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Standards of Proof in Japan and the United States

Kevin M. Clermont†

This article treats the striking divergence between Japanese and U.S. civil cases as to standards of proof. The civil law of Japan requires that facts be proven to a high probability similar to beyond a reasonable doubt, while the common law of the United States requires that the burdened party satisfy merely a more-likely-than-not standard. 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 systems' current motivations to adhere 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 preponderance of the evidence as the standard of proof that more efficiently and fairly captures the real truth of the case.

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† Flanagan Professor of Law, Cornell University. I presented this paper, to my great benefit, in a law seminar at Keio University in Tokyo on July 5, 2003, and so I would like to thank all those who participated there, including the presiding Professor Koichi Miki and also Professors Kojima, Omura, Sakahara, Shibashi, Souda, Wagatsuma, and Yamamoto. I would additionally like to thank for their valuable comments 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 examines the standard of proof—the required degree of persuasion for the factfinder to find a fact—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 beyond a reasonable doubt, 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 evidence examination at 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 physical evidence, 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 first two 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 a specialized issue and its 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.

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 75, 77 (1906).

3. Id. at 76.

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.

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."

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 [kodo 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 conviction [kakushin] of the existence of such a relationship to the degree that an average person will not entertain any doubt.

Of course, Japan inherited this standard of proof from, and still shares it with, the foundational civil law countries. Most of those countries

5. Id. § 7.05[13][b] (footnotes omitted) (quoting H. Kaneko, Rissho sekinin [Responsibility for Adducing Proof], in 2 Minji soshō-hō koza [Lectures on the Law of Civil Procedure] 568 (1954)); see also JOSPEH W.S. DAVIS, DISPUTE RESOLUTION IN JAPAN 314 (1996); CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 324–27 (2004); CARL F. GOODMAN, THE RULE OF LAW IN JAPAN 254 (2003); 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.go.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.") (last visited Feb. 18, 2004); Craig P. Wagnild, Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation, 3 ASIAN-PAC. L. & POL'Y J. 1, 7–8 (2002).

6. HATTORI & HENDERSON, supra note 4, § 7.05[13][b], at 7-77 n.469 (quoting Miura v.Japan, 29 MINSHU 1417, 1419-20 (Sup. Ct., Oct. 24, 1975)); cf. ODA, supra note 5, at 202-03 (seemingly seeking to treat this case as governing only the issue of causation).

apply their high standard, often called intime conviction (an inner, deep-seated conviction of the judge), with a bit of obliviousness. Japan demonstrates a greater awareness of what it is doing, as well as entertaining more debate about the actual standard prescribed and applied. The result is that Japan now seems to have nuded its civil standard down from the level of beyond a reasonable doubt, although it remains well above preponderance of the evidence; so we can call the Japanese standard a high probability. 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.

(Mandarin version). In a remarkable article on the same subject as ours, its European author agrees that the common law's preponderance standard of proof is superior, but nevertheless criticizes our development of arguments in support of that view. Michele Taruffo, Rethinking the Standards of Proof, 51 AM. J. COMP. L. 659, 659 (2003). He makes one relevant, coherent, and possibly accurate point: some civil law countries, such as Spain and Italy but not the more rigorous Germany, are adamantly nonexpress about their higher civil standard of proof, and thereby they free up their judges to apply whatever standard the judges think appropriate in the search for "truth" or "moral certainty." See id. at 666–69 (characterizing intime conviction as "a sort of black box"). He seems to approve of this practice. Cf. id. at 670–71 (maintaining that truth is what judges say it is). We in fact developed at length his observation about judicial freedom to lower the standard in practice. See Clermont & Sherwin, supra, at 261–64. But we did not feel comfortable resting on it, if only because such dangerous judicial discretion is so likely suboptimal that we would never feel competent to attribute it to the civil law. Instead, we discounted his explanation in terms similar to those I use infra in note 33 for the analogous possibility regarding Japanese law-in-action. But see Dominique Demougin & Claude Fluet, Deterrence vs. Judicial Error: A Comparative View of Standards of Proof, 161 J. INSTITUTIONAL & THEORETICAL ECON. (forthcoming Mar. 2005) (showing by sophisticated analysis that a variable standard of proof, set on a case-by-case basis by the ideal judge, could serve accuracy by offsetting the unavailability or inadmissibility of evidence in the particular case).


