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## FROM PREMODERN CHRISTIANITY TO THE POSTMODERN JURY

Ian P. Farrell\*

JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (YALE UNIVERSITY PRESS 2016). PP. 288. PAPERBACK \$28.00.

DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* (UNIVERSITY PRESS OF KANSAS 2016). PP. 478. HARDCOVER \$39.95.

### INTRODUCTION

Professor Whitman, a legal historian at Yale Law School, and Professor Hale, a political science professor at Boston College have provided us with two accounts of the history of the jury as an institution. Whitman's *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* and Hale's *The Jury in America: Triumph and Decline* have several features in common. Both books are primarily historical expositions of daunting breadth. Hale's history traces the institution of the jury (both criminal and civil) from around the Norman Conquest of England in 1066 to present-day America. Whitman's work is even more ambitious. While Whitman's main focus is on the criminal jury, he addresses not only the common law jury but also the Christian theology, the medieval ordeal, and the birth of the Continental legal system—spanning the period from the birth of Christianity through the eighteenth century.

Both books also emphasize the different institutional roles the jury has played in addition to being a finder of fact in legal disputes. Hale states at the outset that his aim is “to examine the jury as Tocqueville saw it: as a political institution.”<sup>1</sup> Whitman emphasizes the forgotten function of the jury, and especially of the reasonable doubt standard in criminal trials, as a procedure for providing “moral comfort” rather than a procedure for finding factual proof.<sup>2</sup>

The two books differ substantially, however, in the role that history plays for each author. Hale, for the most part, takes his history as he finds it. That is, he generally accepts

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1. DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE*, at xiii (2016).

2. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 18 (2016).

the conventional historical understandings of the jury's development, and uses that as a platform on which to build a normative position. Specifically, Hale argues that the quality of the jury as an institution has declined since the reforms in the middle of the twentieth century. Whitman, on the other hand, does not accept the conventional interpretation of the historical purpose of the jury and reasonable doubt. Indeed, Whitman's thesis is precisely that the conventional account is wrong. The conventional understanding is that the purpose of the reasonable doubt standard is to protect the accused from the harsh consequences of criminal punishment. Whitman argues for a contrary view that sounds strange to the modern ear: that the reasonable doubt standard was actually developed to protect *the jurors* from the moral and spiritual dangers of imposing criminal punishment on the accused.<sup>3</sup>

As counterintuitive as Whitman's claim may seem at first blush, he builds a compelling case and ultimately succeeded in convincing this reader, at least, of the accuracy of his account. Indeed, *The Origins of Reasonable Doubt* is a triumph of legal history and a genuine delight to read. Whitman's writing is eloquent, articulate, and learned. He has an eye for detail and is masterful in weaving these details into a logically structured argument of impressive coherence.

While *The Jury in America* does not reach the same impressive heights as *The Origins of Reasonable Doubt*, it is nonetheless a valuable addition to scholarship on the jury. Hale cannot match Whitman's gracefully erudite prose, but the same can be said of most academic writing (including, I must grudgingly admit, this book review). But the major shortcoming of *The Jury in America*, and the reason I was ultimately dissatisfied with the book, is the author's normative claim. Hale argues that the jury immediately prior to the twentieth century reforms—including removal of the “key man” system—was superior to the “postmodern” representative jury that replaced it. This argument fails on many levels, and I shall dedicate a substantial portion of this book review to explaining why Hale is profoundly wrong about the purported failings of the representative jury.

The book review proceeds as follows. In Part I, I summarize Whitman's comprehensive and detailed argument that the historical purpose of the criminal jury and reasonable doubt standard was to protect the jurors from moral danger. In Part II, I present in a briefer summary Hale's book, and then critique his central normative claim, arguing inter alia that Hale fails to appreciate the importance of having a representative jury to both its fact-finding and political functions.

#### I. THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL

As Whitman notes, “[i]t would be hard to name a doctrine more familiar, or more basic to the American sense of justice,” than the requirement of proof beyond a reasonable doubt in criminal cases.<sup>4</sup> Yet this “majestic” phrase contains a “troubling mystery:”<sup>5</sup> we do not really know what it means.<sup>6</sup> But the mystery goes even deeper than this, according

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3. *Id.* at 3.

4. *Id.* at 1.

