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TESE DE DOUTORADO:

O CONTROLE DO CONVENCIMENTO JUDICIAL SOBRE OS FATOS: ANÁLISE COMPARATIVA ENTRE O DIREITO PROBATÓRIO BRASILEIRO E NORTE-AMERICANO

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ORIENTADOR: CARLOS ALBERTO ALVARO DE OLIVEIRA

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Tese apresentada à Faculdade de Direito – Universidade Federal do Rio Grande do Sul, como parte dos requisitos para obtenção do grau de Doutor.

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I – Introdução e Histórico do Tema

1. Introdução

1.1 Tema

1.2 Metodologia

2. Evolução Histórica do Tema

2.1 Ordálios

2.2 Julgamento por Júri

2.3 Prova Legal

2.4 Livre Apreciação da Prova

II – O Convencimento Judicial sobre os Fatos no Direito Norte-Americano

1. Ônus da Prova – Distinção entre *burden of pleading*, *burden of production* e *burden of persuasion*
2. *Standards of Proof*

2.1 Beyond a reasonable doubt

2.2 Clear and convincing evidence

2.3 Preponderance of the evidence

III – O Convencimento Judicial sobre os Fatos no Direito Brasileiro

1. O Estado da Arte do Convencimento Judicial na Doutrina Brasileira
2. Ônus da Prova

I – Introdução e Histórico do Tema

1. Introdução

1.1 Tema

O tema central da tese versa acerca do controle do convencimento judicial sobre os fatos por meio de *standards* jurídicos.

Em qualquer área do conhecimento humano há momentos em que importantes decisões precisam ser tomadas, mormente reine a incerteza sobre os fatos apresentados. Ou seja, o tomador de decisão deverá decidir sob o manto da incerteza.

O julgador forma o seu convencimento a partir da confiança na existência ou inexistência dos fatos postos à sua análise. No nosso dia-a-dia, tomamos inúmeras decisões, tendo como pressuposto fatos sobre os quais não temos certeza da existência.

Ao tomarmos a decisão de sairmos de casa portando ou não o guarda-chuva, analisamos algumas variáveis. Em primeiro lugar, não sabemos se choverá. Assim, podemos basear a nossa decisão na previsão do tempo, que não oferece certeza, mas probabilidade de chuva. Os órgãos públicos

encarregados de liberar a comercialização de novos medicamentos decidem baseados em estudos que apontam a probabilidade de eficácia da droga. Os tratamentos médicos são determinados de acordo com a probabilidade de sucesso. O cancelamento de uma missão espacial é decidida tendo em vista a probabilidade de insucesso. A lista de casos de decisões tomadas sob condições de incerteza e calcadas em probabilidades poderia ser infinitamente extendida.

Conforme apontado, em inúmeras situações do quotidiano pessoas tomam decisões sob a a marca da incerteza. Cabe, agora, acrescentar outro componente nessa análise, além da probabilidade de ocorrência de diversos fatos.

O que se pretende demonstrar é que as decisões calcadas em racionalidade não dependem apenas de probabilidades, mas de um *standard* que as norteie. Probabilidades de 30%, 50%, 80% ou 90%, por si só, não bastam para a tomada de decisões. Qualquer porcentagem pode ser alta ou baixa dependendo do *standard* aplicado a determinada decisão a ser tomada.

Quando alguém resolve portar o guarda-chuva ao sair de casa, age baseado em algum *standard* balizador da decisão. Se a pessoa caminhará despretensiosamente, num dia de calor, a eventual chuva não trará maiores conseqüências. Assim, se a probabilidade de chuva é pequena, o incômodo de portar o guarda-chuva não compensa. Ou seja, o *standard*, ou grau de confiança na ocorrênica de chuva, precisa ser elevado. Contudo, se a pessoa dirige-se a uma festa de casamento, mesmo com a probabilidade pequena de chuva, o

risco de encharcar-se supera o transtorno de levar o guarda-chuva. Aqui, o *standard* exigido é baixo.

A liberação de medicamentos obedece ao *standard* científico de 95% de comprovação de eficácia da droga. O elevado índice acarreta a demora ou impede a utlização de drogas que poderiam salvar vidas. Por outro lado, o risco de causar danos à saúde das pessoas em larga escala requer prudência redobrada nessa decisão.

Na escolha por um tratamento médico, se a probabilidade de insucesso é alta e supera o eventual benefício em relação à situação pretérita, a intervenção resta descartada. Contudo, se a única alternativa de sobrevida do paciente depende dessa intervenção de alto risco, o *standard* exigido, ou seja, o grau de confiança no sucesso do procedimento, fica drasticamente reduzido.

No caso de missões espaciais, como o custo do abortamento é muito elevado, apenas diante de uma probalidade siginificativa de danos justificaria tal decisão. Porém, se os eventuais danos forem muito expressivos, superarão os custos do abortamento. Tudo dependerá dos valores – monetários ou não – envolvidos para determinar o *standard*, ou seja, o grau de confiança no sucesso da missão.

O julgador, em um processo judicial, ao formar o seu convencimento a respeito da existência ou inexistência dos fatos em disputa, não escapa à análise até o momento efetuada.

A decisão a ser proferida, para ser considerada racional, deve inexoravelmente obedecer a algum *standard*. A única concessão circunscreve-

se ao fato de que o julgador pode explicitar qual o *standard* utilizado, ou aplicá-lo implicitamente.

No mundo do *common law*, as decisões são proferidas com base em *standards* explicitamente aplicados aos casos. As discussões doutrinárias e jurisprudenciais acerca da correta aplicação dos *standards* constituem repertório extenso e fecundo.

De outra banda, a família de direito continental ressente-se de

Steven Goode – Pesquisa empírica para se saber qual os standards utilizados nos julgamentos. Talvez juízes utilizem diferentes standards, bem como jurados. Promotor e advogado podem utilizar diferentes standards – certeza, nenhuma dúvida para condenar; pode restar alguma dúvida, mas no conjunto, a prova indica a culpa do réu. Sempre haverá a necessidade de standards, mesmo que o tribunal possa controlar completamente a decisão pelo recurso.

Não é necessária uma definição precisa de BARD, a sociedade confia nas decisões do júri.

No Texas, presume-se que o regime de bens do casal é o da community property, existentes em uns 7 estados. O cônjuge que quiser demonstrar que o regime é outro, deverá demonstar por meio da clear and convincing evidence.

O caso Simpson e demais casos que configuram crimes são comprovados com a preponderance of evidence.

Laudan – a possibilidade de absolvição no crime e condenação no cível pode ser conseqüência não de difentes standards, mas de diferentes regras de evidence. No estupro, a palavra da vítima é levada mais em consideração porque a mulher não se submeteria ao constrangimento de testemunhar se não fosse verdadeira a história. Portanto, não é caso de standard mais baixo, mas sim de valoração diferente da prova testemunhal. No caso da paternidade, o tipo de prova exige DNA.

Um standard para ser racional deve poder ser definido, para ser aplicado uniformemente em todos os casos.

Em Oklahoma, a Suprema Corte anula a decisão do júri em que houver definição de BARD.

KLAMI, Hannu Tapami; GRÄNS, Minna; SORVETTULA, Johanna. *Law and Truth*: a theory of evidence. Helsinki: The Finnish Society of Sciences and Letters, 2000.

TILLERS, Peter; GREEN, Eric D (Edited by). *Probability and Inference in the Law of Evidence*: the uses and limits of Bayesianism. Dordrecht: Kluwer, 1988.

COHEN, L. Jonathan. *An Introduction to the Philosophy of Induction and Probability*. Oxford: Clarendon Press, 1989.

KOKOTT, Juliane. *The Burden of Proof in Comparative and International Human Rights Law*. The Hague: Kluwer, 1998.

p. 9

In American evidence law, the distinction between the two kinds of burdens of proof, first, the burden of going forward with the evidence by producing evidence for the court (subjective Beweislast) and, second, the risk of non-persuasion of the trier of fact (objektive Beweislast), is much more clearly recognized than in German law.

p. 10

The term “burden of proof” has, at times, been used synonymously with the burden of adducing evidence (burden of production, subjective burden of proof).

Burden of proof issues are well analyzed and researched in German private law in instances where the adversarial system and the burden of production apply, whereas they are still somewhat underdeveloped in German public (administrative and constitutional) law, where proceedings are inquisitorial.

p. 15

The significance of the burden of persuasion (objective burden of proof) along with the burden of production (subjective burden of proof) is now well recognized by most German scholars, although, the relationship between the two kinds of burdens often remains unclear.

p. 11

The common formulation is Rosenberg's "norm theory", in which each party must prove the facts underlying a rule favorable to its position. The "norm theory" has some features in common with the principle *onus probandi actori incumbit* in which the party alleging a fact is (p. 12) obliged to prove it.

p. 12

The rationale behind the German “norm theory” and the principle *onus probandi actori incumbit* presupposes a conflict of interests characteristic of private litigation, but absent in constitutional or human rights law.

p. 16

The burden of persuasion is important in any judicial proceeding, adversarial or not, that depends on fact-finding and where the court is required to arrive at some decision. Without rules to distribute the burden of persuasion, inertia on the part of the Court or a *non-liquet* would be unavoidable where relevant facts are unclear.

p. 18

The law of evidence in Germany, as contrasted with United States law, eschews different standards of proof. Under the German system, the judge must be convinced beyond a reasonable doubt, whether the suit involves private, criminal, or public law (administrative and constitutional) issues. The reasonable doubt standard is inapplicable only in the exceptional circumstance in which a statute specifically mentions some other standard to be applied.

Only a few modern German scholars have demonstrated interest in the alternative standards of proof found in Anglo-American and Scandinavian law, and thus the idea of deciding on the basis of a mere preponderance of the evidence (probability) has become more popular. J. Martens has advocated a preponderance of the evidence standard even in administrative litigation.

A simplistic justification has often been offered to support the preponderance or probability standard. In theory, it should prove just because it favors the party

that is probably (by a preponderance of the evidence) right, as opposed to the party that is probably wrong. To avoid an “unjust” apportionment of the burden of proof, G. Kegel and J. Martens suggest that the required showing or measure of proof be lowered. A lower degree of persuasion required (e. g. a 51%:49% probability) decreases the importance of the risk of non-persuasion.

