The Jury and the Risk of Nonpersuasion

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Plaintiffs in civil cases and the prosecution in criminal actions generally have the "burden" of proving all factual issues material under the applicable substantive law. The effect of so placing this burden is twofold. First, it compels the plaintiff, or prosecution, to produce a quantum of evidence sufficient to persuade the judge that a reasonable jury could (not should), on the basis of that evidence, find that the burden has been "carried" and that the requisite facts have been proven. If the judge finds the evidence inadequate for that purpose, he will direct a verdict for the defendant. The second effect results from the revelation of this burden to the jury so that it may consider it in its deliberations. No matter how that burden is described to the jury, some disadvantage should accrue to the party bearing it. The Simon/Mahan study raises a number of interesting questions about the extent to which that disadvantage can be quantified and how juries will react to that quantification.

Although the burden of proof in civil cases generally rests on the plaintiff, there are a number of issues on which it is shifted to the other party, or its impact is varied. Where there is a belief that on a particular issue–for instance, authority to drive a car–one party, in this case the owner of the car, generally has the better access to the material evidence, the burden may be placed on that party, whether or not he is the plaintiff (O'Dea v. Amodeo, 1934). Also, where

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common experience suggests that, given evidence of a particular fact or facts, another fact is highly likely to exist, that other fact may be "presumed"–that is, the burden is satisfied without more–in the absence of contrary evidence. Once the trier of fact believes evidence proves that a letter was duly addressed and mailed, for instance, it must, in the absence of evidence of nonreceipt, also find that it was received (McCormick, 1954: 650). Finally, where a particular contention is disfavored by the law–asserting the plaintiff's contributory negligence as a complete bar to his recovery, for example–the burden of proving the requisite facts may well be shifted to the defendant (James, 1965: 257-258). Nevertheless, on most issues the plaintiff must bear the burden of proof, which is to say that he has the risk of not persuading the trier of fact. And, in civil cases, that risk becomes an injury incurred when he fails to persuade the trier that he proved his case by "a preponderance of the evidence."

The Simon/Mahan findings indicate that the extent to which plaintiffs are disadvantaged by the preponderance of the evidence rule is perceived differently by judges and jurors, in that they disagree as to the degree of probability necessary to prove a fact. And that is, I think, an important disagreement, for this is not a situation in which lawyers and judges traditionally have winked at the jury's failure to follow literally the judge's instructions on the applicable law. It is not, for instance, like the case of the contributory negligence rule (any perceptible amount of contributory negligence by the plaintiff bars any recovery for injuries caused by the defendant's negligence) which, it is generally thought, lawyers and judges anticipate will be ignored or mitigated by jurors in application. A disagreement between judges and jurors over the quantum of proof demanded by a preponderance of the evidence, therefore, may well be a very serious defect in our adjudicatory system.

Initially, however, it is important to establish why most judges in the Simon/Mahan study believed that a probability of slightly better than fifty percent is in fact a preponderance of the evidence. The judges were quite correct, and for three distinct reasons.

First, the finding of historical facts does not permit absolute certainty under any circumstances. Fact-finding in civil litigation is further complicated by a unique consideration. Law performs important functions as a dispute settler, and the goal of our adjudicatory system is not solely reaching "the" correct decision; as important as being correct is ensuring that "a" settlement is in fact reached with reasonable dispatch. That, however, may often seem inconsistent with the goal of correctness. Settling a dispute, after all, is more than reaching "the" correct decision. It is reaching "a" decision, correct or not, and making it stick. Fact-finding at law, therefore, has a judgment-day quality about it, since the trier must decide a case one way or the other within a finite amount of time. And this means that fact-finding in law may look as much to finality and dispatch as to correctness.

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This sacrifice of truth in the name of dispute settlement is not as harsh as it seems, however, for a legal system which permitted civil disputes to go on endlessly—as they would if moral certainty, for example, were the standard—would satisfy no one except those who revel in chaos. Furthermore, an alternative system which was more indecisive and thereby increased delay would impose large costs on all the parties—so large, indeed, that the only difference between the winning and losing litigants might be in the degree of loss. Nor is there assurance that delay or indecision would improve fact-finding in a very large number of cases.

