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INNOCENT UNTIL PROVEN GUILTY: THE ORIGINS OF A LEGAL MAXIM

KENNETH PENNINGTON*

The maxim, 'Innocent until proven guilty', has had a good run in the twentieth century. The United Nations incorporated the principle in its Declaration of Human Rights in 1948 under article eleven, section one. The maxim also found a place in the European Convention for the Protection of Human Rights in 1953 [as article 6, section 2] and was incorporated into the United Nations International Covenant on Civil and Political Rights [as article 14, section 2]. This was a satisfying development for Americans because there are few maxims that have a greater resonance in Anglo-American, common law jurisprudence. The Anglo-American reverence for the maxim does pose an interesting conundrum: it cannot be found in the Magna Carta, the English Bill of Rights of 1689, the Declaration of Independence, or in the Constitution of the United States; and not, I might add, in the works of the great English jurists, Bracton, Coke, and Blackstone. Nevertheless, some scholars have claimed that the maxim has been firmly embedded in English jurisprudence since the earliest times.

Claims about the maxim's Anglo-Saxon roots are sometimes quite stirring and display a peculiarly British capacity to create intellectual Camelots—on their side of the Channel. An English scholar named Clementi gave a talk on the maxim at Göttingen, Germany in 1974.¹ He informed his continental audience about the maxim's unique Anglo-Saxon origins. The English devotion to the principle of 'Innocent until proven guilty' served, he said, to "emphasize a separation between England and its European mainland in matters of law." With a missionary's zeal, Clementi propounded the virtues of innocence while being guilty of explicating texts in which the maxim was completely absent.

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¹ D. Clementi, "The Anglo-Saxon Origins of the Principle 'Innocent until Proven Guilty'," *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (Göttingen: 1977) 68–76 at 69.

Clementi did not know that the maxim ‘Innocent until proven guilty’ cannot be found in any English court case or any jurisprudential treatise before ca. 1800—at least I have not yet found it in one. He also did not seem to know that the French, in spite of their legal system’s being based on rebarbative Roman jurisprudence, did include an article in the French Declaration of the Rights of Man and Citizen of 1789 stating that “every man is presumed innocent until declared guilty.”² These facts raise two questions that will be the subject of this essay: how did this piece of English pragmatism become a part of the Romanist French tradition and how and when did the maxim surface in the Anglo-American tradition?

Before we embark, a few remarks about what we are looking for. We are not looking for the general notion of a presumption or assumption of innocence. That notion is remarkably widespread in every legal system that I’ve looked at—except the most primitive. It may even be there too, but there were no jurists to express the idea. We are also not looking for the modern notion of a presumption of innocence in American law. That notion has been the subject of much debate that, as far as I can tell, now centers around the question: what does presumption of innocence mean in the context of the judicial process and how does it differ from reasonable doubt? We are looking for the maxim, “A person is presumed innocent until proven guilty,” and we are looking at the rights of due process that the maxim aphoristically expressed in earlier jurisprudence. By the end of my essay, I hope to have proven that the maxim and the norm it expressed were core principles of earlier jurisprudence, whose original meaning has been eviscerated, or at least radically changed, in modern American jurisprudence.³ As this paper will also attempt to demonstrate, the maxim began life as a norm that articulated a cluster of rights protecting litigants. In American law, it has become a notion, an assumption, with very little content.

² Déclaration des droits de l’Homme et du Citoyen. Décrétés par l’Assemblée Nationale dans les séances des 20, 21, 23, 24 et 26 août, 1789, acceptés par le Roi. Article 9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be indispensable, all harshness not essential to the securing of the prisoner’s person shall be severely repressed by law. (Tout homme étant présumé innocent jusqu’à ce qu’il ait été déclaré coupable, s’il est jugé indispensable de l’arrêter, toute rigueur qui ne serait pas nécessaire pour s’assurer de sa personne, doit être sévèrement réprimée par la loi.)

³ The literature is enormous and begins with James Bradley Thayer, “The Presumption of Innocence in Criminal Cases,” *The Yale Law Journal* 6 (1896–1897) 185–212; William F. Fox, Jr., “The ‘Presumption of Innocence’ as Constitutional Doctrine,” *Catholic University Law Review* 28 (1979) 253–269; William S. Laufer, “The Rhetoric of Innocence,” *Washington Law Review* 70 (1995) 329–421.

We can know exactly when the maxim formally entered American law: through a Supreme Court decision of 1894, *Coffin vs. U.S.* A lower court had refused to instruct the jury that “The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty”. The appeal to the Supreme Court was based in part on the lower court’s refusal.⁴

Although the lower court rejected the maxim, the judge did instruct the jury that “Before you can find any one of the defendants guilty you must be satisfied of his guilt as charged in some of the counts of the indictment beyond a reasonable doubt.” The lower court then instructed the jury at great length on the doctrine of reasonable doubt and its relationship to evidence. The Supreme Court saw its task as determining whether the lower court had violated the defendants’ rights by not instructing the jury on presumption of innocence and whether reasonable doubt was essentially the same as presumption of innocence.

Justice Edward Douglas White wrote the majority opinion.⁵ For a legal historian, his analysis is a dazzling display of legal history—even if most of it is wrong. To prove the antiquity of “Innocent until Proven Guilty” White cited a story from the late antique Roman historian, Ammianus Marcellinus, and texts from Justinian’s Digest and Code, Pope Gregory IX’s *Decretales*, a decretal of Pope Innocent III,⁶ and Giuseppe Mascardi’s *De probationibus*, all of these works, except for Ammianus, from the continental law.⁷ None of the texts, unfortunately, contained the maxim. Not one of them was from English law.

When White turned to the Anglo-American tradition, he found the principle clearly articulated in a number of nineteenth-century treatises on evidence and criminal law. The jurists White cited were William Wills, († 1860) *On Circumstantial Evidence*, Simon Greenleaf, *On the Law of Evidence* (1783–1853), and William Best, (1809–1869) *On Presumptions*. Of these jurists Best is the only one who explicitly states that

⁴ *Coffin vs. U.S.*, 156 U.S. 432, 432–463 (1894).

⁵ On Justice White see Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley-Los Angeles-Oxford: 1993) 157.

⁶ *Dudum* (X 2.23.16), which was in fact used by the creator of the maxim in the thirteenth century to justify it; see below n. 18.

