On Proving Mabrus and Zorgs

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An unfortunate disconnect exists in modern evidence scholarship. On one hand, a rich literature has explored the process of legal proof in general and legal standards of proof in particular. Call this the "macro level" of legal proof. On the other hand, a rich literature has explored the admissibility rules that regulate the admission or exclusion of particular types of evidence (such as hearsay, character evidence, expert testimony, and so on). Call this the "micro level" of legal proof. Little attention, however, has focused on how the issues discussed in these two distinct strands of evidence scholarship intertwine. One important connection concerns the process and the standards for proving admissibility or exclusion when admissibility or exclusion depends on disputed facts.

This Article illustrates how the theoretical debates regarding the proof process as a whole also apply to questions of admissibility. Federal Rule of Evidence 104 creates a two-part structure for the admissibility of evidence that largely mirrors proof issues that apply to a case as a whole—some issues are decided by a fact finder, and some issues are decided under a "reasonable jury" standard. A classic article by John Kaplan coined the terms "mabrus" and "zorgs" to refer to these different types of admissibility determinations. Extending Kaplan's analysis, this Article argues that the best account of what grounds the proof process as a whole (the macro level)—that is, an explanatory account that focuses on the relationships between the evidence and the competing explanations of the parties—also applies to admissibility determinations (the micro level).

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INTRODUCTION

The law of evidence regulates the process of proof in two primary ways. The first, and more familiar, way is by regulating the admissibility, exclusion, and use of particular items of evidence. The core of these regulations is the codified rules of evidence, including the Federal Rules of Evidence and the similar state equivalents.[1] The second way is by regulating whether the evidence as a whole proves a contested, material fact or, alternatively, is sufficient to prove such a fact.[2] The core of these regulations is the doctrinal rules that regulate burdens and standards of proof.[3] The traditional focus of the law of evidence has been, to a large degree, on the former rather than the latter—heavily regulating the evidentiary inputs into the process of legal proof along with a relatively surprising amount of quietism toward the outputs of that process.[4]

1. I refer to these as "microlevel" rules. *See* Michael S. Pardo, *Grounding Legal Proof*, 31 PHIL. ISSUES 280, 281 (2021). In addition to codified rules of evidence, a number of judge-made doctrines also regulate admissibility at the microlevel. *See* John Leubsdorf, *Fringes: Evidence Law Beyond the Rules*, 51 IND. L. REV. 613, 613 (2018) (describing evidentiary rules that are recognized in many U.S. jurisdictions but are "relegated to the shadows" of evidence law due to the prevalence of the Federal Rules of Evidence).

2. I refer to these as "macrolevel" rules. *See* Pardo, *supra* note 1, at 281–82 ("[The macro-level] structures and regulates the decision-making process as a whole in light of the evidence regulated at the micro-level."). Whether evidence is sufficient is a distinct question from whether a fact finder is persuaded that the fact is proven. Sufficiency is essentially a question of epistemic *permissibility* (i.e., will the law permit a fact finder to make a finding, even though they may not make such a finding). *See infra* notes 71–72 and accompanying text (explaining that the sufficiency of evidence rests on whether a finding is "reasonable" or "rational" in light of the evidence and the standard of proof).

3. Additional macrolevel rules include evidentiary presumptions, jury instructions, comments on the evidence, judicial notice, and sufficiency or weight rules in particular kinds of cases. On the latter, see generally Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957 (2008).

4. One form of quietism is the refusal to define standards of proof, such as "beyond a reasonable doubt." *See, e.g.*, *The William J. Bauer Pattern Criminal Jury Instructions*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR. 26 (2022), https://www.ca7.uscourts.gov/pattern-jury-instructions/Bauer_pattern_criminal_jury_instructions_2022updates.pdf [https://perma.cc/EDV6-SZB3] ("The Seventh Circuit has repeatedly held that it is inappropriate for the trial judge to attempt to define

The past several decades of evidence scholarship have, to some extent, shifted this balance. Although admissibility issues continue to dominate the law of evidence, an explosion of interdisciplinary work (theoretical, empirical, and critical) has focused on the process of proof. In 1986, in a now-classic article, Richard Lempert coined the term the "New Evidence Scholarship" to refer to the then-emerging interdisciplinary evidence scholarship—drawing on "mathematics, psychology[,] and philosophy"—that was analyzing the evidentiary process in light of its goals (primarily, accurate fact-finding).[5] A large portion of this scholarship analyzed legal standards of proof.[6] In Lempert's telling, the scholarship analyzing the process of proof was slowly replacing a "moribund" and "timid" doctrinal scholarship that had "no overarching critical theory."[7] The latter, "seldom interesting" scholarship, largely focused on analyzing the language of admissibility rules—as Lempert put it with the mock title: "What's Wrong with the Twenty-Ninth Exception to the Hearsay Rule and How the Addition of Three Words Can Correct the Problem."[8]

Looking out at the landscape of evidence scholarship in the decades since Lempert's article, four general trends, in my opinion, are noteworthy. First, the type of scholarship identified has become broader, deeper, and more sophisticated.[9] Second, despite (or perhaps because of) the continued development of this scholarship, there is considerable uncertainty on what the standards of proof actually mean, among other issues. As Kevin Clermont explains: "The amazing result is that, even at this late date, there is no consensus on what the standards of proof require or should require. It is a theoretical jungle

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'reasonable doubt' for the jury."). In his extensive and highly influential treatise, Wigmore devoted little space to proof issues and expressed skepticism toward the utility of defining either "beyond a reasonable doubt" or "preponderance of the evidence." *See* 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2497-2498, at 404–33 (James H. Chadbourn rev. ed. 1974) (1904) ("[M]any useless refinements and wordy quibbles have marked the countless and more or less unsuccessful attempts [to define the degree of positiveness of persuasion]."). Although he later came to the view that "there is, and there *must* be, a probative science—the principles of proof—independent of the artificial rules of procedure" (i.e., admissibility rules). JOHN HENRY WIGMORE, PRINCIPLES OF JUDICIAL PROOF 3 (2d ed. 1931).

5. Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 440 (1986).

6. Some of this then-new evidence scholarship was also analyzing microlevel proof issues (e.g., the relevance or probative value of particular items or types of evidence). But this scholarship focused primarily on the particular inferences that ought to (or ought not) follow from the evidence, with less of a focus on admissibility. *See generally id.*

7. *Id.* at 439–40.

8. *Id.* at 439 (internal quotation marks omitted).

9. Some of this is due to the increased focus on legal epistemology from philosophers and legal scholars. See generally the symposium on "legal epistemology" in 31 PHIL. ISSUES (2021).

out there."[10] Third, the original distinction that Lempert drew in terms of types of scholarship no longer holds. Evidence scholars have analyzed and critiqued particular admissibility rules from a variety of illuminating perspectives.[11] Moving beyond doctrine, this work has brought to bear both overarching critical theories and interdisciplinary tools to deepen our understanding of admissibility rules, their justifications, and their shortcomings. Fourth, and finally, it still seems safe to say that issues of admissibility continue to dominate the law of evidence, even if issues of sufficiency are no longer as neglected as they once were.

In this Symposium Article, I advance a general claim and a specific claim. My *general* claim is that these two distinct strands in modern, interdisciplinary evidence scholarship—a focus on admissibility rules, on one hand, and a focus on the process of proof as a whole, on the other—are in fact intertwined in underappreciated ways. Most importantly, the difficult questions that animate debates about burdens and standards of proof run through all evidentiary issues, including those involving the admissibility of evidence (microlevel inputs) in addition to issues of sufficiency and proof at trial (macrolevel outputs). My *specific* claim is that standards of proof impose explanatory thresholds, and this is true in the admissibility context just as it is in the context of proving the elements of crimes, civil causes of action, and affirmative defenses.

And that takes me to my title. Some readers will recognize my title as referring to an illuminating 1978 essay by John Kaplan, which analyzed the relationship between the judge and the jury on factual disputes that relate to admissibility.[12] Through a series of hypotheticals, Kaplan distinguished between "Mabrus" (a fictional name for the preliminary-fact questions that should be decided under one rule) from "Zorgs" (a fictional name for the preliminary-fact questions that should be decided under another rule).[13] The distinction corresponds to the different standards embodied in Federal Rules of Evidence 104(a) (Mabrus) and 104(b) (Zorgs). Although Kaplan provided a useful taxonomy for classifying Mabrus and Zorgs (and for telling them apart), he concluded by noting several other additional issues related to preliminary-fact questions also in need of discussion,

10. Kevin M. Clermont, *Staying Faithful to the Standards of Proof*, 104 CORNELL L. REV. 1457, 1497 (2019).

11. See, for example, the other articles published in this issue, Symposium, *Reimagining the Rules of Evidence at 50*, 76 VAND. L. REV. 1603 (2023) (November issue).