Second, in civil actions, unlike criminal actions, there is no particular reason to disadvantage one party substantially. We are interested in finality and dispatch, but, given whatever sacrifices are necessary to achieve that, we want to find facts correctly as often as possible. And that means that there is no particular reason to disadvantage either plaintiffs or defendants in the placing of the risk of nonpersuasion.[1] We cannot say, as we do in criminal cases, that saving one innocent defendant is worth absolving x number of guilty ones.

Third, the risk of nonpersuasion must nevertheless be put somewhere, if for no other reason than that the trier of fact must know what to do if he finds that the evidence of each party is in equipoise—that is, if the evidence of each party is equally persuasive. There are no ties or sudden death overtimes in litigation. The risk must fall on one or the other party and the only real policy from which some direction may be gotten lies in whether it is more important to deter the initiation of frivolous actions or the raising of frivolous defenses. And it would seem that the cost to society and to litigants of frivolous actions is greater than frivolous defenses because the latter appear only after the fixed costs of a lawsuit have already been incurred—retaining counsel, and the like—and may be disposed of without large additional expenses. It is not that this is a weighty policy, for we can rely on the costs of initiating litigation to deter most frivolous plaintiffs. It is, however, the only discernible policy, and going in the direction in which it points is better than flipping a coin. We might as well, therefore, put the risk of nonpersuasion on plaintiffs.

Apart from the equipoise situation, however, we want the correct result as often as possible and that means that preponderance of the evidence is only 50%+. Imposing a greater disadvantage on plaintiffs would tend to cause more incorrect decisions than correct ones.

The significance of the Simon/Mahan findings in this respect is their indication that jurors disproportionately disadvantage plaintiffs by requiring more proof than is justified under a proper understanding of the preponderance of evidence standard.[2] The source of the jury's misperception is not readily evident. A possible explanation is that the average juror simply does not understand the difference between the burdens of proof in civil and criminal actions, and that, accustomed to the criminal cases through the media, he applies

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the reasonable doubt test in civil cases. If that is the source of the jury's confusion, it can be dispelled by judges and lawyers explicitly emphasizing to jurors that the burdens differ significantly.

A second reason for the disproportionate disadvantage jurors place upon plaintiffs may be an error committed by members of the profession as well as by lay persons. Consider for a moment the words of a judge:

> The burden of proof that is on the plaintiff in this case does not require him to establish beyond all doubt, or beyond a reasonable doubt, that the insured died from accidental injury within the policy period. He must prove that by a preponderance of the evidence. It has been held not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. . . . The weight or preponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there [Sergeant v. Massachusetts Accident Co., 1940: 250].

To begin with, the suggestion that a proposition is not proved by a preponderance of the evidence in the examples given is quite wrong. Assume not one case, but one hundred cases in which various plaintiffs must prove a death from any cause but cancer. Assume further that in each case the only evidence is the death itself. To state the fact that only a minority die of cancer should not warrant a finding of noncancerous demise is deliberately to render decisions more likely wrong than right. The preponderance of the evidence standard is quantifiable precisely because the goal is to be right more often than wrong, and that means that in the wildly hypothetical case in which the only evidence is gross statistics, the higher probability must govern the decision.

To hold otherwise is not only to apply the wrong burden of proof but also to make the mistake of valuing all direct evidence over circumstantial evidence. A witness' direct assertion, "The automobile was colored," is only superficially a superior basis for "actual belief" than probabilities derived from manufacturing statistics. The fallibilities of human perception are so great, and the circumstances of observation so varied, that there is a strong probability that in any group of such direct assertions a large number will be inaccurate. And there is surely no way of saying that a careful assessment of "mathematical chances," which concedes the possibility of error, is less reliable evidence than a direct statement based on a witness' perceptions, which are also subject to error, however unconceded.

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In any event, the Court's examples are almost disingenuous, for there is no case—and I mean *no* case—in which the only evidence is gross statistical conclusions. Indeed, the survey itself is hearsay and inadmissible until supported by testimonial evidence as to how the information it contains was gathered. And that evidence itself must be scrutinized. The very fact that we operate on an adversary system ensures that no case—even forgetting the hearsay rule—will go to a jury in such an undeveloped form.

