

books in print

From Moral Comfort to Moral Certainty

James Q. Whitman

The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial
Yale University Press, 2008

“Beyond a reasonable doubt” is a key phrase in the American criminal justice system, heard from the highest courts in the nation to prime-time television dramas. Yet, as Ford Foundation Professor of Comparative and Foreign Law James Q. Whitman '88 observes in *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, the term has become fraught with uncertainty of meaning as judges, lawyers, and jurors struggle with vague definitions of what makes a defendant guilty “beyond a reasonable doubt.”

Whitman writes in the book's introduction:

'Beyond a reasonable doubt' is among the most majestic phrases in our law; but in practice it is vexingly difficult to interpret and apply. There is always some possible uncertainty about any case. Exactly what kind of uncertainty counts as a legal 'doubt'? Exactly when are legal 'doubts' about the guilt of the accused 'reasonable' ones?

In this 288-page historical examination, Whitman argues that the modern legal system has lost sight of the original purpose of the reasonable doubt rule. According to Whitman, the idea of “reasonable doubt” was originally not a rule of law at all, but a rule of theology. And its original function was not to protect the accused, but to protect the souls of jurors. The doctrine, he explains, was created to make conviction easier—jurors who feared losing their own salvation in convicting an innocent

defendant were assured that they would be safe from damnation as long as their doubts were not “reasonable.”

In making his case, Whitman delves into a history that reaches deep into Antiquity, when the Christian theology of judging first formed, and continues into the Middle Ages, when the Common Law and Civil Law traditions emerged out of the decline of the judicial ordeal. His book then carries the story into the seventeenth and eighteenth centuries, when the “reasonable doubt” rule emerged during an era of constitutional and legal crisis in the Anglo-American world. Throughout all these centuries, he argues, Christian judges and jurors both sought “moral comfort”—means of assuring themselves that they could convict defendants without fear of risking their own salvation.

Today, these theological concerns have vanished. Yet even in the absence of the psychological context of moral peril in which our ancestors lived, the reasonable doubt rule has survived, but has come to be viewed as a protection for defendants—a means of making conviction harder, rather than easier for jurors. No longer seen as a means of moral comfort for jurors, the rule is now a type of exhortation against easy conviction, a warning to jurors that they must have moral certainty in their decision. Whitman writes:

The problems of our world are not the problems of the eighteenth century, or the thirteenth century, or the fourth century. Jurors today bring relatively few Christian qualms to the process of judgment, and we have little need for a rule intended to coax them into convicting. Moreover, they rarely face cases in which there is no real factual uncertainty. We can no longer instruct jurors that their job is to 'confirm' an obvious truth. The very task of the trial has changed in a modern urban world.

Asking twenty-first century jurors to abide by an eighteenth-century instruction, Whitman says, “is neither wise nor kind.”

Ultimately Whitman argues for a return to the original spirit of reasonable doubt—that is, a focus on the fact that a juror's decision is, at its core, a moral one on which another person's fate rests.

JAMES Q. WHITMAN *The Origins of Reasonable Doubt*

Here's just a sampling of the many other books recently written or edited by our alumni, faculty, staff, and students. We welcome your submissions. If possible, please send us two review copies of your book: one for the Lillian Goldman Law Library and one for the Alumni Reading Room.

Michael Abramowicz
Predictocracy: Market Mechanisms for Public and Private Decision Making
Yale University Press, 2008



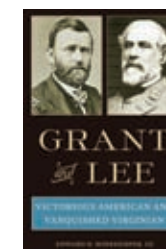
Predicting the future is a serious business for virtually all public and private institutions, for they must often make important decisions based on such predictions. Abramowicz '98 explores how institutions from legislatures to corporations might improve their predictions and arrive at better decisions by means of prediction markets, a promising new tool with virtually unlimited potential applications.

A.C.E. Bauer
No Castles Here
Random House Books for Young Readers, 2007



In her first novel, Alice Bauer '86 tells the story of an eleven-and-a-half year old boy in Camden, New Jersey. Written for ages nine and up, the book tells the story of Augie Boretski, who is badly bullied but finds respect with the help of a gay mentor from the Big Brothers program, a really tough sixth grade teacher, and the last of the fairy godmothers.