12. John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987 (1978).

13. *Id.* at 987.

including issues related to the burdens and standards for proving Mabrus and Zorgs.[14] I take up some of these issues in the discussion to follow.

Part I spells out the basic details regarding Mabrus, Zorgs, and Rule 104. Part II discusses *Bourjaily v. United States*[15] and *Huddleston v. United States*,[16] cases in which the U.S. Supreme Court clarified the doctrine on the burden of proof for Rule 104(a) and Rule 104(b), respectively. Part III provides a brief outline of the theoretical debates on legal standards of proof—a debate focused primarily on proof at trial and, to a lesser extent, on the sufficiency of the evidence as a whole. Part IV applies some of the lessons of Part III to the context of admissibility—to proving Mabrus and Zorgs. A brief Conclusion discusses some implications of the analysis.

I. RULE 104: MABRUS AND ZORGS

The admissibility of evidence will sometimes depend on contested factual issues: A statement may qualify for a hearsay exception only if the declarant was a coconspirator of the defendant; a statement may be privileged only if the speaker and listener were in a valid marriage at the time of the statement; a prior act of the defendant may be relevant and admissible to prove motive only if the defendant actually committed the prior act; a document may be relevant and admissible only if the document was authored by a party; and so on. In designing an evidentiary proof process with admissibility rules, all of these potential factual disputes could be resolved with the same proof framework and under the same standard.[17] In a bifurcated judge-jury proof system, however, another option is to apply different standards—requiring judges to decide some such issues under one standard and leaving other issues to be decided by juries (or at least "reasonable" or "rational" juries) under a different standard. The Federal Rules of Evidence adopt the second option, requiring different standards for different issues.[18]

14. *Id.* at 1009–10 ("Several other problems also require extended discussion that they cannot receive here . . . . [T]here is the question of the appropriate burden of proof.").

15. 483 U.S. 171 (1987).

16. 485 U.S. 681 (1988).

17. As many students learning the law of evidence might prefer.

18. The groundwork for this bifurcated framework was provided in John MacArthur Maguire & Charles S.S. Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927); and Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

Rule 104 spells out two standards for deciding "preliminary questions."[19] According to Rule 104(a), the judge "must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible."[20] The first two examples above (conspiracy and marriage) would be decided under this part of the Rule.[21] According to Rule 104(b), however, "[W]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."[22] This part of the Rule requires a judge to determine whether the evidence is legally sufficient to support a jury finding on that fact. The latter two examples (prior act and authorship) would be decided under the Rule 104(b) standard, assuming relevance depended on these conditional facts.[23] In addition to allocating decisionmaking authority, different frameworks apply to issues decided under Rule 104(a) and Rule 104(b). Judges may consider inadmissible (nonprivileged) evidence in Rule 104(a) fact-finding, but the evidence "sufficient to support a finding" under Rule 104(b) must itself be admissible.[24] Also, judges may consider witness credibility under Rule 104(a) but not Rule 104(b).[25]

Kaplan analyzed whether a given factual dispute should be decided under Rule 104(a) or Rule 104(b). He coined the term "Mabrus" to refer to issues that should be decided by the judge under Rule 104(a) and "Zorgs" to refer to issues that should be decided by the "reasonable jury" standard under Rule 104(b).[26] In distinguishing between the two, he explored the differing duties of judges versus jurors, noting that judges have duties that extend beyond fact-finding in a particular case and that include protecting values and policies underlying the Rules of

19. FED. R. EVID. 104.

20. *Id.* at 104(a).

21. For illuminating analysis of the preliminary-fact issues for hearsay, see generally Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339 (1987).

22. FED. R. EVID. 104(b).

23. On the relationship between relevance and conditional relevance, see generally Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980); Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871 (1992); David. S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95 (2011).

24. *See* FED. R. EVID. 104. For an overview of the doctrinal differences between Rule 104(a) and Rule 104(b), see RONALD J. ALLEN, DAVID S. SCHWARTZ, MICHAEL S. PARDO & ALEX STEIN, AN ANALYTICAL APPROACH TO EVIDENCE 162–73 (7th ed. 2022).

25. ALLEN ET AL., *supra* note 24, at 163, 171.

26. Kaplan, *supra* note 12, at 987 (footnotes omitted):

> Our paradigm, in other words, is that all Mabrus are decided by Rule A, and all Zorgs by Rule B. All we have to do, then, is determine whether the issue before us is a Mabru or a Zorg and we instantly know whether Rule A or Rule B applies.

Evidence and within the law more generally.[27] Jurors, by contrast, are focused primarily on the task of determining "the facts in one particular case" and may be less interested in the values and policies underlying the law of evidence.[28] Given these differences, Kaplan engaged in what he characterized as "purposive" analysis—classifying issues as Mabrus and Zorgs based on whether Rule 104(a) or Rule 104(b) should apply given the policies underlying the admissibility issue.[29] He explained:

> A preliminary fact question that determines the admissibility of evidence is a Mabru if and only if the judge must decide that question to uphold the policy of the rule that makes the admissibility of the evidence turn on the preliminary question of fact to begin with. In other words, a preliminary fact question is a Mabru, and the judge must determine it, whenever we cannot trust the jury to apply the rule governing admissibility. All other such questions, where we can trust the jury, are Zorgs.[30]

This classification scheme allows for both easy cases and more difficult ones.[31] Of the four examples above, the first two (conspiracy and marriage) fall on the Mabru side because the jury might rely on otherwise relevant and probative evidence that should be excluded by the hearsay or privilege rules. The latter two (prior act and authorship) fall on the Zorg side because there is less danger that the jury would rely on the evidence after concluding that the prior act did not occur or that the document is not what it is claimed to be.

The analysis below does not depend on any of the more difficult classification examples Kaplan discussed. But it is important to clarify that the same disputed fact may be a Mabru or a Zorg (or both), depending on how it relates to admissibility. For example, the identity of a document's author may be a Zorg when relevance depends on it

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27. *Id.* at 990:

> A judge's duty is to apply the rules of a legal system which is, one would hope, designed to reach the appropriate factual resolution in the largest possible number of cases, giving appropriate weight as well to other societal values. These other values which shape many of our rules of evidence but which are often unrelated to the fact determining role, include privacy, encouragement of certain confidential relations, convenience in administering a complex body of evidence law, and notions of fairness.

28. *Id.*

29. *Id.* at 989.

30. *Id.* at 993. He also noted:

> There are, to be sure, certain problems in phrasing the test in terms of whether we can or cannot trust the jury. It is impolitic as well as impolite to speak of cases in which we do not trust the jury, despite the fact that a goodly portion of our law of evidence is founded on this reality. More important, our formulation forces us to admit what is undeniably true, but perhaps unpalatable—that a sensible jury might well ignore the many distinctions over which we have so carefully labored in ramifying our law of evidence.

Id. at 994.

31. Kaplan discussed a number of complex hypotheticals that raise preliminary-fact questions resembling both Mabrus and Zorgs. *See id.* at 1003–09.

being authored by someone in particular, but this same fact may be a Mabru when admissibility under a hearsay exception depends on the identity of the author (e.g., whether it is an employee of a party).[32]

Rule 104 is silent, however, on the standard of proof that should apply to disputed facts under (a) and (b). Although Kaplan mentions the importance of this issue, he notes that it is beyond his essay's scope.[33]

II. *BOURJAILY* AND *HUDDLESTON*

In two cases decided within a year of each other, the U.S. Supreme Court clarified the standard of proof for factual disputes under Rule 104(a) (Mabrus) and Rule 104(b) (Zorgs).[34] In both instances, the Court held that the "preponderance of the evidence" standard should apply within the differing Rule 104(a) and Rule 104(b) frameworks.

In *Bourjaily*, the Court considered the admissibility of a hearsay statement under the coconspirator exemption.[35] Among other issues, the Court granted certiorari to decide "the quantum of proof" necessary to determine whether "[a] conspiracy existed and that the defendant and the declarant were members of this conspiracy."[36] The statements at issue concerned a tape-recorded conversation between an FBI informant and the alleged coconspirator, Angelo Lonardo, arranging a sale of cocaine.[37] According to the statements, the sale would occur in a designated hotel parking lot, and Lonardo would transfer the cocaine from the informant's car to a "friend," who would be waiting with his own car. The transaction proceeded as planned. FBI agents arrested Lonardo and the Defendant after Lonardo placed a kilogram of cocaine into the Defendant's car. The agents found over $20,000 in the Defendant's car. The Prosecution argued, and the trial court held, that Lonardo's out-of-court statements were admissible under Rule 801(d)(2)(E) as coconspirator statements.[38]

The Court began its analysis by noting that in order to admit the statement, the trial court must first find that the statement fits within

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32. *See* FED. R. EVID. 801(d)(2)(D).

