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The Surprising History of the Preponderance Standard of Civil Proof

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THE SURPRISING HISTORY OF THE PREPONDERANCE
STANDARD OF CIVIL PROOF

*John Leubsdorf**

Abstract

Although much has been written on the history of the requirement of proof of crimes beyond a reasonable doubt, this is the first study to probe the history of its civil counterpart, proof by a preponderance of the evidence. It turns out that the criminal standard did not diverge from a preexisting civil standard, but vice versa. Only in the late eighteenth century, after lawyers and judges began speaking of proof beyond a reasonable doubt, did references to the preponderance standard begin to appear. Moreover, U.S. judges did not start to instruct juries about the preponderance standard until the mid-nineteenth century, and English judges not until after that. The article explores these developments and their causes with the help of published trial transcripts and newspaper reports that have only recently become accessible. The history thus revealed casts a new light on two subjects that have aroused much scholarly attention during the last few years: the fact that European civil law systems do not proclaim differing standards for civil and criminal proceedings; and the questionable policy foundations on which the preponderance standard rests.

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INTRODUCTION

That the preponderance of the evidence should determine civil cases has long been taken for granted, but not for as long as most assume. It turns out that the preponderance of the evidence standard for resolving factual disputes did not arise until the late eighteenth century. Rather than being a precursor from which the requirement of proof beyond a reasonable doubt in criminal cases diverged, the preponderance standard was born with or a little after the reasonable doubt rule as its contrasting twin. Even after the standard emerged, not until the mid-nineteenth century did American judges find it necessary to tell civil juries that for the party bearing the burden of persuasion to prevail, that party must show that the preponderance of the evidence supports its contentions. In England, such jury instructions did not appear until still later. Even today, courts formulate the standard in different ways, leading to different results.

Scholars have not previously explored any of this history, leaving a gap which contrasts strikingly with the distinguished scholarship devoted to the origins of the reasonable doubt rule.¹ A number of previously unavailable trial transcripts and descriptions can now contribute to a fuller picture of the origins of the preponderance standard.² This Article seeks to trace and explain how lawyers, judges, and scholars created and developed that standard.

Part I shows that the standard is more problematic than some might think: Courts phrase it inconsistently; some legal systems do not recognize it; and its justifications are open to dispute. Part II turns to the origins of the standard in the late eighteenth century and looks for its

1. See, e.g., JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 261–62 (2003); BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE xi (1991) [hereinafter SHAPIRO, *HISTORICAL PERSPECTIVES*]; JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 3 (2008); Anthony A. Morano, *A Reexamination of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 507–09 (1975); Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299, 299 (1959).

2. See sources cited *infra* notes 67, 84, 127, 197–99, 212.

possible precursors. Part III charts the various trends of thought, legal and otherwise, out of which the standard arose, including a possible debt owed by English legal thought to Voltaire, whom most do not consider a creator of English legal doctrine. Part IV explores the failure of courts to instruct juries about the standard—a failure that continued through almost the entire nineteenth century in England and during its first half in the United States—and seeks to explain these contrasting approaches to jury instructions.

I. QUESTIONING THE STANDARD

Resolving a lawsuit by deciding which party has the stronger case may seem too obviously sensible to permit controversy. In a general way, that may well be true. Yet if one examines just how authorities here and abroad set forth the standard for decision, and how they seek to justify it, the obvious evanesces. Exploring how different people have described the standard of civil proof in varying ways makes it easier to perceive the nuances of the preponderance standard and its possible precursors when turning to the historical record.

A. *Varying Jury Instructions*

Thanks to recent efforts to improve and clarify jury instructions, many U.S. jurisdictions have adopted pattern instructions that are more uniform, and sometimes more comprehensible, than previous instructions.³ These instructions, however, often differ from jurisdiction to jurisdiction.⁴ Empirical studies show that differences in the way courts phrase instructions can affect jury verdicts,⁵ as clearly occurs with instructions defining proof beyond a reasonable doubt.⁶ There is also evidence of a similar effect in civil cases.⁷

3. *E.g.*, Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 481 (2006).

4. *See id.* at 475, 478, 481.

5. *See id.* at 454–58 (discussing empirical studies that show how variations of instructions and jurors’ understanding of instructions affect outcomes); *see also* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 435 (2013) (“A study directly examining whether [a] difference in [jury instruction] phrasing matters found, not surprisingly, that it did . . .”).

6. *See, e.g.*, LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 195 (2006); DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 195–97 (2012); Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655, 657 (1996); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119–32 (1999) (discussing empirical studies that exemplify the problems with reasonable doubt instructions and the consequent effects on outcomes).

7. Dorothy K. Kagehiro, *Defining the Standard of Proof in Jury Instructions*, 1 PSYCHOL. SCI. 194, 195 (1990).

Thus, even if the various instructions specifying the civil standard of persuasion in different jurisdictions were logically equivalent, jurors would likely respond to them differently. These instructions, however, are not logically equivalent, at least not in their immediately apparent meaning. There are four different instruction models, each with variants, and some jurisdictions mix two or three models. American courts follow the first three models, English and Canadian courts the fourth model. There are few indications that anyone has made a reasoned choice between one model and another.

“*Greater Weight of the Evidence.*” Under the first model, some courts simply tell jurors that the plaintiff (or a defendant bearing the burden of proof) must establish the facts in question “by a preponderance of the evidence,” with no further explanation.⁸ “Preponderance” is no longer a word in popular use, so some courts supplement it with a synonym, referring to “[t]he greater weight of all the evidence.”⁹ For jurors who do not understand how to weigh evidence, some jurisdictions exhort them to “think about an old-fashioned balance scale” with “all the believable evidence favorable to the plaintiff in one pan,” and all that favoring the defendant in the other, after which they are to decide for the plaintiff “[i]f the scales tip, even slightly, to the plaintiff’s side.”¹⁰ This metaphor has the aesthetic advantage of being just as unclear as, and even quainter than, the term it explains. Courts also add other elucidations, such as a warning that proof beyond a reasonable doubt is not required;¹¹ that the jury “should consider all the evidence, regardless of” whether produced by the plaintiff or defendant;¹² or that “[t]he testimony of one witness whom you believe can be the greater weight of the evidence.”¹³ These additions presumably make it more likely that the jury will find that a party has carried its burden, and the jury might even hear them as hints from the judge.

8. *Contra Burden of Proof—Preponderance of Evidence*, 8 TENNESSEE PRACTICE PATTERN JURY INSTRUCTIONS—CIVIL § 2.40 (2014 ed.), available at Westlaw (establishing Tennessee’s preponderance of the evidence standard, but instructing the courts to give more information to the jury).

9. *E.g., Standard of Proof: Definition of Greater Weight of the Evidence*, VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL INSTRUCTION NO. 3.100, available at LEXIS; Patrick F. Brady, *Burden of Proof*, MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 1.2.3, available at LEXIS.

10. *Burden of Proof and Preponderance of the Evidence*, PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS 5.00, available at LEXIS; see also Ralph K. Anderson, Jr., *General Instructions—Burden of Proof*, SOUTH CAROLINA REQUESTS TO CHARGE—CIVIL § 1–3, available at LEXIS (“[I]f those scales tip ever so slightly . . .”).

11. *E.g., Brady, supra* note 9.

12. *Preponderance*, OHIO JURY INSTRUCTIONS—CIVIL 303.05, Dec. 11, 2010, available at LEXIS.

13. VIRGINIA MODEL JURY INSTRUCTIONS—CIVIL INSTRUCTION NO. 3.100, *supra* note 9.

“*More Likely Than Not.*” Following a second model, California, which has devoted much attention to its jury instructions, has adopted what may be the clearest and simplest formulation: “A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not,” adding that the jury should consider all the evidence, and that the reasonable doubt standard does not apply to civil trials.¹⁴ Other jurisdictions use similar instructions,¹⁵ which reflect the relatively recent view that “preponderance of the evidence” means establishing a probability for the proponent’s view that is greater than 0.5.¹⁶

The first two models—“greater weight of the evidence” and “more likely than not”—do not always coincide. Notably, the evidence submitted in court that supports the plaintiff may outweigh the evidence submitted for the defendant, yet the inherent improbability of the plaintiff’s claim may leave that claim more likely false than true.¹⁷ One could reconcile these formulations by defining the “weight of evidence” as including probabilities and improbabilities not shown by evidence introduced in court but assumed by the jurors on the basis of their experience and knowledge. But one could hardly expect that jurors will ordinarily understand the “weight of the evidence” in that way absent such an instruction. Some jurors might assume that probabilities relating to a witness’s ability to observe, remember, and speak accurately and honestly—for example, the unlikelihood of making an identification at midnight without streetlights—affect the “weight” of that witness’s evidence. Nevertheless, a contrary assumption is also possible for a jury directed to weigh the plaintiff’s evidence against the defendant’s,

14. *Obligation to Prove—More Likely True Than Not True*, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI) 200 (Feb. 2005), available at LEXIS. For California’s efforts to improve instructions, see Marder, *supra* note 3, at 475–76.

15. *E.g.*, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) 3.2 (2014), available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/2014civil.pdf>; *Definition of Burden of Proof*, MICHIGAN MODEL CIVIL JURY INSTRUCTIONS 8.01 (Sept. 2007), available at LEXIS; State Bar of Arizona, *Burden of Proof (More Probably True)*, in ARIZONA JURY INSTRUCTIONS (Civil) 5th, Standard 2 (2005), available at LEXIS; *Preponderance of the Evidence (short version)*, NEW JERSEY MODEL CIVIL JURY CHARGES 1.12H (2009), available at LEXIS. New Jersey avoids excessive consistency by also providing judges with a “weight” instruction. *Id.* at 1.12I. Texas mixes elements of both kinds of instruction. *See Charge of the Court*, TEXAS PATTERN JURY CHARGES—CIVIL 100.3 (2012), available at LEXIS.

16. *See, e.g.*, sources cited *infra* notes 55 & 229.

17. *E.g.*, KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 339 (6th ed. 2006); DAVID HUME, OF MIRACLES, IN PHILOSOPHICAL ESSAYS CONCERNING HUMAN UNDERSTANDING, ch. 10 (1748); *see also* Jonathan J. Koehler, *When Do Courts Think Base Rate Statistics Are Relevant?*, 42 JURIMETRICS J. 373, 385–90 (2002) (discussing when courts admit statistical evidence showing such probabilities).

especially when the issue is not the credibility of a witness but the plausibility of a story.

In short, for jurors a “more likely than not” instruction is simply not the equivalent of a “preponderance of the evidence” or “greater weight” instruction. In this respect, the older, canonical “preponderance” formulation is plainly inferior to the newer “more likely than not” instruction. Whatever the correct approach to standards of proof may be—a determination still disputed¹⁸—and whatever material jurors may properly consider, it cannot be correct for them to disregard inherent probabilities and improbabilities when they appraise the testimony and documents presented in court.

Requiring the plaintiff to show that what he must prove is more likely than not to be true also differs in another way from the preponderance formulation: it is inconsistent with the theory that the plaintiff need only show that his version of the facts is more likely than the defendant’s version. The jury can easily read a preponderance instruction, by contrast, as simply requiring them to compare the plaintiff’s story with the defendant’s story, an approach that some scholars defend.¹⁹ Some of those scholars, however, would support an instruction embodying this approach more explicitly than a preponderance instruction.²⁰

“*Actual Belief.*” Using a third model, a few jurisdictions seem to require the jury to believe the evidence of the party for which they rule.²¹

18. See *infra* Section I.C.

19. E.g., Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 381 (1991); Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 426 (1986); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1258 (2013); cf. Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 L. & PHIL. 223, 225–27 (2008) (explaining that while probability formulas may be helpful as a supplement, explanatory considerations are the superior method for resolving micro-level proof problems). Kevin M. Clermont, *Trial by Traditional Probability, Relative Plausibility, or Belief Function?* (forthcoming 2015) [hereinafter Clermont, *Trial by Traditional Probability*], available at <http://www.ssrn.com/abstract=2636469> would likewise ask the jury to engage in a comparison, one between their level of belief in the plaintiff’s proposed finding to their level of belief in its negation.

20. E.g., Pardo & Allen, *supra* note 19, at 266–67 (proposing that judges tell juries to select the most plausible version of the litigated events).

21. E.g., Brady, *supra* note 9 (“A proposition is proved by a preponderance of the evidence if, after you have weighed the evidence, . . . there exists in your minds an actual belief in the truth of that proposition derived from the evidence.”); JOHN S. PALMORE & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES § 13.09 (requiring instructions to ask the jury if they “believe from the evidence,” or are “satisfied from the evidence”); OHIO JURY INSTRUCTIONS—CIVIL 303.05 (2010) (describing the preponderance of the evidence standard to the jury as “evidence that you believe because it outweighs in your mind the evidence opposed to it”); see also Richard W. Wright, *Proving Causation: Probability Versus Belief*, in PERSPECTIVES ON CAUSATION, 201–02 (Richard Goldberg ed., 2011) (arguing that U.S. and English law require actual belief in the truth of the plaintiff’s contentions, not just a finding of greater probability).

Although this Article establishes that this formulation has considerable historical support,²² today it appears mainly in bastard phrasings that mingle references to the weight of the evidence with references to what the jury actually believes.

Requiring the jury to believe the plaintiff's version of the facts to find for him is not the same as requiring a preponderance of the evidence. Suppose, for example, that only one person can testify about an allegation that the plaintiff must prove to recover. Her testimony supports the plaintiff, but the jury must heavily discount it because of problems with her credibility. Thus, the jury regards it as very feeble though not worthless. Because there is no contrary evidence, the preponderance of the evidence on this allegation supports the plaintiff, but the jurors are not prepared to say that they actually believe the dubious witness. In such situations, a jury using the preponderance standard would decide for the plaintiff, while one using the belief standard would not.

Likewise, the belief standard can diverge from the "more likely than not" standard. Suppose now that there are two untrustworthy witnesses, one for the plaintiff and one for the defendant. One might find the first witness marginally more plausible than the second and still not be prepared to say that he actually believes the witness. The question here is whether it is really enough that a plaintiff's evidence is a bit more likely to be true than the defendant's,²³ or whether courts should require some minimal showing of evidentiary weight to activate the power of the state.²⁴

"*Balance of Probabilities.*" Under the fourth model, used by England and some Commonwealth systems, the decision of the judge or jury should be based on "the balance of probabilities."²⁵ Some might read this phrase as suggesting that the plaintiff should prevail if her story is more probable than the defendant's, even if neither party plausibly establishes the story.²⁶ But, at least in England, it is clear that the plaintiff must prove that the facts on which her case depends are more likely than not to be

22. See *infra* Sections II.A, IV.B.

23. See sources cited *supra* notes 8–10.

24. Compare Neal B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385, 399 (1985) (arguing for greater showing), and Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 U. TORONTO L. J. 299, 300–01 (1998) (same), with D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Proof*, 73 CORNELL L. REV. 54, 57–58 (1987) (criticizing Cohen's theory of probability as misunderstood).

25. *Evidence Act 1995* (Cth) s 140 (Austl.); *Cont'l Ins. Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 165 (S.C.C. 1982) (Can.); COLIN TAPPER, *CROSS AND TAPPER ON EVIDENCE* 154–57 (12th ed. 2010); Frank Bates, *Strength, or Intensity—Some Reflections on the Modern Standard of Proof in Civil Cases*, 27 CHITTY'S L.J. 334 (1979).

26. See sources cited *supra* note 17.

true.²⁷ It is not clear that a jury would understand this, but civil juries are now extremely rare in Commonwealth nations, used only in defamation actions.²⁸ As a result, Commonwealth courts have openly discussed questions about the standard of persuasion that juries in the United States usually resolve in private.

B. *Other Legal Systems*

A number of older legal systems have avoided stating a standard for comparing the evidence that supports opposing parties in civil litigation because they avoid the comparison altogether. If one side presents the appropriate proof, it prevails regardless of what the opposing side might be prepared to show. The requisite proof might be a decisory oath taken by a party,²⁹ a decisory oath backed by a given number of oath helpers,³⁰ the testimony of a prescribed number of qualified witnesses,³¹ or the successful completion of an ordeal.³²

27. *E.g.*, *Sec’y of State v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153 (H.L.) 168 (Eng.); *Rhesa Shipping Co. v. Edmunds*, [1985] 1 W.L.R. 948 (H.L.) (Eng.) (holding that plaintiff ship owners did not satisfy their burden of proof by arguing an “extremely improbable” explanation for the sinking of one of their ships).

28. *SEE LAW COMMISSION, REVIEW OF THE JUDICATURE ACT 1908—TOWARD A CONSOLIDATED COURTS ACT*, 88 (2012) (N.Z.) (noting that the use of juries in defamation cases may be more appropriate than other civil cases); Symposium, *The Common Law Jury*, 62 *LAW & CONTEMP. PROBS.*, at 1, 13, 112, 174 (Spring 1999). In England, defamation cases no longer require a jury. *See* *Defamation Act 2013*, c. 26, § 11 (Eng.).

29. *See* 13 *THE CODE OF MAIMONIDES: THE BOOK OF CIVIL LAW* 128, 190–98 (Jacob J. Rabinowitz trans., 1949) (describing the various oaths and their requirements); WAEL B. HALLAQ, *SHARĪ‘A: THEORY, PRACTICE, TRANSFORMATIONS* 345–46, 352–53 (2009). Some European systems still allow such oaths. *CODE CIVILE [C. CIV.] arts. 1357–69* (Fr.); *NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 317–22* (Fr.); *CODICE CIVILE [C.c.] arts. 2736–39, 2960* (It.); *CODICE DI PROCEDURA CIVILE [C.p.c.] arts. 233–43* (It.).

