THE BURDENS OF PROOF

Adjudicative tribunals in both criminal and noncriminal cases rely on the concept of the "burden of proof" to resolve uncertainty about facts. Perhaps surprisingly, this concept remains clouded and deeply controversial. Written by an internationally renowned scholar, this book explores contemporary thinking on the evidential requirements that are critical for all practical decision making, including adjudication. Although the idea that evidence must favor one side over the other to a specified degree, such as "beyond reasonable doubt," is familiar, less well understood is an idea associated with the work of John Maynard Keynes, namely, that there are requirements on the total amount of evidence considered to decide a case. The author expertly explores this distinct Keynesian concept and its implications. Hypothetical examples and litigated cases are included to assist understanding of the ideas developed. Implications include an expanded conception of the burden of producing evidence and how it should be administered.

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Discriminatory Power, Weight of Evidence, and Tenacity of Belief

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CAMBRIDGE
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University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107124189

First published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication Data
Names: Nance, Dale A., author.
Title: The burdens of proof : discriminatory power, weight of evidence, and tenacity of belief / Dale A. Nance.
Description: Cambridge, United Kingdom : Cambridge University Press, 2016. | Includes bibliographical references and index.
Identifiers: LCCN 2015039553 | ISBN 9781107124189 (hardback)
Subjects: LCSH: Burden of proof. | Evidence. | Proof theory. | Keynes, John Maynard, 1883–1946.
Classification: LCC K2263.N36 2016 | DDC 347/.06–dc23
LC record available at http://lccn.loc.gov/2015039553

ISBN 978-1-107-12418-9 Hardback

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PREFACE

Adjudication is a conspicuous example of decision making under uncertainty, with "burdens of proof" employed to structure the decision. At the center of the following discourse is a set of ideas that collectively constitute the burdens of proof. These ideas inhabit the intersection of diverse disciplines, including law (its principal subject), epistemology, and decision theory. My goal is to elucidate this fascinating interplay of ideas. This work's focus is not heavily doctrinal or historical, although doctrine plays an important part, as does the history of ideas. It is, ultimately, an elaboration of a philosophy of factual adjudication.

In evidence law scholarship, much more attention has been paid to the rules of admissibility over the last two centuries, perhaps because rules regarding the "sufficiency" of evidence have languished: many that had once existed have disappeared, and the few that remain can be learned easily, at least at a superficial level. But among those who are concerned with the process and logic of proof, in the context of evidence that has passed the hurdles of admissibility, the rules that structure the decision take on great significance. And despite a recent surge of scholarly interest in the subject of legal proof, it remains decidedly undertheorized.

It will be widely agreed that adjudication of disputed facts is properly based on the *weight* of evidence. But "weight" can mean many things. For most lawyers, the weight of evidence is understood as the degree to which the evidence favors one side of the dispute over the other, what I will call its "discriminatory power." In modern legal scholarship, however, there has been considerable interest in the weight of evidence in a sense developed, most prominently, by John Maynard Keynes – which refers to the total amount of relevant evidence considered, regardless of which side is favored thereby. The interest in this subject has been limited to a relatively small number of theorists, to judge by the impact that it has had on mainstream evidence scholarship. Perhaps this is because there remains significant disagreement about what lessons to take from the conversation.

This is an unfortunate state of affairs, I believe, because these lessons are of considerable theoretical and practical import.

I argue that the interest in a Keynesian sense of weight (hereafter, "Keynesian weight") is well founded, in that recourse to such an idea is necessary for a full account of the burdens of proof. Although the genesis of this idea goes back to articles I wrote in the 1980s and 1990s, I have sketched its broader themes only more recently. See Dale A. Nance, "The Weights of Evidence," 5 *Episteme* 267 (2008). The present book develops these arguments at greater depth and relates them more fully to the work of others. That said, I should also disclaim any attempt at comprehensiveness of treatment. Despite its underdeveloped character, the volume of sophisticated writings on the burdens of proof and related ideas in both legal and nonlegal disciplines is still such that a comprehensive exposition of all significant contributions would be unbearable for all but the most determined reader. Consequently, many qualifications and subtleties are passed over in the interest of a readable overall presentation. I hope to have achieved a reasonable balance of depth and breadth.

The reader will see that, at least in some parts of this book, I have not shied from the use of mathematical formulas. This reflects two considerations: (1) inference invokes probabilities, as to which an important body of mathematical theory is available, though it cannot tell the whole story, and (2) the formalization involved in the use of mathematics permits a high degree of precision in one's communication, a commodity that is greatly needed in a subject matter where important terms, such as *burden of proof* and *weight of evidence*, are subject to considerable ambiguity and where, as a consequence, the meaning underlying the use of such terms can so easily shift (often without notice) from one context of expression to another. Nevertheless, the reader uncomfortable with mathematics in general or probability theory in particular ought not to be deterred from proceeding. Much of the argument presented here can be understood without engaging the mathematics at any depth, and I have signaled at places where the reader can even skip particular sections without losing the thread.

I emphasize two main conclusions, each of which runs contrary to prevailing opinion among legal theorists who have addressed the topic of Keynesian weight, whether or not by that name. First, the Keynesian weight requirement should be, and generally is, subject to an excusable preference structure: what should be required is limited by what can be obtained. Second, generally speaking, the adequacy of Keynesian weight should not be, and generally is not, a matter for consideration by the trier of fact but rather something to be considered by the court. In lawyers'

jargon, it is a "question of law." Thus, repeated efforts made by theorists to include an assessment of weight in the burden of persuasion applied by the trier of fact are generally misguided. These claims have broad implications.

Format and style notes: Citations are in footnotes to avoid cluttering the text. Primary legal authorities are cited in full in the footnotes. Abbreviated citations are used in the footnotes for books, articles, and secondary legal authorities (treatises, compendia of jury instructions, and so forth); full citations for these are found in the References at the end of the book. For stylistic consistency, letters used as abstract persons or propositions, variables, or functions are italicized throughout, even in direct quotations from works that do not italicize in this manner.

ACKNOWLEDGMENTS

This project could not have been completed without either the generous support of research provided by Case Western Reserve University School of Law or the enthusiasm for this time-consuming project shown by my loving wife, Melani. I specifically want to thank Peter Gerhart for his steady encouragement, Jane Moriarty for her generous friendship through difficult times, Paul Giannelli for his always patient and helpful responses to my "off the wall" questions, and Andrew Pollis for his detailed comments after a careful reading of a draft of the manuscript. I am also grateful for research assistance from several students over the gestation period of this book, especially Shannon Pagano, Ashley Sheroian, and Adam Rosen, and for technical and clerical support in the final stages from Megan Allen and Kimberly Peterson. Finally, I have an enormous intellectual debt to those who have preceded me in the exploration of the epistemology of decision making, especially those who have attempted to apply knowledge developed in other fields to the context of adjudication. Many, though not all, of these intellectual explorers will be discussed in the following pages, and in my effort to find the clear path, and to be clear about the path I am taking, I am often critical of prior work. In every case, however, my comments should be understood in the context of the great respect I have for the work of these fellow travelers.