5. *Id.*

6. *Id.* at 2 (“The [Supreme] Court has simply abandoned any effort of its own to define the standard.”). See *Victor v. Nebraska*, 511 U.S. 1, 23–28 (1994).

to Whitman: we do not even know what it is *for*. As any first-year law student will tell you,<sup>7</sup> according to conventional wisdom “the reasonable doubt rule [is] a rule of factual proof.”<sup>8</sup> The standard of proof is higher in criminal than in civil cases “to make it more difficult for jurors to convict.”<sup>9</sup> This explanation is quite mistaken, Whitman argues. In fact, “[i]t was designed to make conviction *easier*, by assuring jurors that their souls were safe if they voted to condemn the accused.”<sup>10</sup> Whitman explains:

The reasonable doubt rule, this book aims to show, is the last vestige of a vanished premodern Christian world. At its origins, this familiar rule was not intended to perform the function we ask it to perform today: It was not primarily intended to protect the accused. Instead, it had a significantly different purpose. Strange as it may sound, the reasonable doubt formula was originally concerned with protecting the souls of *the jurors* against damnation.<sup>11</sup>

In order to fully “understand our contemporary law, we must leave modern legal doctrine behind and dive deep into the waters of medieval Christian moral theology.”<sup>12</sup> Whitman takes us with him on this dive, and the waters are deep indeed. Whitman begins a thousand years before the birth of the English jury, pointing out that from its very beginnings, premodern Christendom was “an age haunted, as our world no longer is, by the fear of damnation.”<sup>13</sup> One of the ways one’s soul could be damned was by convicting a person of a crime.<sup>14</sup> Early Christians took their *Matthew* seriously: “Judge not, lest ye be judged!”<sup>15</sup> If you passed verdict on another who was then sentenced to a “blood punishment”<sup>16</sup>—that is, death or disfigurement—then your soul was in genuine peril.<sup>17</sup> Avoiding this risk of damnation—*not* determining the factual guilt or innocence of the accused—was the primary goal of premodern criminal procedure.<sup>18</sup> In other words, the procedures that evolved into juries and reasonable doubt were created to provide “moral comfort,” not “factual proof.”<sup>19</sup>

This goal was achieved through various “*responsibility shifting* procedures,” mechanisms by which the judge could deny moral responsibility for the punishment imposed.<sup>20</sup> The most striking early examples of responsibility shifting procedures were the infamous judicial ordeal and trial by battle, which were commonly used in all European societies by A.D. 1000—that is, the period immediately preceding the birth of the English

7. See, e.g., JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 16 (6th ed. 2008) (“Thus, the normal rule that the prosecution must prove its case beyond a reasonable doubt implies a social or political or moral judgment that we are far more willing to tolerate erroneous acquittals than erroneous convictions.”).

8. WHITMAN, *supra* note 2, at 5.

9. *Id.* at 4.

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. WHITMAN, *supra* note 2, at 3.

14. *Id.* at 10.

15. *Matthew* 7:1 (King James).

16. WHITMAN, *supra* note 2, at 3.

17. *Id.* at 11.

18. *Id.* at 17.

19. *Id.* at 18.

20. *Id.* at 16.

jury.<sup>21</sup> During this time, there was little need for a fact-finding mechanism. Medieval peasant villages were very small<sup>22</sup> and so “there were plenty of cases in which there was no dispute about the facts whatsoever.”<sup>23</sup> But thanks to the teachings of leading Christian theologians such as Saint Ambrose, Saint Augustine, and Saint Jerome, the fear of damning their souls by passing judgment on another still weighed heavily on all Christians.<sup>24</sup> As a result, the feudal lords “simply could not induce humans to speak honestly about what they had seen or heard.”<sup>25</sup> They therefore turned to God to pass judgment, in the form of the judicial ordeal.<sup>26</sup> Whitman describes the ordeal as follows:

The most common forms used in Europe were the ordeal of the hot iron, by which an accused person was compelled to grasp a red-hot iron in his bare hand; and the ordeal of the cold water, by which the accused, naked and bound, was lowered into a pit of water. . . . These frightening proceedings were understood to be “judgments of God,” efforts to induce God to decide the case by giving his “divine testimony.”<sup>27</sup>

Because these judgments were passed by God and not by the judge who oversaw the proceedings, the judge’s soul was shielded from spiritual harm. However, the use of ordeals and trial by battle declined steadily over the period from 1000–1250.<sup>28</sup> The Church preached against their use, as they tempted God to perform a miracle, and in 1215 emphatically banned clerics (who were also often judges) from being involved in these so-called “Judgments of Blood.”<sup>29</sup> Once the ban on clerical involvement sounded the death knell for the judicial ordeal and trial by battle, European rulers had to search for other forms of responsibility shifting mechanisms in order to shield their souls.<sup>30</sup> This search took very different paths on continental Europe and in England, culminating in the creation of “two sophisticated legal systems . . . that are in use in every part of the developed world today.”<sup>31</sup> These are, of course, “the common law of England, and the civil law of the Continent.”<sup>32</sup>

On the Continent, judges found their answer in the teachings of Saint Thomas Aquinas (among others)<sup>33</sup> who argued that if a judge sentences someone based solely on the evidence presented, and scrupulously follows the appropriate procedures, “it is not the judge” who passes judgment; rather, it is the law itself, along with “those who declared him to be guilty.”<sup>34</sup> The Continental judge therefore took refuge behind “rigorous

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21. WHITMAN, *supra* note 2, at 53.

