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BOOK REVIEWS

The Origins of Reasonable Doubt—Theological Roots of the Criminal Trial BY JAMES Q. WHITMAN [New Haven: Yale UP, 2008. ix + 276 pp. Hardcover: US$40]

In *Woolmington v. DPP* [1935] A.C. 426 (at 481), Lord Sankey famously referred to the doctrine that requires the prosecution to prove its case beyond reasonable doubt as "the golden thread" that "runs throughout the web of English Criminal Law". This doctrine is by no means peculiar to England; "proof beyond reasonable doubt" is the standard of proof universally adopted in the common law world, hailed by the Privy Council as "fundamental to the administration of justice" in *Yuvajay v. PP* [1970] A.C. 913 (at 921) and by V.K. Rajah J.A. as a "bedrock principle [which is] sacrosanct in our criminal justice system" in *Sakthivel Punithavathi v. PP* [2007] SGHC 54, [2007] 2 S.L.R. 983 (at para. 78).

There is, one might think, nothing controversial about this: surely the court must not convict someone of a crime if it has reason to doubt that he or she is guilty as charged. But what exactly does "proof beyond reasonable doubt" mean? Judges decline to offer any definition of substance (see Larry Laudan in *Truth, Error, and Criminal Law* (Cambridge: CUP, 2006) at 47-51) and the jury is deliberately left in the dark (*e.g.*, *Henry Walters* [1969] 2 A.C. 26 (at 30); *Ching* (1976) 63 Cr. App. R. 7 (at 10); *R v. Hepworth & Fearnley* [1955] 2 Q.B. 600 (at 603)). It is a mystery why a doctrine held in such high esteem should yet be so elusive.

In this book, Whitman attempts to solve the mystery. The reason why the reasonable doubt formula is mysterious to us now is because we have lost sight of its original purpose. While the doctrine is seen today as a protection for the accused, a safeguard against the conviction of the innocent, it started out as a theological doctrine aimed at placating the religious anxieties of jurors. Jurors were assured that they did not put their own salvation at risk by convicting the accused so long as any doubt they might have about his or her guilt was not "reasonable". In the beginning, therefore, the doctrine made conviction easier rather than more difficult to secure, and was not driven by any liberal concerns with which we now associate it, concerns, for instance, about protecting individual liberty and upholding the rule of law. Modern evidence scholars typically view the standard of proof as a heuristic for factual determinations, a truth-ascertaining criterion of some sort. Whitman challenges this view. He claims the rule initially served to offer moral comfort to the persons who were called upon to judge and who were fearful that they might thereby jeopardise

their own souls. Whitman's thesis is as remarkably simple as it is startlingly original. He supports it with a brilliant execution of meticulous historical research.

Chapter 1 draws together comparative and anthropological materials to highlight the pervasiveness of pre-modern fears of taking personal responsibility for judgment. (The sentiment is reflected in Matthew 7:1, "Judge not, lest ye be judged!") To allay these fears, procedures were put in place that afforded moral comfort by, for example, leaving the decision to chance. These procedures, which served a purpose even when the truth was known, were not procedures of factual proof. High anxieties about judgment and punishment in the pre-modern periods make sense if we remember how bloody criminal trials were then. In Chapter 2, the book explores the theology of judicial bloodshed. Judges, like soldiers, were persons who (directly or indirectly) maimed and killed. Judging had to be reconciled with the religious injunction against drawing blood. One technique was by denying moral agency in the matter: judges were impersonal ministers of law and it was the law that killed the accused (p. 47).

Chapter 3 turns to the medieval system of ordeal, and advances an unconventional way of looking at it. According to Whitman, the ordeal was not a device for finding the truth; it was primarily a means of avoiding responsibility for judgment. For instance, the ordeal had the effect of inducing confessions, which meant self-responsibility for the punishment that followed. It also shifted the responsibility of judgment to God and relieved witnesses and accusers from compelled testimony under oath, thus saving them from the temptation to commit the mortal sin of perjury.