KAZAZI, Mojtaba. *Burden of Proof and Related Issues*: a study on evidence before international tribunals. The Hague: Kluwer, 1996.

2. Ordálios

ARNOLD, Morris S. et al. (Edited by). *On the Laws and Customs of England*. Chapel Hill: The University of North Carolina Press, 1981.

HYAMS, Paul R. Trial by Ordeal: The Key to Proof in the Early Common Law. P. 90-126

p. 101

“Civil” ordeals were probably extremely rare in the West when the Council met.

Bartlett, p. 103

Trial by battle was a practice akin to the other ordeals and, as the relationship of kindred implies, it exhibited both a family resemblance and unique features. As an ordeal in the most fundamental sense of the word, it was supposed to reveal the judgment of God. On the other hand, its distinctive mode – a fight between individuals – meant that it was in a class of its own.

Os ordálios constituíam um modelo de prova que apelava ao sobrenatural para a verificação dos fatos.

O historiador Henry Charles Lea, em 1866, publicou *Superstition and Force*, considerado o principal texto em língua inglesa acerca das relações entre os aspectos culturais, religiosos e os procedimentos legais na Europa medieval[1]. O pesquisador norte-americano bem sintetiza a idéia subjacente ao desenvolvimento dos ordálios: "The so-called Judgment of God, by which men, oppressed with doubt, have essayed in all ages to relieve themselves from responsability by calling in the assistance of Heaven"[2].

Henry Lea demontrou, em sua magistral obra, que a exaltação aos ordálios esteve presente em diversos povos ao longo da história. Contudo, para os fins deste estudo, cingir-se-á a análise dos ordálios ao período europeu medieval.

Robert Bartlett[3] divide a história dos ordálios medievais em duas fases: a anterior e a posterior ao ano 800.

O período mais remoto prolongou-se do ano 500, época dos primeiros registros de julgamentos por ordálios, até o ano 800. Dessa época, embora

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[1] A referida obra foi republicada em três diferentes livros: *The Ordeal*. Philadelphia: University of Pennsylvania Press, 1973; *Torture*. Philadelphia: University of Pennsylvania Press, 1973; *The Duel and the Oath*. Philadelphia: University of Pennsylvania Press, 1974.
[2] *The Ordeal*, p. 4.
[3] *Trial by Fire and Water*: the medieval judicial ordeal. New York: Oxford University Press, 1986. p. 4.

escassas as fontes históricas, pode-se constatar, que o único ordálio utilizado foi o do caldeirão, ou seja, o da água quente[4].

Ao redor do ano 800, emergem novas modalidades de ordálios. Um dos ordálios mais utilizados nesse período foi o da cruz, uma espécie de ordálio bilateral em que os dois contendores permanciam com as suas armas estendidas no formato de cruz até que um fraquejasse[5]. Espécie menos utilizada, foi o ordálio de caminhar sobre as pontas quentes do arado[6]. Do mesmo período, verifica-se a existência do ordálio da água fria e do ferro quente[7].

GOITEIN, H. *Primitive Ordeal and Modern Law*. Littleton: Rothman, 1980.

53-79 – descrição e história dos ordálios.

HEATH, James. *Torture and English Law*: an administrative and legal history from the Plantagenets to the Stuarts. Westport: Greenwood Press, 1982.

KELLY, Henry Ansgar. *Inquisitions and Other Trial Procedures in the Medieval West*. Aldershot: Ashgate, 2001.

Descrição dos processos de inquisição na europa ocidental.

3. A livre apreciação da prova

[4] "For the sixth, seventh, and most of the eighth century there are no references to any other kind of ordeal. The procedure involved, in which an object, usually a stone or a ring, had to be plucked form a bubbling cauldron, is vividly described in Gregory of Tours' *De Gloria martyrum*: 'the fire was build up, the cauldron was placed on it, it boiled fiercely, a little ring was tossed into the hot water'. The proband 'drew back his clothes from his arm and plunged his right hand into the cauldron … the fire roared up and in the bubbling it was not easy for him to grasp the little ring, but at last he drew it out'". (BARTLETT, Robert. *Op. cit*. p. 4)
[5] Cf. BARTLETT, Robert. *Op. cit*. p. 9.
[6] Cf. BARTLETT, Robert. *Op. cit*. p. 10.
[7] Cf. BARTLETT, Robert. *Op. cit*. p. 10-11.

COHEN, L. Jonathan. Freedom of Proof. Archiv Für Rechts- Und Sozialphilosophie, Wiesbaden, p. 1-21, n. 16, 1983.

p. 2

Arguments in favour of regulating proof

I – Ideally, therefore, all the rules by which disputes are settled ought to be administered as rules of law, because triers of fact are more likely to behave uniformly and predictably when legally compelled to do so than when left to their own intellectual devices.

II – people ought to be able to discover in advance where they stand as regards possible adjudication in their affairs.

BELLAMY, J. G. *The Criminal Trial in Later Medieval England*: felony before the courts from Edward I to the sixteenth century. Toronto: University of Toronto Press, 1998.

História dos crimes julgados por júri na idade média.

Os Standards do Convencimento Judicial sobre a Prova no Direito Norte-Americano

WILLIAMS, Glanville. *The Proof of Guilt: a study of the English criminal trial*. 3rd. ed. London: Stevens, 1963.

p. 186

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is in the mouth of Sir Edward Seymour, who, speaking (p. 187) for Fenwick upon a Bill of Attainder in 1696, said: “I am of the same opinion with the Roman, who, in the case of Catiline, declared, he had rather ten guilty persons should escape, than one innocent should suffer.” Hale took the ratio as five to one; Blackstone reverted to ten to one, and in that form it became established.

No direito probatório dos Estados Unidos, os standards do convencimento judicial estão inseridos no tópico referente ao ônus da prova (burden of proof), dividido em ônus da persuasão (burden of persuasion) e ônus da produção (burden of production).

O ônus da produção diz respeito

O ônus da persuasão diz respeito ao grau necessário de convencimento acerca da prova carreada pela parte incumbida do ônus da produção. O julgador analisa se a prova trazida aos autos do processo mostra-se suficiente, tendo como parâmetro o standard exigido para o caso.

A parte sobre a qual recai o ônus da persuasão corre o risco da não-persuasão; ou seja, caso não convença o julgador acerca dos fatos que suportam o seu pretenso direito, restará como derrotada.

A função do julgador dos fatos – juiz ou júri – avulta-se extremamente complexa e desafiadora, tendo em vista que a certeza escapa ao seu domínio. As convicções formadas a partir das provas judiciais advêm de um processo cognitivo permeado de imprecisões, ambiguidades, falhas e erros inerentes à natureza humana, conforme relata um J. P. McBaine, em estudo clássico acerca do tema: “Man’s imperfections, which everybody knows exist, make absolute perfection or certainty unattainable in the field of fact finding”[8].

Na esteira das palavras proferidas por McBaine, avulta a impossibilidade de um juízo de absoluta certeza acerca dos fatos. O que resta ao julgador é sopesar o arcabouço probatório no intuito de alcançar diferentes graus de convencimento acerca dos fatos em disputa no processo.

Não discrepa desse entendimento as palavras sábias do grande Jeremy Bentham:

> “Persuasion admits of, and exists in, different degrees of strength, different degrees of intensity; for strength, force, and intensity, are here synonymous. (...) Not only the persuasion of an ordinary man, on an ordinary occasion, but the persuasion of a judge, on a judicial occasion, is capable of existing in different degrees of strength.”[9]

Partindo-se do pressuposto que a prova produzida judicialmente gera um estado de convencimento diverso da certeza, prossegue com total sapiência o ensinamento de McBaine, em síntese lapidar:

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[8] Burden of Proof: Degrees of Belief. *California Law Review*, Berkeley, v. XXXII, n. 1, p. 246, mar. 1944.
[9] *Rationale of Judicial Evidence*. New York: Garland, 1978. p. 71-72. v. I.

> "The only sound and defensible hypotheses are that the trier, or triers, of facts can find what (a) probably has happened, or (b) what highly probably has happened, or (c) what almost certainly has happened. No other hypotheses are defensible or can be justified by experience and knowledge."[10]

Esses três diferentes graus de convencimento, emandos do processo cognitivo de tomada de decisões, são traduzidos em linguagem jurídica por meio de três standards presentes no direito norte-americano.

Beyond a Reasonable Doubt

O primeiro standard a ser dissecado está jungido, de maneira inexorável, na história do sistema de direito criminal dos Estados Unidos da América.

A origem desse standard emerge da peculiar tarefa enfrentada pelos juízes ingleses de instruir os jurados durante o então incipiente julgamento por júri popular.

No século XII, os julgamentos por ordálios, ou juízos de Deus, foram substituídos no direito do common law pelo júri e no direito continental pelo sistema da prova legal. Os ordálios constituíam um modelo de prova irracional, que apelava ao sobrenatural para a prova dos fatos.

O historiador Henry Charles Lea, em 1866, publicou *Superstition and Force*, considerado o principal texto em língua inglesa acerca das relações entre os aspectos culturais, religiosos e os procedimentos legais na Europa medieval[11]. O pesquisador norte-americano bem sintetiza a idéia subjacente ao desenvolvimento dos ordálios: "The so-called Judgment of God, by which men, oppressed with doubt, have essayed in all ages to relieve themselves from responsability by calling in the assistance of Heaven"[12].

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[10] *Op. cit*., p. 246-247.

[11] A referida obra foi republicada em três diferentes livros: *The Ordeal*. Philadelphia: University of Pennsylvania Press, 1973; *Torture*. Philadelphia: University of Pennsylvania Press, 1973; *The Duel and the Oath*. Philadelphia: University of Pennsylvania Press, 1974.

[12] *The Ordeal*, p. 4.

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O abando dos ordálios no século XIII, por meio do Concílio de Latrão, de 1215, fez com que uma nova racionalidade jurídico-política dominasse o campo do direito probatório[18].

O julgador dos fatos deixou de ser Deus para ser um juiz, o que acarretou uma crise de legitimação política, o pensamento encontrava-se ainda muito envolto com questões religiosas, o que justificou, até há pouco tempo, a aceitação dos ordálios. O professor da Yale Law School John H. Langbein, um dos principais estudiosos de direito comparado nos Estados Unidos, aduz que a pergunta dirigida ao juiz pelos homens da época seria: "You who are merely another mortal like me, who are you to sit in judgment upon me"[19].