22. *Id.* at 73–74.

23. *Id.* at 56.

24. *See id.* at 35–49.

25. *Id.* at 57.

26. WHITMAN, *supra* note 2, at 60.

27. *Id.* at 53.

28. *Id.* at 58.

29. *Id.* at 48 (“That pronouncement was the canon known as ‘Judgments of Blood,’ the eighteenth canon of the Fourth Lateran Council of 1215. This was the canon that preached the abolition of the judicial ordeal.”).

30. WHITMAN, *supra* note 2, at 90.

31. *Id.* at 52.

32. *Id.*

33. *See id.* at 92–95.

34. *Id.* at 92.

procedure”<sup>35</sup> and steadfastly refused to rely on any “private knowledge”—that is, facts the judge was aware of but that were not part of the evidence.<sup>36</sup> In other words, “[s]o long as you do not use your private knowledge, it is the law that kills him, and not you.”<sup>37</sup> Hence the infamously rigid, bureaucratic inquisitorial system was born.

In England, judges found a very different mechanism for avoiding passing judgment and thereby shielding their souls from damnation: they passed the buck to the jury. Whitman explains that the “early English efforts to compel testimony and accusation culminated in the creation of jury trial: early English jurors were indeed nothing other than accusing witnesses, who were legally compelled to give their testimony under oath.”<sup>38</sup> But jurors were more than accusing witnesses; they were also required to pass judgment:

With the abolition of the ordeal, jurors were obliged, at least in principle, not only to serve as witnesses but also to render the general verdict of “guilty.” This meant that thirteenth-century jurors effectively mixed the roles of witness and judge, which put them in a position that had been vigorously condemned by Christian moral theology.<sup>39</sup>

In other words, “English law spared the judge moral responsibility.”<sup>40</sup> But in doing so, “English law put all of the moral burden on the witness and the accuser—which is to say, in effect, that it put all the moral burden on the jury.”<sup>41</sup> This left the poor English juror in a perilous spiritual predicament. And according to Whitman, “[h]istorians have not grasped the gravity of the moral challenge faced by jurors, and as a consequence they have not grasped the original sense of the reasonable doubt rule.”<sup>42</sup> Jurors continued to be in moral peril over the centuries of English common law development, because contrary to the views of most historians,<sup>43</sup> “jurors were still expected to make use of their private knowledge of the case, at least occasionally.”<sup>44</sup> This meant that they continued to mix the roles of witness and judge, and thereby remained in moral peril.<sup>45</sup> As a consequence, many authors of this period “saw the moral drama of jury trial as a struggle over the ‘burthen’ of the responsibility for judgment—a struggle in which the judges had the upper hand.”<sup>46</sup>

One of the principle points of contention was around the jury’s ability to render special verdicts. As Whitman explains, “[t]he common law distinguishes between the ‘general’ verdict—verdicts of ‘guilty’ or ‘not guilty’—and ‘special’ verdicts, by which the jury simply makes certain findings without making an ultimate determination of guilt or innocence.”<sup>47</sup> The ability of jurors to render special verdicts protected the souls of jurors, since they were not pronouncing on guilt. According to Whitman, “during the Middle Ages

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35. WHITMAN, *supra* note 2, at 94.

36. *Id.* at 107–09.

37. *Id.* at 112.

38. *Id.* at 128.

39. *Id.*

40. WHITMAN, *supra* note 2, at 129.

41. *Id.*

42. *Id.* at 150.

43. *Id.* at 152.

44. *Id.* at 151.

45. WHITMAN, *supra* note 2, at 151.

46. *Id.* at 149.