30. *See* A.W. BRIAN SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 136–37 (1987).

31. One example is the two witness rule in Jewish and medieval Continental law, usually discussed in connection with criminal cases. *See* JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 4 (paperback ed. 2006). But courts could also apply it in civil actions. *E.g.*, 14 *THE CODE OF MAIMONIDES: THE BOOK OF JUDGES* 86 (Abraham M. Hershman trans., 1949) (explaining that in financial transaction cases, the judges do not interrogate the two witnesses so as not to discourage people from making loans).

32. *E.g.*, *Numbers* 5: 5–31 (King James) (describing an ordeal to determine a woman’s infidelity); ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 1 (1986) (providing an anecdote of an ordeal by burning); *see also* WHITMAN, *supra* note 1, at 56–57 (arguing the ordeal “spare[d] human beings the responsibility for judgment” and passed this judgment to God, even in cases where the facts were not in dispute). *But see* Margaret H. Kerr et al., *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 *J. INTERDISCIPLINARY HIST.* 573, 574 (1992) (contending that ordeal gave defendants known to be guilty a chance to avoid execution).

The outcome of a dispute tried under such a system will turn not only on compliance with the details of the proof procedure, but also on when the court allows the proof in question³³ and on which party the burden—or, as some consider it, the opportunity—of presenting proof rests. Whoever bears that burden will usually prevail, but at a price: In a society that takes oaths and the like seriously, the guilty may hesitate to risk their souls by swearing falsely. Additionally, if the burden consists of an ordeal, a party undergoing it may perish in the process. Because the burden of proof is likely to be decisive, the system is likely to include principles about assigning it and presumptions that shift it.³⁴ In applying these principles and presumptions, the judges may often rely on their impressions of the comparative credibility of each side's story in deciding who must present proof; thus, in a sense the judges weigh these stories against each other. Still, the system does not need to contain a standard for comparing opposing evidence, since formally speaking no opposing evidence will be introduced.

Contemporary civil law systems do have a standard for appraising evidence in civil actions, but as Professors Kevin Clermont and Emily Sherwin have pointed out, they use the same formulations in both civil and criminal proceedings.³⁵ At least that was so until the last decade when Italy and Belgium adopted the “beyond a reasonable doubt” requirement for criminal cases.³⁶ A few civil law jurisdictions also lower the standard of proof in some civil actions.³⁷ The use of general formulations such as the French *intime conviction* reflects the rejection, starting in the eighteenth century, of objective proof requirements such as the two witness rule in favor of the free evaluation of evidence by the tribunal.³⁸

33. Trial by ordeal, for example, typically occurred when other evidence was lacking. *See supra* note 32.

34. *E.g.*, HALLAQ, *supra* note 29, at 345–46, 352–53; 13 THE CODE OF MAIMONIDES: THE BOOK OF CIVIL LAW, *supra* note 29, at 191–98.

35. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 245 (2002); Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 266–67 (1964); *see also* Mark Schweizer, *Loss Aversion, Omission Bias and the Civil Standard of Proof*, in EUROPEAN PERSPECTIVES ON BEHAVIOURAL LAW AND ECONOMICS 125 (Klaus Mathis ed. 2015).

36. Legge 20 febbraio 2006, n.46, art. 5 (amending Codice di procedura penale [C.p.p.] art. 533) (It.); Loi relative à la réforme de la cour d'assises [Act on the Reform of the Criminal Court] of Dec. 21, 2009 art. 137, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 11, 2010, Ed. 1 (amending Code d'instruction criminelle [C.I.CR./Sv.], art. 327) (Belg.).

37. *E.g.*, Civil Code of Québec, S.Q. 1991, c.64, art. 2804 (Can.); Patrick Kinsch, *Entre Certitude et Vraisemblance, le Critère de la Preuve en Matière Civile*, in DE CODE EN CODE 455 (2009) (French law); Fabienne Hohl, *Le Degré de la Preuve dans les Process au Fond*, in DER BEWEIS IM ZIVILPROZESS 127 (Christoph Leuenberger ed. 2000) (Switzerland).

38. Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 344 (1995).

Although there are indications that some civil law nations try to particularize the general formulations that appear in their codes,³⁹ it seems plausible that for the most part judges and, when there are any, jurors are free to decide in each case how much evidence satisfies them. In that sense, the standard is a subjective one, though satisfaction should be based on the evidence.⁴⁰ It may, indeed, be much like the standard (or lack of one) that English jurors followed before the rise of the preponderance of the evidence standard.⁴¹ Curiously, just when the continent was moving from a system of requiring a specified number of witnesses to a more subjective, free proof system, England (which had never really embraced the numerical system) sought to make its verbal formulation of the standard more objective.

C. Critiques of the Preponderance Standard

The purposes and justifiability of the preponderance of the evidence standard have become subjects of academic debate in recent decades, though this debate has had little or no impact on lawmakers. It is not the aim of this Article to resolve or explore in detail any of the issues in this debate. Rather, the point is that the standard is sufficiently problematic to raise the questions of how and why courts adopted it.

Does the standard even exist on the ground? Some recent preliminary studies suggest that juries, even if instructed to follow the preponderance standard, will not find for plaintiffs unless they conclude that the plaintiff's contentions are considerably—not just slightly—more likely to be correct than the defendant's.⁴² The authors of these studies propose

39. See Michele Tarufo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 666–69 (2003).

40. See Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 436–37 (2009); Mark Schweizer, *The Civil Standard of Proof—What Is It, Actually?* (MPI Collective Goods Preprint, No. 2013/12), available at <http://www.ssrn.com/abstract=2311210>; see also Wright, *supra* note 21, at 197, 199 (arguing for a standard based on actual belief rather than probability).

41. See *infra* Section II.A.

42. Andreas Glöckner & Christoph Engel, *Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning*, 10 J. EMPIRICAL LEGAL STUD. 230, 230–32 (2013); Eyal Zamir & Ilana Ritov, *Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165, 197 (2012); see also Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1562–63 (2012) (describing juror invocation of “beyond a reasonable doubt” in civil cases); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 100 (1998) (finding that “a significant number of jurors in civil trials misinterpreted the applicable burden and standard of proof”); Rita James Simon & Linda Mahan,

that jurors are aware that transferring money from a defendant to a plaintiff is more painful to the defendant than it is pleasing to the plaintiff, so it should not be done lightly.⁴³ To the extent that juror reluctance becomes prevalent, the importance of the preponderance standard or its replacement will increase. The standard will not just be a tiebreaker in the rare cases in which evidence is equally balanced, but will govern the result in a significant range of cases. If that is undesirable, it will be necessary to find a new phraseology that actually does what lawyers and judges have thought the preponderance standard did.

What does the standard mean? Aside from the issues of phrasing and interpretation already considered,⁴⁴ the big question here is whether elementary probability theory forces proponents of the standard to choose between two equally unacceptable readings. L. Jonathan Cohen asked this question, pointing out that the typical claim has several elements, each of which the plaintiff must prove to recover.⁴⁵ If a plaintiff establishes each of three elements by a 0.51 probability, the probability that all three are true is only 0.133 (0.51 multiplied by 0.51 multiplied by 0.51), which seems like a feeble basis for holding the defendant liable. Yet if the plaintiff must show that it is more likely than not that all three elements are present, the plaintiff will have to establish each element by a probability of .8,⁴⁶ which seems like a lot to expect of a plaintiff and more than a jury or judge would gather from the usual formulations of the standard.

The huge scholarly literature that Cohen's book elicited, and the divergent ways of meeting the challenges he posed, should be enough to dispel any notion that the preponderance of the evidence standard is a simple and obviously correct one. Cohen himself advocated the use of a system of "Baconian probabilities."⁴⁷ Others have proposed that "fuzzy logic and belief functions" will resolve the problems,⁴⁸ that trials should involve the comparison of competing stories rather than the establishment

Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom, 5 LAW & SOC'Y REV. 319, 325, 327–28 (1971) (describing probabilities ranging from .55 to .75).

43. Zamir & Ritov, *supra* note 42, at 190.

44. *See supra* Sections I.A, I.B.

45. L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 2, 66 (1977). The paradox is traceable to JEROME MICHAEL & MORTIMER J. ADLER, *THE NATURE OF JUDICIAL PROOF: AN INQUIRY INTO THE LOGICAL, LEGAL, AND EMPIRICAL ASPECTS OF THE LAW OF EVIDENCE* 141–42 (1931).

46. The .8 probability is based on the assumption that the plaintiff has established each of the three elements to the same probability. A combination of three different probabilities, some higher than .8 and some lower, could also work.

47. *See* COHEN, *supra* note 45, at 42–43.

48. Kevin M. Clermont, *Death of Paradox: The Killer Logic Beneath the Standards of Proof*, 88 NOTRE DAME L. REV. 1061, 1061, 1067, 1071–71 (2013).

of individual elements,⁴⁹ or that courts should reinterpret the preponderance standard so as to avoid the paradoxes.⁵⁰ None of these responses has won general approval. Furthermore, although they typically appear as defenses of the traditional standard, each of them also involves its reinterpretation.

The Cohen controversy is related to disputes about the relationship between the preponderance standard and probabilistic evidence.⁵¹ Can a plaintiff satisfy his burden of persuasion by presenting “naked statistical evidence”—for example, that exposure to the defendant’s product caused 60% of the cases of his disease—or must there be particularized evidence of causation?⁵² Is a plaintiff in such a case required to show that exposure to defendant’s product more than doubles the chances of developing the disease to prove that causation is more likely than not?⁵³ These disputes implicate many issues concerning substantive law and the law of proof, and those issues clearly include uncertainty about the meaning of the preponderance standard.

Even assuming that people understand the preponderance standard, and understand it in the same way, is it justifiable? The usual justification is that it more or less equalizes the risk,⁵⁴ and hence the cost of errors favoring plaintiffs and those favoring defendants.⁵⁵ That justification assumes that, on the average, pro-plaintiff and pro-defendant errors are

49. See *supra* note 19.

50. Alex Stein, *Of Two Wrongs That Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification*, 79 TEXAS L. REV. 1199, 1199–1200 (2001); Vern W. Walker, *Preponderance, Probability and Warranted Factfinding*, 62 BROOK. L. REV. 1075, 1120–21 (1996).

51. For an introduction to the extensive literature, see Symposium, *Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 377 (1986).

52. Compare Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 264 (1990) (arguing that courts should not treat cases involving “naked statistical evidence” differently from other cases), with ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 79 (2005) (stating that naked statistical evidence is “unsuitable for adjudicative fact-finding”), and Cheng, *supra* note 19, at 1269–71 (providing anecdotes to explain the hostility toward “‘naked’ statistical evidence”).

53. Russel S. Carruth & Bernard D. Goldstein, *Relative Risk Greater than Two in Proof of Causation in Toxic Tort Cases*, 41 JURIMETRICS J. 195, 196 (2001); Steve C. Gold, *The “Reshaping” of the False Negative Asymmetry in Toxic Tort Causation*, 37 WM. MITCHELL L. REV. 1507, 1523 (2011).

54. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

55. D. H. Kaye, *The Error of Equal Error Rates*, 1 L. PROBABILITY & RISK 3, 3, 6 (2002); David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487, 496–97 (1982); Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1084–85 (2009); see also *Santosky v. Kramer*, 455 U.S. 745, 766–68 (1982) (imposing a higher standard when the burdens are disproportionate).

equally likely and impose equal costs. The same logic could warrant adopting a different standard in a class of cases—or for that matter a single case—in which these assumptions do not hold.⁵⁶

In some ways, the existing standard takes account of this critique. Juries can compare the likelihood of pro-plaintiff and pro-defendant errors in assessing the plausibility of the plaintiff's contentions, and presumptions shifting the burden of production or persuasion may be based on a similar comparison.⁵⁷ As to the comparative cost of errors, it might be thought that in civil actions in which the plaintiff gets what the defendant pays, losing inflicts equal burdens on each party.⁵⁸ That courts considering the entry of injunctions routinely consider the comparative impact of their decisions on the parties suggests the contrary.⁵⁹ Australia and New Zealand have authorized courts to consider comparative impact in applying the burden of persuasion,⁶⁰ but courts have not yet explored such an approach in the United States. For example, no one has argued that because the burden of losing one's job is generally more severe than the burden on a large employer of rehiring an unwanted employee, the standard of persuasion in employee reinstatement suits should be less than a preponderance of the evidence.

Professor Louis Kaplow has recently propounded a critique of the preponderance standard (as well as other traditional standards) far more

56. For formulations using this approach, see *Evidence Act 1995* (Cth) s 140(2)(c) (Austl.); *Z v. Dental Complaints Assessment Comm.*, [2009] 1 NZLR 55, at para 4 (SC). For a similar contention about the criminal standard, see generally Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (finding that the reasonable doubt standard of proof is flexible).

57. BROUN ET AL., *supra* note 17, §§ 339, 342–43; see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 17 (2005). As these authorities indicate, conclusions on the relative likelihood of error may in turn be based on relative access to evidence. See also *Schechter v. Klanfer*, 269 N.E.2d 812, 815 (N.Y. 1971) (holding that courts could lower the burden of persuasion when defendant caused plaintiff's amnesia).

58. For proposals that the standard of persuasion in criminal prosecutions should vary with the gravity of the sanction, see Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 836 (2012); Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm Than Good?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 202–08 (Leslie Green & Brian Leiter eds., 2011) (considering varying harm caused by false acquittals and proposing that the standard of proof be based on risk to society and violence of the crime); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 132 (2002).

59. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); see generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978) (noting that some courts consider “comparative hardship to the parties of granting or denying relief” when determining whether to grant an injunction).

60. *Evidence Act 1995* (Cth) s 140(2)(c) (Austl.); *Dental Complaints Assessment*, [2009] 1 NZLR at 2. *Contra In re B (A Child)*, [2008] UKHL 35, [2009] A.C. 11 (H.L.) para. 2, 32 (U.K.); *F.H. v. MacDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (Can.).

extensive than those just discussed.⁶¹ Instead of focusing on the *ex post* impact of the standard on the litigating parties, he considers its *ex ante* tendency to maximize the deterrence of undesirable conduct while minimizing the chilling of desirable conduct.⁶² The relative numbers of valid and invalid claims coming before the courts will affect these tendencies. If, for example, plaintiffs bring only valid claims, then one could simply find all defendants liable regardless of the evidence without bad results. But the choice of a standard of persuasion will in turn affect what claims are asserted or defended. The comparative likelihood that good and bad claims will give rise to evidence tending to show liability will also affect the impact of the standard. As that likelihood varies, courts will become better or worse at filtering out good claims from bad ones. The relative tendency of findings of liability to deter undesirable and desirable conduct will further affect the standard's impact.

Whether or not one accepts Professor Kaplow's *ex ante* approach, and whether or not his analysis leads to a workable alternative to the preponderance of the evidence standard, his massive onslaught on that standard leaves even less reason than before to regard the standard as unavoidable and unproblematic. That again raises the questions of when and how the standard emerged.

II. EMERGENCE OF THE PREPONDERANCE STANDARD

At the end of the eighteenth century, a few jurists began to assert that the party bearing the burden of persuasion in a civil action must establish his case by a preponderance of the evidence. It is less clear whether there had previously been no thought directed to formulating a standard, whether juries were free to formulate their own standard, or whether there had actually been a previous standard that called for the jury's actual belief in the facts to be proved.

61. See generally Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) (examining the preponderance standard). For critiques of Professor Kaplow's theories, see Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 557, 563–64 (2013) (arguing that Professor Kaplow's model suffers from "serious conceptual problems" and is not "feasible operationally"); Edward K. Cheng & Michael S. Pardo, *Accuracy, Optimality, and the Preponderance Standard*, L. PROBABILITY & RISK (forthcoming 2015), available at <http://www.ssrn.com/abstract=2547348> (arguing that Kaplow's *ex ante* approach "relies on contested normative principles, raises legitimacy concerns, and is nearly impossible to implement in practice").

62. Professor Kaplow also brings insights emerging from his own analysis to bear against *ex post* approaches. Compare Kaplow, *supra* note 61, at 799–805, with Dominique Demougin & Claude Fluet, *Rules of Proof, Courts, and Incentives*, 39 RAND J. ECON. 20, 22 (2008) (also using *ex ante* analysis, but supporting preponderance standards).

A. *The Standard Appears*

The earliest clear published statement of the standard appears in Edward Wynne's *Eunomus* in 1768: "Wherever a verdict is given, the Plaintiff at least must give evidence to maintain his Declaration: where evidence is produced on both sides, the verdict is given for the Plaintiff or Defendant, according to the superior weight of evidence."⁶³ It is possible that an essay by Voltaire published in 1772 influenced further developments.⁶⁴ In any event, the point reappeared in Richard Wooddeson's lectures delivered at Oxford starting in 1777:

In causes concerning civil rights and property, that side must prevail, in favor of which probability preponderates: but the (a) humanity of our law never esteems the turn of the balance sufficient to convict a man of any, especially a capital, crime. For it requires a very strong and irrefragable presumption of guilt to justify the infliction of the severer human punishments.⁶⁵

In far off Delaware, a judge charging a jury in a murder prosecution in 1801 responded to arguments of counsel about the adequacy of presumptive evidence by instructing that:

Presumptive evidence, where there is a concurrence of circumstances convincing the jury, is sufficient. In civil cases a preponderance of evidence is sufficient for you to convict; in criminal, you should have proof.⁶⁶

At about this time, eminent judges trying cases in Equity and Admiralty—that is, without a jury—noted that the preponderance of the evidence supported one party as to one of the facts in dispute.⁶⁷ William

63. 2 EDWARD WYNNE, *EUNOMUS: OR, DIALOGUES CONCERNING THE LAW AND CONSTITUTION OF ENGLAND* 153–54 (London 1768). Conceivably, an earlier instance appears in the argument of counsel on an issue of will construction in *Churchill v. Dibben*, (1754) 96 Eng. Rep. 1310 (Ch.) 1314; 3 Keny. 68, 78 (stating that no "very strong probability of intention" to include property in will; "and, if there be no preponderance, the turn of the scale belongs to the heir at law").