9. See, e.g., SHOZO OTA, SAIBAN NI okERU SHOMEIRON 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 ITO, JUItsU 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 CIVIL LAW 140 (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, art. 248 now allows the court to reduce the standard of proof:

In the case where damage is deemed to arise, and if it is extremely difficult to prove the amount of damages from the nature of such damage, the court may recognize a reasonable amount of damages based on the entire tenor of the oral proceedings and the results of the examination of evidence.

2 THE CODE OF CIVIL PROCEDURE OF JAPAN art. 248 (1996) [hereinafter CCP]. "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.").
II. U.S. Approach

As straightforward, albeit unimportant, as this description of approach might sound to a Japanese audience, it is downright shocking to American minds. In the United States, the law treats the standard of proof as centrally important, and that standard of proof is openly probabilistic: civil claims ordinarily must be proved merely by a preponderance of the evidence. Thus, U.S. lawyers 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 own lower standard of proof as unquestionably 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 to reject something so obviously valid. Alas, I shall conclude much the same, albeit at a slower pace.

A. Doctrine

In the United States, different civil and criminal standards of proof clearly exist, with plenty 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,

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 seven percent of the criminal cases, and convictions follow in ninety-nine percent of those contested cases. See id. at 178-82 (the authors' U.S. data are unreliable because of the authors' treatment of dismissed cases). The comparable U.S. figures are nine percent and seventy-seven percent, 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 note 1, 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 ninety-nine percent 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 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 ninety-six percent in Germany).
falling short of absolute certainty." 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." 

To achieve those aims, the law has settled on three standards that differ in how likely the contested fact must be for the factfinder to decide that the fact exists. 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. (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. Continuing debate here focuses on the practical meaning of clear and convincing evidence, while debate decreases on potential differences among the distinctive intermediate formulations. (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

13. WILLIAM TWining, RETHINKING EVIDENCE 73 (1990). Uncovering either the ideal or the actual approach to processing evidence constitutes, of course, an exceedingly difficult endeavor. For a nice introduction, see DAVID A. SCHUM, THE EVIDENTIAL FOUNDATIONS OF PROBABILISTIC REASONING (1994). Most of the process lies in obscurity, and it may not be probabilistic in nature throughout. In this article, I avoid many of the most difficult problems by focusing on the ultimate factfinding step when the factfinder compares the processed proof to the standard, a step that the law forcibly makes probabilistic.

There has, of course, been occasional blindness to this idea of a probabilistic standard, 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).


uncertain world.¹⁹

Today the U.S. 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 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

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) (noting that "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).
²¹. McBaine, supra note 16, at 246-47 (footnote omitted). See generally Clermont, supra note 14 (arguing at length from the cognitive psychology literature that these three-fold standards accord with how humans naturally process information).
²³. See, e.g., Clermont, supra note 14, at 1119 n.13, 1147-48.
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 further, 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:
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 very plausible conditions. The first condition is that an error in favor of the plaintiff is neither more undesirable nor less undesirable than an 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). 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. Under these conditions, which prevail outside criminal law, 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. Formal proofs indeed show that the preponderance standard minimizes not only the number of erroneous decisions, but also the sum of wrongful amounts of damages.

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 . . . .


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.


28. Let p be the apparent probability that the defendant is liable, for D dollars. If $p \geq \frac{1}{2}$, call it $p_1$; and if $p < \frac{1}{2}$, 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 $\varepsilon(1-p_1)D + p_2 D$. On the other hand, under a virtual-certainty standard, the analogous sum is $\varepsilon[p_1 D + p_2 D]$. Because $(1-p_1)$ must be less than $p_1$, the preponderance standard lowers the system's error costs.

29. See D.H. Kaye, The Error of Equal Error Rates, 1 Law, Probability & Risk 3, 6 (2002) (noting that "when the loss resulting from a mistaken verdict for plaintiff is set
Finally worth noting is that a legal system's aim in imposing one of the higher standards of proof is often heavily substantive in nature. The preponderance standard has the procedural aim of providing the parties with a level playing field. But a higher standard usually aims to influence the outcome of the case. Therefore, the common law system demands a special reason before it will impose one of the higher standards on certain kinds of cases. The civil law does not, and that is the critical difference.

