Faculty Scholarship

Cornell Law Faculty Working Papers

Cornell Law Library *Year* 2003

Standards of Proof in Japan and the United States

Kevin M. Clermont
Cornell Law School, kmc12@cornell.edu

This paper is posted at Scholarship@Cornell Law.
http://scholarship.law.cornell.edu/clsops_papers/5

4/25/03

Standards of Proof in Japan and the United States

KEVIN M. CLERMONT*

This article treats the striking divergence in standard of proof for civil cases—the required degree of persuasion for the factfinder—between Japanese and U.S. law. The civil-law Japan requires proof to a high probability similar to the criminal standard, while the common-law United States requires only that the burdened party prove the fact to be more likely than not. This divergence not only entails great practical consequences, but also suggests a basic difference in attitudes toward the process of trial.

As to the historical causation of the difference in standards of proof, civil-law and common-law standards diverged in the late eighteenth century, probably because of one system's French Revolution and the other's distinctive procedure. The French Revolution, in the course of simplifying the civilian law of proof, hid the standards of proof from view. Meanwhile, the common-law jury served to induce judges to articulate standards of proof for the adversary system.

As to the current motivation to adhere still to the old standards, the different standards conform to the subtle differences between the two systems' procedural objectives. The civil-law system seeks the legitimating benefits of the myth that its courts act only on true facts and not on mere probabilities. Common-law courts seek legitimacy elsewhere, perhaps in other myths, and thus are free to adopt the standard of proof that more fairly and efficiently captures the real truth of the case.

Introduction 2
I. Japanese Approach 3
II. U.S. Approach 5
A. Doctrine 5
B. Theory 7
C. Practice 8
D. History 9
III. Comparative Evaluation of Approaches 13
A. Procedural impact 13
B. Substantive impact 16
IV. Likely Explanation of Divergence 17
Conclusion 20

---

*Flanagan Professor of Law, Cornell University. I would like to thank for their invaluable help Samuel Baumgartner, Kuo-Chang Huang, John Palmer, and Daniel Walker—and especially Emily Sherwin with whom I have written previously on these matters.

INTRODUCTION

This article treats the standard of proof—the required degree of persuasion for the factfinder—in Japanese and U.S. law. The comparison will reveal a striking divergence between civil-law and common-law standards of proof in civil cases: Japan requires proof to a high probability similar to the criminal standard, while the United States requires only that the burdened party prove the fact to be more likely than not.[1] This divergence not only entails great practical consequences, but also suggests a basic difference in attitudes toward the process of trial.

A specific example might be useful to set the stage for discussion. I can use the example employed in one of the earliest modern analyses of standard of proof: "A sues B on a note, whose execution B denies."[2] Given indeterminate handwriting samples, one can imagine bodies of evidence by which A tries to prove execution of the promissory note and by which B rebuts, with conflicting witnesses to the surrounding circumstances: "Two apparently credible persons testify affirmatively. One, somewhat more credible, testifies negatively. The testimony of the two, or of the one, would have been believed, had it not been contradicted by that of the one or of the two."[3] Assume there is no further evidence. With this closely balanced evidence, and even without party or expert testimony, the American factfinder could find for A, given a favorable reaction to the three witnesses' credibility. Contrariwise, in an ordinary action,[4] the Japanese factfinder could not faithfully apply its elevated standard of proof and still find for A. After all, no one would be inclined to convict B of a crime based on this body of evidence.

This particular example of issue and related evidence may be more typical of U.S. cases than Japanese cases. Japan's legal system might often be able to avoid a case that in the end looks like this one. Whether or not such avoidance is commendable, such avoidance may allow the Japanese more easily to live with their high standard of proof. But sometimes cases similar to the example will reach trial in Japan. The standard of proof then applied is the revealing concern of this article.

---

[1]*Cf.* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 150 (1999). Those authors contend: "In many areas of the law, Japan and the United States track each other closely. In much of civil procedure, they diverge radically." They attribute those radical differences to two sources: U.S. federalism and juries. The divergence in standards of proof, however, is not so easy to explain. As this article will show, although the jury played a role in the historical development of the divergence, it plays no role in explaining the modern persistence of that divergence.

[2]William Trickett, *Preponderance of Evidence, and Reasonable Doubt*, 10 FORUM (Dick. L. Rev.) 75, 77 (1906).

[3]*Id.* at 76.

[4]*Cf.* TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 9.04 (Yasuhei Taniguchi, Pauline C. Reich & Hiroto Miyake eds., 2d ed. 2002) (describing the optional special action on a bill or check).

I. JAPANESE APPROACH

The major reference work available in English on Japanese civil procedure has this to say on the standard of proof in Japan's civil cases:

> Since the Code makes no mention of degree in the required conviction of the judge, opinions on the point are not wholly in agreement. Some authorities contend that conviction based on "a preponderance of evidence" is sufficient, while others appear to insist that a conviction "beyond a reasonable doubt" is necessary even in a civil trial. The latter seems to be the prevailing view, which is best represented in the following statement: "The free conviction principle requires the judge to find facts according to his conviction. Although he need not be convinced so firmly that there is no room for finding otherwise, he is required to be convinced at least to such an extent that people in general might behave in daily life, relying on his finding with full satisfaction. The judge can find a certain fact true only when he has been convinced that it is ninety-nine per cent true; he may not, when he has been convinced it is seventy per cent true, but thirty per cent untrue."[5]

The same book immediately proceeds to quote a leading Supreme Court medical malpractice case: "Proving of a causal relationship in litigation, unlike in natural science, which permits no doubt, requires a high degree of probability [*kÇdo no gaizensei*] that a certain fact (or facts) induced the occurrence of a specific result. This means putting all of the evidence together and examining it according to logical and experiential rules. It is necessary and sufficient that the judge has acquired through the proof, a [personal] conviction [*syukanteki kakushin*] of the existence of such a relationship to the degree that an average person will not entertain any doubt."[6]

Of course, Japan inherited this standard of proof from, and still shares it with, the civil-law countries.[7] Most of those countries apply their high standard, often called *intime conviction* (an inner, deep-seated conviction of the judge), with a bit

---

[5]*Id.* § 7.05[13][b] (footnotes omitted) (quoting H. Kaneko, *RisshÇsekinin* [*Responsibility for Adducing Proof*], in 2 MINJI SOSHÆHÆKÆZA [LECTURES ON THE LAW OF CIVIL PROCEDURE] 568 (1954)); *see also* JOSEPH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 314 (1996); HIROSHI ODA, JAPANESE LAW 407 (2d ed. 1999); Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 708-09 (1998); Supreme Court of Japan, *Outline of Civil Litigation in Japan, at* http://www.courts.jp ("When the court, considering all the allegations and evidence, has been convinced whether the claim sought by the plaintiff should be granted or not, the court closes oral proceedings and a date for the rendition of judgment is fixed.").

