

A WORLD OF DOUBT: CRIMINAL STANDARDS OF PROOF IN THE COMMON LAW, ISLAMIC, AND EAST ASIAN LEGAL TRADITIONS

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Abstract

“Beyond a reasonable doubt” is synonymous with the Anglo-American criminal justice system. But what does the phrase actually mean? How and why did we adopt it? And does the standard serve a truth-seeking, or some ulterior, purpose? A comparison with other legal traditions can help answer these questions.

This Article considers the development of doubt-based standards of proof in criminal proceedings across the globe, and in particular, three of the largest legal traditions: the common law, Islamic law, and East Asian law. To ground the comparative exercise in real terms, this Article looks at the development of so-called “doubt standards” in the United Kingdom, Saudi Arabia, and Japan, three countries that have adopted their own versions of doubt standards for distinct and overlapping reasons, and with varying results.

Through this comparative experiment, several lessons become apparent: doubt-based standards have often arisen from moral trepidation in convicting the innocent born of religious teachings on unjust bloodshed; doubt standards are also a tool of the political elite to either enforce or resist the state’s monopolization on power; and doubt standards have been expressed in more probabilistic terms in those traditions that include laypersons in the adjudication of guilt. Together, these lessons help illuminate why doubt-based standards of proof have grown organically in separate parts of the globe, while also providing an opportunity for introspection regarding the practical impact of “beyond a reasonable doubt” in the criminal justice system. Ultimately, this Article leaves the reader to consider whether the standards of proof used in criminal trials are worthy of their sacrosanct status.

INTRODUCTION.....	20
I. THE COMMON LAW: BEYOND A REASONABLE DOUBT.....	
A. THE JURY’S CONSCIENCE AND THE REASONABLE DOUBT STANDARD.....	
B. ADVERSARIAL ROOTS OF THE REASONABLE DOUBT STANDARD.....	

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C. EPISTEMOLOGICAL ROOTS OF THE REASONABLE DOUBT STANDARD.....	
II. ISLAMIC LAW: THE DOUBT CANON.....	
A. THE POLITICAL CRUCIBLE.....	
B. SOCIAL USES OF DOUBT.....	
C. THE MORAL CORE.....	
III. EAST ASIAN LAW: JAPAN’S MIDDLE-GROUND ADOPTION OF WESTERN STANDARDS.....	
A. HISTORICAL REASONS FOR THE MIXED APPROACH.....	
B. THE STRUCTURE OF A JAPANESE CRIMINAL TRIAL: A LITTLE BIT OF THIS AND A LITTLE BIT OF THAT.....	
IV. COMPARATIVE LESSONS: A WORLD OF DOUBT.....	
A. THE MORALITY OF DOUBT.....	
B. DOUBT AS A TOOL OF POLITICAL COERCION AND RESISTANCE.....	
C. TRIAL STRUCTURES AND THE TREATMENT OF DOUBT.....	
CONCLUSION.....	

INTRODUCTION

“Beyond a reasonable doubt” is an axiom that has become synonymous with criminal justice in the Anglo-American West. It represents the standard of proof a prosecutor must meet to convict someone of a crime in common law courts. Specifically, a prosecutor must prove the defendant’s guilt beyond a reasonable doubt. Although this standard has become a well-known part of the common law system of proof, its origins, meaning, and purpose are not entirely clear to either lay juror or lawyer.¹ The burden is simply accepted, with little question.

The common law is not alone in its pronouncement of a doubt-based standard of proof (“doubt standard”), either. Under Islamic law, jurists developed, over time, a doubt canon that allowed qadis (judges) to avoid imposing harsh punishments in cases where evidence is lacking and the risk of their own eternal damnation is threatened.² Farther east, Japan adopted and refined a standard of proof somewhere between the civil and common law systems that influenced its modernization, eventually pronouncing a standard whereby judges decide on their own conscience if the evidence proves sufficient but must nonetheless always reach a decision “a reasonable person ... [cannot] doubt.”³

This Article seeks to compare the origins, purpose, and contemporary use

¹ See H. L. HO, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH 180 (2008) (“It is a common observation that ‘beyond a reasonable doubt’ is virtually impossible to define”).

² See *infra* Part II.

³ Saikō Saibansho [Sup. Ct.] Oct. 24, 1975, Sho. 48(o) no. 517, 29 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1417, 1420; see also *infra* Part III.

of doubt standards in three legal traditions. The common law and Islamic traditions have been chosen because each has significant religious influences, allowing the study of religion's influence in the development of doubt standards.⁴ The East Asian legal traditions, on the other hand, offer a contrasting perspective, as their growth has not been centered around theology.⁵ As such, observing East Asian traditions serves as a control in this comparative experiment, offering a frame of reference for the secular variables that have influenced the adoption of doubt standards.

To ground this comparative exercise in real terms, a country has been chosen for each tradition. First, the United Kingdom (primarily England) will represent the common law for obvious reasons: it is the home of the tradition and where the reasonable doubt standard first emerged, making it the ideal setting for understanding the standard's causes and purposes.⁶ For Islamic law, Saudi Arabia has been chosen because "the state does not interfere with the substantive laws of the Shari'a" and "regards uncodified Shari'a as the law of the land, [with] enacted law ... subordinate to it."⁷ This has left Islamic law in Saudi Arabia largely untouched—ideal for understanding the use of the Islamic doubt canon today. Finally, Japan will represent the East Asian legal traditions mostly because China—the obvious alternative—has been heavily influenced by Soviet legal ideals, particularly in evidence law.⁸ Thus, Japan represents a more authentic progression of East Asian law, though it, too, has been influenced by other systems.

This Article will proceed in four parts. Part I will discuss the emergence of "beyond a reasonable doubt" as the standard of proof in common law criminal trials, analyzing the religious, structural, and epistemological causes of its emergence. Part II will analyze the earlier development of the doubt canon in Islamic law, considering its predominantly political and moral

⁴ See *infra* Parts I.A., II.C.

⁵ See *infra* Part III.A.

⁶ See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 197-200 (2008).

⁷ RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 148 (2005); see also Abdulaziz K. Al-Hamoudi, *Criminal Defense in Saudi Arabia: An Empirical Study of the Practice of Criminal Defense in Saudi Arabia* 31 (2014) (unpublished Ph.D. dissertation, University of Washington), <https://digital.lib.washington.edu/researchworks/handle/1773/27511> (noting that "Islamic law in Saudi Arabia today 'remains largely unchanged since the time of the Prophet'" (quoting ANTHONY HAM, *SAUDI ARABIA* 169 (2004))).

⁸ See Douglas Walton & Nanning Zhang, *Recent Trends in Evidence Law in China and the New Evidence Scholarship*, 9 *LAW, PROBABILITY & RISK* 103, 104 (2010) ("The establishment of the People's Republic of China in 1949 brought with it a more Soviet-influenced system of socialist law ... many legal theories of the Soviet Union became influential in China, and research on evidence law was not an exception.").

causes. Part III will then consider why and how Japan adopted an approach to doubt that lies somewhere between the civil and common law systems. Finally, Part IV will discuss what a comparison of these three systems teaches us about the evolution and use of doubt in legal decision-making.

I

THE COMMON LAW: BEYOND A REASONABLE DOUBT

English judges first enumerated the standard of beyond a reasonable doubt in the 1780s at the Old Bailey court in London.⁹ The exact case where a judge first espoused the “beyond a reasonable doubt” standard is unclear, but what is clear is that judges used the standard to instruct jurors on how to reach a lawful verdict.¹⁰ In the modern-day United Kingdom, the Crown must still prove all criminal cases beyond a reasonable doubt or, as it is commonly phrased, “beyond all reasonable doubt.”¹¹ This standard does not require the prosecution to prove the defendant’s guilt with absolute certainty, but the jurors must be “satisfied [by the evidence] so they are sure” of culpability.¹² Although “sure” and “certain” are indistinguishable in common parlance, drawing any particular distinction between them is left to the jury.¹³ However, should the jury be confused by the meaning of “reasonable doubt,” the judge instructs them that “reasonable doubt is the sort of doubt that might

⁹ See, e.g., *R v. John Clarke* (1783), *microformed on The Old Bailey Proceedings* 10 Dec. 1783 at 20 (Harv. Univ. Lib.), <https://www.oldbaileyonline.org/browse.jsp?div=t17831210-4> (“If ... you think there is any room to doubt the truth of the evidence ... it is your duty to acquit the prisoner wholly.... If ... you think there is any reasonable cause for doubt ... you will acquit him.”); see also JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 264 (2003) (citing several cases from the 1780s in which the reasonable doubt standard was first mentioned).

¹⁰ See WHITMAN, *supra* note 6, at 197-200 (quoting cases from the early 1780s in which judges instructed jurors using “reasonable doubt” language).

¹¹ See, e.g., *R v. P* (JM) (2008) 2 Cr. App. R. 68 [73] (appeal taken from Eng.) (“[T]he basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand.”) (quoting *McGreevy v. DPP* (1973) 47 Cr. App. R. 44 [436] (Lord Morris of Borth-y-Gest)); *R v. Dunbar* (1957) 41 Cr. App. R. 182 [187] (appeal taken from Eng.) (holding that the defense’s burden to prove diminished intent is less than the prosecution’s burden to prove its case “beyond all reasonable doubt”); see also JOHN F. ARCHBOLD, *ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE* § 4-444 (2018) (“The judge must always direct the jury upon the burden and standard of proof. No formula has to be followed slavishly, but two points must be made clearly: (a) the burden of proof is upon the prosecution ... (b) before the jury can convict they must be satisfied beyond a reasonable doubt (or be sure) of the defendant’s guilt.”).

¹² ARCHBOLD, *supra* note 11, at § 4-447 (quoting *R v. Kritz* (1949) 33 Cr. App. R. 169 [177] (Lord Goddard C.J.)).