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, factfinders are not necessarily a mere on or off switch and, with proper instruction, can roughly determine probability at the same time they decide facts. Accordingly, human decisionmaking can reflect gradations of probability. Despite sometime confusion, juries and judges engaged in factfinding can and usually do make at least the gross distinction between the 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; that the factfinder is more apt to be right, having actually heard the evidence; and that intrusive review has many costs, including a 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

Thus, the U.S. standard of proof is really more of a guide to the first-instance factfinder than an enforced standard of decision. But there is empirical support to show that those factfinders take the standard


31. See Clermont, supra note 14, at 1126-30, 1133-34, 1152-55.
Finally, there is good reason to think that the U.S. standard of proof differs in practice from the civil law standard. Civilians also appear to take their dramatically stated high standard seriously. 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 emerge in both the civil law and the common law in the eighteenth century. Legal theorists contributed early on 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 people looked at the world:

"Probability" from the ancient 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 assigned weights to specified classes of


33. It is of course possible that the law in action does not equate to the law on the books—that Japan in actuality utilizes generally a preponderance standard (or alternatively that the United States in effect applies generally a standard of high probability), despite the difference in the countries' articulated standards. In that event, the whole mystery of standards of proof would disappear. At least, any degree of convergence, or merely real-world fudging, would make civilian standards of proof easier to live with. Surely, some Japanese judges apply a lower standard of proof, at least for certain kinds of facts. But it is unlikely that the countries' standards have converged completely. First, outward appearances and legal practices suggest that many judges in Japan, and even more surely in other civil law countries, are applying a higher standard than the United States. See Clermont & Sherwin, supra note 7, at 262-64. Second, the verbalizations of the countries' standards are so dramatically different that their very articulation likely produces a real outcome difference in at least some cases. Id. at 262. Third, the articulated differences are significant in themselves, affecting how people feel and think about adjudication, and also having practical effects in shaping doctrines such as res judicata between civil and criminal litigation. Id. at 262-64. Thus, Japan's standard of proof still does differ from the U.S. standard, and that difference has a real impact.

34. See generally Shapiro, supra note 25, at 1-41, 123-24, 220-23, 253-55 (tracing the development of of the standard of proof from the concepts of probability and moral certainty to the modern standard of beyond reasonable doubt); Barbara J. Shapiro, A Culture of Fact: England, 1550-1720, at 8-33 (2000) (examining the distinction between fact and law, the role of juries in evaluating witness testimony, and the value of impartiality in legal proceedings and judgments); Éric Desmons, La preuve des faits dans la philosophie moderne, 23 Droits 13 (1996).

35. Shapiro, supra note 25, at 8.
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. But unaccustomed 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. 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 probabilities [preuve légale], the mathematical applications to jurisprudence may have been tainted by association."

So, the Continentals stopped considering standards of proof, throughout the subsequent periods of history in which probabilistic thinking waned and waxed in other disciplines. 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 French law of the principle of the judge's intuitive conviction . . . ." Of course, the French today realize that intime conviction requires only very high probability, not certitude; a reasonable doubt will defeat the necessary intuitive conviction. But beyond these obvious insights, French legal theoreticians have not pursued probabilistic notions in any coherent or accepted way. They still draw no distinction between civil and criminal standards.

36. See CCP, supra note 11, art. 247 ("In rendering a judgment, the court may, taking into consideration the entire tenor of the oral proceedings and the result of the examination of evidence, judge whether or not the assertion of the facts is admitted to be true according to its free conviction."). 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, whose evolution is 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 the free evaluation debate, the focus of this article remains the starker disagreement between civil law and common law on the standard of proof in civil cases.

39. See Shapiro, supra note 25, at 253; Friedman, supra note 22, at 1944-46.
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 (mistakenly likening serious doubt in criminal cases to the probability of innocence).
43. See Clermont & Sherwin, supra note 7, at 247-51; cf. id. at 243, 245 (similarly discussing Germany).
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 a free evaluation of the 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 common law saw judges begin to instruct 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 began to diverge from the criminal standard at about that same time49—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 jury51 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 for 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

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44. *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.
46. See id. at 3-12.
50. See 2 *McCormick on Evidence, supra* note 13, § 339, at 424 & n.16; *supra* text accompanying notes 16-25.
52. See *Damaszka, 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..."
Determining the cause of a legal rule can be tricky, however. 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 professional judge controlling a factfinding lay jury, and operating with openness in an adversary setting—played in combination a causal role in developing the probabilistic standards.

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

History thus seems to explain the divergence of civil law and common law standards of proof, but history alone cannot explain why their standards of proof remain so strikingly different today. In other words, studying the past may help to reveal 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. This question of why the civil law chooses to sacrifice error minimization raises the preliminary question of whether its high standard of proof in civil cases serves some other procedural or substantive purpose.

A. Procedural Impact

Perhaps the high standard affects the procedural system in some beneficial way. This possibility requires consideration of the goals of civil procedure.