47. *Id.* at 155.

criminal jurors were not yet rigorously compelled to enter general verdicts in the morally fraught business of inflicting blood punishments.”<sup>48</sup> But over time, the insistence that criminal jurors enter general verdicts increased. “By the seventeenth and eighteenth centuries, this resulted in a kind of moral crisis of jury trial—a moral crisis that produced the reasonable doubt standard.”<sup>49</sup>

In the sixteenth and early seventeenth centuries, “the English Crown worked hard to diminish the right of jurors to resist giving judgments.”<sup>50</sup> The Protestant jurors of this period continued to resist passing judgment, according to Whitman, for the same reasons as their medieval Catholic forebears. Whitman supports this claim by referring to “the literature of ‘cases of conscience’” that was widely read and well understood at the time. As Whitman explains, “[t]he cases of conscience literature is the Protestant, and especially Calvinist, repository of the law of conscience whose history since the twelfth century [we] have traced.”<sup>51</sup> Despite the emergence of science and philosophy, “[t]he prevailing conception of the trial, and of the jury’s role, still revolved around the moral responsibility for judgment. When it came to justice, the old untransformed theology of blood was still the order of the day.”<sup>52</sup>

Whitman insists that it is “only by reading the sections on judging, in the cases of conscience literature that we can understand the seminal developments of the late seventeenth century and after.”<sup>53</sup> Among the most prominent of these developments were “the great jury cases of the later seventeenth century, Wagstaff’s Case and Bushel’s Case.”<sup>54</sup> Both cases arose out of the prosecution of Quakers under the Conventicles Act of 1664, by which “the Crown attempted to forbid gatherings that might foster political or religious sedition.”<sup>55</sup> As pamphleteers of the time insisted, echoing the cases of conscience, “jurors who convicted accused persons under the Conventicles Act did so at the cost of their own salvation.”<sup>56</sup> Consequently, “jurors sought to deliver ‘not guilty’ verdicts”—despite no dispute about the underlying facts—and were consequently fined by the Crown.<sup>57</sup> Wagstaff’s Case and Bushel’s Case both addressed the Crown’s attempts to “discipline recalcitrant jurors.” In Wagstaff’s Case in 1665, “the decision made it clear that King’s Bench could make use of its well-established authority to fine jurors who refused to enter guilty verdicts as directed.”<sup>58</sup>

Five years later, however, in the famous prosecution of William Penn, the jurors resisted the severe pressures of the Crown and again rendered a verdict of “not guilty.”<sup>59</sup> One of the jurors, Edward Bushel, was imprisoned and brought a writ of habeas corpus.<sup>60</sup>

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48. *Id.* at 153.

49. *Id.*

50. WHITMAN, *supra* note 2, at 161.

51. *Id.* at 163.

52. *Id.* at 166.

53. *Id.* at 167.

54. *Id.* at 161.

55. WHITMAN, *supra* note 2, at 173.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 176.

60. WHITMAN, *supra* note 2, at 176.

The Chief Justice of King's Bench granted the writ and freed Bushel "in a celebrated decision that definitively established that 'a juror cannot be fined for a verdict given according to his conscience.'"<sup>61</sup> Among other things, this established the power that we now refer to as jury nullification. But for Whitman's purposes, what mattered most was the rationale for the Chief Justice's decision: "it was founded on the ground, very strange to modern readers, that jurors might use private knowledge."<sup>62</sup> To put it another way, "[b]ecause the jury mixed its fact-finding—partly on the basis of private knowledge—in its general verdicts, it could not be fined or imprisoned."<sup>63</sup> To do so would be to unconscionably coerce a juror into "putting his own salvation at risk."<sup>64</sup>

The prohibition on forcing jurors to give general verdicts created a serious problem for the Crown, which of course wanted to enforce its laws and have guilty people convicted. This consequently caused a dilemma to the Englishman who took his public duty seriously, since "good Christians must serve."<sup>65</sup> According to Whitman, "it was the resulting tensions that produced the reasonable doubt formula at the end of the eighteenth century: 'Reasonable doubt' emerged as a formula intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty."<sup>66</sup>

Moreover, the terms of this formula were found in the same theology that led jurors to resist passing judgment in the first place. For the premodern Christian theology of blood judgments had always had a strand dealing with different degrees of doubt. In the hands of the English Protestants, the degrees of doubt—and the difference between genuine "doubts" and mere "scruples"—turned on the application of *reason*:

[T]he eighteenth century moralists continued to insist on the old provisos. Christians were to stay upon the safer path, which meant that they were to listen to their doubts. But this was not to be taken too far. . . . [A] *doubting* conscience was not to be confused with a *scrupulous* conscience. Doubts were legitimate and had to be obeyed; scruples were foolish and had to be ignored. In particular, the moralists held, the good Protestant was always to use his "reason," wherever possible, in order to remove his doubts.<sup>67</sup>

In other words, "doubts were . . . subject to a test of reason."<sup>68</sup> One did not commit a mortal sin if he conscientiously considered the evidence and made a decision based on reason. "In the end, a reasoned decision would leave the soul of the Christian judge [or juror] safe."<sup>69</sup>

And so we arrive at last to the standard of "beyond a reasonable doubt," justified not because it protects the accused from being convicted, but because it protects the soul of the Christian juror from damnation. As Whitman says, "the eighteenth century theology

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61. *Id.*

62. *Id.*

63. *Id.* at 177.

