors fearing for their souls. Instead, the court's articulation was con-

229. 2 Dall. 55 (Pa. 1790).

230. *See generally id.*

231. *Id.* at 55

232. *Id.* at 56.

sistent with the Enlightenment notion that the standard had a wide application for determining when a matter had been well enough established for a particular action to be taken.²³³

IX. REASONABLE DOUBT AS A NEW STANDARD

The view that reasonable doubt emerged to make convictions easier sees the standard as a conceptually new one. The Boston Massacre trials, however, suggest otherwise and that differing formulations of jury certainty were seen as equivalent.

Justice Trowbridge mingled an in-doubt and an if-you-are-satisfied standard.²³⁴ At one point, he stated, “if upon a full consideration of the evidence in the case, you should be in doubt, as to any one of the prisoners having *in fact* killed either of the persons that were slain,” you must consider whether a defendant aided and abetted another’s killing.²³⁵ He stated one soldier’s killing was justifi-

233. The third known use of the reasonable doubt by an American court was in a jury instruction. The court in the 1793 New Jersey burglary case of *State v. Wilson*, 1 N.J.L. 439 (1793), charged the jury, “It is, however, a good rule, and it is also a humane rule, to which every virtuous man will assent, that where reasonable doubts exist, the jury, particular in capital cases, should incline to acquit rather than condemn.” *Id.* at 442. The standard was a compassionate one to benefit the accused, according to the court, not one to bring convictions in a manner to ease jurors’ anxieties. *Cf. id.* The instructing judge went on to say, “If you entertain any doubts, I do not mean doubts wantonly raised, but such as arise from a deliberate consideration of the testimony, these doubts should be determined in favor of life—the prisoner should be acquitted.” *Id.* at 444. Here, there is the any doubt standard, but one immediately qualified so that all doubts did not apply. *See id.* The court does not indicate that this formulation is different from a reasonable doubt, but instead seems to say that a doubt has to come out of the reasoning process, that is, that it cannot be wanton and must come from “a deliberate consideration.” *Id.* The court gave no hint that this was a new standard, but suggested ancient roots since, according to the court, all virtuous men agree with it, indicating that it had existed as long as virtuous men had existed. *See generally id.*

234. John Adams equated a satisfied mind with not having a doubt. He told the jury about a witness whose testimony was not corroborated, “If you can be satisfied in your own minds, without a doubt, that [the witness] knew *McCauley* so well as to be sure, you will believe he was there.” *See* John Adams, Adams’ Argument for the Defense, in ADAMS PAPERS, *supra* note 26, at 261.

235. Edmund Trowbridge, Trowbridge’s and Oliver’s Charges to the Jury, in ADAMS PAPERS, *supra* note 26, at 292. *See also id.* at 290–91 (Trowbridge stated

ble self-defense if the soldier's life had been in danger and continued, "[if] you do not believe that was the case, but upon the evidence are satisfied" that the defendant was attacked without his life being in danger, then the defendant should be convicted of manslaughter.²³⁶ A few moments later, Trowbridge told the jury, "[i]f you are satisfied upon the evidence, that *Killroy* killed *Gray*, you will then enquire, whether it was justifiable, excusable, or felonious homicide"²³⁷ Thus, the jury was told that if "in doubt" that a defendant killed, consider aiding and abetting. The jury was also told that if "satisfied" that a soldier did kill, then to decide whether the killing was justifiable or, if not, the degree of homicide. Apparently, not being in doubt was the same as being satisfied about the evidence.

These portions of the instruction did not explicitly clarify whether jurors were to use reason or be rational in assessing whether they were satisfied or in doubt, but elsewhere Trowbridge did instruct the jury to use reason. He told jurors to reconcile testimony "if by any reasonable construction of the words it may be done."²³⁸ He also told jurors that instead of concluding that contradictory evidence meant a witness had lied,

if the thing said to be done be such as it may reasonably be supposed some might see and others not, by reason of their want of observation, or particular attention to other matters there, as both may be true, you ought to suppose them to be so²³⁹

Thus, according to Trowbridge, jurors were supposed to use reason to see if they were satisfied by the evidence and assess whether they were in doubt about the facts. Trowbridge did not say that all of these tasks were the same, but he certainly did not point to any distinctions among them.²⁴⁰

that the jury could give a general verdict, "but in cases of doubt, and real difficulty, the Jury ought to state the facts and circumstances in a special verdict, that the Court upon farther consideration thereof, may determine what the law is thereon.").