[6]Miura v. Japan (*Runb¬ru* Case), 29 MINSHâ 1417 (Sup. Ct., Oct. 24, 1975).

[7]*See* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 247, 260 (2002).

of obliviousness.[8] Japan demonstrates a greater awareness of what it is doing,[9] as well as entertaining more debate about the actual standard prescribed and applied.[10] The result is that Japan now seems to have nudged its civil standard down from the level of beyond a reasonable doubt, although it remains well above preponderance of evidence; so we can call the Japanese standard a high probability.[11] Nevertheless, the common feature in all the civil-law countries remains a high standard of proof in civil cases, one that at least resembles the very high standard applied with deliberation in criminal cases everywhere.[12]

---

[8]*See* Kevin M. Clermont & Emily Sherwin, *A Comparative Puzzle: Standards of Proof, in* LAW AND JUSTICE IN A MULTISTATE WORLD 629, 635 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

[9]*See, e.g.*, SYÆZÆ ÆTA, SAIBAN NI OKERU SYÆMEIRON NO KISO [THE BASIS OF PROOF THEORY IN ADJUDICATION] (1982) (examining the theories and cases on standard of proof under Japanese and German law).

[10]*See, e.g.*, SHIGEO ITÆ JIJITSI NINTEI NO KISO [THE BASIS OF FINDING FACTS] 158, 162-63, 171 (1996) (arguing that the civil standard is high, but no longer as high as the criminal standard).

[11]*See* KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO THE CIVIL LAW 151 (2003) (concluding that the Japanese standard of proof in civil cases is similar to the U.S. intermediate standard of clear and convincing evidence). Indeed, for the proof of damages, MINSOHÆ[CODE OF CIVIL PROCEDURE], art. 248 ("In cases where it is determinable that damages have arisen, if it is extremely difficult to prove the amount thereof from the nature of the damage, the court may determine a proper amount of damages on the basis of the entire import of the oral argument and the result of the examination of evidence.") [hereinafter CCP], now allows the court to reduce the standard of proof. "This device is intended to enable the court to render a judgment in accordance with common sense by adjusting the standard of proof to reflect reality." Kojima, *supra* note 5, at 709; *see* Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767, 785 (1997) ("This change can be said to be more substantive than merely procedural.").

[12]That high standard of proof applies in Japan's criminal cases. *See* HATTORI & HENDERSON, *supra* note 4, § 7.05[13][b], at 7-77 n.468; RAMSEYER & NAKAZATO, *supra* note 1, at 172. Incidentally, in the Japanese district courts, the defendants contest guilt in only about 7% of the criminal cases, and convictions follow in 99% of those contested cases. *See id.* at 178-82 (the authors' U.S. data are unreliable because of their treatment of dismissed cases). The comparable U.S. figures are 9% and 77%, respectively. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 225 tbl.D-4 (1995).

The comparatively high conviction rate in Japan is noteworthy. As an explanation, perhaps the overworked Japanese prosecutors pursue only their strongest cases, *see* RAMSEYER & NAKAZATO, *supra*, at 181-82, or perhaps bureaucratic pressures induce Japanese judges to apply a diluted standard of proof, *see id.* at 179. However, in trying to explain completely the 99% conviction rate, one has to wonder whether judges' having to live with a nominally high standard of proof in civil cases has caused them by habit to dilute the similar standard of proof in criminal cases, applying it less rigorously than they would if civil and criminal standards were clearly distinguished as in the United States. Such dilution of the criminal standard of proof could help to explain why high conviction rates prevail generally in civil-law countries, where Ramseyer and Nakazato's explanations tailored to Japan do not work so well. *See* Grant H. Carlton, *Equalized Tragedy: Prosecuting Rape in the*

As straightforward as all of this might sound to a Japanese audience, it is downright shocking to American minds. In the United States, the standard of proof is openly probabilistic: civil claims ordinarily must be proved merely by a preponderance of the evidence. Thus, they find strange the standard that prevails in Japan: the party who bears the burden in a civil case ordinarily must satisfy the judge, to the point of a high probability, of the existence of the pertinent fact. U.S. lawyers accept their lower standard of proof as obviously proper. Most of them are ignorant of this basic civilian practice to the contrary; they react with disbelief upon having it explained; upon being convinced of its reality, they quickly conclude that civilians have been misguided. Alas, I shall conclude much the same, albeit at a slower pace.

II. U.S. APPROACH

A. Doctrine.—In the United States, different civil and criminal standards of proof clearly exist, with lots of attention expended over the years on what those different standards should be. Although this long, candid debate continues as to details, certain basic propositions enjoy wide acceptance. Everyone agrees, as a rational matter, on this: "The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty."[13] Furthermore, as an instrumental matter, everyone agrees that the law should set the required probability at a level that serves the legal system's aims: "A task of the law is making the choice appropriate to the situation; the law may aim to minimize overall errors, to decrease dangers of deception or bias or to disfavor certain claims, or to avoid a special kind of error such as convicting the innocent."[14]

The law has settled on three standards that differ in how likely the contested

---

Bosnian Conflict Under the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, 6 J. INT'L L. & PRAC. 93, 100 n.59 (1997) (attributing the high conviction rate to the European inquisitorial system—an explanation that in turn does not work so well in the more adversarial Japan, *see* ODA, *supra* note 5, at 423-29); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 585 (1997) (citing a trial conviction rate over 96% in Germany).

[13] WILLIAM TWINING, RETHINKING EVIDENCE 73 (1990). There has, of course, been occasional blindness to this idea, particularly in older cases. Courts have sometimes stated that even the preponderance standard requires convincing the jury of the truth of an allegation. *See* 2 MCCORMICK ON EVIDENCE § 339, at 423-24 (John W. Strong gen. ed., 5th ed. 1999) (collecting and criticizing cases).