¹³ See *id.*

affect the mind of a person in dealing with matters of importance in his own affairs.”¹⁴

The exact roots of the reasonable doubt standard are ambiguous, but three explanations for its emergence are most promising. First, concerns with morality caused medieval and Enlightenment jurors to fear for their own salvation if they wrongly convicted an innocent person, creating the need for a probabilistic standard that allowed room for doubt.¹⁵ Second, the adversarial nature of the common law criminal trial required a definitive standard to referee competing evidence.¹⁶ And third, the emergence of the reasonable doubt standard coincided with Enlightenment-era views on degrees of certainty in fact-finding, explaining the exact phrasing of the standard and its relation to other standards of proof in the common law.¹⁷

A. *The Jury’s Conscience and the Reasonable Doubt Standard*

Pivotal to the enumeration of the reasonable doubt standard was the emergence of the jury trial in the Middle Ages. In 1215, the Catholic Church prohibited clergymen from blessing trials by ordeal, citing concern that such trials involved clergymen in bloodshed, which “polluted” them under Christian theology.¹⁸ The trial by ordeal had previously been used in cases where “the community was fairly sure of someone’s guilt, but no one was willing to accuse, and no one was willing to give sworn testimony to what he knew.”¹⁹ In this way, the ordeal served as a moral comfort procedure, allowing human adjudicators to avoid moral blame for the death of someone whose guilt was already largely certain by shifting the ultimate judgment of guilt and punishment to an outside authority (i.e., God).²⁰ After the Church’s prohibition on clerical oversight of trials by ordeal, which deprived such trials of their God-sanctioned purpose, governments across Europe faced the dilemma of how to judge the guilt of the accused, leading King Henry III (of

¹⁴ *Id.* Whatever its meaning, it is universally accepted that “beyond a reasonable doubt” falls somewhere short of absolute certainty. See KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD 226 (2013).

¹⁵ See *infra* Part I.A. See generally WHITMAN, *supra* note 6.

¹⁶ See *infra* Part I.B. See generally LANGBEIN, *supra* note 9, at 263-66.

¹⁷ See *infra* Part I.C. See generally Barbara J. Shapiro, ‘Beyond a Reasonable Doubt’: The Neglected Eighteenth-Century Context, 8 LAW & HUMAN. 19 (2014).

¹⁸ WHITMAN, *supra* note 6, at 83, 87. For more reasons why the Church prohibited ordeals, see HARRY POTTER, LAW, LIBERTY, AND THE CONSTITUTION: A BRIEF HISTORY OF THE COMMON LAW 77-78 (2015).

¹⁹ WHITMAN, *supra* note 6, at 73-74. Trial by ordeal involved putting the accused through some painful or life-threatening experience from which the community believed only God could save them. See *id.*

²⁰ See *id.* at 74.

England) in 1219 to order his justices to find a new way to try cases.²¹ The jury trial was the obvious replacement because the English had been using panels of compelled witnesses in the king's courts since the twelfth century.²² These "protojuries" had been used to both issue accusations and provide testimony against purported criminals.²³ Thus, while the Continent turned to inquisitorial methods of full legal proof, including coerced confessions, the English turned to what they already knew—the jury.²⁴

The jury trial also signified a strengthening British monarchy. Unlike their continental counterparts, England's monarchs had been able to monopolize power fairly early, and juries came to signify that power.²⁵ After all, juries comprised common subjects compelled to appear by the king's authority alone.²⁶ Therefore, using juries to implement the king's justice signified great strength. But the expansion of the king's authority competed with the authority of his vassals and of the Church.²⁷ As such, England's monarchs had immense political incentives to make the jury system effective as a symbol of their preeminence.²⁸ Jurors, however, aware of Christian teachings on unjust killings, resisted guilty verdicts because such convictions—even for minor crimes—could send an innocent Christian to his or her death, threatening jurors' salvation.²⁹

Initially, jurors could overcome their moral anxiety by entering specific verdicts as to only conclusions of fact, giving the judge ultimate

²¹ *Id.* at 126-27.

²² *Id.* at 128; see also POTTER, *supra* note 18, at 79 (calling the transition from ordeal to jury trial "seamless," with the first criminal jury trial occurring just a year after the last trial by ordeal).

²³ WHITMAN, *supra* note 6, at 128, 135-36. In 1220, these protojuries, or "presenting juries," were given the additional burden of convicting the accused. *Id.* at 137-38.

²⁴ *Id.* at 129; see also BARBARA SHAPIRO, "BEYOND A REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 3 (1991) (noting that the presentment juries of pre-1215 and the trial jury of post-1215 originally overlapped in membership but became separate institutions by 1328).

²⁵ See WHITMAN, *supra* note 6, at 128-132.

²⁶ See *id.* at 132 ("Cases decided by jury trial were cases decided by the king's authority.").

²⁷ See *id.* at 132-133 (noting that having a court that could give blood punishments was an important symbol of power, and lords as well as monarchs wanted their courts to hold that authority).

²⁸ *Id.* at 154-55; see also POTTER, *supra* note 18, at 79 (describing coercive efforts by English monarchs to achieve verdicts, including threat of punishment if "[jurors] gave a false verdict").

²⁹ See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1081 (2015). Specifically, Christian theology taught that wrongly convicting the accused would be the equivalent of killing Christ himself, as all humans are made in God's image. WHITMAN, *supra* note 6, at 43-44.

responsibility for declaring guilt.³⁰ Benefit of clergy, a legal fiction by which the accused could be saved from capital punishment, also expanded to most defendants early on, alleviating the moral pressures felt by English jurors.³¹ However, by the sixteenth and early seventeenth centuries, English monarchs lost patience with the high number of jury acquittals and moved to limit the ability of jurors to avoid general verdicts of guilt, as well as the availability of benefit of clergy.³² Lawmakers also passed laws that coerced jurors to reach verdicts.³³ Eventually, the pressure on juries waned as the British Empire grew, and transportation to the Americas became the punishment of choice in lieu of death.³⁴ But when the American Revolution temporarily ended transportation, the death penalty returned in force.³⁵

At the same time, Christian conscience literature spread throughout Europe, reigniting the ideas of Saint Augustine and others who warned against unjustly shedding the blood of fellow Christians.³⁶ With this revival came the Christian theology of doubt, which permitted conviction only if a judge (or, in this case, the jury) had moral certainty.³⁷ To be sure, moral certainty did not equate to scientific certainty, but represented sufficient certainty that jurors would not significantly doubt their own eternal salvation.³⁸ It was against this backdrop that judges first enumerated a reasonable doubt standard.

Ultimately, the choice of English officials to use juries to achieve verdicts resulted in a legal and moral dilemma.³⁹ Recalcitrant jurors, concerned with their eternal salvation, threatened to undermine the administration of justice—and the monarch’s justice at that—by avoiding convictions.⁴⁰ By the eighteenth century, there existed a growing consensus that crime “was not being ... rigorously prosecuted.”⁴¹ Some contemporary writers started openly pleading for jurors to convict.⁴² But coercion could go only so far, so the

³⁰ WHITMAN, *supra* note 6, at 154-55.

³¹ *Id.* at 156.

³² *Id.* at 161-62.

³³ *Id.*

³⁴ *Id.* at 162-63.

³⁵ *Id.* at 163; *see also* POTTER, *supra* note 18, at 198 (“By the end of the [1700s] some two hundred and twenty offenses were deemed by parliament to warrant death.”).

³⁶ WHITMAN, *supra* note 6, at 163.

³⁷ *Id.* at 165.

³⁸ *See id.* at 166.

³⁹ *Id.* at 197.

⁴⁰ *See* POTTER, *supra* note 18, at 199-200 (“Juries ... were increasingly wont to show mercy or pity.”).

⁴¹ *See id.* at 197 (“With no police force and no forensic science service, the only means of deterring crime was through exemplary punishment.”); *see also* SHAPIRO, *supra* note 24, at 220.

⁴² *See, e.g.,* WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY

sovereign's justices had to find a solution. Reasonable doubt presented the answer, offering jurors a flexible, feel-good standard that allowed them to convict while also preserving their chances in the afterlife.⁴³ The reasonable doubt standard "reassure[d] timid jurors that they could vote to convict as long as they could assure themselves that none of their doubts were 'reasonable.'"⁴⁴

The existence of juries stimulated the development of a doubt standard in another way. Separating the decision of guilt from the judge mandated the creation of a standard that parties external to the judge could comprehend and utilize. Although civil law judges—who serve as finders of both fact and law—could internalize doubt in their decisions, the common law's reliance on a jury required judges to "acknowledge the role of uncertainty in decision making" and to produce a probabilistic standard of reasonable doubt with which jurors could be content.⁴⁵ Indeed, appellate courts in the United Kingdom continue to provide extreme deference to juries' findings of fact, demonstrating the common law's primary concern not with actually finding truth beyond all reasonable doubt, but rather with guiding juries to a final verdict.⁴⁶ Finality, not truth, constitutes the overarching goal. However, the jury-trial system is not, alone, a sufficient explanation for the existence of the reasonable doubt standard. Notably, the adversarial presentation of evidence

318 (1785) (chastising juries for their "overstrained scrupulousness, or weak timidity"); see also *id.* at 321 ("The security of civil life ... is protected chiefly by a dread of punishment. The misfortune of a [wrongly convicted] individual cannot be placed in competition with this object.").

⁴³ See, e.g., POTTER, *supra* note 18, at 198 (citing the case of John Smith, who was tried and sentenced to death for "housebreaking" in 1825 because the "jury had convicted him on the evidence," without moral doubt).

⁴⁴ Alec Walen, *Proof Beyond a Reasonable Doubt: A Balanced Retributive Account*, 76 LA. L. REV. 355, 368-69 (2015) (noting that the reasonable doubt standard "is not meant to provide substantive guidance for determining what kind of doubt would be 'reasonable'"); see also HO, *supra* note 1, at 177 (describing arguments that the standard of proof should be lowered in times of high crime to deter more crime and heightened in times of low crime to avoid more unjust convictions).

⁴⁵ Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 274 (2004).

⁴⁶ See, e.g., Criminal Appeal Act 1968, c. 19, § 2 (UK) (stating that an appeal to overturn a conviction shall be granted only if the conviction "is unsafe"); R v. Mirza [2004] UKHL 2, (2004) 2 Cr. App. R. 8 (appeal taken from Eng.) (citing "the common law rule that the court [will] not investigate or receive evidence about anything said in the course of the jury's deliberations while they were considering their verdict" to hold that the court would not review the verdict for juror bias); see also Clermont, *supra* note 45, at 271 (discussing similar deference in the United States). Juries are not even expected to provide a reasoning for their verdicts, further undermining discovery of truth. See John Jackson, *Unbecoming Jurors and Unreasoned Verdicts: Realising Integrity in the Jury Room*, in THE INTEGRITY OF CRIMINAL PROCESS 281, 296-307 (Jill Hunter et al. eds., 2016).

also played a role in its arrival.

