



# The Origins of Reasonable Doubt:

## Theological Roots of the Criminal Trial

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James Q. Whitman, *Author*



### COMMITTEE COMMENTARY

"Beyond a reasonable doubt." Anyone who has served on an American jury or even watched a police drama on television is familiar with this concept, under which a criminal defendant may be found guilty only if the prosecution meets this high legal standard of proof. In *The Origins of Reasonable Doubt*, author James Whitman, a lawyer and historian, upends what we think we know about the "reasonable doubt" standard by taking readers on a historical journey to its origins. Strikingly, Whitman locates those origins before the very birth of modern law—in Christian moral theology. The demand to prove guilt beyond a "reasonable doubt," he argues, was driven originally by the goal not to protect the legal rights of defendants, but rather to assuage the powerful moral anxieties of jurors: "Judge not lest ye be judged!" in the words of the Bible. *The Origins of Reasonable Doubt* is an

impressively erudite work of scholarship, yet it is written clearly and accessibly, and is worthy of attention by general educated readers interested in criminal law, the American jury, and the relation between law and our fundamental institutional and moral commitments as a nation. "If we do not grasp the depth of the theological problem that haunts the history of the reasonable doubt rule," Whitman writes, "we will not understand how our law arrived at the unsettling state of confusion it is in today," nor will we be able to appreciate fully the ethical values that should animate our criminal justice system. Whitman's brilliantly illuminating history of the premodern origins of a modern legal concept aims ultimately to encourage us "to gaze into our own breasts and ask ourselves hard questions about when and how we have the right to punish others."



#### INTERVIEW with James Whitman

*James Whitman is Ford Foundation Professor of Comparative and Foreign Law at Yale Law School.*

#### Where did the initial idea for your book come from?

The "beyond a reasonable doubt" standard of proof has always struck me as mysterious.

One day it occurred to me to wonder whether it might not originally have been a rule of moral theology, rather than a rule of law. I consulted some of the literature of early modern theology and decided that I had guessed right.

#### How do you think *The Origins of Reasonable Doubt* treats or offers insights or perspectives on legal issues and legal institutions, especially in ways not previously addressed?

The reasonable doubt rule, the book aims to show, was originally a rule of Christian moral theology and its original purpose was not to protect the defendant, but to protect

the souls of the jurors. Christian jurors risked damnation if they voted to convict an innocent person, and the reasonable doubt instruction was designed to encourage them to convict despite their fears for their own salvation. The rule was originally intended, that is, not to serve as a barrier against conviction, but to facilitate conviction. And while the reasonable doubt instruction was well designed to serve its original purpose of allaying the anxieties of Christian jurors, it is poorly designed to serve the current purpose to which we put it, since it offers little meaningful guidance when it comes to modern fact-finding.

#### How does your book foster public understanding?

My hope is to shed some needed light on the history and structure of jury trial for both jurors and legal professionals.

### EXCERPT

The legitimacy of our common law system depends on its fierce attachment to its traditions, and no quantity of historical learning will change that. So what can we do? At the very least, we can overcome some of our occasionally credulous, indeed superstitious, attachment to traditional formulas like "reasonable doubt." We can make an effort to understand this ancient phrase (and other ancient phrases like it that haunt our law) in a more historically informed, open-minded, and morally humane spirit. First, there is no point in trying to be faithful to the original intent of a phrase like "reasonable doubt." This is in part because the phrase has no original drafter: not only does the phrase not appear in the Constitution, it was never crafted by anybody in particular. It emerged in a process of collective European rehashing of the precepts of Christian moral theology that

date back to Gregory the Great and beyond. It was created not only by English jurists but also by English moralists—and by Italian and Spanish and French moralists and lawyers as well. There is no original intent to interpret. All that we can do is try to understand the rule in its original context, which is something quite different. ... We can also try to relearn the old lesson of reasonable doubt in conducting jury trial. After all lay jurors can still find something shocking and fearful in what they do, especially in capital cases, but perhaps in others as well. ... Instructing jurors forcefully that their decision is "a moral one," about the fate of fellow human being, is, in the last analysis, the only meaningful modern way to be faithful to the original spirit of reasonable doubt.