[14] Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1120 (1987) (footnote omitted).

fact must be for the factfinder to decide that the fact exists.[15] They apply in different circumstances: (1) The standard of *preponderance of the evidence* translates into more-likely-than-not. It is the usual standard in civil litigation, but it appears throughout law. Considerable debate revolves around its practical meaning, but nearly everyone now accepts the propriety of this standard as the bottom end of the usual probability scale that extends upward from equipoise.[16] (2) Next comes the intermediate standard or standards, often grouped under the banner of *clear and convincing evidence* and roughly translated as much-more-likely-than-not. These apply to certain issues in special situations, such as when terminating parental rights.[17] Continuing debate here focuses on the practical meaning of clear and convincing evidence, while debate decreases on potential differences among the distinctive intermediate formulations.[18] (3) The standard of *proof beyond a reasonable doubt* means proof to a virtual-certainty. It very rarely prevails outside criminal law. Again, arguments persist about its practical meaning, but not about the propriety of this standard as the top end of the probability scale in our unavoidably uncertain world.[19]

Today the law seems indeed to limit the choice to no more than these three standards from among the range of probabilities stretching from more-likely-than-not to virtual-certainty. The law did not always recognize this limitation, but with time the law acknowledged that the conceivable spectrum of standards had coalesced irresistibly into three.[20] Indeed, it is wise to view the three U.S. standards in terms of psychological inevitability: "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

---

[15]*See* RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1256-60 (8th ed. 2003) (citing authorities); 9 JOHN H. WIGMORE, EVIDENCE §§ 2497-2498 (James H. Chadbourn rev. 1981).

[16]*See* 2 MCCORMICK ON EVIDENCE, *supra* note 13, § 339; J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 247-51 (1944).

[17]*See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982).

[18]*See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 416-17 (5th ed. 2001); 2 MCCORMICK ON EVIDENCE, *supra* note 13, § 340.

[19]*See* 2 MCCORMICK ON EVIDENCE, *supra* note 13, § 341; McBaine, *supra* note 16, at 255-58.

[20]*See* Addington v. Texas, 441 U.S. 418, 423 (1979) ("the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases"). *Compare* THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 449 (Boston, Wells & Lilly 1826) (discussing an infinite number of degrees of evidence), *with* Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 60 (1933) (discussing three standards of proof).

hypotheses are defensible or can be justified by experience and knowledge."[21]

In short, in the U.S. view, it is candid, rational, and desirable to recognize that truth and hence factfinding is a matter of probability, and that the system should seek to optimize its probabilistic standards of proof.[22] For civil cases, the standard is almost always preponderance of the evidence. As already suggested, room for debate still exists as to what the U.S. preponderance standard practically means, especially in light of the inadequacies of judicial instructions to a lay jury, the effect of the voting rule for a group of factfinders, and the psychological truth that equipoise is a range of probabilities rather than a point.[23] Moreover, lots of room exists to elaborate the finer theoretical points of probabilistic proof and consequent liability, such as the recent elaboration of the proper role for statistical evidence.[24] The point here is simply that such debate occurs in a lively and open fashion in the United States, against the background of acceptance of the more-likely-than-not standard for civil cases.[25]

B. Theory.—In setting preponderance of the evidence as the civil standard of proof, U.S. law has overcome the appealing but unsound lay intuition that outcome should not swing from no recovery to full recovery on the basis of a slight shift in the weight of evidence. Instead, U.S. law pursues an error-minimizing strategy by routinely applying preponderance and not some higher standard.

The argument for its approach is strong, because the preponderance standard is optimal given two conditions that are very plausible. The first condition is that an error in favor of the plaintiff is neither more undesirable nor less undesirable than an

---

[21]McBaine, *supra* note 16, at 246-47 (footnote omitted). *See generally* Clermont, *supra* note 14.

[22]*See* Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law "Adrift"?*, 107 YALE L.J. 1921, 1946 (1998).

[23]*See, e.g.*, Clermont, *supra* note 14, at 1119 n.13, 1147-48.

[24]*See, e.g.*, FIELD ET AL., *supra* note 15, at 1260-66 (citing authorities, including 600- and 800-page symposia); Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627 (1994).

[25]The common law too can hide some aspects of proof from view, as it does with the conjunction problem of element-by-element application of the standard of proof: here common lawyers muddle through with their heads in the sand, albeit with acceptable results. *See* FIELD ET AL., *supra* note 15, at 1272-74 (citing authorities). But civilian lawyers bury their heads farther, *see* BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 253-55 (1991), never even perceiving a conjunction problem: "In this respect there is a notion of 'fact' which has received little or no attention from either the courts or doctrinal writers. 'Fact' as used in the statute and by the courts probably comes close to that of 'ultimate fact' in common law parlance: that which, once established, causes the court to apply legal rule X rather than legal rule Y. Virtually no attention is given to intermediate facts . . . ." James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 466-67 (1986) (discussing French law of proof).

error in favor of the defendant, or that a dollar mistakenly paid by the defendant (a false positive) is just as costly to society as a dollar mistakenly uncompensated to the plaintiff (a false negative).[26] The second condition is that the goal is to minimize the sum of expected costs from these two types of error, that is, the system wants to keep the amounts suffered mistakenly to a minimum.[27] Under these conditions, the preponderance standard performs better than any other standard of proof. The basic idea is that by deciding in accordance with apparent probabilities, the legal system in the long run makes fewer errors than, for example, the many false negatives that a virtual-certainty standard would impose, and so the preponderance standard minimizes the system's error costs.[28] Formal proofs indeed show that it minimizes not only the number of erroneous decisions, but also the sum of wrongful amounts of damages.[29]

C. Practice.—Empirical research indicates that different standards of proof have a practical effect in the United States. The existing research, although quite imperfect, suggests that factfinders, charged to find a fact vel non, can focus separately on the question of how probable it is that the fact is true. That is, with proper instruction, factfinders are not necessarily a mere on/off switch, but can roughly determine probability as well. Accordingly, human decisionmaking can reflect gradations of probability. Despite sometime confusion, juries and judges when factfinding can and usually do make at least the gross distinction between the

---

[26]"[I]n civil actions, unlike criminal actions, there is no particular reason to disadvantage one party substantially. We are interested in finality and dispatch, but, given whatever sacrifices are necessary to achieve that, we want to find facts correctly as often as possible. And that means that there is no particular reason to disadvantage either plaintiffs or defendants in the placing of the risk of nonpersuasion. We cannot say, as we do in criminal cases, that saving one innocent defendant is worth absolving x number of guilty ones." Ralph K. Winter, Jr., *The Jury and the Risk of Nonpersuasion*, 5 LAW & SOC'Y REV. 335, 337 (1971) (footnote omitted); *see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.2 (5th ed. 1998); David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487, 496 n.39.