The hypotheticals chosen by the Court may well be a source of the error it commits. One must distinguish between our ability to speak of the burden of proof in terms of quantified probabilities and our ability to quantify the persuasiveness of the evidence in a particular case. The fact that we can quantify the preponderance test does not mean that the trier of fact must decide how persuasive each party's evidence is. It merely must decide whether one is more persuasive than the other. By choosing hypotheticals in which the evidence was quantifiable, the Court blurred this important distinction.

Failing to appreciate the quantifiability of the preponderance test, the Court is then driven to further error—perhaps the very error made by the jurors in the Simon/Mahan findings. For the Court suggests that a trier of fact may not find a proposition proved by a preponderance of the evidence unless it has an "actual belief" in the existence of that proposition. That is a radically different, and radically more stringent, burden of proof than the one I described earlier. And it is a burden of proof which disproportionately disadvantages plaintiffs. Because there is a need for a final decision, no possibility of certainty, and no reason to disfavor plaintiffs, the need is only to form *an actual belief as to the balance of probability*—that is, a belief as to which side enjoys the 50%+ advantage. Our rhetoric about the jury's function in civil cases being "to find the facts," therefore, is not only wrong but confusing, for what the jury must find is probabilities, not facts.

Civil juries ought to be instructed that proof beyond a reasonable doubt is the standard only in criminal cases and then told only one thing more about the burden of proof in civil cases: they ought to be instructed that there are no ties and that if each side's evidence seems equally persuasive and the evidence is in equipoise, the defendant wins. For, indeed, the only function burden of proof plays in civil cases is to resolve ties. [3] In all other situations, the most persuasive case wins. So the only thing the jury need know is what to do when the evidence is fifty-fifty. And this in turn means that we may be telling the jury far too much today when we deliver charges which go into superfluous and misleading detail as to what preponderance of the evidence means.[4]

In criminal actions we take a different view of the burden of proof. We are interested in more than being right as often as possible within the limitations imposed by the need for moderately expeditious decisions and the nature of the adjudicatory system. In criminal cases we concede the possibility of error but

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have traditionally opted for rules designed to ensure that the error is generally in one direction. Given, among other considerations, the seriousness of the criminal sanctions which result from a conviction, we want our mistakes to be in the form of acquittals. The law does, therefore, deliberately and purposefully disadvantage the prosecution by imposing a substantial risk of nonpersuasion: it must prove its case beyond a reasonable doubt or an acquittal will follow.

It does not, however, ensure that mistakes in the form of convictions will not occur. Total protection of that kind is available only by destroying the viability of the criminal law. Indeed, one important function of the risk of nonpersuasion in criminal matters is to effect a balance between the competing objectives of avoiding mistaken convictions and maintaining the viability of the criminal law. Too stringent a burden of proof, for example, might not only weaken the deterrent effect of the criminal sanction—a risk generally overestimated by critics of procedural reform—but also discourage guilty pleas. This might increase the number of trials enormously and destroy the effectiveness of the criminal sanction simply by causing the collapse of the judicial system.

Notions of probability are, therefore, quite relevant, and offhand I can think of no reason why such considerations ought not be brought to the attention of a jury. Indeed, the Simon/Mahan finding that the failure to do so affects verdicts may demonstrate that the typical charge on reasonable doubt is inadequate. How these considerations are to be brought to the jury's attention is less clear. In no event, however, should the law attempt to quantify the reasonable doubt test. That is, the jury should not be told, "I instruct you not to convict the defendant unless you find that there is only a one in twenty chance that he is innocent." Because it asks the jury to quantify the evidence in a particular case, such language may be less informative and more confusing than the present instruction on reasonable doubt. There is presently no way to quantify the persuasiveness of evidence beyond reaching a subjective determination that one case is more persuasive than the other. The reliability of inferences drawn from facts and the accuracy of the human perceptions on which those facts are based are simply not quantifiable. Nor do all persons or jurors have the same notion of what degree of certainty is indicated by one out of twenty, one out of fifty, and so forth.