With the abolition of the ordeal, the moral burden of judging had to be reallocated. Chapters 4 and 5 explain how this responsibility came to be assigned differently in England and the Western Continent. In the latter, witnesses shouldered the burden; as it was on their word that a conviction rested, they were seen as the ones responsible for the outcome. Judges took refuge in the impersonal logic of formal quantification of evidential weight and rules of proof. An "inquisitorial" procedure emerged which compelled witnesses to testify, and in the absence of testimony, the accused was forced to confess under threat of torture. In England, on the other hand, the moral pressure came to be placed on the jury instead. In the early days, the jury was self-informing; since it took on the mixed role of judge and witness/accuser, it could not escape responsibility for the verdict. Jurors were reluctant to convict and had often to be pressured into doing so. According to Whitman, juror timidity had not only to do with corporeal fears (for example, fear of vengeance by the kinsmen of the convicted); it also had a lot to do with spiritual anxieties about judging others (the fear of the vengeance of God).

Chapter 6 traces the end of the "era of royal jury discipline" (p. 161) in the middle of the seventeenth century. The jury gained legal recognition of the right to acquit according to their conscience and legal immunity for doing so. But private conscience could undermine the administration of criminal law if jurors became overly reluctant to convict. By the eighteenth century (the period covered in Chapter 7), "reasonable doubt" appeared "as a formula intended to ease the fears of those jurors who might otherwise refuse to pronounce the defendant guilty" (p. 186). Eighteenth-century moral literature stressed the distinction between a "doubting conscience" and a "scrupulous" one. Doubts were legitimate and had to be obeyed. But scruples, doubts that were speculative, were foolish, and it was lawful for the conscience to act against them. According to Whitman, the doctrine of reasonable doubt was designed

"to help quell fears about the responsibility for judgment, not to resolve factual mysteries. It was designed to coax jurors into acting, in situations in which they felt uneasy about the "perilous" task of condemning others" (p. 204).

What lesson can we draw from this history? One should avoid "the nasty conclusion that a modern jury instruction should tell the jury to get over its squeamish qualms and convict" (p. 211). The lesson to be drawn is exactly the opposite. Whitman puts it very well:

> Open-hearted human beings condemn others in a spirit of humility, of duteousness, of fear and trembling about their own moral standing. That is what our ancestors, for all their bloodiness, believed; and it is why they spoke about "reasonable doubt."… 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. (p. 212)

What is even more exciting about the book than its debunking of many received historical views is this message about reclaiming the moral significance of "reasonable doubt". While the original theological underpinnings may no longer hold sway, it is important that they be revitalised as secular values of humanity and virtues.

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Contract Damages: Domestic and International Perspectives BY DJAKHONGIR SAIDOV AND RALPH CUNNINGTON, eds. [Oxford: Hart Publishing, 2008. 532 pp. Hardcover: £85]

If evidence was ever required to refute the misconception that the law of contract damages was straightforward, one need look no further than between the covers of *Contract Damages: Domestic and International Perspectives*. This is a collection of papers delivered by contract law scholars from common law and civilian traditions at a conference on contract damages of that same title conducted at Birmingham University in June 2007. Unusually, the conference sought to bring together contract law scholars working primarily within the common law contract tradition, as well as scholars concentrating on international contract instruments, chiefly the Vienna Convention on Contracts for the International Sale of Goods ('CISG'). The confluence of these streams of learning certainly provides interesting insights into the strengths and weaknesses of each tradition. But before that, a thumb-nail sketch of the book.

This collection of essays focuses on current and contemporary concerns as to various aspects of contract damages in both the domestic (*i.e.* common law) and the international arena. The book is divided into four large parts, the first, on the purpose and scope of damages (with contributions by Professor Stephen A. Smith, Professor Daniel Friedmann, Professor Ingeborg Schwenzer, Mr. Pascal Hachem and Professor John Y. Gotanda); the second, on the measures of damages (featuring contributions by Professor Anthony Ogus, Professor Peter Jaffey, Professor Andrew Burrows, Professor Stephen Waddams, and Mr. Ralph Cunnington); the third, on