33. Kaplan, *supra* note 12, at 1009–10 ("Several other problems also require extended discussion that they cannot receive here . . . there is the question of the appropriate burden of proof.").

34. Bourjaily v. United States, 483 U.S. 171 (1987); Huddleston v. United States, 485 U.S. 681 (1988).

35. *Bourjaily*, 483 U.S. at 173; *see* FED. R. EVID. 801(d)(2)(E).

36. *Bourjaily*, 483 U.S. at 173. The Court also considered "whether the court must determine by independent evidence that the conspiracy existed and that the defendant and the declarant were members of this conspiracy" and "whether a court must in each case examine the circumstances of such a statement to determine its reliability." *Id.*

37. *Id.* at 173–74 (providing the facts and details of the hearsay statements).

38. *Id.* at 174.

the coconspirator exemption.[39] This determination, as the Court explained, is a Rule 104(a) issue—in other words, a Mabru.[40] But, the Court pointed out, the Federal Rules of Evidence "nowhere define the standard of proof the court must observe in resolving these questions."[41] In deciding the applicable proof standard, the Court explained that admissibility decisions concerning "the technical requirements of the evidentiary Rules" are "unrelated to the burden of proof on the substantive issues" and are not about whether a party "wins or loses . . . on the merits."[42] Relying on prior decisions, the Court further noted that "traditionally," preliminary factual questions must be "established by a preponderance of proof."[43] Thus, the Court concluded that the "preponderance of the evidence" standard should apply to Rule 104(a) factual disputes (Mabrus) to ensure that "the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."[44]

One year later, in *Huddleston*, the Court addressed the standard of proof for Zorgs.[45] The Defendant was on trial for possessing and selling stolen property.[46] The counts related to a shipment of stolen videocassette tapes the Defendant had allegedly possessed and sold, and the "only material issue at trial was whether [the Defendant] knew they were stolen."[47] To prove the Defendant's knowledge, the trial court allowed the Prosecution to introduce evidence of prior sales of other allegedly stolen goods, including televisions and appliances.[48] The

39. *Id.* at 175.

40. *See id.*

41. *Id.*

42. *Id.*

43. *Id.* at 175–76. The Court's holding was predictable, given that the Court had previously held that the preponderance standard also applies to preliminary-fact disputes related to several constitutional issues in criminal cases. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 158 (1986) (waiver of rights in custody); Nix v. Williams, 467 U.S. 431, 432 (1984) (inevitable discovery); United States v. Matlock, 415 U.S. 164, 177 (1974) (voluntariness of consent to search); Lego v. Twomey, 404 U.S. 477, 489 (1972) (voluntariness of confession). For a critique of the Court's reliance on the preponderance standard in the criminal context, see generally Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

44. *Bourjaily*, 483 U.S. at 175. A three-Justice dissent by Justice Blackmun (joined by Brennan and Marshall) also agreed that the preponderance standard should apply and dissented on other grounds. *See id.* at 186 n.1 (Blackmun, J., dissenting).

45. Huddleston v. United States, 485 U.S. 681 (1988).

46. *Id.* at 682–84 (providing the facts and details of the challenged evidence).

47. *Id.* at 683.

48. *Id.* at 683–84; *see* FED. R. EVID. 404(b)(2) (evidence of other acts is permissible to prove knowledge). The evidence consisted of two witnesses. One witness testified that he purchased thirty-eight televisions from the Defendant for twenty-eight dollars each and that the Defendant also "indicated that he could obtain several thousand of these televisions." *Huddleston*, 485 U.S. at 683. A second witness (an undercover FBI agent) testified that the Defendant offered to sell him

appellate court initially reversed, concluding the evidence should have been excluded because the Prosecution had failed to prove—and the trial court had failed to find—that the other goods were stolen "by clear and convincing evidence."[49] In other words, the appellate court concluded that the Rule 404(b)(2) issue was a Mabru[50] that must be proven by the "clear and convincing evidence" standard of proof. The panel, however, granted a rehearing after another panel decision adopted the preponderance standard for such issues. And applying the preponderance standard, the panel this time upheld the conviction.[51]

The Court granted certiorari to resolve a split among lower courts on whether the trial court must make a finding to admit such evidence and, if so, by what standard of proof.[52] The Defendant proposed requiring a trial court to make a finding by "clear and convincing evidence" but conceded at oral argument that, in light of *Bourjaily*, the preponderance standard should apply.[53] The primary dispute thus was whether the trial court must make a preliminary finding—in other words, is the issue a Mabru or a Zorg? The Court held that it is a Zorg.[54] As with other Rule 104(b) issues, the Court explained, the factual issues for Rule 404(b)(2) evidence are ones of conditional relevance: "[S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."[55] Relying on the text and history of Rules 104 and 404, the Court further explained that nothing in the Rules requires judges to make a finding—or grants the discretion to arbitrarily exclude such evidence—when there is evidence "sufficient to support a finding" on the disputed conditional facts.[56] Thus, as with other Rule 104(b) issues, the trial court "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence."[57] Rather, the trial court "examines all the evidence in the case and decides whether the

several appliances (twenty-eight refrigerators, two ranges, and forty icemakers) for eight thousand dollars. *Id.*

49. *Huddleston*, 485 U.S. at 684.

50. *See id.* Although not using this label.

51. *Id.* In doing so, the appellate court again characterized the issue as a Mabru (again, not using this label).

52. *See id.* at 685. The circuit split was, thus, essentially over whether the issue was a Mabru or a Zorg and also under what standard of proof it should be proven.

53. *Id.* at 687 n.5.

54. *Id.* at 689. Again, not using this label.

55. *Id.*

56. *Id.* at 688–90.

57. *Id.* at 690.

jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence."[58]

Collectively, *Bourjaily* and *Huddleston* establish a proof structure for admissibility rules resembling the proof structure for civil cases decided under the preponderance standard. Judges decide Rule 104(a) issues (Mabrus) under the preponderance standard just as fact finders (juries or judges) decide whether the elements of causes of action or affirmative defenses are proven by a preponderance of the evidence at trial.[59] By contrast, Rule 104(b) issues (Zorgs) are decided by a sufficiency-of-the-evidence standard similar to the standard used for other types of sufficiency motions (e.g., for summary judgment or judgment as a matter of law)—namely, whether a "reasonable jury" could find the disputed fact by a preponderance of the evidence.[60]

This all assumes, of course, that the meaning and requirements of the preponderance standard are well understood. Unfortunately, this is not the case.

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58. *Id.* Although the Court does not address this, it seems that under the Prosecution's theory of relevance (to prove knowledge that the tapes were stolen), an additional Rule 104(b) issue (a Zorg) is whether the Defendant also knew the television sets were stolen. *See id.* at 683. In other words, relevance also seems to depend on this conditional fact—unless the Prosecution was relying on an implicit "doctrine of chances" argument. I put this issue to the side for the purposes of the analysis to follow. The Government also argued before the Supreme Court that the television evidence was relevant even if the televisions were not stolen, but the Court dismissed this possibility as not having been "suggested to or relied upon by" the lower courts. *Id.* at 686 n.4. The Defendant did not dispute before the Supreme Court that the appliance evidence had been properly admitted. *Id.* at 686 n.3.

59. One notable difference is that, under Rule 104(a), judges may consider otherwise (nonprivileged) inadmissible evidence, but fact finders at trial must decide based on the admissible evidence. *See* FED. R. EVID. 104(a).

60. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135, 150 (2000) (discussing the "reasonable jury" standard at the judgment as a matter of law and summary judgment stages); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that the sufficiency standard "necessarily implicates the substantive evidentiary standard of proof"); *Anderson*, 477 U.S. at 255 ("[W]e conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages."). This assumes that the preponderance standard applies at trial. For higher standards of proof, the "reasonable jury" issues depend on whether a reasonable jury could find the disputed elements to the higher standards. *See* Jackson v. Virginia, 443 U.S. 307, 318 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.").

One notable difference between Rule 104(b) and summary judgment is that the evidence sufficient to support a finding must be admissible for the former. In the case of the latter, the evidence need not necessarily be in admissible form for purposes of the summary judgment motion. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In particular, summary judgment may be based on "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A).

