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A Comparative View of Standards of Proof

INTRODUCTION

The subject of this article is a striking divergence between common-law and civilian standards of proof in civil cases. In England and the United States, the standard of proof is probabilistic: civil claims ordinarily must be proved by a preponderance of the evidence. In civil-law countries, the standard seems strange to us: a civil claimant must in effect convince the trier of fact that the claimant's assertions are true.

Thus, for example, the classic comparative study of German civil procedure makes this passing observation on standards of proof:

> What is the degree of conviction to which the civil court must be brought in ordinary situations before it is justified in holding that the burden of establishing a proposition has been met? [A German treatise says]: "The judge may and must always content himself with a degree of certainty that is appropriate for practical life, one which silences doubts without entirely excluding them." Evidently a rather high degree of probability is called for, and there is a tendency toward at least verbal equation of the civil with the criminal standard.[1]

Assuming that the standards of proof operate in practice as they are stated in texts, this difference between common-law and civilian rules not only has great practical importance, but also suggests a basic difference in attitudes toward the process of trial. Yet, the comparative literature has largely overlooked the subject of standards of proof. We believe this subject needs attention.

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1. Kaplan, von Mehren & Schaefer, "Phases of German Civil Procedure (pt. 1)," 71 *Harv. L. Rev.* 1193, 1245 (1958) (footnotes omitted), reprinted in Arthur Taylor von Mehren & James Russell Gordley, *The Civil Law System* 151 (2nd ed. 1977); see also von Mehren, "Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules," 63 *Notre Dame L. Rev.* 609 (1988).

Sound comparative scholarship, in our view, is a delicate enterprise that demands great learning and skill. A comparativist should be sufficiently immersed in the different legal cultures to understand the context in which legal rules operate and the attitudes an insider might take toward the rules. To the extent the comparativist is not an insider, he or she should also approach the rules of a different system with modesty and respect. Then, in drawing lessons for the home system, the comparativist should remain cautious. He or she should be suspicious of drawing easy generalities[2] or making confident calls for legal transplants.[3] This caution is especially appropriate for comparisons in procedure, a field marked by the interrelatedness of its parts and its inseparability from local institutional structure.

We are not expert comparative scholars in the sense just described. We are American legal scholars who have noticed a very odd difference between common-law and civilian procedures. We write in the hope that comparative study can help one to think about one's own legal system, even with only a misty understanding of the foreign systems. For us in this endeavor, "The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law."[4] But in the pages that follow, we shall also do what expert comparativists would not do: we shall rudely wonder how civilians can be so wrong. Not only shall we express our puzzlement over the civilian rule, but we shall proceed to speculate about why the rule has persisted abroad. We trust our readers will understand that this article is not intended as an authoritative comparative analysis. Our purpose is simply to highlight a subject that needs attention, and to provoke response and analysis from comparative scholars, especially from the civilian side.

Before proceeding with our task, we should back up a little. What we are considering in this article is the standard of proof, the degree of necessary persuasion. Our subject is distinct from the Roman principle of the judges' free evaluation of the evidence, or *la liberté de la preuve*, although free evaluation will play a part in our analysis. Free evaluation returned to the Continent with the French Revolution to

2. See Allen, Köck, Riechenberg & Rosen, "The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship," 82 *Nw. U.L. Rev.* 705 (1988); Markesinis, "Comparative Law—A Subject in Search of an Audience," 53 *Mod. L. Rev.* 1, 7-10 (1990).

3. See Kaplan, "Civil Procedure—Reflections on the Comparison of Systems," 9 *Buffalo L. Rev.* 409, 422 (1960); Plett, "Civil Justice and Its Reform in West Germany and the United States," 13 *Just. Sys. J.* 186 (1989); Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure," 75 *Iowa L. Rev.* 987 (1990).

4. Langbein, "The Influence of Comparative Procedure in the United States," 43 *Am. J. Comp. L.* 545, 545 (1995); see also Bermann, "The Discipline of Comparative Law in the United States," in *L'avenir du droit comparé* 305, 306-08 (2000) (discussing various aims of comparative law).

replace in large part the medieval formal theory of evidence, or *la preuve légale*. Medieval legal proof had assigned weights to specified classes of evidence, such as admissions and oaths, and prescribed exactly when a set of evidence amounted to full proof. Modern civilians still take pride in their free evaluation principle, contrasting it with the common law's exclusionary rules of evidence partly attributable to the jury.[5] Regardless of the merits of that debate, the focus of this article remains the apparently much starker disagreement on the standard of proof in civil cases.

I. Comparative Observations

A. *Civil-Law and Common-Law Differences on Standards of Proof*

Research confirms the above-quoted observation on the standard of proof. German law does indeed differ from U.S. law on the standard in civil cases. According to a more recent sketch, the situation is this:

> The law . . . in Germany, as contrasted with United States law, eschews different standards of proof. Under the German system, the judge must be convinced beyond a reasonable doubt, whether the suit involves private, criminal, or public law (administrative and constitutional) issues. The reasonable doubt standard is inapplicable only in the exceptional circumstance in which a statute specifically mentions some other standard to be applied.[6]

Thus, Germany applies, with some exceptions, a reasonable-doubt standard in civil cases.

Beyond Germany, other civil-law countries follow suit, with the result that the civil-law and common-law formulations of the civil standard of proof in general differ starkly.[7] This difference qualifies now as obvious truth, justifying an encyclopedia's summary:

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5. See Damaška, "Free Proof and Its Detractors," 43 *Am. J. Comp. L.* 343, 343-48 (1995).

6. Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* 18 (1998) (footnotes omitted); cf. Gottwald, "Fact Finding: A German Perspective," in *The Option of Litigating in Europe* 67, 77 (D.L. Carey Miller & Paul R. Beaumont eds., 1993) (stressing the importance of exceptions that apply a preponderance standard "with regard to prima facie cases, to causation, to negligence and to assessment of damages"); Ekelöf, "Beweiswürdigung, Beweislast und Beweis des ersten Anscheins," 75 *Zeitschrift für Zivilprozess* 289 (1962) (criticizing the logic of such exceptions). The existence of legislative or judge-made exceptions, as in Germany, may suggest soft support for the high civil standard.

7. We focus on the civil-law systems, and only on those of Europe, but their approach to standards of proof appears to prevail in other legal traditions. See Mary Ann Glendon, Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions* 903 (1985) (explaining that Soviet law did not distinguish between degrees of proof, but instead required "inner conviction of the judge" in all civil as well as criminal cases); I.V. Reshetnikova & V.V. Iarkov, *Grazhdanskoe pravo i grazhdanskii protsess v sovremennoi Rossii* [Civil Law and Civil Procedure in Contemporary Rus-

> In continental European law, no distinction is made between civil and criminal cases with regard to the standard of proof. In both, such a high degree of probability is required that, to the degree that this is possible in the ordinary experience of life itself, doubts are excluded and probability approaches certitude. In the common-law countries the degree of probability required in civil cases is lower than that called for in criminal matters.[8]

For the standard of proof on the criminal side, as the above quotations report, the Continentals set a high standard, requiring what some call *une intime conviction*, or an inner, deep-seated, personal conviction of the judge.[9] This high criminal standard, whatever one chooses to call it, has its champions, who claim its superiority over the common-law standard of beyond a reasonable doubt, seeing it as clearer, as more focused on a subjective belief, or as more squarely imposed on the prosecution.[10] In actual practice, however, the civil-law and common-law standards for criminal cases are likely equivalent.[11]

Much more surprisingly, the Continentals employ the same high standard on the civil side, and indeed in all courts including their administrative courts. The party who bears the burden in a civil case must satisfy the judges, to the point of *intime conviction*, of the existence of the pertinent fact. Our concern in this article lies with this marked difference from the common-law standard of preponderance of the evidence.

Our concern rests on the general level. But for some purposes, a specific example might be useful. We 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."[12] Given indeterminate handwriting samples, we can imagine various bodies of evidence by which

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sia] 168-71 (1999) (same standard still applies under art. 56 of the new Russian Civil Procedure Code); cf. infra n. 82 (describing the same standard in Japan, which, like Russia, lacks the civil jury). Thus, the common-law approach could fairly be termed the common-law exception.

8. Nagel, "Evidence," in 7 *Encyclopædia Britannica: Macropædia* 1, 2 (1974), available at <http://www.britannica.com/bcom/eb/article/8/0,5716,117328+6+109441,00.html>.

9. Our subject does not reach the Continental countries' differences on whether the judges must merely arrive subjectively at an *intime conviction* or must go on to state more objectively the reasons for the grounds on which judgment was based, specifying in writing why they were convinced and thus meeting a standard of explicable conviction, or *conviction raisonnée*.