64. See *infra* Section III.F.

65. 3 RICHARD WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 295 (1793).

66. *State v. Crocker*, 2 Del. Cas. 150, 154 (Ct. Quarter Sess. 1801); see also *Higbee v. Hopkins*, 12 F. Cas. 126, 126 (C.C.D. Pa. 1805) (No. 6,466) (charging that the jury must consider an answer true unless contradicted by a witness "and circumstances to give it a preponderance").

67. *Marquis of Devonshire v. Sandys*, (1801) 31 Eng. Rep. 962 (Ch.) 965; 6 Ves. Jun. 107, 113 (Eldon, Ch.) (holding that because preponderance of evidence supported plaintiff, there was no need to direct a common law trial to resolve the factual issue); *The "Dordrecht,"* (1799) 165 Eng. Rep. 237 (Adm.) 241; 2 C. Rob. 55, 68 (Scott, J.) (finding that the preponderance of the evidence supported one party, though the issue in question turned out to be inconsequential); see *Cottle v. Champion*, *TIMES* (London) Dec. 2, 1795, at 4, available at *Law Report*, *TIMES*,

David Evan's discussion of the law of evidence, published in 1806 as an appendix to another work said on a single page that the party bearing the burden of proof must satisfy it by "an absolute preponderance of testimony," "a decisive preponderance," and "a preponderance of evidence."⁶⁸ After that, preponderance language appeared in other evidence treatises, each of which distinguished it from the criminal standard.⁶⁹ The language of all these sources approximates the preponderance formulation used in the United States, rather than the balance of probabilities language later adopted in England. It also seems to contemplate a comparison of each party's evidence as a whole, not an appraisal of whether a party has established each element of a claim or defense.

On the whole, the eighteenth-century English authority is skimpy. Some of it seems more concerned with criminal than with civil cases, invoking the civil standard by way of comparison. Much of it is not authoritative when it comes to establishing a central principle of English law: Edward Wynne was a nonpracticing barrister and country gentleman;⁷⁰ a Delaware trial court jury charge in a criminal case would have been of little weight in England; William David Evans' outline of evidence law, though impressive, was an appendix to a translation; and a few passing descriptions of evidence in nonjury cases scarcely demonstrate a binding rule.

The preponderance standard, moreover, was not the only one proposed. Jeremy Bentham advanced a variant, although it did not appear in print until John Stuart Mill edited and published his writings on evidence in 1827.⁷¹ Bentham proposed that the judge should be attentive to

<http://www.thetimes.co.uk/tto/archive/> (search "Search the Archive" for "Cottle" on the date of 2 Dec. 1795; then follow the link to "Law Report" (subscription required) (last visited Aug. 20, 2015)) (noting that the preponderance of the evidence favored the plaintiff). In the United States, see *Beecher v. Bechtel*, 3 F. Cas. 47, 47 (S.D.N.Y. 1800) (No. 1,220a); *The Sea Gull*, 21 F. Cas. 910, 910 (C.C.D. Md. 1800) (No. 12,578a).

68. William David Evans, *On the Law of Evidence* app. XVI, in 2 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 123 (William David Evans trans., 3d Am. Ed. 1853) (1806).

69. See JAMES GLASSFORD, AN ESSAY ON THE PRINCIPLES OF EVIDENCE, AND THEIR APPLICATION TO SUBJECTS OF JUDICIAL INQUIRY 656–57 (1820); DANIEL M'KINNON, THE PHILOSOPHY OF EVIDENCE 63 (1812); LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 578 (1802); 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 450–51 (1824).

70. Michael Lobban, *Wynne, Edward (bap. 1734, d. 1784), Jurist*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/30157>.

71. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE (J.S. Mill ed., London 1827).

the difference (if any) in point of mischief, that may be incident to the decision For if, as between right decision and misdecision, the scales of probability appear to hang upon a level, his choice will naturally fall on that side on which, if to the prejudice of that side misdecision should ensue, the quantity of the mischief resulting from it will be at the lowest pitch.⁷²

The main mischief he had in mind was the likelihood of encouraging baseless claims,⁷³ but his proposal could surely appear as anticipating contemporary *ex ante* analyses such as that of Professor Kaplow.⁷⁴

Likewise, the Connecticut author Zephaniah Smith proposed a standard that would vary with the impact of a jury decision on the defendant:

The law knows no distinction between the proof requisite to be produced in civil and criminal cases, except where life is concerned; yet, in practice, it is well understood, that a jury will not require so strong proof, to maintain a civil action, as to convict of a crime, and that in criminal prosecutions, the greater the crime, the stronger must be the proof.⁷⁵

This formulation likewise seems to foreshadow more recent scholarly thinking,⁷⁶ as well as the occasional invocation by courts of a sliding scale.⁷⁷

B. *Was There a Previous Standard?*

If the preponderance of the evidence standard did not exist until the end of the eighteenth century, a question immediately arises: What were jurors supposed to do before then? One possibility is that the need for a standard of proof in civil cases simply had not occurred to jurists. This is hard to reconcile with the fact that the reasonable doubt standard for

72. *Id.* at 715.

73. *See id.* at 716.

74. Kaplow, *supra* note 61.

75. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES, AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES 151 (1810). Just before and after the quoted language, however, Swift seems to endorse the preponderance and reasonable doubt standards. *Id.* at 151–52.

76. *See supra* notes 54–60 and accompanying text.

77. *Hornal v. Neuberger Prods. Ltd.*, [1957] 1 Q.B. 247, 266 (C.A.); *Cont'l Ins. Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, 168, 170 (Can.); *see Schechter v. Klanfer*, 269 N.E.2d 812, 813 (N.Y. 1971) (discussing whether less proof was necessary when the plaintiff's amnesia, which the event in question caused, prevented her from testifying); *see also* Mike Redmayne, *Standards of Proof in Civil Litigation*, 62 MOD. L. REV. 167, 176 (1999) (analyzing the court's approach in *Hornal*).

criminal cases, which arose late in the eighteenth century, *did* have a precursor, even though English law's asserted reluctance to allow conflicts of sworn testimony was especially strong in criminal cases.⁷⁸ Another possibility is that everyone simply accepted that civil juries were to follow the more probable view of the facts. This may be true, but there is at least some evidence for a third view: The party bearing the burden of proof had to convince the jury that the party's assertions were correct. This "subjective" phrasing would have been similar to the standard followed today in civil law systems.⁷⁹

Because the eighteenth-century English courts handed down no general discussions of the standard of persuasion in civil actions and granted no new trials for misinstructing juries on that subject,⁸⁰ inquiry must open with descriptions of jury instructions appearing in the *nisi prius* reports published beginning in the last decade of the century. These simply state that the judge "left it to the jury to consider" or "to say" whether the facts were one way or another.⁸¹ A judge could use his power to comment on the evidence to insert these phrases in a way clearly intimating his preferred result, as happened in a case in which the defendant was a rich but indiscreet young man from whom the plaintiff had obtained a bill of exchange:

Lord Kenyon left it to the jury, to consider whether this was not a gross fraud on the part of the plaintiff. If they should be of a contrary opinion, and think that the plaintiff was entitled to recover anything, they would then take into their consideration the damages which he had really sustained by the non-performance of the contract, and were not obliged to give the whole sum for which the bill was given in damages.⁸²

The jury took the hint and found for the defendant.⁸³

78. See *infra* Section III.E; George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 597–607 (1997). For evidence that eighteenth-century English jurists were more comfortable than Professor Fisher argues with conflicting testimony and appraisals of witness credibility, see Barbara J. Shapiro, *Oaths, Credibility and the Legal Process in Early Modern England: Part One*, 6 L. & HUMANITIES 145, 146–48 (2012).

79. See *supra* notes 35–40 and accompanying text.

80. See 2 JOHN MORGAN, ESSAYS UPON I. THE LAW OF EVIDENCE II. NEW TRIALS III. SPECIAL VERDICTS IV. TRIALS AT BAR AND V. REPLEADERS 272–351 (1789) (collecting cases in which the court granted new trials because of jury misdirection or nondirection).

81. See, e.g., *Kannen v. M'Mullen*, (1791) 170 Eng. Rep. 87, 88 (K.B.); Peake 83, 84; *Walwyn v. St. Quintin*, (1797) 170 Eng. Rep. 439, 439; 2 Esp. 515, 516; *Fitch v. Fitch*, (1797) 170 Eng. Rep. 449, 450; 2 Esp. 543, 545.

82. *Ledger v. Ewer*, (1794) 170 Eng. Rep. 157, 157; Peake 283, 283.

83. *Id.*

Although these reports suggest that judges in the 1790s told the jury nothing about what sort of showing the plaintiff needed to make, they may be incomplete. Reporters of *nisi prius* proceedings never published complete transcriptions of trials, using their discretion to decide what would be of significance to readers. Fortunately, some civil trials were transcribed and published separately, often when they involved sexual shenanigans making them saleable.⁸⁴ These were therefore not typical cases. They involved elite parties well represented by counsel, and both reputation and money were in question. These cases were usually hard fought on both sides, presumably in front of an attentive audience. For just that reason, one would expect to find in them judicial instructions at least as elaborate as in the average case.⁸⁵

The earliest four examples of purportedly complete trial transcripts that I have found display varying approaches to the plaintiff's burden. Curiously, the earliest charge, delivered in 1684 by the infamous Lord Jeffreys and strongly slanted in favor of the plaintiff, comes the closest to a preponderance standard:

[Y]ou must weigh the Evidence whether the Circumstances do shesw it, that there was Malice in Mr. *Papillon*. If the Circumstances are enough to amount to a proof of Malice, you then are to find for the Plaintiff; and you are the Judges what Damages it is fit to give him for that Injury⁸⁶

The other early charges tell the jury to “consider” if the defendant had intercourse with the plaintiff's wife,⁸⁷ simply describe “presumptions” (meaning inferences) favoring each party,⁸⁸ or tell the jurors to find for

84. For a discussion, see LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530–1987, at 248–55 (1990). I have found printed trial reports in the following databases: EEBO: EARLY ENGLISH BOOKS ONLINE, <http://eebo.chadwyck.com/home> (last visited Aug. 20, 2015) (seventeenth-century England); EECO: EIGHTEENTH CENTURY COLLECTIONS ONLINE, <http://quod.lib.umich.edu/e/ecco/> (last visited Aug. 20, 2015) (England and Ireland); Nineteenth Century British Pamphlets (available from JSTOR); HEINONLINE WORLD TRIALS LIBRARY, <http://home.heinonline.org/titles/World-Trials-Library> (subscription required) (eighteenth- and nineteenth-century England and United States).

85. Many of these cases were tried before Lord Kenyon in the 1790s and therefore may not represent the practice of other judges in earlier periods.

86. AN EXACT ACCOUNT OF THE TRIAL BETWEEN SR. WILLIAM PRITCHARD, KT. AND ALDERMAN OF THE CITY OF LONDON, PLAINTIFF, AND THOMAS PAPILLON, ESQ. DEFENDANT 28 (London 1689).

87. THE TRYAL BETWEEN HENRY DUKE OF NORFOLK, PLAINTIFF, AND JOHN JERMAINE DEFENDANT 20 (London 1692) (stating that the jury found for the plaintiff, but the judge reprimanded the jury “for giving so small and Scandalous a Fine”).

88. THE TRIAL AT LARGE, BETWEEN JAMES ANNESLEY, ESQ; AND THE RIGHT HONOURABLE THE EARL OF ANGLESEA 420 (London 1744).

the plaintiff “[i]f you are satisfied the facts are clearly proved.”⁸⁹ These varying charges indicate that no one had devoted much thought to the standard of persuasion in civil actions.

By the last quarter of the eighteenth century, the published cases multiplied and placed a greater emphasis on the jurors’ internal state of persuasion. Jurors were told to “give a verdict as your consciences direct you,”⁹⁰ or to find for the plaintiff if “satisfied”⁹¹ or if “you think”⁹² or “believe”⁹³ the facts were as alleged. When the evidence was circumstantial rather than positive, there must be “strong, pregnant suspicions, such as rouse the mind of every man who hears them stated, and carry him involuntarily to certain conclusions: this is the sort of evidence expected to be given.”⁹⁴ There are cases in which the judge used neither these nor any other expressions to describe the jury’s duties.⁹⁵

89. THE WHOLE PROCEEDINGS AT LARGE, IN A CAUSE ON AN ACTION BROUGHT BY THE RT. HON. RICHARD LORD GROSVENOR AGAINST HIS ROYAL HIGHNESS HENRY FREDERICK DUKE OF CUMBERLAND 79 (London 1770).

90. A CAUSE, ON AN ACTION OF TRESPASS, BETWEEN JAMES ARMITSTEAD, PLAINTIFF, AND THOMAS DICKONS, DEFENDANT, TRIED AT THE CASTLE OF YORK, AT THE LENT ASSIZES, MARCH 22, 1778, BEFORE THE HON. SIR HENRY GOULD, KNT., AND A SPECIAL JURY 55 (York 1778); ADULTERY. TRIAL, IN THE COURT OF KING’S BENCH, BEFORE LORD KENYON, AND A SPECIAL JURY, BETWEEN EDWARD DODWELL, ESQ. PLAINTIFF; AND THE REV. HENRY BATE DUDLEY, DEFENDANT; FOR THE CRIM. CON. (1789), *reprinted in* 1 THE CUCKOLD’S CHRONICLE; BEING SELECT TRIALS FOR ADULTERY, INCEST, IMBECILLITY, RAVISHMENT, & C. 323 (London 1793) (stating that because evidence was contradicted, “it was only necessary that the case should be so far clear as to convince the conscience of the Jury, that the charge was well founded”).

91. THE TRIAL OF A CAUSE INSTITUTED BY RICHARD PEPPER ARDEN, ESQ.; HIS MAJESTY’S ATTORNEY GENERAL . . . TO REPEAL A PATENT GRANTED . . . TO MR. RICHARD ARKWRIGHT 187 (London 1785) (asking if the jurors were “of opinion” for a party in a case involving the disputed invention of textile machinery); PROCEEDINGS IN AN ACTION AT LAW, BROUGHT BY THE MAYOR, BAILIFFS, AND BURGESSES, OF THE BOROUGH OF LIVERPOOL, FOR THE RECOVERY OF A PENALTY UNDER A BY-LAW MADE BY THEM IN COMMON HALL ASSEMBLED 298 (Liverpool 1796); THE WHOLE PROCEEDINGS ON THE TRIAL OF AN EJECTMENT, BETWEEN JOHN DOE, ON THE SEVERAL DEMISES OF MARY MELLISH, SPINSTER, AND OTHERS, AGAINST ELIZA RANKIN, SPINSTER 253 (London 1786) (“The fact you ought to be satisfied of is . . .”).

92. THE TRIAL, WITH THE WHOLE OF THE EVIDENCE, BETWEEN THE RIGHT HON. SIR RICHARD WORSLEY, BART. . . PLAINTIFF, AND GEORGE MAURICE BISSETT, ESQ; DEFENDANT 23 (7th ed. London 1782); THE TRIAL AT LARGE OF SIR MATTHEW WHITE RIDLEY, BART. M.P. . . FOR CRIMINAL CONVERSATION WITH THE WIFE OF MR. WILLIAM BRUMWELL, SURGEON, BEFORE LORD KENYON AT GUILDHALL, MARCH 4TH, 1793, at 46–47 (Newcastle 1793) (stating both “[i]f you find” and “[i]f . . . you think”).

93. THE TRIAL OF SAMUEL HAWKER, ESQ. FOR SEDUCING AND DEBAUCHING THE WIFE OF HOOKER BARTTELOT, ESQ. BEFORE LORD KENYON, AT WESTMINSTER HALL, JUNE 26, 1790 (1790), *reprinted in* 2 THE CUCKOLD’S CHRONICLE, *supra* note 90, at 123.

94. THE TRIAL AT LARGE OF THE RIGHT HONOURABLE LADY CADOGAN FOR ADULTERY WITH THE REV. MR. COOPER 46 (London 1794).

95. *E.g.*, MIDDLETON VERSUS ROSE. A REPORT OF AN ACTION BROUGHT IN HIS MAJESTY’S COURT OF KING’S BENCH, BY WILLIAM MIDDLETON, OF STOCKELD-PARK, ESQ. AGAINST JOHN

However, these are cases in which the dispute concerned only the amount of damages, which in tort suits was less a factual issue than a discretionary shaping of the appropriate sanction.⁹⁶

Judges had no need to give instructions on the standard of persuasion because they had a far more powerful way to guide juries: comments on the evidence.⁹⁷ In one 1786 case, for example, Lord Loughborough described and analyzed the evidence for twenty-eight pages, clearly intimating his own opinions, and concluding

[t]hat the defendant's title as heir . . . cannot be impeached but by requiring you to find, upon your oath, against all the parol evidence, and against the tendency of a great part of the written evidence, two propositions—that the will of 1780 had been, as to a second part of it, executed, and afterwards cancelled; and that only rests, in my apprehension, upon the testimony of Clarke and Taylor: if you give credit to them against all the rest of the evidence, and against these observations upon the written evidence, in that case, and in that case only, in my apprehension, the lessor of the plaintiff will be entitled to your verdict; but in any other view of the case, the consequence will be, that the title and possession of the defendant will remain undisturbed.⁹⁸

This peroration's reference to the jurors' oath might imply a standard of conscientious belief, but the judge's concern was obviously focused on the merits of the case, not the standard for its decision or the duties of the jurors should they remain uncertain about the facts. Not surprisingly, the jury took only ten minutes to find for the defendant.⁹⁹

ROSE, HIS GROOM, FOR CRIMINAL CONVERSATION WITH CLARA LOUISA MIDDLETON, THE WIFE OF MR. MIDDLETON (London 1795); TRIAL BETWEEN JAMES DUBERLY, ESQ. PLAINTIFF, AND MAJOR-GENERAL GUNNING, DEFENDANT, FOR CRIMINAL CONVERSATION WITH THE WIFE OF THE PLAINTIFF: TRIED BEFORE LORD KENYON AT WESTMINSTER, FEBRUARY 22, 1791, at 40–42 (London 1792).