B. Adversarial Roots of the Reasonable Doubt Standard

Like the jury, the adversarial presentation of evidence represents a hallmark of the common law criminal trial and shares in the creation of the reasonable doubt standard. Originally, the English criminal trial required someone to come forward to accuse another of violating the king's peace, to which the accused was expected to respond in open court.⁴⁷ In these early trials, the accused simply denied the accuser's evidence as it was being presented.⁴⁸ As a result, the early criminal trial "had a formless or wandering quality that resembles ordinary discourse, a conversation of sorts, lacking the crisp division into prosecution and defense case that we now expect."⁴⁹ This informality did not particularly matter in the early centuries because most jurors had personal knowledge of the facts.⁵⁰

Eventually, the "unstructured bicker" that described medieval trials gave way in the latter part of the 1700s to the lawyer-versus-lawyer trial familiar to common law jurists today.⁵¹ The emergence of the reasonable doubt standard coincides with the "lawyerization" of the criminal trial, though it is not certain that this correlation equates to causation.⁵² What is clear, however, is that the adversarial nature of the eighteenth-century criminal trial led to the universal application of the standard, as opposing lawyers now demanded a consistent standard to mediate between their competing stories.⁵³

The adversarial trial also creates failures that the reasonable doubt standard attempts to address. First, adversarial trials incentivize lawyers to suppress evidence and distort the truth.⁵⁴ Second, the reliance on lawyers to

⁴⁷ LANGBEIN, *supra* note 9, at 258-59.

⁴⁸ *Id.* at 259.

⁴⁹ *Id.* (describing a sixteenth-century rape trial in which the accused and accuser interrupted each other with denials and personal pleas to the jury not to believe what the other was saying).

⁵⁰ See SHAPIRO, *supra* note 24, at 4-5 ("Jurors, men of the neighborhood, were assumed to know the facts and to incorporate their knowledge in their verdict.").

⁵¹ LANGBEIN, *supra* note 9, at 259-60 (noting that "by the 1750s the Old Bailey trials ... show a consistently crisp division of testimony along partisan lines"); see also POTTER, *supra* note 16, at 199.

⁵² LANGBEIN, *supra* note 9, at 265.

⁵³ *Id.*; see also POTTER, *supra* note 18, at 201-02 (describing the example of Sir William Garrow, an eighteenth-century lawyer who "helped both to ensure a general right ... to advance a defense using a trained lawyer, and to alter the relationship between judge and defendant and jury").

⁵⁴ See LANGBEIN, *supra* note 9, at 265 (coining what Langbein calls the "combat effect"); see also Clermont, *supra* note 45, at 275 (noting that the adversarial nature of the common law trial forced uncertainty of evidence "out into the open," requiring a standard of proof to

persuade a jury creates a disadvantage for the party “who is less able to hire lawyers and to pay for pretrial investigation,” usually the defendant.⁵⁵ Indeed, the eighteenth-century judges who first coined the reasonable doubt language were former trial lawyers familiar with these disadvantages.⁵⁶ Evidence suppression and inequities between adversaries demanded a standard that forced jurors to focus on the evidence and less on the quality of the defendant’s answer; reasonable doubt provided this standard.⁵⁷ Unlike their medieval predecessors, moreover, eighteenth-century jurors no longer came to trial with prior knowledge of the facts, requiring a standard to help them make sense of the evidence.⁵⁸ In fact, in summary proceedings for petty crimes, which do not require an adversary jury trial, the reasonable doubt standard did not emerge, suggesting that the adversarial nature of major criminal trials constituted a significant factor in the standard’s evolution.⁵⁹ But what the adversarial jury trial does not explain is why the standard of proof enumerated in 1780s London used the language of “beyond a reasonable doubt” and not some other wording—a question the next subpart attempts to address.

C. *Epistemological Roots of the Reasonable Doubt Standard*

Common law judges often state the reasonable doubt standard in a maximalist manner, believing it persuades the jury of the certitude they must reach.⁶⁰ In reality, however, the reasonable doubt standard is not one of absolute certainty, for its very words allow some amount of doubt.⁶¹ Instead, reasonable doubt falls somewhere short of certainty and is often made “by reference to what is at stake.”⁶² In other words, “reasonable doubt” relies on

determine which side was more uncertain).

⁵⁵ See LANGBEIN, *supra* note 9, at 265-66 (coining the term “wealth effect” to describe this phenomenon).

⁵⁶ *Id.* at 266; see also HO, *supra* note 1, at 174 (describing the standard of proof as a “decision threshold” that requires a fact-finder to decide “against the party carrying the burden of proof on the ground that she has failed to prove her case to the required standard”).

⁵⁷ LANGBEIN, *supra* note 9, at 265-66; see also SHAPIRO, *supra* note 24, at 6 (“As witnesses became more important, juries increasingly required standards for the evaluation of testimony.”).

⁵⁸ See SHAPIRO, *supra* note 24, at 4 (“Clearly by the early fifteenth century juries were no longer truly self-informing but were listening to and assessing evidence introduced by private accusers and government officials.”).

⁵⁹ See LANGBEIN, *supra* note 9, at 265-66.

⁶⁰ Walen, *supra* note 44, at 364.

⁶¹ See *id.* (noting that the standard of proof would be “beyond any *rational* doubt” if courts wanted to require actual certainty).

⁶² *Id.* at 371. For a study on how the definition of “reasonable doubt” affects the decisionmaking of jurors, see generally Robert S. Atkin et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock*

context, with its meaning changing depending on the costs to the individual jurors if they err.⁶³

Whatever its meaning today, the phrase “reasonable doubt” is itself traceable to Aristotelian distinctions between probable and certain knowledge.⁶⁴ These distinctions translated into seventeenth- and eighteenth-century epistemological debates on fact-finding that provided the backdrop for reasonable doubt’s adoption into criminal law.⁶⁵ Specifically, “beyond a reasonable doubt” became equated with “satisfied conscience” or “moral certainty,” familiar terms in intellectual circles of the day.⁶⁶

In Enlightenment Europe, scholars categorized certainty into three types: physical certainty, proven by one’s own senses; mathematical certainty, proven by logic; and moral certainty, proven by testimony and second-hand accounts of sensory information.⁶⁷ The latter category required decision-making in the face of uncertainty and was therefore “discussed in terms of probable knowledge.”⁶⁸ Intellectuals of this era advised that one faced with a moral decision “avoid a ‘doubting’ or ‘scrupulous’ conscience” and instead seek “a ‘sure’ or ‘satisfied’ conscience that excluded reasonable doubts.”⁶⁹

To intellects of eighteenth-century England, “satisfied [or sure] conscience” required that “‘the matter, be a thing in its nature, plain and intelligible nor encumbr’d with difficulties and Doubts.’”⁷⁰ If one felt less sure, they were said to have a “‘probable conscience,’” and still less sure was considered a “‘doubting conscience.’”⁷¹ To go against one’s conscience was considered immoral, whereas one who had a satisfied conscience could live without fear that they made the wrong decision.⁷² By the middle of the seventeenth century, “satisfied [or sure] conscience” had come to mean

Jurors, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976) (finding correlations between the definition of “reasonable doubt” and the jurors’ likelihood to acquit).

⁶³ See Walen, *supra* note 44, at 372 (outlining a thought experiment in which the jurors are told they will be executed if the defendant turns out to be innocent and noting that in such a case jurors “would certainly find that they have ‘reasonable’ doubt much more frequently than they do now”); see also HO, *supra* note 1, at 173 (“The evidence must be able to justify a strong enough categorical belief in the truth of the disputed allegation, where what is strong enough is a function of the seriousness of both the content of the allegation and the consequences of accepting that it is true.”).

⁶⁴ Shapiro, *supra* note 17, at 19.

⁶⁵ *Id.* at 24.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25.

⁶⁸ See *id.* at 26.

⁶⁹ Shapiro, *supra* note 17, at 26.

⁷⁰ *Id.* at 26-27 (quoting HENRY SACHEVERELL, *THE NATURE, OBLIGATION, AND MEASURE OF CONSCIENCE* 6-7 (1706)).

⁷¹ *Id.* at 26.

⁷² *Id.* at 27.

“moral certainty,” which was itself synonymous with the standard of “beyond a reasonable doubt.”⁷³

Ultimately, both secular and clerical thinkers used the language of probabilistic certainty and reasonable doubt to determine what constituted sufficient surety in decision-making.⁷⁴ This epistemological exploration and categorization of certainty developed at the same time early-modern judges saw the need for a standard of proof jurors could use to referee conflicting evidence and achieve verdicts.⁷⁵ It is therefore unsurprising that the standard of proof chosen proved equivalent to moral certainty, which would allow jurors to reach a verdict that is—at least in their minds—morally sound. Today, reasonable doubt continues to play a moral comfort role in common law courts, despite the waning influence of Christian morality in the West, by allowing jurors to consider doubt and still achieve a comfortable level of certainty, whether they have discovered the truth or not.⁷⁶

II

ISLAMIC LAW: THE DOUBT CANON

The role of doubt in Islamic law dates back to its beginnings.⁷⁷ That there is room for doubt in Islamic law may be surprising, as the tradition is often perceived as rigid and divinely ordained, allowing little room for human discretion.⁷⁸ However, doubt played, and continues to play, an extremely

⁷³ See *id.* at 27-28 (citing the works of seventeenth- and eighteenth-century thinkers and clerics, all of whom thought of moral certainty in terms of reasonable doubt). John Locke even became an influential writer on these distinctions. See *id.* at 34. See generally JOHN LOCKE, *ESSAY CONCERNING HUMAN UNDERSTANDING* (1690).

⁷⁴ See generally Shapiro, *supra* note 17.

⁷⁵ See CLERMONT, *supra* note 14, at 242 (stating that once probability theory “arrived on the scene.... The common law was ready to take a major leap forward, hand in hand [with it]”).

⁷⁶ See HO, *supra* note 1, at 178 (“The firmness of a belief, that is, the depth of one’s conviction in it, does nothing to settle whether the belief is rational or founded on the evidence.”) (quoting Larry Laudan, *Is Reasonable Doubt Reasonable?* 9 *LEGAL THEORY* 295, 304 (2003)).

⁷⁷ INTISAR A. RABB, *DOUBT IN ISLAMIC LAW: A HISTORY OF LEGAL MAXIMS, INTERPRETATION, AND ISLAMIC CRIMINAL LAW* 48-49 (2015) (remarking that jurists would cite to the Islamic doubt canon consistently from the beginning of Islamic criminal law, but did not originally attribute it to the Prophet).