⁷ Joseph Mascardi (d. 1588), *Josephi Mascardi . . . conclusiones probationum omnium, quae in vtroque foro versantur continens, iudicibus, aduocatis, caudicis, omnibus denique iuris pontificij, Cesareique professoribus utiles, practicabiles, ac necessarias . . .* 3 vols. (Venice: 1609); 4 vols. (Frankfurt: 1661, 1703, 1727–1731)

it is a “maxim of law, that every person must be presumed innocent until proven guilty.”

Justice White did try and trace the maxim in the English common law tradition but could only find one piece of evidence. He cited an anonymous author of an article in the *North American Review* of 1851 who stated that the maxim is first found in a treatise on evidence by an Irish jurist named Leonard MacNally. White concluded that even “if the principle had not yet found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from earliest time.”⁸

In *Coffin v. U.S.* Justice White ordained Leonard MacNally (1752–1820) as the midwife of “Innocent Until Proven Guilty’s” entrance into the American common law tradition.⁹ Who is he? He was born in Dublin in 1752. An ambitious sort, he was called to the Irish bar in 1776 and to the English bar in 1783. At the same time he began to write lyrics for musicals, some of which were performed in Covent Garden and other London theaters. In 1779 “The Apotheosis of Punch: A Satirical Masque” was performed, followed by thirteen other plays between 1779 and 1789. In anticipation of the pullulation of romantic medieval themes in the nineteenth century, he entitled one play “Robin Hood, or Sherwood Forest, a comic opera” and another “Richard Coeur de Lion: An Historical Romance.” Although light fare, sort of a bargain basement Gilbert and Sullivan, MacNally does merit a mention in *The Grove Dictionary of Music and Musicians*.¹⁰

The anonymous author of the *Dictionary of National Biography’s* article on MacNally alleged that he was “no great lawyer” but an “astute and eloquent advocate.”¹¹ His dismissal of MacNally’s legal skills does the Irish barrister a grave disservice. The DNB’s author did not realize that MacNally’s *The Rules of Evidence on Pleas of the Crown illustrated from Printed and Manuscript Trials and Cases*, published in Dublin and London 1802 was immediately transported across the Atlantic and printed in Philadelphia 1804 and reprinted in 1811. One cannot read

⁸ *Coffin vs. U.S.*, 156 U.S. 432, 455.

⁹ For a detailed discussion of its present meaning in American law, see William S. Laufer, “The Rhetoric of Innocence,” *Washington University Law Review* 70 (1995) 329–421.

¹⁰ “Robin Hood,” in *The Grove Dictionary of Music and Musicians* (New York: 1954) 7: 191.

¹¹ “MacNally, Leonard,” *Dictionary of National Biography* (1921–1922) 12: 687–688.

American treatises on evidence and presumption in the first half of the nineteenth century without stumbling over MacNally.

MacNally was particularly important for the development of rules governing evidence and procedure in criminal cases because he had represented a number of United Irishmen accused of treason. He quotes a large number of his own cases in his book. It is no fluke that treason led MacNally to consider the rules of evidence more carefully than previous writers. The cases that society has found most heinous have always been those in which the rules of fair and just procedure have come under attack.

The rules of procedure for cases of treason were still substantially different from the normal rules of criminal procedure in eighteenth-century Ireland. During MacNally's lifetime the same rules of due process enjoyed by English defendants were not extended to Irishmen defendants in treason trials. Although two statutes of King Edward VI and another of William III required two witnesses for any conviction of treason, this procedural nicety was not extended to Irishmen. MacNally emphasized the presumption of innocence for those accused of treason and justified applying the same rules of due process to them as to other defendants of criminal offences. His defense of Irish rights was fierce, and he argued vehemently for the rights of defendants, often using examples from cases in which he had participated. Although MacNally never, *pace The North American Review* and White, quoted our maxim, he came very close to stating the principle when he discussed the two witness rule for cases of treason by citing Cesare Beccaria.

In Beccaria's judgment, one witness is not sufficient; for whilst the accused denies what the other affirms, truth remains suspended, and the right that every one has to be believed innocent turns the balance in his favour.¹²

A century later Justice White may have used this passage from MacNally to plant the doctrine of the presumption of innocence firmly in American jurisprudence. Let me note an important caveat here: White does not give a specific citation, and from the wording of his opinion, he may not have even looked at MacNally's book.

MacNally's story does however have a darker side. After his death in 1820 the English press revealed that MacNally had played the role of a

¹² Leonard MacNally, "The Rules of Evidence on Pleas of the Crown" (London-Dublin: 1802) 19. Charles Louis de Secondat Montesquieu, *De l'esprit des lois* in *Oeuvres complètes*, ed. Daniel Oster (Paris: 1964) Book 12, chapter 3: 599.

double agent since at least 1794. While he was representing Irish revolutionaries as their defense attorney in court, he was betraying them to the government by passing on key information. He relayed all the details about the revolutionary activities that he received from his clients to the government prosecutors. From 1800 until his death he received 300*l.* a year for his trouble. Of this side of MacNally, Justice White knew nothing.¹³

One may ask, from where did MacNally get his principles? MacNally acknowledged Beccaria, and, indeed, Cesare did extol the presumption of innocence several times in his famous treatise, *Dei delitti e delle pene* (On crimes and punishments). He argued for always having two witnesses before one could be condemned for a criminal offence:

More than one witness is needed, because, so long as one party affirms and the other denies, nothing is certain and the right triumphs that every man has to be believed innocent.¹⁴

A few pages later, Beccaria repeated the same argument when, in the most passionate page of his tract, he assailed torture.¹⁵

either the crime is certain or it is not; if it is certain, then no other punishment is called for than what is established by law and other torments are superfluous because the criminal's confession is superfluous; if it is not certain, then according to the law, you ought not torment an innocent because such is a man whose crimes have not been proven.¹⁶

¹³ Bernard Porter, *Plots and Paranoia: A History of Political Espionage in Britain, 1790–1988* (London: 1989) 32–33 for a short account of MacNally's career. Porter misspells his name (McNally).

¹⁴ Cesare Beccaria, *On crimes and punishments*. Trans. Richard Davies. Ed. Richard Bellamy, and Virginia Cox. Cambridge Texts in the History of Political Thought. (Cambridge: 1995) chapter 13, 32. The Italian text reads: "Più d'un testimonio è necessario, perché fintanto che uno asserisce e l'altro nega niente v'è di certo e prevale il diritto che ciascuno ha d'essere creduto innocente," ed. Luigi Firpo (Milan: 1984) 56

¹⁵ F. Venturi, "Beccaria, Cesare," *Dizionario biografico degli Italiani* 7 (1965) 458–469, at 461: "Argomenti vecchi, derivanti in parte de Montesquieu, ed elementi nuovi, che sgorgavano dalla personalità stessa del Beccaria, confluivano in queste pagine, tra le più chiare e persuasive uscite della sua penna."