A acatação das decisões judiciais sedimentou-se com o surgimento dos Estados nacionais, a partir da construção do pensamento jurídico-político de legitimação dos atos estatais[20]. Nesse contexto, John H. Langbein afirma que a resposta a ser dada pelo juiz à pergunta anteriormente formulada seria: "I, the

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[13] *Trial by Fire and Water*: the medieval judicial ordeal. New York: Oxford University Press, 1986. p. 4.

[14] "For the sixth, seventh, and most of the eighth century there are no references to any other kind of ordeal. The procedure involved, in which an object, usually a stone or a ring, had to be plucked form a bubbling cauldron, is vividly described in Gregory of Tours' *De Gloria martyrum*: 'the fire was build up, the cauldron was placed on it, it boiled fiercely, a little ring was tossed into the hot water'. The proband 'drew back his clothes from his arm and plunged his right hand into the cauldron … the fire roared up and in the bubbling it was not easy for him to grasp the little ring, but at last he drew it out'". (BARTLETT, Robert. *Op. cit.* p. 4)

[15] Cf. BARTLETT, Robert. *Op. cit.* p. 9.

[16] Cf. BARTLETT, Robert. *Op. cit.* p. 10.

[17] Cf. BARTLETT, Robert. *Op. cit.* p. 10-11.

[18] Cf. LANGBEIN, John H. *Torture and the Law of Proof*. Chicago: The University of Chicago Press, 1976, p. 6-8. Com referência bibliográfica sobre o tema, SILVA, Carlos Augusto. *O Processo Civil como Estratégia de Poder*: Reflexo da Judicialização da Política no Brasil. Rio de Janeiro: Renovar, 2004, p. 15.

[19] *Op. cit.*, p. 6.

[20] Acerca do tema, consultar SILVA, Carlos Augusto. *Op. Cit.*, p. 49-71.

judge, sit in judgment upon you because I have the power to do so. I derive my power from the state, which selects, employs, and controls me"[21].

Contudo, na vigência do século XIII, essa idéia de legitimidade ainda não prosperava.

A construção jurídica arquitetada para legitimar as decisões do juiz sobre os fatos baseou-se, então, no sistema da prova legal. Os homens da época não aceitariam submeter-se a decisões sobre as quais pairassem dúvidas acerca dos fatos revelados. Não seria tolerável conceder ao juiz – simples mortal – o poder de decidir em caso de dúvida.

A exclusão da dúvida sobre a decisão judicial adveio de um sistema probatório em que ao juiz descabia a tarefa da valoração, mas tão-somente verificar a ocorrência da prova previamente estabelecida[22].

A tese de John H. Lagbein repousa na idéia de que o sistema da prova legal

"In the history of evidence the interaction of general culture and legal ideas can be followed most clearly. It is a field that belongs to psychological as well as legal history. It demonstrates the true position of the law in the general context of civilization: not as a marginal, abstruse technique of interest to specialists only, but part and parcel of the culture of any given period and one of its most important elements. The history of modes of proof does, of course, throw light on legal thinking and judicial organization, but it also illuminates the mentality, the attitude towards the supernatural and other aspects of the psychology of ordinary

[21] *Op. cit.*, p. 6.

[22] "The system of statutory proofs was the answer. Its overwhelming emphasis is upon the elimination of judicial discretion, and that is why it forbids the judge the power to convict upon circumstantial evidence. Circumstantial evidence depends for its efficacy upon the subjective persuasion of the trier, the judge. He has to draw an inference of guilt from indirect evidence. By contrast, the system of statutory proofs insists upon objective criteria of proof. The judge who administers it is an automaton. He condemns a criminal upon the testimony of two eyewitnesses, evidence which is in the famous phrase 'as clear as the light of day'. (p. 7) There should be no doubt about guilt in such a case. Likewise, when the accused himself admits his guilt, there ought to be no doubt. (Even under the former system of proof, confession constituted waiver. If the culprit admitted his guilt, the authorities were not going to waste their time and God's by asking for a confirmation under ordeal.)" (LANGBEIN, John H. *Op. cit.* p. 6-7)

people – a very precious source indeed for those remote centuries where information is hard to come by."[23]

"On the one hand there were the rules and methods of evidence worked out by civilists and canonists. Their learned Romano-canonical procedure, created in the second half of the (p. 71) twelfth and in the thirteenth century, conquered continental courts and stamped their civil and criminal procedure. Its main elements were the single judge or body of judges, who decided at the same time on questions of fact and on questions of law, who led the inquest, carried out interrogations in person or through commissioners and gave final judgment. In the field of evidence we note the use of party witnesses, confessions, secret hearings and torture.
In various other countries another system emerged. It also broke with the old irrational proofs and relied on human knowledge, insight and inquiry, but was based on a different approach and worked along different lines. We mean, of course, the jury system in all its variations. Here the trial was based on two distinct bodies, the judges who led it and eventually gave judgment, and the members of the jury who pronounced a verdict on the crucial issue of right and wrong, guilty or innocent. The voice of the vicinity, the 'truth of the land', was heard under the guidance of the judges, but was binding upon them. It was as binding, in fact, as the ordeals had been, the vox populi had simply taken the place of the final and inscrutable vox Dei. The jury could hear evidence and draw upon its own first-hand knowledge of the facts. Later it developed into a trial jury, deciding merely on the evidence put before it."[24]

4. Prova Legal

Langbein, Torture and the law of proof

p. 9

Another point which emphasizes the connection between torture and the Roman-canon law of proof is that Europe itself, torture (p. 10) was not allowed in cases of petty crime, *delicta levia*. The statutory proofs pertained only to cases of capital crime. Delicta levia were governed by what would today be called freie Beweiswürdigung or l'intime conviction, that is, the subjective persuasion of the judge.

p. 11

[23] CAENEGEM, R. C. Van. *The Birth of the English Common Law*. 2nd. ed. New York: Cambridge University Press, 1988. p. 62.
[24] CAENEGEM, R. C. Van. *The Birth of the English Common Law*. 2nd. ed. New York: Cambridge University Press, 1988. p. 70-71.

The thesis of this book is that the Roman-canon law of proof lost its force not in the nineteenth century but in the seventeenth. A new system of proof, which was in fact free judicial evaluation of the evidence although not described as such, was developed in the legal science and the legal practice of the sixteenth and seventeenth centuries, and confirmed in the legislation of the seventeenth and eighteenth centuries.

This new system of proof developed alongside the Roman-canon system. The Roman-canon law of proof survived in form, but in the seventeenth century it lost its monopoly. Thereafter the standards of (12) the Roman-canon law continued to be complied with easy cases, cases where there was a voluntary confession or where there were two eyewitnesses. But for cases where there were neither, the Roman-canon standards no longer had to be complied with. That is to say, in just those cases where it had previously been necessary to use torture, it now became possible to punish the accused without meeting the evidentiary standards that had led to torture.

p. 12

What happened was no less than a revolution in the law of proof. Concealed under various misleading labels, a system of free judicial evaluation of the evidence achieved subsidiary validity. This development liberated the law of Europe from its dependence on torture. Torture could be abolished in the eighteenth century because the law of proof no longer required it.

LANGBEIN, John H. *Prosecuting Crime in the Renaissance*: England, Germany, France. Cambridge: Harvard University Press, 1974.

135

The abolition of the ordeals could have occurred only when alternatives were in sight. The Roman-canon alternative, nascent Inquisitionsprozess (officialized prosecution and rational judgment), mirrored the ongoing officialization and rationalization of government and public life.

p. 205

English procedure had permitted the trial jury, as successor to the ritual modes of trial, to convict without reference to objective standards for rational evaluation of evidence such as the Roman-canon system of arithmetic proofs. Roman-canon Inquisitionsprozess entered the Renaissance codes afflicted by the legacy of its own precocity: standards of proof high enough to contain judicial arbitrariness.

By the middle of the sixteenth century the major Continental legal systems exhibit a set of common characteristics of criminal procedure. These features share a common association with the Roman-canon prototype, whose outline had matured in the church courts by the end of the thirteenth century. They take the name *Inquisitionsprozess* from the leading German scholarship.

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TILLERS, Peter; GREEN, Eric D (Edited by). *Probability and Inference in the Law of Evidence*: the uses and limits of Bayesianism. Dordrecht: Kluwer, 1988.

TRIBE, Laurence H. *American Constitutional Law*. 2nd ed. New York: The Foundation Press, 1988.

p. 740

The Supreme Court has also held that the *standards of proof* with which courts are to evaluate potential deprivations of substantive interests serve important practical and symbolic purposes, and thus must comport with constitutional minima in civil as well as in criminal cases.

NOWAK, John E.; ROTUNDA, Ronald. *Constitutional Law*. 5th. Ed. St. Paul: West Publishing, 1995.

p. 530

Due process safeguards apply whenever the government seeks to burden an individual in the exercise of fundamental constitutional rights. The right to privacy includes a right to freedom of choice in marital and family decisions. Thus, when a state seeks to take a child away from its parents, the parents must be given a hearing to determine their fitness to retain the child. Because of the fundamental nature of the interest in family autonomy, the state must prove its allegation of parental unfitness by at least "clear and convincing" evidence. This principle is valid even if the state seeks to take away an illegitimate child from its father. Due process requires that the equal protection guarantee prohibits discrimination against illegitimates.

GIGERENZER, G.; ENGEL, C. (Edited by). *Heuristics and the Law*. Cambridge: The MIT Press, 2006.

