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PROOF IN (CIVIL LAW) CRIMINAL PROCEDURE¹

W. P. J. Pompe*

In the application of law, and more particularly in the application of the criminal law "to prove" means "to produce evidence of facts which occurred in the past." The application of law implies also the proof of all sorts of abstract theories, but by "proof" in the application of law one must only include proof of concrete facts.

The proof of such facts occurs continually in the course of human existence, in daily life as well as in science.

It is for that reason that one may justifiably compare the proof of a crime in criminal procedure with proof in the historical sciences. I recognize without reservation the well-founded basis for such a comparison: in history—whether it deals with pre-history or history proper; in journalism where contemporary history is written; even in the diagnosis of a physician, psychiatrist, pedagogue; and finally, when the judge in a criminal case finds that a fact is proven—it always has to do with demonstrating that the facts asserted have actually happened.

Thus, if in the course of this lecture I attempt to demonstrate the particular character of proof in criminal cases, I must never lose sight of the fact that in criminal procedure, just as in history or in the other aforementioned spheres of human activity, it always has to do with a unique truth: the real existence of the facts alleged.

The particular character of proof in criminal cases lies in the fact that such proof is of a legal nature. Jurists are accustomed to distinguish between two types of questions which are submitted to a judge,² to wit, between questions of law and questions of fact.

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¹Lecture (based generally on the civil law and principally on Dutch law) delivered at the Faculty of Law and Economic Sciences of Paris, December 9, 1960. Translated from *La preuve en procédure pénale*, 16 *Revue de Science Criminelle et de Droit Pénal Comparé* 269 (1961), by Manfred Pieck, Associate Professor of Law, The Creighton University, Omaha, Nebraska.

The text, with some additions and omission, had been delivered before as a lecture at the Koninklijke Vlaamse Academie (Royal Flemish Academy) in Brussels, and published in the *Mededelingen* (Communications) of the Academy, *Klasse der Letteren* XXI 1959, no. 4 in Dutch.

²In the context of this article which deals mainly with Dutch law the term "judge" is used to denote a court usually composed of one to three professional judges who also sit as triers of fact. (Translator's comment.)

Also, one may put forth the idea that a question of law appropriately has a legal nature and that consequently a question of fact is stripped of its legal character. However, this idea appears to dissolve by itself. The judge in a criminal case has the task to apply the penal law to concrete facts. Basically, his task is twofold: the finding of the facts on the one hand and the application of the law so found on the other hand. The task of the judge in a criminal case—the same task for that matter as that of the judge in a civil case—is thus divided in verifying the facts and in evaluating the verified facts according to legal norms.

Yet this conception appears to me erroneous. During the ascertainment of the facts a good deal of value judgment is introduced, because to recognize that a fact is proved presupposes an application of the law. That manifests itself during the entire procedure from the description of the fact which is to be proved, then to the introduction of the evidence, and finally, to the decision that the fact is proved. That such is truly the case would appear from the differences existing between proof in civil cases and proof in criminal cases. The judge in a civil case has the task of re-establishing peaceful relations between the two parties in disagreement. It results that in a civil case the judge must generally accept the facts on which the parties agree. At the same time the burden of proof is divided in the sense that each party must prove the facts which he alleges and with regard to which the judge generally remains passive.

I will not say any more about proof in civil cases in order to focus all my attention on the extensive problem of proof in criminal cases. In the course of the criminal procedure itself other differences appear in the matter of proof, when it deals with proof of facts which are inferred or with proof of other facts such as the circumstances which preclude the application of the penalty, the legitimate defense, force majeure, mental incapacity, etc., or, further, proof of the formalities of procedure, for example, the taking of the oath by a witness. These differences in the matter of proof, in the course of the criminal process demonstrate well that the proof in all cases derives its character from the significance attributed to the fact to be proved in the total picture of the criminal process.

To maintain order in society a criminal proceeding is instituted against a person accused of having disturbed the social order. Indeed, the social order, the well-being of the community of people has for us an enormous value, but the well-being of the accused has equally a very great value even for us, because even though we may be able to refrain from committing a crime, any of us may

face the danger of being charged with a crime. The predominant requirement of a criminal proceeding is that it gives to society as well as the accused that which is their due, according to the principle of justice. The contents of this requirement varies in function with time and place. In Dutch law and in French law, the principles, which Beccaria in 1764 put into literary form and the French National Convention in 1789 into political form, are always applicable. It is on the basis of these principles that I would like to attempt to demonstrate the particular character of proof in criminal proceedings in contrast to proof utilized in other human endeavors. I will deal successively with the facts which must be proved, with the method of introducing evidence, and with the degree of certainty required of the evidence.

The principal matter proved must be included in the summons which is issued before the trial.³ At this point already appears the party-character (accusatory nature) in our criminal procedure, since before the trial the prosecutor must furnish the data which, to the exclusion of all others, must induce the judge to decide whether the charge is proven or not.⁴ The accused, on the other hand, must be apprised of the charge to prepare his defense against this charge.

This bondage of the trial to a fact previously alleged in the summons gives the inquiry in criminal matters a peculiar characteristic. It is no longer unencumbered. If it appears in the course of the inquiry that the accused has not committed the crime with which he is charged but *has* committed a crime which was not included in the charge against him, the judge *does not have* the authority in such a case to inquire into this other crime.