64. *Id.* at 179.

65. WHITMAN, *supra* note 2, at 190. Whitman explains, "So it was that the fundamental dilemma of the late seventeenth century hung on, opposing the safe conscience to the claims of public duty." *Id.*

66. *Id.* at 186.

67. *Id.* at 190.

68. *Id.*

69. *Id.* at 191.



of reasonable doubt was not designed with the problems of factual uncertainty in mind at all. It was designed to comfort, coax, and prod anxious and reluctant Christians.”<sup>70</sup> The modern American justice system retains this concept of reasonable doubt, but for a very different function:

[T]he formulation that emerged in the eighteenth century—“beyond a reasonable doubt”—is still alive in American law today. Indeed, the proposition that guilt must be proven beyond a reasonable doubt has become a pillar of our secular legal system. But we no longer understand it as a principle intended to soothe the anxieties of Christians who fear the responsibility of judgment. Instead, we treat beyond a reasonable doubt as a fact-finding principle, as a heuristic formula that can help guide the individual juror in the effort to achieve sufficient certainty about uncertain facts.<sup>71</sup>

This disconnect between the origin and design of the reasonable doubt standard, on the one hand, and its modern function, on the other, provides answers to contemporary questions about the criminal jury. For example, it helps explain why it is so difficult for judges to define and jurors to understand. The answer to the question of just how much factual doubt is reasonable remains elusive precisely because the reasonable doubt standard was not originally about *factual doubt* at all. The original purpose of the jury trial also explains other aspects of criminal trials, such as the requirement of jury unanimity. The unanimity rule did not arise as a fact-finding rule or fact-certainty rule, but as a moral comfort rule: “it allow[ed] the twelve to share the heavy moral responsibility for judgment, and therefore to diffuse it among themselves.”<sup>72</sup>

## II. THE JURY IN AMERICA: TRIUMPH AND DECLINE

Like Whitman, Hale traces the development of the jury over a substantial period, from about the time of the Norman Conquest in the eleventh century to the present day. And like Whitman, Hale also emphasizes that the jury’s role was not limited to fact-finding. As Hale points out, the jury is a *political* as well as a judicial institution.

Hale describes several aspects of the jury as a political institution. The jury allowed the “common people” to participate in the processes of government; it was the “lower house of the judiciary,” the “people’s voice in the courts.”<sup>73</sup> This was “the best means within our knowledge of keeping the administration of justice in tune with the community,”<sup>74</sup> as well as aiding in maintaining community acceptance of the law.

Even though getting the correct verdict was the most important goal of the courts, “of almost equal importance” was ensuring that justice was done in a way that was fair and that satisfied the defeated parties and the community as a whole, especially

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70. WHITMAN, *supra* note 2, at 206.

71. *Id.* at 202.

72. *Id.* at 204.

73. HALE, *supra* note 1, at 76, 376, 383.

74. *Id.* at 189. Hale notes several historical examples of juries refusing to apply the law, and thereby affecting legal change. These include forcing the English Parliament to change the laws of homicide, and effectively ending the death penalty for adultery in Massachusetts, and later for all crimes in Michigan and Wisconsin. *Id.* at 16–17, 56, 115.

in cases that divided the community's sentiments.<sup>75</sup>

The jury therefore empowered citizens; "ordinary citizens could stand against judges, prosecutors, and even the monarch himself."<sup>76</sup> From its earliest development, the jury trial was understood as "a check on royal power" and other forms of tyranny.<sup>77</sup> In its American incarnation, according to Hale, the jury trial also served as a source of political *education*, providing those who served with a model of deliberative decision-making.<sup>78</sup> Hale cites studies showing citizens who serve on juries "become more generally engaged in public affairs."<sup>79</sup> In each of these ways, jury trials "make citizens *powerful*."<sup>80</sup>

Hale recounts the important role the institution of the jury has played in American history, such as the part it played in the lead-up to the American Revolution<sup>81</sup> and the debates about the U.S. Constitution and the Bill of Rights.<sup>82</sup> Hale also describes the many important changes the jury trial has undergone throughout its history on either side of the Atlantic, but his true passion is for one particular change: what he refers to as the shift from the "modern jury" to the "postmodern jury."