III. A BRIEF ACCOUNT OF THE PROOF DEBATES

In selecting the preponderance standard for Rule 104(a) and Rule 104(b), the U.S. Supreme Court in one sense simplified the inquiry. At least in comparative terms, the preponderance standard appears to be better understood than the other two common standards of proof—"beyond a reasonable doubt" and "clear and convincing evidence."[61] But this comparative clarity is potentially misleading because the meaning and requirements of the preponderance standard are also highly contested. This Part surveys some of the theoretical disagreements surrounding the standard.

The usual starting point for discussing the preponderance standard is the common assumption that the standard means "more likely than not," which in turn translates into a threshold of beyond 0.5, or greater than fifty percent.[62] This simple picture quickly breaks down, both practically and theoretically.[63] As a practical matter, the instructions that explain the standard to juries use several different formulations, some of which are consistent with the "more likely than not" language and some of which are not (e.g., "greater weight" or "belief").[64] And the variations generally eschew explicitly probabilistic language such as "0.5."[65] As a theoretical matter, two general issues have dominated the debates about the preponderance standard. The first concerns the criteria that ground whether the standard is satisfied (such as different types of probabilities or explanatory considerations).[66] The second concerns the extent to which the standards are comparative

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61. *See* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 31 (2006):

> The most earnest jury, packed with twelve people desirous of doing the right thing and eager to see that justice is done, are left dangling with respect to how powerful a case is required before they are entitled to affirm that they believe the guilt of the defendant beyond a reasonable doubt;

Addington v. Texas, 441 U.S. 418, 425 (1979) ("[T]he difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.").

62. *See* Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUM. BEHAV. 159, 160 (1985).

63. *See* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1279 (2013) ("[C]ourts and attorneys [should] stop using the misleading 0.5 rule as a shorthand for the preponderance standard . . . .").

64. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1571–72 (2015) (surveying varying jury instructions among jurisdictions).

65. *See id.* at 1573.

66. For a general overview of the debates, see Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. EVIDENCE & PROOF 5 (2019).

or not—that is, whether the standard depends on the quality of the evidence, arguments, or explanations offered by the opposing party.[67]

Before turning to these issues, spelling out the common ground in the debates will help to clarify the disagreements. The underlying goals or aims of the preponderance standard are relatively uncontroversial. It is commonly assumed that the preponderance standard is intended to (1) allocate the risk of decisionmaking error roughly evenly between the parties, and (2) foster decisionmaking accuracy, other things being equal.[68] It is also commonly assumed that standards of proof have both a *psychological* aspect and an *epistemological* aspect. The psychological aspect concerns the inferential reasoning processes of fact finders and whether they are persuaded or not. In the context of a case, this concerns whether the disputed elements of a crime, civil cause of action, or affirmative defense have been proven.[69] A great deal of psychological research has explored these reasoning processes.[70] The epistemological aspect concerns whether the evidence is sufficient to support a particular factual finding—in other words, whether the finding is "reasonable" or "rational" in light of the evidence and the standard of proof.[71] The context for such determinations is one of epistemic *permissibility*. Sufficiency determinations permit a range of possible (and possibly inconsistent) factual findings but reject potential findings outside of that range as "unreasonable" or "irrational."[72]

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67. *See id.*

68. On accuracy, see Edward K. Cheng & Michael S. Pardo, *Accuracy, Optimality and the Preponderance Standard*, 14 LAW PROBABILITY & RISK 193, 193–94 (2015) (using a "minimax" approach to show that the optimal burden of proof to minimize the maximum probability of error for either party is the preponderance of the evidence standard). On equality, see Grogan v. Garner, 498 U.S. 279, 286 (1991) ("[T]he preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants . . . ."); and Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 286–89 (2004) (discussing the importance of equality as a procedural value).

69. In other words, a fact finder's conclusions are not simply a function of the evidence by itself—rather, the evidence must be combined with the background knowledge, assumptions, and beliefs of the fact finder in order to draw inferences from that evidence.

70. *See, e.g.*, MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW 157–58 (2016) (discussing how people view behavior in terms of the person's inferred characteristics).

71. Courts use "reasonable" and "rational" interchangeably in this procedural context. *See, e.g.*, Jackson v. Virginia, 433 U.S. 307, 318–19 (1979) ("rational trier of fact" and "evidence could reasonably support"); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148–49 (2000) ("rational factfinder" and "reasonable jury"); United States v. Beard, 354 F.3d 691, 692 (7th Cir. 2004) ("reasonable jury"); Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 902 (7th Cir. 1994) ("rational jury").

72. Courts measure this range of permissibility after making some deferential assumptions. First, courts will not assess witness credibility (but will assume that jurors may reach different conclusions about whether a witness is credible). *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Second, courts will construe the evidence in favor of the nonmoving party when the evidence is ambiguous or otherwise permits conflicting, reasonable inferences. *Id.*

The following discussion evaluates three possible accounts in light of these considerations, two based on different types of probabilistic facts[73] and one based on explanatory facts.[74]

A. Possibility One: Objective Probabilities

One possibility is that standards of proof impose an *objective* probabilistic threshold. According to this view, the "preponderance of the evidence" standard means and requires that the party with the burden of proof establish that, based on the evidence, the disputed fact is greater than 0.5 (or fifty percent) probable as a matter of objective probabilistic fact.[75] Under such a view, objective probabilistic facts would ground whether a fact is proven by a preponderance of the evidence in the same way that, say, randomly selecting a blue marble from a jar of one hundred marbles containing fifty-one blue and forty-nine red is more than 0.5 (or fifty percent) probable.[76]

This account is implausible as an accurate description of the preponderance standard for (at least) three reasons, one practical and two theoretical.

First, as a practical matter, the knowledge necessary to implement such a standard is missing in virtually every litigated case. For most items of admissible evidence, the objective probabilistic facts are unknown. Nor do parties even attempt to provide such information in the vast majority of cases.[77] What is true for individual items of

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73. Lumping different types of probabilistic accounts under a general label (such as "probabilism" or the "probabilistic approach") provides some rhetorical benefit to such accounts, given the illuminating uses of probability in other domains. *See* John D. Norton, *There Are No Universal Rules for Induction*, 77 PHIL. SCI. 765, 777 (2010) ("There are systems for which the probability calculus provides a serviceable logic of induction, and there are systems for which it does not."). Filling out the actual details of such an account, however, requires choices that, in turn, render individual varieties less plausible than they might otherwise seem in the abstract. I focus on the two most common ways to spell out such an account. A third, less developed probabilistic variety is discussed *infra* note 86.

74. *See* Pardo, *supra* note 1; Allen & Pardo, *supra* note 66; Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 256–57 (2008).

75. Objective probabilities are typically based on relative frequencies or propensities. *See generally* Alan Hájek, *Interpretations of Probability*, STAN. ENCYCL. OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2019/entries/probability-interpret/ (last updated Aug. 28, 2019) [https://perma.cc/DZF2-33JM] ("Like the frequency interpretations, *propensity* interpretations regard probabilities as objective properties of entities in the real world.").

76. It would also be similar to whether the probability that an unbiased coin will land "heads" (or "tails") when tossed is 0.5. *See id.*

77. Evidence of base rates and other types of statistical evidence are sometimes admissible and probative. But even in such instances, the statistical evidence is not offered as the "objective probability" of the disputed fact. At the very least, the statistical evidence must be combined, or interpreted, in light of the other evidence. And even the statistical evidence itself may support different inferences and conclusions. *See generally* Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107 (2007).

evidence is also true for the body of evidence as a whole. It is a familiar feature of the legal system that disputed facts are routinely proven by a preponderance of the evidence, without anyone having any idea of the objective probabilistic relationship between the evidence and the disputed fact.[78]

Second, a threshold such as 0.5 (or fifty percent) is *noncomparative* in a manner that appears to be inconsistent with the underlying goals of the preponderance standard. If the threshold is understood as not taking into account the evidence and explanations of the opposing party, then the standard would no longer align with the goals of allocating the risk of error roughly evenly between the parties or minimizing total errors. For example, imagine a case in which, in light of the evidence, the plaintiff's explanation of the fact is 0.4 probable and the defendant's alternative explanation is 0.2 probable. The plaintiff loses under a 0.5 rule, despite having an explanation that is twice as likely to be true as the alternative. Moreover, giving the benefit of the unknown 0.4 to the defendant fails to treat the parties roughly equally with regard to the risk of error. These are some of the reasons why more recent probabilistic accounts have converged on comparative accounts of the proof process.[79]

Third, an objective-probability account eliminates the psychological aspect of standards of proof and fails to explain sufficiency-of-the-evidence doctrine. As discussed above, whether evidence satisfies a standard of proof depends not only on the evidence itself but also the reasoning processes of fact finders (including their beliefs, assumptions, and background knowledge). Sufficiency-of-the-evidence analysis gives some deference to this aspect by permitting a range of (possibly inconsistent) findings, so long as the findings meet a threshold of being "reasonable" or "rational." By contrast, if there *were*

78. To be clear, nothing in the above paragraph is a critique of statistical evidence—statistical evidence may be relevant, admissible, quite probative, and even, in some cases, sufficient to prove a contested fact (depending on the details). The only point being made above is that such evidence rarely, if ever, establishes an objective probabilistic fact.