236. *Id.* at 299.

237. *Id.* at 300.

238. *Id.* at 294.

239. *Id.* at 294–95.

240. *See id.* at 282–309.

Trowbridge was certainly not breaking new ground by suggesting that jurors had to use reason to assess if they were satisfied that the evidence established guilt. Jurors were also told that more than a generation earlier in the notorious New York slave conspiracy trials of 1741.²⁴¹ There jurors were instructed that “if you should have sufficient reason in your own consciences to discredit [the prosecution witnesses], and that notwithstanding the weight of that evidence, you can think them, or any of them, not guilty, you will then say so and acquit them. . . .”²⁴² The court then addressed the jury’s role in assessing a particularly important prosecution witness and stated that “if you give credit to her testimony, you will no doubt discharge a good conscience, and find them guilty; if you should have sufficient reason in your own minds to discredit her testimony, if you can think so, you must them acquit them”²⁴³ The notion that American jurors were to use reason in assessing evidence existed well before the 1770 proceedings.

Justice Oliver, in the Massacre trials, of course, did explicitly talk about reasonable doubt, but he did not state or suggest that he was giving any standard different from Trowbridge’s instructions. Instead, as we have seen, Oliver several times indicated that he agreed with what Trowbridge had instructed. If his use of reasonable doubt had been intended to mean something different from what Trowbridge meant by a satisfied mind, being in doubt, and the use of reason, we might expect that Oliver would have said something explicit about the distinction.

Finally, if Oliver was not just giving another formulation for an existing legal concept, but breaking with established principles and stating a new one that sought to aid convictions, we might expect to find contemporaries commenting on it at its emergence.²⁴⁴ Nothing in the Boston Massacre trials itself indicates that a new standard was being articulated, and, at least so far, no one has pointed out any account of those proceedings from that time that suggests an unprece-

241 THE NEW YORK CONSPIRACY TRIALS OF 1741: DANIEL HORMANDEN’S *JOURNAL OF THE PROCEEDINGS* 116–17 (Serena R. Zabin ed., 2004).

242 *Id.*

243. *Id.*

244. Cf. SHAPIRO, *supra* note 176, at 22 (“Interestingly, the Boston cases do not suggest that the standard was considered innovative . . .”).

dented test was being argued and instructed. Since these were not obscure, but closely watched trials, surely the absence of such comment is noteworthy.

X. LESSONS FOR FINDING THE ORIGINAL MEANING OF AMERICAN CRIMINAL PROCEDURE RIGHTS

A. *The Impossibility of Finding Definitive Original Meaning for an Evolved Right*

This exploration into the origins of the reasonable doubt standard was not undertaken to ascertain its original meaning, but for insights into searching for the original meaning of other constitutional criminal procedure rights. Perhaps, the most important lesson is that when a right was not legislated, but evolved, finding its definitive original meaning is impossible. The evolutionary steps of reasonable doubt were not accompanied by explanations that might occur today when a statute is proposed and enacted. We do not have cases from the standard's first appearances delineating why it was being used. Contemporaries did not write articles or books about its development, and if they argued about it in court, we do not have those arguments.