10. E.g., Solan, "Reforming the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt," 78 *Tex. L. Rev.* 105, 106, 118, 145 (1999).

11. See Delmas-Marty, "La preuve pénale," 23 *Droits* 53, 59-60 (1996) (observing initially, "*Le degré de certitude qui conditionne la décision de culpabilité est une des questions les plus obscures du droit pénal.*").

12. Trickett, "Preponderance of Evidence, and Reasonable Doubt," 10 *Forum* (*Dick. L. Rev.*) 75, 77 (1906).

A tries to prove execution and B rebuts, such as 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."[13] Assume there is no further evidence. With this closely balanced body of evidence, and even without party or expert testimony, the common-law factfinder could find for A, given a certain reaction to the three witnesses' credibility. Contrariwise, the civil-law factfinder could not faithfully apply its standard of proof and still find for A. After all, no one would be ready to convict B of a crime based on this body of evidence.

B. The French Example

Our precise concern is why the civil-law standard of proof in civil cases is so much higher than the common-law standard. Let us take France as the civil-law example for a more detailed inspection of the standards of proof.[14]

France, of course, is a prototypical civil-law country in most respects,[15] including its civil procedure.[16] In the terminology of legal mythology, then, French procedure for civil cases is partly inquisitorial. But that description holds true only as long as one concentrates on the statutory powers of investigation bestowed on the French

13. Id. at 76.

14. For a broader survey of procedure, see Stephen O'Malley & Alexander Layton, *European Civil Practice* (1989). We are not contending that all European civil-law systems employ exactly the same civil standard in the same manner. For example, Austria may be readying to nudge its civil standard down to high probability, a standard lower than its criminal standard but higher than the U.S. preponderance standard. See Walter Rechberger & Daphne-Ariane Simotta, *Grundriß des österreichischen Zivilprozeßrechts* ¶ 580 (5th ed. 2000). All we are contending is that France is not an atypical representative. See generally O.F. Robinson, T.D. Fergus & W.M. Gordon, *European Legal History* (3rd ed. 2000). Nevertheless, any developments lowering the civil standard elsewhere may demonstrate an awareness of the problem that has not yet reached France. Cf. infra n.82 (observing a lowering of the Japanese civil standard).

15. See generally John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* (1998); Christian Dadomo & Susan Farran, *The French Legal System* (2nd ed. 1996); Brice Dickson, *Introduction to French Law* (1994); Catherine Elliott, Carole Geirnaert & Florence Houssais, *French Legal System and Legal Language* (1998); Catherine Elliott & Catherine Vernon, *French Legal System* (2000); François Terré, *Introduction générale au droit* (1991); Andrew West, Yvon Desdevises, Alain Fenet, Dominique Gaurier & Marie-Clet Heussaff, *The French Legal System* (1992).

16. See generally Bernard, de Kondserovsky & Hoch, "France," in 2 *Transnational Litigation: A Practitioner's Guide* (Richard H. Kriendler gen. ed., 1997); Byrd & Bouckaert, "Trial and Court Procedures in France," in *Trial and Court Procedures Worldwide* 138 (Charles Platto ed., 1990); Lécuyer-Thieffry, "France," in *International Civil Procedures* 241 (Christian T. Campbell ed., 1995); Martin & Martin, "France," in 1 *International Encyclopaedia of Laws: Civil Procedure* (Paul Lemmens ed., 1994); Nauta & Meijer, "French Civil Procedure," in *Access to Civil Procedure Abroad* 131 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., 1996).

judge.[17] If one looks beyond the statute books, the French procedure for civil cases appears to be a mixed system, as are most civilian systems.[18] Indeed, according to the best description in English of modern French factfinding in actual practice, the French system is largely adversarial.[19]

In French litigation before a generic court, the parties fix the issues, and ultimately they must prove their cases. The preparatory judge, called *le juge de la mise en état*, in practice seldom uses the statutory powers to investigate, and so controls more than directs factual investigation in the pretrial phase.[20] Although the French system is thus quite adversarial, the parties lack any substantial methods of discovery, a U.S. innovation that the French disdain. "Since the lawyers are not only disinclined but powerless to engage in real factual investigation and since the court is reluctant to use the powers which it enjoys, the perception of fact by the court tends to be based entirely on an evaluation of documents submitted by the parties and exchanged between them . . . . While the exchange of documents may sometimes serve to uncover useful evidence, it is not seen as a device whose principal aim is the discovery of evidence . . . ."[21] As a result, a party's case usually consists of documents already in the party's possession.

Any high standard of proof makes burdens of proof critical to outcome. The French system has no need to make fine distinctions among burdens of production and persuasion, so we can, as the French do, speak just of burden of proof, or *la charge de la preuve*.[22] The party with the burden loses if the key fact is unproven or remains uncertain. The French plaintiff must prove all elements of the claim, while the defendant must prove affirmative defenses. As to allocating elements between claim and defense, the theory is to impose the burden on the party who seeks to upset an existing situation. That party "must establish every fact which conditions the existence of the right he invokes. He need not prove the absence of a fact which could have obstructed the birth of this right. Nor is he bound to show the absence of defects which might destroy his right."[23] The implications of this theory prove rather obscure in application, allowing the actual allocation of the burden between the parties to follow familiar

17. See West et al., supra n.15, at 286-88, 291-98.

18. See J.A. Jolowicz, *On Civil Procedure* 175-76, 218-21 (2000).

19. See Beardsley, "Proof of Fact in French Civil Procedure," 34 *Am. J. Comp. L.* 459 (1986).

20. See Godard, "Fact Finding: A French Perspective," in *The Option of Litigating in Europe* 57, 57-61 (D.L. Carey Miller & Paul R. Beaumont eds., 1993).

21. Beardsley, supra n. 19, at 467, 474.

22. See Peter Herzog & Martha Weser, *Civil Procedure in France* 310 (1967). One also encounters the expression *le fardeau de la preuve*.

23. Giverdon, "The Problem of Proof in French Civil Law," 31 *Tul. L. Rev.* 29, 41 (1956) (footnote omitted).

considerations of fairness and policy, such as access to proof, unlikeliness of contention, and substantive disfavor. Further, legal presumptions play a large role in carrying or shifting the burden. Thus, for illustration, the plaintiff must prove fault, causation, and harm in tort cases, but the burden on causation shifts when the defendant was responsible for the equipment involved in the tort.[24]

At the end of the civil process, there is a public hearing, or *audience*, before a three-judge panel, which prominently includes the preparatory judge. The *avocats* debate the import of previously investigated facts that appear in the dossier. The judges in principle engage in free evaluation of the evidence, although a number of legal hierarchies of proof do persist. For instance, even beyond an extensive statute of frauds, documentary proof definitely tends to outweigh oral accounts, which must have been reduced to writing anyway.[25] That is, the French do not have a pure version of free evaluation, but rather a mixed system that retains some of the old spirit of *preuve légale*.[26]

On the evidence before them, the judges must decide.[27] They decide by majority vote in secret, with no publicly expressed dissent.[28] In announcing their decision, the judges must explain their factfindings.[29] The judgment must show that their inner conviction comports with logic and experience,[30] albeit in a brief and uninformative manner that cannot express doubt.[31]

Clearly, the French system, like any legal system, is not ideally suited to the search of truth. As a perceptive French commentator put it: "In the first place, he who undertakes the search must have full liberty of investigation on the question to be resolved. Secondly, if he considers that the results of his search are not satisfactory, he must have the power of not concluding or of concluding only provisionally. Very clearly, these two possibilities must be refused to the civil judge."[32] The prevailing situation, in which the decisionmaker

24. See Herzog & Weser, supra n. 22, at 310-16; West et al., supra n. 15, at 286; Ngwasiri, "The Role of the Judge in French Civil Proceedings," 9 *Civ. Just. Q.* 167, 167-68 (1990).

25. See Godard, supra n. 20, at 61-65.

26. See Jolowicz, supra n. 18, at 213-15.

27. See id. at 211-13.

28. See Bell et al., supra n. 15, at 103; Herbert J. Liebesny, *Foreign Legal Systems: A Comparative Analysis* 320 (1981).

29. See Nouveau code de procédure civile [N.C.P.C.] art. 455 (Fr.) ("*Le jugement doit être motivé.*"); Baïssus, "Common v. Continental: A Reaction to Mr. Evan Whitton's 1998 Murdoch Law School Address," 5 *Murdoch U. Elec. J.L.* No. 4, ¶ 68 (Dec. 1998) <http://www.murdoch.edu.au/elaw/issues/v5n4/baissus54.html>.

30. See Damaška, supra n. 5, at 345-46.

31. See Bredin, "Le doute et l'intime conviction," 23 *Droits* 21, 25 (1996) ("*La décision ne peut pas être douteuse.*").