Edward H. Bonekemper III
Grant and Lee: Victorious American and Vanquished Virginian
Praeger Publishers, 2007



Bonekemper '67 offers a multi-theater, war-long comparison of the commanding general skills of Ulysses S. Grant and Robert E. Lee. The book clarifies the impact both generals had on the outcome of the Civil War while also providing readers with eighteen battle maps and a set of appendices that describes the casualties incurred by each army, battle by battle.

Mary L. Dudziak
Exporting American Dreams: Thurgood Marshall's African Journey
Oxford University Press, 2008



Thurgood Marshall became a living icon of civil rights when he argued *Brown v. Board of Education* before the Supreme Court in 1954. Six years later, he was at a crossroads. A rising generation of activists were making sit-ins and demonstrations rather than lawsuits the hallmark of the civil rights movement. What role, he wondered, could he now play? When in 1960 the Kenyan independence leaders asked him to help write their constitution, Marshall threw himself into their cause. Dudziak '84 recounts the untold story of Marshall's journey to Africa.

Philip Galanes
Emma's Table: A Novel
Harper Collins Publishers, 2008

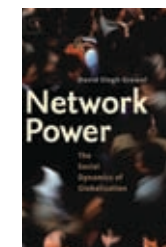
Novelist Galanes '91 offers the tale of Emma Sutton—a one-time media darling who is fresh from a yearlong stretch in prison. Emma finds her life just as she left it before her incarceration: filled with glittering business successes and bruising personal defeats. Emma is eager to put her “difficulties” behind her, but the ruthlessness with which she pursues an exquisite antique dining table underscores just how hard true redemption is going to be.

Michael D. Goldhaber
A People's History of the European Court of Human Rights
Rutgers University Press, 2007



Goldhaber '93 introduces American audiences to the judicial arm of the Council of Europe, whose mission is centered on interpreting the European Convention on Human Rights. He describes the ways in which the Council has routinely confronted nations over their most culturally-sensitive, hot-button issues, arguing that in the battle for the world's conscience, the court in Strasbourg may be pulling ahead.

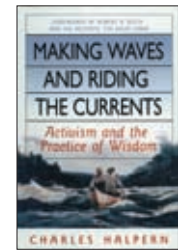
David S. Grewal
Network Power: The Social Dynamics of Globalization
Yale University Press, 2008



Grewal '02 draws on several centuries of political and social thought to show how globalization is best understood in terms of a power inherent in social relations, which he calls network power. Using this framework, he demonstrates how our standards of social coordination both gain in value the more they are used and undermine the viability of alternative forms of cooperation.

Charles Halpern

Making Waves and Riding the Currents: Activism and the Practice of Wisdom
Berrett-Koehler Publishers, 2008



Public interest advocate and social innovator Halpern '64 offers a memoir about working for a more just, compassionate, and sustainable world while cultivating the wisdom that supports and deepens this work. With forewords by Robert B. Reich '73 and the Dalai Lama,

the book aims to teach readers about integrating the inner and outer work of their lives through the practice of wisdom.

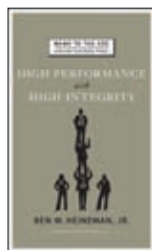
Joshua Hawley

Theodore Roosevelt: Preacher of Righteousness
Yale University Press, 2008

Hawley '06 explores the historical context of Theodore Roosevelt's politics, its intellectual sources, its practice, and its effect on his era and our own. He finds that Roosevelt developed a political science centered on the theme of righteousness, and this "warrior republicanism" was what made the progressive era possible.

Ben W. Heineman Jr.

High Performance with High Integrity
Harvard Business Press, 2008

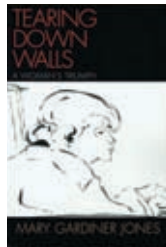


Heineman '71, former general counsel of GE, argues that high performance with high integrity should be the goal of contemporary corporations—and global capitalism—to avoid catastrophic legal and ethical lapses but also to achieve affirmative benefits inside the company, in

the marketplace, and in the broader society. He argues that CEOs must create an affirmative culture by driving eight core integrity principles and associated practices deep into business operations.