96. *E.g.*, THE TRIAL OF THE HON. RICHARD BINGHAM, FOR CRIM. CON. WITH LADY ELIZABETH HOWARD, WIFE OF B.H. HOWARD, ESQ. 73–77 (London 1794) (giving elaborate instruction on factors relevant to damages for inducing adultery); *Duberley v. Gunning*, (1792) 100 Eng. Rep. 1226, 1227 (K.B.); 4 T.R. 651, 654; *Huckle v. Money*, (1763) 95 Eng. Rep. 768, 768 (K.B.); 2 Wils. K. B. 205, 206; JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 64–73 (2006). In suits for criminal conversation, parties often did not collect large damage awards, but these suits laid the groundwork for divorce suits in the ecclesiastical courts. 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1263–64 (1992).

97. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1191–93 (1996).

98. THE WHOLE PROCEEDINGS ON THE TRIAL OF AN EJECTMENT, BETWEEN JOHN DOE, ON THE SEVERAL DEMISES OF MARY MELLISH, SPINSTER, AND OTHERS, AGAINST ELIZA RANKIN, SPINSTER 259 (London 1786).

99. *Id.*

Likewise, in an Irish case, even though the defendant's lawyer gave "an address to the jury of considerable length, with infinite ability and no less energy,"¹⁰⁰ the jury awarded a cuckolded husband ten thousand pounds after the judge charged the following:

With respect to the first question [whether adultery occurred], there are five witnesses to the fact; and unless you shall refuse crediting every one of them, and that you had no right to believe them, you cannot give your verdict for the defendant. Those witnesses stand unimpeached and uncontradicted, notwithstanding the utmost exercise of the talents of counsel in their cross examination. . . . With respect to the second question, it appears beyond a shadow of doubt, that the adultery in this case was committed without the privity, knowledge or concurrence of the husband.¹⁰¹

For the judge, the lawyers, and the jurors themselves, vigorous comments like these must have far overshadowed the judge's direction that the jurors should "give that verdict in the presence of God and of their country, which they should in their conscience from the evidence conceive to be right."¹⁰²

Forceful judicial comments filled a number of procedural gaps (by today's standards), of which the lack of detailed instructions on the standard of proof was only one. Because eighteenth-century procedure did not provide for summary judgment and allowed little pretrial discovery,¹⁰³ weak cases were likely to reach trial, where a judge's analysis of the evidence or lack of evidence could help dispose of them. There was no way to waive jury trial in the common law courts, so reliance on judicial comment was a kind of substitute for trial by judge. If a judge directed a verdict, the jury was free to disobey.¹⁰⁴ That blurred the line between directed verdict and judicial comment, and made it prudent for a judge who wished his conclusions to prevail to go beyond a bare direction to a more elaborate comment.

This survey, albeit based on limited evidence, supports several conclusions. First, judges did not tell eighteenth-century English jurors of any preponderance of the evidence or balance of probabilities standard.

100. REPORT OF THE TRIAL HAD BEFORE THE RT. HON. ARTHUR, LORD KILWARDEN . . . BETWEEN ROBERT TIGHE, ESQ. M.P. PLAINTIFF, AND DIVE JONES, ESQ. . . . DEFENDANT 64 (Dublin 1800). The plaintiff's counsel replied "in a torrent of manly and convincing eloquence." *Id.*

101. *Id.* at 67–68.

102. *Id.* at 68.

103. John H. Langbein, *The Decline of Civil Trial in the United States*, 122 YALE L.J. 522, 531–32, 566–68 (2012).

104. Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 728–30 (2004).

Second, although judges told jurors a lot about the issues and the evidence before them, they said little about any standard for appraising that evidence. Presumably, they assumed either that there was not much to be said about such an uncontroversial subject or that the jury's role of finding the facts included the role of deciding what was required for a finding. Perhaps it was also less necessary to go into detail because many jurors had served before,¹⁰⁵ so judges could assume that jurors understood their role.

Third, to the extent that judges did intimate a standard, it was that jurors should follow their consciences and decide for a party when satisfied that the party's assertions were correct. This is very similar to the standard used in criminal cases before the rise of reasonable doubt in the later eighteenth century. One may assume that, as in the criminal context, conscience was thought of as a rational process, not just a moral one.¹⁰⁶ The jury's function was apparently considered one of belief founded on the evidence, rather than the more detached appraisal implied by the preponderance and balance of probabilities standards. Still, one must qualify this conclusion by noting that these two contrasting views are not very different and that there is little indication that anyone was actually focusing on the differences. Had someone raised the point, judges likely would have agreed that jurors should believe the propositions supported by a preponderance of the evidence; but the point was not raised, and the judges did not find it necessary to say this.

III. WHY THE STANDARD EMERGED WHEN IT DID

A procedural rule or practice means little by itself. Its function and impact depend on the procedural, and sometimes the substantive, system it helps to compose. To better understand the preponderance of the evidence standard, it is important to evaluate the context in which it developed. This includes prerequisite practices without which the questions the standard answers could not be posed, as well as contemporary developments that led to its appearance at a particular time.

105. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 276–77 (1978).

106. SHAPIRO, HISTORICAL PERSPECTIVES, *supra* note 1, at 19–21; *see generally* Barbara Shapiro, *Changing Language, Unchanging Standard: From 'Satisfied Conscience' to 'Moral Certainty' and 'Beyond Reasonable Doubt,'* 17 CARDOZO J. INT'L & COMP. L. 261 (2009) [hereinafter Shapiro, *Unchanging Standard*] (examining the role of Christianity in the development of the phrase “beyond a reasonable doubt”).

A. *Burdens of Proof and Presumptions*

Only after deciding which party must present evidence does it make much sense to specify just how much evidence the party must present. The concept of the burden of proof dates back to Roman law¹⁰⁷ and existed in other ancient legal systems.¹⁰⁸ Renaissance civilian authors devoted much attention to the burden of proof and the circumstances that could shift it, in works accessible to jurists in eighteenth-century England.¹⁰⁹

Those English jurists also referred to the burden of proof. Judge Geoffrey Gilbert's pioneering evidence treatise placed the burden on the party asserting the affirmative side of an issue, except when the law presumes the affirmative until the opposing party disproves it.¹¹⁰ Other treatises spoke similarly,¹¹¹ as did judicial opinions.¹¹² Earlier courts invoked the similar formula *actori incumbit probatio*, which places the burden of proof either on the plaintiff or on the party making an assertion.¹¹³

Eighteenth-century courts could also use a proponent's proof of a fact to shift to an opposing party the burden of rebutting the inference

107. *Concerning Proofs and Presumptions*, DIG., at 22.3; *Concerning Proofs*, CODE JUST. 4.19.

108. See, e.g., JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* 6, 17–18 (2001); LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 31, 33–34 (1989); 13 *THE CODE OF MAIMONIDES: THE BOOK OF CIVIL LAWS*, *supra* note 29, at 190–94.

109. E.g., ANTONII MATTHAEI, *DE PROBATIONIBUS LIBER* (Groningen 1739); JACOBUS MENOCHIVS, *DE PRESUMPTIONIBUS, CONIECTURIS, SIGNIS, ET INDICIS COMMENTARIA* (Venice 1587); *THE LAW OF PRESUMPTIONS: ESSAYS IN COMPARATIVE LEGAL HISTORY* (R.H. Helmholz & David Sellar ed. 2009).

110. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 147–48 (London, Henry Lintot 1756), written in the early eighteenth century according to Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 *J. LEGAL HIST.* 252, 266 n.107 (1994). The principle dates back to ancient Rome. *Concerning Proofs and Presumptions*, JUSTINIAN DIGEST, 22.3.2 (Paulus, Ad Edictum 69).

111. 1 MORGAN, *supra* note 80, at 290; WILLIAM NELSON, *THE LAW OF EVIDENCE* 4–5 (2d ed. London, E. and R. Nutt & R. Gosling 1735); THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 2 (London, S. Rider 1801).

112. *Dickson v. Evans*, (1794) 101 Eng. Rep. 433, 434–35 (K.B.); 6 T.R. 57, 57–60; *Ross v. Hunter*, (1790) 100 Eng. Rep. 879, 881 (K.B.); 4 T.R. 33, 36–37.

113. *Hynde's Case*, (1591) 76 Eng. Rep. 1040, 1042–43 (K.B.); 4 Co. Rep. 70b, 71b; *Digby v. Fitzharbert*, (1615) 80 Eng. Rep. 251, 252 (K.B.); *Hobart* 101, 103. This formula dates back to CODE JUST. 4.19.8.

naturally arising from that fact.¹¹⁴ Legislation in England¹¹⁵ and America¹¹⁶ sometimes shifted the burden of proof regarding the status of goods to their possessor or claimer. These statutes typically involved penalties and taxes, so they did not necessarily apply in ordinary civil actions,¹¹⁷ but the idea of specifying the burden of proof must have been widely known.

One might think that jurists, aware of the significance of the burden of proof, would also have thought about the size of that burden and would have asked whether it should be the same for all issues. Perhaps they did, but they did not write about these matters until late in the eighteenth century. If this seems odd, remember that jurists in many European nations have been almost equally silent even today.¹¹⁸ Similarly, eighteenth-century discussions of the burden of proof do not differentiate the burden of coming forward from the burden of persuasion, a distinction that has seemed obvious since James Bradley Thayer described it.¹¹⁹ It is a truism of legal history that questions that seem inescapable today were not equally salient in the past.

114. See *Batchellor v. Searl*, (1716) 23 Eng. Rep. 1081, 1081 (Ch.); 2 Vern. 736, 737 (allowing the rebuttal of presumption that the executor who received specific legacy was not residuary legatee); *Lord Barrington v. Searle*, (1730) 1 Eng. Rep. 1518, 1519 (H.L.); III Brown 593, 594–95 (allowing rebuttal of presumption that old note was paid); *Lanfelde ex dem. Banton v. Hodges*, (1771) 98 Eng. Rep. 625, 626 (K.B.); *Lofft*, 230, 232 (permitting rebuttal of equitable presumption that recipient took as trustee); *Brady v. Cubitt*, (1778) 99 Eng. Rep. 24, 29 (K.B.); 1 Dougl. 31, 31 (rebutting presumption of will revocation arising from testator's subsequent marriage and offspring); *Cartwright v. Cartwright*, (1795) 161 Eng. Rep. 923, 926–27 (High Ct. Delegates); 1 Phill. Ecc. 90, 100 (stating that when opponent of will proves testator's insanity, proponent has burden of proving lucid interval); see also W.M. BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT 46 (Phila., T. & J. W. Johnson 1845). For an earlier history of presumptions in England, see David J. Seipp, *Presumptions in Early English Common Law*, and R.H. Helmholz, *The Law of Presumptions and the English Ecclesiastical Courts*, in THE LAW OF PRESUMPTIONS: ESSAYS IN COMPARATIVE LEGAL HISTORY 117, 137 (R.H. Helmholz & W. David H. Sellar ed. 2009).

115. *E.g.*, Stat., 2 GEO. 2, c. 35, § 9 (1715); Stat., 8 GEO. 2, c. 15, § 3 (1721); 2 ISAAC ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AT NISI PRIUS 81 (Dublin 1790); Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 135 (2005).

116. JAMES BISSET, ABRIDGEMENT AND COLLECTION OF THE ACTS OF ASSEMBLY OF THE PROVINCE OF MARYLAND 18 (Phila. William Bradford 1759); 1 ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 254 (Hartford, Elisha Babcock 1786); Act of Feb. 26, 1795, ch. 31, § 2, 1 Stat. 420–21 (repealed).

117. *E.g.*, *Salomon v. Gordon*, (1773) 96 Eng. Rep. 479, 479–80 (K.B.); 2 Black. W. 813, 813–14.

118. See *supra* Section I.B.

119. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 354–55, 357 (Bos., Little, Brown & Co. 1898).

B. *Weighing the Evidence*

Speaking of the “preponderance of the evidence” or the “balance of probabilities” relies on an ancient metaphor comparing the process of judgment to weighing on a set of scales. The Egyptians depicted the weighing of a dead person’s heart to determine its worthiness,¹²⁰ and Homer and Virgil described the divine use of scales when a hero’s fate was, literally, in the balance.¹²¹ Curiously enough, in these instances of balancing, the desirable outcome was for one’s side of the scale to go up, not down. In any event, by the Renaissance, the scales of justice were an iconographical commonplace, as they have remained.¹²²

Thus, it is not surprising that in the eighteenth century legal authors spoke of the jury’s function as weighing the evidence.¹²³ Once again, one might think that this would have led them to state, and to tell juries, that even a slight difference in the weight of the evidence on each side should turn the scales, but there is no available evidence that they did. Indeed, when judges told juries to weigh the evidence, it was in criminal trials.¹²⁴ That was also true in the United States.¹²⁵ “Weigh” could be used in the sense of “appraise,”¹²⁶ without reference to a comparison with opposing evidence, and it was used in just that sense in criminal trials reported in

120. JAN ASSMANN, *DEATH AND SALVATION IN ANCIENT EGYPT* 73–76, 149 (David Lorton trans., 2005).

121. *THE ILIAD OF HOMER* bk. XXII, ll. 271–76 (Steven Shankman ed., Alexander Pope, Penguin Books 1996) (n.d.); *VIRGIL, AENEID* bk. XII, ll. 1054–57 (Frederick M. Keener ed., John Dryden trans., Penguin Classics 1997) (n.d.); *see also* JOHN MILTON, *PARADISE LOST* bk. IV ll. 990–1015 (John Leonard, ed., Penguin Classics 2009) (1667).

122. *See* JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 8–9, 18–25 (2011).

123. *See e.g.*, GILBERT, *supra* note 110, at 156; SIR MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 165 (Charles M. Gray ed., 1971); GILBERT HORSEMAN, *NOTES AND OBSERVATIONS ON THE FUNDAMENTAL LAWS OF ENGLAND* 91 (London, Henry Lintot 1753).

124. *E.g.*, *THE TRYAL AND CONVICTION OF PATRICK HURLY* 54 (Dublin, 1701); *THE TRIAL OF HUMPHRY FINNIMORE, ESQ. . . IN STEALING OF FIVE TURKIES* 16 (London, 1779); *THE TRIAL AT LARGE OF NICHOLAS WILKINSON, DOCTOR HERD, AND HENRY WORSWICK FOR THE WILFUL MURDER OF GEORGE BATTERSBY* 32 (York, 1778); 4 *THE SPEECHES OF THE HON. THOMAS ERSKINE* 393 (London 1810) (discussing the trial of the Earl of Thanet).

125. *E.g.*, *State v. Wilson*, 1 N.J.L. 502, 506 (N.J. 1793) (giving a “weigh the evidence” instruction as part of reasonable doubt instruction); *see also* *State v. Negro George*, 2 Del. Cas. 88, 95 (Ct. Quarter Sess. 1797) (similar). *But see* *Parker v. Avery*, 1 Kirby 353, 353 (Conn. Super. Ct. 1787) (stating that auditors, like juries, “weigh evidence and determine facts”).

126. The Oxford English Dictionary defines “weigh” as “[t]o consider (a fact, circumstance, statement, etc.) in order to assess its value or importance; to ponder, estimate, examine, take due account of; to balance in the mind with a view to choice or preference.” 20 OXFORD ENGLISH DICTIONARY 93 (Oxford, 2d ed. 1989).

the Old Bailey Sessions Papers.¹²⁷ One could also speak of the weight of a single piece of evidence.¹²⁸

Likewise, although judges occasionally stated that the weight of the evidence supported the prevailing party, they did so only in nonjury cases, in which the judge was the finder of fact.¹²⁹ We have seen that the same is true of the phrase “preponderance of the evidence.”¹³⁰ This type of expression indicates that the metaphor of scales tended to develop into a standard under which the triers balanced the opposing evidence and decided for the party with the weightier proof, but it does not mean that jurists in general had accepted this as a binding requirement even for judges acting as fact finders. Still less does it show that judges were prepared to limit the freedom of juries by imposing such a requirement on them.

C. Degrees of Belief and Probability

The preponderance of the evidence standard performs at least two functions. First, it effectuates the burden of persuasion by telling the trier of fact that if the evidence leaves the trier in equilibrium, the party bearing that burden must lose. Second, it tells the trier to decide for that party if the evidence moves the trier’s belief just a bit beyond the point of suspense. The standard may do other things as well. For example, different phrasings may in practice encourage or discourage finding the burden satisfied, or may suggest more or less subjective paths to decision.¹³¹ But if it does not accomplish at least these two functions, it has not done what its framers wished.