WAGNER, Gerhard. Heuristics in Procedural Law. P. 281-302

p. 283

German law does not distinguish between criminal and civil trials but requires certainty beyond a reasonable doubt for both types of trial. However, the application of this standard does not refute the thesis developed here that courts, in their everyday practice, do not aim to establish the truth in an ambitious sense of the term. For one, the beyond-any-reasonable-doubt-standard embodied in Sect. 286 of the German Code of Civil Procedure (ZPO [Zivilprozessordnung]) allows for a broad spectrum of judge-made exceptions, which enables a court to decide hard cases without constant recourse to *non-liquet* decisions. Second, the standard is understood to be subjective – the relevant test is not whether the objective likelihood of the plaintiff's or defendant's case to be true is approaching 1, but only the perception of the individual judge (Entscheidnungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 53, 245, 225f.; Zoller/Greger 2004, 286 no. 13). If the court "feels" convinced, the facts are thought to have been established "beyond reasonable doubt" (Gottwald 1979; *Alternativkommentar ZPO*/Russmann 1987, 286 no. 14f.). It is this subjective element that allows German courts to operate in much the same way as their American counterparts, even though they may be slightly more reluctant to allow claims (and defenses) than an American court. In concrete cases involving scientific uncertainties that are impossible to clarify (e.g., as is typical in medical malpractice actions), the Federal Supreme Court (BGH) has repeatedly warned the lower courts that they should not exaggerate the standard of proof but operate pragmatically (*Bundesgerichtshof* [BGH] *Versicherungsrecht* [VersR] 1994, 52, 53; Muller 1997; Giesen 1982). It is obvious, then, that even under German law of civil procedure, the "objective truth" is not what the courts are aiming at when evidence is gathered and evaluated.

KOEHLER, Jonathan J. Train Our Jurors. P. 303-325

p. 305

Studies reveal that jurors do not understand jury instruction terminology and cannot remember, recognize, or paraphrase the instructions after they have heard them.

p. 306

Nearly seven in ten people who received jury instructions in actual cases erroneously believed that one must be "100 %" before voting to convict in a criminal case (Saxton 1988). One in ten of these jurors agreed with this statement: "In a criminal trial, all that the state has to do is to convince the jury that it is more likely than not (i.e., that there's a better than 50-50 chance) that the defendant committed the crime that the defendant is accused of" (Saxton 1998).

p. 309

In light of the difficulty clarifying the meaning of beyond a reasonable doubt, perhaps it is best to leave the standard undefined.

MURRAY, Peter L.; STURNER, Rolf. *German Civil Justice*. Durham: Carolina Academic Press, 2004.

p. 307

ZPO 286:

The court is to decide upon consideration of the entire content of the arguments and the results of reception of evidence according to its free conviction whether a factual assertion is to be regarded as true or untrue. The reasons which led to the court's convictions are to be stated in the judgment.

Das Gericht hat unter Berucksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Uberzeugung zu entscheiden, ob eine tatsachliche Behauptung fur whar oder fur nicht wahr zu erachten sei. In dem Urteil sind die grunde anzugeben, die fur die richterliche Uberzeugnung leitend gewesen sind.

p. 310

In order to determine a fact in dispute, the court must be "convinced" (uberzeugt) that the fact exists, without setting an unrealistic standard of certainty. Such a level of conviction may be difficult to describe. Termed sufficient have been "a degree of certainty useable for practical life"[25], or "such a high degree of probability as would quiet, without eliminating, the doubts of a person of reasonable and clear perception of the circumstances of life"[26]. (311) How high this probability must be is the subject of some dispute. Some scholars suggest that "more likely than not" should suffice. Others contend that a standard of probability akin to that of the common law would open the floodgates of liability. In practice theoretical formulations of degrees of conviction may be of little importance. The court will in the final analysis base its determinations on such evidence as is reasonable to expect, considering the circumstances of the case, the nature of the issue and the kind and amount of evidence available. One must remember that the German judge does not merely evaluate the presentation of others, but actively participates in the process of the reception and evaluation of the evidence, and in a sense, develops his own degree of conviction.

[25] ("ein fur das praktische Leben brauchbarer Grad von Gewissheit"); Federal Supreme Court, 46 NJW 935 (1993).

[26] ("ein fur einen vernunftigen, die Lebensverhaltnisse klar uberschauenden Menschen so hoher Grad von Wahrscheinlichkeit, das er den Zweifeln Schweigen gebietet, ohne sie vollig auszuschliessen"); Federal Supreme Court, 53 BGHZ 245, 256 (1970); 53 NJW 953 (2000). This standard was originally formulated by the Reichsgericht for criminal cases; see Walter, Freie Beweiswurdigung, pp. 91 ff.

McEWAN, Jenny. *Evidence and the Adversarial Process*: the modern law. Oxford: Blackwell, 1992.

CARSON, David; BULL, Ray (Edited by). Handbook of Psychology in Legal Contexts. 2nd edition. West Sussex: Wiley, 2003.

FEENEY, Floyd; HERRMANN, Joachim. One Case – Two Systems: a comparative view of American and German criminal system. Ardsley: Transnational Publishers, 2005.

p. 401

The standard of proof is obviously more or less the same in American and German criminal procedure.

p. 402

According to the "principle of free evaluation of the evidence," the German Criminal Procedure Code directs: "In evaluating the evidence the court shall decide according to its free conviction obtained from the entire trial." A second – uncodified – principle requires the court, in case of doubt, to decide in favor of the defendant. Taken together, these two principles seem to call for the same degree of persuasion as the beyond a reasonable doubt standard of American law.

p. 430

The German comments suggest that this principle, in combination with the principle calling for "free evaluation of the evidence", results in a standard similar to the American "beyond a reasonable doubt" standard.

p. 431

Whether that is so or not is difficult to determine. There is no good research on the issue, and we cannot tell much from the verbal formulas alone. The German verbal formula – in dubio pro reo (in doubt for the defendant) – sounds more like the American civil standard (preponderance of the evidence) than the much more demanding "beyond a reasonable doubt" standard. Even within the United States, the "beyond a reasonable doubt" standard is not everywhere the same. In practice, each community tends to have its own local legal culture with its own variant of the basic standard. If the variation wanders too far from the basic standard, the appellate courts will find that the evidence is not sufficient to uphold the verdict against the defendant – thus correcting the course and enforcing minimum standards.

Insofar as comparisons of the two standards are concerned, ultimately all that we have to go on are impressions – things that are notoriously suspect because each observer comes to the table with so many preconceptions. Having observed around 30 trials in various parts of Germany and discussed the O.J. Simpson case with many German lawyers, professors, and students during a series of lectures about the Simpson trial, my own impression is that the beyond a reasonable doubt standard is somewhat more stringent.

FREITAS, Jose Manuel Lebre de (Edited by). *The Law of Evidence in the European Union*. The Hague: Kluwer Law International, 2004.

LINDELL, Bengt. Evidence in Sweden. P. 407-435

p. 428

According to Ekelof, the judge should freely evaluate every item of evidence. On the other hand, the summing up of all evidence presented in the action should be performed in accordance with logical rules.

p. 429

There two main models for evaluating evidence that have been debated in Swedish doctrine, namely the evidentiary value model and the evidentiary theme model.

HUANG, Kuo-Chang. *Introducing Discovery into Civil Law*. Durham: Carolina Academic Press, 2003.

p. 52

Despite the controversy as to some particulars of the applicability of probability theory to judicial fact-finding, our inability to ascertain past events undeniably begets two critical issues: first, who has the burden of proving the disputed facts – the allocation of burden of proof – and second, to what degree of certainty is this burden discharged – the standard of proof.

In a judicial system without a jury to share the responsibility of fact-finding, it is understandable that the common law notion of distinguishing burden of production and burden of persuasion has no place to grow.

p. 53

The general standard of proof in civil adjudication adopted by continental civil procedure is the judge's personal conviction that the fact exists under a high degree of probability close to certitude.

German(Gottwald), French (Clermont and Sherwin) and Japan

In Japan, the judge's personal conviction is required, although there are widespread disputes on the meaning and content of this conviction. The earlier majority view seems to have gone along with the German and French attitude that the civil standard of proof is as high as the criminal one, but the current majority no longer (p. 54) believes that the two standards should be the same. Nevertheless, one can still safely say that a high degree of certainty standard is used in Japan.

p. 54

First, the continental system, like the common law system, follows Bayesian decision theory to determine whether the burden of persuasion has been satisfied by comparing the fact-finder's subjective posterior probability to the required minimum degree of probability – standard of proof. Second, the continental standard of proof in civil cases is significantly higher than the common law preponderance-of-the-evidence standard.

p. 55

In continental procedural thinking, the standard of proof flows from the principle of free evaluation of evidence. This close relation, however, can barely withstand theoretical scrutiny, because the principle of free evaluation calls for the judge, relying on logic and life experience, to evaluate the quality and weight of the evidence, and does not itself compel any particular standard of proof. Rather, this relation can be explained only in historical terms. The French Revolution brought about the reform to replace the mechanical and numerical system of legal proof with the principal of free evaluation, and ideological notion that the judge can find the fact only when he is firmly convinced by freely and fully evaluating all evidence led to the uniform application of the personal conviction standard in all kinds of cases. This ideological thinking seems to make the civilians ignore the inherently different natures of civil and criminal cases.

p. 57

The consequences of different standards of proof can be evaluated from four different perspectives: (1) the probability of erroneous judgments, (2) the distribution of that probability, (3) the expected cost of erroneous judgments, and (4) the distribution of that cost.

With regard to the probability of erroneous judgments, it has been firmly established that the preponderance-of-the-evidence standard (S>50%) is the best rule to keep this probability to a minimum.

p. 58

With the regard to the expected cost of erroneous decisions, Figure 1 clearly shows that when the standard of proof is set up as ½ (50%), the sum of the total cost is in the minimum (area ***a*** plus ***b***+***d***). Moreover, this cost is allocated equally between the plaintiff and the defendant (area ***a***=area ***b***+***d***). The plaintiff bears the cost of a false negative (area ***a***) and the defendant (p. 59) shoulders the cost of a false positive (area ***b***+***d***).

p. 61

Figure 2 shows that when the cost of an erroneous judgment in favor of the plaintiff rises from D to D1, the equilibrium which denotes the optimal standard minimizing the cost of erroneous judgments shifts from 50% to some point higher than 50%.

p. 62

The notion that the high standard of proof serves the truth is accurate only insofar as the possibility of a false positive in a particular case – wrongly finding the existence of a fact alleged by the party with burden of persuasion – will be kept very low. Beyond this, the high standard of proof not only does not promote truth-seeking, but also increases the probability of a false negative – wrongly finding the nonexistence of the fact. If the fact-finder believes that it is more probable than not, or even much more probable than not, that the disputed fact exists, this high standard of beyond a reasonable doubt will nonetheless require him to find the opposite. Thus, the high standard of proof decreases rather than increases the likelihood of finding the truth.