79. *See* Cheng, *supra* note 63, at 1258 ("[The Essay] proposes viewing preponderance not as an absolute probability, such as 0.5, but rather as a ratio test that compares the probability of the narratives offered by the plaintiff and defendant."); Jonah B. Gelbach, *Estimation Evidence*, 168 U. PA. L. REV. 549, 617–19 (2020) (offering a comparative admissibility rule based on Bayesian hypothesis testing that allocates the chance of errors equally between the plaintiff and the defendant); Sean P. Sullivan, *A Likelihood Story: The Theory of Legal Fact-Finding*, 90 U. COLO. L. REV. 1, 17–22 (2019) (summarizing inconsistent descriptions of probability thresholds and suggesting a likelihood analysis that "describes the comparative consistency of different hypotheses with the evidence"). It is of course possible to interpret a "0.5 rule" as comparative by dividing the unknown probability space between the parties. For example, in the example in the text, the unknown 0.4 could be divided between the parties such that the plaintiff's explanation is now 0.6 probable and the defendant's is 0.4 probable, and thus the plaintiff now wins under a "0.5 rule." This is not how the "0.5 rule" is typically interpreted, however.

a known objective probability for a disputed fact, then the only decisionmaking task would involve comparing that number with the standard of proof threshold. There would be nothing else for the fact finder to do, nor anything to reason about. Moreover, that probabilistic fact would be the only reasonable or rational answer. This picture is plainly inconsistent with both how the preponderance standard operates at trial and how sufficiency doctrine operates in light of the standard of proof. These inconsistencies further render the objective-probability account implausible as an explanation of the preponderance standard.[80]

B. Possibility Two: Subjective Probabilities

A second possibility is that standards of proof impose a subjective probabilistic threshold. Given the problems with the objective-probability account, legal scholars have typically relied on subjective credences (or "degrees of belief") to explain the preponderance standard.[81] According to this account, a disputed fact is proven under the preponderance standard when the fact finder *believes* the disputed fact is greater than 0.5 (or fifty percent) probable.[82] One

80. Another theoretical issue (outside the scope of this article) is the so-called "conjunction issue," which follows from the fact that as a matter of black-letter law, the standard of proof applies to the individual elements of crimes, civil causes of actions, and affirmative defenses. For example, in a two-element civil claim, the plaintiff wins under a "0.5 rule" by proving each element to 0.6, even though the probability of plaintiff's claim is only 0.36 (assuming independence between the elements). This result and related anomalies further suggest that the "0.5 rule" is inconsistent with the preponderance standard's goals regarding accuracy and equalizing the risk of error. Scholars continue to debate the significance of conjunction issues. *See* David S. Schwartz & Elliott Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 WM. & MARY L. REV. 619 (2017); Allen & Pardo, *supra* note 66, at 37–39 (questioning whether courts actually evaluate elements as conjunctive probabilities); *see also infra* note 108 (discussing the conjunction issue when admissibility depends on multiple factual disputes).

81. *See* Clermont, *supra* note 10, at 1459 n.4 ("[T]he usual particularization of probability for discussing legal proof is subjective probability."); Richard D. Friedman, *Answering the Bayesioskeptical Challenge*, 1 INT'L J. EVIDENCE & PROOF 276, 276 (1997); *see also* LEONARD J. SAVAGE, THE FOUNDATIONS OF STATISTICS 3–5 (1954) (presenting a theory of statistics based on subjective "personalistic" probability); Bruno de Finetti, *Probabilism: A Critical Essay on the Theory of Probability and the Value of Science*, 31 ERKENNTNIS 169, 172 (1989) (arguing for the adoption of "the subjective theory of probability" as a "fundamental instrument of scientific thought").

82. One possible check on the "rationality" of the subjective beliefs in such models is whether the beliefs conform to Bayes' Theorem—used to calculate conditional probabilities—and are thus consistent with one another. This constraint is a weak one, however, because it still allows for virtually any conclusion by the fact finder, no matter how weak or absent the evidence. The Bayesian updating posited by such models is also inconsistent with other features of the process of proof. *See* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1534 (2001) (discussing common jury instruction to not draw any inferences until after all the evidence has been presented). It also relies on other potentially problematic

upside of this possibility is that it does not make the unattainable epistemological demands of the objective-probability account. It also draws on a rich literature of applications in other domains.[83]

Despite these potential upsides, however, the subjective account is also implausible as an accurate description of the preponderance standard. As with the objective account, it is inconsistent with the goals of the standard when it is understood in noncomparative terms, for similar reasons. The subjective account, however, also fails to align with the goals of the standard for deeper reasons and, relatedly, fails to explain core aspects of legal doctrine. Most importantly, the subjective account severs the link between evidence, outcomes, and truth. This is because subjective credences, or degrees of belief, are not constrained by the quality or strength of the evidence. They may be anything at all between zero and one (or zero and one hundred percent) regardless of how strong, weak, or completely absent the evidence is in support of a contested fact. Such an account, if true, would be an epistemological disaster for a system aimed at promoting accurate fact-finding.[84]

Such an account also fails to explain core aspects of sufficiency-of-the-evidence doctrine. Because subjective credences are not constrained by the quality of the evidence, any finding at all would count as "reasonable" or "rational" in light of the evidence (or lack thereof).[85] This implies that virtually every litigated case should go to a jury and that every verdict should be upheld on appeal, no matter how weak or absent the evidence. These implications provide a reductio ad absurdum for a subjective-probability account of the preponderance standard. Just as the objective possibility fails to account for the

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assumptions. *See* State v. Spann, 617 A.2d 247, 254 (N.J. 1993) ("[T]his .5 assumed prior probability clearly is neither neutral nor objective . . . .").

83. *See generally* Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 Q.J. ECON. 643 (1961) (behavioral economics); Ward Edwards, *Subjective Probabilities Inferred from Decisions*, 69 PSYCH. REV. 109 (1962) (cognitive psychology); STEVEN G. VICK, DEGREES OF BELIEF: SUBJECTIVE PROBABILITY AND ENGINEERING JUDGEMENT (2002) (engineering).

84. *See* Alvin I. Goldman, *Quasi-objective Bayesianism and Legal Evidence*, 42 JURIMETRICS 237, 239 (2002):

> Orthodox Bayesianism is subjective, or personalistic, and subjective Bayesianism does not commend itself as a basis for truth acquisition. It is not at all clear how purely subjective Bayesian methods, applied to the legal context, hold any promise of leading a trier of fact to truth. And it is not clear how purely subjective Bayesian criteria could be helpful in showing how certain rules or procedures of evidence should be preferred to others on grounds of promoting truth ascertainment.

85. Consistency is too weak of a constraint because it allows findings to count as "rational" or "reasonable" no matter how weak or absent the evidence to support it. *See supra* note 82 (discussing the limitations of Bayesian consistency).

psychological aspect of standards of proof, the subjective possibility fails to account for the *epistemological* aspect.[86]

C. Possibility Three: Explanatory Facts

The problems with probabilistic approaches in the literature led to a search for alternative theoretical accounts of standards of proof specifically and the process of legal proof more generally. A third possibility focuses on explanations and explanatory criteria. In the discussion below, I focus on the particular version of explanationism that Ron Allen and I have advanced under the label of "relative plausibility."[87]

According to this account, cases decided under the preponderance standard involve a choice between the competing, contrasting explanations of the evidence and the disputed events.[88] The preponderance standard thus imposes an explanatory threshold on the party with the burden of proof.[89] In order to satisfy the standard, the party with the burden must persuade the fact finder that their explanation is better or more plausible than the alternative explanations that support their opponent.[90] And with regard to

86. Scholars have suggested a third possible probability account based on "epistemic" or "evidential" probabilities—in which, for example, explanatory criteria (discussed below) fix the range of reasonable or rational probabilities based on the evidence. *See, e.g.*, Brian Hedden & Mark Colyvan, *Legal Probabilism: A Qualified Defence*, 27 J. POL. PHIL. 448, 453–54 (2019) ("Evidential probabilities incorporate . . . epistemological considerations—explanatory quality, simplicity, comprehensiveness, and the like . . . ."). Such a possibility is hard to evaluate because no one has spelled out what the numbers would or should be in particular cases (in a manner in which the numbers add explanatory value and are not epiphenomenal). *See also* Ronald J. Allen, Response, *Debate: Legal Probabilism—A Qualified Rejection: A Response to Hedden and Colyvan*, 28 J. POL. PHIL. 117, 125 (2020) (asserting that proponents of "evidential probabilism" do not provide examples of how the concept "would be operationalized in realistic legal settings").