The preponderance standard thus presupposes recognition that evidence can induce varying levels of persuasion. Like the other

127. *E.g.*, *The Arraignment, Tryal, Conviction and Condemnation of Henry Harrison, Apr. 6, 1692*, OLD BAILEY PROCEEDINGS, available at <http://www.oldbaileyonline.org/print.jsp?div=t16920406-1> (last visited Aug. 20, 2015) (“[W]eigh well the Evidence he hath brought for himself.”); *The Trial of James Maclean, Sept. 12, 1750*, OLD BAILEY PROCEEDINGS, available at <http://www.oldbaileyonline.org/print.jsp?div=t17500912-22> (last visited Aug. 20, 2015) (noting that the transaction was private and no witnesses were available, which “your lordship and the gentlemen of the jury will duly weigh”); *The Trial of John Burke, Oct. 29, 1783*, OLD BAILEY PROCEEDINGS, available at <http://www.oldbaileyonline.org/browse.jsp?ref=t17831029-1> (last visited Aug. 20, 2015) (“[T]he circumstances of the robbery are for you to weigh.”).

128. *E.g.*, GILBERT, *supra* note 110, at 51, 133.

129. *Standish v. Radley*, (1741) 26 Eng. Rep. 511, 511 (Ch.); 2 Atk. 177, 178; *Seeman v. Seeman*, (1752) 161 Eng. Rep. 67, 68 (Prerog. Ct.); 1 Lee 181, 185; *Forfar v. Heastie*, (1756) 161 Eng. Rep. 348, 351 (Prerog. Ct.); 2 Lee 300, 309. And in the United States, see *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 165–66, 169 (1795) (opinions of Iredell, J. and Rutledge, C.J.).

130. See cases cited *supra* note 67.

131. See *supra* notes 5–7 and accompanying text.

presuppositions just discussed—the concepts of a burden of proof and the comparison of opposing evidence on the scales of justice—this recognition existed well before the eighteenth century. But the way in which people conceived of levels of persuasion as in the process of changing:

[B]y the sixteenth and seventeenth centuries, much of the old language of moral theology had migrated into the literature of epistemology and science. The language that was originally developed to address the question ‘when is it right (or safe) to act?’ was gradually deployed for the purpose of asking questions about epistemology.¹³²

Because jurors both act and know, they are necessarily involved in both morals and epistemology, so this change affected the ways in which their deliberations were described and prescribed.

The starting point for these developments was a body of late medieval thought considering how one should act when faced with uncertainty as to the facts or as to the correct moral rule, and basing the answer in part on the extent to which certainty was attainable. The idea that there are different levels of conviction thus took root. In the seventeenth century, several influences reshaped this idea: theological controversy about the existence and nature of a rational basis for religious belief, philosophical and scientific concern with how humans can acquire knowledge of the external world, and the growth of mathematical probability theory.¹³³ The resulting system of ideas could easily apply to quasi-judicial investigations, such as the analysis of the nature and credibility of the witnesses that were thought to demonstrate the truth of Christianity.¹³⁴

132. James Q. Whitman, *Response to Shapiro*, 2 *LAW & HUMAN* 175, 181 (2008) (footnote omitted).

133. See IAN HACKING, *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE* 85–86, 89–90 (1975); BARBARA J. SHAPIRO, *PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW AND LITERATURE* (1983) (discussing the nature of certainty in various fields of thought). The simplified statements in the text gloss over complexities explored in these studies. For example, “probable” had several meanings in the eighteenth century and should not be equated to anything found in frequentist probability theory. See DOUGLAS LANE PATEY, *PROBABILITY AND LITERARY FORM: PHILOSOPHIC THEORY AND LITERARY PRACTICE IN THE AUGUSTAN AGE* 3–34 (1984) (noting the various uses of “probable” throughout history).

134. *E.g.*, JOSEPH ADDISON, *THE EVIDENCES OF THE CHRISTIAN RELIGION* (London 1730) (citing scholars, including John Locke and Isaac Newton, as examples of “reasoners” who were also “believers”); SIMON GREENLEAF, *AN EXAMINATION OF THE TESTIMONY OF THE FOUR EVANGELISTS* (Boston, Charles C. Little & James Brown 1846) (by the author of a celebrated treatise on evidence law); 1 WILLIAM PALEY, *A VIEW OF THE EVIDENCES OF CHRISTIANITY* (London 1794).

John Locke, in 1775, provided an influential statement of the bases and levels of probable belief. He noted that the grounds of judgments of probability about uncertain matters are “The Conformity of any Thing with our own Knowledge, Observation, and Experience” and “The Testimony of others,” considering:

1. The Number.
2. The Integrity.
3. The Skill of the Witnesses.
4. The Design of the Author, where it is a Testimony out of a Book cited.
5. The Consistency of the Parts and Circumstances of the Relation.
6. Contrary Testimonies.¹³⁵

He further stated:

Experience and Testimonies clashing, infinitely vary the Degrees of Probability. . . . Thus far the *Matter* goes easy enough. Probability upon such Grounds carries so much Evidence with it, that it naturally determines the Judgment, and leaves us as little Liberty to believe or disbelieve, as a Demonstration does, whether we will know or be ignorant. The Difficulty is, when Testimonies contradict common Experience, and the Reports of History and Witnesses clash with the ordinary Course of Nature, or with one another; there it is, where Diligence, Attention, and Exactness is required to form a right Judgment, and to proportion the *Assent* to the different Evidence and Probability of the Thing, which rises and falls according as those two Foundations of Credibility, *viz.* Common Observation in like Cases, and particular testimonies in that particular Instance, favour or contradict it. . . . This only may be said in general, that as the Arguments and Proofs, *pro* and *con*, upon due Examination, nicely weighing every particular Circumstance, shall to any one appear, upon the whole *Matter*, in a greater or less Degree to preponderate on either Side, so they are fitted to produce in the Mind such different Entertainment, as we call *Belief, Conjecture, Guess, Doubt, Wavering, Distrust, Disbelief, &c.*¹³⁶

That judgments based on factual evidence rise to varying degrees of probability soon became commonplace among writers on philosophy,

135. 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 275 (London, 17th ed. 1775); *see also* STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 228–29 (1994) (describing other scholars who agreed with Locke).

136. *Id.* at 282–83. Locke’s discussion of levels of belief finds a contemporary analogue in Clermont, *Trials by Traditional Probability*, *supra* note 19.

morality, and religion.¹³⁷ Starting with Gilbert, who began his treatise with a discussion of Locke,¹³⁸ writers on the law of evidence began to reference the varying degrees of probability.¹³⁹ Jeremy Bentham, the Irish scientist Richard Kirwan, and Downing Professor of Law Edward Christian sought to develop mathematical models for describing the credibility of witnesses.¹⁴⁰

Clearly, such analyses of evidence in terms of degrees of probability come close to the preponderance of the evidence standard. Consider, for example, the words of James Wilson:

With regard to moral evidence, there is, for the most part, real evidence on both sides. On both sides, contrary presumptions, contrary testimonies, contrary experiences must be balanced. The probability, on the whole, is, consequently, in the proportion, in which the evidence on one side preponderates over the evidence on the other side.¹⁴¹

Although Wilson was a lawyer lecturing on law and would soon become a Justice of the U.S. Supreme Court, this statement looks less like a rule of law than a description of sound human judgment. The more one regards it as such, the less one would feel the need to instruct jurors to follow the reasoning process described by theorists in reaching factual conclusions. In Professor Thayer's familiar words, "[t]he law has no

137. *E.g.*, JOSEPH BUTLER, ANALOGY OF RELIGION i–iii (Dublin, J. Jones. 1736); HUME, *supra* note 17, at 175–76; ISAAC WATTS, LOGICK: OR, THE RIGHT USE OF REASON IN THE ENQUIRY AFTER TRUTH 278 (London 1725); George Hooper, *A Calculation of the Credibility of Human Testimony*, 21 PHIL. TRANSACTIONS ROYAL SOC'Y 359 (1699), available at http://www.cs.xu.edu/math/Sources/Craig-Hooper/Craig_philtrans.pdf. *But see* 1 DAVID HUME, A TREATISE OF HUMAN NATURE: BEING: AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 184 (London 1739) (“When I give the preference to one set of arguments above another, I do nothing but decide from my feeling concerning the superiority of their influence. Objects have no discoverable connexion together; nor is it from any other principle but custom operating upon the imagination, that we can draw any inference from the appearance of one to the existence of another.”).

138. GILBERT, *supra* note 110, at 1–2.

139. *E.g.*, EDWARD CHRISTIAN, A DISSERTATION SHEWING THAT THE HOUSE OF LORDS IN CASES OF JUDICATURE ARE BOUND BY PRECISELY THE SAME RULES OF EVIDENCE, AS ARE OBSERVED BY ALL OTHER COURTS 78–81 (Cambridge 1792); GILBERT, *supra* note 110, at 1–2; 2 MORGAN, *supra* note 80, at 2–3; Justice James Wilson, *Of the Nature and Philosophy of Evidence, Lectures on Law Delivered in the College of Philadelphia (1790–1791)*, in 2 THE WORKS OF THE HONORABLE JAMES WILSON 112–13 (Philadelphia, Lorenzo Press 1804); PEAKE, *supra* note 111, at 1–2.

140. BENTHAM, *supra* note 71, at 71–80; CHRISTIAN, *supra* note 139, at 80–85; RICHARD KIRWAN, 1 LOGICK: OR, AN ESSAY ON THE ELEMENTS, PRINCIPLES, AND DIFFERENT MODES OF REASONING 224–77 (London 1807).

141. Wilson, *supra* note 139, at 113.

mandamus to the logical faculty.”¹⁴² References to degrees of probability might add epistemological pizzazz to legal treatises, but judges felt no need to include them in judicial opinions or instructions to juries.

D. “Preponderance” Enters the Language of Law

References to the preponderance of the evidence standard first appeared in English law to describe not what should guide the jury’s decision, but what should *not* warrant the court to set aside the jury’s verdict and grant a new trial. As early as 1739, the King’s Bench rejected a claim that the court should grant a new trial when there was evidence on both sides but the trial judge certified that the verdict was against the weight of the evidence: “[A]s there was evidence on the part of the defendant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial.”¹⁴³

The leading new trial case of *Bright v. Eynon*¹⁴⁴ reiterated this holding and led to William Blackstone’s statement that courts should not grant a new trial “where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate.”¹⁴⁵ Similar statements soon appeared in American opinions.¹⁴⁶

142. THAYER, *supra* note 119, at 313 n.1. For language like Wilson’s in works not concerned with law, see WATTS, *supra* note 137, at 277–78 (“[When] the Arguments on either Side seem to be equally strong, and the Evidence for and against any Proposition appears equal to the Mind . . . the Mind which is searching for Truth ought to remain in a State of Doubt and Suspence, until superior Evidence on one Side or the other incline the Balance of the Judgment, and determine the Probability or Certainty to one Side.” (emphasis omitted)); see also JAMES BENTHAM, AN INTRODUCTION TO LOGICK, SCHOLASTICK AND RATIONAL 86 (Oxford 1773).

143. *Ashley v. Ashley*, (1739) 93 Eng. Rep. 1088 (K.B.); 2 Strange 1142.

144. (1757) 96 Eng. Rep. 1104, 1106–07 (K.B.); 2 Keny. 53, 60, 62 (Mansfield, C.J.: not enough for new trial that trial judge “thinks the weight of the evidence was against the verdict;” Foster, J.: “if the scale preponderates greatly against the verdict” there may be a new trial but not “where the scales hang nearly even”). A second and more frequently cited report of the same case, 97 Eng. Rep. 365, 368; 1 Burr. 390, 397, omits the language quoted from Lord Mansfield and modifies that of Justice Foster.

145. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *392 (Philadelphia, J.B. Lippincott Co. 1893) (first published 1765–69); see also *Swain v. Hall*, (1770) 95 Eng. Rep. 924 (K.B.) 925; 3 Wils. 45, 47.

146. See, e.g., *Polk’s Lessee v. Minner*, 1 Del. Cas. 59, 60–61 (1795) (granting new trial only when “the scale of evidence strongly preponderates against the verdict”); *Silva v. Low*, 1 Johns. Cas. 184, 198 (N.Y. Sup. Ct. 1799) (finding that contradictory statements as to whether verdict was against weight of evidence warranted new trial); *Campbell v. Sproat*, 1 Yeates 327 (Pa. 1794); *Fuller v. Alexander*, 3 S.C.L. (1 Brev.) 149, 150 (1802) (showing that two dissenters would grant new trial where verdict was against “manifest preponderance of evidence”).

This kinship between the standard for new trials and what was soon proclaimed as the standard of persuasion helps explain why the latter appeared in apparently objective terms, without the criminal standard's reference to doubt. The standard for new trials focused on whether the jury had gone beyond permissible bounds. Courts might expect jurors to rely on their own beliefs about the facts at issue, but judges appraising jury verdicts would naturally take a more distanced perspective. Indeed, the court sitting en banc—consisting mainly of judges who had not been present at the trial, who knew only the evidence the presiding judge and counsel reported, and who hence were in a weak position to form personal views about the credibility of witnesses—decided motions for new trials.¹⁴⁷ The relatively objective standard for judges framed in this setting could later migrate into the standard for juries without losing its character.

These new trial formulations draw very close to the preponderance of the evidence standard. Why insist that a preponderance of the evidence is not enough to set aside a verdict unless one needs to controvert an assumption that courts should, ideally, give judgments in accordance with that preponderance? If that is how courts should give judgments, then triers of fact should follow the preponderance standard. The premise of the discussion, sometimes unstated, is that judges must respect the authority of juries to decide the facts and that, therefore, what judges need to set a verdict aside is more than what should lead a jury to enter that verdict.

Although the preponderance rule was close, it had not been reached. For one thing, judges used a variety of formulas for what a new trial required: manifest preponderance, great preponderance, strong preponderance, and very strong preponderance. If the judges' standard implied by contrast the standard for jurors, uncertainty in the first standard may imply comparable uncertainty in the second. Apparently there can be more than one kind of preponderance, and in 1806, Evans referred to the decisional standard as requiring an "absolute preponderance," a "decisive preponderance," and just a preponderance.¹⁴⁸ It was not until later that it became clear that a "mere preponderance" is enough to ground a verdict.¹⁴⁹

Why did judges dance around the standard for jurors without actually stating it? One answer, as noted above, is that they felt no need to state

147. At least, this would be true under the traditional view that seeing and hearing the witnesses in person is indispensable, a view not followed in some continental systems. SIR DAVID EDWARD, *Evidence, Proof, Fact-Finding and the Expert Witness*, in PUBLICATIONS, THE DAVID EDWARD ORAL HISTORY PROJECT (Expert Witness Institute 2004), available at <http://www.law.du.edu/documents/judge-david-edward-oral-history/2004-proof-fact-finding.pdf>.

148. Evans, *supra* note 68.

149. GLASSFORD, *supra* note 69, at 656; 1 STARKIE, *supra* note 69, at 451.

what they assumed that any reasonable juror would take for granted—though judges are rarely reluctant to state the obvious. Another answer is that telling the jury just how much was necessary to warrant a verdict might itself have been an “infringement of the legal and constitutional rights of juries.”¹⁵⁰ At any rate, the silence was about to end, and the preponderance standard soon traveled from new trial decisions to jury verdicts.

E. *Reasonable Doubt: The Catalyst*

It cannot be a coincidence that the preponderance of the evidence standard appeared at about the same time as the beyond a reasonable doubt standard for criminal cases. Courts first explicitly demanded proof beyond a reasonable doubt in the Boston Massacre trials of 1770,¹⁵¹ and instructions and jury arguments to that effect appeared in many trials by the end of the century,¹⁵² though treatises did not discuss it until later.¹⁵³ By contrast, this Article has shown that the preponderance of the evidence standard appears in only a few sources antedating 1800, mostly in treatises or by implication in new trial cases.¹⁵⁴ Surely the reasonable doubt standard must have assisted at the birth of the preponderance standard, and there are at least three ways in which this may have occurred.

First, enunciating the new reasonable doubt standard for criminal cases naturally stimulated comparisons to civil cases. One way to explain reasonable doubt is to contrast it to the standard for civil cases, which requires stating that standard. Indeed, many of the early authorities mentioning the preponderance standard do so in the course of comparison to the “beyond a reasonable doubt” standard.¹⁵⁵ As the reasonable doubt standard became better known, it eventually became appropriate to caution jurors hearing civil cases to apply a standard different from that one. Even today, some civil jurors confuse the two standards.¹⁵⁶

150. *See Silva*, 1 Johns. Cas. at 199.

151. Shapiro, *Unchanging Standard*, *supra* note 106, at 274–75.

152. *E.g.*, *Rex v. Thomas Hardy*, 24 How. State Trials 199, 966 (London 1794) (depicting counsel arguing that a party must convince the jury “beyond all reasonable doubt”); *THE TRIAL OF THE CAUSE OF THE KING VERSUS THE BISHOP OF BANGOR* 119 (London 1796); *A REPORT OF THE WHOLE PROCEEDINGS ON THE TRIAL OF HENRY SHEARES AND JOHN SHEARES, ESQRS.* 64 (Dublin 1798); *AN AUTHENTIC REPORT OF THE TRIAL OF THOMAS LIDWELL, ESQ.* 88–90 (Dublin 1800); *THE TRIAL OF ARTHUR WALLACE* 48 (Dublin 1800).

153. *E.g.*, MACNALLY, *supra* note 69, at 578.

154. *See supra* text accompanying notes 67–69.