⁷⁸ See *id.* at 321 (“[T]he popular notion of Islamic law ... as a divinely revealed textual ideal endowed with certainty, dismissive of doubt ... seems not only ahistorical and incorrect but also an unfortunately pervasive way of approaching Islamic law in the modern world.”). The *hudud* crimes are, depending on the source: theft, banditry, unlawful sexual intercourse, making false accusations of unlawful sexual intercourse, alcohol consumption, and denouncement of Islam (apostasy). See MOHAMED S. EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* 1-2 (1981) (arguing that alcohol consumption and apostasy are not *hudud* crimes).

important role in the administration of Islamic justice and is even attributed to the Prophet Muhammad.⁷⁹

In Saudi Arabia, classical Islamic criminal law and procedure are still upheld as the law of the land.⁸⁰ Although French civil law has had considerable influence over Saudi codified law, Islamic law remains supreme.⁸¹ Notably, the country belongs to the Hanbali school, which requires strict adherence to textual sources of Islamic law.⁸² The *Qur'an*—Islam's holy book—and the *Sunnah*—the Prophet's words, acts, and tacit approvals—are therefore considered the primary sources of law in Saudi Arabia.⁸³ However, qadis (Islamic law judges) are permitted to use their own *ijtihad* (reasoning) when textual law is silent.⁸⁴ Like other Islamic nations, Saudi Arabia categorizes crimes into three types: (1) *hadd* (*hudud* in the plural), or those crimes with defined punishments in the *Qur'an* and the *Sunnah*; (2) *qisas*, or those crimes for which the victim or the victim's family may seek justified retaliation (the crimes of murder and bodily injury are *qisas* crimes); and (3) *ta'zir*, or crimes for which punishment falls within the discretion of the qadi.⁸⁵

⁷⁹ See *infra* notes 92-94 and accompanying text.

⁸⁰ See Law of Criminal Procedure, Umm al-Qura 3867, art. 1 (2001) (Saudi Arabia) (mandating that courts applying Islamic criminal law apply "Shari'ah principles" of criminal procedure); PETERS, *supra* note 7, at 148-49; see also Jeffrey K. Walker, *The Rights of the Accused in Saudi Criminal Procedure*, 15 LOY. L.A. INT'L & COMP. L. REV. 863, 863 (1993) ("Saudi Arabia is the only major Arab country that still adheres to a more or less unamended form of the *Shari'a*.").

⁸¹ See Al-Hamoudi, *supra* note 7, at 40-41 ("Saudi Arabia was no exception among Middle Eastern countries in adopting the French legal system. Most of the kingdom's modern codes, though driven by Islam, are influenced directly by the French system."); see also *id.* at 46 ("Judges must therefore apply Islamic law and other regulations that are issued by the legislative authorities, as long as they do not contradict the *Shari'ah*."). To create an apt comparison, this Paper focuses on the Saudi courts' use of doubt in their application of pure Islamic law.

⁸² Walker, *supra* note 80, at 866.

⁸³ Al-Hamoudi, *supra* note 7, at 31. The *Qur'an* contains 100 verses that address legal issues directly, while the *Sunnah* contains *hadiths* that: (1) describe or clarify commands of the *Qur'an*; (2) highlight important commands of the *Qur'an*; (3) place limits on general commands of the *Qur'an*; or (4) are not in the *Qur'an* and are thus an independent source of law. See *id.* at 52-54.

⁸⁴ See FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 83 (2000) ("[T]he ideal of qadi *ijtihad* ... is alive and well in Saudi Arabia."); see also *id.* at 131.

⁸⁵ See Walker, *supra* note 80, at 867-68. The *hudud* crimes are listed at *supra* note 76. For *qisas* crimes, the victim's family may waive retaliation and instead seek compensation (called *diyya*) or pardon the offender. Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, B. C. INT'L & COMP. L. REV. 29, 38 (1989).

Saudi criminal procedure requires the accuser to convince the qadi of the accused's guilt "beyond a reasonable doubt."⁸⁶ In practice, this requires proof to the point of "utter certainty."⁸⁷ Any doubt, therefore, should be decided in the defendant's favor.⁸⁸ For *hudud* crimes, the existence of doubt requires the imposition of either a *ta'zir* (discretionary) punishment or no punishment at all.⁸⁹ Avoiding punishment in cases of doubt accords with the general belief that *hudud* punishments are primarily a deterrent, not intended for broad imposition.⁹⁰

The sources of the Saudi doubt standard (or canon) are mixed. The prosecution's burden of proof clearly comes from the Prophet Muhammad's declaration that "the onus of proof is upon the claimant," which is found in the *Sunnah*.⁹¹ However, the doubt canon enjoys a softer grounding in Islamic law. Although often attributed to the *Case of Ma'iz*, in which the Prophet accepted Ma'iz's confession to fornication and adultery but refused to issue the *hadd* punishment,⁹² the doubt canon began simply as judicial custom as early as the seventh century C.E..⁹³ Today, various *hadith* (which compose the *Sunnah*) are cited as sources of the doubt canon.⁹⁴ It is also preserved

⁸⁶ Al-Hamoudi, *supra* note 7, at 62.

⁸⁷ See VOGEL, *supra* note 84, at 244.

⁸⁸ Al-Hamoudi, *supra* note 7, at 63.

⁸⁹ See Saeed Hassan Ibrahim & Nasir bin Ibrahim Mehemeed, *Basic Principles of Criminal Procedure under Islamic Sharia*, in CRIMINAL JUSTICE IN ISLAM 17, 26 (Muhammad Abdel Haleem et al. eds., 2003).

⁹⁰ See WAEL B. HALLAQ, SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS 311-12 (2009). In fact, in Saudi Arabia the imposition of *hudud* punishments is historically rare. See VOGEL, *supra* note 84, at 246 (reporting an average of one stoning every three years and four hand amputations each year between May 1981 and April 1992).

⁹¹ IBN ABBAS, NAWAWI, 40:1, no. 33; see also al-Saleh, *The Right of the Individual to Personal Security in Islam*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 55, 67 (C. Bassiouni ed., 1982).

⁹² RABB, *supra* note 77, at 115 (noting that, though the case is often cited as proof of the Prophet's recognition of doubt, the Prophet still found Ma'iz guilty). For a more detailed analysis of the case, see *id.* at 39-46.

⁹³ *Id.* at 55-56, 319 (noting that before its attribution to the Prophet, "[t]he [doubt] canon functioned ... as a kind of 'superprecedent' for which specific attribution was either uncommon or unnecessary"); see also Intisar A. Rabb, "Reasonable Doubt" in Islamic Law, 40 YALE J. INT'L L. 41, 76 (2015) (noting that jurists from the first three centuries of Islam "regarded [the doubt canon] as statement of judicial practice, not as prophetic *hadith*.").

⁹⁴ See, e.g., IBN MAJAH, SUNAN 4:161, no. 2545 (1998) ("Avoid hudud [punishments] wherever you find an opportunity to do so."); 'ABD AL-RAZZAQ, MUSANNAF 10:166, no. 18698 (1972) ("Avoid hudud [punishments] involving Muslims to the extent possible; if there is an exculpating cause for [the accused], then release him, as it is better that the imam make a mistake in pardoning than in punishing"); IBN ABI SHAYBA, MUSANNAF 9:359, no. 28964 ("If hadd [liability] is doubtful [to you], then avoid [the punishment]."). For a full listing of mentions of the doubt canon in the *Sunnah*, see RABB, *supra* note 77, at 323-330.

under the concept of *istishab*, which presumes the continued truth of certain facts, such as innocence, until disproven.⁹⁵

As with the reasonable doubt standard in common law, there are multiple explanations for the evolution of the Islamic doubt canon, with each adding part of the story. First, the doubt canon allowed Islamic jurists to maintain their independence in the face of caliphal overreach.⁹⁶ Second, the doubt canon worked in conjunction with elitist doctrines, letting nobles avoid severe punishments.⁹⁷ Finally, doubt enabled (and still enables) qadis to avoid unjustified bloodshed and thus preserved their own salvation in the hereafter.⁹⁸

A. The Political Crucible

Unique among the three legal traditions in this article, the Islamic judiciary developed as a separate arm of the state, giving Islamic jurists considerable influence over how the doubt canon emerged. After the Prophet Muhammad's death in 632 C.E., the legal, political, and spiritual authority that once embodied one person split, and a succession of caliphs took over the Muslim world.⁹⁹ At first, these caliphs derived authority from their close association with the Prophet.¹⁰⁰ However, after the fourth caliph, 'Alī, died in 661 C.E., leadership of the Islamic world shifted to more autocratic rulers whose authority came not from their moral or spiritual superiority but from their monopolization of violence and political acumen—traditional avenues of state power.¹⁰¹ One means by which these secular autocrats could monopolize violence was through criminal punishments, and, like the kings of England in later centuries, the secular caliphs and their successors pushed for harsh, effective criminal justice.¹⁰² Indeed, by the time of the Seljuq takeover of Iraq and Persia in the eleventh century, “violence became more excessive and public.”¹⁰³

⁹⁵ See Al-Hamoudi, *supra* note 7, at 58.

⁹⁶ See *infra* Part II.A.

⁹⁷ See *infra* Part II.B.

⁹⁸ See *infra* Part II.C.

⁹⁹ RABB, *supra* note 77, at 60.

¹⁰⁰ See *id.* at 61. These period during which the first four caliphs ruled was known as the Rashidun Leadership Period and lasted from 631 to 661 C.E.. Al-Hamoudi, *supra* note 7, at 35.

¹⁰¹ See RABB, *supra* note 77, at 61-62.

¹⁰² See *id.* at 62 (noting that Islamic autocrats “were known for their excesses in punishment”). In particular, the two dynasties that followed 'Alī, the Umayyad and Abbasid dynasties, had a reputation for “disparate and excessive application of punishment.” Rabb, *supra* note 93, at 79.

¹⁰³ Rabb, *supra* note 93, at 80 (noting also that “[e]xecutions were especially rampant, accompanied by floggings, public shaming parades, and imprisonment”).

But the secular caliphs could not claim to be the interpretive authority over Islamic law, because they lacked any claim of spiritual superiority.¹⁰⁴ Instead, a learned class of “Companions of the Prophet” filled the interpretive void in Sunni Islam.¹⁰⁵ Among the Shi’a, the Imams, as rightful successors to the Prophet, claimed the same interpretive role.¹⁰⁶ Together, these Companions and Successors became the respected jurists of Islamic law, progressively gaining soft power to the point that they could interpret the law with the guarantee that the state would enforce their proclamations.¹⁰⁷ In return, the caliphs gained legitimacy from the jurists’ recognition of their authority.¹⁰⁸ This is not unlike the relationship between Islamic jurists and the Saudi royal family today.¹⁰⁹

What resulted was a *de facto* separation of powers. Secular rulers pushed for harsher punishments as a means to monopolize power,¹¹⁰ while at the same time, Islamic jurists developed tools to maintain their independence and push back against tyrannical abuse of the criminal justice system.¹¹¹ This power struggle created the incentive for jurists to establish the doubt canon not as part of judicial custom—as it had been before—but as authoritative religious law.¹¹² Whether the jurists succeeded in curtailing caliphal power is unclear, but the doubt canon nonetheless survived the early centuries of Islam, strengthened by the political crucible of its beginnings.¹¹³

¹⁰⁴ See RABB, *supra* note 77, at 62.