According to Hale the jury in America reached its acme, its triumph, prior to the jury reforms of the mid-twentieth century, before the "invention" of the representative jury.<sup>83</sup> The modern conception of the jury was still "that jury service called for qualities of character and judgment that exceeded those required for voting."<sup>84</sup> Those who served on the jury should be "above average."<sup>85</sup> In the first half of the twentieth century, states used several methods for ensuring that jurors were drawn from "the better class of citizens in respect of intelligence, moral character, and business experience."<sup>86</sup> Hale describes two of these in detail. The first was the "Cleveland system" in which people selected from lists of registered voters "were then required to appear before the jury commissioners for examination."<sup>87</sup> Only those who exhibited sufficient honesty, morality, intelligence, and "experience in life" qualified for jury service.<sup>88</sup>

The second method—and the one of which Hale is evidently most fond—was the "key-man system of jury selection."<sup>89</sup> Under the key-man system, "jury commissioners solicited the names of likely jurors from key men (and sometimes women, after passage of the Nineteenth Amendment) in the community: civic leaders, clergymen, businessmen, schoolteachers, newspaper editors, officers of social service clubs, trade union officials,

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75. *Id.* at 162.

76. *Id.* at 60.

77. *Id.* at 19.

78. HALE, *supra* note 1, at 60, 92, 190.

79. *Id.* at 406.

80. *Id.* (emphasis added).

81. *Id.* at 46.

82. *Id.* at 68–88.

83. HALE, *supra* note 1, at 193–206.

84. *Id.* at 141.

85. *Id.* at 146.

86. *Id.* at 159.

87. *Id.* at 189, 192.

88. HALE, *supra* note 1, at 191.

89. *Id.* at 192.

and so on.”<sup>90</sup> This system “had an important practical advantage for jury commissioners pressed to locate capable jurors: those making the recommendations presumably knew something about the persons they suggested, giving their recommendations added credibility.”<sup>91</sup>

Of course, the drawback of this system is self-evident. Only those who were known and liked by these key men had a chance of serving on a jury—and only those known and liked by the jury commissioners and court clerks were considered “key men.” The problems this created were, unsurprisingly, most evident in southern states. In *Rabinowitz v. United States*,<sup>92</sup> for example, “[t]he court record shows that while blacks were roughly thirty-five percent of the population of the Macon Division [in Georgia], Negroes constituted less than six percent of the names in the jury wheel.”<sup>93</sup> The clerk of the district court explained:

[H]e did not choose the names of many black Georgians because he “naturally did not know many Negroes,” having most of his dealings with “the white race.” When asked whether he had sought the names of Negro doctors, teachers, ministers, and other professionals in the counties under his jurisdiction, he replied that, “unfortunate as it may be, . . . I don’t know too many Negroes.” He did recall writing to one Negro funeral home director.<sup>94</sup>

The key-man system was attacked on several sides in the middle of last century. The Supreme Court took aim at the key-man system with its “sudden reinvention of the ‘traditional’ American jury system” as requiring a representative cross section of the community.<sup>95</sup> The key-man system was abolished by the federal Jury Selection and Service Act of 1968, by which time “it had already been abandoned in about half the federal districts, replaced by random selection from various lists without any screening for subjective qualities of intelligence, morality, or common sense.”<sup>96</sup> In Hale’s words, “the most important failing of the key-man system—and of discretionary jury selection more generally—was its *alleged* complicity in the exclusion of black Americans from jury service.”<sup>97</sup> For example, Attorney General Ramsey Clark, testifying on behalf of the jury selection bill, stated that “unless we establish an objective standard . . . we risk discrimination through subjective judgment.”<sup>98</sup>

For Hale, the abolition of the key-man system is a cause for great lament. Hale mounts a spirited, if misguided, defense of the key-man system, arguing at length that the key-man system—and discretion more generally—were not in fact complicit in racial discrimination in jury selection. His key claims are worth reading in full. He asserts, for example:

Since racial discrimination could hardly be described as a result of “subjective

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90. *Id.* at 192.

91. *Id.* at 220–21.

92. 366 F.2d 43 (5th Cir. 1966).

93. HALE, *supra* note 1, at 225.

94. *Id.* at 226.

95. *Id.* at 231, 237.

96. *Id.* at 224.

97. *Id.* (emphasis added).