[27]*See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-02 (1973).

[28]Let p be the apparent probability that the defendant is liable, for D dollars. If p>½, call it p_1; and if p#½, call it p_2. On the one hand, under the preponderance standard, the expected sum of false positives and false negatives over the run of cases is 3 [$(1-p_1)D + p_2D$]. On the other hand, under a virtual-certainty standard, the analogous sum is 3 [$p_1D + p_2D$]. Because ($1-p_1$) must be less than p_1, the preponderance standard lowers the system's error costs.

[29]*See* Kaye, *supra* note 26 (showing superiority also to an expected-value approach that would award only proportional damages); *cf.* Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159 (1983) (considering bias in the distribution of errors).

civil and criminal standards of proof.[30]

Note that under U.S. law, the application of the standard is left to the first-instance factfinder. The standard of review for factfinding is deferential. Whether the trial judge is reviewing the jury or whether the appellate court is reviewing the trial judge, the reviewer must be reluctant to substitute its view of the facts. The basis for deference is that any review is more concerned with getting the law right for the sake of society than correcting the facts for the sake of a party; the factfinder is more apt to be right, having actually heard the evidence; and intrusive review has many costs, including the long-run detrimental effect on the factfinder's sense of responsibility and image of legitimacy and on the reviewer's effective functioning as its workload increases.[31]

In brief, the U.S. standard of proof is really only a guide to the first-instance factfinder, rather than an enforced standard of decision. But there is good reason empirically to think that those factfinders take the standard seriously.[32]

Finally, there is good reason to think that the U.S. standard of proof differs in practice from the civil law's standard. Civilians too seem to take seriously their dramatically stated high standard. Their officials' and lawyers' decisions and behavior reflect a belief that their civil standard basically resembles their criminal standard.[33]

D. History.—How did the U.S. doctrine, theory, and practice get to where they are today? I can make the long story fairly short. Probability theory began to interplay with both the civil law and the common law in the eighteenth century. Legal theorists and the examples they forwarded made early contributions to the rapid advances in the science and philosophy of probability, and then the interaction flowed back the other way.[34] This intellectual ferment resulted from a recent revolution in the way all people looked at the world: "'Probability' from the ancient

---

[30]*See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 156 (1988) (research "suggests that, whether by instruction, intuition, or simply an appreciation for the differential consequences of criminal and civil decisions, juries are already sensitive to variations in the standard of proof"); Clermont, *supra* note 14, at 1141 & n.110, 1146 & n.126, 1147 & n.127, 1149 & n.135; Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 144-46 (2002) (describing the impressive level of agreement between juries and judges); Martin F. Kaplan, *Cognitive Processes in the Individual Juror, in* THE PSYCHOLOGY OF THE COURTROOM 197, 216 (Norbert L. Kerr & Robert M. Bray eds., 1982).

[31]*See* Clermont, *supra* note 14, at 1126-30, 1133-34, 1152-55.

[32]*See* TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE 344-45, 365-66 (1991).

[33]*See* Clermont & Sherwin, *supra* note 7, at 261-64.

[34]*See* SHAPIRO, *supra* note 25, at 1-41, 123-24, 220-23, 253-55; BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND, 1550-1720, at 8-33 (2000); Éric Desmons, *La preuve des faits dans la philosophie moderne*, 23 DROITS 13 (1996).

world to the late seventeenth century traditionally had lumped together the noncertain, the seemingly true, and the merely likely. When evidence was unclear . . . , the result was probability or mere opinion, not knowledge. A late seventeenth-century development, however, suggested that probability consisted of a graduated scale that extended from the unlikely through the probable to a still higher category called 'rational belief' or 'moral certainty.'"[35]

The civil-law systems then employed the medieval method of legal proof, or *la preuve légale*, which had assigned weights to specified classes of evidence, such as admissions and oaths, and prescribed exactly when a set of evidence amounted to so-called full proof. Probability theory could manifest itself only through readjustment of the weight appropriate to each class of evidence. Legal proof's requirement of "full proof" avoided the necessity of formulating or even contemplating expressly different standards of proof for the criminal and civil sides. Then the French Revolution largely overthrew legal proof in favor of free evaluation of the evidence, or *la liberté de la preuve*.[36] But not being used to requiring anything but full proof, civilians naturally came to apply a standard of *intime conviction* to all cases, criminal and civil alike, rather than probabilistic standards of proof.[37] Indeed, with the sensation of root-and-branch abolition of the old method of legal proof, probability theory fell out of civilian favor. "Although Voltaire's criticisms and the Revolutionary reforms were aimed at the legal system of [*preuve légale*], the mathematical applications to jurisprudence may have been tainted by association."[38]

So, the Continentals stopped thinking and talking about the matter of standards of proof, throughout subsequent periods of history in which probabilistic thinking waned and waxed in other disciplines.[39] Take France as the extreme example. Professor René David theorized that the *intime conviction* idea allowed French law simply to ignore such matters: "The indifference of French lawyers to evidentiary questions is explained basically, without doubt, by the importance in

---

[35]SHAPIRO, *supra* note 25, at 8.

[36]*See* CCP, *supra* note 11, art. 247 ("In rendering a judgment, the court shall, considering the entire import of the oral argument and the result of the examination of evidence, and based upon its freely determined conviction, decide whether or not the allegations of fact are true."). Today's law actually represents a return of the old Roman principle of the judges' free evaluation of the evidence. Nevertheless, modern civilians take pride in their free evaluation principle, contrasting it with the common law's exclusionary rules of evidence partly attributable to the jury. *See* Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 343-48 (1995). Regardless of the merits of that debate, the focus of this article remains the much starker disagreement between civil law and common law on the standard of proof in civil cases.

[37]*See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 114 n.78 (1997).

[38]LORRAINE DASTON, CLASSICAL PROBABILITY IN THE ENLIGHTENMENT 354 (1988).

[39]*See* SHAPIRO, *supra* note 25, at 253; Friedman, *supra* note 22, at 1944-46.