Mary Gardiner Jones

Tearing Down Walls: A Woman's Triumph
Hamilton Books, 2007

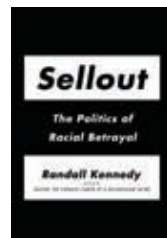


In this memoir, Jones '48 offers a look back at her life—including her relationship with her forceful and domineering mother, the virtual absence of her hearing-impaired alcoholic father, and the workplace gender barriers she confronted at

every step of her legal and government careers. The book chronicles the author's steps toward life as an attorney, corporate executive, Federal Trade Commissioner, and public service advocate.

Randall Kennedy

Sellout: The Politics of Racial Betrayal
Pantheon, 2008



Kennedy '82 grapples with a stigma of our racial discourse: "selling out," or racial betrayal, which is a subject of much anxiety and acrimony in Black America. He atomizes the vicissitudes of the term and shows how its usage

bedevils blacks and whites, while elucidating the effects it has on individuals and on our society as a whole. The book considers the ways in which prominent members of the black community—Colin Powell, Condoleezza Rice, and Barack Obama, among others—have been stigmatized as sellouts.

Daniel J. Kornstein

Partial Verdicts: Essays on Law and Life
AuthorHouse, 2008

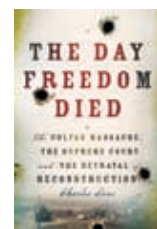


In essays that are by turns serious, whimsical, meditative, and witty, Kornstein '73 explores various aspects of the legal profession based on his thirty-five years of experience as an attorney. He uses the legal discipline

as a springboard for musings of a general nature.

Charles Lane

The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction
Henry Holt and Co., 2008



The Washington Post's Lane '97 MSL presents the untold story of the slaying of a Southern town's ex-slaves and a white lawyer's historic battle to bring the perpetrators of the Colfax Massacre to justice. A piece of historical

detective work, the book captures a gallery of characters from presidents to townspeople and re-creates the bloody days of Reconstruction, when the brutal struggle for equality moved from the battlefield to communities across the nation.

Eric L. Muller

American Inquisition: The Hunt for Japanese American Disloyalty in World War II
The University of North Carolina Press, 2007

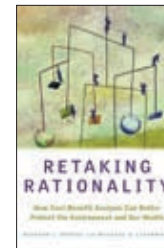


In this examination of how civilian and military agencies attempted to judge the loyalty of 40,000 American citizens of Japanese ancestry during World War II, Muller '87 argues that all government efforts at

determining loyalty ultimately failed. The methods of loyalty investigations of World War II, he shows, cropped up again in the Second Red Scare and the McCarthy period and, he argues, could easily arise again in the wake of modern domestic terror attacks.

Richard Revesz and Michael Livermore

Retaking Rationality: How Cost Benefit Analysis Can Better Protect the Environment and Our Health
Oxford University Press, 2008

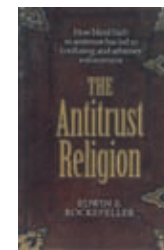


Revesz '83 and Livermore argue that one of the least understood—and most important—causes of our failure to protect the environment has been a misguided rejection of reason. They believe that by embracing and reforming cost-benefit analysis, and by joining reason

and compassion, progressive groups can help enact strong environmental and public health regulation.

Edwin S. Rockefeller

The Antitrust Religion
Cato Institute, 2007



Drawing on fifty years of experience with U.S. anti-trust laws, Rockefeller '51 believes that lawmakers, bureaucrats, academics, and journalists use arbitrary and irrational laws and enforcement mechanisms to punish capital-

ists rather than promote competition. Everything most people know about anti-trust is wrong, he argues.