87. *See* Allen & Pardo, *supra* note 66, at 14–19 (detailing the relative plausibility approach to the proof process); Pardo & Allen, *supra* note 74, at 245–57 (defending the relative plausibility approach against common objections and alternative approaches).

88. *See* Allen & Pardo, *supra* note 66, at 15 ("The proof process involves two stages: (1) the generation of potential explanations of the evidence and events, and (2) a comparison of these explanations in light of the applicable standard of proof."). The inferential process resembles one of "inference to the best explanations," with adjustments made for higher standards of proof. On "inference to the best explanation," see GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 67–72 (1986); PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 33, 55–71 (2004). *See generally* BEST EXPLANATIONS: NEW ESSAYS ON INFERENCE TO THE BEST EXPLANATION (Kevin McCain & Ted Poston eds., 2017).

89. Higher standards of proof thus require higher explanatory thresholds. For a discussion, see Allen & Pardo, *supra* note 66, at 16 (applying relative plausibility to the "beyond a reasonable doubt" and "clear and convincing evidence" standards).

90. Within the proof process, there is some flexibility for parties to offer alternative (or disjunctive) explanations, and fact finders may (but are not required to) consider possibilities not advanced by the parties. *See id.* at 24–26 (discussing these issues); *see, e.g.*, Anderson v. Griffin, 397 F.3d 515, 521 (7th Cir. 2005) (holding that the jury is entitled to believe an explanation if "all

sufficiency of the evidence, the evidence must be strong enough that a "reasonable jury" could find that the explanation of the party with the burden is better than the alternative(s). What makes particular explanations better or worse, or more or less plausible, are case-specific facts about the relationships between the evidence and the contrasting explanations.[91] Before discussing the details of these *explanatory facts*, it will be helpful to first explain how this account better fits with both the policy goals of the standards and their practical applications than the probabilistic accounts.

First, the explanatory account of the preponderance standard is explicitly comparative in a way that comports with the goals of the standard in terms of allocating the risk of error and minimizing errors. With regard to error allocation, each side bears a roughly similar risk of having the worse explanation, with "ties" going against the party with the burden of proof. Regarding error minimization, accuracy will be advanced to the extent that better, more plausible explanations are more likely to be true than worse, less plausible explanations.[92] These theoretical reasons help explain why the more recent formal accounts of the proof process have modeled the process as consistent with the explanatory framework of relative plausibility.[93]

Second, the explanatory account of proof also better comports with the best psychological account of fact finder behavior. The "story model" of jury decisionmaking posits that jurors construct stories to fit the evidence they are hearing and that story construction drives verdict choice.[94] The explanatory criteria that make explanations better or worse overlap with some of the criteria that appear to drive story construction and juror reasoning—namely, coverage, consistency, and

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the alternatives are ruled out"); Zuchowicz v. United States, 140 F.3d 381, 390–91 (2d Cir. 1998) (holding fact finder did not err in determining a drug caused death by pulmonary hypertension even where "it was not possible to eliminate all other possible causes of pulmonary hypertension"); McCormick v. Kopmann, 161 N.E.2d 720, 730 (Ill. App. Ct. 1959) ("Here, either of two defendants may be liable to plaintiff, depending upon what the jury finds the facts to be. . . . Plaintiff need not choose between the alternative counts.").

91. *See* Pardo, *supra* note 1, at 288–90 (discussing the role of explanatory facts).

92. The fact that a better explanation might be false is similar to the fact that a more probable hypothesis might also be false. Both are general examples of the so-called "problem of induction." *See* Timothy Williamson, *Abductive Philosophy*, 47 PHIL. F. 263, 267 (2016) ("Inference to the best explanation may be a good heuristic to use when—as often happens—probabilities are hard to estimate . . . . In such cases, inference to the best explanation may be the closest we can get to probabilistic epistemology in practice.").

93. For examples of such accounts, see *supra* note 79.

94. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–21 (1991).

coherence.[95] This overlap makes the explanatory account a better fit with fact finder practices than either probabilistic account.

More generally, the explanatory account fits with sufficiency-of-the-evidence doctrine and explains both the psychological and epistemic aspects of standards of proof. In evaluating whether a particular factual finding is "reasonable" or "rational" in light of the evidence and the standard of proof, courts look to *explanatory facts*—that is, facts about the relationships between the evidence and the alternative explanations advanced by the parties. The types of explanatory facts that matter will vary based on the details of individual cases,[96] but familiar examples observed in the case law include

1. consistency or inconsistency between the evidence and the explanations;[97]
2. the absence of evidence to support an explanation (or an important part of an explanation);[98]
3. counterfactual considerations (e.g., is the evidence produced, what would be expected if an explanation were true);[99]
4. fit with background knowledge (or "common sense" assumptions);[100] and
5. the absence of plausible, alternative explanations.[101]

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95. *See id.* at 527–28 (defining coverage, consistency, and coherence). The story model and explanatory accounts of proof are different kinds of theories, with different objects of inquiry. They are thus not competitors, although they make differing predictions on certain issues. For discussions of the differences, see Pardo, *supra* note 1, at 295 n.49; Allen & Pardo, *supra* note 66, at 31; Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 598–99 (2013).

96. Philosophers have identified general criteria that tend to make explanations better or worse. See, for example, LIPTON, *supra* note 88, at 59–62, for an influential account. The role of explanatory facts in sufficiency-of-the-evidence determinations is discussed in more detail in Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431 (2023).

97. *See, e.g.*, Muckler v. Buchl, 150 N.W.2d 689, 693 (Minn. 1967) ("The evidence is consistent with the theory that decedent fell on the stairway because of the darkness. But it is also consistent with the possibility that the fall would have occurred no matter what the lighting condition might have been."); Yeschick v. Mineta, 675 F.3d 622, 632 (6th Cir. 2012) (discussing whether the provided evidence is consistent with age discrimination or a nondiscriminatory explanation).

98. *See, e.g.*, Alvarez v. City of Brownsville, 904 F.3d 382, 391–92 (5th Cir. 2018) (holding Plaintiff failed to introduce evidence sufficient to establish "deliberate indifference").

99. *See, e.g.*, O'Laughlin v. O'Brien, 568 F.3d 287, 304 (1st Cir. 2009) ("It bears repeating that the prosecution had to rely on circumstantial evidence because no physical or DNA evidence linked O'Laughlin to the attack despite the copious amount of blood at the crime scene.").

100. *See, e.g.*, United States v. Beard, 354 F.3d 691, 692 (7th Cir. 2004) ("It would mean that someone who borrowed the car from [the defendant] placed a loaded gun in the console . . . and then—what? Forgot about it? That is possible, but it was not so lively a possibility as to compel a reasonable jury to acquit . . . ."); *see also* United States v. Morales, 902 F.2d 604, 607–08 (7th Cir. 1990) (comparing the arresting officer's "improbable" explanation of the evidence with the Defendant's "alternative hypothesis" based on local "common knowledge" about gun ownership).

101. *See, e.g.*, Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 902 (7th Cir. 1994) ("[Plaintiff] produced evidence that could lead a rational jury to eliminate the hypotheses inconsistent with his favored theory, which in turn permits an inference that his hypothesis is

These examples of explanatory facts are intended to provide a sense of the details that courts point to in determining whether the evidence is sufficient in the context of a particular case. Because the explanatory facts will vary depending on the details of individual cases, they cannot be reduced to an algorithm or a simple rule for measuring evidential sufficiency. Rather, it means that courts evaluating the sufficiency of evidence must grapple with the relationships between the contrasting explanations and the evidence.

When courts evaluate these relationships, the psychological and epistemic aspects of proof standards are manifest. First, on the one hand, the explanatory facts are distinct from purely *subjective* beliefs. In other words, they involve details about the evidence that are in some sense "outside of the heads" of jurors and judges.[102] This feature corresponds to the *epistemic* aspect of sufficiency doctrine. Because of the explanatory facts, some factual findings are unreasonable and some are not, regardless of the subjective credences of fact finders. Second, and on the other hand, the evaluation of possible explanations cannot be completely separated from the exercise of judgment by jurors and judges, who must engage with case-specific details and evaluate potentially conflicting inferences. In other words, the process is not completely *objective* either—in the sense that a generalized process or procedure can identify correct answers (or rank explanations as reasonable or unreasonable) in the absence of such judgment.[103] This feature corresponds to the *psychological* aspect of sufficiency doctrine. The evaluation of a possible explanation in light of the evidence takes place in a context that gives deference to fact finders to assess witness credibility and to weigh conflicting evidence.[104] Accordingly, inconsistent findings may be both permissible and reasonable.[105] In sum, the explanatory facts that make evidence sufficient allow an important role for fact finder reasoning (contrary to the objective-probability account), but these facts are also distinct from subjective credences and thus provide a basis for courts to evaluate whether a

true."); *Beard*, 354 F.3d at 693 ("Confidence in a proposition, such as [the defendant's] guilt, is . . . undermined by presenting plausible alternatives."); Brackett v. Peters, 11 F.3d 78, 80 (7th Cir. 1993) ("[N]o persuasive evidence of an alternative causal sequence [was] presented . . . .").