In the Netherlands this restriction is sometimes a hindrance in discovering the truth. Taverne, at the time when he was Professor [of Law] at the University, and later when he was a member and Vice-President of the Hoge Raad,⁵ spoke about the "tyranny of the charge": in our procedure the judge is strictly held to the crime charged. Only in very limited situations may a modification be authorized by the judge on motion of the prosecutor.⁶ In French criminal procedure the connection between the facts as charged in the decision to proceed to trial and the facts on which

³ CODE OF CRIMINAL PROCEDURE art. 261 (Dutch).

⁴ CODE OF CRIMINAL PROCEDURE art. 350 (Dutch).

⁵ The Supreme Court of the Netherlands.

⁶ CODE OF CRIMINAL PROCEDURE art.. 312 and 313 (Dutch).

the judge must decide is not so strict according to the *Precis de Procedure Penale* of my colleagues Stefani and Levasseur.⁷

Thus, to give an example, if in a decision to proceed to trial (in France) the charge is voluntary homicide, the judge may convict for assault resulting in death. Dutch law does not permit this because in fact the intent is different: in one case it is to inflict death, in the other only to inflict a beating.

French law thus gives recognition to the freedom to inquire without subjecting the defense to an unjustifiable disadvantage.

There is another peculiarity concerning proof in criminal procedure. The prosecutor includes such facts in the charge which he considers not only capable of being proved but also of being punishable. For that reason he describes the facts in such a fashion that they describe an offense punishable by a provision of the penal law.

There are different customs in different countries concerning the way the charge is drawn. In certain countries, a detailed fact description is given. In our country (the Netherlands) it is brief, although showing what in fact happened (including a description of the time and place) which coincides as much as possible with the legal definition of the alleged crime. In this respect one sees the legal nature of proof in a criminal proceeding. The charge comprises different terms which correspond to the provisions of the substantive criminal law. Before deciding that the facts must be considered to have been proved, the judge must already interpret different terms of the legal definition of the crime. In effect, according to the established case law of the Hoge Raad,⁸ if the charge contains a legal term it must have the same meaning attributed to it by the substantive criminal law.⁹

The charge thus manifests already the legal nature of proof in criminal proceedings as much in the statutory and case-law limitation which this charge imposes as in the legal terms employed in it, and it requires the judge to interpret the penal law at the same time that he decides that the fact is proved.

Likewise, this legal nature, in effect, appears in the manner in which proof may be introduced, which is regulated pursuant to the accusatory system. This system accords, as one knows, a

⁷ *PRECIS DALLOZ* No. 794 (1959).

⁸ See note 5, *supra*.

⁹ H.R. 2.11. 1948, N.J., No. 35. (Decision of the Dutch Supreme Court of November 2, 1948, *Nederlandse Jurisprudentie* No. 35).

fixed legal position to the two parties. On the one hand, the prosecuting party, the public prosecutor, has rights so extensive that the accused may be delivered into his custody, or to investigating officials under his command. On the other hand, the accused has definite rights which are limited during the preliminary investigation, but are unlimited during the final inquiry (that is to say at the trial) to enable him to defend himself.

There are legal restrictions on the authorities while the accused is in their custody. There is first of all the important prohibition provided by law applicable to all persons who interrogate an accused. It applies as well to the public prosecutor and all other officials who conduct the investigation and who are under the orders of the public prosecutor, as to the investigating or trial judge. They may not do anything for the purpose of extracting a confession from the accused in such a way that it cannot be said to have been given in full freedom.¹⁰ The legislator has there expressly added that the accused is not obligated to answer. This article, introduced for the first time into our Code of Criminal Procedure in 1926, represents the reaction which was directed mostly against the inquisitorial system, the most horrible feature of which was torture. The reasons for this prohibition appear to me to be twofold. In and of themselves they represent reasons of a humane nature, even though they are of a very particular significance to the law.

The first of these reasons is the respect for one's fellow man from whom one may not force confessions by any means of coercion whatsoever. From the point of view of the accused this reason is very important, since coerced statements may contribute in bringing about a heavy sentence. The fact that the accused is a party [to the proceeding] will be flouted by any sort of coercion.

The second reason is the respect for the truth. We are astonished today that under the old regime one ascribed credibility to confessions extracted under torture. The requirement that these confessions had to be repeated after torture makes no sense at all particularly because of the fact that in case of a retraction the accused would be tortured all over again.

The prohibition of Article 29 of the Dutch Code of Criminal Procedure is liberally formulated. All is prohibited which has the effect of limiting the freedom of the confession. Not only physical tortures and other torments, not only interrogations of long dura-

¹⁰ CODE OF CRIMINAL PROCEDURE art. 29 (Dutch).

tion (forbidden by Article 63 of the new French code), but promises of release from custody, promises of milder sentences or other temptation of this nature, the responsibility for which can never be taken by persons who themselves do not have to pronounce judgment.

Even if the contemplated coercion does not involve any physical torture, it takes away the accused's human dignity. For this reason, the discovery of modern science—the narco-analysis, the so-called truth serum—is prohibited. The lie detector appears to me equally forbidden. This revealer of a lie involves a quasi-burglary into the conscience of the accused. In spite of their scientific character, these modern methods present the same drawbacks as the torture chamber of old. They do not respect the dignity of the person, who is regarded as an object, and offer no guarantee whatsoever of the trustworthiness of the confession so obtained. Narco-analysis takes place when the accused is in a condition during which he cannot resist any suggestion; and the lie detector may put the innocently accused in the same state of tension and confusion as the guilty one, or perhaps even in a worse condition.