It is not just the lack of contemporary commentary, however, that is important. Because the standard evolved, it had neither an individual nor collective drafter. Neither a person nor a specific body decided that the rule should exist. We can look to no historical individual or group who could have authoritatively stated the rule's original purpose, meaning, or intent.²⁴⁵ Professor Whitman captures an important point when he says about reasonable doubt that, consequently, “[t]here is no original intent to interpret. All that we can do

245. See WHITMAN, *supra* note 27, at 210–11 (“[T]he phrase has no original drafter 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 moralists and lawyers as well.”).

is try to understand the rule in its original context, which is something quite different.”²⁴⁶

Comprehending this context is difficult. To do that, we have to shed our present day biases, but Professor Whitman maintains that we are unlikely to be able to do that because we have lost touch with the world that produced the reasonable doubt standard.²⁴⁷ This thought should produce humility for those seeking original meaning of criminal procedure rights. When those who have devoted their impressive scholarly powers to capturing the lost world that produced the standard do not agree on the original purposes for that rule, surely only the hubristic among the rest of us can be positive about what that meaning was.

If that is true for reasonable doubt, which has produced so much outstanding scholarship, it is likely true for other criminal procedure rights. The Framers did not create the criminal procedure rights, but were instead protecting already existing rights. If the Framers indicated what they thought a particular right meant, then we might be able to seek the original meaning of the constitutional guarantee in the constitutional debates. But, since they did not, we have to turn to the content of the right, as it existed in the framing era. And since these were evolved rights, the difficulties apparent in finding the original meaning and purposes for the reasonable doubt standard appear for the specifically enumerated constitutional guarantees. Such rights had neither an individual nor collective author and did not have an original intent to interpret. At most, we can seek to understand their evolution in their historical context with all the difficulties that entails.

B. *Searching Beyond Legal Texts*

The reasonable doubt scholarship indicates that we can only grasp reasonable doubt’s development by seeing the standard’s emergence in the broader context of a general eighteenth century epistemological search for how to determine facts from human re-

246. *Id.* at 211.

247. *See id.* at 209 (“We have lost touch with that old moral world. . . . The older morality required judges to doubt their authority to punish, demanding that they regard the guilty as human beings like themselves.”).

ports and observations. The scholars do not agree on how the other disciplines affected the law, but they agree that we cannot truly understand the development of reasonable doubt merely by looking at judicial opinions and other legal writing. The inquiry must be expanded. If that is true for reasonable doubt, it is also true for other criminal procedure rights concerned about the finding of facts from human actions and reports. The search for a true understanding of the original meaning of such rights has to go beyond judicial opinions, constitutional debates, and legal treatises into the epistemological developments of the age.

An example is the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." ²⁴⁸ Even though the Framers of the Constitution hardly discussed this provision, ²⁴⁹ *Crawford v. Washington* ²⁵⁰ asserted that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." ²⁵¹ As a result the Court searched for the Confrontation Clause's content by examining the law as it existed at the time of the framing of the Bill of Rights, and the opinion lengthily discusses English cases, and a few American cases, from that era and before as well as various dictionary definitions. ²⁵²

Confrontation is concerned with the determination of facts at trial. The reasonable doubt scholarship indicates that the legal system was not standing alone in seeking how to make factual determinations, but that the law was part of a broader epistemological movement including philosophy, science, and religion that all influenced

248. U.S. CONST. amend. VI.

249. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995) ("The origins of the Confrontation Clause are murky. Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the Clause.").

250. 541 U.S. 36 (2004).

251. *Id.* at 54; see also *id.* at 43 ("The founding generation's immediate source of the [confrontation] concept . . . was the common law.").

252. See generally Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, Noah Webster, and Compulsory Process, 79 TEMP. L. REV. 155 (2006), for *Crawford's* use of dictionary definitions.

each other. Other disciplines besides law were concerned with “hearsay” and “testimony” and who were proper witnesses and what evidence was reliable enough to form the basis for decisions.²⁵³ The scholarship about reasonable doubt’s development teaches that this general Enlightenment thinking needs to be studied for any true search into the original meaning and purposes of the Confrontation Clause and other criminal procedure rights concerned with finding facts.

C. American Original Meaning and English Sources

The reasonable doubt scholarship also illustrates that we should not draw definitive conclusions about the original meaning of American criminal procedure rights from English sources.²⁵⁴ As we have seen, the available information indicates that the reasonable doubt standard emerged in America before England and that America did not simply adopt or inherit a standard that was first developed in England.