32. Giverdon, supra n. 23, at 30 (footnote omitted).

must render an umpireal decision on limited party-produced evidence, makes the burden and standard of proof critical.

So, at last, what is the French standard of proof, or *le degré de la preuve*?[33] Typically civilian, it is the same for civil and criminal cases:

> [T]he standard of proof required in civil and penal law in France is the same: the judge has to be convinced, without a shadow of a doubt, of a person's fault, be it penal or civil. In other words, there is in French law a direct relationship between the civil tort and the penal fault. The outcome is that where a civil and a penal action are concurrently pending, the civil case is stayed until the penal decision is taken. To avoid any delay for victims, they are given the possibility of joining their civil action to the criminal proceedings, which they do in the immense majority of cases. They enjoy the added advantage of seeing the prosecution doing the hard work of establishing proof of guilt—and footing the costs.[34]

Reconsider the case of A v. B, the action on a note that the defendant denies executing. Let us assume that it was a nonnotarized note of a nonmercantile nature. French pretrial proceedings would consist of an exchange of pleadings and of documents. Thus, the body of evidence would consist of documents, including writing samples as well as party-obtained and exchanged written witness statements, or *attestations*. The preparatory judge could, but usually would not, order other measures taken: first, the preparatory judge could order an *enquête*, for orally questioning witnesses in chambers and then summarizing their responses in a written report to the dossier;[35] second, the preparatory judge could hear the parties' unsworn versions in chambers, *la comparution personnelle*, which the judge would summarize for the dossier;[36] and third, the preparatory judge could seek written expert opinion from a *technicien*, or might even delegate the whole fact dispute to a judge-chosen expert for a common-law-like mini-trial pursuant to the so-called *expertise* device.[37] In any event, eventually someone, expert or judge, would have to decide the fact dispute. On any such closely balanced body of evidence, the burden of proof, after applying any presumptions, would be critical. The civil law's high civil standard of proof, imposed on the ultimately burdened party, should be determinative. Here the burden to prove execution falls on

33. One also encounters the expression *le degré de certitude*.

34. Baïssus, supra n. 29, ¶ 77.

35. See N.C.P.C., supra n. 29, arts. 288, 290, 293; West et al., supra n. 15, at 288, 295-96; Beardsley, supra n. 19, at 476-77, 478-80.

36. See N.C.P.C., supra n. 29, art. 291; West et al., supra n. 15, at 288, 295; Beardsley, supra n. 19, at 464, 469.

37. See N.C.P.C., supra n. 29, art. 292; West et al., supra n. 15, at 296-97; Beardsley, supra n. 19, at 469, 480-85.

A.[38] Thus, the high civil standard of proof likely preordains poor A's doom.

C. *The U.S. Example*

Take the United States as the common-law example on the standards of proof.[39] Here, different civil and criminal standards 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 the 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."[40] Furthermore, as an instrumental matter, the law should set the required probability at levels that serve the system's aims. Thus:

> Three such standards, differing in how likely the particular fact must be, 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 one end of the usual probability scale. (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 rarely prevails outside criminal law. Again, arguments persist about its practical meaning, but not about the propriety of this standard as the other end of the probability scale in our unavoidably uncertain world.

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38. See Code civil [C. civ.] arts. 1323-1324 (Fr.); cf. U.C.C. § 3-308(a) (2000) (imposing the burden of persuasion on the same party).

39. England recognizes two standards: balance of probabilities for civil cases and beyond a reasonable doubt for criminal cases. See Pattenden, "The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof," 7 *Civ. Just. Q.* 220 (1988); cf. Adrian Keane, *The Modern Law of Evidence* 91, 95-101 (5th ed. 2000) (observing some intermediate standards in practice).

40. William Twining, *Rethinking Evidence* 73 (1990). There has, of course, been occasional obliviousness to this idea, particularly in older cases. Courts have sometimes stated that 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).

> . . . 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.[41]

Indeed, some view the 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."[42] 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.[43]

In setting its standards of proof, U.S. law has overcome the appealing but unsound lay intuition that outcome should not swing from no to full recovery on the basis of a slight difference in the weight of evidence. Instead, U.S. law pursues an error-minimizing strategy, by routinely applying preponderance of the evidence as the civil standard and not some higher standard. The argument for its approach is strong:

> [T]he best decision rule is one that, as far as is practical, imposes liability entirely on the party who would indeed be liable under the governing substantive law if only all the facts could be known with certainty. This premise leads to the following notion of errors in damage awards: (1) every dollar paid by a defendant who would not be found liable if the true state of affairs were known is a dollar erroneously paid, and (2) every one of D dollars not paid to a plaintiff who would be entitled to collect this sum if the true state of the world were known is a dollar erroneously "paid" by plaintiff. . . .
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> The [preponderance] rule emerges as optimal if two assumptions about these types of errors are granted. The first is that one type is neither more nor less costly than the other. A dollar mistakenly paid by defendant (a false positive) is just as onerous as a dollar erroneously paid by a plaintiff (a false negative). The second assumption is that the best decision rule keeps the sum of the expected costs of

41. Clermont, "Procedure's Magical Number Three: Psychological Bases for Standards of Decision," 72 *Cornell L. Rev.* 1115, 1119-20 (1987) (footnotes omitted); see Richard H. Field, Benjamin Kaplan & Kevin M. Clermont, *Materials for a Basic Course in Civil Procedure* 684-88 (7th ed. 1997) (citing authorities).

42. McBaine, "Burden of Proof: Degrees of Belief," 32 *Cal. L. Rev.* 242, 246-47 (1944) (footnote omitted).

43. See Friedman, "Anchors and Flotsam: Is Evidence Law 'Adrift'?," 107 *Yale L.J.* 1921, 1946 (1998).

> each type of error to a minimum. In other words, the claim on behalf of the [preponderance] rule is that it does better than [any other standard of proof] in minimizing the total expected number of dollars coming from the wrong pockets.[44]

Room for debate still exists as to what the U.S. standard of preponderance of the evidence 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.[45] 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.[46] The point here is simply that such debate occurs in a lively and open fashion in the United States. Continental lawmakers and commentators have done some such work on the implications of proof standards,[47] but not much,[48] so judges there have to muddle through cutting-edge problems.[49]

D. Civil-Law and Common-Law Differences on Levels of Interest

As just suggested, another stark difference lies in the civilians' much lower level of interest in the subject of standards of proof.

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44. Kaye, "The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation," 1982 *Am. B. Found. Res. J.* 487, 496-97 (footnote omitted); see Orloff & Stedinger, "A Framework for Evaluating the Preponderance-of-the-Evidence Standard," 131 *U. Pa. L. Rev.* 1159 (1983).

45. See, e.g., Clermont, supra n. 41, at 1119 n. 13, 1147-48.

46. See Field et al., supra n. 41, at 688-94 (citing authorities, including 600- and 800-page symposia); Allen, "Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse," 17 *Harv. J.L. & Pub. Pol'y* 627 (1994).

47. See, e.g., Pierre Widmer & Pierre Wessner, *Révision et unification du droit de la responsabilité civile: rapport explicatif* 241-46 (c. 2000) (explaining Swiss law-reform proposals on liability); Hohl, "Le degré de la preuve dans les procès au fond," in *Der Beweis im Zivilprozess* 127, 137 (Christoph Leuenberger ed., 2000) (describing current Swiss approach and calling for reform, but concluding: *"Par conséquent, une vraisemblance simple, chiffrée pour les besoins de la démonstration à 51%, ne devrait jamais suffire."*); Taroni, Champod & Margot, "Forerunners of Bayesianism in Early Forensic Science," 38 *Jurimetrics J.* 183 (1998) (discussing, inter alia, studies of proof in the Dreyfus case).

48. See Barbara J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* 253-55 (1991).

49. 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 n. 41, at 700-02 (citing authorities). But civilians bury their heads farther, 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 . . . ." Beardsley, supra n.19, at 466-67 (discussing French law of proof). But cf. Terré, supra n.15, at 413-15 (discussing elements of fact in French law of proof).