¹⁰⁵ See *id.* at 62-63.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 63. The opinion of the Companions, who are called Sahabah (Sahabi in the singular), is considered binding Islamic law. Al-Hamoudi, *supra* note 7, at 55. *But see* Lippman, *supra* note 85, at 33-34 (noting that the Abbasid dynasty established secular criminal courts to circumvent the qadis courts, though secular rulers still could not disclaim the Companions’ exclusive interpretive authority).

¹⁰⁸ See RABB, *supra* note 77, at 63. Today, Saudi Arabia’s monarchs continue to derive authority from their recognition of Islamic law as the supreme law of the land. See Al-Hamoudi, *supra* note 7, at 41-42 (quoting King Fahd arguing that democracy is not suitable for Saudi Arabia, in part, because of its Islamic legal system).

¹⁰⁹ See PETERS, *supra* note 7, at 148-49; *see also* VOGEL, *supra* note 84, at 91 (“Saudi kings ... have been scrupulous about a policy of avoiding interference in shari’a matters and of leaving those to the [Islamic jurists].”).

¹¹⁰ See RABB, *supra* note 77, at 65.

¹¹¹ See *id.* The judiciary in Saudi Arabia remains independent today. Al-Hamoudi, *supra* note 7, at 45-46 (citing Basic Law of Governance (No. A/90) art. 46 (Saudi Arabia)).

¹¹² See Rabb, *supra* note 93, at 65, 103. Notably, judicial decisions are not an authoritative source of Islamic law so Islamic jurists needed to attribute the doubt canon to prophetic texts for it to survive. Lippman, *supra* note 85, at 32.

¹¹³ See RABB, *supra* note 77, at 65 n.61.

B. Social Uses of Doubt

The requirement that crimes be proven beyond the qadi's reasonable doubt also developed within the social context of tenth-century Islam. At least in theory, Islamic law applies equally to all Muslims, because Allah's intent in revealing the law was to correct immorality regardless of one's background.¹¹⁴ After all, even the wealthy are susceptible to sin.¹¹⁵ Thus, Islamic law follows a "moral egalitarianism" ideal, caring only about one's moral standing.¹¹⁶

However, the moral egalitarian ideal did not translate into practice in Islam's early centuries, as the caliphs created dynasties based on bloodlines and loyalties.¹¹⁷ Eventually, equality before God was relegated to a "spiritual ideal reserved mostly for the next world."¹¹⁸ Moral equality instead gave way to elite favoritism.¹¹⁹ Indeed, the jurists were themselves part of the Islamic elite and had ample incentives to shape the law to their benefit.¹²⁰ In Islamic criminal law, elitist tendencies translated into a maxim calling for leniency in blood punishments for high-status Muslims "even when there was no doubt about criminal culpability."¹²¹ Although the "elite leniency maxim," as it has been called, developed separately from the doubt canon, the two doctrines existed and developed together and were even combined.¹²² What resulted is a hybrid doctrine calling for blood punishments to be avoided in cases of doubt and in cases involving a high-status defendant.¹²³

Although the doubt canon constitutes a distinct doctrine in Islamic law used regardless of one's status, the hierarchical structure of Middle Eastern societies in the Middle Ages influenced its development.¹²⁴ In several cases, qadis used the doubt canon quite explicitly to favor aristocratic defendants, including a prince charged with violating an oath and a jurist's own brother charged with blasphemy.¹²⁵ But its use to favor elites does not mean the doubt

¹¹⁴ *Id.* at 69-70; see also al-Saleh, *supra* note 91, at 80 (quoting the Prophet as saying "[m]en are equal as the teeth of a comb" (citation omitted)).

¹¹⁵ See RABB, *supra* note 77, at 71.

¹¹⁶ *Id.* at 73.

¹¹⁷ See *id.* at 75.

¹¹⁸ *Id.* at 76-77.

¹¹⁹ *Id.* at 77-78.

¹²⁰ *Id.*; see also Muhammad Khalid Masud et al., *Qādīs and their Courts: An Historical Survey*, in DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGMENTS 1, 13, 19 (2006) (discussing qadis' high standing and wealth).

¹²¹ RABB, *supra* note 77, at 78.

¹²² See *id.* at 79-80.

¹²³ See *id.* at 80.

¹²⁴ *Id.* at 88-89 (noting that a majority of jurists appear to have applied the doubt canon as a separate doctrine but used it nonetheless in ways that favored elites).

¹²⁵ See *id.* at 89-93 (citing TANUKHI, NISHWAR AL-MUHADARA 252-54 and KHUSHANI, AKHBAR 186-91).

canon existed for the *purpose* of favoring elites, as use and purpose are distinct concepts.¹²⁶ Rather, like political context, the social context in which the doubt canon developed encouraged and spread its use but did not cause its creation.¹²⁷ Instead, “moral concern, more than social status, was at play in the construction of the early Islamic doctrine of doubt.”¹²⁸

C. The Moral Core

The Islamic doctrine of doubt developed primarily on the foundation of moral anxiety in ordering blood punishments.¹²⁹ Specifically, qadis—like common law jurors—feared that the wrongful execution of an innocent defendant would doom their salvation in the hereafter.¹³⁰ Indeed, the Prophet himself discouraged unwarranted prosecution,¹³¹ and unjust punishment by a qadi could result in the same punishment being executed against him.¹³² The qadis’ moral discomfort generated greater procedural protections in *hudud* cases than even the foundational Muslim texts required.¹³³ For example, although the *Qur’an* already required accusations of immoral sex acts to be proven by four male eyewitnesses, jurists defined the crime narrowly to further decrease the chances that *hudud* punishment would be necessary.¹³⁴ The doubt canon was yet another tool that qadis used to avoid punishment.¹³⁵

At first, qadis cited early cases as proof that punishment avoidance was a judicial custom in cases of doubt.¹³⁶ But judicial custom was not enough for many jurists who relied strictly on religious texts, particularly the *Qur’an* and the *Sunnah*, for all Islamic law.¹³⁷ Once custom no longer sufficed, jurists

¹²⁶ See *id.* at 98.

¹²⁷ See RABB, *supra* note 77, at 88-89.

¹²⁸ *Id.* at 100.

¹²⁹ See *id.* at 102-03.

¹³⁰ *Id.* at 123-24. In fact, Muslim jurists tried to avoid appointments as judges because they despised the act of judging so much. See Rabb, *supra* note 93, at 83.

¹³¹ See Lippman, *supra* note 85, at 46 (noting that “[t]he warning against persecution of individuals reportedly is repeated 299 times in the Koran” (citing Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 4, 19 (1982))).

¹³² *Id.* at 51 (“If it is determined the defendant was wrongfully punished, the qadi will be removed from office and the same punishment which was wrongfully imposed ... will be inflicted on the qadi.”).

¹³³ See RABB, *supra* note 77, at 124.

¹³⁴ See *id.* at 124-126; see also Lippman, *supra* note 85, at 52-53. For example, theft was defined to require stealth, not force, and had property value and storage requirements as well. See VOGEL, *supra* note 82, at 243.

¹³⁵ See RABB, *supra* note 77, at 126.

¹³⁶ See Rabb, *supra* note 93, at 70-76 (describing three early cases after the *Case of Ma’iz* that jurists cited as proof that doubt was a grounds for punishment avoidance).

¹³⁷ See *id.* at 76 (“For staunchly textualist jurists, judicial practices would have little

quickly attributed the doubt canon to actual prophetic teachings by citing the *Case of Ma'iz* and other hadith as proof that the Prophet himself called for punishment avoidance in cases of doubt.¹³⁸ Indeed, “[b]y the end of the tenth and eleventh centuries ... virtually all Muslim jurists came to conceive of the doubt canon as a foundational text issued by the Prophet himself.”¹³⁹ Moral anxiety coupled with political pressures drove jurists to ground the doubt canon in prophetic texts so they could claim that *hudud* avoidance in cases of doubt represented a religious mandate, not man-made law.¹⁴⁰ After all, secular rulers could not argue against the Prophet’s will.

Ultimately, the doubt canon allowed an independent Islamic judiciary “to alleviate a deep sense of moral concern with false convictions, to rein in rather than work with the political rulers in punishment, and to construct a version of Islamic law in line with their ideals of divine legislative supremacy.”¹⁴¹ Jurists quickly expanded the original doubt canon beyond only *hudud* crimes to apply to all crimes and to mandate greater evidentiary and definitional standards in Islamic criminal law more generally.¹⁴² The legal pluralism that characterizes Islamic law also allowed for multiple interpretations and iterations of doubt to develop, with jurists today avoiding punishments when either evidence, procedure, or even interpretative differences across schools create doubt.¹⁴³ Doubt was and still is, therefore, a powerful tool for Islamic jurists to achieve whatever ends they desire—be they political, social, or moral.

III

EAST ASIAN LAW: JAPAN’S MIDDLE-GROUND ADOPTION OF WESTERN STANDARDS

Like England and Saudi Arabia, modern-day Japan requires criminal

normative weight ... any canon had to be rooted in a foundational text.”)

¹³⁸ See RABB, *supra* note 77, at 124-25 (“From the Prophet’s exclamation upon learning of the defendant’s execution, ‘you should have let Mā’iz go’ [or in one version: ‘if only you had let him go’], most later jurists understood the case to require judges to question offenders about possible deficiencies that would remove *hadd* liability.” (citing IBN ABI AL-‘IZZ, TANBĪH, 4:128)). For more on the facts in the Case of Mā’iz, see *supra* note 80 and accompanying text. For the hadith that support the doubt canon see *supra* note 94.

¹³⁹ Rabb, *supra* note 93, at 76.

¹⁴⁰ See *id.* at 78 (“The need to avoid capital punishment ... had grown so urgent that jurists needed a doubt doctrine of unassailable authority to justify avoiding punishment. They gained one by attributing the canon to the Prophet directly.”).

¹⁴¹ RABB, *supra* note 77, at 130-31; see also Ibrahim & Mehemeed, *supra* note 89, at 26.

¹⁴² Rabb, *supra* note 93, at 90; see also Hossein Mir Mohammad Sadeghi, *Filling the Gap in Favour of the Accused: The Approach of Islamic Criminal Law in Light of the Rule No Punishment in Case of Doubt*, 29 TUL. EUR. & CIV. L.F. 147, 149 (2014) (describing the different uses of doubt in *hudud*, *qisas*, and *ta’zir* crimes).