¹⁶ Cesare Beccaria, *On crimes and punishments*, translated by Richard Davies and edited by Richard Bellamy, with Virginia Cox and Richard Bellamy (Cambridge Texts in the History of Political Thought; Cambridge: 1995), chapter 16, 39 (I have corrected their translation). The Italian text reads: "o il delitto è certo o incerto; se certo, non gli conviene altra pena che la stabilita dalle leggi, ed inutili son i tormenti, perché inutile è la confessione del reo; se è incerto, e' non devesi tormentare un innocente, perché tale è secondo le leggi un uomo i di cui delitti non sono provati," ed. Luigi Firpo (Milan: 1984) 62.

MacNally relied on Cesare Beccaria to justify the presumption of innocence.¹⁷ But the story is much longer and more complicated than the obvious link that I have shown between Beccaria, MacNally, and Justice White. The right to the presumption of innocence had a long history that stretches back to the thirteenth century. It is to the jurisprudence of the *Ius commune* that I shall now turn in search of the birth of our maxim.

The *Ius commune* was the common law of Europe from the twelfth to the seventeenth centuries. It was formed by the fortuitous and contingent conjuncture of Roman law, canon law, and, later, feudal law in the schools and courts of medieval Europe. Its birth took place in an age when momentous changes in the practice of law were taking place. Law was evolving from unwritten customary usages to written customary and legislated law. Judicial procedure was in a state of great flux. Prior to the twelfth century the judicial ordeal was a pervasive mode of proof. During the course of the twelfth century, particularly in Southern Europe, the ordeal was replaced by the *ordo iudiciarius*, a mode of proof that was based on Roman law, but whose rules were established by the jurists of the *Ius commune*.¹⁸

The change from modes of proof based on the ordeal to a mode of proof borrowed from the procedural norms of Roman law was profoundly unsettling for twelfth-century society.¹⁹ Procedure is the central part of any legal system. A society's sense of justice is intimately linked to its modes of proof. As the *ordo iudiciarius* was imposed on Europe's

¹⁷ On Beccaria and eighteenth-century penal law, see Cesare Cantù, *Beccaria e il diritto penale* (Florence: 1862) and Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: 1973) especially 3–19, 110–143. Also Francesco Corpaci, *Ideologie e politica in Cesare Beccaria* (Milan: 1965).

¹⁸ Winfried Trusen, "Das Verbot der Gottesurteile und der Inquisitionsprozeß: Zum Wandel des Strafverfahrens unter dem Einfluß des gelehrten Rechts im Spätmittelalter," in *Sozialer Wandel im Mittelalter: Wahrnehmungsformen, Erklärungsmuster, Regelungsmechanismen*, ed. Jürgen Mietke and Klaus Schreiner (Sigmaringen: 1994) 235–247 and Mathias Schmoeckel, "Ein sonderbares Wunderwerk Gottes: Bemerkungen zum langsamen Rückgang der Ordale nach 1215," *Ius commune* 26 (1999) 123–164.

¹⁹ A short sketch of these developments can be found in K. Pennington, "Law, Procedure of, 1000–1500," *The Dictionary of the Middle Ages* 7 (New York 1986) 502–506 and Pennington "Law Criminal Procedure," *Dictionary of the Middle Ages, Supplement 1* (New York 2003) 309–320. See also Pennington, "Due Process, Community, and the Prince in the Evolution of the Ordo iudiciarius," *Rivista internazionale di diritto comune* 9 (1998) 9–47, Karl Blaine Shoemaker, "Criminal procedure in Medieval European Law: A Comparison between English and Roman-canonical Developments after the IV Lateran Council," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 85 (1999): 174–202 and Lotte Kéry, "Inquisitio—denunciatio—exceptio: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 87 (2001) 226–268.

courts by ecclesiastical and secular authorities, there is clear evidence that all strata of society had questions about its legitimacy.

Although founded on Roman law, the *ordo* was new. It takes a leap of our imaginations to understand the turmoil this change must have created. We might project this turmoil into our own lives if we could imagine how we would react if our traditional procedural system were suddenly replaced by an alien set of procedural norms. Jurists of the twelfth century needed to justify these radical changes of procedure. Quite surprisingly, they found their justification in the Old Testament and ingeniously traced the origins of the *ordo iudiciarius* to God's judgment of Adam and Eve in paradise. By doing so, they created a powerful myth justifying the *ordo* that retained its explanatory force until the seventeenth century.

The myth can give us insight into the workings of the twelfth-century juridical mind. Its originator was a jurist named Paucapalea. He was the first to link the *ordo iudiciarius* to Adam and Eve. Around 1150 he noted in his commentary on Gratian's *Decretum* that the *ordo* originated in paradise when Adam pleaded innocent to the Lord's accusation of wrong doing. In Genesis 3.9–12, the Lord burst into Paradise and demanded: Adam ubi es? One may note that for a Deity His question was not particularly omniscient. Adam responded to the Lord's accusation of illegal apple picking by complaining "My wife, whom You gave to me, gave <the apple> to me, and I ate it." God had, in other words entrapped Adam when he gave him a wife. Paucapalea's point is subtle but was not be lost on later jurists. Although God is omniscient, he too must summon defendants and hear their pleas. Paucapalea added another piece of evidence that the *ordo* arose from the Bible. When Moses decreed that the truth could be found in the testimony of two or three witnesses, he pronounced a basic rule of evidence and confirmed the antiquity of a system of procedure accepted by God himself (Deuteronomy 19.15). Most importantly for our story, the subtext of Paucapalea's commentary clearly implies that if God must summon litigants to defend themselves, mere humans must also summon them and presume that every defendant is innocent until proven guilty in court.²⁰

So, from the middle of the twelfth century, the jurists legitimated the *ordo* by placing its origins in the Bible.²¹ Without question this myth then justified the *ordo's* general adoption by ecclesiastical courts—and by

²⁰ See my discussion of this development in "Due Process, Community, and the Prince."