155. *See* MACNALLY, *supra* note 69, at 578; M’KINNON, *supra* note 69, at 63–64; GLASSFORD, *supra* note 69, at 656–57; 1 STARKIE, *supra* note 69, at 450–51 (“The distinction between full proof and mere preponderance of evidence is in its application very important.”).

156. *See supra* note 42.

Second, it could be that some of the causes of the reasonable doubt standard also helped bring about the preponderance standard. Here controversy arises because scholars have proposed three different explanations for the appearance of the reasonable doubt standard.¹⁵⁷ Their relative significance is disputed, but it seems clear enough that each of them played some role in the development of the “beyond a reasonable doubt” standard.

One of the three explanations might not be directly involved in the preponderance of the evidence standard because it is limited to criminal prosecutions. Professor John Langbein has shown that the appearance of defense counsel in eighteenth-century felony prosecutions led to increasingly adversarial proceedings and hence fostered procedural disputes and judicial decisions that made new law to resolve them, notably the law of criminal evidence and the reasonable doubt rule.¹⁵⁸ But in civil cases, representation by counsel and adversarial proceedings long antedate this period.

The second explanation of the reasonable doubt standard has some bearing on the preponderance standard through negative implication. Professor James Q. Whitman has traced the special standard for criminal matters to Christian qualms about taking responsibility for the shedding of blood even in judicial proceedings.¹⁵⁹ Because civil actions do not lead to hanging, such qualms could not have caused the rise of the preponderance of the evidence standard. They did leave room for a standard differing from the criminal standard, but that room had existed for centuries, so its filling in the eighteenth century needs additional explanation.

That leaves Professor Barbara Shapiro’s tracing of the reasonable doubt standard to the transition from a medieval concern with conscience to a more epistemological and scientific concern with how humans can acquire factual knowledge.¹⁶⁰ This led not only to the reasonable doubt standard but also to that of probable cause,¹⁶¹ and the preponderance of the evidence standard also belongs on that list. Indeed, this Article has already shown that references to “preponderance” and to the “weight of the evidence” hark back to Locke and others.¹⁶² Thus, reasonable doubt and preponderance grew from at least one common root.

157. Compare Barbara Shapiro, *The Beyond Reasonable Doubt Doctrine: ‘Moral Comfort’ or Standard of Proof?*, 2 *LAW & HUMAN* 149, 153 (2008), with Whitman, *supra* note 132, at 182.

158. LANGBEIN, *supra* note 1, at 265–66.

159. See WHITMAN, *supra* note 1.

160. See SHAPIRO, *HISTORICAL PERSPECTIVES*, *supra* note 1, at 1–41; Shapiro, *Unchanging Standard*, *supra* note 106; Barbara J. Shapiro, *‘Beyond Reasonable Doubt’: The Neglected Eighteenth-Century Context*, 8 *LAW & HUMAN* 19 (2014).

161. SHAPIRO, *HISTORICAL PERSPECTIVES*, *supra* note 1, at 113.

162. See *supra* Section III.C.

Third, the origin of different standards for civil and criminal cases is part of a broader trend to distinguish between these kinds of cases and to provide more safeguards for criminal defendants than for civil defendants. Not that all such safeguards were new: Judges had stated that juries should consider the evidence carefully before convicting in capital cases,¹⁶³ and it was a familiar maxim that it is better to acquit several guilty defendants than to convict one innocent one.¹⁶⁴ But in other ways, criminal defendants had been treated *more* harshly than civil parties. Determined to repress crime and maintain royal authority, the authorities denied them fundamental rights until late in the seventeenth century or afterward.¹⁶⁵ In still other ways, criminal cases were more like civil cases than they are today: Private parties usually prosecuted them and would often settle them for money.¹⁶⁶

As one approaches the period when the reasonable doubt and preponderance standards emerged, the belief that criminal defendants need protection led to their receiving rights that had long been available to parties in civil litigation. They were notified in writing of the charges against them before trial.¹⁶⁷ They could be represented by counsel.¹⁶⁸

163. Trial of the Seven Bishops, 12 How. State Trials 183, 304 (1688) (Powell, J.) (stating that in civil cases, “slender proof” will authenticate document, but is not enough to convict in criminal cases); 3 EDWARD COKE, INSTITUTES OF THE LAWE OF ENGLAND 137 (noting that in a capital case, “evidence should be so manifest, as it could not be contradicted”); FRANKLIN, *supra* note 108, at 32–33 (describing views of Baldus de Ubaldis in the fourteenth century).

164. See, e.g., JOHN FORTESCUE, A LEARNED COMMENDATION OF THE POLITIQUE LAWS OF ENGLAND 63 (Robert Mulcaster, trans., photo. reprint 1969) (1567); 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 189 (London 1736); Alexander Volokh, *Aside: n Guilty Men*, 146 U. PA. L. REV. 173, 180–85 (1997) (discussing the guilty–innocent tradeoff). For civil law antecedents, see *The Digest or Pandects*, in 11 S. P. SCOTT, THE CIVIL LAW tit. 19.5 (Cincinnati, Central Trust Co. 1932) (translating ULPAN, ON THE DUTIES OF PROCONSUL bk. VI, quoting the Roman Emperor Trajan: “It is better to permit the crime of a guilty person to go unpunished than to condemn one who is innocent”); PETER HOLTAPPELS, DIE ENTWICKLUNGSGESCHICHTE DES GRUNDSATZES “IN DUBIO PRO REO” 9–10, 17 (1965).

165. See Philip B. Kurland & D. W. M. Waters, *Public Prosecutions in England, 1854–79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 494–97.

166. See J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, at 35–59 (1986) (discussing the role of private parties in criminal prosecution); Norma Landau, *Indictment for Fun and Profit: A Prosecutor’s Reward at Eighteenth-Century Quarter Sessions*, 17 L. & HIST. REV. 507 (1999) (noting the financial incentives for private parties to prosecute in England’s criminal courts). *But see* David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475 (1995) (outlining the problems of England’s lack of incentives for private criminal prosecution).

167. See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1058 (1994).

168. See ALLYSON N. MAY, THE BAR AND THE OLD BAILEY, 1750–1850, at 2 (2003) (discussing the Treason Trials Act of 1696 granting the right to full legal representation); John H.

They could present, subpoena, and swear witnesses.¹⁶⁹ Courts also began to recognize the presumption of innocence, placing the burden of producing evidence on the prosecution.¹⁷⁰

Eventually, it became possible to argue that criminal defendants require more extensive procedural rights than civil parties. This certainly happened in the United States, where the Bill of Rights gave special protection to criminal defendants.¹⁷¹ Thus, James Wilson argued that a majority verdict should suffice in a civil case but that only unanimity would suffice in a criminal one.¹⁷² Similarly, Thomas Erskine's argument in the *Dean of St. Asaph's Case* for the right of a jury to give a general verdict in a criminal case controverted in detail the claim that there was no relevant difference between civil and criminal cases.¹⁷³ However, Erskine did not mention the difference between the civil and criminal standards of persuasion among the criminal safeguards he mentioned because he spoke in 1784 before the civil burden had been clearly formulated.¹⁷⁴ Twenty years later, that difference might have been sufficiently salient to help support his argument.

F. Voltaire's Influence?

It is not impossible that Voltaire influenced some of the English writers—an ironic influence indeed because nowadays French law governs both civil and criminal cases by a “deepseated conviction” (*intime conviction*) standard.¹⁷⁵ In 1772, when the preponderance standard had only begun to sprout,¹⁷⁶ Voltaire published his *Essai sur les*

Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314 (1999).

169. See BEATTIE, *supra* note 166, at 36; Landau, *supra* note 166, at 526–27; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 434–35 (London, 3d ed. 1739); Fisher, *supra* note 78, at 597–624.

170. BEATTIE, *supra* note 166, at 341, 349; LANGBEIN, *supra* note 1, at 61–62.

171. *E.g.*, U.S. CONST., amends. V–VII (1789).

172. Wilson, *supra* note 139, at 352–53.

173. 21 How. State Trials 847, 977–80 (1784).

174. The four criminal safeguards he mentioned were: (1) the need for a grand jury indictment; (2) the requirement of a general plea of not guilty; (3) the unavailability of a new trial after acquittal; and (4) the Crown's inability to attain allegedly perjured jurors. *Id.* at 977. Arguably, however, all of these demonstrated the prerogatives of the jury and hence supported a jury's right to render a general verdict, which is not the case for the criminal standard of persuasion.

175. See sources cited *supra* notes 35–38. Although the *intime conviction* standard for civil and criminal cases did not exist in French law when Voltaire wrote, I have found no indication other than in his *Essai* that differing standards were proposed.

176. See *supra* text accompanying note 63.

Probabilités en Fait de Justice,¹⁷⁷ an intervention in a much publicized criminal case, in which he attempted to compare numerically the force of the evidence for and against the Count of Morangiès. At the outset, he distinguished civil from criminal proceedings:

If the point is to construe an equivocal will or an ambiguous clause in a marriage contract, or to interpret an obscure law about inheritance or commerce, you are absolutely bound to decide, as the greater probability guides you. Only money is in question.¹⁷⁸

But it is not the same when the point is to deprive a citizen of life or honor. Then the greater probability does not suffice. Why? Because when two parties dispute about land, it is obviously necessary for the public interest and for private justice that one of the two parties possesses the land. It is impossible that it should belong to no one. But when a man is accused of a crime, it is not obviously necessary that he should be sent to the executioner on the greater probability. It is very possible that he may live without disturbing the state. It may be that twenty appearances against him may be balanced away by one in his favor.¹⁷⁹

This presentation of the difference between civil and criminal standards, and of the rationale for their difference, is far more specific than anything appearing in England for decades after Voltaire wrote.

Although there is no direct evidence that Voltaire's formulation affected the unfolding of the preponderance standard in England, one cannot rule out the possibility of influence. Voltaire had readers and acquaintances in England.¹⁸⁰ During the eighteenth century, legal texts in English mentioned him more than eighty times.¹⁸¹ Indeed, one of

177. VOLTAIRE, 74A LES OEUVRES COMPLÈTES DE VOLTAIRE 300 (Voltaire Found. ed., 2006). For a description of the controversy, see Sarah Maza, *The Véron-Morangiès Affair, 1771–1773: The Social Imagery of Political Crisis*, 18 HISTORICAL REFLECTIONS/RÉFLEXIONS HISTORIQUES 101 (1992).

178. VOLTAIRE, *supra* note 177, at 306.

179. *Id.* Voltaire was evidently thinking of the resolution of legal as well as factual issues. For Condorcet's reaction to this work, see KEITH MICHAEL BAKER, CONDORCET: FROM NATURAL PHILOSOPHY TO SOCIAL MATHEMATICS 231–36 (1975).

180. See ARCHIBALD BALLANTYNE, VOLTAIRE'S VISIT TO ENGLAND 1726–1729, at 229–324 (London, 1893) (describing contacts in the third quarter of the eighteenth century); Ronald S. Crane, *The Diffusion of Voltaire's Writings in England, 1750–1800*, 20 MOD. PHILOLOGY 261 (1923) (discussing the impacts of Voltaire's works on eighteenth-century England).

181. See *Eighteenth Century Collection Online: Results*, EIGHTEENTH CENTURY COLLECTIONS ONLINE (ECCO), <http://find.galegroup.com/ecco/start.do?prodId=ECCO>

Voltaire's discussions of the Morangiès case—though not the discussion considering the standard of proof—was published in London, both in French and in English, in 1774.¹⁸² This is not definitive proof, or even proof by a preponderance, but it is at least suggestive.

G. Putting the Pieces Together

The emergence of the preponderance of the evidence standard in civil cases has many antecedents. The standard presupposes widespread recognition among legal systems that one party or another carries a burden of persuasion, or more broadly a burden of proof. Its phrasing draws on a theory of judgment, well established by the onset of the eighteenth century, in which the person making a decision weighs evidence supporting one choice against evidence supporting another. It further presumes a notion that such a comparison can support varying levels of belief. This notion, drawing on old currents of thought, had reached a new form in that era. Courts then began to say that a preponderance of the evidence would not justify vacating a jury's verdict, deploying a phrase and implying a standard that commentators could easily use to posit a standard of persuasion for judges and jurors. The desire to control juries thus played a role in the development, as it has in the development of so many features of common law procedure. Then, the appearance of the requirement of proof beyond a reasonable doubt in criminal trials catalyzed the precipitation of its civil counterpart.

Critics may claim that this explanation treats the evolution of ideas and formulations as autonomous, reflective perhaps of intellectual forces but divorced from social and political ones. Yet it is not easy to establish a social or political impact for standards applied in litigations brought by a variety of plaintiffs raising a variety of claims. One might view the new standard against a background of rising litigation costs and shrinking dockets¹⁸³ and see it as counteracting these trends by making things easier

(subscription required) (uncheck all subject areas except for "Law" and search "Advanced Search" for "Voltaire") Search of Eighteenth Century Collections Online database, category "Law", for "Voltaire" (last visited Aug. 20, 2015).

182. FRAGMENTS RELATING TO THE LATE REVOLUTIONS IN INDIA, THE DEATH OF COUNT LALLY, AND THE PROSECUTION OF COUNT DE MORANGIÈS (London trans., 1774); L'ÉVANGILE DU JOUR (London ed., 1774); see also 5 HORACE WALPOLE'S CORRESPONDENCE 365–65, 419 (W.S. Lewis & Warren Hunting Smith, Yale Univ. Press 1937) (1773), available at <http://images.library.yale.edu/hwcorrespondence/> (search "Search For a Specific Citation" for "Volume 5, Page 365").

183. See DAVID LEMMINGS, LAW AND GOVERNMENT IN ENGLAND DURING THE LONG EIGHTEENTH CENTURY 57–64 (2011) (providing context for eighteenth-century English courts through litigation patterns); CHRISTOPHER W. BROOKS, LAWYERS, LITIGATION AND ENGLISH SOCIETY SINCE 1450, at 27–62 (1998); see also Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740–1840*, 80 NW. U. L. REV.

for plaintiffs. One might also wonder if the seemingly mechanical process evoked by the preponderance standard covered up the arbitrariness of decisions by elite jurors¹⁸⁴ in an era of increasing unrest and revolution, or if it enshrined the rationalistic ideology of a departing era against the romanticism of an arriving one. The arrival of the standard could be ascribed to an attempt to get jurors to decide cases under the law laid down by judges, acting as finders of fact rather than wielders of moral judgment. These interpretations, and no doubt others, are consistent with the story this Article narrates, though not compelled by it.

In any event, the enunciation of the preponderance standard remained marginal well beyond the end of the eighteenth century. It appeared mainly in treatises, less in judicial opinions, and seemingly not at all in instructions to civil juries—quite unlike the reasonable doubt standard, which originated in advocates' arguments and judges' instructions. It may have consoled theoreticians of the law but could scarcely have had much practical impact on jurors who were not told about it. Its implementation was yet to come.

IV. THE NINETEENTH CENTURY AND BEYOND

Although recognized by a handful of authors, the preponderance of the evidence standard was far from established as effective reality at the outset of the nineteenth century, and it proceeded to develop in quite different ways in England and the United States. In England, courts replaced the "preponderance" phrasing with "the balance of probability," and neither form appeared in jury instructions for a long time. In the United States, preponderance jury instructions were likewise tardy, but not to the same extent: they became prevalent around the middle of the century, though debate continued as to their scope and meaning. The causes for this discrepancy between nations include the greater role that judicial comments on the evidence continued to play in England and the right of lawyers in the United States to submit instructions and require judges to give them.

807, 873 (1986) ("In the face of enormous increases in the number of suits commenced during the period 1740-1840, rising trial costs appear to have caused fewer cases to proceed to trial.").

184. On the property needed for juror service, see 3 BLACKSTONE, *supra* note 145, at *362-63; JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 153-73 (2006).

A. England

The current state of English law is clear. In the few civil cases still tried by jury in England—mostly defamation cases¹⁸⁵—the judges tell jurors that the party bearing the burden of persuasion must establish its contentions by a balance of probabilities.¹⁸⁶ In nonjury civil cases, judges apply the same standard.¹⁸⁷ But how English courts reached this point is unclear.

According to Henry John Stephen's assertions, by 1844 the instructions of judges left it to "the jury to determine for themselves the credit and weight to which [the witnesses] are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or defendant."¹⁸⁸ That principle certainly appeared in evidence treatises.¹⁸⁹

But evidence exists to the contrary, and leaves it highly unlikely that at this time, judges instructed juries about the preponderance standard. Stephen's statement that judges left it to jurors to decide where the preponderance lay implies that judges used preponderance language. There are no contemporaneous appellate discussions, however, of what instruction juries should receive about the standard of persuasion, and the few complete reports of civil trials from this period continued to use the eighteenth-century formulations described previously.¹⁹⁰ Courts told

185. See Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEG. HIST. 253 (2005). As a result of Defamation Act 2013, c. 26, § 11, jury trials will now be unlikely even in defamation cases.

186. E.g., *Jameel v. Wall St. Journal Eur. Sprl.*, [2006] UKHL 44, [2007] 1 A.C. 359, ¶ 59 (H.L. 2006) (detailing jury instructions); PATRICK DEVLIN, *TRIAL BY JURY* 62 (1966).

187. E.g., *Sienkiewicz v. Greif Ltd.*, [2011] UKSC 10, 2 A.C. 229 (appeal taken from Eng.), ¶ 6; COLIN TAPPER, *CROSS AND TAPPER ON EVIDENCE* 154 (10th ed. 2004) ("[A]ll evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted.").