Clermon & Sherwin, Kaplan, David Kaye (The limits of the preponderance of the evidence standard, 1982 Am. B. Found. Res. J. 487), Ball (the moment of the truth), Orloff&stedinger (framework for evaluating the preponderance of the evidence standard, 131 u. pa. l. rev. 1159), Finkelstein (quantitative methods in law), david kaye (naked statistical evidence, 89 yale l.j. 601),

Gerber, p. 768, Beardsley, 469, Evidence law adrift,83, 114, 122

p. 64-65

The system uses the private character of civil dispute as a justification to impose the burden of producing evidence on the party. This burden is even raised to the level of persuasion beyond a reasonable doubt to serve the system's need of legitimate appearance of its fact-finding.

p. 65

It sends a clear, unequivocal message to all prospective plaintiffs: unless you have obtained sufficient evidence to prove your case beyond a reasonable doubt, do not

approach the court. Studies show that the level of litigation appears to be a steady state, not really affected by procedural arrangements like these.

Clermon & Shermin, p. 268, George Priest, 69 B.U.L. Rev. 527

p. 138

The required standard of proof under Japanese civil procedure is a subject of confusion and controversy. The only thing that can be said with some certainty is that the required standard of proof is certainly higher than the standard of preponderance of evidence, although there are few cases holding to the contrary.
The leading case on this subject is the so-called *Runbaru* case. In this medical malpractice case, the Japanese Supreme Court held "to prove the causation in litigation is not a matter of scientific proof, which allows no doubt; rather, it requires the proof of *a high probability* that the certain facts resulted in the certain outcome. It is necessary and sufficient that the judge, by (p. 139) considering all evidence in accordance with *the experiential rule*, has obtained *a personal conviction* of *his finding* to the degree that an average person will not entertain doubts." While this holding was made on a specific point – causation in a medical malpractice case – most commentators believe that it is generally applicable to elemental facts in civil adjudication. Also based upon this holding, the majority view believes that a high standard of proof is required in civil cases.

p. 139

GOODMAN, Carl F. *Justice and Civil Procedure in Japan*. Dobbs Ferry: Oceana Publications, 2004.

p. 324

The plaintiff bears the general burden of proof to establish the claim, while the defendant has the burden of establishing the facts to support any "affirmative defenses". As a general rule, the burden on the plaintiff in Japan is more severe than in the United States. Japan does not follow the American practice wherein a 50. + % chance of success is sufficient to meet the burden of proof in a civil case.

p. 324

In Japan the court must be convinced that the plaintiff is correct for the plaintiff to win. As a rule the necessity to be convinced by the evidence of a matter requires a high degree of confidence that the party is correct (a "high probability" standard). This is a higher standard of proof than a mere preponderance. Although it is not as stringent as the beyond a reasonable doubt standard, the high probability standard is difficult to meet.

DELMAS-MARTY, Mireille; SPENCER, J. R (Edited by). *European Criminal Procedures*. Cambridge: Cambridge University Press, 2002.

SPENCER, J. R. Evidence. P. 594-640

p. 600

In French law the court must not convict accept where it has "*une intime conviction*" that the accused is guilty. The best-known expression of this phrase is found in the celebrated instruction to French juries contained in article 353 of the CPP:"… the law puts to them just this single question, in which the whole of their duty is contained: (p.601)"are you personally convinced?" [*avez-vous une intime conviction*?]". The concept of *intime conviction* is also found in German and in Belgian law, as it is, indeed, in most of the systems that were influenced by French law in the nineteenth century.

p. 601

Intime conviction dates from the abandonment of the system of "legal proof" at the time of the French Revolution, when reformers wanted to ensure that henceforth the courts were not obliged to convict simply because a certain number of pieces of evidence were present, and conversely, that the court is free to convict on evidence of any kind if it finds this evidence convincing. Most of the discussion about "*intime conviction*" deals not with the level of certainty which these words represent, but the liberty which they give the court to weigh each piece of evidence as it thinks proper.

If asked to explain what *intime conviction* means, a judge from France or any other country in continental Europe would reply "It means you must feel sure". And that is exactly how English judges actually direct juries as to the meaning of the standard of proof. The standard direction as currently recommended by the Judicial Studies Board is this:

p. 602

How does the prosecution succeed in proving the defendant's guilt? The answer to that is quite simple – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'.

MILLER, D. L. Carey; BEAUMONT, Paul R (Edited by). *The Option of Litigating in Europe*. London: United Kingdom National Committee of Comparative Law, 1993. (United Kingdom Comparative Law Series, volume 14)

GOTTWALD, Peter. Fact Finding: a German Perspective. P. 67-85

p. 77

The standard of proof is that of the personal conviction of the judge that the evidence is the truth. According to the prevailing opinion such a conviction has to be based on a high probability that the statement under consideration can be taken for truth in practical life; a probability which silences any doubt, but does not exclude it. There is a wide discussion in Germany that such standard is higher than a mere preponderance of evidence or balance of probabilities, but this is rather doubtful. Because in many cases with facts difficult to prove, the courts regularly relax the standard to that of preponderance of evidence; this is particularly true with regard to prima facie cases, to causation, to negligence and to the assessment of damages. As these pragmatic mitigations are widespread one doubts whether there is any practical difference between the standards of proof applied by British and German civil courts.

Kokkot ,p. 196

KAZAZI, Mojtaba. *Burden of Proof and Related Issues*: a study on evidence before international tribunals. The Hague: Kluwer Law International, 1996.

p. 325

Thus, the apparent lack of a general definition for standard of proof in international procedure can be attributed to the influence of civil law system on international law in this regard, and the flexibility of international tribunals in matters related to evaluation of evidence. Even ongoing arbitral institutions which have adjudicated numerous international claims have normally refrained from providing a comprehensive discussion in this regard, or from explaining the underlying standard they have applied in their decisions. In some instances, however, international tribunals have had to address this question in order to provide a general guideline to the evidentiary requirements of the cases before them.

p. 344

While proof beyond reasonable doubt seems to be too high a standard, it has been applied under special circumstances by international tribunals. It is to be noted, however, that similar to municipal law where a high standard such as proof beyond reasonable doubt is applied in trying defendants on criminal charges, in (p. 345) international proceedings, too, this standard is normally applied where civil claims having the same nature, tort claims or quasi-criminal allegations are involved.

p. 347

Proof beyond reasonable doubt is, presumably, the favourite standard of proof with international tribunals since it relieves them of the task of searching for other standards which may be appropriate in the context of a given case. Unfortunately, it is a luxury that the party which carries the burden of proof in international proceedings cannot always afford.

p. 348

As a result of the above considerations, international tribunals have traditionally often had to be content with a lesser but more flexible degree of proof, which is often referred to as the *preponderance of evidence*.
p. 377

"Proof beyond a reasonable doubt", although a high standard, has occasionally been applied by international tribunals under special circumstances. While this standard has been favoured more by courts and commissions dealing with humanitarian issues, other international tribunals, too, have applied it whenever appropriate. The most common standard applied by international tribunals, however, is the "preponderance of evidence", which generally means evidence greater in weight than that adduced by the other party.

Yet it must be emphasized that what constitutes a given standard of proof is ultimately subject to the sole discretion of the international tribunal seized of a given case. To some extent, international tribunals take account of the extraordinary difficulties which may be encountered by a party to rely on indirect evidence, accepting a lower standard of proof such as prima facie evidence, or taking the proponent's difficulties in obtaining evidence into account at the stage of evaluation of the evidence.

COHEN, L. Jonathan. Freedom of Proof. Archiv Für Rechts- Und Sozialphilosophie, Wiesbaden, p. 1-21, n. 16, 1983.

p. 2

Arguments in favour of regulating proof

I – Ideally, therefore, all the rules by which disputes are settled ought to be administered as rules of law, because triers of fact are more likely to behave uniformly and predictably when legally compelled to do so than when left to their own intellectual devices.

II – people ought to be able to discover in advance where they stand as regards possible adjudication in their affairs.

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KOEHLER, Jonathan J. Train Our Jurors. P. 303-325

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In light of the difficulty clarifying the meaning of beyond a reasonable doubt, perhaps it is best to leave the standard undefined.

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p. 307

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Das Gericht hat unter Berucksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Uberzeugung zu entscheiden, ob eine tatsachliche Behauptung fur whar oder fur nicht wahr zu erachten sei. In dem Urteil sind die grunde anzugeben, die fur die richterliche Uberzeugnung leitend gewesen sind.

p. 310

In order to determine a fact in dispute, the court must be "convinced" (uberzeugt) that the fact exists, without setting an unrealistic standard of certainty. Such a level of conviction may be difficult to describe. Termed sufficient have been "a degree of certainty useable for practical life"[27], or "such a high degree of probability as would quiet, without eliminating, the doubts of a person of reasonable and clear perception of the circumstances of life"[28]. (311) How high this probability must be is the subject of some dispute. Some scholars suggest that "more likely than not" should suffice. Others contend that a standard of probability akin to that of the common law would open the floodgates of liability. In practice theoretical formulations of degrees of conviction may be of little importance. The court will in the final analysis base its determinations on such evidence as is reasonable to expect, considering the circumstances of the case, the nature of the issue and the kind and amount of evidence available. One must remember that the German judge does not merely evaluate the presentation of others, but actively participates in the process of the reception and evaluation of the evidence, and in a sense, develops his own degree of conviction.

McEWAN, Jenny. *Evidence and the Adversarial Process*: the modern law. Oxford: Blackwell, 1992.

CARSON, David; BULL, Ray (Edited by). Handbook of Psychology in Legal Contexts. 2nd edition. West Sussex: Wiley, 2003.

FEENEY, Floyd; HERRMANN, Joachim. One Case – Two Systems: a comparative view of American and German criminal system. Ardsley: Transnational Publishers, 2005.

[27] ("ein fur das praktische Leben brauchbarer Grad von Gewissheit"); Federal Supreme Court, 46 NJW 935 (1993).