²¹ Richard Helmholz, "The Bible in the Service of Canon Law," *Chicago Kent Law Review* 70 (1995) 1557–1581; idem, *The Spirit of Classical Canon Law* (Athens, Georgia-London: 1996) passim.

some secular courts—in the second half of the twelfth century. Although the general principle of presumption of innocence was well established in the jurisprudence of the *Ius commune* by the beginning of the thirteenth century, that right was far from absolute. Notorious crimes provided the most clear infringement of the right. The jurists did not see immediately that if God must summon Adam to judgment, then logic inexorably dictated that every defendant must be summoned to trial. They did universally agree that when a crime was heinous and notorious a judge could render a decision against a defendant without a trial. In the middle of the thirteenth century, one of the most distinguished jurists of the age, Henricus of Segusio, summed up juristic thought when he declared that notorious crimes, especially those committed against the Church, needed no formal juridical examination.²²

Before the presumption of innocence could become an absolute right, one more crucial change had to occur. This change was brought about in large part by Paucapalea's argument that the *ordo iudiciarius* originated in the Bible. Before the middle of the thirteenth century jurists accepted the right of the prince or the judge to ignore the rules of the judicial process because they considered legal procedure to be a part of the civil law, that is positive law, and, therefore, completely under the prince's or judge's authority. Paucapalea and the canonists introduced a different story and a different paradigm. The inexorable logic of their argument resulted in the inevitable conclusion that, if the *ordo iudiciarius* can first be found in the Old Testament, and if God had to respect the rights of defendants, then the rules of procedure must transcend positive law.

The implications of Paucapalea's new paradigm evolved slowly in the jurisprudence of the thirteenth century. The Bible was, after all, the cornerstone of our human understanding of divine law, and, from Gratian on, the jurists equated divine law and natural law. Consequently, under the influence of Paucapalea, between 1250 and 1300 the jurists began to argue that the judicial process and the norms of procedure were not derived from civil law, but from natural law or the law of nations, the *Ius gentium*. Consequently, the fundamental rules of procedure could not be omitted by princes or judges. The right of a defendant to have his case heard in court was absolute, not contingent.

The jurists who first discussed this problem often referred to a gloss of Pope Innocent IV when they redefined the origins of "actiones."²³ In-

²² On the problem of notorious crimes, see Kenneth Pennington, *The Prince and the Law*, 229–230, 247–248, 251–252, 256–257, 264–266.

²³ The following discussion is based on my *Prince and the Law*, 146–160.

deed, although he does not quite meet the issue, Innocent was the first jurist to broach the question whether the prince has an absolute right to take an action away from a subject.

Later two civilians, Odofredus and Guido of Suzzara connected the right to own property with the right to obtain a remedy for a wrong. If property had been established by natural law, remedies for the recovery of property must also be protected by natural law. They stopped short, however, of arguing that actions derived from natural law.

Once the jurists decided that the norms of procedure were part of natural law, they quickly saw that essential rights of defendants could not be transgressed. The most sophisticated and complete summing up of juristic thinking about the rights of defendants in the late thirteenth and early fourteenth centuries is found in the work of a French canonist, Johannes Monachus who died in 1313. While glossing a decretal of Pope Boniface VIII (*Rem non novam*) he commented extensively on the rights of a defendant. He began by asking the question: could the pope, on the basis of this decretal, proceed against a person if he had not cited him? Johannes concluded that the pope was only above positive law, not natural law. Since a summons had been established by natural law, the pope could not omit it. He argued that no judge, even the pope, could come to a just decision unless the defendant was present in court. When a crime is notorious, the judge may proceed in a summary fashion in some parts of the process, but the summons and judgment must be observed. He argued that a summons to court (*citatio*) and a judgment (*sententia*) were integral parts of the judicial process because Genesis 3.9–12 proved that both were necessary. God had been bound to summon Adam; human judges must do the same. Then he formulated an expression of a defendant's right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (*item quilbet presumitur innocens nisi probetur nocens*).²⁴ This fact is a double blow to Anglophilic sensibilities: not only is the maxim not found in Anglo-Saxon source, it was not even expressed in English!

This then is the ultimate irony of the story: rather than a sturdy Anglo-Saxon, a cardinal of the Roman church, a Frenchman, a canonist, Johannes Monachus was the first European jurist to recognize the inexorable logic of God's judgment of Adam: God could not condemn Adam without a trial because even God must presume that Adam was innocent until proven guilty. Other canonists played with the idea of defendants'

²⁴ Citing Innocent III's decretal *Dudum* (X 2.23.16) to justify his assertion.

rights.²⁵ They coined a proverb that God must even give the devil his day in court. Johannes' commentary on *Rem non novam* eventually became the Ordinary Gloss of a late medieval collection of canon law known as the *Extravagantes communes*. This collection and its gloss circulated in hundreds of manuscripts and scores of printed editions until the seventeenth century.²⁶ So—the answer to our question, who first uttered the principle, Innocent until proven guilty—a perfect question for the legal edition of *Trivial Pursuit*—is the French canonist Johannes Monachus. Since his gloss was read by the jurists of the *Ius commune* to the time of Cesare Beccaria, it was a primary vehicle for transmitting the principle to later generations of jurists.

Roman law, canon law, the *Ius commune*: from these sources spring that great Anglo-Saxon principle: A person is presumed innocent until proven guilty. The question remains, however, how deeply did this doctrine inform the jurisprudence and court practice of late medieval and early modern Europe? In this essay I shall give only a brief outline of the problem and a rough sketch of the story's main features up to the time with which we began, the time of Beccaria and MacNally.

A glance at the standard accounts of procedure and law after the thirteenth century would seem to render the opinion risible that any conception of "innocent until proven guilty" existed before the eighteenth century in European jurisprudence. Inquisitorial courts searching out heresy seem the antithesis of due process and contrary to any conception of defendants' rights. Torture, secret accusations, and arbitrary procedural injustices seem the norm rather than the exception.²⁷ Some modern schol-

²⁵ Pennington, *Prince and the Law* 163–164.