One may ask oneself if other procedures, not prohibited by Article 29, may be considered unacceptable by virtue of unwritten law. I think here especially of the deceit which may be used by the professional interrogator. This deceit occurs in the most diverse forms. I think, for example, of the case of an individual charged with the theft of a fur coat who was interrogated while another coat, identical to the stolen coat, was hung behind the interrogating official. This case appears harmless; yet, by this method the accused is cunningly and fraudulently (words which the public prosecutor uses in many charges of fraud) informed that the stolen object has already been discovered. This kind of technique can lead him and often does induce him to confess. Worse appears to me the case, equally borrowed from reality, of an individual charged with burglary and confronted with a cast of a footprint taken from a flowerbed under the window of the place having been broken into, but which in fact was made there by the police themselves with the aid of a shoe "borrowed" from the accused while he was sleeping! After comparing—in the presence of the accused—the footprint with the sole of the accused's shoe, he confessed to the burglary and pointed out the location where the stolen goods were hidden. In both these cases there was only little or no basis for a reasonable doubt that the confession conformed to the truth. The fur coat would not have impressed an individual who was not guilty since he would not have recognized it as the stolen object. The confession to burglary in the case of the footprint was confirmed

by the fact that the accused pointed out the hiding place of the stolen goods. The question remains which of such methods are legally permissible under the pretext of maintaining law and order.

Other examples which deserve reflection may be taken from reality. There was the case of an investigator who in the absence of the occupants hid himself under the marital bed of an individual suspected of burglary in the hope that as soon as the couple went to bed he would overhear a confidence of the accused to his spouse. When he was successful in his undertaking, he made a report of it and presented himself joyously to the public prosecutor (the French Procureur de la République). Great must have been his disappointment when the prosecutor rejected the confession so obtained and refused to prosecute. Does that mean that investigators must leave the public prosecutor in ignorance of the manner in which they have obtained the confession? For the prosecutor that would be much simpler.

There is no written rule [in Dutch law] which prohibits the investigator to employ deceptive or improper methods for the purpose of obtaining confessions from the accused. I think, however, that inherent in the law itself there is an unwritten rule which prohibits these procedures. But one must still determine in which cases one may speak of deceit and dishonesty, and for that, one must take into account the surrounding circumstances. May one make the distinction between "non-permissible deceit" and "permissible trickery"? May one take into account the importance respectively for the law and for life in society of the interest existing in every case in discovering the truth? To accept that distinction appears to me to introduce a dangerous procedure. However, that appears to me not to be an argument sufficient to bar that procedure. Dangers threaten us everywhere whatever way we may choose.

It is understandable that the investigator goes all out to discover the truth. It is even understandable, but for that reason is nevertheless not justified, if he were to employ means which manifest characteristics of coercion or of deceit. He is naturally concerned with discovering the really guilty person, but an excessive zeal, resulting from a professional predisposition could lead him not to discover the guilty person, but to invent him. The cases of convicting innocent persons are (as I will show) sufficiently numerous not to be disregarded. Even in France, classical country of liberty, this remark is not devoid of reality. Such cases could be the result of improper methods of interrogation of the accused and witnesses.

But, when one has guarantees that the confessions so obtained are based on truth, should they not be used at least in serious cases?

Should one not permit methods which are without doubt themselves subject to criticism in cases where essential interests as of the law and of society are involved in discovering the truth? I think of serious crimes such as murder; of the dangerous offenders whose acquittal because of a lack of proof may produce a dangerous repeater. I think also of the cases in which the conviction of the really guilty persons will free innocently accused persons from suspicion. But all that which borders on coercion it seems to me must be discarded on the basis of Article 29 of our [the Dutch] Code of Criminal Procedure. The temptation toward coercion in any form is too great to open the door, however slight, for the interrogating official in these matters.

In serious cases, however, should a distinction not be made between permissible trickery and dishonest fraud? Here the door would be opened slightly which may be dangerous. I myself would discard all methods of deception whether they are called trickery or fraud.

The discovery of the truth is in certain cases an urgent need, but there are other methods which, in my opinion, have not yet been sufficiently utilized such as, for example, the thorough scientific investigation under expert guidance of the so-called silent witnesses: finger prints, traces of blood, analysis of hairs. Through the use of these scientific methods one can arrive at the truth in a more certain manner than by the interrogation of suspects and witnesses. These silent witnesses may also be an aid to obtain good results in such interrogations.

And if one nevertheless seeks to obtain confessions from suspects there are more humane methods and perhaps also more effective methods than interrogations which utilize coercion and deception.

I concede that the physician and the psychiatrist are in a better position than the police or the prosecution. Their relationship to the accused is based on trust and confidence. They must therefore refrain from reporting confessions which the accused made to them in confidence. But, once a confession has been made, the psychiatrist should convince the accused that it would be in his best interest to communicate this confession to the prosecution. It appears to me likewise possible for the investigating official and especially the investigating judge to establish a human rapport in the atmosphere of the interrogation which may induce the accused to speak the truth. The objective of the interrogating official is manifestly not to take care of the accused's health and well-being. The creation of an atmosphere of trust and confidence may become a form of deception and in that event to be prohibited even more so than the forms

of deception already mentioned. An abuse of such confidence seems to me to be a serious form of double-dealing, especially if such abuse takes place under the mask of human sympathy.