[28] ("ein fur einen vernunftigen, die Lebensverhaltnisse klar uberschauenden Menschen so hoher Grad von Wahrscheinlichkeit, das er den Zweifeln Schweigen gebietet, ohne sie vollig auszuschliessen"); Federal Supreme Court, 53 BGHZ 245, 256 (1970); 53 NJW 953 (2000). This standard was originally formulated by the Reichsgericht for criminal cases; see Walter, Freie Beweiswurdigung, pp. 91 ff.

p. 401

The standard of proof is obviously more or less the same in American and German criminal procedure.

p. 402

According to the "principle of free evaluation of the evidence," the German Criminal Procedure Code directs: "In evaluating the evidence the court shall decide according to its free conviction obtained from the entire trial." A second – uncodified – principle requires the court, in case of doubt, to decide in favor of the defendant. Taken together, these two principles seem to call for the same degree of persuasion as the beyond a reasonable doubt standard of American law.

p. 430

The German comments suggest that this principle, in combination with the principle calling for "free evaluation of the evidence", results in a standard similar to the American "beyond a reasonable doubt" standard.

p. 431

Whether that is so or not is difficult to determine. There is no good research on the issue, and we cannot tell much from the verbal formulas alone. The German verbal formula – in dubio pro reo (in doubt for the defendant) – sounds more like the American civil standard (preponderance of the evidence) than the much more demanding "beyond a reasonable doubt" standard. Even within the United States, the "beyond a reasonable doubt" standard is not everywhere the same. In practice, each community tends to have its own local legal culture with its own variant of the basic standard. If the variation wanders too far from the basic standard, the appellate courts will find that the evidence is not sufficient to uphold the verdict against the defendant – thus correcting the course and enforcing minimum standards.

Insofar as comparisons of the two standards are concerned, ultimately all that we have to go on are impressions – things that are notoriously suspect because each observer comes to the table with so many preconceptions. Having observed around 30 trials in various parts of Germany and discussed the O.J. Simpson case with many German lawyers, professors, and students during a series of lectures about the Simpson trial, my own impression is that the beyond a reasonable doubt standard is somewhat more stringent.

FREITAS, Jose Manuel Lebre de (Edited by). *The Law of Evidence in the European Union*. The Hague: Kluwer Law International, 2004.

LINDELL, Bengt. Evidence in Sweden. P. 407-435

p. 428

According to Ekelof, the judge should freely evaluate every item of evidence. On the other hand, the summing up of all evidence presented in the action should be performed in accordance with logical rules.

p. 429

There two main models for evaluating evidence that have been debated in Swedish doctrine, namely the evidentiary value model and the evidentiary theme model.

LERNER, Daniel (Edited by). Evidence and Inference. Free Press of Glencoe: Chicago, 1960.

HART JR., Henry M.; MCNAUGHTON, John T. Evidence and Inference in Law – p. 48-72

p. 53

The law does not require absolute assurance of the perfect correctness of particular decisions. While it is of course important that the court decide the case when the parties ask for the decision and on the basis of the evidence presented by the parties. A decision must be made now, one way or the other. To require certainty or even near-certainty in such a context would be impracticable and undesirable. The law thus compromises.

PATTI, Salvatore. Commentario de Codice Civile: Prove: disposizioni generali: art. 2697-2698. Bologna: Zanichelli, 1987.

p. 147

“Si pu`o parlare di libero convincimento soltanto quando l’iter logico del giudice non incontra lo sbarramento della prova legale, che appiattisce l’ativit`a del giudice rendendola simile a quella del burocrate, tenuto semplicemente a constatare l’allegazione di una serie di documenti al fine di poter prendere una certa decisione prevista dalla legge per il caso specifico.

p. 153-154

Reichsgericht: “Data la limitezza delle conoscenza umana, nessuno (neanche nel caso di diretta percezione di un fenomeno) puo pervenire alla assoluta certezza circa l’esistenza di una fattispecie. Sono sempre ipotizzabili astratte possibilita di non esistenza. Chi e cosciente dei limiti della conoscenza umana non ammetera mai di essere talmente convinto dell’esistenza di un certo accadimento da escludere assolutamente un errore. Per questo motivo nella vita pratica il piu alto grado di verossimiglianza, che si consegue con la migliore applicazione possible dei mezzi di conoscenza esistenti, vale come verita, e la coscienza di chi ha svolto questo processo conoscitivo circa l’esistenza di un’alta verossimiglianza vale come convincimento della verita”.
RG, 14 gennaio 1885 (RGZ, 15, 338 e segg.)

COHEN, L. Jonathan. Freedom of Proof. Archiv Fur Rechts- und Sozialphilosophie, Wiesbaden, p. 1-21, 1983.

p. 2

An initial line of argument in favour of regulating proof is that the heart of the idea of justice, it can be argued, lies the principle that like cases should be treated alike.

A second argument in the same direction rests on the claim that all the rules applied by the courts in determining issues of fact should be equally accessible in adjective law.

DERSHOWITZ, Alan M. *Reasonable Doubts*: the O. J. Simpson case and the criminal justice system. New York: Simon & Schuster, 1996.

p. 71

The typical instructions given by judges on reasonable doubt are so pro-prosecution that many defense attorneys, citing the Supreme Court’s dictum, ask that the term not to be defined. They prefer to leave its meaning to the common understanding of jurors and to the analogies they can come up with during the closing argument.

SHREVE, Gene R.; RAVEN-HANSEN, Peter. *Understanding Civil Procedure*. 3rd ed. Newark: LexisNexis, 2002.

p. 406

Many of the traditional maxims offered to explain how parties acquire burdens of productions and persuasion are of little use. It is said that the burden rests on the party who seeks to disturb the status quo or for whom a particular issue is essential. It is often defendant who disturbed the status quo outside of the court.

GIANNELLI, Paul C. *Understanding Evidence*. Newark: LexisNexis, 2003.

HUANG, Kuo-Chang. *Introducing Discovery into Civil Law*. Durham: Carolina Academic Press, 2003.

p. 52

Despite the controversy as to some particulars of the applicability of probability theory to judicial fact-finding, our inability to ascertain past events undeniably begets two critical issues: first, who has the burden of proving the disputed facts – the allocation of burden of proof – and second, to what degree of certainty is this burden discharged – the standard of proof.

In a judicial system without a jury to share the responsibility of fact-finding, it is understandable that the common law notion of distinguishing burden of production and burden of persuasion has no place to grow.

p. 53

The general standard of proof in civil adjudication adopted by continental civil procedure is the judge's personal conviction that the fact exists under a high degree of probability close to certitude.

German(Gottwald), French (Clermont and Sherwin) and Japan

In Japan, the judge's personal conviction is required, although there are widespread disputes on the meaning and content of this conviction. The earlier majority view seems to have gone along with the German and French attitude that the civil standard of proof is as high as the criminal one, but the current majority no longer (p. 54) believes that the two standards should be the same. Nevertheless, one can still safely say that a high degree of certainty standard is used in Japan.

p. 54

First, the continental system, like the common law system, follows Bayesian decision theory to determine whether the burden of persuasion has been satisfied by comparing the fact-finder's subjective posterior probability to the required minimum degree of

probability – standard of proof. Second, the continental standard of proof in civil cases is significantly higher than the common law preponderance-of-the-evidence standard.

p. 55

In continental procedural thinking, the standard of proof flows from the principle of free evaluation of evidence. This close relation, however, can barely withstand theoretical scrutiny, because the principle of free evaluation calls for the judge, relying on logic and life experience, to evaluate the quality and weight of the evidence, and does not itself compel any particular standard of proof. Rather, this relation can be explained only in historical terms. The French Revolution brought about the reform to replace the mechanical and numerical system of legal proof with the principal of free evaluation, and ideological notion that the judge can find the fact only when he is firmly convinced by freely and fully evaluating all evidence led to the uniform application of the personal conviction standard in all kinds of cases. This ideological thinking seems to make the civilians ignore the inherently different natures of civil and criminal cases.

p. 57

The consequences of different standards of proof can be evaluated from four different perspectives: (1) the probability of erroneous judgments, (2) the distribution of that probability, (3) the expected cost of erroneous judgments, and (4) the distribution of that cost.

With regard to the probability of erroneous judgments, it has been firmly established that the preponderance-of-the-evidence standard (S>50%) is the best rule to keep this probability to a minimum.

p. 58

With the regard to the expected cost of erroneous decisions, Figure 1 clearly shows that when the standard of proof is set up as ½ (50%), the sum of the total cost is in the minimum (area ***a*** plus ***b***+***d***). Moreover, this cost is allocated equally between the plaintiff and the defendant (area ***a***=area ***b***+***d***). The plaintiff bears the cost of a false negative (area ***a***) and the defendant (p. 59) shoulders the cost of a false positive (area ***b***+***d***).

p. 61

Figure 2 shows that when the cost of an erroneous judgment in favor of the plaintiff rises from D to D1, the equilibrium which denotes the optimal standard minimizing the cost of erroneous judgments shifts from 50% to some point higher than 50%.

p. 62

The notion that the high standard of proof serves the truth is accurate only insofar as the possibility of a false positive in a particular case – wrongly finding the existence of a fact

alleged by the party with burden of persuasion – will be kept very low. Beyond this, the high standard of proof not only does not promote truth-seeking, but also increases the probability of a false negative – wrongly finding the nonexistence of the fact. If the fact-finder believes that it is more probable than not, or even much more probable than not, that the disputed fact exists, this high standard of beyond a reasonable doubt will nonetheless require him to find the opposite. Thus, the high standard of proof decreases rather than increases the likelihood of finding the truth.

Clermon & Sherwin, Kaplan, David Kaye (The limits of the preponderance of the evidence standard, 1982 Am. B. Found. Res. J. 487), Ball (the moment of the truth), Orloff&stedinger (framework for evaluating the preponderance of the evidence standard, 131 u. pa. l. rev. 1159), Finkelstein (quantitative methods in law), david kaye (naked statistical evidence, 89 yale l.j. 601),

Gerber, p. 768, Beardsley, 469, Evidence law adrift,83, 114, 122

p. 64-65

The system uses the private character of civil dispute as a justification to impose the burden of producing evidence on the party. This burden is even raised to the level of persuasion beyond a reasonable doubt to serve the system's need of legitimate appearance of its fact-finding.

p. 65

It sends a clear, unequivocal message to all prospective plaintiffs: unless you have obtained sufficient evidence to prove your case beyond a reasonable doubt, do not approach the court. Studies show that the level of litigation appears to be a steady state, not really affected by procedural arrangements like these.