²⁶ Johannes Monachus to Extravag. com. 2.3.1 (*Rem non novam*) v. *Non obstantibus aliquibus privilegiis*, London, BL Royal 10.E.i., fol. 214r, London, Lambeth Palace 13, fol. 363v–364r: "Et Gen. xviii. ubi factum erat notorium attamen Deus uoluit probare quam iudicare . . . Nec obstat extra. de accus. c. Euidencia <X 5.1.9>, nec ibi tollitur citatio nec sententia quia Gen. iii. probatur utrumque necessarium . . . Hinc est quod iudiciorum ordo et placitandi usus in paradiso videtur exordium habuisse. Nam Adam de inobedientia a Domino redargutus, quasi actori exceptionem obiiciens, relationem criminis in coniugem, immo in coniugis actorem convertit, dicens: Mulier quam mihi sociam dedisti me decept . . . Item quilibet presumitur innocens nisi probetur nocens, extra. de presum. c. Dudum <X 2.23.16>." Walter Ullmann was, as far as I know, the first modern historian to cite Johannes' gloss in "The Defence of the Accused in the Medieval Inquisition," *The Irish Ecclesiastical Record* 73 (1950) 481–489 at 486.

²⁷ On the role of torture in the judicial process see Mathias Schmoeckel, *Humanität und Staatsraison: Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter* (Norm und Struktur: Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit, 14; Cologne-Weimar-Vienna: Böhlau Verlag, 2000).

ars have argued that the courts felt an obligation to punish crimes, it was a matter of public utility, and that procedural short cuts to the “truth” like torture were means through which these courts fulfilled their obligations.

So the question is, how did a defendant’s right to a presumption of innocence survive in late medieval and early modern jurisprudence? It has been true in the past and remains true today that procedural rules are broken and rights violated most often when judges have faced crimes that strike society’s most sensitive nerves. The cases in which I have found that the presumption of innocence is discussed again and again are those that dealt with marginal groups, especially heretics, witches, and Jews.

Let me give a few examples. In 1398 or 1399, Salamon and his son Moyses, Jews living in Rimini, had been accused by several Christian women of having had sexual relations with them. The case was heard by a Franciscan inquisitor, Johannes de Pogiali. The case fell under the jurisdiction of the Inquisition because Salamon and Moyses had used heretical arguments to seduce the women. When they encountered virtuous resistance from the women, Salamon and Moyses told them that Christian women who fornicated with Jewish men did not sin. The women testified before the Inquisition that they capitulated to Salamon and Moyses only after having been convinced by their clever arguments.²⁸ We do not know the facts behind this case, only its outcome as reported in the papal court. Although the bare facts might make us think of this case as material for a Boccaccian farce, Salamon and Moyses did not think the accusation was amusing. The inquisitor’s summary of the

²⁸ *The Apostolic See and the Jew: Documents: 492–1404* (Studies and Texts, 94; Toronto 1991) 527–529, ASV, Reg. Vat. 316, fol. 226r–226v and Bologna, Bibl. univers. Cod. Lat. 317, Vol. 5.1, fol. 277r–280v. Published by C. Piana, *Cartularium Studii Bononiensis S. Francisci* (Analecta Franciscana 11; Assisi: 1970) 384ff. For another *consilium* treating a Jew’s allegation that fornication was not a sin, see Bologna, Collegio di Spagna, MS 123, fol. 382r–416r: “Quidam Iudeus firmiter credit et publice aserit quod cohire solutum cum soluta non est peccatum mortale.” This *consilium* was probably written between 1381 and 1387 by Guglielmo de Vallseca who was the chancellor to King Peter IV of Catalonia. See *I codici del Collegio di Spagna di Bologna*, ed. Domenico Maffei, Ennio Cortese, Antonio García y García et al. (Orbis Academicus: Saggi e documenti di storia delle università, 5; Milan: 1992) 400. On Muslim and Jewish miscegenation with Christian women, see David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (Princeton: 1996) 127–165. For other *consilia* dealing with Jewish defendants, see Diego Quaglioni, “Gli ebrei nei *consilia* del Quattrocento veneto,” *Consilia im späten Mittelalter: Zum historischen Aussagewert einer Quellengattung*, ed. Ingrid Baumgärtner (Studi, Schriftenreihe des Deutschen Studienzentrums in Venedig, 13; Sigmaringen: 1995) 189–204. See also Battista de’ Giudici, *Apologia Iudaeorum inuenticiva contra Platinam: Propaganda antiebraica e polemiche di curia durante il pontificato di Sisto IV (1471–1484)*, ed. Diego Quaglioni (Inedita, 1; Rome: 1987).

case is of great interest. He called witnesses before him, examined them, and took their oaths to tell the truth. In the end he did not find that the accusations against Salomon and Moyses were juridically and legitimately proven. It is not often that we find a judge justifying his decision in the Middle Ages. In this case, Johannes de Pogiali did. He examined the facts and concluded that "it was better to leave a crime unpunished than to condemn an innocent person."²⁹ Many will recognize in these words "Blackstone's ratio": "the law holds that it is better that ten guilty persons escape than one person suffer," that entered English law from the *Ius commune* through Fortescue.³⁰

Johannes had to choose between two conceptions of order: that crimes should be punished in the public interest or that defendants should be presumed innocent if proofs were insufficient, even in a delicate case where an outsider had violated more than just the public order.³¹ Johannes also had to choose between a standard of justice for Christians and a standard for Jews. When judges and jurists asked themselves that question in the fifteenth and sixteenth century, the theoretical answer was invariably the same: Jews had the same rights of due process as Christians. And if proofs failed, they were presumed innocent. To be sure, the theory did not always find its way into the courtroom, but the rules were repeated again and again in papal mandates sent to local judges and to inquisitorial courts. In 1469 Pope Paul II confirmed the petition of the Emperor Frederick III that absolved Christian judges, notaries, and scribes who participated in cases involving Jews from any wrongdoing. Some Christian priests had refused to absolve them from their sins unless they did penance for their roles in court aiding Jews.

²⁹ Ibid., 528: "non invenit contra ipsum Salomonem fore iuridice et legitime probatum, videlicet quod ipse talia verba protulerit aut alia supradicta commiserit vel fecerit, considerans fore melius facinus impunitum relinquere quam innocentem condemnare . . . declaravit dictum Salomonem de verborum predictorum prolatione et aliorum premissorum perpetracione fuisse et esse innocentem."

³⁰ Laufer, "Rhetoric of Innocence," 333–334 and n. 17.

³¹ Richard M. Fraher has argued in a series of articles that medieval procedure between 1200 and 1500 was saturated with the idea that the *Ius commune* dictated that it was in the public interest that crimes not remain unpunished. This conception of judicial order led to the introduction of torture and deposited the burden of proof on defendants. I think that the presumption of innocence played a greater role in theory and practice than Fraher would concede. See his articles "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei publicae interest ne crimina remaneant impunita,'" *University of Illinois Law Review* (1984) 577–595 and "Conviction according to Conscience: The Medieval Jurists' Debate concerning Judicial Discretion and the Law of Proof," *Law and History Review* 7 (1989) 23–88.