98. HALE, *supra* note 1, at 236.

judgment” or “unconscious bias”—to the racist, race is an objective fact and bias is a deliberate choice—then the bill . . . must have had a broader target in mind. It is hard not to draw the conclusion that the target was discretion itself, even when such discretion had no connection to the exclusion of any group from jury service.<sup>99</sup>

In Hale’s view, “there is nothing to suggest that a racially neutral key-man system would have been hard to devise.”<sup>100</sup> Moreover, it was not the key-man system, or discretionary jury selection processes, that was responsible for racial discrimination in jury selection. According to Hale, “what stood in the way of a racially impartial jury system in Georgia in 1966 . . . was not the key-man system but the persistence of the regime of white supremacy.”<sup>101</sup> Hale elaborates:

[I]t is important to pause briefly and recall the failings for which the key-man system cannot be held responsible. The exclusion of blacks from juries was the product of deeply embedded social and political customs that would have worked the same damage and had the same result, whatever the law required.<sup>102</sup>

Hale’s arguments about the connection—or lack thereof—between subjective, discretionary jury selection and racial discrimination are deeply flawed. To insist that racial discrimination cannot be described as the result of “subjective judgment” or “unconscious bias” is to misunderstand—or redefine—each of them. Hale seems to be arguing that the only kind of racial discrimination, by definition, is overt, deliberate, and openly admitted. According to Hale’s position, unconscious racial bias either does not exist or, if it does, is not something we should be concerned about. This is an untenable position. There is voluminous scholarly and empirical evidence—not to mention the lived experience of the millions of people subjected to it—that implicit bias is both real and harmful.<sup>103</sup> Similarly, it is incontrovertible that subjective discretion allows a pretext for deliberate racism—which Hale himself acknowledges when he refers, in the context of voting, to “the power of white officials to adapt any procedure to an unlawful purpose.”<sup>104</sup>

That racial minorities are disproportionately harmed by the criminal justice system cannot be denied. African Americans, for example, are not responsible for more crime than whites, but they are disproportionately arrested, convicted, and sentenced to longer prison terms.<sup>105</sup> Yet Hale is, at the very least, tone deaf to these realities. He laments that “[i]n

99. *Id.*

100. *Id.* at 228. *See also id.* at 227, n.36 (“The [Rabinowitz] ruling simply assumed that the key-man system could not be administered in a racially neutral way.”).

101. *Id.* at 228–29.

102. *Id.* at 232–33.

103. For a sampling of the recent legal literature addressing implicit bias, see Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 *YALE L.J. F.* 406 (2017), <https://www.yalelawjournal.org/forum/systemic-implicit-bias>; Stephanie Bornstein, *Reckless Discrimination*, 105 *CAL. L. REV.* 1055 (2017); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 *U.C. IRVINE L. REV.* 843 (2015); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 *CONN. L. REV.* 827 (2012); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 *HARV. L. & POL’Y REV.* 149 (2010).

104. HALE, *supra* note 1, at 233.

105. *See, e.g.*, Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 *J. MARSHALL L. REV.* 911 (1997). For a very recent comprehensive study showing the racial bias in sentencing, see Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida’s Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, *HERALD TRIB.*, <http://projects.heraldtribune.com/bias/sentencing/#clarification>.

many cities, prosecutors find it more difficult to secure convictions of minority defendants in districts with large numbers of black or Hispanic jurors.”<sup>106</sup> Such miscarriages of justice were less likely when “the jury list was compiled through use of the key-man system [because] nearly all the veniremen were solid, more than usually solid, citizens.”<sup>107</sup> In the context of peremptory challenges, Hale asserts:

[A]lways, below the surface, is the rarely spoken reality: precisely because race is an issue in American life, it can be risky for a prosecutor to try a black defendant before black jurors. Wouldn't it be wiser, then, to replace black jurors with those less likely to *harbor suspicions* about white prosecutors or white police officers?<sup>108</sup>

Hale concedes that “[n]o doubt, attorneys always wanted sympathetic jurors” but insists that “in the past, however, they had a limited opportunity to find them.”<sup>109</sup> According to Hale, in other words, propertied white men—and people handpicked by government officials—did not have sympathies for any particular people, values, or viewpoints. They just had objective facts.<sup>110</sup>