Clermon & Shermin, p. 268, George Priest, 69 B.U.L. Rev. 527

p. 138

The required standard of proof under Japanese civil procedure is a subject of confusion and controversy. The only thing that can be said with some certainty is that the required standard of proof is certainly higher than the standard of preponderance of evidence, although there are few cases holding to the contrary.
The leading case on this subject is the so-called *Runbaru* case. In this medical malpractice case, the Japanese Supreme Court held "to prove the causation in litigation is not a matter of scientific proof, which allows no doubt; rather, it requires the proof of *a high probability* that the certain facts resulted in the certain outcome. It is necessary and sufficient that the judge, by (p. 139) considering all evidence in accordance with *the experiential rule*, has obtained *a personal conviction* of *his finding* to the degree that an average person will not entertain doubts." While this holding was made on a specific

point – causation in a medical malpractice case – most commentators believe that it is generally applicable to elemental facts in civil adjudication. Also based upon this holding, the majority view believes that a high standard of proof is required in civil cases.

p. 140

The current majority view believes that the standard of proof in civil cases is lower than the standard of proof in criminal cases, and because it is settled that the Japanese criminal procedure adopts the beyond-a-reasonable-doubt standard, it is extremely unlikely and illogical to claim that the high probability means the beyond-a-reasonable-doubt standard. Also, the majority view believes that the high probability is a standard higher than the preponderance-of-evidence standard, this high probability standard must lie somewhere between beyond a reasonable doubt and the preponderance of evidence. While it is unclear whether this high probability standard is equal to the clear-and-convincing-evidence standard, some Japanese commentators do suggest that the two might not be different.

It should be noted, however, that my examination of the standard of proof in Japan above is purely analytic and interpretative. If my analysis of the majority view is correct, Japanese civil procedure in effect adopts the second-order probabilities approach; the judge must believe beyond a reasonable doubt that the fact has been shown to a high probability.

Indeed, one scholar has complained that whenever standard of proof has been advocated in Japanese civil procedure, it was done without expressing any concrete justifications for such a standard. Instead, this high probability standard is rationalized through the rejection of the other two obvious options – the beyond-a-reasonable-doubt and preponderance-of-evidence standards. The reasons for rejecting the beyond-a-reasonable-doubt standard are easy to identity [sic], because the civil and criminal procedures have different natures. As to the preponderance-of-evidence standard, the objections to it are threefold. First, a high (p. 141) probability is necessary to safeguard truth-seeking, which is an important aim of civil adjudication, and the preponderance-of-evidence standard seems to rest more on chance. Second, maintaining the status quo is an interest worthy of protection, and therefore it is reasonable to ask the party seeking to upset the status quo to shoulder a greater burden. Third, a judgment in favor of plaintiff will trigger the state's power to enforce the judgment, and therefore it is desirable to reduce the probability of wrongly granting an award.

p. 141

What lies behind this high standard of proof is the court's desire to legitimate its decision in appearance. The state will not exercise its power to enforce a private right unless the plaintiff has shown that there is a high probability it exists. A mere showing that the right more likely than not exists is not enough.

p. 143

The most important technique employed by the Japanese courts to ameliorate the party's difficulty in proving his case is through the concept of prima facie presumption.

The gravity of this problem is more apparent in the area of tort litigation because the two indispensable elements of negligence and causation are difficult to prove. This is especially so in so-called modern litigation, such as medical malpractice cases, product liability litigation, and environmental litigation.

p. 149

However, while this approach can somewhat ameliorate the unfairness of setting a high standard of proof and a lack of means of discovery, the biggest problem of this approach is that it is unclear under what conditions and to what extent the standard of proof can be reduced. While one judge suggested that the question of whether a proof has been made should be decided individually in each case according to the possibility of collecting evidence, the difficulty of proof, and the attitude of the opposing party – so that the less possible the necessary evidence can be collected, the lower the standard of proof should be – he still failed to provide a clear and workable formula. The answer seems to remain that it is up to the court to consider all relevant interests and the actual circumstances to make the decision and o justice in each individual case.

The second approach advocated by Japanese scholars to reduce the party's burden of proof is through the imposition of a duty of elucidation on the opposing party.

p. 150

The phrase "duty of elucidation" is somewhat awkward. It refers to the fact notwithstanding the ordinary allocation of burden of proof, where the party with the burden of allegation and proof is unable to make clear factual allegations and provide necessary evidence, the opposing party, while supposedly having no burden of allegation and proof, is required under certain conditions to elucidate the relevant facts of the dispute and provide evidence to support his elucidation.

LILLICH, Richard B. (Edited by). *Fact-Finding Before International Tribunals*: Eleventh Sokol Colloquium. Ardsley-on-Hudson: Transnational Publishers, 1991.

SANDIFER, Durward V. *Evidence Before International Tribunals*. Charlottesville: University Press of Virginia, 1975.

REDFERN, Alan. The Standards and Burden of Proof in International Arbitration. *Arbitration International*, London, v. 10, n. 3, p. 317-322, 1994.

p. 321

The degree, or level, of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assume that it is close to the "balance of probability" (to be distinguished from the concept of 'beyond a reasonable doubt' required, for example, (p. 322) in England to prove guilt in a criminal trial before a jury.).

REYMOND, Claude. The Practical Distinction Between the Burden of Proof and Taking of Evidence – A Further Perspective. *Arbitration International*, London, v. 10, n. 3, p. 323-327, 1994.

p. 326

The choice of the level of proof. Indeed, it is a question that is very rarely addressed in international arbitration. On this issue, the reaction of a civil law lawyer usually is: 'What the sufficient to convince me?', whereas I suspect that a common law lawyer, thinking in terms of a jury trial in purely adversarial proceedings, will tend to ask 'On which side is the evidence most convincing?'.

Article 25 (b) UNCITRAL, Article 34 ICSID; Art. 5 (13) IBA or Article 44 Zurich specifically provide that the arbitrator is free in the assessment of the evidence. In making this assessment should the arbitrator: (i) acquire an inner conviction as to the facts, according to the continental tradition; or (ii) does it suffice that he be satisfied by the preponderance of evidence, to use (p. 327) an American formulation (and one can ask whether such formulation corresponds to a 'reasonable certainty')?

REINER, Andreas. Burden and General Standards of Proof. *Arbitration International*, London, v. 10, n. 3, p. 328-340, 1994.

p. 328

None of the arbitration rules, as far as I am aware, contain provisions on the burden and standard(s) of proof, with one major exception, namely the UNCITRAL Rules which state in Article 24, first paragraph, that 'each party (p. 329) shall have the burden of proving the facts relied on to support his claim or defence'.

p. 329
Article 24 does not decide which facts have to be proved by whom. The UNCITRAL Rules certainly do not define any standard of proof, which seems to confirm that Article 24 does not and was never intended to allocate the legal burden of proof.

p. 335

While the parties sometimes agree in the contract on the burden of proof or at least on basic burden of proof rules, it is extremely unusual that parties agree in their contract on a given standard of proof.

Continental laws seem to establish a much higher standard. The laws and the legal doctrine refer to the 'inner conviction of the judge'. Austrian law even uses the term 'full conviction' (*volle Uberzeugung*). But in spite of the different wording the practical result seem to be the same in both systems. In all cases the real general standard is and must be a test of preponderance of evidence. This text applies in state courts and must even more so apply in international commercial arbitration.

p. 340

In delicate cases where the burden of proof and the standard of proof may be decisive, the arbitrators should avoid 'surprising the parties'. The arbitrators should rather openly discuss these questions with both parties in order not to violate the fundamental principle of due process of law.

HANOTIAU, Bernard. Satisfying the Burden of Proof: The View Point of a 'Civil Law' Lawyer. *International*, London, v. 10, n. 3, p. 341-356, 1994.

p. 345

Authors who have studied the case-law in France or in Belgium have reached the conclusion that the courts do not apply the rules concerning the burden of proof with a spirit of geometry. To satisfy the burden of proof means to establish the existence of a probability of likeliness which is sufficient to convince the judge and when this result is reached, the judge gives the other party the opportunity to explain himself in order to create eventually in his turn a contrary likelihood.

There is therefore a gap between law and practice. (p. 346) Therefore, to satisfy the burden of proof is to establish likelihood to convince the judge who will then turn to the other party and will give him the possibility to establish a contrary likelihood. In a complex case, judges most often will try to determine what is the most probable or likely solution. They consider that their role is not to establish the truth, since this often exceeds human capability, but to decide between the parties, to determine which party has a position which is more likely than the one of his adversary.

REDFERN, Alan et al. *Law and Practice of International Commercial Arbitration.* 4th. Ed. London: Sweet & Maxwell, 2004.

p. 297 , 6-67

The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the “balance of probability”.

MARRIOTT, Arthur. Evidence in International Arbitration. *International*, London, v. 5, n. 3, p. 280-290, 1989.

p. 282

Neither the main institutional rules for international arbitration of which I am aware, nor the UNCITRAL rules fix a standard of proof. Rather, the standard of proof which is required is often expressed by international arbitrators in terms of the jurisdiction form which they come. Thus, the English lawyers may talk in terms of the standard of proof in civil cases in this country, namely, a balance of probability. The civil lawyers may talk in terms of the (p. 283) concept of the inner conviction of the judge (l’intime conviction du juge’, ‘die richterliche Uberzeugung’, ‘il libero convincimento del giudice’). In practice the result is the same.

HOGARTH, Robin. *Judgment and Choice*. 2nd ed. Chichester: John Wiley, 1987.

ARKES, Hal R.; HAMMOND, Kenneth R. (Edited by). *Judgment and Decision Making*. Cambridge: Cambridge University Press, 1986.

SAKS, Michael J.; KIDD, Robert F. Human information processing and adjudication: Trial by heuristics. P. 213-242

p. 213

While a trial is many things, it most surely is a social invention for deciding between disputed alternatives under conditions of uncertainty.

KAHNEMAN, Daniel; SLOVIC, Paul; TVERSKY, Amos (Edited by). *Judgment under Uncertainty: heuristics and biases*. Cambridge: Cambridge University Press, 1982.

TVERSKY, Amos; KAHNEMAN, Daniel. Judgment under uncertainty: heuristics and biases. P. 3-20.

p. 3

Many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, the guilt of a defendant, or the future value of the dollar.

DEGROOT, Morris H.; FIENBERG, Stephen E.; KADANE, Joseph B (Edited by). *Statistics and the Law*. New York: John Wiley, 1986.