¹⁴³ See Rabb, *supra* note 93, at 90-91. For more on the types of situations that can create sufficient doubt under Islamic law, see generally Sadeghi, *supra* note 142.

cases to be proven “beyond a reasonable doubt.”¹⁴⁴ Unlike England and Saudi Arabia, however, the Japanese doubt standard did not develop organically. Instead, Japan’s standard of proof represents influences from both the civil and common law. The Japanese standard is a civil law standard in that it allows judges (the exclusive finders of fact in almost all cases) to convict on their own intuition, but the standard resembles the common law in its considered treatment and enumeration,¹⁴⁵ though its mandate is not as robust.¹⁴⁶ Thus, “reasonable doubt” is not as strongly emphasized in Japan as in Anglo-American trials but is nevertheless given more thought than in the archetypal civil law country. In other words, Japan’s standard falls somewhere in the middle.¹⁴⁷

The origin of this mixed-system standard tracks the history of Japan’s legal system and the influences of various Western powers on its development,¹⁴⁸ with unique structural features in Japanese trials also contributing to the treatment of doubt.¹⁴⁹

A. Historical Reasons for the Mixed Approach

In ancient Japan, criminal trials were swift and local, obviating the need for an espoused standard of proof because those judging the trial were familiar with the underlying facts.¹⁵⁰ The first major evolution in Japanese law occurred in the eighth century when Japan briefly adopted Chinese criminal procedures.¹⁵¹ The Chinese model was characterized by Confucian ideals of loyalty and respect for one’s rank and usefulness to society, all of which determined punishments.¹⁵² Justice was swift, often decided on the

¹⁴⁴ SUP. CT. JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 24 (2016) (“In criminal cases, the principle of ‘innocent until proven guilty’ is held, so the public prosecutor must prove the charged facts beyond a reasonable doubt based on the evidence.”).

¹⁴⁵ See Clermont, *supra* note 45, at 266.

¹⁴⁶ See John O. Haley, *Japan*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 393, 403 (Kevin J. Heller & Markus D. Dubber eds., 2011) (noting that “[t]he prosecution need not establish facts beyond any question, but need only provide evidence that excludes doubt based on “‘sound social common sense’” (quoting Saikō Saibansho [Sup. Ct.] Oct. 16, 2007, 61 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 677)).

¹⁴⁷ See CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 392-93 (2017) (observing that the Japanese Supreme Court has ruled both that reasonable doubt can be overcome by common sense and that it “may be overcome only when there is a fact that cannot reasonably be explained other than if the defendant is guilty”).

¹⁴⁸ See *infra* Part III.A.

¹⁴⁹ See *infra* Part III.B.

¹⁵⁰ See George B., *The Impact of the Past Upon the Rights of the Accused in Japan*, in JAPANESE LEGAL SYSTEM 112, 112 (Meryll Dean ed., 2002).

¹⁵¹ *Id.*

¹⁵² See CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868, 59-62 (1996).

spot, with doubt serving to mitigate punishment, not guilt.¹⁵³ Japanese society also heavily discouraged the prosecution of cases, with accusers often jailed and even tortured along with the accused.¹⁵⁴ Accordingly, judicial officials did not need a standard of proof because one was not necessary: The system dissuaded prosecutions and those cases actually prosecuted could be decided easily on the judge's own conscience.

The Chinese criminal model dissipated by the ninth century, replaced by rudimentary feudal justice.¹⁵⁵ Proof in these early feudal years depended on documents and sworn oaths, with omens—such as nosebleeds and a bird defecating on the party—relied on to signify a party's dishonesty.¹⁵⁶ Perhaps unsurprisingly, crime remained largely unpunished during these centuries.¹⁵⁷

In the seventeenth and eighteenth centuries, the Tokugawa Shogunate pushed for a more robust deterrence of crime. By the 1800s, officials had instituted a ruthless system of punishment, including burning or boiling defendants alive, beheading, and crucifixion.¹⁵⁸ Justice remained decentralized, administered by local lords and *rôjû* (elders).¹⁵⁹ Proof during this time required a confession from the defendant, which was often coerced by torture.¹⁶⁰ Following judgment based on a coerced confession, officials immediately carried out the sentence, leaving no time to question doubt in the case.¹⁶¹ Thus, a doubt standard proved unnecessary for much of Japanese history, as a confession (forced or otherwise) became the necessary proof for all crimes.¹⁶²

The Meiji Restoration of 1868 marked the first sweeping change in Japanese approaches to criminal procedure.¹⁶³ After centuries of decentralized, feudal justice, a unified government emerged intent on

¹⁵³ See *id.* at 63-64.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 66.

¹⁵⁶ See STEENSTRUP, *supra* note 152, at 96.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 152 (observing that “European penal practices at the time were actually more cruel” and that “[o]nly from about 1830 can one say that Japanese penal practices were even more barbaric than Europe’s”).

¹⁵⁹ See *id.* at 156-57.

¹⁶⁰ See *id.* at 158 (describing methods of torture used in the Tokugawa Shogunate, including piling stones on the defendant's legs to cripple him, tying the defendant in the shape of a crab to suffocate him, or “hoisting [the defendant] with a rope tied to his hands bound behind his back”).

¹⁶¹ *Id.* at 158-59.

¹⁶² See PAUL HENG-CHAO CH'EN, *THE FORMATION OF THE EARLY MEIJI LEGAL ORDER* 69 (1981) (noting that a confession was considered mandatory until 1876 reforms allowed other forms of evidence to decide cases).

¹⁶³ George B., *supra* note 150, at 113.

restoring imperial authority.¹⁶⁴ Eventually, in the 1870s and 1880s, the Meiji leaders reformed their criminal procedure laws to mirror the French Civil Code, demonstrating a desire to be considered equal with Western powers.¹⁶⁵ These changes followed efforts by European influencers—namely, Boissonade de Fontarabie—to abolish the use of torture in Japan (a leftover from the feudal era) and to adopt, among other things, a more Western “standard of evidence.”¹⁶⁶ The Meiji reforms did just that, embracing an evidence-based standard of proof from the civil law system, with confessions alone no longer sufficient to convict.¹⁶⁷ Civil law traditionally requires judges to make decisions based on their own intuition about the evidence presented, so-called “intime convictions.”¹⁶⁸ Intime convictions do not require an enumerated standard of proof because the judge or judges decide the case on their own conscience and thus do not need to make distinctions between standards or espouse a particular standard in the first place.¹⁶⁹ That said, civil law jurists accept that judges must be convinced beyond a reasonable doubt, even if the standard is not universally stated.¹⁷⁰ In any case, Japan’s first evidentiary standard of proof followed the civil law’s intime convictions intuitive mold. In 1922, Japan again amended its criminal procedures but remained within the civil tradition.¹⁷¹

Following World War II, Anglo-American influences challenged the

¹⁶⁴ CH’EN, *supra* note 162, at xix (1981).

¹⁶⁵ HIROSHI ODA, JAPANESE LAW 425, 436 (2009); *see also* CH’EN, *supra* note 162, at xix (describing how the Meiji leaders adopted civil codes in an attempt to demonstrate their “willingness and ability to establish a reasonable and modern legal system” after first following a Chinese model).

¹⁶⁶ CH’EN, *supra* note 162, at 67-68.

¹⁶⁷ *See id.*; *see also* Kayoko Ishida, *Evidence Law in Japan and Australia: Principles, Practice, and Reform* 22 J. Japan L. 77, 79 (2006) (describing reforms to Article 318 of the Criminal Procedure Act, requiring judges to consider the evidence before them and not simply whether the defendant has confessed).

¹⁶⁸ *See* CLERMONT, *supra* note 14, at 230 (“The French system has no need to make fine distinctions among burdens of production and persuasion, so we can, as the French do, speak just of burden of proof, or *la charge de la preuve*.”).

¹⁶⁹ *See* Clermont, *supra* note 45, at 273; Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 255-56 (2002); *see also* CLERMONT, *supra* note 14, at 232 (“The French do not really have a word for [their standard of proof], although recently one does see the phrase *le degré de la preuve*.”).

¹⁷⁰ Clermont, *supra* note 45, at 273; *see also* Jean-Marc Baïssus, *Common v. Continental: A Reaction to Mr. Evan Whitton’s 1998 Murdoch Law School Address*, 5 MURDOCH U. ELECTRONIC J. LAW at ¶ 77 (Dec. 1998) (“The standard of proof required in civil and penal law in France is the same: the judge has to be convinced, without a shadow of a doubt, of a person’s fault, be it penal or civil.”).

¹⁷¹ *See* ODA, *supra* note 165, at 436 (explaining the reforms as a shift toward Germanic civil law).

wholly civil law approach that defined prewar Japan.¹⁷² The postwar constitution, for example, included rights familiar to Anglo-American nations, including the right to counsel, the right to a speedy and public trial, the right against self-incrimination, and other criminal rights found in the U.S. Bill of Rights.¹⁷³ These new due process rights mandated similar reforms in Japanese criminal procedure, and, in 1948, U.S. advisers assisted in revising the Japanese Code of Criminal Procedure.¹⁷⁴ Among the revisions, the inquisitorial trial—a hallmark of civil law—was replaced by a more adversarial, common law trial.¹⁷⁵ Yet, the Japanese reformers did not completely abandon civil law influences. Rather, they held onto some of the attributes of civil law trials that they preferred, such as the investigation process and a preference for written dossiers over oral testimony.¹⁷⁶ What resulted is a system of criminal procedure with characteristics of both the civil law and the common law—a procedure unique among nations.

The standard of proof that exists in modern-day Japan has emerged from the trajectory of Japanese history. For much of that history, jurists did not manifest their doubt in the form of a standard, as proof relied on confessions and swift decision-making. It was not until the Meiji Restoration in the nineteenth century that Japanese leaders contemplated, at the behest of Western advisers, the development of an evidentiary standard of proof. The result was the adoption of a civil law, intime conviction standard. If not for Japan's surrender in 1945, which allowed for the momentary injection of American-style common law, the civil law's grip on Japanese criminal procedure may well have remained. This injection required more thought to be given to the exact standard required, as defendants gained more rights and adversarial presentation of the evidence replaced judge-led inquisition. What resulted is a trial structure that lends itself to both intime convictions and a more considered reasonable doubt standard.¹⁷⁷

¹⁷² See *id.* at 436 (“Radical changes to criminal procedure were introduced after the Second World War at the initiative of the Allied Forces.”).

¹⁷³ *Id.* For a full list of the rights for criminal defendants adopted into the 1946 Constitution, see AC Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back*, in JAPANESE LEGAL SYSTEM 116, 124-25 (Meryll Dean ed., 2002).

¹⁷⁴ ODA, *supra* note 165, at 436.

¹⁷⁵ See *id.* But see CLERMONT, *supra* note 14, at 229-230 (questioning whether the French system is truly inquisitorial and stating that “in actual practice, the French system is largely adversarial”).

¹⁷⁶ See ODA, *supra* note 165, at 436.

¹⁷⁷ See Clermont, *supra* note 45, at 266 (noting that, unlike traditional civil law countries, Japan applies its standard of proof “with greater awareness of what it is doing,” and with “more debate about the actual standard prescribed and applied”).

