

Introduction

The six basic ideas in this book are:

1. The requirement of legal proof (the burden of proof) is part of the law's essential conservatism. Everything about legal proof goes back to this conservatism.
2. There are two fundamentally different kinds of legal proof. One involves an idea of truth; the other does not. The two differ doctrinally and procedurally.
3. When a document is proven, a hybrid cross of the two fundamentally different kinds of legal proof is used. Proof of documents is peculiarly formalistic.
4. What has to be proven and the presumptions that apply to the proof of it determine the burdensomeness of the burden of proof.
5. In ancient and medieval law there were forms of legal "proof" that purported to be conclusive. We can see the mythicalness of their myths clearly and catch a glimpse of the mythicalness of our own.
6. The idea of legal proof is not static. We may well be growing past it altogether.

There is one lecture on each of these ideas. The lectures are not written in big words but some parts of them deal with extremely technical legal questions. This is particularly true of Lectures II-V. These lectures are so detailed and explore so many diverse legal questions that only a few lawyers and legal scholars will wish to read them completely. They should be read selectively.

Lectures I and VI are accessible to a much wider audience and the book is not intended solely for lawyers and legal scholars. Thomas Aquinas said law is the business of the whole people. In addition to the lectures, therefore, this book contains a collection of aphorisms. An aphorism is a short, pithy statement of a truth that is not usually expressed in the way the aphorism expresses it. Aphorisms are meant to be thought-provoking.ⁱ At the bottom of the pages, below the lectures and footnotes, there is a running stream of aphorism. The aphorisms follow the lectures. There are more aphorisms in some places than in others. The aphorisms may be read on their own or the lectures may be read as a commentary on the aphorisms.

For convenience all the aphorisms are collected here.

ⁱ Aphorisms have a long and distinguished history. Francis Bacon preferred them to what he called "methods".

Aphorisms representing a knowledge broken, do invite men to inquire farther; whereas Methods, carrying the show of a total, do secure men, as if they were at farthest.

McLuhan, **the Gutenberg galaxy** (University of Toronto, 1962) 102.

Aphorisms

Lecture I

Law is made by those with wealth and/or power to preserve their wealth and/or power. (p.1)

Law is essentially conservative; it resists changes in the legal status quo. (p.1)

A law, the laws and the law may change. Law remains the same; it is the exercise of power constrained by reason; it is a way of thinking about things. (p.2)

Law is the requirement that there be a legally acceptable reason (justification, not motivation) for the exercise of power. (p.3)

Legal proof is a justification for the exercise of legal power. (p.3)

The requirement of proof is the burden of proof. (p.4)

When a burden of proof has been met, it is legally OK to change the legal status quo. (p.4)

One cannot think about law without at least implicitly thinking in terms of a trial in a court. (p.5)

In a court, the legal status quo, the way things are, always starts with the benefit of the doubt. (p.6)

In a trial, if the burden of proof moves from one party to another, that indicates a change in the legal status quo. (p.7)

Law is a compromise between fixity and flexibility. (p.7)

The law is not neutral and is not supposed to be neutral; it is supposed to be for some things and against others. (p.8)

A society's attitudes toward things are embodied in its law's burdens of proof. Burdens of proof are the slant of the law: they determine the overall pattern of legal decisions, which determines the pattern of litigation and settlement. (p.8)

A fact that cannot be legally proven is not a legal fact: if something cannot be proven in court, legally it never happened. (p.9)

Legal proof is about consequences, not knowledge. (p.11)

A party that meets its burdens of proof is legally entitled to a change in the legal status quo: meeting a burden of proof compels a change in the legal status quo. (p.11)

Legal proof is different from other kinds of proof because it brings the power of the state into play. (p.12)

Lawyers talk incessantly about proof and the burdens thereof. (p. 12)

Legal proof is of the facts-in- issue in a trial. (p.13)

*In a legal trial, a certain number of discreet facts are in issue.
A fact is put in issue by the denial of an allegation.
The denial of an allegation creates a burden of proof. (p. 14)*

Lecture II

There isn't one thing called legal proof, there are two things called legal proof; they work differently in court and while one is about the "truth", the other is not. (p.15)

The line between the two is almost the same as the line between criminal cases and civil ones, but it's not exactly the same. The difference is instructive. (p.15)

The balance of the probabilities is the ordinary legal way to decide whether something has been proven. (p.16)

Proof of guilt is a special form of legal proof created by the presumption of innocence. (p.17)

The two kinds of legal proof do not work this way:
civil trials criminal trials
ordinary proof proof of guilt

They work this way:
civil trials criminal trials
ordinary proof
proof of guilt

(p.18)

The balance of the probabilities is not a variable standard of proof. (p.20)

*Proof of guilt is about the truth. You must be morally convinced to say
 "guilty". (p.23)*

Every burden of proof has two parts. (p.25)

*During a trial the burden can move from one party to the other. It can do this
 in two ways: the whole burden of proof can shift or part of it can split off and
 move by itself. (p.25)*

*Characteristically, the burden of proof shifts in ordinary proof and splits in
 proof of guilt. (p.36)*

This is the pattern

<u>Ordinary proof</u>	<u>Proof of Guilt</u>
<i>two proofs compared against one another</i>	<i>one proof judged against an external standard</i>
<i>balance of the probabilities</i>	<i>beyond a reasonable doubt clear and convincing evidence</i>
<i>burden shifts</i>	<i>burden splits</i>
	<i>criminal trials</i>
<i>civil trials</i>	(p.40)

*A great legal scholar misunderstood this pattern and taught us to
 misunderstand it. (p.40)*

Lecture III

Proof of a document is a third kind of legal proof. When a document is proven the burden of proof often splits but an abstract standard is not usually used. (p.46)

Proof of a document is very formal. (p.48)

Documents are extraordinary devices that throw legal proof into an ecstatic tizzy. (p.48)

Lecture IV

The facts that must be proven can be defined in ways that make them harder to prove or easier to prove. (p.75)

A presumption helps a party meet a burden of proof. (p.80)

A presumption may help a little; it may help a lot. (p.80)

Irrelevance is an irrebuttable presumption. (p.82)

The presumptions that characterize a society are invisible. (p.82)

Our law is very precise about the procedural effect of a presumption but very imprecise about when presumptions arise and precisely what is presumed. (p.90)

What is presumed or inferred is responsibility. (p.91)

Presumptions are about mental states. (p.91)

Presumptions involve a characterization of what happened or a judgment on the character of the people involved. (p.92)

Presumptions move us from proof to inference. (p.93)

*Circumstantial, prima facie, inferred and presumed all mean the same thing.
(p.94)*

Different kinds of facts are proven and presumed: the facts that are proven are simple facts about the world; the facts that are presumed are conclusions about responsibility. (p.95)

Lecture V

*Legal conclusions are the product of reasoning and evidence,
to go from evidence to conclusion requires inference,
what inferences we make is not a matter of logic,
therefore, it is not possible to have logically conclusive legal proof. (p.103)*

There is often psychologically conclusive proof, but there is no reliable way to generate it consistently. (p.104)

Every legal system says it has found a way to do the impossible. (p.141)

Lecture VI

Law always says that the law is as good as it can be. (p.143)

Either law is not rational or being rational is not what we think it is. (p.145)

Juries were once supposed to be impartial; now they are supposed to have balanced partiality. (p.148)

Our ideas about legal proof are changing in big ways. (p.149)

Alternative dispute resolution is an alternative to law as law is an alternative to war. (p.154)

Is legal proof a by-gone game for old white men? (p. 157)