Scholars of procedure have attributed multiple and sometimes con-
flicting purposes to the civil process.\textsuperscript{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.\textsuperscript{55} Another intertwined objective is to foster popular belief in the legitimacy of judgments.\textsuperscript{56} Yet, if the legal system also aims to be fair and individualized or to regulate conduct and modify behavior in beneficial ways, its procedure must pursue truth, in the sense of making an accurate determination of the facts before it applies the law—because procedure that yields 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.\textsuperscript{57} Of course, scarcity of time and resources will often cause the divergent aims of dispute resolution, legitimacy, and accuracy to conflict.

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 while preserving public order or enhancing social harmony.\textsuperscript{58} In so considering 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 factfind-


\textsuperscript{55} See JoloWicz, supra note 54, at 69–70; Simpson, supra note 54, at 141.


\textsuperscript{57} See JoloWicz, supra note 54, at 70–71; Golding, supra note 54, at 107.

ing. But I have no need to enter the fray on the relative desirability of adversarial versus inquisitorial methods. Although genuinely inquisitorial methods could conceivably signal a greater attachment to truth, 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 to a large degree, thus mooting the debate. Second, like the civil law, the common law certainly pursues dispute resolution. But it also pursues other values, including truth.

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 alternative 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. However, 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. Indeed, the

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

60. Compare Joint Conference on Professional Responsibility, Report, 44 A.B.A. J. 1159 (1958) (articulating a reasoned statement of the lawyer’s responsibilities in order to convey insight into the value of the adversary system and an understanding of the tacit restraints with which it is infused), with JOLOWICZ, supra note 54, at 86, 175-82 (arguing that, while the adversarial principle has its virtues, it is not an absolute and that, in any system of civil procedure, a balance between adversarial and inquisitorial elements is inevitable and appropriate).

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.”).


63. One piece of evidence to this effect is that the United States has overlaid its adversarial procedure with an extensive 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 case-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, 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. Id. The different standards will not, therefore, trans-
amount of contested litigation tends to expand to fill the system's existing capacity. 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 arguable when it could be found out more definitely. 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 in civil law countries 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.

Upon inspection, then, 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 decisions 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 based on probability.

When viewed in this light, the civil law's demand for "truth" in civil cases has the appearance of willful 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 of truth determination. Accordingly, I turn now to possible substantive benefits that would explain why the civil law might affirmatively wish to retain its high standard in civil cases.

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

late into different win rates observable in outcome data. Id. (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.)


66. See Huang, supra note 11, at 141-42 (cataloguing Japanese objections to the preponderance standard).
a burden of proof that already disadvantages plaintiffs by usually designating them to prove affirmatively the elements of their claims, obviously makes it even more 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, and (2) might sometimes reflect a specific substantive policy of imposing liability on defendants, who could better shoulder the expense. Alternatively, regardless of who bears 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 three 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 to prefer this defendant to this plaintiff. In this and 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 between plaintiffs and defendants in civil cases. It is thus hard to believe that civil law societies, otherwise so similar to common law societies, would reach a

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67. On Japanese rules for shifting the burden, see HATTORI & HENDERSON, supra note 4, §§ 7.05[13][a], [14]; HUANG, supra note 11, at 143-53; ODA, supra note 5, at 406-07.


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).
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 in most civil law countries. 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

So, why do the two systems continue to treat standards of proof in civil cases so differently? The obvious procedural and substantive explanations, explored above, fail to convince.

Maybe the civil law simply felt no need for change. But given that the preponderance-of-the-evidence standard is a better way to allocate legal responsibility in civil cases, it is implausible that Japan would by mere inertia continue to adhere to an unrealistic and potentially unfair and inefficient standard. Indeed, most civil law countries, including Japan, have adjusted their standard downward in all or some cases. Tradition may suffice to explain many features of law, but a fuller explanation is necessary for the persistence of seriously suboptimal provisions.

Another 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. Civilian inattention to matters of procedure and evidence likely does help to explain why civil law and common law continue to differ. But, of course, inadvertence has no justificatory force. Moreover, such an explanation is unsatisfactory when it comes to Japan—which is not at all indifferent to or disdainful of these fields of study, and which has a long history of openness to foreign ideas while adapting them to native needs.