What ought to be said to the jury depends on its function in criminal cases. Tentatively at least, I would argue that the jury's role is not simply to find facts and apply rules of law taken from the judge's instructions. Rather, the jury may be viewed as one of those institutions in the criminal process with discretion to exercise leniency as well as to find facts and apply legal rules. Policemen have discretion not to arrest, and are expected to exercise it, even though a crime has been committed. Prosecutors have discretion not to prosecute, and are expected to exercise it, even though a justified arrest has been made. We do not intend or anticipate that the criminal law will be applied universally across the board and,

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at various stages of the criminal process from arrest to sentencing, discretion to exercise leniency has been deliberately delegated. I see no reason why we ought not to accept and welcome the jury as one of those decision makers—one which, if the jury is properly constituted, may well express the sentiments of the relevant community in a particular case (Kalven and Zeisel, 1966: 193 ff.).

There is omnipresent confusion over the function of the criminal sanction, as well as the grave difficulty of knowing whether punishment in any particular case really deters others. Representatives of the community at large may be useful in making such decisions at least as reviewers of the prior exercise of discretion in a particular case. Society itself initiated the case through its agents, and the jury may in some way be looked upon as society reviewing the work of those agents.

No such role for the jury, I would maintain, can be sketched out in civil matters, and for three reasons. First, civil law does have what is, in my mind at least, a relatively agreed-upon function, the compensation of individuals for harms they have suffered, according to preexisting standards.[5] There is, therefore, considerably less room than in the criminal law for the ad hoc exercise of discretion. A tort plaintiff, for example, should not receive greater damages because a particular jury believes he is a worthy and responsible person. Second, and by way of elaboration, civil sanctions are expected to be applied universally and across the board and that is why they are invoked at the will of private individuals. That itself suggests that discretion in the application of the relevant rules of law is to be very limited. Third, and by way of further elaboration, we desire even-handedness in the application of civil sanctions. Where commercial matters are at stake, for example, certainty may be important to the maintenance of a wealthy economy. We do not want such decisions to be governed by a jury's view of the relative "worth" or wrongdoing of the parties as we well might in criminal cases. The lack of even-handedness in the criminal process is, after all, the price of permitting the exercise of forms of leniency. Being unable to find discernible standards to govern such discretionary rulings, we may properly permit them in some cases but not in others which seem to many to be equally meritorious. Compelling even-handedness in the absence of discernible standards would effectuate an abstract principle but at the price of denying leniency in a large number of cases. This is a far cry from looking to juries to mitigate harsh rules of law in civil cases,[6] for there the rules themselves can be improved. If the contributory negligence rule is too harsh, for example, there are many alternatives: a comparative negligence rule, a no fault system, and the like. Choice among these alternatives, moreover, seems best made by the political process which can take all of the relevant considerations into account, e.g., insurance rates, court costs, and need for individual compensation. The weight to be given to such matters is not readily evident in the individual negligence action. And to resolve the issue by relying on juries to disregard the

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bad rule is to subject some parties (those who get a jury which thinks the judge means what he says) to bad substantive law. The expectation of jury mitigation simply deters needed changes. If the jury has a role in civil cases, therefore, it is strictly as a fact finder, and the question of its retention in that role must turn on its ability to perform that function.

To some extent, the present law of criminal procedure supports this skeletal theory of the jury. Defendants may insist on a general verdict, the inscrutability of which permits the exercise of leniency. Rules protecting the secrecy of jury deliberations have the same effect. And rules prohibiting judges from directing verdicts of guilty, overruling verdicts of not guilty, and permitting inconsistent verdicts seem rather deliberately designed to foster jury leniency. Other rules, however, move in a different direction. Prosecutors should not, for instance, be permitted to opt for trial by a jury over the resistance of the defendant. Such a tactic involves appeal to the jury's punitive rather than its lenient nature (Kalven and Zeisel, 1966: 375). And the present rules of evidence are not well designed to bring before the jury matters it might think relevant to an exercise of discretion because of sentiments toward the law or toward a particular defendant. The rules are designed to construct a logical record in terms of the substantive law and often openly make facts which relate to the kinds of considerations I have discussed inadmissible. Nor is there assurance in most jurisdictions that juries will represent the community in a sense broad enough to perform the tasks I have described. I would urge reform of the law to render it more consistent with the theory of the jury I have sketched out. [7] Indeed, I sometimes think that reform of the law of evidence depends as much on the development of a theory of the jury's function as it does on further findings in the field of psychology.

