



# THE MORALITY OF REASONABLE DOUBT

*Jacob A. Stein*

Reviewing

JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*  
(Yale University Press 2008)

**M**R. WHITMAN OPENS HIS BOOK by saying that no person in the United States can be convicted of a crime unless that person's guilt is proven with certainty. Mere probability is not enough. The requirement of proof beyond a reasonable doubt is so fundamental that the Supreme Court has read it into our constitutional law even though the phrase "proof beyond a reasonable doubt" appears nowhere in the Constitution.

It is a level of proof standing above both preponderance of the evidence and clear and convincing proof.

Those who try criminal cases know that defense counsel, in the closing argument, must repeat and repeat those magic four words. To fail to do so would be malpractice.

Where did these words come from? Well, most of us have never given it a thought. We just assume it is part of the common law. Mr. Whitman tells us how, why, and when these words found their way from Christian theology into the common law. He surprises us by telling us that the words were used in the long ago to protect the judge and the jurors, not to protect the defendant.

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He traces it back to pre-modern Christian history, before the common law took it up. The Christian believers, especially the Clergy, were apprehensive that declaring a judgment against another, if wrong, affects their very souls, here and in the future. The judges and the jurors “faced the risk of damnation if they committed sins in the course of their official acts.” There was a place in Hell for those who involved themselves in “blood punishments” – that is, execution and mutilation, the standard criminal punishment of pre-19th Century law. The words “proof beyond a reasonable doubt” were used to protect those sitting in judgment against immoral verdicts.

Mr. Whitman tells us something else of interest. The early jurors knew who did what. They were witnesses as well as jurors. The facts of the case were within the small town common knowledge of the jurors. Nevertheless, these jurors were fearful for their souls if they were tainted by a wrongful verdict. They also were fearful that the friends and relatives of the defendant would come after them. Therefore, the twelvers must be unanimous in their verdict. They wanted, as further protection, the cautionary words “proof beyond a reasonable doubt.” These words carried a moral and practical protection for the judge and the jury.

I have heard judges say, in instructing a jury, that the jury cannot convict unless the defendant has been proven guilty to a moral certainty, that is, beyond a reasonable doubt.

The use of the word “moral” is a carryover from the Christian theology. It was of a time when judges and jurors took seriously St. Matthew’s statement “Judge not, lest ye be judged.”

What do the words “reasonable doubt” mean? Mr. Whitman tells us that in many states, judges are forbidden to explain just what these words mean. Whitman says: “No matter how much jurors may beg for guidance under the traditional rule, they are on their own in interpreting ‘reasonable doubt’.” Even if a judge were permitted to give an explanation, he did not need to do so. The jurors themselves had to use their own common sense in responding to the words.

Resourceful defense lawyers are eager to explain what proof be-

## *Morality of Reasonable Doubt*

yond a reasonable doubt means. Here are some samples:

- If a single one of you feels the crime could have been committed in some other way, or by some other person or under conditions other than are contained in the indictment, then this is reason for a doubt to rise in your mind, and it justifies the defendant's acquittal.
- The judge will charge you on proof beyond a reasonable doubt. Now, if you believe my client is not guilty, she's entitled to an acquittal. If you believe she may be guilty, that is reasonable doubt, and under the law, she must be acquitted. If you believe she's possibly guilty, that is reasonable doubt. If you believe she is most likely guilty, that is reasonable doubt. To get beyond the presumption of innocence to guilty beyond a reasonable doubt and to a moral certainty, you must get by the probabilities. You must get past simple conjecture. You must put away suspicions and any personal feelings you might have.
- If any one of us were to buy a house, which is certainly one of the more important and critical affairs in our lives, and we observed cracks in the walls, but could not determine if they were of a serious structural nature, without the aid of an engineer or soil tests made by an expert, it is obvious you would have such a doubt as would cause you to hesitate to buy the house.

I ask you now whether or not there are real cracks in the prosecution's case. Specifically, how positive can you be of what actually transpired on the date in question in light of the numerous inaccuracies, or apparent lapses of memory, in the testimony of the prosecution's leading witness? You are entitled to a house that is solid, without cracks. The prosecutor asks you to buy a house with a few cracks when anyone with common sense would hesitate to buy such a house no matter how clever the salesman. Under your oaths as jurors, and under our system, you are obligated to tell the sales agent, no sale.

Mr. Whitman closes his book by suggesting we re-learn the lesson of beyond a reasonable doubt with its moral implications. He

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suggests that jurors be told that their finding is a moral one about the fate of a fellow human being. Such words would be faithful to the original spirit of beyond a reasonable doubt.



“Induction,” one of them insisted.

“Deduction,” cried another.

“Analogy,” suggested the mildest of the party.

“Strict construction,” answered yet another.

I, too, became intoxicated by these legal reasoning words.

“Rationalization!” I chimed in, “Original intention!”

“Deviation!” “Interpretation!”

*Variations on a Theme*, by Logan Pearsall Smith