Reasonable doubt is just another possibility illustrating that at least some American rights developed earlier and perhaps in different forms from similar English procedures. The prime example is the right to counsel, which was not granted in England in the eighteenth century, but was in America,²⁵⁵ to the applause of American legal thinkers.²⁵⁶

253. Barbara Shapiro’s study of the development of “facts” in diverse disciplines including history, science, and religion in early England finds that “suspicion of secondhand or hearsay reports were characteristic of all the discourses of fact.” SHAPIRO, *supra* note 39, at 161. See also *id.* at 211 (“All the fact-oriented disciplines exhibited a preference for personal observation and a belief that the testimony of credible witnesses under optimum conditions could yield believable, even morally certain ‘facts.’ It favored first-person accounts that made vivid the ‘facts’ described.”).

254. Cf. Mark deWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583 (1939) (“[T]he historian cannot assume an explanation of American doctrine to be accurate simply because it is a precise and true statement of English theory.”).

255. See Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 327 (2009) (“England did not permit full representation by defense attorneys until the middle decades of the nineteenth century. In contrast, early America not only did not restrict the role of

The differences in American rights and procedures went beyond the right to counsel and knowledge of the American distinctiveness was not confined to the legal elite. For example, the New York City newspaper *The Royal Gazette*²⁵⁷ published an article on October 22, 1783, which was datelined London, August 5, and indicated it was reprinting an article from the *Old Bailey Intelligencer*. The recycled English article praised a procedure in the new country.²⁵⁸

The Americans, in adjusting their code of criminal law, have adopted one general rule of proceeding, which does honour to their humanity as well as their justice, which is, establishing by law the rule that no man shall be tried for a crime, unless he has notice served on him seven days previous to his trial of the nature of the indictment, together with the names and places of abode of the several witness produced to prove the fact.²⁵⁹

defense attorneys, it guaranteed the right of counsel. It did this not only in the Sixth Amendment to the federal constitution, but also earlier in the state constitutions after Independence -and even before the Revolution, in a number of the colonies.”).

256. For example, Zephaniah Swift in his 1796 treatise about Connecticut law stated that the English law had been rejected in Connecticut.

We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed, when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of the crime with the advice, and assistance necessary to make his defence.

ZEPHANIAH SWIFT, *A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* 398–99 (1796). See also WILSON, *supra* note 86, at 702 (noting that both the United States and Pennsylvania granted a full right of counsel while England did not and stating, “This practice in England is admitted to be a hard one, and not to be very consonant to the rest of the humane treatment of prisoners by the English law.”).

257. This newspaper was published by James Rivington and was preceded by Rivington’s *New-York Gazette* and Rivington’s *New-York Loyal Gazette*. See *THE ENCYCLOPEDIA OF NEW YORK CITY* 811 (Jackson, Kenneth T. ed. 1995).

258. *The Royal Gazette*, Oct. 22, 1783.

259. *Id.*

Obviously this framing-era writer believed that American procedures and rights were not simply the same as those in England and that Americans at least sometimes had greater, desirable protections. Americans reading this article no doubt saw the same. When a few years later Americans were adopting constitutional rights, surely they were not just incorporating narrower, less protective English rights than Americans already had.

The original meaning of American rights cannot be assumed to be found solely in English sources when American rights developed in advance or independently from those in England, but this conclusion only highlights the difficulty in finding the original American rights. Our knowledge of what happened in eighteenth century American courts is so scant that it is often impossible to truly find that original American meaning.

The reasonable doubt scholarship provides an important cautionary lesson. Reasonable doubt is one of the rare times when we have a relevant and detailed early American source. The Boston Massacre trials, and their context, teach that conclusions about the standard's development that might appear valid when only English sources are examined seem dubious when viewed in the American light. Most often, however, we do not have good sources about early American criminal procedure. That should not mean that by default that we rely on English sources to find the original American meaning and purposes of American rights. Instead, the lack of information should make us humble. Without that information, we cannot definitively state the original American meaning of criminal procedure rights.