“Justice,” Pope Paul observed, “ought to be common to all, Christian or Jew.”³² Later popes issued decretals that specified in great detail the procedural protections that Jews must be given. A letter of Pope Sixtus IV in 1482 mandated that Jews should receive the names of their accusers, should be able to present legitimate exceptions, proofs, and defenses to the court, and, if these rights were violated, could appeal to Rome.³³ From the number of times the Roman curia repeated these admonitions over the next fifty years, theory and practice may not have always happily coincided.³⁴ Several sixteenth-century letters emphasized a Jew’s right to a defense, to have an advocate, and to receive money from supporters for a defense in heresy and apostasy trials.³⁵ As Pope Paul III declared in 1535, “no one should be deprived of a defense, which is established by the law of nature.”³⁶ The right to a defense, a lawyer, and the means to conduct a defense was an obvious extension of the rights enshrined by the maxim “Innocent until Proven Guilty.” By way of contrast, the common law did not recognize the right of a criminal defendant to counsel in treason trials until 1696.³⁷

The sixteenth century became a great age for criminal law and procedure in the *Ius commune*. Earlier jurists had written tracts on torture, evidence, heresy and witchcraft trials, but none had written a detailed tract on criminal procedure. From the thirteenth to fifteenth centuries, treatises on criminal procedure were, with only a few exceptions, short and

³² Shlomo Simonsohn, *The Apostolic See and the Jews: Documents: 1464–1521* Studies and Texts 99 (Toronto: 1990) 1163–1164 at 1164: “cum iustitia, que omnibus communis esse debet, ipsis Iudeis ministratur.”

³³ *Ibid.*, 1284–1287.

³⁴ *Ibid.*, 1287–1288; *The Apostolic See and the Jews: Documents: 1522–1538* Studies and Texts 104 (Toronto: 1990) 1693–1700 at 1696; *The Apostolic See and the Jews: Documents 1539–1545* Studies and Texts 105 (Toronto: 1990) 2297–2298.

³⁵ And the right to remain silent; see Richard H. Helmholz, “Origins of the Privilege against Self-incrimination: The Role of the European ‘*ius commune*,’” *New York University Law Review* 65 (1990) 962–990 and Henry Ansgar Kelly, “The Right to Remain Silent: Before and After Joan of Arc,” *Speculum* 68 (1993) 992–1026, now reprinted in *Inquisitions and Other Trial Procedures in the Medieval West* (Ashgate: 2001), with several other articles touching on the issues discussed in this essay.

³⁶ *Ibid.*, 1991: “nos, volentes nemini defensionis munus, quod de iure nature est, tolli . . .” See *ibid.*, 2078.

³⁷ Theodore F.T. Plucknett, *A Concise History of the Common Law* (4th Ed. London 1948) 410. Cf. James A. Brundage, *Medieval Canon Law* (London-New York: 1995) 149 n. 50. French jurisprudence continued to follow the dictates of the *Ius commune*: *Procez verbal des conférences tenues par ordre du roi, entre messieurs les commissaires du conseil et messieurs les députés du parlement de Paris*, reprinted in *Code Louis: Ordonnance criminelle, 1670* (Testi documenti per la storia del processo, edd. Nicola Picardi and

schematic.³⁸ During the sixteenth century, the jurists synthesized the jurisprudence of the *Ius commune*, and they wrote great tracts on the rights of criminal defendants. The names of these proceduralists are not well known: Giuseppe Mascardi, Giovanni Luigi Riccio, Giulio Claro, and Giacomo Menochio are not household names, even to legal historians. One of the great figures in this development was Prospero Farinacci who lived from 1544–1618. He was most likely educated in Perugia and quickly gained experience on both sides of the bench. In 1567 he became the general commissioner in the service of the Orsini of Bracciano; the next year he took up residence in Rome as a member of the papal camera. However, in 1570 he was imprisoned for an unknown crime. Legal problems hounded him for the rest of his life. He lost an eye in a fight, was stripped of his positions, and was even accused of sodomy.³⁹ In spite of his difficulties, Pope Clement VIII reinstated him to the papal court in 1596. Farinacci defended Beatrice Cenci who was accused of killing her father in the most famous criminal case of the time.⁴⁰ He began his most important work, *Praxis et theorica criminalis*, in 1581 and put the finishing touches on it by 1601.⁴¹

Alessandro Giuliani (Milan: 1996) 163: “ce conseil qu’on a acoûtumé de donner aux acusez n’est point un privilège acordé par les Ordonnances ni par les Loix que c’étoit une liberté aqoise par le droit naturel, qui est plus ancien que toutes les Loix humaines. Que le nature enseignoit à l’homme d’avoir recours aux lumieres des autres, quand il ne n’en avoit pas assez pour se conduire et d’emprunter du secours, quand il ne se sentoit pas assez fort pour se défendre. . . . Que si on vouloit comparer nôtre procédure criminelle à celle des Romains et des autres Nations, ou trouveroit qu’il n’y en voit point de si rigoureuse, que celle qu’on observe en France, particulièrement depuis l’Ordonnance de 1539.”

³⁸ Tancred of Bologna wrote one the first tracts dealing solely with criminal procedure ca. 1210–1215. See Richard M. Fraher, “Tancred’s ‘Summula de criminibus’: A New Text and a Key to the Ordo Iudiciarius,” *Bulletin of Medieval Canon Law* 9 (1979) 23–35, edited on pp. 29–35. The most complete discussion of criminal procedure during this period was the third part of Guilielmus Durantis’ *Speculum iuris* 2 vols. Basel 1574; reprinted (Aalen: 1975). Other influential tracts on criminal procedure can be found in volume 11 of *Tractatus universi iuris* (Venice: 1584).

³⁹ When Giuseppe Cesari painted Farinacci’s portrait ca. 1600 (Rome, Museo Nazionale di Castel Sant’ Angelo) he quite deliberately and obviously posed him to leave his left eye in the shadows.

⁴⁰ See *Beatrice Cenci: La storia, il mito*. ed. Mario Bevilacqua and Elisabetta Mori. Roma, Viella, 1999.