French law of the principle of the judge's intuitive conviction . . . ."[40] Of course, the French today realize that *intime conviction* requires only very high probability, not certitude;[41] a reasonable doubt will defeat the necessary intuitive conviction.[42] But beyond these obvious insights, French legal theoreticians do not pursue probabilistic notions in any coherent or accepted way. They still draw no distinction between civil and criminal standards.[43]

Meanwhile, the common-law systems continued their reciprocal interactions with probability theory over the ensuing centuries. The earlier moves in the direction of expressing standards of proof had given the matter, in Bacon's terms, to the "juries' consciences and understanding."[44] From there, the common law evolved toward a standard of inner conviction. "Seventeenth- and early eighteenth-century trials abound in references to 'conscience,' and writers on conscience often used the trope of 'an inner tribunal.'"[45] By the turn into the eighteenth century, criminal and civil juries were basing decisions on evidence presented in court, and the authorities had come to understand the task of evaluating conflicting sets of evidence to reach a rational conclusion.[46] The common law was then ready for a major leap forward, hand in hand with probability theory.

By the late eighteenth century, the evolving situation of the common law saw the judges begin instructing juries in detailed Lockean terms of probability and degrees of certainty.[47] Criminal cases became subject to the standard of beyond a reasonable doubt.[48] Although the evolution of the lower civil standard is murkier, it

---

[40]RENÉ DAVID, FRENCH LAW 147 (1972).

[41]*See* Jean-Denis Bredin, *Le doute et l'intime conviction*, 23 DROITS 21, 23 (1996). *But cf. id.* at 26 (seeming confusedly to equate *intime conviction* in criminal cases with mere likelihood).

[42]*See id.* at 27. *But cf. id.* at 25 (seeming confusedly to equate serious doubt in criminal cases with probability of innocence).

[43]*See* Clermont & Sherwin, *supra* note 7, at 247-51; *cf. id.* at 243, 245 (similarly discussing Germany).

[44]1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 333 n.6 (7th ed. 1956) (quoting a 1607 proclamation for jurors by Francis Bacon); *see* SHAPIRO, *supra* note 25, at 11.

[45]SHAPIRO, *supra* note 25, at 14.

[46]*See id.* at 3-12.

[47]*See* DAMAŠKA, *supra* note 37, at 51-54. A classic statement of the probabilistic nature of knowledge lies in JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING chs. XV-XVI (Peter H. Nidditch ed., 1975).

[48]*See* SHAPIRO, *supra* note 25, at 21-25.

began to diverge from the criminal standard at about that same time[49]—and it has since undergone a lengthy process of refinement, as attested by the high number of cases struggling with the concept until just recently.[50]

Why precisely did the common-law standards change? The modern institution of the jury appears to have been especially effective in catalyzing this progress toward probabilistic standards of proof. At the least, the correlation between the existence of the civil jury[51] and the development of the preponderance standard seems perfect in this sense: countries that used the civil jury applied the preponderance standard. Beyond correlation, the relation might be causal. Because of the jury's need of judicial instruction, the common law had to acknowledge the role of uncertainty in decisionmaking and thus confront probability—while the civil law could sweep such matters under the rug and so freeze in time underdeveloped notions of probability.[52]

Determining the cause of a legal rule can be tricky, however.[53] The common law has shown a broad tendency to be explanatory, as in its judicial opinions, so this general openness could instead be the root cause of the articulation of its standards of proof. Or common-law adversariness could be the root cause, as it thrusts the uncertainty of evidence, and hence the need for a standard of proof, out into the open. Or, finally, the common law's judges, who faced the need for an articulated standard of proof and had the lawmaking power to formulate even such a fundamental feature of their legal system, could constitute the root cause of this divergence from civilian law. Most likely, the structure and function of the common-law court—bifurcated with a lawmaking judge controlling a lay jury, and operating with openness in an adversary setting—played in combination a causal role in developing its probabilistic standards.

Nonetheless, the desire or need to articulate a standard does not necessarily

---

[49]*See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 482 & n.87 (1996).

[50]*See* 2 MCCORMICK ON EVIDENCE, *supra* note 13, § 339, at 424 & n.16; *supra* text accompanying notes 16-25.

[51]*See* WORLD JURY SYSTEMS (Neil Vidmar ed., 2000).

[52]*See* DAMAŠKA, *supra* note 37, at 54 ("In short, problems pertaining to fact-finding that are expressly regulated and highly visible in the fish-bowl world of jury trials remain veiled from view in Continental procedure, shrouded by the secrecy of the deliberation room."). The jury's role affected the specific content of the common-law standards too, as group deliberation and the unanimity requirement produced more intersubjective standards of proof. *See id.* at 36 n.23, 38-40. To the extent the civil jury did act as proximate cause of the preponderance standard, the civil jury has worked yet another of its benefits, helping not only to induce an optimal standard but also to force more broadly an honesty about the probabilistic nature of decisionmaking.

[53]*See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE 113-38 (1980) (outlining major sources of error in causal analysis).

dictate what the standard will be. The common law has indeed thought much more about its standards of proof than has the civil law. The common law consciously chose its low standard for civil cases to pursue error minimization. In that sense, then, sound policy was the specific cause of the preponderance standard itself.

III. COMPARATIVE EVALUATION OF APPROACHES

A. Procedural impact.—The question of whether error minimization justifies adopting the preponderance standard requires consideration of the goals of civil procedure. Scholars of civil procedure have attributed multiple purposes to the civil process.[54] In any legal system, dispute resolution must be a primary objective of the civil process—especially in run-of-the-mill cases—so that law can stand as a ready alternative to private revenge and self-help.[55] Another intertwined aim is to foster popular belief in the legitimacy of judgments.[56] Yet, if the legal system also aims to be fair and individualized or to regulate conduct and modify behavior in beneficial ways, it must pursue truth, in the sense of making an accurate determination of the facts before it applies the law—because procedures that yield a reasonably accurate picture of the facts will contribute to equal treatment of litigants and to better realization of the substantive ends of law, such as protection of rights and efficient allocation of resources.[57] Of course, if time and resources are scarce, then dispute resolution, legitimacy, and accuracy-dependent aims may sometimes be at odds.

As a widely accepted proposition, but not one essential to my analysis, civil procedure in civil-law countries today concerns itself more with dispute resolution than with other aims, favoring procedures that resolve essentially private disputes

---

[54]*See, e.g.*, J.A. JOLOWICZ, ON CIVIL PROCEDURE 71-77 (2000) (stressing aims to demonstrate the effectiveness of law, to develop the substantive law, and most importantly to effectuate the substantive ends of law); Martin P. Golding, *On the Adversary System and Justice, in* PHILOSOPHICAL LAW 98, 106-19 (Richard Bronaugh ed., 1978) (discussing truth-finding, satisfaction, and protection functions of adversary procedure); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937-39 (1975) (describing conflict-resolution and behavior-modification models); Sidney Post Simpson, *The Problem of Trial, in* DAVID DUDLEY FIELD CENTENARY ESSAYS 141, 141-42 (Alison Reppy ed., 1949) (observing that trials now aim not only to settle disputes but also to adjudicate them correctly, in accordance with "the reality of the controversies presented"); *cf.* Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 908-21 (breaking general values down into ultimate goals).