Kermit Roosevelt III

The Myth of Judicial Activism: Making Sense of Supreme Court Decisions
Yale University Press, 2008



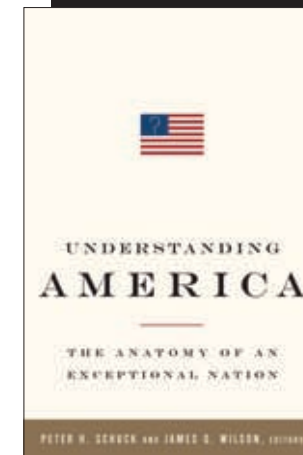
Weighing in on the debate over "judicial activism," Roosevelt '97 examines controversial Supreme Court decisions through a lens of constitutional interpretation. He clarifies the task of the Supreme Court in constitutional cases, then

sets out a model to describe how the Court creates doctrine to implement the meaning of the Constitution. Ultimately, he uses this model to examine the legitimacy of decisions.

“It is a bit odd for any nation to be deeply divided, witlessly vulgar, religiously orthodox, militarily aggressive, economically savage, and ungenerous to those in need, while maintaining a political stability, a standard of living, and love of country that are the envy of the world—all at the same time.”

Peter H. Schuck and James Q. Wilson, Editors

Understanding America: The Anatomy of an Exceptional Nation
PublicAffairs, 2008



SIMEON E. BALDWIN PROFESSOR of Law Peter Schuck and co-editor James Q. Wilson have collected essays from America's leading social scientists in this 704-page book devoted to answering the questions "What is America?" and "How exceptional is it?"

These are questions, they contend, that are not easily answered even by their target audiences: well-educated Americans and cosmopolitan foreigners. They answer them with twenty chapters by America's leading social scientists analyzing our most important institutions, public policy areas, and cultural domains.

In the book's preface, they write, "For Americans marinating in their own society, a clear understanding of [America's] nature and distinctiveness remains elusive. . . It is a bit odd for any nation to be deeply divided, witlessly vulgar, religiously orthodox, militarily aggressive, economically savage, and ungenerous to those in need, while maintaining

a political stability, a standard of living, and love of country that are the envy of the world—all at the same time. To do these things at once, America must indeed be unusual. Or even, as Alexis de Tocqueville said a century and a half ago, exceptional."

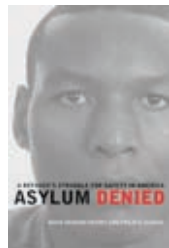
In their concluding chapter, Schuck and Wilson find cross-cutting themes that capture this exceptionalism: culture, constitutionalism, competition, diversity, civil society, welfare state, and demography. *Understanding America* also calls attention to the country's most pervasive problems, including the deep polarization of the electorate, the decline of equality and social mobility, and widespread family dysfunction. Ultimately, the editors argue, both the extraordinary successes and abject failures of the United States are closely tied to our sense of freedom—and that redefining that sense of freedom might be the key to improving America.

Elyn R. Saks

**The Center Cannot Hold:
My Journey Through Madness**
Hyperion, 2007

Saks '86 was only eight, and living an otherwise idyllic childhood in sunny 1960s Miami, when her first symptoms of schizophrenia appeared in the form of obsessions and night terrors. But it was not until she reached Oxford University as a Marshall Scholar that her first full-blown episode, complete with voices in her head and terrifying suicidal fantasies, forced her into a psychiatric hospital. Now Professor of Law and Psychiatry at the University of Southern California, her new book provides perspective as both an expert and a sufferer of psychological disorder.

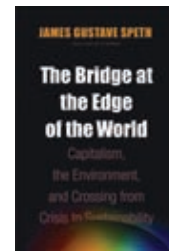
**Philip G. Schrag and
David Ngaruri Kenney**
**Asylum Denied:
A Refugee's Struggle for
Safety in America**
University of California Press, 2008



Kenney and Schrag '67 (who serves as Kenney's attorney) tell the story of Kenney's near-murder, imprisonment, and torture in Kenya after leading a boycott protesting his government's treatment of farmers; his escape to the United States; and the obstacle course of ordeals and proceedings he faced as U.S. government agencies sought to deport him to Kenya.