⁴¹ A. Mazzacane, “Farinacci, Prospero (1544–1618),” *Juristen: Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert*, ed. Michael Stolleis (Munich: 1995) 199–200; Niccolò Del Re, “Prospero Farinacci giureconsulto romano (1544–1618),” *Archivio della Società Romana di Storia Patria*, 3rd series 28 (1975) 135–220. Mazzacane writes that he completed it in 1614, but an edition of *Praxis et theoricae criminalis* was published in Venice: apud Georgium Variscum, 1603 (in fine 1601), which is described as

Farinacci's treatise bristles with the presumption of innocence. The issue arose in several different contexts. He insisted that the exception of innocence was privileged in law and could never be abolished by statute; if a statute would abolish a defendant's right to a defense, it should be interpreted as only being unjust or calumnious defenses.⁴² Even the pope could not take away the right of a defendant to prove his innocence, since that right was grounded in the law of nature.⁴³ Like other jurists who wrote on criminal procedure, Farinacci distinguished between presumptions of law and of men: a presumption of man was, for example, that in doubt, a man was presumed to be good.⁴⁴

Another great voice of reason in criminal procedure was Frederick von Spee (1591–1635). Spee was a jurist, Jesuit, poet—literary critics are still spilling ink on his most important poem, *Trutznachtigall*. Most importantly, he was a critic of intolerance and ignorance. As Beccaria would a century later, he condemned torture, the persecution of witches, and other crimes that enraged princes and the rabble. Unfortunately for him, Europe was not yet ready for his voice of reason. He was stripped of

the third edition, with additions made by the author to the first and second editions. See *Antichi testi giuridici (secoli XV–XVIII) dell'Istituto di Storia del Diritto Italiano*, ed. Giuliana Saponi (Milan: Università degli Studi di Milano, Pubblicazioni dell'Istituto di Storia del Diritto Italiano, 7: 1977) 1.242, no. 1162.

⁴² Prospero Farinacci, (Prosperus Farinacius), *Praxis et theoricæ criminalis libri duo in quinque titulos distributi* (Frankfurt: 1606) Liber I, tit. I, quaestio XI, p. 141, num 9: "Quarto urget quia exceptio innocentiae a iure priuilegata est, et taliter, ut numquam a statuto alias exceptiones tollente sublata censeatur, I. Quoniam, C. ad leg. Iul. de adult. Anan. in c. Si adversus . . . immo si statutum tollit reo defensionem, intelligitur de defensionibus iniustis et calumniosis, secus de iustis, et quae respiciunt illius innocentiam."

⁴³ *Ibid.*, 143–144, num. 15: "Et si tu subtilis diceres ergo Princeps isto casu <cases where the pope has judged someone contumacious> tollit exceptionem, et defensionem innocentiae? Qua tamen eum sit de iure naturae, nec a principe, nec a statuto tolli potest . . . Respondeo duobus modis. Primo, quod ex causa (sic) publicae utilitatis multa potest princeps contra generales iuris regulas, praesertim ne delicta remaneant impunita, ita in his terminis respondet Carer. d. num. 89 et 99 poret Matth. et Andr. in constitu. Paenam eorum, in i. notab. . . . Respondeo secundo, quod isto casu summus pontifex non prohibuit exceptionem innocentiae, sed illius admissionem sibi reservavit, cum dicit "Nisi habita desuper assignatura nostra speciali gratia" (Cited bull of Pius V, dated to the fifth year of his pontificate on p. 143). Advertat ergo iudex isto casu, ne sit velox ad exsequendum sententiam quia si reus offert innocentiam suam docere per contrarias probationes debet supersedere et principem consulere vel exspectare, quod pro parte rei adendum principem recurratur, isto praesertim casu, in quod prout infra dicitur, facilis esse debet idem princeps in admittendo reum ad defensiones, et si iudex aliter faceret, male faceret."

⁴⁴ *Ibid.* Lib. I, tit. V, p. 563 num. 94: "Praesumptio hominis . . . est quidam conceptus causatus in mente ab aliqua probabili coniectura . . . quod in dubio quilibet praesumitur bonus et non malus, c. Dudum, de praesum. et similia [citing Giuseppe Mascardi, *Con-*

his academic positions and condemned by his order after the publication of *Cautio criminalis*, his famous treatise on procedure in witchcraft trials. He died young at Trier while helping to treat soldiers infected by the plague of 1635.⁴⁵

“Must we assume that witches are guilty?” he asked in *Cautio criminalis*. “That’s a stupid question,” he answered.⁴⁶ His condemnation of torture was absolute. He took his arguments from Farinacci.⁴⁷ His rhetoric inspired Beccaria a century later.⁴⁸

Can a defendant who does not confess under torture be condemned? “I assume,” wrote Spee, “that no one can be condemned unless his guilt is certain; an innocent person ought not be killed. Everyone is presumed innocent, who is not known to be guilty.”⁴⁹

There is some irony in this part of the story too. Beccaria and Pietro Verri, Beccaria’s muse who wrote a significant tract on torture published long after *Dei delitti*,⁵⁰ probably borrowed Spee’s thought and adapted

clusiones probationum, Lib. I, q.10, num. 24 and 25]. See Sven K. Knebel, “Naturrecht, Folter, Selbstverzicht: Spees ‘Cautio Criminali’ vor dem Hintergrund der spätscholastischen Moralphilosophie,” *Die politische Theologie Friedrich von Spees*. (Munich: 1991) 155–157.

⁴⁵ Wilhelm Kosch, *Deutsches Literaturlexikon*, ed. Bruno Berger (Bern-Munich: 1963) 408–409; Karl Keller, *Friedrich Spee von Langenfeld (1591–1635): Seelsorger, Dichter, Humanist* (S.l. 1969); G. Richard Dimler, *Friedrich Spee’s Trutznachtigall*. German Studies in America, 13; (Bern-Frankfurt am Main: 1973) 11–13. On Spee see Schmoekkel, *Humanität und Staatsraison* 119–122.

⁴⁶ Friedrich von Spee (published anonymously), *Cautio criminalis seu De processibus contra sagas liber* (Rintelhii(Rinteln an der Weser): 1631) Dubium XIX, p. 101: “An de captis nomine Veneficii mox praesumendum sit eas necessario reas esse? Stulta quaestio videatur.” A modern edition was edited by Theo G.M. van Oorschot (Friedrich Spee, *Sämtliche Schriften*, 3; Tübingen-Basel 1992), including the pagination of the 1631 edition.