If I lingered on this question of the permissibility of methods of interrogation and investigation, it is because it seems to me basic to the matter of proof in criminal cases. Assuming that obtaining confessions by means of coercion or deception or even by other improper means is legally not permissible, there remains a question of a purely legal nature. May such a confession be used as evidence in a criminal case? Our legislature has not expressed itself clearly on this matter. The case law of the Hoge Raad¹¹ does not provide an adequate basis from which it can be inferred whether the judge must consider such evidence to be null and void. Such a hiatus is surprising especially with regard to confessions obtained by coercion, because we find here a flagrant conflict with the express provision of Article 29 [of the Dutch Code of Criminal Procedure].

The legislature has provided other methods to guarantee the trustworthiness of the evidence. I think of the oath which must be taken by witnesses and experts at the trial in the form prescribed by law. Should the proof be based on testimony given in violation of the provision of the law—whether by a person who did not or did not properly take the oath—even if such testimony given at the trial is not used as evidence, then the Hoge Raad¹² considers such testimony, the entire trial and the judgment based on it null and void. It seems strange to me that improprieties in taking the oath causes the judgment based thereon to be void, but the coercion of a confession, even contrary to law, likewise contrary to a legal guarantee of freedom, and moreover in conflict with the human dignity of the accused, does not cause any legal invalidity.

Nevertheless, I am afraid that the Hoge Raad¹³ would not see in such a coerced confession, even though obtained in flagrant violation of Article 29 of the [Dutch] Code of Criminal Procedure, any basis for invalidating the judgment based thereon. It follows then that there will be no invalidity in cases of confessions obtained by deceptive or dishonest methods.

This difference by which the lesser evil leads to invalidity and the greater evil does not, is, on reflection, understandable and perhaps even partly acceptable. The penal laws and the law of criminal

¹¹ See note 5, *supra*.

¹² See note 5, *supra*.

¹³ See note 5, *supra*.

procedure must be susceptible of application. The failure to take the oath is relatively easy to establish. The Hoge Raad¹⁴ has created a legal theory on this subject pursuant to which, if the report of the trial fails to mention the taking of the oath prescribed by law, it will consider such omission from the report as proof of the omission of this formality.¹⁵ But proof of coercion or fraud for the purpose of obtaining a confession naturally cannot be obtained in such a simple manner. The recorder (griffier) who prepares the report of the trial proceedings does not know anything of improper methods which may have been utilized in the investigation which preceded the trial. The official in charge of such investigation will be careful not to mention in his report that he has obtained the confession through improper means. How difficult it is for an accused to prove that improper means have been employed is not a mystery to anybody, since it is well-known that the official will be generally considered more trustworthy than the accused.

To that may perhaps be added a second reason why such a violation of the law (based on coercion or deception) will not easily lead to the invalidity of the confession so obtained. With regard to the oath it concerns the question whether or not the legal prerequisites were followed or not, while with regard to confession obtained by coercion and deceit there is the matter of more or less coercion and deceit. This, in each case, may change the limitations on their admissibility depending on the seriousness of the crime charged. Under those circumstances, aside from the difficulties of proof, the Hoge Raad¹⁶ could only conclude the invalidity in cases of flagrant impropriety. But in such cases it seems to me the invalidity should be seriously deliberated. After all it concerns here both the truth and human dignity.¹⁷

Proof in criminal cases presents legal peculiarities which, as far as appears from the preceding, affect, despite all, more the form than the substance. The facts to be proved are alleged before the

¹⁴ See note 5, *supra*.

¹⁵ H.R. 5.1 1931 N.J. p.287 (Decision of the Dutch Supreme Court of January 5, 1931.). Notes, Pompe 1 and 2.

¹⁶ See note 5, *supra*.

¹⁷ After the publication of this article in the French Revue, the Hoge Raad has decided (H.R. 26.6 1962, N.J. 1962, no. 470) that in the case of suspected drunken driving, the driver may not be forced to submit to a blood test without his consent and the test result is not admissible in a criminal case. From this case it may be inferred that the Hoge Raad acknowledges *in principle* that a confession obtained by some form of coercion contrary to Article 29 [of the Dutch Code of Criminal Procedure] is not admissible.

trial. The production of the evidence takes place according to a procedure pursuant to which the accused is a party clothed with rights designed to permit him to defend himself and pursuant to which the authorities may not utilize improper means of obtaining evidence. These restrictions have in serious cases saved the accused. According to the Dutch Code [of Criminal Procedure] the types of evidence are limited, but the case law has virtually removed these limitations.

Is there then not any material difference between proof in criminal cases and historical proof? In a criminal case—the Dutch Code expresses itself at length on this subject—the crime is considered proved when the judge is convinced that the accused has committed it. This conviction according to our Code must be founded in the evidence which the judge observed at the trial which is conducted on a party basis (which follows the accusatory system). But the important thing is the convincing of the judge. In criminal matters, should particular conditions be imposed for such conviction? In that case, naturally, such proof as distinguished from proof in other fields manifests indeed a character of its own. At first glance, there does not appear to be a difference between proof in a criminal case and such as one encounters elsewhere. One is convinced of a fact if one knows with certainty that such fact has actually occurred.

Here, it is true, is found the crux of the problem of proof in criminal cases just as in other fields. One clue to this is immediately shown by the qualification that must be imposed on this certainty. One speaks of “human certainty” sometimes, and also of “moral certainty.” In my opinion these qualifications do not mean anything concerning the matter of certainty. Everyone recognizes that the certainty which we can attain in criminal cases is not superhuman.