[55]*See* JOLOWICZ, *supra* note 54, at 69-70; Simpson, *supra* note 54, at 141.

[56]*See* Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 113-14 (1997) (discussing the yearning of the system's participants to augment its legitimacy); Simpson, *supra* note 54, at 141-42 (discussing the value of public satisfaction); *cf.* CHARLES P. CURTIS, IT'S YOUR LAW 3-4 (1954) (discussing the value of party satisfaction).

[57]*See* JOLOWICZ, *supra* note 54, at 70-71; Golding, *supra* note 54, at 107.

while preserving public order.[58] In so recounting that civil-law systems might prefer dispute resolution over truth, I do not mean to suggest either (1) that common-law procedure is a better way to arrive at truth or (2) that truth is the exclusive value of the common-law systems. First, some features of common-law adversarial procedure admittedly can thwart accurate factfinding.[59] But I have no need to enter the fray on the relative desirability of adversarial versus inquisitorial methods.[60] Although genuinely inquisitorial methods could conceivably signal a greater attachment to truth,[61] they cannot do so if they have disappeared in practice. In actuality, both common-law and civil-law procedures are now functionally adversarial on the civil side, thus mooting the debate.[62] Second, like the civil law, the common law certainly pursues dispute resolution. But it does pursue other values, including truth.[63]

Returning to the particular feature under consideration, does the high civil-law standard of proof reflect the civil law's devotion to dispute resolution relative to its devotion to truth?

At first glance, the civil law's high standard might seem to facilitate dispute resolution. The high standard might reflect a desire to deter litigation overall and thereby minimize its associated public and private costs. Litigation costs are a real worry, of course, although they hardly justify skewing outcomes without regard to the merits. Moreover, once a country has established a court system, skewing outcomes by imposing a high standard of proof likely will not alleviate concerns about costs or lower the amount of litigation. Disputes will still arise, despite the high standard. Cases that fall close to the standard of proof, whatever it is, will exist in good number and will tend to go to trial.[64] Indeed, the amount of contested

---

[58]*See, e.g.*, DAMAŠKA, *supra* note 37, at 110-13, 120.

[59]*See* Golding, *supra* note 54, at 109-12 (discussing some flaws, as well as some benefits, of the truth-finding function of the adversary system).

[60]*Compare* Joint Conference on Professional Responsibility, *Report*, 44 A.B.A. J. 1159 (1958), *with* JOLOWICZ, *supra* note 54, at 86, 175-82.

[61]*See* TWINING, *supra* note 13, at 76-77 ("For it is generally recognized that inquisitorial systems are more directly and consistently concerned with the pursuit of truth and the implementation of law than adversarial proceedings, the primary purpose of which is legitimated conflict-resolution.").

[62]*See* JOLOWICZ, *supra* note 54, at 175-76, 218-21.

[63]One piece of evidence to this effect is that the United States has overlaid its adversary procedure with a nonadversarial disclosure and discovery scheme, which signals a special allegiance to truth. *See generally* HUANG, *supra* note 11.

[64]I should note that the strong anti-plaintiff effect of the Japanese standard should not lead to more victories for defendants in litigated cases. Because parties can select cases for trial (the so-called selection effect), mainly cases that fall close to whatever standard of proof applies will proceed to trial. Other cases will tend to settle. Under simplifying assumptions, and as a limiting implication,

litigation tends to expand to fill the system's existing capacity.[65] After all, a substantial number of criminal trials occur despite the criminal law's high standard of proof.

At second glance, it might seem that a standard of virtual certainty is better designed to produce true answers to disputed questions of fact than the preponderance standard. Under the civil law, no fact is "true" unless the judge reaches an inner conviction of its truth; truth should not rest on chance; nor should truth be viewed as contestable when it can be found out. If civil-law procedure were genuinely inquisitorial, and if civil-law courts had unlimited time and resources, a requirement of virtual certainty could conceivably advance truth. But no court has unlimited time and resources, and civil procedure has become functionally adversarial. In these circumstances, the practical effect of the high civil-law standard of proof is not that truth will prevail, but that the party favored by the burden of proof will enjoy a huge advantage. The result in an uncertain case will be a decision for the party favored by burden-of-proof rules, rather than a decision for the party whose claim is most probably true. Wrongly rejecting claims is just as much an error as wrongly sustaining them. The error-minimizing preponderance standard better serves truth. Thus, the high civil-law standard represents another sacrifice of truth, but this time without facilitating dispute resolution.

In fact, the civil-law standard is fundamentally at odds with the state of evidence in a typical civil dispute. Certainty in knowledge simply is not attainable with respect to a disputed past event that receives brief representation through conflicting evidence. Like most judgments one makes and acts on in ordinary life, most legal disputes remain forever in a state of considerable doubt. For example, the decisionmaker's conclusion in my A v. B case must be a conclusion based on probability. When viewed in this light, the civil law's demand for "truth" in civil cases has the appearance of wilful mischaracterization, suggesting that some unstated purpose must lie behind it, some purpose that has nothing to do with the procedural aim of dispute resolution or truth determination. Accordingly, I turn now to possible substantive reasons why the civil law might affirmatively wish to retain its high

---

the result would be about a 50/50 ratio of plaintiff victories to defendant victories in litigated civil cases, under any standard of proof. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588-89 (1998); J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 284-85 (1989). Therefore, the Japanese standard would affect the kind of cases that proceed to trial rather than settle, but not necessarily the win rate. Under the preponderance standard, trials are most likely to occur when the evidence is roughly in balance; but under the Japanese standard, trials are most likely to occur when the evidence is strongly in the plaintiff's favor. The different standards will not, therefore, translate into different win rates observable in outcome data. (Nor will they lead to wildly different caseloads: the same forces that minimize the effect of a high standard of proof on the number of actual trials will also reduce its effect on the number of case filings.)