102. For this reason, the explanatory facts differ from the subjective-probability accounts.

103. For this reason, the explanatory account recognizes a necessary role for the fact finder, a role that is eliminated under the objective-probability account.

104. The doctrine thus seeks to guide what is epistemically *permissible* (not necessarily what is epistemically correct).

105. The explanatory account thus recognizes this feature of sufficiency review (ignored by the objective-probability account) without collapsing to a subjective-probability account. *See also supra* note 72 and accompanying text.

particular finding is reasonable or not (contrary to the subjective-probability account).

IV. PROVING MABRUS AND ZORGS

The debates outlined in the previous Part have focused on the proof of disputed facts at trial and, to a lesser extent, the sufficiency of evidence to prove those facts. The structural similarities between these issues, on one hand, and the proof structure for admissibility under Rule 104, on the other hand, however, suggest that similar theoretical issues should also arise on the admissibility side. Thus, the best understanding of the "preponderance of the evidence" standard in the former context should also illuminate the proof of Mabrus and Zorgs. Accordingly, this Part applies some of the lessons of the previous Part to the admissibility context.

A. Proving Mabrus Under Rule 104(a)

In *Bourjaily*, the U.S. Supreme Court clarified that the preponderance standard applies to factual disputes under Rule 104(a).[106] The case specifically concerned whether the Prosecution's use of hearsay statements (i.e., Lonardo's recorded statements made to an FBI informant) fell within the coconspirator exemption to the hearsay rule.[107] For the statements to fall within the exception, the Court explained, the Prosecution needed to prove by a preponderance of the evidence that "the conspiracy existed" and "that the defendant and the declarant were members of this conspiracy."[108]

The Court concluded that the Prosecution had satisfied this burden.[109] Suppose we ask: What underlying details make it the case that—or what grounds the fact that—the preponderance standard has been satisfied in this case?[110] First, it is not an objective probabilistic fact. Neither party attempted to introduce any evidence of such a fact. And even after the issues were "proven" for legal purposes, no one had

106. Bourjaily v. United States, 483 U.S. 171, 175–76 (1987). See *supra* Part II for a more detailed explanation of *Bourjaily*.

107. *Bourjaily*, 483 U.S. at 173–74.

108. *Id.* The various "conjunction" issues that apply to the proof of legal elements also potentially arise for admissibility when admissibility depends on multiple factual disputes. *See supra* note 80. For example, suppose a hearsay exception requires a proponent to prove each of three requirements by a preponderance of the evidence. *See, e.g.*, FED. R. EVID. 803(5). Under a "0.5 rule," the proponent succeeds in admitting the hearsay by proving each to 0.6, even though the probability that the statement falls under the hearsay exception may be considerably lower than 0.5 (0.216, assuming independence among the elements).

109. *Bourjaily*, 483 U.S. at 180–81.

110. See Pardo, *supra* note 1, at 286–90.

any idea what the objective probability was that a conspiracy existed and that the Defendant and the declarant were involved. Second, it is not a subjective credence. Neither the Court nor the lower court judges appeared to consult their subjective credences in deciding this issue. And even if they did, those credences could have been anything between zero and one, regardless of how strong or weak or completely absent the evidence was on these facts.[111]

Instead, the Court pointed to several *explanatory facts* supporting the Prosecution's explanation that a conspiracy existed and that the conspiracy included the Defendant and the declarant. The Court first noted that several details in Lonardo's statements were corroborated by "independent evidence."[112] The statements indicated that Lonardo and a "friend" were involved in a plan to buy a kilogram of cocaine from the undercover informant.[113] To carry out this plan, they agreed that the "friend" would be in his car at the hotel parking lot to accept the cocaine.[114] This plan, according to the Court, was corroborated by the "independent evidence" that (1) the "friend," who turned out to be the Defendant, "showed up at the prearranged spot at the prearranged time"; and (2) the Defendant "picked up the cocaine" and had "a significant sum of money" in his car.[115] This evidence supported the explanation that a conspiracy existed and that the Defendant and the declarant were involved. By contrast, this evidence was inconsistent with the alternative explanations that there was no conspiracy or that the "friend" was someone other than the Defendant. Because of these explanatory facts, the Prosecution's explanation was better than the alternative. Accordingly, the Court held that "the trial court concluded, in our view correctly, that the Government had established" the applicability of the coconspirator exemption by a preponderance of the evidence.[116]

B. Proving Zorgs Under Rule 104(b)

In *Huddleston*, the Court clarified that the preponderance standard applies to factual disputes under Rule 104(b).[117] In this context, courts examine whether there is "evidence sufficient to support

111. *See* Goldman, *supra* note 84 and accompanying text (discussing the epistemological shortcomings of subjective probabilities).

112. *Bourjaily*, 483 U.S. at 180–81.

113. *Id.* at 180.

114. *Id.*

115. *Id.* at 181.

116. *Id.*

117. Huddleston v. United States, 485 U.S. 681, 690 (1988). See *supra* Part II for a more detailed discussion of *Huddleston*.

a finding" of the disputed fact—which in turn requires the court to examine whether a reasonable jury could find the disputed fact by a preponderance of the evidence.[118] In *Huddleston*, in order to prove the Defendant's knowledge that the videotapes were stolen, the Prosecution attempted to introduce evidence that the Defendant had previously sold stolen televisions.[119] As the Court framed the issue, the admissibility of this evidence depended on whether the televisions were in fact stolen.[120] Thus, admissibility depended on whether there was evidence sufficient to support a finding on whether the televisions were stolen—in other words, could a reasonable jury find this fact by a preponderance of the evidence?

The Court concluded that the evidence was sufficient to support this finding.[121] Again, what makes it the case that a reasonable jury could find this fact by a preponderance of the evidence? It is not an objective probability. No evidence was introduced on this, and even after the standard had been satisfied, no one has any idea of the objective probability that the televisions were stolen. Moreover, it is not a subjective credence. Under the subjective account, any credence would have been permissible (hence "reasonable") regardless of how weak or absent the evidence.[122]

As in *Bourjaily*, the Court in *Huddleston* again looked to *explanatory facts*. Under the Rule 104(b) framework, the explanatory facts grounded whether a "reasonable jury" could find the fact (on which relevance depends) by a preponderance of the evidence.[123] In support of the Prosecution's explanation that the televisions were stolen, the Court pointed to (1) the low sale price of the televisions, (2) the large quantity of televisions the Defendant offered for sale, and (3) the Defendant's involvement in the sale of other stolen goods.[124] As an alternative explanation, the Defendant claimed he was selling the televisions on commission from a third party who told him the televisions were not stolen.[125] Based on these contrasting explanations and the above evidentiary details, the Court concluded a reasonable jury could find the Prosecution's explanation better, and thus it would

118. *Huddleston*, 485 U.S. at 690 (quoting FED. R. EVID. 104(b)).

119. *Id.* at 683. For additional details on the Prosecution's evidence, see *supra* note 48.

120. *Huddleston*, 485 U.S. at 690; *see supra* note 58 (discussing the relevance of the Defendant's knowledge regarding whether the televisions were stolen).

121. *Huddleston*, 485 U.S. at 691.

122. *See supra* notes 110–111 and accompanying text.

123. *Huddleston*, 485 U.S. at 690.

124. *Id.*

125. *Id.* at 684 ("[Defendant] testified that the Memorex tapes, the televisions, and the appliances had all been provided by Leroy Wesby, who had represented that all of the merchandise was obtained legitimately.").

be reasonable to find the Zorg by a preponderance of the evidence.[126] This is so even though the jury might ultimately believe the Defendant's testimony and reject the Prosecution's explanation.