*B. The Structure of a Japanese Criminal Trial:
A Little Bit of This and a Little Bit of That*

To an outsider, the Japanese criminal trial resembles something stuck between two systems. For instance, the police are primarily responsible for investigating crimes, like in many common law countries, but the public prosecutor, or “procurator,” actively participates in the investigation as well, like in civil law countries.¹⁷⁸ Procurators are also given similar latitude to their civil law counterparts to dismiss cases.¹⁷⁹ In fact, the procurator serves as the first arbiter of doubt, filtering out most cases in which the guilt of the accused proves doubtful before ever reaching trial.¹⁸⁰ This pre-trial discretion helps explain why over 99 percent of Japanese trials end in guilty verdicts.¹⁸¹

At trial, “[m]ore than 90 percent of cases are handled by a single judge.”¹⁸² The rest are handled by panels of judges which include lay judges called saiban-in.¹⁸³ At the initial hearing, the defendant may admit guilt but, like in many civil law countries, admission of guilt does not end the trial process.¹⁸⁴ Defendants have a right to the assistance of counsel, though it can be waived in all but the most serious cases.¹⁸⁵ Borrowing from the common law, Japan relies on lawyers, not judges, to introduce and examine evidence.¹⁸⁶ The constitutional right of the defendant to confront the witnesses against him has also established a system of cross-examination and rules against hearsay, both of which are familiar to Anglo-American

¹⁷⁸ See ODA, *supra* note 165, at 437.

¹⁷⁹ See *id.* at 439; see also Jacqueline Hodgson & Laurène Soubise, *Prosecution in France*, CRIMINOLOGY (May, 2017), <https://www.researchgate.net/publication/317037650> (describing the high degree of prosecutorial discretion in France). Japanese prosecutors may dismiss cases based on the offender, the nature of the crime committed, or if the offender has repented or paid compensation. See ODA, *supra* note 165, at 439.

¹⁸⁰ See GOODMAN, *supra* note 147, at 392; Haley, *supra* note 146, at 398 (“Japanese procurators ... are generally reluctant to indict anyone unless they are certain of ... guilt.”). In 2007, for example, only 29.6 percent of criminal suspects were indicted. ODA, *supra* note 165, at 439.

¹⁸¹ See Haley, *supra* note 146, at 384-85 (noting a conviction rate of “99.9% for cases that went to judicial verdict [in 2004]”).

¹⁸² ODA, *supra* note 165, at 440.

¹⁸³ See SUP. CT. JAPAN, *supra* note 144, at 20 (describing the saiban-in appointment process).

¹⁸⁴ See ODA, *supra* note 165, at 440 (noting, however, that guilty pleas do shorten trials); see also CATHERINE ELLIOTT ET AL., *FRENCH LEGAL SYSTEM* 219-20 (2006) (stating that “[h]istorically, in France, ... [a] full investigation and trial automatically took place regardless of whether the accused had confessed”).

¹⁸⁵ See ODA, *supra* note 165, at 441.

¹⁸⁶ See *id.*; see also SUP. CT. JAPAN, *supra* note 144, at 19 (noting that in Japan “the court is able to examine evidence if needed, but the parties concerned have the initiative for the collection and provision of evidence”).

jurists.¹⁸⁷ The result is a trial that is both inquisitorial and adversarial; civil and common.

The saiban-in system represents another manifestation of Japan's choice between common and civil criminal procedure, though it is different than either in many respects. Saiban-in are lay judges who collaborate with professional judges to reach verdicts.¹⁸⁸ A saiban-in panel comprises three judges and six lay judges (saiban-in), with a simple majority of the panel necessary to achieve a verdict.¹⁸⁹ Any majority must include at least one judge and one saiban-in, meaning the professional judges may veto a verdict despite their minority status.¹⁹⁰ The saiban-in are not powerless, however. For example, the saiban-in may ask questions of any party or witness.¹⁹¹ Any decision must also include the opinions of both the saiban-in and the professional judges, recognizing the importance of collaboration in the saiban-in process.¹⁹² In any case, the professional judges are expected to guide the saiban-ins, instructing them on the law, including the standard of proof.¹⁹³

Lawmakers first introduced saiban-in in 2009, mandating their use for "crimes punishable by death or indefinite imprisonment, or in cases in which the victim has died."¹⁹⁴ The reform was seen as a response to the secrecy that characterized pre-millennium Japanese criminal procedure.¹⁹⁵ Interestingly, the saiban-in system was part of an effort by the Japanese bar to reinvigorate public trust in the presumption of innocence and the reasonable doubt standard.¹⁹⁶ Indeed, there is some evidence to suggest that the saiban-in have instigated a more measured consideration of the standard of proof in Japanese criminal trials.¹⁹⁷ An evaluation of the system three years after its implementation revealed that, although the overall acquittal rate had not

¹⁸⁷ *Id.*

¹⁸⁸ Caleb Jon F. Vandenbos, *Patching Old Wineskins: Heightened Deference Towards Saiban-In Findings of Fact on Koso Appeal is not Enough*, 24 WASH. INT'L L.J. 391, 392 (2015). Saiban-in are used in about 3,000 cases a year. Haley, *supra* note 146, at 398.

¹⁸⁹ Vandenbos, *supra* note 188, at 393.

¹⁹⁰ *See id.*; *see also* SUP. CT. JAPAN, *supra* note 144, at 30 (noting that the professional judge veto is necessary because the Japanese constitution guarantees "the right to a fair trial in a court of law"). In fact, one initial objection to the saiban-in system was that it would "violate the right to a trial guaranteed by the Constitution." Daniel H. Foote, *Citizen Participation: Appraising the Saiban'in System*, 22 MICH. ST. INT'L L. REV. 755, 757 (2014).

¹⁹¹ Vandenbos, *supra* note 188, at 393.

¹⁹² *See* SUP. CT. JAPAN, *supra* note 144, at 30.

¹⁹³ *See* Vandenbos, *supra* note 188, at 393.

¹⁹⁴ *Id.* at 392.

¹⁹⁵ *See id.* at 395-96 (describing a highly professional, secretive judicial system that did not invite public participation before the saiban-in reforms).

¹⁹⁶ *See* Foote, *supra* note 190, at 758.

¹⁹⁷ *Id.* at 764.

increased, the reasonable doubt standard played a greater role in individual saiban-in cases.¹⁹⁸

The structure of the Japanese criminal trial proves helpful in explaining how and why the standard of proof there has developed to be somewhere between an intuitive, intuitive standard and an enumerated, probabilistic one. All Japanese trials, even those with saiban-in, remain judge-driven and reliant on pre-trial dismissal of doubtful cases, requiring a less thoughtful provocation of what “reasonable doubt” means.¹⁹⁹ Judges may simply judge on their own consciences and most likely will affirm the procurator’s determination of guilt.²⁰⁰ Yet, at the same time, the adversarial nature of the Japanese trial and the recent injection of lay saiban-ins into the most serious cases necessitates more consideration than in traditional civil law countries of what the standard of proof should mean.²⁰¹ After all, professional judges are expected to explain the law to the lay assessors in saiban-in trials,²⁰² requiring them to espouse the Japanese standard of “beyond a reasonable doubt” in such a way to referee conflicting evidence and to give judges, particularly lay saiban-in, a probabilistic standard by which they can still achieve a decision in light of some doubt.²⁰³

IV

COMPARATIVE LESSONS: A WORLD OF DOUBT

Although today the phrase “beyond a reasonable doubt” is relatively ubiquitous in criminal trials, an analysis of three of the world’s legal traditions demonstrates the multivariable influences on its emergence and use across legal systems. Specifically, a comparison of the doubt standard in common, Islamic, and Asian law garners three important observations. First, religious teachings on unjust killing and maiming have been hugely important

¹⁹⁸ See *id.* (citing GEN. SECRETARIAT, SUP. CT. JAPAN, REPORT ON EVALUATION OF THE CIRCUMSTANCES OF IMPLEMENTATION OF SAIBAN-IN TRIALS 46 fig.3 (Dec. 2012)).

¹⁹⁹ See MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 83 (1997) (observing that when a decision rests in a single person or group, they are able to persuade themselves that truth is objectively achievable and there is no need to consider doubt); cf. RENÉ DAVID, FRENCH LAW 147 (1972) (“The indifference of French lawyers to evidentiary questions is explained ... by the importance in French law of the principle of the judge’s intuitive conviction.”).

²⁰⁰ See Vandebos, *supra* note 188, at 95 (“Prior to the introduction of the saiban-in, professional judges were sole arbiters of guilt and sentencing in all cases.”). For a discussion on what the judge’s “conscience” really means, see generally Shigemitsu Dando, *The Conscience of the Judge: Its Role in the Administration of Criminal Justice*, in STUDIES IN COMPARATIVE CRIMINAL LAW 13 (Edward M. Wise & Gerardo O. Mueller eds., 1975).

²⁰¹ See GOODMAN, *supra* note 145, at 393; see also CLERMONT, *supra* note 14, at 248-49 (describing the continued disdain in the French academy for “civil procedure and especially evidence law”).

²⁰² See *supra* note 193 and accompanying text.

²⁰³ Cf. *supra* Part I.A-B.

prerequisites for the organic growth of a doubt standard.²⁰⁴ Second, political pressure was vital to the strengthening of doubt standards globally, being used to either extend or limit executive power.²⁰⁵ Finally, the structural features of criminal trials in each tradition have shaped their doubt standard, with the more adversarial systems and systems involving third-party decision makers requiring an enumerated standard while the inquisitorial systems have thought of doubt more internally.²⁰⁶

A. The Morality of Doubt

In the two traditions studied where a doubt standard grew organically, the common law and Islamic law, morality played an important role in the standard's beginnings. In Christian England, teachings by Saint Augustine and others taught that participating in the killing of an innocent Christian would tarnish one's salvation after death. This moral concern permeated society, influencing the lay jurors on whose shoulders verdicts rested.²⁰⁷ Likewise, in the Muslim world, concerns about killing or maiming the innocent in *hudud* cases lay in the forefront of the qadis' minds.²⁰⁸ To kill a fellow Muslim unjustly went against the teachings of the Prophet and would be punished in the hereafter, so qadis had to be sure they reached just verdicts. Yet, despite their shared moral concerns, Islamic and common law jurists diverged in how they responded to the moral dilemma of unjust bloodletting.

In Islamic law, the qadis addressed their moral concerns by developing the doubt canon as a genuine tool of punishment avoidance, with a positive duty to survey the evidence for doubt—even unreasonable doubt—before punishment could be imposed.²⁰⁹ Doubt was and is a serious obstacle to Islamic prosecutions meant to achieve certain truths.²¹⁰ In England, on the other hand, the common law doubt standard developed to encourage punishment.²¹¹ Specifically, the reasonable doubt standard gives jurors a moral scapegoat, allowing them to achieve a guilty verdict they can feel is

²⁰⁴ See *infra* Part IV.A.