While the United States buzzes with interest, France shows remarkably little interest in its standards of proof. Although the French criminal standard receives thought and discussion, it is quite hard to find even an explicit statement as to what is the French civil standard. There is a paucity of code, case, and commentary on the latter subject. First, no general statutory provision sets the civil standard of proof.[50] The old Code Civil and the New Code of Civil Procedure do not treat the standard.[51] Second, the courts' uninformative judgments do not elaborate the civil standard of proof they apply. There being no effective review of fact—the first level of appeal is a rehearing, the second level extends only to law[52]—appellate cases have no occasion to spell out the standard.[53] Third, the major text on civil procedure does not mention the standard of proof.[54] Few discussions, if any, appear in commentary. One rare article somewhat on point sums up the doctrinal situation: "In Civil Matters.—*Intime conviction* appears in no statute. It is not defined. But one can see many similarities between the civil judge and the criminal judge."[55]

Although on the standard of proof France seems less self-aware than some of its neighbors, the Continental situation nevertheless appears basically consistent: "There is elaborate caselaw on [standard of proof] in the United States, but the concept is less known to continental lawyers who generally assume that the judge needs to be 'fully persuaded' in all types of cases. Only a few modern [continental] scholars have demonstrated interest in alternative standards of proof . . . ."[56]

This situation is downright bizarre. Standards of proof are not an obscure point. The disagreement between the civil and common law here is deep and evident enough that even the encyclopedia notes

50. See Herzog & Weser, supra n. 22, at 309.

51. See C. civ., supra n.38; N.C.P.C., supra n. 29.

52. See West et al., supra n.15, at 300-05.

53. See Herzog & Weser, supra n. 22, at 310 n.361.

54. See Jean Vincent & Serge Guinchard, *Procédure civile* (24th ed. 1996).

55. Bredin, supra n. 31, at 23 ("*En matière civile.—L'intime conviction n'est évoquée par aucun texte. Elle n'est pas définie. Mais on peut observer bien des ressemblances entre le juge civil et le juge pénal.*"); see also Baïssus, supra n. 29, ¶ 77.

56. Kokott, supra n.6, at xvii-xviii, 18 (citing German scholarship that expresses interest in the preponderance standard, including Kegel, "Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit," in *Das Unternehmen in der Rechtsordnung* 321, 335-39 (Kurt H. Biedenkopf, Helmut Coing & Ernst-Joachim Mestmäcker eds., 1967)); see Bolding, "Aspects of the Burden of Proof," 4 *Scandinavian Stud. L.* 9, 18 (1960) (arguing for a probabilistic approach and the preponderance standard—against "the classical view of the burden of proof, which is that the judge may find himself, after having made the evaluation of evidence, in one of three different situations. About the fact X he may have arrived at the conviction (1) that it does not exist, or (2) that it does exist, or (3) that there is uncertainty about its existence," and thus decide against the burdened party in cases (1) and (3).); cf. Vincent & Guinchard, supra n. 54, at 634 nn.1-2 (citing recent, tangential French scholarship on proof).

it.[57] But strangely, nobody seems to make much of the difference, in the United States or in Europe.[58]

II. Explanation of Historical Divergence

Probability theory began to interplay with both the civil law and the common law in the eighteenth century. Legal theorists and their examples made early contributions to the rapid advances in the science and philosophy of probability, and then the interaction flowed back the other way.[59] This ferment resulted from a 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.'"[60]

In the civil-law systems, probability theory could manifest itself only through their scheme of *preuve légale*, by readjusting the weight appropriate to each class of evidence.[61] 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. The French Revolution then overthrew legal proof in favor of

57. See supra text accompanying n. 8.

58. E.g., Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog & Edward M. Wise, *Comparative Law* (6th ed. 1998) (no discussion); Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Tony Weir trans., 3rd rev. ed. 1998) (same). Some comparativists allude to the puzzle. Professor Mirjan Damaška's impressive recent book, American-published but European-informed, compares the law of proof in the civil and common law. Mirjan R. Damaška, *Evidence Law Adrift* (1997), reviewed by Friedman, supra n. 43. In it, he briefly observes the oddity of civil-law standards of proof: "Surprisingly, the [criminal] standard of [*intime*] conviction is often said to be applicable in civil cases as well." Damaška, supra, at 40 n.29 (citations omitted). But cf. id. at 114 n.78 (stressing that exceptions exist to the high civil standard). Neither his book's general theme on evidence law nor his specific preference for civil-law methods of proof sheds light that would lessen the surprise. See id. at 114 (observing that a high civil standard is unexpected, given the dispute-resolution purpose of civil proceedings on the Continent), 121 (observing that the lesser devotion to truth on the civil side would warrant a less demanding standard of proof than on the criminal side). For instance, he says that civilians view themselves as less technically legalistic, more real-world and scientific, than common lawyers in their approach to truth-finding. See id. at 11-12. But he realizes that any such superiority fails to explain the civil-law standards of proof. See id. at 89 ("At the outset, it should be made clear that these [shortcomings of common-law factfinding] are not to be found in the sphere of reasoning about the validity of proof," but in the passivity of Anglo-American factfinders and in the methods for putting evidence before them.).

59. See Shapiro, supra n. 48, at 1-41, 123-24, 220-23, 253-55; Barbara J. Shapiro, *A Culture of Fact: England, 1550-1720*, at 8-33 (2000); Desmons, "La preuve des faits dans la philosophie moderne," 23 *Droits* 13 (1996).

60. Shapiro, supra n. 48, at 8.

61. See supra text accompanying n. 5.

free evaluation. 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.[62] In this civilian attempt at root-and-branch abolition of legal proof, probability theory fell out of 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."[63]

So, the Continentals stopped thinking and talking about the matter of standards of proof, throughout subsequent periods in which probabilistic thinking waned and waxed in other disciplines.[64] Professor René David theorized that the *intime conviction* idea allowed French law 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 . . . ."[65] Of course, the French today realize that *intime conviction* requires only very high probability, not certitude.[66] A reasonable doubt defeats the necessary intuitive conviction.[67] 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.

Meanwhile, the common-law systems continued their reciprocal interactions with probability theory over the ensuing centuries. The first moves in the direction of expressing standards of proof had given the matter, in Bacon's terms, to the "juries' consciences and understanding."[68] 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.'"[69] 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.[70] The common law was ready for a great leap forward. By the late eighteenth century, the evolving situation caused the judges

62. See Damaška, supra n. 58, at 114 n.78.
63. Lorraine Daston, *Classical Probability in the Enlightenment* 354 (1988).
64. See Shapiro, supra n. 48, at 253; Friedman, supra n. 43, at 1944-46.
65. René David, *French Law* 147 (1972).
66. See Bredin, supra n. 31, at 23. But cf. id. at 26 (seeming confusedly to equate *intime conviction* in criminal cases with mere likelihood).
67. See id. at 27 ("*Seul le doute sérieux s'impose à l'intime conviction. Ce doute doit être argumenté, cohérent, raissonnable. Ce doit être un vrai doute.*"). But cf. id. at 25 (seeming confusedly to equate serious doubt in criminal cases with probability of innocence).
68. 1 William Holdsworth, *A History of English Law* 333 n.6 (7th ed. 1956); see Shapiro, supra n. 48, at 11.
69. Shapiro, supra n. 48, at 14.
70. See id. at 3-12.

to begin instructing juries in detailed Lockean terms of probability and degrees of certainty.[71] Criminal cases became subject to the standard of beyond a reasonable doubt.[72] Although the evolution of the lower civil standard is murkier, it began to diverge from the criminal standard at about that same time[73]—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.[74]

Quebec nicely demonstrates the influence of Anglo-American procedure on the civil standard of proof. There, the common-law approach heavily infiltrated the prevailing French procedural system from 1785 onward, creating an adversarial procedure that included until recently the civil jury. Consequently, a preponderance of the evidence, or balance of probabilities, standard now governs in Quebec, as it does in the rest of Canada.[75]

The modern institution of the civil jury appears to have been especially effective in catalyzing the common law's progress toward probabilistic standards of proof. At the least, the correlation between the existence of the civil jury[76] and the development of the preponderance standard seems perfect. Beyond correlation, it is probable that because of the jury's need of judicial instruction, the common law had to acknowledge the role of uncertainty in decisionmaking—while the civil law could sweep such matters under the rug and so freeze in time underdeveloped notions of probability.[77] To the extent the civil jury acted as proximate cause of the preponderance standard, the jury has worked yet another of its benefits, helping not only

71. See Damaška, supra n. 58, 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).

72. See Shapiro, supra n. 48, at 21-25.

73. See Berman & Reid, "The Transformation of English Legal Science: From Hale to Blackstone," 45 *Emory L.J.* 437, 482 & n.87 (1996).

74. See 2 *McCormick on Evidence*, supra n. 38, § 339, at 424 & n.16.

75. See John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law* 52 & n.96, 689 n.11, 690-91, 696 (1993); cf. La. Code Evid. Ann. art. 302(1) (West Supp. 2000) (exhibiting a similar result in Louisiana, another somewhat mixed system, with civil jury); L.H. Hoffman, *The South African Law of Evidence* 365-67 (2d ed. 1970) (same for South Africa, which formerly had civil jury in some provinces according to H.R. Hahlo & Ellison Kahn, *The Union of South Africa* 214-15, 221, 235, 237, 257 (1960)); W.A. Wilson, *Introductory Essays on Scots Law* 57, 67 (1978) (same for Scotland, which has civil jury). Moreover, equity followed the old civilian approach of legal proof until it later absorbed the common law's standards of proof. See Michael R.T. Macnair, *The Law of Proof in Early Modern Equity* 263-66, 288-89 (1999).