ZUCKERMAN, A. A. S. *The Principles of Criminal Evidence*. Oxford: Clarendon Press, 1989.

p. 122

A guilty verdict may be mistaken in two different senses. A verdict is mistaken in the first sense if it does not logically follow from the evidence. In the second sense a verdict is mistaken, notwithstanding that it may logically be supported by the evidence, when it fails to conform with the facts. A mistake in the first sense will occur if I reason that a person seen running away from a burning house was therefore guilty of arson. A mistake of the second kind occurs where, although my conclusion is warranted by the evidence, it is still at variance with the fact of the matter. This will happen, for instance, where I infer that the accused was the arsonist having heard the reports of honest and ostensibly reliable eyewitnesses, who turn out to have been mistaken. We may refer to the first kind of mistake as a mistake of reasoning. An inference that fails to conform to the facts as they really happened may be referred to as mistake of fact.

The corroboration and hearsay rules, for instance, are designed to prevent unwarranted reliance on unreliable testimony. However, no matter what we do we cannot completely eliminate mistakes of fact. This is an inescapable feature of inductive reasoning: inferences can only be reached as a matter of (p. 123) probability and not as a matter of certainty.

123

In ordinary affairs we deal with the risk of factual mistake by balancing the likelihood that our inference will be factually erroneous against the magnitude of the harm that we will suffer if it turns out to be so.

p. 127

The aim of the criminal process is to protect the community from crime as well as to protect the innocent from conviction. It might therefore be suggested that in determining the standard (p. 128) of proof we ought to strike an acceptable balance between these two aims.

p. 128

It might be argued that to the extent that we increase the requirement of proof for conviction, we increase the likelihood that guilty people will go free and we accordingly weaken the deterrent force of punishment. Increased resources in the detection of crime could go a long way towards maintaining deterrence without having to place the innocent at risk.

There is a more sophisticated version of the deterrence theory which argues that the most important aspect of punishment is to educate the public by strengthening the citizen's instinct to obey the law.
Ver Ten, Crime, Guilt and punishment.

p. 129

Doubt about guilt is immediately translatable into doubt about the justice of punishment and is liable to eat away at the confidence in the criminal system and harm the very basis upon which it stands.

Ver Nesson, 98 Harv L Rev 1357, Allen , 66 Boston U L Rev 541

A lowering of the standard of proof will also undermine the second major justification for punishment: the retributive theory. According to this theory the purpose of punishment is to render to the offender his just deserts.

Conforme Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980. p. 265.

Yet the moral justification works only in respect of the guilty and can hardly justify the conviction of an innocent person.

p. 131

It is difficult to believe that the expression 'beyond a reasonable doubt' is self-explanatory in our pluralist society.

ROBERTS, Paul; ZUCKERMAN, Adrian. *Criminal Evidence*. Oxford: Oxford University Press, 2004.

p. 327

The 'presumption of innocence' is a standard component of the 'fair trial' rights contained in international human rights treaties, including the European Convention on Human Rights and the International Convenant on Civil and Political Rights, and is frequently elevated to the status of a constitutional guarantee in jurisdictions with written Bill of Rights or their equivalent.

p. 328

A ‘presumption of innocence’ is only truly valuable if it carries robust implications for criminal procedure generally, and for the burden and standard of proof in particular.

p. 331

Burdens of proof and presumptions are the common law’s basic evidentiary techniques of risk allocation.

The simplest device for allocating the risk of error in litigation is a decision-rule providing that the court will only vindicate and enforce a claimant’s right if constitutive facts are proved by the claimant, to a specific degree of probability.

p. 344

The protection of the innocent from conviction is identified as a foundational principle of criminal evidence. Its significance derives directly from the neo-Kantian, deontological requirement that, at least in broadly liberal societies, the interests of individual citizens must be afforded high priority in government policy and administration, sometimes at the expense of maximizing aggregate social welfare.

p. 347

Liberal governments respect persons by helping to protect their citizens’ vital interests, not by leaving people to fend for themselves, so that only the strongest and fittest survive, with opens season to victimize the rest.

The liberal state is subject to these competing claims and pressures. On the hand, it must establish and effective criminal process to punish and deter wrongdoing in order to protect citizens’ vital interests and deliver justice. Yet, at the same time, all human beings have an inalienable right not to be subjected to the profound harm of wrongful conviction and punishment. The presumption of innocence and the evidentiary rules allocating the burden and the standard of proof are part of the normative machinery by which the state seeks to mediate this fundamental tension. The allocation of the probative burden to the prosecution, and the criminal standard of proof (p. 348) beyond a reasonable doubt, are the twin evidentiary pillars of the presumption of innocence in action.

VICENT, Jean; GUINCHARD, Serge. *Procédure Civile*. 27 ed. Paris: Dalloz, 2003.

Nenhuma referencia a standard of proof.

LANGBEIN, John H. *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press, 2003.

p. 261

The presumption of innocence (the idea that doubt should be resolved in favor of a criminal defendant) was (p. 262) ancient. It was known form classical Roman law and had been reinvigorated in the natural law literature of the seventeenth century.

PUIGELIER, Catherine (Org.). La Preuve. Paris: Economica, 2004

CARTIER, Marie-Élisabeth. Brèves remarques sur la prevue devant la Cour pénale internationale. P.
57-72.

Comenta art. 66, 3 do Estatuto de Roma

p. 71

Ce faisant, les rédacteurs du Statut ont, semble-t-il, fait pencher la balance du côté des droits anglo-saxons meme si la référence à la conviction de la Cour évoque les droits continentaux.

NIYUNGEKO, Gérard. *La Preuve devant les Juridictions Internationales*. Bruxelles: Editions de l'Univesité de Bruxelles, 2005.

p. 414

En droit international, l'examen de la pratique judiciaire et arbitrale révèle que les tribunaux, généralment parlant, ne se tiennent pour liés par aucun critère standard de la preuve.

p. 442

L'on constaté en outre qu'en procédure internationale, il n'existait pas de critère uniforme de la preuve et que les tribunaux se laissaient convaincre plus ou moins facilement, en fonction des faits et circonstances de l'espèce.

TRIFFTERER, Otto (Org.). *Commentary on the Rome Statue of the International Criminal Court*. Baden-Baden: Nomos Verlagsgesellschaft, 1999.

SCHABAS, William A. Art. 66. Presumption of innocence. P. 833-843

p. 841

Human rights law has left the issue of the standard of proof in criminal law in an uncertain state. The European Commission and Court have no clear pronouncement on the subject. However, the Human Rights Committee has been less circumspect, clarifying that the prosecution must establish proof of guilt beyond reasonable doubt. The International Military Tribunal at Nuremberg applied the standard of reasonable doubt, stating explicitly in its judgment that Schacht and von Papen were to be acquitted because of failure to satisfy the norm.

SCHABAS, William A. *The UN International Criminal Tribunals*: the former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006.

p. 463-467

Guilt must be proven “beyond a reasonable doubt”. Prática dos tribunais e tendência dos tribunais penais internacionais.

ZIMMERMANN, Andreas; TOMUSCHAT, Christian; OELLERS-FRAHM, Karin (Org.). *The Statute of the International Court of Justice*: a commentary. Oxford: Oxford University Press, 2006.

KOLB, Robert. General Principles of Procedural Law. P. 793-835

p. 729

There is a last question to be addressed: what is the standard of proof in order to satisfy the Court. As the practice of the Court shows, there is no single standard of proof for all types of judicial facts. All depends on the norms at stake. In cases where the responsibility of a State is the object of the dispute, the Court has shown itself quite demanding, requiring a high degree of certainty (*Corfu Channel case*). At the other end of the spectrum lie provisional measures cases, where it must only be shown that there is a *prima facie* case for competence of the Court on the merits.

HERZOG, Peter. *Civil Procedure in France*. The Hague: Martinus Nijhoff, 1967.

p. 309

No legislative provision of general import defines the standard of proof to be met in civil cases.

p. 310

Because of the large degree of freedom in evaluating evidence enjoyed by the courts, the problem is of little practical interest. French authors usually state that the conclusions reached need not be absolutely true, but that it is sufficient if they are probable.

ZEVE, Oren Lee. *Justification of Belief Beyond a Reasonable Doubt*. Buffalo: Graudate School of State University of New York. July 1998.

p. 49

One approach to the understanding of reasonable doubt involves (primarily) efforts through the courts and legal academic literature to define the phrase for use in jury instructions.

p. 51

Victor v. Nebraska – moral certainty

DAVIS, John Patrick. *When Jurors Ignore the Law and the Evidence to do Justice*. Seattle: University of Washington, 1998.

p. 76

The studies presented here replicated previous research: jurors who were informed of their powers to set aside the law and the evidence to reach a verdict when their senses of justice demanded it, tended to do so.

FINKELSTEIN, Michael O. *Quantitative Methods in Law*: studies in the application of Mathematical Probability and Statistics to Legal Problems. New York: The Free Press, 1978.

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WRIGHTSMAN, Lawrence S. *Judicial Decision Making*: is psychology relevant? New York: Kluwer Academic, 1999.

AYER, A. J. *Probability and Evidence*. New York: Columbia University Press, 1972.

p. 3

A rational man is one who makes a proper use of reason: and this implies, among other things, that he correctly estimates the strength of evidence. In many instances, the result will be that he is able to vindicate his assertions by adducing other propositions which support them.

BROOK, James. *A Lawyer's Guide to Probability and Statistics*. Toronto: Carswell, 1990.

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PORAT, Ariel; STEIN, Alex. *Tort Liability under Uncertainty*. Oxford: Oxford University Press, 2001.

p. 16

Law, experience, and philosophy of induction tell us that fact-finding in adjudication is a matter of probability rather than certainty. Any "fact" upon which people act in their daily affairs is clouded by doubts, and fact-finding in adjudication is no exception.

p. 17

Allocation of the risk of error in proceedings that determine people's rights is a moral and political decision.

The fairness framework attempts to explain and justify the workings of the civil proof doctrine from the point of view of corrective justice. The utility framework does the same form the deterrence perspective.

p. 18

Under the preponderance-of-the-evidence standard, the party whose evidence preponderates that of her opponent must prevail. Any other rule of decision would produce more errors and less correct decisions than this rule does.

This maximization of correct decisions indeed appears to serve an important utilitarian objective, promulgated ever since Bentham: greater accuracy in (p. 19) fact-finding ('rectitude of decision', in Bentham's words) gives more space to the controlling substantive law.

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