[65] *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989).

standard in civil cases.[66]

B. Substantive impact.—Retaining a high standard of proof might rest on a desire to influence the substantive outcome of litigation. A high civil standard, combined with a burden of proof that requires plaintiffs to prove the elements of their claims, quite obviously makes it difficult for plaintiffs to succeed. The same high standard, coupled with rules and presumptions that sometimes shift the burden of proof,[67] permits the law to choose between favoring defendants and favoring plaintiffs. The civil law's use of standard and burden of proof to influence the outcome of litigation (1) might reflect a general hostility toward plaintiffs, who usually seem intent on disrupting the status quo, or (2) might sometimes reflect a specific substantive policy of imposing liability on defendants, who could better shoulder the expense. Alternatively, on whomever the law imposes the burden, the high standard (3) might reflect the civil law's historical desire to constrain the judiciary—as the legislature can play a somewhat bigger role by allocating the high burden on the various elements of the cause of action—or perhaps might simply reflect a desire not to trigger the state's power without strong justification.[68]

I doubt the force of these sorts of explanation for the civil law's standard of proof. I can offer several arguments to support my doubt.

First, there is no general reason to prefer one side of civil litigation to the other. In criminal cases, a high standard of proof reflects the view that punishment of an innocent defendant is a heavy cost, one that outweighs the cost of letting some guilty defendants go free. But in civil cases, as already explained, harm to one party is as weighty as harm to the other, whether the harm takes the form of liability inflicted or injury unredressed.[69] Disruption of the status quo provides at best a weak justification for prejudicing plaintiffs.[70] Indeed, because identifying the status quo is notoriously difficult,[71] that justification is almost weightless. Taking the A v. B case as an example, it is not clear whether A in seeking to enforce the note or B in contesting its validity is challenging the status quo, and society in fact has no reason

---

[66]*See* HUANG, *supra* note 11, at 153 (cataloguing Japanese objections to preponderance standard).

[67]On Japanese rules for shifting the burden, see HATTORI & HENDERSON, *supra* note 4, § 7.05[13][a], [14]; HUANG, *supra* note 11, at 159-65; ODA, *supra* note 5, at 406-07.

[68]*See* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996).

[69]*See supra* text accompanying note 26.

[70]"There may well be some predisposition to disfavor plaintiffs because they are 'accusers.' Such a view seems to me, however, more emotional than rational and wholly inappropriate in a highly commercialized and insured society." Winter, *supra* note 26, at 343 n.1.

[71]*See, e.g.*, Cooling v. Security Trust Co., 49 A.2d 121, 123-24 (Del. Ch. 1946) (attempting to determine the "status quo" for purposes of a preliminary injunction that had required a trustee to file exceptions in a probate proceeding in order to preserve the rights of beneficiaries).

to prefer this defendant to this plaintiff. In other examples, moreover, the parties' status as plaintiff or defendant may be interchangeable, depending on who first institutes suit. In brief, it appears that any society should be generally indifferent in civil cases between plaintiffs and defendants. It is thus hard to believe that civil-law societies, otherwise so similar to common-law societies, would reach a different general conclusion about the relative merits of plaintiffs and defendants.

Second, it is easier to believe that civil-law societies, although similar to common-law societies, have reached different conclusions about the bases for imposing substantive liability in specific kinds of cases. Nevertheless, because lawmakers would find it more difficult to conceal any substantive tilt than to conceal often obscure procedural motives, one would expect the pursuit of substantive policy by disadvantaging one of the parties to prompt considerable debate. Instead, the whole question of standard of proof has gone largely unnoticed. It is thus almost as hard to believe that the civil law is utilizing its high standard to achieve specific substantive ends.

Third, a high standard of proof would be a clumsy way to restrain judges or restrict state power. All it would ensure is that judges will act, or refrain from acting, on a set of facts that might not comport with the most probable view of reality. Moreover, any judicial decision, for plaintiff or defendant, constitutes state activity, there being no neutral outcome. The high standard will yield biased outcomes, but certainly not restraint in any desirable sense.

IV. Likely Explanation of Divergence

Although history seems to explain the divergence of civil-law and common-law standards of proof, history alone cannot explain why their standards of proof remain so strikingly different today. In other words, studying the past may reveal the answer why the common law lowered its standard of proof in civil cases, but it fails to illuminate why the civil law has declined to follow suit. Tradition may suffice to explain many features of law, but a fuller explanation is necessary for the persistence of seriously suboptimal provisions. So, why do the two systems continue to treat standards of proof so differently? More pointedly, I cannot stop wondering—in light of my conviction that the preponderance-of-the-evidence standard is a better way to allocate legal responsibility in civil cases—why Japan continues to adhere to an unrealistic and potentially unfair and inefficient standard of proof in civil cases.

One quick explanation for why civilian legal systems have retained their high standard of proof in civil cases is that the scholars who shape the civil law have failed over the years to advert sufficiently to the problem of proof.[72] Civilian inattention to matters of procedure and evidence likely helps to explain why the civil law and the common law continue to differ. But, of course, inadvertence has no justificatory force. Moreover, such an explanation is unsatisfactory when it comes

---

[72]*See* Clermont & Sherwin, *supra* note 7, at 259-61.

to Japan—which is not at all indifferent to or disdainful of these fields of study,[73] and which has a long history of openness to foreign ideas while adapting them to native needs.[74] Something more than inattention, or any such national peculiarity, is therefore needed to resolve the mystery.[75]

Because the high civil-law standard of proof serves neither dispute resolution nor truth determination, and because no substantive aim or even happenstance can explain it fully, it must owe its existence to the pursuit of yet some other procedural aim. That is, it exists perhaps in hope of enhancing the perceived legitimacy of judicial decisions, an enhancement achieved whenever judges act within the seemly role allocated to them. Professor Takeshi Kojima of Chuo University, in justifying procedural reform, has described the systemic yearning for legitimacy thus: "The integrity of the judges and the correctness of fact determinations have been traditionally established features of Japanese civil justice. However, a judgment rendered by the court may not be strong enough to satisfy the sense of justice or common sense that the general public embraces."[76]

Admittedly, the probabilistic nature of factfinding does produce discomfort, require sophistication, and impose some destructive side-effects, at least if acknowledged. The civil-law systems could be choosing to avoid all that, by refusing to acknowledge it. If so, they would be relying on the widespread efficacy of the people's unexamined intuition, which would yield the legitimating misimpression that requiring virtual certainty comports with finding real truth.[77] That is, the high

---

[73]*See* HUANG, *supra* note 11, at 119-20.