James Gustave Speth

**The Bridge at the Edge of the World:
Capitalism, the Environment, and
Crossing from Crisis to Sustainability**
Yale University Press, 2008



Co-founder of the NRDC, Yale University dean, and former White House advisor Speth '69 argues that the current of American-style consumer capitalism must be altered in order to preserve a livable planet for future generations. He argues that environmental degradation is linked to growing social inequality and the erosion of democratic governance and popular control.

David O. Stewart

**The Summer of 1787:
The Men Who Invented the Constitution**
Simon & Schuster, 2007



In this fast-paced narrative tale, Stewart '78 chronicles the birth of the Constitution, showing that it was "an act of inspired improvisation," fraught with passionate conflict, highly-charged bargaining, and hard-won compromise.

**Marisa B. Van Saanen and
Katherine Marshall**

**Development and Faith: Where Mind,
Heart, and Soul Work Together**
World Bank Publications, 2007



Van Saanen '10 and Marshall explore and highlight promising partnerships in the world between secular and faith development entities. They recount the evolving history of relationships between faith and secular development institutions and focus on the Millennium Development Goals as a common framework for action and an opportunity for new forms of collaboration and partnership.

ALSO OF NOTE

R.P. Anand '62 LL.M., '63 JSD
**Compulsory Jurisdiction of the
International Court of Justice, 2nd ed.**
*New States and International Law,
2nd edition*
**Sovereign Equality of States in
International Law, 2nd ed.**
Hope India Publications, 2008

Morris L. Cohen and Kent C. Olson
Legal Research in a Nutshell, 9th ed.
Thomson West, 2007

José Carlos de Magalhães
**Direito Econômico Internacional:
Tendências e Perspectivas, 2007**
Juruá Editora, 2007
**O Supremo Tribunal Federal e o Direito
Internacional**
Livaria do Avogado, 2000

**Martin Marcus '74,
Richard A. Greenberg,
Lynn W. L. Faherty, and Eve Cary**
New York Criminal Law, 3rd ed.
Thomson West, 2008

Abe Ordover '61
Imagining Nature II: Reflections
Blurb, 2008

Jean Koh Peters
**Representing Children in Child
Protective Proceedings:
Ethical and Practical Dimensions,
3rd ed.**
Michie, 2007

John A. Ritter '70 LL.M.
**You Be the Judge IV
(Russian and English)**
YBJ Publishing, 2007

Susan Rose-Ackerman
Economics of Administrative Law
Edward Elgar Publishing, 2008

**Harold G. Wren '57 JSD and
Beverly J. Glascock**
**The Of Counsel Agreement:
A Guide for Law Firm and Practitioner,
3rd ed.**
American Bar Association, 2005

**WILLIAM N.
ESKRIDGE, Jr.**
**DISHONORABLE
PASSIONS**
**SODOMY LAWS
IN AMERICA**

1861-2003

William N. Eskridge Jr.
**Dishonorable Passions:
Sodomy Laws in America, 1861-2003**
Viking, 2008

JOHN A. GARVER PROFESSOR of Jurisprudence William N. Eskridge '78 demonstrates that there is nothing new about the political and legal obsession with the gay rights controversy. Eskridge uses sodomy law as a lens through which to examine the social history of changing sexual attitudes in America over the past two centuries.

In the book's introduction, Eskridge writes, "A history of the crime against nature is, in some ways, a history of American sexuality and its social and legal regulation. That is, sodomy's tale reflects the evolution of a culture that has remained ambivalent about the morality of pleasure."

Beginning with the American colonies and early states, which prohibited sodomy as a "crime against nature," Eskridge traces changes in American laws and attitudes through the 2003 *Lawrence v. Texas* decision. With dramatic stories of both the hunted (Walt Whitman and Margaret Mead) and the hunters (Earl Warren and J. Edgar Hoover), *Dishonorable Passions* reveals how American sodomy laws affected the lives of both homosexual and heterosexual Americans throughout history.

Save the Date

October 3-5, 2008

Yale Law School Alumni Weekend 2008

Join us in New Haven as we discuss the challenges facing the new presidential administration

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More information about Alumni Weekend 2008 will be posted on the Yale Law School website in the coming months. In the meantime, please visit www.law.yale.edu/alumniweekend to view streaming video and photographs from the 2007 reunion.