⁴⁷ *Ibid.*, 264, Dubium XXXIX, Ratio i. “Si convicta esset, torta non esset, est autem torta, non igitur convicta: Constat ex supra dictis et vide Farinacium q.38 n. 4.”

⁴⁸ *Ibid.*, 264–265: “Dubium XXXIX, Ratio ii. Quaero ex iudice quem in finem ream torserit? An, ut tortura paena delicti esset? An, ut, via ad veritatem? Contra jura est, ut tortura paena sit, et prorsus inauditum, nam cujus criminis erit paena? . . . Ratio iii. Quero item ex iudice an haec reae confessio necessaria ad condemnandum fuit, an non fuit? Si fuit, cur igitur sine ea nihilominus damnavit? Si non fuit, crudelitas est, quam morte puniendam seu confessam seu inconfessam destinaverat, tam gravibus torturis lacerasse, ne, quae unit tantum destinata morte erat, una morte morderetur.”

⁴⁹ *Ibid.*, 262–263: “Dubium XXXIX. An, quae nihil in torturis confessa est, damnari possit? Suppono damnari neminem posse nisi certo de eo constet culpam sustinere; neque enim innocens occidi debet. Innocens autem omnis praesumitur, qui nocens esse nescitur.”

⁵⁰ Pietro Verri (1728–1797), *Osservazioni sulla tortura* (Milan: 1804). Most recent edition: Pietro Verri, *Osservazioni sulla tortura* (Volte e anime, 3) (Milan: 1997).

his words when they wrote about torture.⁵¹ Yet Beccaria and Verri condemned Spee, Farinacci, and other jurists at the same time that they appropriated their ideas, accusing them of being soft on torture.⁵²

As Alessandro Manzoni eloquently pointed out, Verri overemphasized his contribution to the intellectual arguments that underpinned his condemnation of torture and de-emphasized the contribution of earlier jurists. As part of Manzoni's account of a Milanese *cause célèbre* in which the judges sent several innocent men to the rack with almost no evidence of their guilt, he demonstrated that Verri had seriously distorted the legal tradition.⁵³

From this evidence and from all we know of the practice of torture in their own time, one can undoubtedly conclude that the interpreters of criminal procedure left the theory and practice of torture much, but much, less barbarous than they found it. Of course it would be absurd to attribute this diminution of evil to one cause alone, but I think that among the many causes that it would be reasonable to count the repeated reproofs and warnings, renewed publicly, century after century, by jurists to whom it is certainly granted a definite authority over the practice of the courts.

Manzoni had extraordinary insight into the evolution of norms in European jurisprudence. He perceived extraordinarily well the complicated dialectic through which jurists argued with, borrowed from, and added to the thought of their predecessors and, in their works, spoke across the centuries to their successors. I might add, in this essay dedicated to the modern scholar who has done most to reintroduce the norms of the *Ius*

⁵¹ See the comparison of texts printed in the edition of Beccaria, ed. Luigi Firpo (Milan: 1984) 62 n. 1 and 63 n. 1.

⁵² Pietro Verri, *Osservazioni sulla tortura: E singolarmente sugli effetti che produsse all'occasione delle unzioni malefiche alle quali si attribui la pestilenza che devasto Milano l'anno 1630* (Milan: 1804). On Verri's and Beccaria's relationship to Spee, see Schmoeckel, *Humanität und Staatsraison* 582–585.

⁵³ Alessandro Manzoni, *Storia della colonna infame: Testo del 1840*, ed. Alberto Chiari and Fausto Ghisalberti (Verona: 1963) 702: "Da queste testimonianze, e da quello che sappiamo essere stata la tortura negli ultimi suoi tempi, si può francamente dedurre che i criminalisti interpreti la lasciarono molto, ma molto, men barbara di quello che l'avevan trovata. E certo sarebbe assurdo l'attribuire a una sola causa una tal diminuzione di male; ma, tra le molte, me par che sarebbe anche cosa poco ragionevole il non contare il biasimo e le ammonizioni ripetute e rinnovare pubblicamente, di secolo in secolo, da quelli ai quali pure s'attribuisce un'autorità di fatto sulla practica de' tribunali." Manzoni's father was probably Giovanni Verri, the brother of Pietro; and his mother was Giulia Beccaria, the daughter of Cesare. See Alessandro Manzoni, *Storia della colonna infame: Testo definitivo e prima redazione*, ed. Renzo Negri (Milan: 1974) 5.

commune into contemporary scholarship, that the jurists and Manzoni have had a worthy successor.

We have come full circle: from Justice White to MacNally to Beccaria to Johannes Monachus and back to Beccaria. The evolution of the norm that every person is presumed innocent until proven guilty is a case study of the long process through which principles of law emerge, slowly, hesitantly, sometimes painfully, in jurisprudence. The maxim, 'innocent until proven guilty' was born in the late thirteenth century, preserved in the universal jurisprudence of the *Ius commune*, employed in the defense of marginalized defendants, Jews, heretics, and witches, in the early modern period, and finally deployed as a powerful argument against torture in the sixteenth, seventeenth, and eighteenth centuries. By this last route it entered the jurisprudence of the common law through a thoroughly disreputable Irishman's having read a book on criminal punishments by an Italian. But because it was a transplant from the *Ius commune*, it entered the world of American law in a very different form. It no longer was a maxim that signified the bundle of rights that was due to every defendant. Because American law did not inherit the jurisprudence of the *Ius commune* directly, its broader meanings were lost during the transplant. Consequently, the focus in American has been entirely on its meaning for the presenting of evidence and for procedural rules in the courtroom. In the jurisprudence of the *Ius commune*, the maxim summarized the procedural rights that every human being should have no matter what the person's status, religion, or citizenship. The maxim protected defendants from being coerced to give testimony and to incriminate themselves. It granted them the absolute right to be summoned, to have their case heard in an open court, to have legal counsel, to have their sentence pronounced publicly, and to present evidence in their defense. A jurist of the *Ius commune* would be puzzled that today we can embrace the maxim 'a person is innocent until proven guilty' and still deny human beings a hearing under certain circumstances. For them the maxim meant 'no one, absolutely no one, can be denied a trial under any circumstances.' And that everyone, absolutely everyone, had the right to conduct a vigorous, thorough defense.

In a world that is choked by the narrow horizons of legal systems imprisoned by national sovereignties, this story is the best argument I know for returning to a conception of law that is broad, comparative, and open to the jurisprudence of other legal systems.