[74]*See* ODA, *supra* note 5, at 6-9.

[75]A variation of the national-peculiarity approach is to postulate that Japan shares an Asian aversion to probabilistic inference. *See* Richard D. Friedman & J. Frank Yates, The Triangle of Culture, Inference, and Litigation System (manuscript on file with author). This explanation has the air of the traditionalist theories premised on Japanese uniqueness, theories previously discredited for such subjects as litigation-aversion. *See* KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 16-19 (2d ed. 2003). As to the standard of proof, such traditionalist notions run into two more problems. First, Japan adopted their standards as transplants from continental Europe. *See supra* text accompanying note 7. Second, Japan today shows more sensitivity to probabilistic proof than most of its European predecessors. *See supra* text accompanying notes 8-11.

[76]Kojima, *supra* note 5, at 691; *cf.* John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 139 (2002) ("Japan by all reliable accounts has the most autonomous, corruption-free and trusted judiciary in the world.").

[77]The high standard in civil cases could also convey an appealing impression of compassion and individualized justice, because no one's legal fate turns on the basis of statistical probability. But this subtle and nonintuitive message would need to be explained to the people. Therefore, the civil law likely does not intend to send this message, given that the civil law does not enunciate its civil standard of proof too expressly, loudly, or frequently—sensing perhaps that this message could not stand up to logical scrutiny.

standard would insinuate to the parties and the public that judges will not treat facts as true on less than certain evidence. Moreover, civil-law judges should not appear to have free rein to call close cases or to exercise discretion. That is, they should act only when more-or-less forced to act. All this rhetoric sounds good, and implies a seriousness of purpose and a caution in action. When the court does render judgment, the standard in turn implies that the evidence must have been certain. These implications are appealing (but nonetheless false).

Relatedly, the high standard of proof gives comfort to judges too. Japanese judges fear errors of fact more than errors of law, because factual errors will be more obvious to the parties; accordingly, the judges receive special training in factfinding.[78] A high standard of proof gives the judge a rock to hide behind. The judge will not have to call close cases. The party with the burden of proof will win only when clearly entitled to win; if that party loses, the standard of proof, not the judge, is to blame.

Again, I do not mean to imply inferiority by observing the civil-law systems' quest for legitimacy. Public perceptions of what courts do may be just as important as what courts do in fact.[79] Judicial myths can sometimes have great utility. Civil-law systems of course are not alone in seeking legitimacy for their decisions. Common-law courts have had their own means of maintaining an appearance of fairness and accuracy, such as delegating factfinding to a jury of citizens that supposedly embodied common sense and community values. Analogously, civilian courts with magisterial judges, sensitive to the special need for legitimacy in a social structure historically wary of the judiciary, may have willingly continued to accept the duty to deal only in "truth."

Similarly, common-law judges seek psychic comfort. The jury again bestows this benefit by shouldering responsibility for decision. Judges like juries.

Although legitimacy and comfort are important objectives, I still think the civil law suffers some costs as a result of its high standard in civil cases, while the common law enjoys some benefits from its frank acknowledgment of the probabilistic character of evidence and its embrace of an error-minimizing policy. First, the common law obtains more accurate results, by determining the most probable state of affairs in each case. In contrast, the civil law's outcomes flow from rules allocating the burden of proof, which do not necessarily capture the realities of particular cases. Second, the common-law standard of proof permits courts to

---

[78]Interview with Tadashige Æhishi, District Judge, Fukuoka District Court, in Ithaca, N.Y. (Apr. 11, 2003). The relative fears are the reverse for U.S. judges, as shown not only by their lack of special training in factfinding, but also by the less deferential standard of review for law than for fact, *see supra* text accompanying note 31, and by the attorneys' duty to disclose adverse law and not adverse fact, *see* FIELD ET AL., *supra* note 15, at 273-77. The U.S. fear of an error of law could lie in the realization that under stare decisis a legal error will affect all of society rather than just the parties; contrariwise, the judge can still blame an error of fact on the parties' faulty adversarial presentation in meeting the preponderance standard.

[79]*See* JOLOWICZ, *supra* note 54, at 72-73.

maintain a more impartial stance toward litigants, because it equalizes the litigants' positions. By explicitly pronouncing and patrolling the preponderance standard, the common law better controls decisional bias. Contrariwise, civil-law judges likely apply a haphazardly variable civil standard of proof, but the system cannot regulate the judges' modifications or even modulate them because the question of standard remains hidden. The civil law's formalistic approach thus opens the door to unthinking, or thinking, bias in decisionmaking. Third, the common law's approach is more conducive to introspective and open development of evidence law. For example, the common law is in a better position to handle statistical evidence in this era of increasing scientization of evidence. Meanwhile, the civil law has just begun to grapple with some fundamental liability questions. Examples include probabilistic problems of causation and apportioned liability.[80]

CONCLUSION

After this brief comparative study, I remain convinced of the soundness of the common law's standard of preponderance of the evidence. That stance irresistibly has led me to puzzle over one feature of the civil law's procedure: the high, criminal-like standard of proof that it applies in civil cases. I do not offer a definitive answer to this puzzle, but I have offered some tentative explanations of this difference between the U.S. and Japanese law, indeed doing so as to both historical causation and current motivation.

The historical causation of the difference in civil standards of proof is easier to uncover, albeit less instructive. Civil-law and common-law standards of proof diverged in the late eighteenth century, probably because of one system's French Revolution and the other's distinctive procedure. The French Revolution, in the course of simplifying the civilian law of proof, hid the standards of proof from view. Meanwhile, the common-law jury served to induce judges to articulate standards of proof for the adversary system.

Yet, historical causation does not tell the whole story. The need to articulate a standard does not explain the content of the chosen standard. Nor does history explain why the two systems have continued to adhere to their different standards over the centuries. Accordingly, I have also attacked the question of standard of proof on the second front of current motivation, asking why the modern civil law has retained what I believe is an unrealistic standard.

The current motivation, in my view, lies in the subtle differences between the two systems' procedural objectives, to which the different civil standards employed by civil-law and common-law courts conform. The civil law seeks the legitimating benefits of the myth that its courts act only on true facts and not on mere probabilities. Courts of the common-law seek legitimacy elsewhere, perhaps in other myths, and thus are free to adopt the standard of proof that more fairly and efficiently captures the real truth of the case.

---

[80]*See* DAMAŠKA, *supra* note 37, at 143-52; *supra* text accompanying notes 24-25.