76. See *World Jury Systems* (Neil Vidmar ed., 2000).

77. Damaška, supra n. 58, 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 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 induce an optimal standard but also to force more honesty about the probabilistic nature of decisionmaking.

Causation is a tricky concept, 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 the civil standard 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 approach.

In sum, 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—appear to have played in combination a causal role in developing its 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 standard 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 cause of the preponderance standard.

III. Explanations of Persistent Differences

In the previous section, we discussed how civil-law and common-law systems came to adopt different approaches to proof in the late eighteenth century. The Revolution in France brought a radical simplification of evidence law; this reform in turn led civilian lawyers to disapprove, or at least to ignore, refined standards of proof. In England and the United States, there was no similar disruption in legal procedure, so the law of evidence continued to evolve in a way that increasingly incorporated the concept of probability; consistently, at an early stage common-law judges and lawyers thought through the problem of standards of proof in order to craft appropriate instructions for juries and otherwise to adapt to common-law procedure.

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 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, we cannot stop wondering—in light of our conviction that

the preponderance of the evidence standard is a better way to allocate legal responsibility in civil cases—why civilian legal systems continue to adhere to the unrealistic and potentially unfair and inefficient standard of *intime conviction* in civil cases.

In the following subsections, we offer a series of possible explanations of the persistent divergence. We begin with commonly voiced explanations that, in our view, contribute only minimally to an understanding of the problem. Although some of these explanations suggest how the unitary standard of *intime conviction* has managed to escape remark in civilian systems, they do not provide a complete explanation of its persistence. Then, we turn to what we believe is the best explanation for why civilians continue to favor the unitary standard of *intime conviction*: suppression of the probabilistic nature of factfinding gives judgments an appearance of legitimacy, which all courts, including civilian courts, closely guard.

A. *Inattention to the Problem*

One quick explanation for why civilian legal systems have retained the standard of *intime conviction* in civil cases is that the scholars who shape the civil law have failed to advert sufficiently to the problem of proof. Scholarly inattention may be due to the civilians' indifference to the study of civil proof, or it may be due to a lack of understanding of probabilities.

1. First Version: disdain. If we look to France, a prototype of civil law, there does indeed appear to be a general lack of interest in, or disdain for, civil procedure and especially evidence law within the French academy.[78] These are not serious subjects in the university curriculum.[79] The little study that is done in these fields tends to be aridly formal: "Despite statutory, and a great deal of doctrinal, concern with the 'truth,' there doesn't seem to have been much serious reflection on what the courts really do."[80] In fact, according to Professor David himself: "The expression *law of evidence* does not even exist in France . . . ."[81]

Thus, civilian inattention to matters of procedure and evidence helps to explain why the civil law and the common law continue to differ, both as to their civil standard of proof and also as to their level of interest in the subject. Widespread inattention further helps to ex-

78. See David, supra n. 65, at 144-49.

79. See Vincent & Guinchard, supra n. 54, at 3.

80. Beardsley, supra n.19, at 460; see, e.g., Giverdon, supra n. 23, at 48 ("the French law of proof is a perfectly logical construction, quite in harmony with our cartesian character").

81. David, supra n. 65, at 146; see Dickson, supra n.15, at 129. In recent years, an upswing in interest has found expression in *le droit de la preuve*. E.g., Théry, "Les finalités du droit de la preuve en droit privé," 23 *Droits* 41, 41 (1996) ("*Les études consacrées à la preuve en font ressortir la complexité.*").

plain how the civil law can live with a suboptimal standard of proof. But, of course, inadvertence has no justificatory force. Moreover, the civilian approach to standards of proof persists in other countries, such as Japan, that are not at all indifferent to or disdainful of these fields of study.[82] Therefore, something more than inattention, or any such national peculiarity, is needed to resolve the mystery.

2. SECOND VERSION: MISUNDERSTANDING. The second possibility—that civilian scholars have failed to study and reform their standards of proof because they misunderstand the probabilistic character of decisionmaking—rests on a weak basis. Its primary support is the fact that probability has not worked itself into the civil law in a nuanced form since before the French Revolution. Thus, civilian lawyers may be a little out of practice in thinking about their law in terms of uncertainty.

The strongest form of this argument, a claim of actual misunderstanding of probability theory, is simply implausible. Surely the home of Blaise Pascal and Pierre de Fermat, just like that of G.W. Leibniz and C.F. Gauss, is at least as comfortable with probability as the colonies of the country that produced Thomas Bayes and Francis Galton.[83]

One could back off from that strongest form, while escalating the level of conceptualization. The argument might then run along the line that the code-heavy civil-law systems exhibit a particular mental outlook, an outlook based on an Enlightenment belief in consistent and complete absolutes that make accessible a single correct answer—in contrast to the procedure-dominated common-law systems that display a Romantic allegiance to relativism and pluralism, which increases the comfort with uncertainty.[84] Such an insight might indeed be quite useful in understanding differences in methodologies for making and applying law.

However, any such difference in outlook between civil law and common law seems less apt in illuminating why the two systems' judges would differ on how to decide, on the same conflicting evi-

82. See Joseph W.S. Davis, *Dispute Resolution in Japan* 314 (1996); Takaaki Hattori & Dan Fenno Henderson, *Civil Procedure in Japan* § 7.05[13][b] (Yasuhei Taniguchi, Pauline C. Reich & Hiroto Miyake eds., 2nd ed. 2000) (explaining that although more open debate as to the civil standard has transpired in Japan, a high standard has prevailed—and quoting with approval one authority's position: "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."); cf., e.g., Shigeo Itô, *Jijitsu Nintei no Kiso* [The Basis of Finding Fact] 162-63, 171 (1996) (explaining that the civil standard is high, but no longer as high as the criminal standard).

83. See generally Peter L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996).

84. See Curran, "Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union," 7 *Colum. J. Eur. L.* 63, 64, 70-71 (2001).

dence, whether B executed a note. Ours is a very concrete and practical problem. No civilian, whatever the details of his or her mental outlook, would contend that whether B executed the note has an answer that is certain. The Enlightenment outlook of civilians might make their high standard of proof less jarring to them, but it does not justify or explain that suboptimal standard's continued existence.

B. Insignificance of the Problem

Another explanation is that the difference in articulated standards of proof has no practical effect. Whatever civil-law and common-law courts say about the level of proof required, they may find facts and decide civil cases similarly in actual practice. Again, this explanation comes in two possible versions: perhaps the civilians do not adhere to their articulated standard in civil cases, or perhaps both systems settle intuitively on the same standard somewhere along the spectrum between a preponderance of the evidence and an *intime conviction*.

1. FIRST VERSION: LIP-SERVICE. Several American scholars have suggested that the difference between civil-law and common-law articulations of the standard of proof are insignificant in practice. They have tended to doubt that the Continentals really follow their civil standard, thinking that the Continentals simply cannot be doing what they say. Professor Peter Herzog, for example, assumed that French courts must be applying probabilities in practice;[85] Kaplan, von Mehren & Shaefer seemed to hypothesize that the civil standard in Germany is only verbally equivalent to the criminal standard.[86]

If these scholars were completely right, the whole mystery would vaporize. Concededly, it may very well be in some civil cases, such as our A v. B example where A sues on a note that B denies executing, that common sense would prevail over doctrine, and Continental judges would allow judgment to rest on a balance of probabilities. But

85. See Herzog & Weser, supra n. 22, at 310. For this proposition, their book cites, somewhat out of context, 7 Marcel Planiol & Georges Ripert, *Traité pratique de droit civil français* 851 (2nd ed. 1954) (*"Puisque la règle de la neutralité enlève au juge toute initiative de la preuve, et que les éléments de sa conviction dépendent des parties, il n'est pas possible de parler de certitude judiciaire, mais seulement de probabilité."*); see Lagarde, "Vérité et légitimité dans le droit de la preuve," 23 *Droits* 31, 32 (1996). The better citation might have been to Giverdon, supra n. 23, at 38 ("And this conviction will be established by the party who has furnished the more likely explanation of his position. Thus judicial proof comes down to a simple probability; it is the party who gains the better position in the argument who wins the process.").

86. See supra text accompanying n. 1. Some Continentals share this belief. E.g., Bolding, supra n. 56, at 19-22 (arguing that the Swedish courts may in fact sometimes be applying unknowingly a preponderance standard). On the Swedish standard, see also Ruth B. Ginsburg & Anders Bruzelius, *Civil Procedure in Sweden* 297-98 (1965), and especially Lindell, "Sweden," in 2 *International Encyclopaedia of Laws: Civil Procedure* ¶¶ 611-16 (Paul Lemmens ed., 1996). For a more general conjecture of lip-service, see *ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure* P-18A, R-31E (Discussion Draft No. 3, 2002).

we believe their conjecture cannot reach all cases, as we shall explain after stating the other version of this type of explanation.