The primitive era in which trial by ordeal decided controversies has passed. I understand “moral certainty” to be a certainty acceptable to the conscience. Thus, there is nothing which may be considered as peculiar to proof in criminal cases. If one wanted to impose a qualification on certainty in criminal cases it would have to be a legal certainty, even a certainty especially applicable to the criminal law. But does it concern a special kind of certainty? And if so, of what consists this extraordinary certainty? It is completely understandable that one tries to define as precisely as possible certainty of proof in criminal cases. The thesis that absolute certainty cannot be humanly achieved neither in criminal procedure nor elsewhere is incontestible. Should one like to have an illustration, one only has to consult those works which in various countries describe exclusively judicial errors. It is an impressive series. The

legislature itself is convinced of this imperfection of certainty and the danger of judicial errors which inevitably are caused thereby. The Dutch Code, like the French, shows this concern by providing an extraordinary judicial remedy which permits the review of a sentence which may not be appealed.¹⁸

Challenged by a Dutch colleague to prove that the conviction of innocents does not occur without a certain frequency I have made an inquiry into this subject. For this one may have recourse to a number of trustworthy works dedicated to judicial errors among which I cite the work of the French authors, Lailier and Vonoven¹⁹ and the recent work of the American authors, Jerome K. Frank and Barbara Frank.²⁰ One finds in these different cases which occurred in western Europe and the United States during the 19th and 20th centuries that the innocence of the convicted person became apparent. Outside the inquiry remain the cases in which the proof of guilt is shown by the balance of the evidence to be insufficient without such evidence however showing that the innocence has been proved. The inquiry has turned up, subject to those limitations, at least 265 cases and that figure may be considered as only a fraction of the number of nonappealable convictions of innocent persons. The Dutch judicial statistics give us some idea thereof.

For the Netherlands these available statistics are proportionally more eloquent since the Dutch Jurist is often tempted to attribute to the jury's verdict the judicial errors which occur abroad. Thus, in our country, which is only familiar with the judicial function exercised by professionals, there should be, pursuant to such reasoning, much less judicial errors. Personally, I do not believe the theory that the judicial function when exercised by professionals is superior to that exercised by the jury. It cannot be denied that the jury makes mistakes, but the professional judge makes them too, although they are of a different character.

Let us examine the available Dutch statistics. Between 1899 and 1926 there were 34 petitions to review a sentence which resulted in an acquittal.²¹ Of these 34 cases, only 2 are comprised in the 265 above mentioned cases. Although there have been acquittals in each case where guilt was not proved—consequently not only in cases

¹⁸ CODE OF CRIMINAL PROCEDURE art. 455 (Dutch).

¹⁹ LES ERREURS JUDICIAIRES ET LEURS CAUSES (*sans date*).

²⁰ NOT GUILTY (1957). See a critique of this book in 16 *Revue de Science Criminelle et de Droit Pénal Comparé* 923 (1959).

²¹ De Gaay Fortmann, T. (ijdschrift) v. (oor) S. (trafrecht) XXXVII.

where innocence was proved—there stands out nevertheless the comparison of the two cases with the 34 of the [Dutch] statistics. For that reason the 265 cases mentioned before which took place in such a great number of countries and for a period of a century and one-half could easily be multiplied by 10 to obtain an approximately exact number of persons who were innocently convicted. In my opinion, on the basis of these data I would estimate the number of convictions of innocent persons in those countries during those 150 years at several thousands.

Starting from the principle that absolute certainty cannot be achieved, one cannot avoid the question of what is the degree of certainty required in criminal cases. The answer to this question is extremely difficult and cannot be expressed in a "percentage" of certainty. One can only give an approximate answer. Besides, it will not necessarily be the same for all types of proof in criminal cases. But in each case the answer is of a judicial nature. In effect, it must be given after evaluating the different considerations in accordance with the judicial norm which accords each that to which he is entitled.

The judicial character of the quest for certainty appears in the answers to different questions during the course of a criminal case. The case law of the appellate judge shows that an appeal based on the omission of a formal procedure entails the obligation to prove that such omission in fact took place. The Hoge Raad²² contents itself here with a very unsatisfactory solution, to wit, that a formal omission occurring during the trial—for example the failure of a witness to take the oath—is considered as actually having taken place if the report [of the trial] does not set forth that such formality has been followed to the letter. On the other hand it considers that there has not been a formal defect when the report—and it concerns most often the printed-form part of the report—sets forth that the legal formalities have been observed. That is what is called the system of positive legal proof in which convincing [the judge] plays no part whatsoever.

This solution may nevertheless be acceptable if one considers the significance which an appeal based on a formal defect has for the appellate judge. It is not so important to decide if there really was a formal defect but, conceding that such defect occurred, to decide that the decision of the trial judge is null and void.

Proof concerning circumstances which preclude the imposition of the sentence such as self-defense presents a different problem.

²² See note 5, *supra*.

Here pursuant to Dutch law the legislature did not even prescribe that to accept the defense of self-defense the judge must be convinced that it actually took place. Some writers contend that if there is a doubt about the existence of the defense of self-defense the judge may not pronounce any sentence.²³ To support this view they advance the contention that in case of self-defense the illegality of the [criminal] act charged disappears, and, consequently, in case of doubt on the matter of self-defense there is the same doubt concerning the illegality of the [criminal] act charged, without which illegality there can be no question of a crime. I believe that this concept is inconsistent with a legal presumption of the illegality of the fact furnished by the legal definition of the punishable act. If someone kills a person intentionally it is punishable unless there exists a reason for not applying the punishment such as the defense of self-defense. It appears to me that the proof of self-defense does not require certainty in the same degree as is required for the proof of the crime charged. I believe that in these cases likelihood or probability is sufficient because it concerns the proof of a fact which exonerates the accused.