²⁰⁵ See *infra* Part IV.B.

²⁰⁶ See *infra* Part IV.C.

²⁰⁷ See *supra* Part I.A.

²⁰⁸ See *supra* Part II.C.

²⁰⁹ See Sadiq Reza, *Due Process in Islamic Criminal Law*, 46 GEO. WASH. INT'L L. REV. 1, 21 (2013); see also *supra* note 87 and accompanying text.

²¹⁰ See Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 91, 98 (C. Bassiouni ed., 1982) (noting that the qadi's primary purpose is "discovering the truth").

²¹¹ See RABB, *supra* note 77, at 130-31. Indeed, when the British colonized the Ottoman Empire, they "regarded [Islamic] criminal law as too lenient." See Masud et al., *supra* note 120, at 37-38.

above moral repute, even with doubt.²¹² Contrary to their Islamic counterparts, English jurists turned to morality to support the undesired task of capital punishment.²¹³ This likely is why, in England, judges do not explain the exact degree of certainty jurors must achieve: ambiguity allows jurors to frame their own definition of “beyond a reasonable doubt” without second-guessing judicial professionals.²¹⁴

B. Doubt as a Tool of Political Coercion and Resistance

A comparison of these three systems also reveals the important role of politics in strengthening and widening the use of doubt in criminal trials, though in different and curious ways. For the common law, politics pushed for a doubt standard that would allow the politically loyal judicial branch to meet the demands of an increasingly powerful sovereign. In the Islamic world, the doubt canon strengthened when an independent judiciary resisted pressure from secular caliphs to punish harshly and more often. In Japan, the adoption of an evidentiary standard of proof followed political centralization and influence from Western states.

In common law England, political incentives pushed for a standard that lubricated the gears of criminal justice, corrupting the moral concerns of lay jurors to allow for decisions in the face of doubt. Political motivations help explain why the language of “beyond a reasonable doubt” is equivalent to similar epistemological thoughts on moral certainty.²¹⁵ If one does not have sufficient doubt to create moral concern, they can safely convict, which promotes the sovereign’s desire to institute law and order.²¹⁶ The doubt standard, therefore, developed as a tool of political persuasion, allowing judges loyal to their sovereign to implement an effective system of criminal justice despite jurors’ moral obstinacy.²¹⁷

²¹² See HO, *supra* note 1, at 175 (describing the determination of the common-law standard of proof as “a matter of social policy ... treated as a means of attaining desired ends”); see also *id.* at 176 (“[T]he need to secure a greater rate of convicting the guilty in order to maintain ‘law and order’ prompted Pollock CB to warn jurors not to be overly demanding of the evidence necessary to support a conviction.... ‘To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect.’” (quoting R v. Muller [1865] 4 F&F 383))

²¹³ See *supra* Part I.A; see also VOGEL, *supra* note 84, at 140 (noting that, unlike Western judges, “qāḍī ... perform[] an ethical role ... which requires a case-specific discretion to fulfill a higher justice”).

²¹⁴ See HO, *supra* note 1, at 181-82 (noting that “there is a strong judicial hostility to any attempt at probabilistic quantification of the standard”); see also R v. Thompson [2010] EWCA Crim 1623, [2011] 1 WLR 2000 (holding that trial judges should give only general guidance out of a desire to let juries deliberate in their own way).

²¹⁵ See *supra* Part I.C.

²¹⁶ See POTTER, *supra* note 18, at 197-200.

²¹⁷ See *id.*; see also *supra* Part I.A.

In the Islamic world, the doubt canon developed outside the reach of secular political will and, in fact, strengthened to resist it. Muslim jurists, unlike their English counterparts, were not part of the secular state and grew independently of it. They enjoyed (and still enjoy) immense legitimacy because of their claim to exclusive interpretative authority.²¹⁸ This interpretive independence allowed jurists to develop a doubt canon that pushed back against caliph's intent on monopolizing power through criminal punishment. Unlike their English counterparts in later centuries, therefore, Islamic jurists used doubt to work against, not with, executive power.²¹⁹

Japan's story offers still more insights. The fact that Japan did not develop or adopt a doubt standard until the state centralized power in the Meiji Restoration of 1868 indicates that society's willingness to afford defendants the benefit of criminal standards of proof is linked with the government's ability to provide law and order.²²⁰ Before the Meiji Restoration, Japanese criminal justice relied on swift action and harsh punishments because the state was weak and lacked an effective police force. The decentralized state could not provide a standard of proof that helped avoid unjust verdicts because punishment constituted one of the only ways to deter crime.²²¹ The state apparatus for law and order was nonexistent until the unification of the state in 1868, after which it could more safely afford to give defendants "the benefit of the doubt."²²²

The other systems support this explanation. In Islamic law, doubt could be afforded to the defendant early on because the caliphs were overexerting their police power;²²³ and, in England, the development of a doubt standard coincided with the strengthening of the central state and, in fact, resulted from the affording of greater rights to criminal defendants.²²⁴ It is no wonder that when Japan finally achieved a unified government, it looked west for models of effective state power, adopting a Western standard of proof in the

²¹⁸ See VOGEL, *supra* note 84, at 177 (describing the relationship between Islamic scholars and the king of Saudi Arabia, noting that scholars "frame [the king's ability to make laws] in a way that offers little competition to their fiqh legitimacy and is moreover conditioned on tests they control").

²¹⁹ See *id.*; see also *supra* Part II.C.

²²⁰ See HO, *supra* note 1, at 177 ("Only when a society is emancipated from fear—only when it can rely, in the main, on its organized protective forces—dare it give suspected persons the benefit of the doubt." (quoting Carleton Kemp Allen, *The Presumption of Innocence*, in *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 272 (1931))).

²²¹ See Haley, *supra* note 146, at 394 ("For much of Japanese history, the vast majority of the population has been subject less to formal legal controls than to informal community sanctions."); see also *supra* note 160.

²²² See *id.*

²²³ See *supra* Part II.A.

²²⁴ See *supra* Part I.A.

process.²²⁵

C. Trial Structures and the Treatment of Doubt

Finally, a comparison of these three systems suggest that the structure of the criminal trial is important to how a doubt standard is phrased and considered. First, in common law systems, adversarial presentation of evidence and a reliance on lay jurors to reach verdicts necessitated the development of a standard that could determine winners and losers. With conflicting evidence before them, jurors needed a standard that allowed them to make decisions in the face of some doubt, explaining why the common law's standard is framed probabilistically.²²⁶

Conversely, in Japan, the unique structure of its trials helps explain why it has treated its standard of proof as somewhere between the civil and common law traditions.²²⁷ Japanese trials mirror the largely judge-driven civil law, but also follow the common law in their adversarial presentation of the evidence and their more recent use of lay adjudicators in serious cases. The result is a standard of proof that allows judges to achieve a verdict on their own intuition, but that must also be explained to third parties who assist in the decision.²²⁸ This necessary enumeration likely is why Japan, unlike other civil law countries, "now seems to have nudged its civil [lawsuit] standard down from the level of beyond a reasonable doubt."²²⁹ When enumeration is required, judges must more thoughtfully consider what each standard should be, leading to distinctions between criminal and civil standards.²³⁰ Indeed, the same standard differentiation occurred in Quebec, another system with civil and common law influences.²³¹

In contrast, Islamic criminal trials are non-adversarial, depending on all parties to work with the qadi to find the appropriate law for the facts.²³² Qadis

²²⁵ See *supra* Part III.A.

²²⁶ See *supra* Part I.B.; see also CLERMONT, *supra* note 14, at 244 (observing also that "the common law has shown a broad tendency to be explanatory, as in its judicial opinions and its legal writings, so this general openness could instead be the root cause of the divergence from civilian law").

²²⁷ See *supra* Part III.B.

²²⁸ See CLERMONT, *supra* note 14, at 244. For the importance of defining a standard of proof for lay decisionmakers, see generally Atkin et al., *supra* note 62.

²²⁹ *Id.* at 239. Clermont argues that the standard for Japanese civil cases is one of "high probability." *Id.* at 239-40.

²³⁰ See *id.*

²³¹ See *id.* at 243-44 ("[In Quebec,] the common-law approach heavily infiltrated the prevailing French procedural system from 1785 onward.... Consequently, a preponderance of the evidence, or balance of probabilities, standard now governs [civil lawsuits].").

²³² See VOGEL, *supra* note 84, at 145-46, 162; see also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 188 (5th ed. 2014).

possess immense discretion in their decision making, and lay persons do not participate in reaching a verdict.²³³ Therefore, although phrased today in the language of “beyond a reasonable doubt,” the doubt canon historically has been an introspective legal doctrine, thought of in terms of the qadi’s own mercy and discretion and not a quantifiable threshold of certainty. In fact, Saudi appellate courts cannot reverse the qadi’s use of discretion to acquit.²³⁴ Thus, the qadi need not enumerate a specific standard for others to comprehend and use but may simply decide cases using his own conscience.²³⁵ This results in a doubt canon of which no one really considers the meaning, but that nonetheless represents a highly respected part of Islamic justice.²³⁶

CONCLUSION

Doubt permeates our day-to-day decisions in immeasurable ways, and legal decisions are no exception. A study of three major legal traditions demonstrates that doubt is ubiquitous: all three systems require proof beyond a reasonable doubt, even for intine convictions. But the exact manifestation of doubt proves unique to each tradition. For the common law, doubt serves as an enabler, allowing recalcitrant decisionmakers to achieve probabilistic conclusions even with doubt in their minds. In Islamic jurisdictions, doubt allows jurists to avoid the imposition of harsh punishments mandated by divine law, making doubt a genuine hurdle. And in Asia, Japan avoided questions of doubt for centuries before emerging from isolation to adopt its own unique structures that have resulted in a doubt standard in between two systems. No matter its manifestation, doubt in the common law, Islamic, and Japanese legal traditions is a creature of social policy, useful for whatever objectives the tradition holds dear.

* * *

²³³ See VOGEL, *supra* note 84, at 83, 131.

²³⁴ See *id.* at 100-01.

²³⁵ In fact, qadis rarely ever publish explanations of their decisions. See GLENN, *supra* note 232, at 188.

²³⁶ See *supra* Part II. This is not to say that common-law jurists have really defined what “reasonable doubt” means. In fact, it remains a mystery to most and is purposefully ambiguous, dependent on the circumstances of the case. That said, the reasonable-doubt standard is necessarily enumerated in common law countries, because a jury needs a standard to referee the evidence, whereas Islamic jurists may simply invoke doubt implicitly as a means to avoid punishment without necessary explanation. See HO, *supra* note 1, at 180-82.