2. SECOND VERSION: CONVERGENCE. Alternatively, it may be that neither civil-law courts nor common-law courts are faithful to their standard, but both instead apply an intermediate standard. In support of this possibility, a civilian could argue that some patterns of human perception and cognition are resistant to probabilistic analysis. When humans perceive sounds, colors, and the like, they tend to sort them into discrete categories that suppress shadings and ambiguities. Moreover, this way of sorting data can be useful, because it allows humans to reach definite conclusions and act on them. More generally, a civilian could argue that whatever the articulated standard of decision, decisionmakers confronted with a fixed strength of probabilistic data—convincing but well short of certainty—will tend to form convictions about the data's meaning. Thus, a civilian might argue that the standard of *intime conviction*, while somewhat misleading because it suggests a very high level of certainty, nevertheless captures how all factfinders naturally weigh evidence to reach categorical judgment.

Although it is possible that such imperfect compliance with the articulated standards of proof lessens the practical importance of differences between standards, we suspect that both versions are incomplete explanations. We can offer a number of counterarguments.

First, the civil-law and common-law standards are dramatically different on their face, and when articulated standards are so different, they likely produce a real difference at least in some cases. In theory, the prevailing standard should in practice affect decisionmakers, jury and nonjury. Consider again the case of A v. B, which turns on credible but conflicting testimony about the authenticity and circumstances of B's execution of a note. It seems obvious that the different standards, applied with any degree of seriousness, would produce different outcomes in this case. Under the preponderance of the evidence standard, the case is a close one; under the standard of beyond a reasonable doubt, B surely wins. Therefore, unless a lot of decisionmakers are flagrantly ignoring the formal rules with great consistency, the difference in articulated standards of proof should have a real effect on the run of legal outcomes.

Second, existing empirical data indicate that standards of proof can make a practical difference. Admittedly, existing empirical research focuses only on Anglo-American factfinding and is quite imperfect. To our knowledge, there are no studies examining the standard actually applied by civilian factfinders, because civilian scholars are largely oblivious to the whole subject. Nor are there direct comparative studies, and designing a sound study would be a

daunting task.[87] Nonetheless, the existing research does suggest that factfinders, charged on the issue of a fact vel non, can focus separately on the question of how probable it is that the fact is true. Human decisionmaking on probability can also determine gradations. Despite some confusion, factfinders can and usually do make the gross distinction between the civil and criminal standards of proof.[88] Thus, with proper instruction, factfinding is not necessarily an on/off switch, but can reflect probability as well.

Third, even if researchers could show that outcomes in like cases are alike under the civil-law and common-law standards of proof, the formal difference between the standards is significant in itself, because it affects how people feel and think about adjudication. Civilians believe they are applying a unitary standard of "truth." This belief, even if illusory, deflects their attention from the questions of proof and prevents them from developing strategies for management of uncertainty. Their belief in a unitary standard also has procedural consequences, such as their criminal-to-civil preclusion rules. In the United States, the differing criminal and civil standards of proof mean that acquittal of a defendant in a criminal case does not preclude a further civil claim against the defendant based on the same factual allegation.[89] For example, in the O.J. Simpson case,[90] a criminal jury applying the standard of beyond a reasonable doubt acquitted Simpson of killing two persons, while a civil jury applying the preponderance of the evidence standard was later free to find him liable for the same act. The U.S. courts think they are applying a criminal standard that is higher than their civil standard. In contrast even to most of its neighbors, French law broadly recognizes criminal-to-civil preclusion, so that the outcome of a civil case cannot con-

87. See Clermont, supra n. 41, at 1149 & n.136. We should note that the strong anti-plaintiff effect of the *intime conviction* 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, the result would be about a 50/50 ratio of plaintiff victories to defendant victories in litigated cases, under any standard of proof. See Clermont & Eisenberg, "Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction," 83 *Cornell L. Rev.* 581, 588-89 (1998). Therefore, the *intime conviction* standard would affect the kind of cases that proceed to trial rather than settle. Under the preponderance standard, trials are most likely to occur when the evidence is roughly in balance; but under the standard of *intime conviction*, trials are most likely to occur when the evidence is strongly in the plaintiff's favor. The different standards will not, however, translate into different win rates observable in outcome data.

88. See Clermont, supra n. 41, at 1141 & n.110, 1146 & n.126, 1147 & n.127, 1149 & n.135.

89. See generally Restatement (Second) of Judgments § 85 (1982); cf. Bresler, "O.J. Is Over There," *Nat'l L.J.*, Nov. 5, 2001, at A21 (observing that the same is now true in England).

90. See Moskovitz, "The O.J. Inquisition: A United States Encounter with Continental Criminal Justice," 28 *Vand. J. Transnat'l L.* 1121 (1995).

tradict a prior criminal conviction or acquittal.[91] The French rule follows from the French courts' belief that they are applying the same standard of proof in criminal and civil cases.

Fourth, researchers in fact will never be able to show that outcomes in like cases are always alike under the civil-law and common-law standards of proof, because contrary proof of actual differences in application already exists in the peculiarly French practice of joining civil claims to parallel criminal cases.[92] The high criminal standard directly and unavoidably affects outcome in those French civil cases that the plaintiff chooses to join with the criminal proceedings, acting as a so-called *partie civile*. A loss on the criminal case generally will dictate a loss on the joined civil case. More interestingly for our purpose, French plaintiffs prefer to join their civil cases to parallel criminal proceedings whenever possible, in order to save time, effort, and money and to gain leverage. In other words, potential civil plaintiffs calculate that no advantage will be lost by joining the criminal proceedings, because they must realize that even in a purely civil case there is a presumption of the defendant's innocence. This practice seems to establish that French courts actually do apply the high standard of *intime conviction* in purely civil cases.

In sum, whatever the factfinders are really doing in ordinary cases, the articulated difference between the civil-law and common-law standards of proof has significant practical consequences in some cases. Real-world fudging of the civilian standard would make it easier to live with. But that standard has a real impact. One would be making a sizable mistake to dismiss the two systems' different standards as harmless verbal formulas.[93]

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91. See West et al., supra n. 15, at 229-31 (explaining the principle of *la chose jugée au criminel a autorité sur le civil*). As a result of the Continental distaste for collateral estoppel based on mere civil proceedings, rather than as a result of acknowledging different standards of proof, there is no civil-to-criminal preclusion in France. See Casad, "Issue Preclusion and Foreign Country Judgments: Whose Law?," 70 *Iowa L. Rev.* 53, 63-65 (1984). Within France's narrow realm of issue preclusion, an interesting question would be whether a French civil court should refuse to credit an Anglo-American civil finding because it rested on a mere preponderance of the evidence. But the French seem not to have focused on this possible impediment to recognition, consistently with their lack of interest in standards of proof. See Bernard Audit, *Droit international privé* 395-407 (3rd ed. 2000).

92. See supra text accompanying n. 34; West et al., supra n.15, at 229-31; Tomlinson, "Nonadversarial Justice: The French Experience," 42 *Md. L. Rev.* 131, 148 n.52 (1983).

93. See Addington v. Texas, 441 U.S. 418, 425 (1979) ("Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a 'standard of proof is more than an empty semantic exercise.'") (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

C. *Avoidance of the Problem*

A third type of explanation for the persistence of different standards of proof in civil-law and common-law countries rests on two peculiarities of civilian procedure, namely, the tight control that some civilian courts maintain over factual disputes and the vestigial notion that civilian procedure is primarily inquisitorial rather than adversarial. Neither of these two possibilities can explain why civil-law courts would deliberately retain a nonprobabilistic standard of proof, but each may help to show how the courts avoid facing the problem.

1. FIRST VERSION: NONFACTS. France exercises tight control by a variety of techniques to avoid or minimize the role of factfinding in trials. For example, French courts prevent access to evidence by denying discovery, and they strongly prefer documentary evidence to oral accounts. The result, in the words of one commentator, is "an approach to fact-finding which appears to have the main aim of resolving factual issues by means other than the arduous sifting of evidence."[94] In other words, despite the French ideal of free evaluation, constraints on the availability and types of evidence effectively limit factfinding, which in turn may reduce the impact of an unsatisfactory civil standard of proof.[95]

For several reasons, however, the explanation that French courts can avoid the problem of their standard of proof by avoiding factfinding is seriously incomplete. First, French fact-avoidance techniques do not likely explain the difference between French and U.S. standards of proof because the United States itself has a fair number of exclusionary rules of evidence and jury control mechanisms that limit factfinding in comparable ways.[96] Second, French courts cannot avoid all factual questions: the case of A v. B, for example, calls for some decision, which will have to rest on conflicting evidence about the authenticity and circumstances of B's execution. Third, although fact-avoidance techniques are a prominent feature of French procedure, they are not characteristic of all civil law countries that apply the high civil-law standard of proof in civil cases. Thus, while fact-avoidance techniques may help some civil-law courts to live with their high standard of proof in civil cases, it is more than difficult to construct a general explanation of the civil-law standard on this ground.