But what is the degree of certainty necessary to prove the charge? That this invariably requires the balancing of interest can be seen from the different solutions which have been devised.²⁴ "Better to let a guilty one go free than convict an innocent person." That is a solution accepted by all civilized people, except, perhaps, in case of political disturbances. This principle was already accepted under the old regime when the inquisitorial system and the torture chamber had their heyday. Many people even today defend the thesis that it is better to let 10 or 20 guilty ones go free than convict an innocent person. What is found in such solutions is not a precise weighing of the interest in seeing a guilty person acquitted or an innocent person convicted, but an evaluation, necessarily vague, which decisively places the interest of the innocent accused on the highest plane. On the other hand, there was an era in which the emphasis was placed on the interest in convicting every guilty one: "Judex damnatur dum reus absolvitur" wrote the Byzantine author, Procopius, in the 6th century. In contemporary Communist China the authorities take the position that the accused is already the guilty one.²⁵ The government knows everything. They would

²³ NOYON-LANGEMEYER, *HET WETBOEK VAN STRAFRECHT* VERLAARD 261 (6^e ed. 1954).

²⁴ Cf. WILLIAMS, *THE PROOF OF GUILT* (1955).

²⁵ Cf. BONNICHON, *LAW IN COMMUNIST CHINA* 8 (published by International Commission of Jurists, The Hague.)

not arrest the accused if he were not guilty and the accused only aggravates his guilt if he denies it.

These solutions hide the balancing of two interests—the interest of the individual and that of society, and the interest of the individual citizen and that of the government. To the extent to which one prefers the first to the second, one will demand a higher degree of certainty of the proof of the criminal act charged. Since the end of the 18th century the law of our civilized world attaches a very special value to the individual and to the freedom of the individual. But one can ask oneself if this has remained an important value during the last decades.

In every case it is of the greatest importance that the judge takes this value into consideration when he decides what the evidence introduced has proved. Any evaluation of this nature is not shown by his decision even if it sets forth the reasons on which it is based. It is thus especially important that the judge remains aware of the significance of this value in arriving at his decision.

Other factors are also involved in the judge's decision. For example, the sympathy or antipathy for the accused may play a dangerous part. Nothing thereof, however, will appear in his decision to the extent that this may be camouflaged in the reasons stated. The part played by such sympathy or antipathy may be apparent from the attitude adopted by the police and the prosecution toward the accused in the course of the proceedings. The idea (more exactly the feeling), irrational and often erroneous, that the accused is capable of having committed the crime with which he is charged may exercise an unconscious influence on the decision that the charge has been proved. Here considerations of class justice or inverse class justice may creep in. Also, the judge may be more easily led to believe that a recidivist is capable of having committed the crime with which he is charged. For that reason he will without a doubt subconsciously but most often, alas not unjustly, neglect the role of the rehabilitation played by the sentence of imprisonment already served.

With regard to the influence of the factor of sympathy or antipathy one must be content with presumptions. One confirmation of the influence which sympathy for the accused may exercise is furnished by the statistics which have shown on different occasions that female accuseds are acquitted relatively more often than male accuseds.²⁶ The protective attitude of men toward women is evident here.

²⁶ HUDIG, *CRIMINALITEIT DER VROUW* (CRIMINALITY OF WOMEN) 66 (1940).

The conception concerning the relation between the individual and society, the sympathy or antipathy for the suspect, these factors and others exercise an influence, consciously or subconsciously, on the decision taken by the judge that the charge has been proved. My intention here is not to point out an evil state of affairs which must be eliminated in order to arrive at the decision [that the charge has been proved] without preconception. Such influences are inherent in man. However, one must require that the judge is aware of these influences. If he were unable to critically dominate them at the time when he decides that the charge has been proved, he would betray his impartiality and thereby the law itself.

The question of the proof pertains also to the administration of justice. With regard to the decision that the facts have been proved, just as with the application of the law to the facts, one can distinguish four functions: Interpreting the case in accordance with a general scheme, subsuming the case within this scheme, deciding, and stating the reasons for the decision. The legal character of the question of proof may be shown by the use of this analysis. It will be apparent that legal particularities are inherent in each of these four functions.

For the proof, the judge must interpret the words of the accused and witnesses. That may be difficult. The judge must, in effect, have a current knowledge of the linguistic usages of the accused as well as of the circumstances under which they are used. As Crainquebille explains: "J'ai dit mort aux vaches (I have said death to the cows)."²⁷ One could interpret that as a confession although its real meaning is a categorical denial. When witnesses declare what they have perceived, the judge may not consider that as a trustworthy reproduction of what they know in the sense of a mirror or a tape recorder. In his testimony the witness includes always something of himself, just as the judge in his evaluation of this testimony always injects something of himself.