188. 3 HENRY JOHN STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 617 (London, 1844). Stephen was an authority on pleading, but "a man of nervous and retiring disposition, and, though an accomplished lawyer, obtained no great professional success." Leslie Stephen, *Stephen, Henry John (1787-1864), Serjeant-at-Law*, in *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* (Patrick Polden, rev., H.C.G. Matthew & Brian Harrison eds., 2004), available at <http://www.oxforddnb.com/view/article/26372> (subscription required). Proceduralists remember Henry John Stephen as the author of *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* (London, 1824), whose elucidation of the logic of common law pleading helped give that pleading a longer life than it deserved.

189. See *supra* note 69. Most of these works went into revised editions, which carried over the "preponderance" language. See also *Hartley v. Cook*, (1832) 172 Eng. Rep. 1045, 1049 (K.B.); 5 Car. & P. 441, 449 (giving preponderance instructions as to one issue in the case).

190. See *supra* Section II.B.

jurors that “it is for you to say whether you are satisfied”¹⁹¹ or to “say, whether, upon the whole”¹⁹² a party has established a fact. One commentator criticized “[t]he too common mode of summing up— ‘Gentlemen, if you think so and so, you will find for the plaintiff’” because he thought it did not suffice in the absence of judicial comments on the evidence, but his point was that judges should comment, not that an “if you think” charge was inadequate to prescribe the jury’s function.¹⁹³ The *nisi prius* reports, which may not reproduce the whole jury charge, use similar phrases even in the 1860s.¹⁹⁴

By that time, however, the courts were beginning to move toward preponderance charges. In 1851, Baron Alderson stated—but not to a jury and not in a regularly reported case—that

in ordinary civil cases, a jury must give its verdict for the side on which there is any preponderance of evidence; but where the question is, as it frequently will be now, which of

191. *E.g.*, CULVERWELL V. SIDEBOTTOM, A LETTER TO HER MAJESTY’S ATTORNEY-GENERAL, WITH A FULL REPORT OF THE ABOVE EXTRAORDINARY TRIAL 24 (Effingham Wilson, London 1857) (“If these two points were established to the satisfaction of the jury . . .”); W.B. GURNEY REPORT OF THE LATE IMPORTANT TRIAL IN THE COURT OF KING’S BENCH, IN WHICH SIR CHARLES MERIK BURRELL, BART. WAS PLAINTIFF, AND HENRY JOHN NICHOLSON, THE DEFENDANT 191 (London, J.B. Nichols & Son 1834); *accord* PROCEEDINGS ON THE TRIAL OF THE CAUSE JACOB MORGAN, PLAINTIFF, VERSUS THE REV. ILTYD NICHOLL, DEFENDANT 210 (London, C.W. Reynell 1858) (“[W]hether you are satisfied by the evidence . . .”); REPORT OF AN ACTION FOR LIBEL HAD BEFORE BARON SIR WM. CUSACK SMITH, BARONET, AT NISI PRIUS, IN THE COURT OF EXCHEQUER 98 (Dublin, George Folds 1834) (“[I]f you should be of the opinion . . .”); REPORT OF THE TRIAL OF THE ACTION, BOGLE VERSUS LAWSON 169 (London, John Hatchard & Son 1841) (“If they were satisfied upon the evidence . . .”). Earlier reports are comparable. *See, e.g.*, W.B. GURNEY, A REPORT OF THE TRIAL OF THE ACTION, BROUGHT BY MESSRS. SEVERN, KING, AND CO. AGAINST THE IMPERIAL INSURANCE COMPANY 247 (London, John Major 1820) (“Whether, you do think, or do not think . . .”); IN THE KING’S BENCH, WILLIAM BEER AND REBECCA HIS WIFE, LAWRENCE DUNDAS HENRY COKBURNE AND MARY TERESA HIS WIFE, ELIZABETH COTTON WIDOW, RALPH ADDERLEY AND ROSAMOND HIS WIFE, AND JOHN ROBERT BROWN CAVE, AND CATHERINE PENELOPE, HIS WIFE VERSUS THE REVEREND RICHARD ROWLAND WARD 311 (“You will exercise your own judgment, and if exercising that judgment you bring yourself to think, . . .”); REPORT OF THE TRIAL OF THE CAUSE BETWEEN JOHN CULLEN AND ARTHUR MORRIS 75 (London, Howard and Roscoe 1820) (“[I]f you are of that opinion . . .”); THOMAS WAKLEY, REPORT OF THE TRIAL OF COOPER V. WAKLEY, FOR AN ALLEGED LIBEL 145 (London, Lancet 1829) (“If you are of opinion the defendant has made out what it was incumbent on him to make out . . . if, on the other hand, you are not satisfied . . .”).

192. MOSS V. SMITH, TRIED BEFORE LORD CHIEF JUSTICE WILDE AND A SPECIAL JURY 290 (London 1848).

193. 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE 28 (London 1848).

194. *E.g.*, Strauss v. Francis, (1866) 176 Eng. Rep. 926, 929 (K.B.); 4 F. & F. 1107, 1116 (“If you think . . .”); Henderson v. Lloyd, (1862) 176 Eng. Rep. 4, 5 (K.B.); 3 F. & F. 7, 9 (“If they thought . . .”); Watts v. Ainsworth, (1862) 176 Eng. Rep. 6, 7 (K.B.); 3 F. & F. 12, 13 (“[W]hether they were satisfied . . .”).

the parties has committed perjury, I think the jury ought to be slow in coming to a conclusion.¹⁹⁵

This is apparently the first reported statement by an English judge clearly stating that the preponderance standard is a rule of law, and even it contains a bit of hesitation. Meanwhile, judges in the new county courts heard many law cases without juries¹⁹⁶ and sometimes stated their conclusions in preponderance terms.¹⁹⁷ When a jury was present, the judge might have stated his own view of the preponderance of evidence, adding that it did not bind the jury.¹⁹⁸ At last a few explicit instructions appeared, but they called on the jury to balance the probabilities, not to decide on the preponderance of the evidence.¹⁹⁹

One plausible conclusion from these scattered and indecisive records is that no one considered the details of the charge as to the standard of persuasion to be worth fussing over. Even today, it is not clear that a preponderance charge accomplishes anything. Victorian judges continued to comment on the evidence, sometimes in such a vigorous way that specifying the standard of persuasion would have added little.²⁰⁰ Additionally, it does not appear that courts expected lawyers to propose instructions: even at the end of the century, a standard practitioners' text devoted only three sentences to the judge's summation.²⁰¹

195. *Hornidge v. Hawkins*, MORNING CHRONICLE (London), Nov. 26, 1851, at 7 (referring to the fact that parties could now testify under An Act to Amend the Law of Evidence, 1851, 14 & 15 Vict., c. 99, § 2).

196. *E.g.*, County Courts Act of 1846, 9 & 10 Vict., c. 95, §§ 69–70 (1846); Hanly, *supra* note 185, at 266–67.

197. *E.g.*, *Higham v. Holding*, THE PRESTON GUARDIAN, Mar. 10, 1849 (Cty. Ct.); *Stewart v. Durand*, LIVERPOOL MERCURY, June 8, 1864 (Cty. Ct.); *Burden v. Egerton*, HAMPSHIRE TELEGRAPH AND SUSSEX CHRONICLE, May 1, 1869 (Cty. Ct.). Equity courts sitting without juries likewise continued to use the phrase. *E.g.*, *Page v. Horne*, (1848) 50 Eng. Rep. 804, 806 (Rolls Ct.); 11 Beav. 227, 234.

198. *Weblake v. Montague*, DAILY NEWS (London), May 6, 1853 (Exch.) (Alderson, B.); *Fleming v. Smith*, DAILY NEWS (London), Dec. 17, 1857 (Q.B.) (Campbell, J.); *Langhorne v. Langhorne*, TIMES, June 12, 1896, at 14 (Prob., Div. & Adm. Div.).

199. *Mulloney v. Aston*, BIRMINGHAM DAILY POST, Aug. 7, 1863 (Nisi Prius Ct.); *M'Queen v. Great Western Ry.*, WESTERN MAIL (Cardiff, Wales), Nov. 27, 1874 (Q.B.). Lord Chief Justice Cockburn gave both instructions. In an Irish case, an exasperated judge told an indecisive jury: "Try to make up your minds, on what grounds I don't care, where the balance of probability lies." *O'Brien v. De Courcy (City of Cork Sessions)*, KERRY STAR, Apr. 7, 1862, at 4 (Irish Newspaper Archives).

200. *E.g.*, *Perionowsky v. Freeman*, 176 Eng. Rep. 873, 875 (1866) (Cockburn, C. J.); 4 F. & F. 977, 982 ("[I]t was incredible that [doctors] should have allowed the man to be treated in their presence as had been described by him."); *Scott v. Wakem.*, (1862) 176 Eng. Rep. 147, 149–50 (Bramwell, B.); 3 F. & F. 328, 332–34.

201. W. BLAKE ODGERS, THE PRINCIPLES OF PLEADING, PRACTICE, AND PROCEDURE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE 286 (London, 3d ed. 1897).

Lack of attention may also explain why the transition from the preponderance of the evidence standard to the balance of probabilities standard was a gradual one not traceable to any definitive decision or enactment. Indeed, even now, English judicial references to the preponderance of the evidence standard are easy to find.²⁰² Likewise, the nineteenth century provides at least a few examples of the phrase “balance of probabilities”²⁰³ and a few hybrid forms.²⁰⁴

Granted the fuzziness of the transition, the most that can be said is that the balance of probabilities standard gradually established itself during the first quarter of the twentieth century. During that period, while references to the preponderance standard continued, other authorities accepted the balance of probabilities standard.²⁰⁵ In 1922, the Court of Appeal stated that courts must “determine on a balance of probabilities, as in every case of circumstantial evidence.”²⁰⁶

Unfortunately, no one seems to have stated in writing why this shift was desirable or even what difference it made. Perhaps judges thought comparing the probability of opposing views of the facts was a more helpful guide to decision than weighing evidence on scales, even though the “balance” metaphor survived in the new standard. Perhaps judges thought a standard that spoke of probabilities was more modern and scientific. It may also be that the change somehow relates to the fact that between 1913 and 1919, the rate of civil jury trials in the superior courts fell from fifty-five percent to sixteen percent,²⁰⁷ but it is not clear why the preponderance standard might have been thought more fitting for jurors or less so for judges. Possibly the problem with preponderance was that the Victorian precedents on new trials had sometimes relied on a

202. *E.g.*, *Ganz v. Childs*, [2011] All E.R. (D) 35 (Q.B.D. 2011); *Mayor of London v. Hall*, [2010] All E.R. (D) 171 (C.A. 2010).

203. *Owners of the P. Caland v. Glamorgan Steamship Company*, [1893] A.C. 207 (H.L.); *see supra* notes 188–89 and accompanying text.

204. *E.g.*, *Cooper v. Slade*, 10 Eng. Rep. 1488, 1498, VI H.L.C. 746, 772 (H.L. 1858) (Eng.); 10 E.R. 1488, 1498 (finding that “preponderance of probability” may ground decision); *Rex v. Burdett*, 106 Eng. Rep. 873, 883 (K.B. 1820); 4 B. & Ald. 95, 122 (stating that in criminal cases, “the superior number of probabilities on one side and on the other” should guide courts).

205. *Compare* JOSEPH A. SHEARWOOD, *QUESTIONS AND ANSWERS ON THE LAW OF CIVIL PROCEDURE AND EVIDENCE* 133 (1911), *and* ERNEST COCKLE, *CASES AND STATUTES ON THE LAW OF EVIDENCE* 141 (Sidney L. Phipson ed., 4th ed. 1925) (preponderance standard), *with* EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 96 (1929) (balance of probability).

206. *La Compañía Martiartu v. Corp. of the Royal Exchange Ins.*, [1923] 1 K.B. 650 (C.A. 1922); *see also* *Att’y-Gen’l v. Cory Bros.*, [1921] 1 A.C. 521, 552 (H.L. 1921) (Eng.); *Mendip Range v. Radcliffe*, [1921] 1 A.C. 556, 576 (H.L. 1921); *Thomas v. Jones*, [1921] 1 K.B. 22 (C.A. 1920).

207. Hanly, *supra* note 185, at 278. The decline was due both to litigants’ choices and to legislation giving judges the power to deny jury trial. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 51 (1977).

“preponderance of the evidence” or the like against the verdict to describe what evidence *would* authorize imposing a new trial, and was hence more than the trier of fact needed to find to reach its decision.²⁰⁸ In any event, the cause for the change of formulations remains a mystery.

B. *The United States*

Until late in the 1840s, the preponderance standard was by no means established in U.S. courtrooms. It does appear in a few reported instructions,²⁰⁹ and toward the end of this period in Professor Simon Greenleaf’s influential treatise,²¹⁰ but when judges referred to a preponderance of the evidence standard, it was usually to describe what would *not* suffice to grant a new trial.²¹¹ On the other hand, none of the published civil trials available contain a preponderance charge,²¹² nor do practice books refer to one.²¹³ There are even a few references in civil

208. *Directors of Dublin, W & W. Ry. v. Slattery*, 3 App. Cas. 1155 (H.L. 1878) (Eng.); *Metropolitan Ry. v. Wright*, 11 App. Cas. 152 (H.L. 1886) (Eng.); *Toronto Ry. v. King*, [1908] A.C. 260 (P.C. 1908) (Can.). This was a divergence from the older authorities described in Section III.D.

209. *See, e.g.*, *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Martin*, 82 Ind. 476, 487 (1882); *Kornegay v. White*, 10 Ala. 255 (1846); *Walker v. State*, 6 Blackf. 1, 4 (Ind. 1841); *Hughes v. Boyer*, 9 Watts 556, 560 (Pa. 1840); *see also* *Corks v. The Belle*, 6 F. Cas. 558, 558 (S.D.N.Y. 1846) (describing the standard for admiralty judges).

210. 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 575 (Boston 1842). In a later edition, Greenleaf added a not very persuasive reason: “In civil cases . . . the mischief of an erroneous conclusion is not deemed remediless.” 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 74 (3d ed. 1846).

211. *See, e.g.*, *United States v. Three Cases*, 28 F. Cas. 109, 110 (S.D.N.Y. 1845); *Cain v. Cain*, 40 Ky. 213, 213 (1841); *Yarborough v. Abernathy*, 19 Tenn. 413, 418 (1838).

212. *See* 1 W.D. ALEXANDER & JOHN C. LOWBER, *REPORT OF THE CASE OF ALEXANDER AND OTHERS AGAINST THE PRESIDENT, MANAGERS AND COMPANY OF THE SCHUYLKILL NAVIGATION COMPANY* 78 (Phila. 1825) (instructing the jury, “They must satisfy you”); 1 ARCULARIUS AND WILLIAM COLEMAN, *A FAITHFUL REPORT OF THE TRIAL OF THE CAUSE OF PHILIP I* 57 (N.Y.C. 1807) (instructing the jury, “If then you shall think”); 1 WILLIAM SAMPSON, *IS A WHALE A FISH? AN ACCURATE REPORT OF THE CASE OF JAMES MAURICE AGAINST SAMUEL JUDD* 78 (N.Y.C. 1819) (instructing the jury, “If . . . you are of opinion”); 1 ANTHONY SHERMER & JOSEPH RUSLING, *REPORT OF THE IMPORTANT TRIAL OF SHERMER V. RUSLING* 20 (Philadelphia 1833) (stating that members of the “jury are to judge of the testimony, and thence determine”); 1 JOHN TAYLOR, *A REPORT OF THE TRIAL OF THE CAUSE OF JOHN TAYLOR VS. EDWARD C. DELAVAN* 48 (Albany 1840) (“If you are satisfied . . .” and “you are carefully to weigh and compare all the evidence . . .”). Newspaper reports, although no doubt summaries, likewise indicate instructions of the traditional kind. *See, e.g.*, *Taft v. Buffum* (Mass. S.J.C. 1834) (Shaw, C.J.) (“[I]f they were satisfied . . .”), *MASS. SPY*, May 21, 1834, at 3; *Evans v. Coburn* (Mass. Comm. Pleas 1845) (“[I]f they believed”), *BOS. DAILY ATLAS*, Jan. 23, 1845, at 2; *Landlord v. Tenant* (N.Y.C. Super. Ct. 1828) (“[I]f they believed”), *AMERICAN*, Nov. 24, 1828, at 2. These newspapers are from the America’s Historical Newspapers database.

213. *See, e.g.*, 3 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 491–93 (2d ed. Philadelphia 1854); SAMUEL HOWE, *THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW*, IN

cases to proof beyond a reasonable doubt.²¹⁴ One reason why American judges were slow to develop more specific and uniform instructions on the standard of proof may have been that colonial judges, often lacking in legal education, gave no judicial jury instructions in some colonies and only rudimentary ones in others.²¹⁵

Around the middle of the nineteenth century, appellate decisions requiring jury instructions under the preponderance of the evidence standard appeared and multiplied.²¹⁶ A few states even wrote the standard into their statutes.²¹⁷ Lawyers began to dispute its scope and meaning.

One set of disputes concerned whether the proof of certain matters should require *more* than a preponderance—as in today’s requirement of clear and convincing evidence for some proceedings and issues.²¹⁸ Indeed, courts imposed such requirements for a variety of issues.²¹⁹ For example, when an insurance company claimed that the insured deliberately set the fire destroying the insured property, the court required it to prove the arson beyond a reasonable doubt.²²⁰ Additionally, a

MASSACHUSETTS 255–56, at 511–15 (Richard S. Fay & Jonathan Chapman eds. Boston 1834); 2 JOSEPH R. SWAN, *THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW*, IN OHIO 609–10, at 1138–39 (Columbus, 1845–50).