Applying some of these notions to the question of the prosecution's burden of proof, what then do we want the jury to do and what do we want to tell it about probability?

I think the jury ought to be explicitly instructed (as to the burden of proof) to take two things into account. First, it should not return a verdict of guilty unless it believes in the defendant's guilt. That is, it must subjectively believe that the defendant is guilty. Beyond that, however, the jury should also render a guilty verdict only if the probability is as great as it itself requires before it risks substantial interests of its own—interests comparable to those at stake in the proceeding—in reliance on the existence of a particular fact. In short, the jury should be told that it is up to it to decide what kind of doubt is "reasonable." Given the theory of the jury described above, we want the jury to give us the sense of the community as to how much risk of convicting an innocent man can be taken. And that can be achieved by telling the jury that a reasonable doubt as to the existence of a fact is the kind of doubt that would stop the jury itself from risking substantial interests of its own in reliance upon the existence of

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that fact. This may evoke the sense of the community–above the "floor" created by the judge's power to divert an acquittal where he finds that a substantial probability simply has not been shown–concerning the proper balance between the need to avoid mistaken convictions and the need to maintain the viability of the criminal sanction.

NOTES

1. There may well be some predisposition to disfavor plaintiffs because they are "accusers." Such a view seems to me, however, more emotional than rational and wholly inappropriate in a highly commercialized and insured society.

2. These findings must be qualified by the observation that, however great the apparent difference between judges and jurors in their understanding of the meaning of preponderance, that difference may not have an operational effect. That is to say that each case would have been decided in precisely the same way by the judge or juror although each expresses his views of the probabilities involved differently. A study of how judges and jurors evaluate evidence would of course indicate whether the differing views of burden of proof have an operational effect.

3. This is not to say that the equipoise case is either rare or frequent with the average juror.

4. For example, Wright (1960: 328-329) says that:

> The plaintiff must prove the material facts of his case by a fair preponderance of evidence. A fair preponderance of evidence means this: He must prove them by the better and the weightier evidence. You will take all the evidence that is offered here, and consider the various circumstances which are involved; you will weigh them and balance them, and then if you find that the evidence fairly preponderates in favor of the plaintiff, he will have proved the particular issue you have before you. If, on the other hand, it does not fairly preponderate in his favor, if the better and the weightier evidence does not seem to you to establish his position, then he has failed in his duty to prove to you the facts upon which he relies; and in case it happens that the evidence is evenly balanced so that you cannot say it inclines this way or that way, then upon the issue in question your decision must be against the plaintiff, because it is for him to prove it, and not for the defendant to disprove it.

5. This is of course an imperfect definition of the existing situation. Not only do many disagree with the general proposition that such a clear-cut purpose exists but many legal harms–e.g., libel–may evoke punitive damages which seem suspiciously close to criminal sanctions.

6. I do not mean to suggest that juries have no discretion to exercise. Indeed, they do, but according to preexisting and relatively discernible standards. The "reasonable man" test in the law of torts, for example, is quite permissive. Nevertheless, the jury is not asked to make idiosyncratic and moral judgments about the conduct of the parties, for the "reasonable man" test calls for the application of an "objective" standard (Prosser, 1964: 153 ff.).

7. Apart from changing the rules of evidence, this might entail increasing the size of criminal juries and changing the selection process in order to ensure that a cross-section of the community is represented. In civil cases, it is my belief, based almost entirely on speculation, that the principal value of the jury is in resolving difficult issues of credibility.

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Assuming that twelve jurors have, as the myth asserts, seen a larger slice of life than a single judge, they may be better able to determine the relative reasonableness of conflicting stories. Within a group of twelve, moreover, biases toward certain kinds of witnesses may be neutralized. As to all other issues of fact-finding, my speculative wanderings leave me unpersuaded as to the superiority of the jury over a judge. I prefer, therefore, advisory juries employed solely at the discretion of the judge to answer precise questions he submits. Where punitive damages are involved, however, use of a jury should be compulsory (if the parties desire), since that issue smacks of the criminal sanction.

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