The judge in order to declare that the matter has been proved must also classify the case which is submitted to him, not pursuant to a provision of the criminal law, but pursuant to a model, a pattern, a scheme which will satisfy him whether or not the accused is guilty. An example will perhaps explain what I am talking about. In 1943 during the German occupation [of the Netherlands] a man was killed in the northern part of the country. He was financially comfortable. The police made inquiries of a cousin, a confirmed

²⁷ FRANCE, CRAINQUEBILLE, PUTOIS, RIQUET ET PLUSIERS AUTRES PROFITABLES 17 (150^e ed. 1924).

bachelor, who was one of the heirs. As the result of an investigation the police discovered in the house of this cousin a coat covered with blood. Upon being shown this coat, the cousin gave a complete confession. The pattern, which considers this homicide proved when a person, who would be benefitted by the death of the victim and in whose house, in addition, a bloody vest was found, has confessed, appears in effect to be amply sufficient. But no detail which could be the object of an investigation should be neglected. This appears clearly from our example. The blood was analyzed during the preliminary investigation and the analysis revealed that it was not human blood! This investigation was perhaps instituted because the accused retracted his confession. During the investigation two persons were arrested and confessed to be the ones who in fact committed the murder.

Why then did the man give a false confession? One could suppose that he confessed because he illegally slaughtered a sheep which the [German] occupying powers punished with deportation to a special concentration camp which justly had acquired a bad reputation and, because of fear of this camp, the man perhaps preferred to confess to a murder. This example shows well that the generalization according to a particular pattern must be controlled and corrected. That must be done from the very beginning by the examination of all peculiarities and by verifying other matters even if they do not immediately appear to be connected with the case.

Subsequently, the judge must make his decision, that is to say, he must decide whether the accused is guilty or not guilty. This formula, however, is not complete because there is a third possibility. The judge has, in effect, the choice between guilty, not guilty, and *non liquet*, but in our [Dutch] law a distinction between these two last possibilities is not made. If the judge is not convinced that the accused committed the crime charged, he must acquit him for lack of proof of guilt. Among these cases are included those in which the accused's innocence became apparent. All kinds of influences contribute to the choice between the decision that guilt has been or not been proved. To decide that guilt has been proved, the judge must have acquired the conviction thereof, that is to say, again, the certainty.

Thus, the following situation may occur. There is the conviction, the certainty that the accused has perpetrated the crime, but proof thereof is lacking. This presents a curious situation which is not entirely clear. It involves the situation where the judge is convinced that the accused has committed the crime, but this conviction is not justified by the evidence as seen by himself or by

others. This irrational feeling on the part of the judge may be the result of his inhibitions, of a prognostic feeling, of an irrational antipathy. However, I do not want to say that an impression so acquired has no value for the trial. However dangerous it (the impression) may be, it may yet provide a working hypothesis for the trial which during the trial must constantly be verified by the facts. It does not seem to me superfluous for the proof, provided that when the judge acquires the conviction that the accused is guilty the conviction is based on reasons which would permit others to share this conviction.

Even the "conviction intime" (inner conviction), which article 342 of your former (French) Code and article 353 of your present Code of Criminal Procedure prescribes as the criterion for the jury, expressly requires that the members of the jury must evaluate what impression the proof against the defendant and the proof offered in his defense made on their reason. This situation may thus also present itself to juries, namely that they are convinced (of the accused's guilt) but cannot justify this conviction to themselves nor to others. The only peculiarity of the function of your (the French) jury appears to me that they need not give any express justification for this conviction. However, this requirement is expressly imposed on our [Dutch] professional judge.²⁸

To state the reasons for reaching the decision, according to which the fact charged is considered proved, is as important as it is difficult. It means justification of such decision not only towards oneself, but, above all, towards the accused and, at the same time, towards the people. The jury represents the people. Their decision resembles the *vox populi*, and in accordance with that philosophy, the absence of the obligations of the jury to give reasons for its decision appears to me understandable. But this philosophy does not apply to the professional judge. The Dutch legislature was particularly interested in imposing the requirement that sufficient reasons be stated which show that the crime has been proved. The judge may decide only on the basis of the evidence. He must decide not only that he considers the crime proved, but he must also indicate in his decision the facts and circumstances which furnished the basis for his decision and which, consequently, constitute the explanation for arriving at his decision. Meanwhile, as a general matter, this second obligation has led to a printed formula that the facts and circumstances stated in the decisions constituted the means of proof on which the decision is based.

²⁸ CODE OF CRIMINAL PROCEDURE art. 359 (Dutch).

Besides the content of the statements of witnesses and other persons, the trustworthiness of the witness is equally important for the decision that guilt has been proved. That often occurs when there is conflicting testimony. It may happen that the defense in a criminal case relies entirely on the lack of trustworthiness of a witness. Legally, the Dutch judge is not, strictly speaking, obliged to give reasons whether he believed or disbelieved a witness, and in fact the reasons for his decisions will not generally expressly refer to this question. It is the same in the case where the defense consists of interposing an alibi. The judge may then, in stating his reasons, disregard all arguments concerning the alibi and yet satisfy the legal requirements of stating the reasons for his decision.

Although these two examples are hardly convincing, it must nevertheless be recognized that a complete statement of the reasons that the crime has been proved is impossible. From this point of view, the difference between the absence of the requirement of giving reasons for the decision made by the French jury and the legal requirement that the Dutch judge state the reasons for his decision are not so great as appears at first glance. This legal obligation that the judge state the reasons for his decision may create the danger—perhaps because of fear of reversal—that by attempting to satisfy the requirements of the law he neglects to state his real reasons in a concrete case.

How must one at present understand the terms "certainty," "human" or "moral" required for the proof in criminal cases? Considering the consequences which the decision that the crime is proved may have for the accused, only a high degree of certainty may satisfy the conscience of the judge. I find myself finally, as in the beginning, confronted with the serious question of what must be the criterion of this certainty.