214. *See, e.g.*, *Washburn v. Gould*, 29 F. Cas. 312, 320 (D. Mass. 1844) (Story, J.) (ruling that the defendant must prove that the invention existed before plaintiff patented it beyond a reasonable doubt); 1 DANIEL ROGERS, *REPORT OF THE TRIAL OF JOHN QUAY, VS. THE EAGLE FIRE COMPANY OF NEW YORK* 51 (New York 1817) (stating that the jury should believe “the black man” only if no reasonable doubt existed).

215. *See* William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 909–11 (1978); *see also* JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW* 495–97 (2009).

216. *See, e.g.*, *Black v. Thornton*, 30 Ga. 361, 374 (1860); *Barfield v. Britt*, 47 N.C. 41, 45 (1854); *Hopper v. Ashley*, 15 Ala. 457, 467–71 (1849).

217. *See, e.g.*, CAL. CIV. PROC. CODE § 1826, *in 2 THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA* 482 (Creed Haymond et al. 1872); GA. CODE ANN. § 3672, *in THE CODE OF THE STATE OF GEORGIA* 697 (R.H. Clark et al. 1861) (adopted 1862); OR. REV. STAT. § 835(5), *in THE ORGANIC AND OTHER GENERAL LAWS OF OREGON* 356 (M.P. Dedy 1866) (adopted 1862).

218. *See* BROWN ET AL., *supra* note 17, § 340.

219. *See, e.g.*, *McNeill v. Norsworthy*, 39 Ala. 156, 159 (1863) (requiring clear and convincing evidence to prove that an apparent conveyance was a mortgage); *Roberts v. Woods*, 82 Ill. App. 630, 640 (1894) (requiring clear and satisfactory evidence to show fraud); *Monroe v. Graves*, 23 Iowa 597, 599 (1867) (requiring clear and conclusive evidence to establish parol trust); *Elliott v. Holder*, 40 Tenn. 698, 700 (1859) (requiring clear and convincing evidence to rebut presumption that those receiving slaves as joint property continued to hold them as such).

220. *Barton v. Thompson*, 46 Iowa 30 (1877), *overruled in part*, *Welch v. Jugenheimer*, 56 Iowa 11 (1881); *Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N.J.L. 441 (N.J. Sup. Ct. 1876), *rev’d*, 39 N.J.L. 697 (1877); *see also* *Sprague v. Dodge*, 48 Ill. 142 (1868) (noting that Illinois law required a plaintiff to prove any criminal element of a civil case beyond a reasonable doubt); *Sinclair v. Jackson*, 47 Me. 102 (1860) (same under Maine law); *Burckhalter v. Coward*, 16 S.C. 435 (1882) (holding that the defendant must show truth of slanderous words imputing crime by proof beyond a reasonable doubt); *Thurtell v. Beaumont*, 130 Eng. Rep. 136 (C.P. 1823); 1 Bing.

statutory right to increased damages might trigger an increased standard of proof.²²¹ At least one case, by contrast, held in effect that the court might lower the standard when the defendant's wrongful act placed it beyond the plaintiff's power to prove his damages with precision.²²²

Other disputes concerned the phrasing and meaning of the preponderance standard, which this Article has shown are still issues today.²²³ Some courts opined that the preponderance of evidence must convince or satisfy jurors to warrant a verdict for the party bearing the burden of persuasion.²²⁴ Others saw no need for the jury to be satisfied, rejecting what had been a common formulation a few decades earlier.²²⁵ Some courts condemned as too weakly supported judgments based on the conclusion that the plaintiff's case was more probable than the defendant's.²²⁶ Others thought that probabilities in the plaintiff's favor were sufficient.²²⁷

In the twentieth century, academics took up the possible significance of the jury's actual belief²²⁸ and of probability theory,²²⁹ leading to the view that the jury must indeed be convinced, but convinced only that the proponent's claim was more probable than not.²³⁰ Logically, that view is not really a compromise because it reduces to almost nothing the role of the jury's belief, but if incorporated into an instruction, it might have the

339; see also 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 25 n.1 (15th ed. 1892) (discussing conflicting cases on whether a criminal act alleged in a civil suit must be proved beyond a reasonable doubt).

221. Compare *Hitchcock v. Munger*, 15 N.H. 97, 101 (1844), with *Thayer v. Boyle*, 30 Me. 475, 475 (1849).

222. See *Tea v. Gates*, 10 Ind. 164, 166 (1858). Later cases treat this as a principle of damages law, not a modification of the standard of persuasion. E.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563–64 (1931).

223. See *supra* Sections I.A, I.C.

224. E.g., *Jarrell v. Lillie*, 40 Ala. 271, 273 (1866); *Mays v. Williams*, 27 Ala. 267, 273 (1855); *Richardson v. Burleigh*, 85 Mass. 479, 481 (1862); *Gores v. Graff*, 77 Wis. 174 (1890).

225. E.g., *Hopper v. Ashley*, 15 Ala. 457, 470 (1849); *Murphy v. Waterhouse*, 113 Cal. 467, 473 (Calif. 1896); *Black v. Thornton*, 31 Ga. 641 (1860); *Herrick v. Gary*, 83 Ill. 85, 89 (1876); *Chapman v. McAdams*, 69 Tenn. 500, 503 (Tenn. 1878); CHARLES HUGHES, THE LAW OF INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL ACTIONS 188–89 (1905).

226. See, e.g., *Warner v. Crandall*, 65 Ill. 195, 197 (1872); *Haskins v. Haskins*, 75 Mass. 390, 390 (1857); *Dunbar v. McGill*, 64 Mich. 676, 682 (1889).

227. See, e.g., *Murphy v. Waterhouse*, 45 Pac. 866 (Calif. 1896); *Crabtree v. Reed*, 50 Ill. 206, 207 (1869).

228. William Trickett, *Preponderance of Evidence, and Reasonable Doubt*, 10 FORUM 75 (1906).

229. MICHAEL & ADLER, *supra* note 45, at 141–42.

230. See, e.g., Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 53 (1961); J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 249 (1944); Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 64–67 (1933).

practical effect of making jurors slightly more reluctant to find for plaintiffs than under a plain preponderance charge.

As these citations and disputes establish, the third quarter of the nineteenth century witnessed an enormous growth in the number of decisions considering the preponderance standard, and presumably in the number of judges charging juries about it. The detail of jury instructions undoubtedly varied from state to state²³¹ and from case to case. Thus, a set of civil jury instructions drafted by Abraham Lincoln in 1859 used the old “if they believe from the evidence” formulation.²³² But clearly something had changed, and the change was greater than the increase in reported decisions of all sorts during these years could explain. Simple comparison with the contemporary English record demonstrates this. Four explanations for the divergence are worth considering.

First, beginning around midcentury, lawyers gained increased control over jury instructions, while judicial power was reined in. Legislation in many states provided for lawyers to submit proposed instructions in writing and obliged judges to state which proposed instructions they would give.²³³ In at least one state, the judge could not give any instruction not proposed by counsel.²³⁴ As requests for instructions became the general practice, and as their improper denial led to appellate reversal, lawyers were able to pressure judges to charge on relevant matters, including the standard of persuasion. As a result, both instructions and disputes about them were likely to multiply.

Second, during this same period, states increasingly restricted the power of American judges to comment on the evidence—a further gain of power for lawyers at the expense of the judiciary.²³⁵ Under the law of conservation of verbiage that governs all legal matters, more detailed instructions on the law, including the standard of persuasion, were likely

231. See T.A. GREEN, A GENERAL TREATISE ON PLEADING AND PRACTICE IN CIVIL PROCEEDINGS AT LAW AND IN EQUITY UNDER THE CODE SYSTEM § 1051 (W.J. Gilbert 1879).

232. *Fairchild v. Capps & St. Clair* (Sept. 1859), reproduced in STACY PRATT McDERMOTT, THE JURY IN LINCOLN’S AMERICA 120 (2012).

233. *E.g.*, 2 JOHN SALES, EARLY LAWS OF TEXAS 99 (2d ed. 1891) (1846 statute); 1 SAMUEL H. TREAT, THE STATUTES OF ILLINOIS 261 (1858); 2 THE REVISED STATUTES OF INDIANA, PASSED AT THE THIRTY-SIXTH SESSION OF THE GENERAL ASSEMBLY § 324 (1852); REVISION OF 1860, CONTAINING ALL THE STATUTES OF A GENERAL NATURE OF THE STATE OF IOWA § 3051, at 566 (1860); 2 JOSEPH ROCKWELL SWAN, THE REVISED STATUTES OF THE STATE OF OHIO § 266, at 1021–23 (1860).

234. MISS CODE ANN. §§ 11-7-155, 99-17-35 (1972), held unconstitutional by *Newell v. State*, 308 So. 2d 71, 77–78 (Miss. 1975).

235. See generally Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595 (1985); Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000).

to emerge in response. Indeed, the need for instructions was greater because judges were no longer guiding (or controlling) jurors as they had under the former practice. Also, the standard of persuasion instructions, previously eclipsed by the judge's comments, now seemed more likely to influence the jury's verdict. It is therefore not surprising that such instructions proliferated in the United States but were less popular in England, where judges continued to comment on the evidence.

Third, during the century, jury pools lost some of their elite character, and with it some of the respect in which lawyers and judges held jurors.²³⁶ Certainly, nineteenth-century judges, distrustful of juries, waged a long war to limit their freedom in deciding cases.²³⁷ It would not be surprising, in this context, if the "it's up to you" attitude of earlier approaches to the standard of persuasion were to yield to more detailed, if not necessarily more helpful, attempts to specify that standard.

Fourth, it is conceivable that the development of instructions on the standard of persuasion reflects the conflicting pushes of lawyers representing plaintiffs and those representing defendants.²³⁸ A lawyer representing a plaintiff would naturally want to lower the bar as much as possible. Instructing the jury to follow the preponderance of the evidence standard might help to do this because it would indicate that the plaintiff's evidence needed to be only a smidgeon more persuasive than the defendant's to warrant recovery. It might also suggest that the jury would not have to actually believe the plaintiff's evidence and would certainly reduce any tendency to apply what had become a familiar beyond a reasonable doubt standard.

A lawyer representing a defendant would have opposite concerns and might have been content with simply omitting any reference to the preponderance standard. But if that could not be done—and by this period a judge could hardly refuse altogether the plaintiff's request for a preponderance instruction—at least one might hope to heighten the standard by contending that actual belief was necessary or that a higher standard governed certain issues. As this Article has established, lawyers advanced just such claims, sometimes with success.²³⁹ The preponderance standard did at least make clear that a jury left in

236. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876–901 (1994); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1181–99 (2011) (describing Congressional attempts to exclude from juries those unsympathetic to its policies). *But see* STACY PRATT McDERMOTT, *supra* note 232, at 54–83 (showing that local notables still dominated the juries before whom Lincoln appeared).

237. See generally Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448 (2013).

238. This is not to suggest that at this time there were separate groupings of plaintiffs' and defendants' lawyers as there are today: many lawyers represented both at different times.

239. See *supra* text accompanying notes 219–22.

indecision should decide for the defendant. In sum, the instructions that emerged were somewhat favorable to plaintiffs but included qualifications that defendants could invoke. The result was the sort of impacted compromise endemic to precedential law.

CONCLUSION

Although the criminal standard of proof beyond a reasonable doubt and the civil standard requiring only a preponderance of the evidence have intertwined histories, those histories also reveal differences. The criminal standard preceded and catalyzed the precipitation of the civil standard. The criminal standard also drew more on a tradition of conscientious qualms about shedding blood, and hence refers to jurors' doubts (albeit reasonable doubts). The civil standard lacked that tradition, and hence appears in language reflecting the more mechanistic and external philosophy of the Enlightenment. The criminal standard originated in arguments of counsel and judicial instructions, while the civil standard descended from more theoretical writings, reaching the ground of actual courtroom practice only decades later. Indeed, when the civil standard appeared in early instructions, it might well be in a criminal case as a way of clarifying the reasonable doubt standard.²⁴⁰

The appearance of these contrasting standards was part of a broader separation between civil and criminal procedure. On the criminal side, this led to developments such as the growth of public prosecutors²⁴¹ and the elaboration of procedural safeguards for defendants, including an elaborate constitutional law of criminal procedure strikingly different from the constitutional law of civil procedure.²⁴² On the civil side, the separation led to the decline of trial by jury²⁴³ and to current efforts to shunt civil disputes into alternative dispute resolution. The recognition of different standards of persuasion and the thoughts underlying that recognition possibly gave an important nudge that helped send criminal and civil cases down these diverging roads.

Even today, so far as the standard of proof is concerned, the split between criminal and civil cases is not complete. In England, debate

240. *United States v. Lockman*, 26 F. Cas. 988, 989 (C.C.D. Mass. 1848); *United States v. Ashton*, 24 F. Cas. 873, 875 (D. Mass. 1834); *State v. Marler*, 2 Ala. 43, 47 (1841); *State v. Crocker*, 2 Del. Cas. 150, 154 (1801); *Hiler v. State*, 4 Blackf. 552, 552 (Ind. 1838).

241. See generally GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

242. See generally John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984).

243. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459 (2004); authorities cited *supra* note 185.

continues as to whether some sort of sliding scale may justify an intermediate standard in some instances.²⁴⁴ In the United States, courts can treat some issues in criminal prosecutions as part of an affirmative defense that a party may prove by a preponderance of the evidence.²⁴⁵ On the civil side, courts can raise the standard by specifying what evidence constitutes a preponderance.²⁴⁶ Courts and legislatures can also require “clear and convincing” evidence in proceedings threatening especially heavy deprivations or having a quasi-criminal punitive aspect.²⁴⁷ That standard prevails in one jurisdiction or another for a wide variety of issues, sometimes for reasons of policy, but sometimes for reasons hard to fathom.²⁴⁸ These various crossovers between the usual civil and criminal standards might be compared to geological remains that show that two continents, now separated, were once united.

From a more practical point of view, one might wonder whether the choice and phrasing of a proof standard for civil cases is all that important. Until late in the eighteenth century, lawyers and judges seem to have felt no need to discuss the issue, contenting themselves with hints to juries at most. For decades after the preponderance standard was formulated, no one told jurors about it. England switched from a preponderance standard to the balance of probabilities standard without any apparent attempt to explain the change. Even today, jurisdictions in

244. See generally Redmayne, *supra* note 77; Ennis McBride, *Is the Civil “Higher Standard of Proof” a Coherent Concept?*, 8 L. PROBABILITY & RISK 323 (2009).

245. See, e.g., *Dixon v. United States*, 548 U.S. 1, 8 (2006); *Martin v. Ohio*, 480 U.S. 228, 233 (1987).

246. See generally Steve C. Gold, *The “Reshaping” of the False Negative Asymmetry in Toxic Tort Causation*, 37 WM. MITCHELL L. REV. 1507 (2011).

247. E.g., 42 U.S.C. § 300aa-22(b)(2)(B) (2012) (outlining standard for vaccine manufacturers); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (discussing the standard for deportation); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (showing the standard for civil commitment); *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982) (disclosing the standard for deprivation of parental rights); *Laux v. Harrington*, 38 A.3d 318, 328 (Me. 2012) (noting the standard for punitive damages).

248. See, e.g., *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2245–46 (2011) (overcoming presumption of patent validity); *Smith v. Walker*, 91 So. 3d 77, 85–86 (Ala. App. 2012) (discussing need to prove fraud to set aside deed); *Iddings v. Mee-Lee*, 919 P.2d 263, 274–75 (Haw. 1996) (permitting employee to sue fellow employee outside workers compensation system); *Gregory v. Gregory*, 425 S.W.3d 845, 846 (Ark. Ct. App. 2013) (showing a constructive trust based on a confidential relationship); *R.I. Mobile Sportfisherman, Inc. v. Nope’s Island Conservation Ass’n*, 59 A.3d 112, 121 (R.I. 2013) (establishing easement by adverse possession); *Barnes v. Johnson*, 742 S.E.2d 6, 12 (S.C. Ct. App. 2013) (establishing promise in promissory estoppel claim); *Keefe v. Doornweerd*, 984 N.E.2d 1105, 1108 (Ohio Ct. App. 2013) (proving common law marriage); *Try Hours, Inc. v. Douville*, 985 N.E.2d 955, 963 (Ohio Ct. App. 2013) (showing irreparable harm to obtain preliminary injunction); *Gillespie v. Gillespie*, 106 So. 3d 869, 873 (Miss. Ct. App. 2013) (requiring, in a divorce case, clear and convincing evidence needed to show adultery, but not cruel treatment).

the United States describe the standard in different ways, occasionally authorizing their judges to use quite different versions.²⁴⁹

Yet skepticism would be premature. Different ways of phrasing the standard may influence civil juries, as they clearly do in criminal cases.²⁵⁰ They also influence judges. For example, the identification of the preponderance standard with a probability greater than 0.5, likely first advanced in 1931,²⁵¹ has recently become the means by which judges throw out toxic tort cases when the epidemiological evidence fails to show that the poison in question fails to multiply the incidence of the plaintiff's disease by more than two.²⁵² Thus, the choice of proof standard does affect the viability of large classes of claims. That by itself would justify the ongoing critique²⁵³ of a standard whose birth was unconsidered and whose shaping has been haphazard.

249. *Preponderance of Evidence (Long Version)*, NEW JERSEY MODEL CIVIL JURY CHARGES (rev. 2012), available at <https://www.judiciary.state.nj.us/civil/charges/1.12I.pdf>.

250. See *supra* notes 4–7 and accompanying text.

251. MICHAEL & ADLER, *supra* note 45.

252. See *supra* note 52.

253. See *supra* Section I.C.