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94. Beardsley, supra n. 19, at 473; see Giverdon, supra n. 23; Lagarde, supra n. 85.

95. Some scholars have tried to explain what they view as a civilian advantage in factfinding by reference to the free evaluation principle. E.g., Langbein, "The German Advantage in Civil Procedure," 52 *U. Chi. L. Rev.* 823 (1985). But see Allen et al., supra n.2 (powerfully questioning the existence of a German advantage). This lends a special irony to an explanation of the civil-law standard of proof that rests on the observation that civilian judges actually resolve few disputes of fact. See Beardsley, supra n.19, at 459.

96. See Jolowicz, supra n. 18, at 213-15.

2. SECOND VERSION: INQUISITION. The other version of how civil-law courts may have avoided coming to grips with the problem of their standard of proof rests on the vestigial character of the civil law as an inquisitorial rather than an adversarial system. The perception that civil-law judges have investigatory responsibility in certain or even all civil cases may both lead judges to seek "truth" and also permit them to believe that they have found it. If judges have sole or primary responsibility for assembling and evaluating evidence, they may be able to convince themselves that the evidence is complete enough and that no real doubts remain about its meaning.[97] In contrast, the avowedly adversarial orientation of common-law procedure, with each party presenting its account of the truth (often by oral testimony), may sensitize common-law judges to the uncertainty of evidence.[98] Moreover, their detached and umpireal role, combined with long experience in applying the preponderance standard of proof, may make it easier for common-law judges to accept uncertainty.[99] Thus, it is not surprising that civil-law judges are more comfortable with the standard of *intime conviction* in civil cases than common-law judges would be.

The difficulty with this version of the explanation is that the association of civil law with inquisitorial procedure and of common law with adversarial procedure is largely mythical. The different images must flow from theory or memory, or from attitudes and experience on the criminal side, because on the civil side the civilian judges today are in reality much less independent than they once were. Typically, a civilian judge's independent powers extend only to calling experts and interrogating witnesses; even French judges, who have substantial powers on paper, independently do little more than this and have ceded responsibility to adverse lawyers for gathering and presenting facts.[100] Meanwhile, common-law systems have become less adversary on the civil side.[101] In brief, civil-law and common-law proceedings today are not much different in fundamental nature, as even those who champion the civil law concede.[102] So, although the civil law's conceptualization of judges as investigators may help make its standard of proof less jarring, the inquisitorial image does not survive a reality-check and so utterly fails to justify or explain that standard of proof.

97. See Damaška, supra n. 58, at 83.

98. See Reshetnikova & Iarkov, supra n.7, at 168-71 (predicting that increased adversariness in Russian procedure will lead to the preponderance standard).

99. See Mirjan R. Damaška, *The Faces of Justice and State Authority* 122 (1986) ("Troubling questions of proper standards for sufficiency of proof can be more easily resolved; where facts remain uncertain, judgment can be awarded in favor of the party who has made a better evidentiary case.").

100. See Damaška, supra n. 58, at 106-08, 113-15.

101. See id. at 135-41.

102. See Jolowicz, supra n.18, at 175-76, 218-21.

D. Purposiveness Behind Standards

Thus far we have reviewed three sets of explanations for the high civil-law standard of proof that succeeded in showing only why civil-law courts have not been under serious pressure to adopt a lower, probabilistic standard. We found those explanations incomplete, in part because the civil-law standard is so fundamentally at odds with the state of evidence in a typical civil dispute. Certainty in knowledge is not attainable with respect to a disputed past event briefly represented through conflicting evidence. Like most judgments one makes and acts on in ordinary life, most legal cases conclude in a state of reasonable doubt. For example, the decisionmaker's conclusion in our A v. B case must be a conclusion based on probability. 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. Accordingly, we turn now to two possible reasons why the civil law might affirmatively wish to retain its high standard in civil cases.

1. FIRST VERSION: SUBSTANCE. One reason for retaining a high standard of proof might be a desire to influence the substantive outcome of litigation.[103] 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, permits the law to choose between favoring defendants and favoring plaintiffs.[104] The civil law's use of its high standard of proof to influence the outcome of litigation might reflect a general hostility toward plaintiffs, who usually seem intent on disrupting the status quo,[105] or might 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 might reflect a desire to deter litigation overall and thereby minimize its associated public and private costs, or might reflect the civil law's historical desire to constrain the judiciary.[106]

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103. Cf. Lindell, supra n. 86, ¶ 614 (explaining Sweden's possibly variable standard of proof in civil cases on substantive grounds).

104. Cf. Richard H. Field, Benjamin Kaplan & Kevin M. Clermont, *Materials for a Basic Course in Civil Procedure* 42 (Supp. 2002) (explaining how judges, in the old days of trial by ordeal, oath, and battle, manipulated the mode and burden of proof to produce the just outcome); F.W. Maitland, *The Forms of Action at Common Law* 15-19 (1936) (same).

105. Ralph Winter comments that "[t]here may well be some predisposition to disfavor plaintiffs because they are 'accusers,'" but adds that "[s]uch a view seems to me . . . more emotional than rational and wholly inappropriate in a highly commercialized and insured society." Winter, "The Jury and the Risk of Nonpersuasion," 5 *L. & Soc'y Rev.* 335, 343 n.1 (1971).

106. See Merryman, "The French Deviation," 44 *Am. J. Comp. L.* 109 (1996).

We doubt the force of this sort of explanation for the civil law's standard of proof. We can offer several arguments supporting our 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 innocent defendants is a heavy cost, one that outweighs the cost of letting some guilty defendants go free. But in civil cases, harm to one party is as weighty as harm to the other, whether the harm takes the form of liability inflicted or injury unredressed.[107] Disruption of the status quo provides at best a weak justification for prejudicing plaintiffs. Indeed, because identifying the status quo is notoriously difficult,[108] 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 the defendant to the 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 any substantive tilt is more difficult to conceal than sometimes obscure procedural motives, one would expect the pursuit of substantive policy by disadvantaging one of the parties to prompt considerable debate. Instead, as we have noted, 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, litigation costs are a real worry, but they hardly justify skewing outcomes without regard to the merits. Moreover, once a

107. Winter makes precisely this point: "[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." Winter, supra n.105, at 337; see Richard A. Posner, *Economic Analysis of Law* § 21.2 (5th ed. 1998); Kaye, supra n. 44, at 496 n.39.

108. 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).

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. Cases that fall close to the standard of proof, whatever it is, will exist in good number and will tend to go to trial.[109] The amount of contested litigation, in any event, tends to expand to fill the existing system's capacity.[110] After all, many criminal trials occur despite the high standard of proof.

Fourth, a high standard of proof would be a clumsy way to restrain judges. 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 judicial activity, there being no neutral outcome. The high standard yields biased outcomes, but certainly not judicial restraint in any desirable sense.

2. SECOND VERSION: LEGITIMACY. This analysis finally brings us to the possible reason that we find most promising as an explanation, one that focuses on procedural rather than substantive purposes that legal systems might be pursuing through their standard of proof. In particular, the civil law may retain its high standard with the aim of increasing the apparent legitimacy of judicial decisions. To explain what we have in mind, we begin with brief background on the possible aims of civil procedure.

Scholars of civil procedure have attributed multiple purposes to the civil process.[111] In any legal system, dispute resolution must be a primary objective—especially in run-of-the-mill cases—so that law can stand as a ready alternative to private revenge and self-help.[112] Another intertwined aim is to foster popular belief in the legitimacy of judgments.[113] Yet, if the legal system also aims to be fair or to

109. See supra n. 87.

110. See Priest, "Private Litigants and the Court Congestion Problem," 69 *B.U. L. Rev.* 527 (1989).

111. See, e.g., Jolowicz, supra n. 18, at 71-77 (stressing aims to demonstrate the effectiveness of law, to develop the substantive law, and most importantly to effectuate the substantive ends of law); 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); Scott, "Two Models of the Civil Process," 27 *Stan. L. Rev.* 937, 937-39 (1975) (describing conflict-resolution and behavior-modification models); 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. 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).