The question of the degree of certainty remains always without an answer. I cannot give you an exact answer. I doubt very strongly that the degree of certainty should depend on the severity of the sentence in cases where the crime has been proved. Certainly, the judge's conscience should be very heavily burdened when he must impose the death or other serious sentence on an accused who may be innocent. Could one nevertheless say that in a case of a less severe sentence, the judge may be satisfied with a lesser degree of certainty? Is a judicial error not always an injustice? Must the conclusion be that when heavy sentences are imposed on an innocent defendant grave injustice results, while when lighter sentences are imposed on him they result in lesser injustice?

But on the other hand, the acquittal of a guilty person equally hurts the law. *"Some risk of convicting the innocent must be run"*

wrote Glanville Williams.²⁰ Human imperfection and human tragedy are implicit in the matter of proof in criminal cases.

This question is more dramatic in the actual application of the criminal law, because the consequences of the decision in the matter of proof may be very disadvantageous and destructive to the accused. It is different with regard to the law applied to juvenile delinquents. In effect, in compliance with the law, the offense is then the occasion for the judge to take measures—even if they are punitive—having in mind the well-being of the delinquent, his social readjustment, his education. The harmony between the interests of society and those of the convicted juvenile are without a doubt not attained in this manner, but it is certainly approached and then the relations between the two parties are modified. Does this modification not exert an influence on the degree of certainty required for the proof of the crime charged? That is also a real question concerning offenses perpetrated by adults, since for about a century there exists a permanent movement, although varying in emphasis and complexion which has for its objective to make the penal treatment of the delinquent—whether or not the retributive quality of the sentence is preserved—useful to his reformation, his social readjustment, and eventually to his complete recovery. The movement called by Mr. Ancel the *Defense sociale nouvelle* (New Social Defense) reflects the modern aspects thereof.

This new orientation of the penal law poses yet another question with regard to the matter of proof. It is based on the "individualization of the punishment"—the term was coined by the Parisian Professor of civil law, Saleilles. The judge must know the personality of the convicted in order to accomplish this and to have proper advice on this matter he must be furnished with the "reports of information" by probation agencies and eventually also by psychiatrists.

When should this information concerning the personality [of the accused] be transmitted to the judge? Before or after the introduction of proof? For the moment I would like to bypass this question.

With regard to the subject treated today, the proof of facts in a criminal case, it matters that a report concerning the personality [of the accused] is included among the data which must themselves be proved in one way or another. There, too, the judge must be conscious of his responsibility.

²⁰*Op. cit. supra* note 24, at 133-34.

The judge should not admit, without a thorough investigation, data which to a great extent are based on information furnished by third parties. The person preparing a report similarly has his responsibility, but it should not remove the responsibility of the judge. To illustrate the danger of rumors accepted without investigation, I recall a report which had been prepared in a civil case. Neighbors complained to the Board of Guardians that a widow who had come to live in the neighborhood regularly had sexual intercourse with a soldier. He would go to her home during the evening and leave early in the morning. Here, the investigator (of the Board) himself thought that there were reasons to pursue the inquiry which revealed that the soldier was the son of the widow who was stationed in a village at some distance from the town.

The "information" included in a social worker's report must be the more exactly verified because this report is included in the "dossier" of the individual concerned and accompanies him all his life.

The basic question that I pose in accordance with the actual evolution of the penal law, which is trying to reconcile the interests of society with those of the accused, remains whether in such a case [of an investigation by a social worker] one should impose as severe requirements for the proof of the incriminating fact as when the accused is threatened with a sentence which may result in serious harm to his interests.

The British author, Glanville Williams, already referred to, defends the thesis that one may be less exacting with regard to most proof when the application of the punishment consists more of a treatment which seeks to improve or cure the delinquent than when it is a retribution for the wrong he has committed. One may perhaps expect that in the future the sentence will be applied to serve both purposes.

One may still advance here a second argument, to wit, that pursuant to a penal law so oriented the proof of the crime charged will be less important for the imposition of the sentence. The means of constraint are based not only on the crime committed, but also on the character and the environment of the accused. The offense in such a case acquires thus more the nature of a condition for the imposition of the means of constraint, a symptom of the dangerous character of the delinquent which must be found, among other symptoms, in the accused's probation report.

It appears to me nevertheless understandable that jurists may hesitate to accept Glanville Williams' thesis. It creates an unfavorable impression to establish easier requirements for the proof of

a fact which leads to the application of a sanction. The impression will be less unfavorable if one give this thesis a different explanation by saying that where heavy sentence is imposed its extra severity must be established by an extra certainty of the proof. But since it does not concern a question of emphasis, of expression, one must remember that therapeutical treatment imposed by force may heavily burden an innocent person, perhaps even more heavily than a penalty which is, at any rate, limited in duration.

Once more we must tell ourselves that we are still far from the application of a penal law effectively oriented toward the social readjustment and the cure of the delinquent. There are still too many doubts that the penal law in its entirety may some day be able to apply this kind of coercive means. But, to the extent that the change in the penal law in the sense indicated is judicially acceptable, one must realize that many difficulties must be overcome before such an ideal penal law may be realized. That will require a great deal of skill in those to whom the application of the penal law is entrusted.

Whatever may happen in this regard, I am anxious to end this conference on proof in criminal cases by this conception of the future of the penal law which may also exert an important influence on the matter of proof. This capability to which I have referred will only be implemented to the extent that the spirit of the judge and of all those who bear responsibilities in the application of the penal law is disposed to respect [the dignity of] the human person, even though he be a delinquent.