Hale describes the replacement of discretionary jury selection with a jury drawn randomly from a representative cross section of the community as a move from a *modern* jury to a *postmodern* jury. For Hale, the term “postmodern” is by no means a compliment; indeed, Hale appears to consider this the beginning of the American jury’s titular decline. According to Hale, “the most intriguing aspect” of the push for a representative jury system “was the appearance—dare we say debut?—of a distinctly postmodern understanding of truth (or ‘truth’).”<sup>111</sup> To claim that discretionary, subjective jury selection would inevitably result in bias is, according to Hale, the equivalent of claiming that “truth” is a mere social construct. According to Hale, to insist that juries be drawn from a representative cross section necessarily involves denying that there is any such thing as objective truth. It entails that “justice is a function of class,” and that “there is one truth for the poor and another for the rich.”<sup>112</sup> The shift to the postmodern jury involves—in Hale’s view—a fundamental change in the concept of truth: “This is not just an alternative understanding of jury deliberation; it is the necessary consequence of the belief that there is no such thing as truth.”<sup>113</sup> And if there is no such thing as objective truth—or no such thing as truth at all—then the jury obviously cannot perform its traditional function

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106. HALE, *supra* note 1, at 310.

107. *Id.* at 316.

108. *Id.* at 276 (emphasis added). This complaint is especially astonishing in an age where, for example, white police officers kill unarmed black men (with tragic regularity) but are almost never convicted. See, e.g., Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html?mcubz=3>.

109. HALE, *supra* note 1, at 326.

110. Hale emphasizes his belief that propertied white males have superior judgment to people from other sectors of society when he criticizes the following state of affairs: “[T]he model impartial juror is no longer the middle-to-upper class male property owner known among similar citizens as a man of good moral character and moderate temperament. Instead, society recognizes the judgment of such people as one perspective among many, no more or less neutral than any other.” *Id.* at 280 (quoting Darryl K. Brown, *The Means and Ends of Representative Juries*, VA. J. SOC. POL’Y & L. 445, 445 (1993)).

111. HALE, *supra* note 1, at 242.

112. *Id.* (quoting Sam J. Ervin, Jr., *Jury Reform Needs More Thought*, 53 A.B.A. J. 132, 134 (1967)).

113. *Id.* at 408.

of “determining objective ‘truth’ as far as is humanly possible.”<sup>114</sup>

Hale is indeed correct that justice is a function of class, that there is one set of rules for the rich and another for the poor—but not in the way that he means. Quite the contrary, in fact. The poor, and racial minorities, face a harsher reality than the white and wealthy when it comes to the criminal justice system and trial by jury. But in terms of the metaphysical and epistemic conceptions of truth, Hale is incorrect to conclude that insisting on a representative jury is to give up on the idea of objective truth. The fact-finding task of a jury is to draw inferences from *evidence* to *facts* (i.e., truth). We can surely understand that two people, from very different social backgrounds, could interpret the same evidence differently, without saying that there is no such thing as objective truth. To use Hale’s own example, a white police officer’s testimony may be less credible to a black juror who has been subjected to stop-and-frisk style policing than to a white suburbanite whose interaction with police has always been positive.<sup>115</sup> That does not mean there are two truths; rather there is one truth about which one of the hypothetical jurors is mistaken in any given instance. The benefit of a jury drawn from a representative cross section, even purely on fact-finding terms, is that the potential mistakes (too much skepticism or too much credulity) are not always in the one direction.

Perhaps more importantly, in his criticisms of the representative jury, Hale seems to temporarily forget that the jury is also a *political* institution. The jury can optimally serve its political functions—as the “lower house of the judiciary” that ensures the law conforms with community values, and in turn ensures the law is accepted by the entire community—only if the jury is truly representative of the community. Similarly, a representative jury ensures the benefits of jury service—political education, involvement, and consequently *power*—are not granted merely to a select few.

#### CONCLUSION

Hale’s *The Jury in America* is an informative story of the evolution of the jury in the Anglo-American legal system. Unfortunately, the author does not adequately grasp the relationships between discrimination and implicit bias, subjectivity and discretion, evidence and truth. This shortcoming limits the extent to which *The Jury in America* can aid us in meeting the challenges of the contemporary jury system. Perhaps ironically, it is Whitman’s more esoteric history of “reasonable doubt” that provides us with advice worth heeding, especially in this era of DNA exonerations of those wrongly convicted by a jury:<sup>116</sup> “Instructing jurors forcefully that their decision is ‘a *moral* one,’ about the fate of a fellow human being, is, in the last analysis, the only meaningful modern way to be faithful to the original spirit of reasonable doubt.”<sup>117</sup>

114. *Id.*

115. *See, e.g.*, Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>; *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

116. *See, e.g.*, *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate> (stating that, since 1992, the Innocence Project has obtained 353 DNA exonerations and identified 152 alternative perpetrators).

117. WHITMAN, *supra* note 2, at 212.