112. See Jolowicz, supra n. 18, at 69-70; Simpson, supra n. 111, at 141.

113. See 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 n.111, 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).

regulate conduct in beneficial ways, it must value truth, in the sense of making an accurate determination of the facts before it applies the law.[114] Procedures that yield a reasonably accurate picture of the facts 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.[115] 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, 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.[116] As one writer has observed about France, "the aim of civil litigation is to end the dispute between the parties and not necessarily to do so on the basis of historical truth. . . . From these traditional ideas, the Frenchman—judge, lawyer or party—has acquired a concept of civil procedure which is primarily focused on putting an end to the dispute on the basis of what, in common law perspective, may seem like a mere approximation of the truth."[117]

In recounting that civil-law systems prefer dispute resolution over truth, we do not mean to suggest either (1) that common-law procedure is a better way to arrive at truth[118] 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.[119] But we 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,[120] they cannot do so if they have disappeared in practice. In actuality, as we have already observed, both common-law and civil-law procedures are now functionally adversarial on the civil side, thus mooting the debate. Second, the common law certainly values dispute resolution. But it pursues other values, including truth.

114. See Jolowicz, supra n.18, at 70-71; Golding, supra n.111, at 107.

115. It might be argued that objective accuracy in factfinding is not very important in creating incentives for desirable future conduct. For this purpose, the argument might go, it is enough that actors *believe* that judicial outcomes rest on accurate factfinding. Yet, although the perception of accuracy does not equate with objective accuracy, the latter is instrumental in creating such a perception.

116. See, e.g., Damaška, supra n. 58, at 110-13, 120.

117. Beardsley, supra n. 19, at 464, 486.

118. Compare Joint Conference on Professional Responsibility, "Report," 44 *A.B.A.J.* 1159 (1958), with Jolowicz, supra n. 18, at 86, 175-82.

119. See Golding, supra n. 111, at 109-12 (discussing some flaws, as well as some benefits, of the truth-finding function of the adversary system).

120. See Twining, supra n. 40, 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.").

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. Thus, while we believe that the common law pursues multiple aims, we need here contend no more than that common-law systems currently *may* have a greater concern with truth than civil-law systems.

Returning to the particular feature under consideration, does the high civil-law standard of proof shed light on the civil law's devotion to dispute resolution relative to its devotion to truth? At first glance, the high standard might seem to facilitate dispute resolution. But as we have already noted, disputes will still arise and require trial despite the high standard. 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. Indeed, 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 their 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. The error-minimizing preponderance standard better serves truth. In sum, the high civil-law standard represents another sacrifice of truth, but this time without facilitating dispute resolution.

Therefore, the high civil-law standard of proof must owe its existence to the pursuit of some other aim. It perhaps exists in hope of enhancing the perceived legitimacy of judicial decisions, as judges act within the role allocated to them. The probabilistic nature of factfinding produces discomfort, requires sophistication, and can have some destructive effects, if acknowledged. The civil-law systems could be choosing to avoid all that. If so, they would be relying on the widespread efficacy of the people's unexamined intuition, for the legitimating misimpression that requiring virtual certainty comports with finding real truth.[121] The standard of *intime conviction* insinuates to the parties and the public that judges will not treat facts as true on less than certain evidence. This rhetoric sounds good, and shows a

121. The standard of *intime conviction* 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. However, the civil law likely does not intend to send this nonintuitive message, given that the civil law does not enunciate its civil standard of proof too expressly, loudly, or frequently—sensing perhaps that the subtle message could not stand up to logical scrutiny.

seriousness of purpose. When the court renders judgment, the standard in turn implies that the evidence must have been certain. This implication is appealing but nonetheless false.

Circumstantial evidence exists that the high civil-law standard of proof does indeed serve the important objective of legitimating judicial decisions. Taking France once more for specific example, the brief French decisions cannot express doubt, but instead must exhibit certainty.[122] In the words of one French scholar, "[t]he judge, the good judge, lives without doubt in an ocean of doubt . . . ."[123] The task of the judge is to convert that doubt into a judicial certainty. "The judge must pronounce the judicial truth, which will become social truth."[124]

Important scholarship in France has recently argued that all of French evidence law on the civil side, under the guise of truth-directed rules, aims at legitimating judicial decisions rather than finding truth.[125] Of special interest is the work of Professor Xavier Lagarde, the leading insider to take a critical look at French evidence law and, in particular, at burdens of proof.[126] He suggests that when the various rules of evidence that work to minimize factfinding (deference to experts, preference for signed documents, reliance on admissions, and a strictly interpreted statute of frauds) fail to yield a mechanical judgment, then the burden of proof, with its air of slight fault on the part of the burdened party, gives the system and its judges a last rock to hide behind.[127] Although the recent French scholarship does not address the standard of proof, the same idea applies readily to suggest that the high standard makes this last rock much bigger.

At any rate, there is empirical evidence that the French legal system has succeeded in its quest for legitimacy. According to one American practitioner in Paris, the French system of factfinding "appears to satisfy those who operate it and those whose claims are decided by it. It is worth noting that nothing in a sociological survey conducted in 1973 at the behest of the Ministry of Justice suggests that the French consider that the treatment of fact is a serious problem in civil procedure."[128]

Again, we do not mean to suggest inferiority by observing the civil-law systems' quest for legitimacy. Public perceptions of what

122. See Bredin, supra n. 31, at 25 ("*La décision ne peut pas être douteuse.*").
123. Id. at 29 ("*Le juge, le bon juge, vit sans doute dans un océan de doute . . . .*").
124. Id. at 24 ("*Le juge doit dire la vérité judiciaire, qui sera vérité sociale.*").
125. See Xavier Lagarde, *Réflexion critique sur le droit de la preuve* (1994); Vincent & Guinchard, supra n. 54, at 634; Lagarde, supra n. 85.
126. See Lagarde, supra n. 125, at 203-72, 355-65.
127. See Lagarde, supra n. 85, at 38 ("*Ainsi, les règles d'attribution de la charge de la preuve évitent aux juges d'avoir à rendre des jugements de preuve dont la réalité serait trop facilement contestable.*").
128. Beardsley, supra n. 19, at 486 & n.114.

courts do may be just as important as what they do in fact.[129] 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 accuracy and fairness, such as delegating factfinding to a jury of citizens that supposedly embodied common sense and community values and that shouldered responsibility for decision.[130] 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."

Although legitimacy is thus an important objective, we think the civil law suffers some costs as a result of its standard of *intime conviction* 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 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 judicial 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.[131] Meanwhile, the civil law has just begun to grapple with

129. See Jolowicz, supra n.18, at 72-73.

130. An intriguing article makes an argument comparable to ours, but with respect to constitutional interpretation in the United States. Rosen, "Defrocking the Courts: Resolving 'Cases and Controversies,' Not Announcing Transcendental Truths," 17 *Harv. J.L. & Pub. Pol'y* 715 (1994). Rosen argues that the Supreme Court has used burden-shifting presumptions in order to reach what appear to be confident resolutions of controversial moral issues when actually the choices made are close and difficult. The Court's method lends its decisions an air of certainty and legitimacy, which in turn increases popular respect for and acceptance of its rulings. Rosen, however, suggests that this decisional method is ultimately an unstable one. He believes the Court would fare better if it candidly admitted that, as a matter of necessity, it was shaping practical solutions to difficult problems.

131. See Damaška, supra n. 58, at 143-52.

some fundamental liability questions. Examples include probabilistic problems of causation and apportioned liability.[132]

CONCLUSION

We have used comparative methods to illuminate the common law's standards of proof. The yield is a better understanding of the standards' origins, as well as a realization that what the common law now takes to be obvious the world's other legal systems have long rejected. But the common law goes its own way with good reasons. We remain convinced of the soundness of its unique standard of preponderance of the evidence.

This stance irresistibly leads us to puzzle over one feature of the civil law's procedure: the high, criminal-like standard of proof that it applies in civil cases. We do not offer a definitive answer to this puzzle, in part because a grasp of the tiny matter of standard of proof turns out to require a profound understanding of the legal and nonlegal context in which it functions,[133] an understanding we do not pretend to have. Nevertheless, we shed enough light to justify calling on civilians, immersed in their own system but traditionally inattentive to standard of proof, to study and explain this bizarre puzzle. In the meantime, we have offered some tentative explanations of this difference between the civil law and the common 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, we 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 we believe is an unrealistic standard. In our view, the best explanation is that the different civil standards employed by civil-law and common-law courts conform to subtle differences in the procedural objectives of the two systems. The civil law seeks the legitimating benefits of the myth that their courts act only

132. See supra n. 47.

133. See Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?," 143 *U. Pa. L. Rev.* 1889 (1995).

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.

In final summary, the common law's standard of proof evolved early and still fits nicely within its generally forthright operational method. The civil law's standard, perhaps less forthright, seemingly allows its courts to enjoy the benefits of legitimacy, with the hope that those benefits outweigh the trade-off costs.