72. See Clermont & Sherwin, supra note 7, at 245 n.6, 247 n.14, 253 n.47, 260 n.82; supra note 11 and accompanying text.
73. See Clermont & Sherwin, supra note 7, at 259-61.
74. See Huang, supra note 11, at 109-10.
75. See Oda, supra note 5, at 6-9.
Therefore, some explanation more robust than inertia or inattention, or any other such national peculiarity, is needed to resolve the mystery.\textsuperscript{76} Because no substantive aim can fully explain the high civil law standard of proof, as shown above, and because it seems to serve neither dispute resolution nor truth determination, it must owe its existence to the pursuit of a heretofore untreated procedural aim, namely, legitimacy.\textsuperscript{77}

That is, the high civil law standard of proof exists perhaps in hope of enhancing the perceived legitimacy of judicial decisions. Legitimacy, in the sense used here, refers to popular acceptance, which grows whenever judges act within the seemly role allocated to them.\textsuperscript{78} 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


In explaining standards of proof in particular, the cultural proposition runs into two more problems. First, the Japanese took their standards as transplants from continental Europe, so that supposed Asian attitudes do not help to explain the development of Japan's standards of proof. See \textit{supra} text accompanying note 7; ODA, \textit{supra} note 5, at 6–9. Second, although supposed Asian attitudes might suggest that the Japanese would be more at home with continuing a nonprobabilistic approach than continental Europeans, Japan today in fact shows more sensitivity to the probabilistic nature of proof than most of its European predecessors. See \textit{supra} text accompanying notes 8–11.

My own tentative view of the culture/rationalism debate is that as one of many factors, culture can affect the general task of evidential reasoning, especially in the step of collecting evidence and even in the step of analyzing evidence, but less so in evaluating evidence against a standard of proof. Although I admit that application of the standard of proof is a complicated and ultimately behavioral task, see Schum, \textit{supra} note 13, at 41, there is as yet no showing that advanced cultures differ in how their people compare processed proof of a fact to the standard of required likelihood. See Clermont, \textit{supra} note 14, at 1139 n.103; \textit{cf.} Mo Zhang & Paul J. Zwier, \textit{Burden of Proof: Developments in Modern Chinese Evidence Rules}, 10 \textit{Tulsa J. Comp. \& Int'l L.} 419, 453–54 (2003) (observing movement toward a similar approach). At any rate, there is no basis for postulating a cultural difference between the United States and Japan as to handling standards of proof.

\textsuperscript{77} See sources cited \textit{supra} note 56.

\textsuperscript{78} See Alain A. Levasseur, \textit{Legitimacy of Judges}, 50 \textit{Am. J. Comp. L.} 43, 45–46 (Supp. 2002).
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."

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 probabilism. 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. That is, the high 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 to say, the high standard's rhetoric and form help judges to appear as mechanical applicators of the law who act only when more or less forced to act, implying a seriousness of purpose and a caution in action. Finally, when the court does render judgment, the standard retrospectively implies that the evidence must have been certain and the result necessary. All these implications are admittedly appealing (but nonetheless false or misleading).

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. A high standard of proof gives the judge a rock to hide behind. The judge will not have to call evenly balanced 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. Likewise, the judge might duck a difficult decision, or otherwise seek to self-protect, by relying on the unrealistically high standard of proof.


80. 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.

81. Interview with Tadashige Onishi, 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 trial attorneys' duty to disclose adverse law and not adverse fact, see FIELD ET AL., supra note 15, at 273-77, and by the appellate courts' less deferential standard of review for law than for fact, see supra text accompanying note 31. The greater 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.
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. 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 an impartial jury of citizens who supposedly embody common sense and community values. Analogously, I am arguing, 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 decisions. Judges like juries.

Although legitimacy and comfort are important objectives, and their pursuit yields real benefits, I still think the civil law suffers some costs as a result of its high standard in civil cases. Meanwhile, the common law enjoys some offsetting benefits from its embrace of an error-minimizing policy, its neutral treatment of plaintiffs and defendants, and even its frank acknowledgment of the probabilistic character of evidence.

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 always capture the realities of particular cases. Second, the common law standard of proof permits courts to 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.

Now, I am not arguing that the civil law's valuing of legitimacy is worse or better than the common law's view, but rather that it reflects a different weighing of costs and benefits in a different legal context.

82. See JOLOWICZ, supra note 54, at 72-73.
83. See DAMAŠKA, supra note 37, at 143-52; supra text accompanying notes 24-25.
Conclusion

After this brief comparative study, I remain convinced of the soundness of the common law's standard of preponderance of the evidence—as an abstract matter of theory. 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 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 standard of proof conforms. 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 efficiently and fairly captures the real truth of the case.

The final question is not for me. While the preponderance standard is definitely appropriate for the United States, would it be a desirable reform for Japan? The answer turns on a subtle balance of benefits and costs that the Japanese have thus far concluded favors a higher standard of proof for their civil cases.