C. Intertwined Mabrus and Zorgs: United States v. Bonds

A final example concerns the perjury prosecution of Barry Bonds for allegedly lying to a grand jury by denying the use of steroids.[127] An important evidentiary issue in the case involved the Prosecution's attempt to admit lab results of urine and blood samples that had tested positive for steroids.[128] The Prosecution claimed the samples came from Bonds.[129] Admissibility of the test results raised both a Mabru and a Zorg. To prove the requisite foundation for the evidence, the prosecution had to introduce evidence "sufficient to support a finding" that the evidence was what it is claimed to be (i.e., the samples tested came from Bonds).[130] This was a Zorg to be decided under the Rule 104(b) standard. Yet, some of the evidence the prosecution intended to supply this foundation was hearsay (statements made by Bonds's trainer to the lab that the samples were from Bonds).[131] Whether the statements were admissible under a hearsay exemption or exception—and thus part of the evidence that could support the foundation issue—was a Mabru to be decided under the Rule 104(a) standard. In excluding the evidence, the trial and appellate courts each pointed to explanatory facts at both the Mabru and Zorg levels.

First, the hearsay issue. To admit the statement from the trainer (Greg Anderson), the prosecution had the burden of proving by a preponderance of the evidence that the statement fell under a hearsay exemption or exception (a Mabru). Before the trial court, the prosecution relied on several possibilities, including authorized statements[132] and statements made by an agent or employee.[133] In

126. *See id.* at 691 ("Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.").

127. United States v. Bonds, 608 F.3d 495, 499 (9th Cir. 2010).

128. *Id.* at 497.

129. *Id.*

130. *See* FED. R. EVID. 901(a).

131. *Bonds*, 608 F.3d at 498 ("Valente [a lab employee] would testify Anderson [the trainer] brought the samples to the lab and said they came from Barry Bonds."). Anderson refused to testify and was jailed for contempt. *Id.* at 499.

132. *Id.* at 500; FED. R. EVID. 801(d)(2)(C).

133. *Bonds*, 608 F.3d at 500; FED. R. EVID. 801(d)(2)(D). I focus on these two examples in the discussion below. Other possibilities advanced by the Prosecution but rejected by the trial court were: statements against interest, FED. R. EVID. 804(b)(3), coconspirator statements, FED. R.

concluding that the statement did not fall under either exemption, the trial and appellate courts pointed to several explanatory facts.[134] Before the trial court, the prosecution argued that Bonds had "implicitly authorized" the statements by giving the blood and urine samples to Anderson.[135] The court, however, concluded that such authorization was inconsistent with the general nature of such relationships (trainers are not generally authorized to speak on behalf of clients, nor are those who provide blood or urine samples necessarily authorizing those delivering the samples to reveal their identity).[136] The court also concluded that such an authorization was inconsistent with the specific relationship between Bonds and Anderson—Bonds did not hire Anderson to deliver the samples to the lab, nor ask Anderson to do so, he provided the samples because Anderson asked for them.[137] Given these facts, and absent any explicit authorization to speak on behalf of Bonds, the trial court concluded that the prosecution's explanation (i.e., that Bonds had authorized Anderson to speak on his behalf) was not better than the alternative (i.e., that Bonds had not authorized such a statement).[138] With regard to agent/employee statements, the trial court again pointed to several facts that were inconsistent with the prosecution's explanation that Anderson was an agent or employee of Bonds. Although Anderson had served as a trainer for Bonds, the trial court noted that the specific nature of their relationship was more akin to a friendship or an "independent contractor" relationship rather than an employer-employee (or principal-agent) relationship.[139] These facts were inconsistent with the prosecution's explanation that Anderson was an agent or employee and consistent with the defendant's alternative explanation that Anderson was neither.[140]

The appellate court agreed, upholding the trial court's findings on the hearsay issue under Rule 104(a). In doing so, the appellate court pointed to additional *explanatory facts* that made the prosecution's explanations regarding authorization, agency, or employment even less plausible. Regarding the informal nature of the relationship, the appellate court noted that Bonds referred to Anderson in his testimony

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EVID. 801(d)(2)(E), and the residual exception, FED. R. EVID. 807. *See* Order Re: Defendant's Motions in Limine, *Bonds*, 608 F.3d 495 (No. CR 07-00732), 2009 WL 416445, at *3–7.

134. Order Re: Defendant's Motions in Limine, *supra* note 133, at *7–8; *Bonds*, 608 F.3d at 502–07.

135. *Bonds*, 608 F.3d at 503.

136. *Id.*

137. *Id.*

138. *See* Order Re: Defendant's Motions in Limine, *supra* note 133, at *5.

139. *Id.* at *5 n.8 ("Defendant testified to the grand jury that he did not pay Anderson [for trainer services] but gave him a $3,000 ring as a gift.").

140. *Id.* at *5.

as a "friend" and that Bonds did not control or direct any of Anderson's training activities.[141] Moreover, the court noted that Anderson provided his own equipment and supplies, had several other clients, and offered training services to others.[142] Finally, the lab testing was done at Anderson's request, and there was no evidence that Bonds exercised any control or direction over any of the testing details. At both the trial and appellate levels, neither objective probabilities nor subjective credences[143] appeared to play any role in the analysis. Instead, explanatory facts grounded the analyses of both courts.

Second, the foundation issue. The remaining issue—the Zorg—concerned whether a reasonable jury could find by a preponderance of the evidence that the samples came from Bonds. Without Anderson's statement, the trial court concluded that there was not sufficient evidence to support this finding—in other words, that no reasonable jury could find by a preponderance of the evidence that the samples came from Bonds.[144] Again, neither objective probabilities nor subjective credences appeared to play any role. After all, the jury might have had a subjective credence beyond 0.5 (or fifty percent) even in the absence of Anderson's statement (or, for that matter, any evidence linking Bonds to the sample). Rather, there was not sufficient evidence to support this finding because of, or in virtue of, the explanatory facts.[145] There was no admissible evidence that made the prosecution's explanation (i.e., that the samples came from Bonds) more plausible than the alternative explanations (i.e., that the samples came from another client of Anderson or from someone else entirely). Thus, no reasonable jury could make this finding, a ruling not challenged on appeal.

CONCLUSION

I have aimed to link significant issues regarding the admissibility of evidence with the significant, and contested, theoretical

141. *Bonds*, 608 F.3d at 505 ("Bonds testified that he had a 'Dude, whatever' attitude to Anderson's actions.").

142. *Id.*

143. The trial or appellate court judges could have had a subjective credence above 0.5, regardless of the evidence.

144. *See* Order Re: Defendant's Motions in Limine, *supra* note 133, at *5 ("[Without Anderson's statement] the government [i]s without evidence that the information in the Quest records pertains to urine samples that came from defendant. . . . [T]his is not a case in which the chain of custody has a few "rusty" links. . . . Rather, crucial pieces of the chain are missing altogether." (citation omitted)).

145. *See* Pardo, *supra* note 96 (discussing the role of explanatory facts in sufficiency determinations).

issues regarding the nature and structure of legal proof as a whole. In the process, I have also aimed to highlight the importance of explanations and explanatory facts at the microlevel of admissibility, arguing that their importance largely mirrors the important roles they play at the macrolevel of proof as a whole.[146] The benefits of linking the admissibility issues and the proof issues are twofold.

On one hand, virtually every contested admissibility issue may depend on some underlying disputed fact (a Mabru or a Zorg), which will in turn depend on an application of the "preponderance of the evidence" standard.[147] Yet, as the evidence literature reveals, what that standard requires, and what makes evidence sufficient to satisfy it, remains contested.[148] Greater attention to the theoretical issues and options may help to clarify and illuminate the implicit choices being made by courts and parties at the admissibility level. Making these issues more explicit may provide greater understanding of the admissibility issues, as well as a more transparent target for critique.

On the other hand, greater attention to proof issues on the more routine (sometimes mundane and sometimes less consequential) admissibility issues may also help to clarify and illuminate how the same standards of proof operate at the macrolevel. These macrolevel proof issues are not only contested among evidence scholars—they also raise highly controversial questions for civil and criminal litigation more broadly, such as when evidence is sufficient to survive summary judgment or when evidence is sufficient to support a guilty verdict in a criminal case (both of which depend on the standard of proof).[149] Thus, understanding the proof of Mabrus and Zorgs may provide a model for understanding proof issues throughout civil and criminal procedure.

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146. For important differences, see *supra* notes 59–60 (detailing the burdens of proof at trial and summary judgment compared to the burden that must be met to submit evidence).

147. *See supra* Part II.

148. *See supra* Part III.

149. *See, e.g.*, Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 784 (2009):

> [T]he determination by a judge of whether a reasonable jury could find for the plaintiff is a legal fiction, incapable of determination. Accordingly, the only analysis that judges perform in their decisions to dismiss cases—under the mantra of the reasonable jury standard—is an improper one based on the judge's own views of the facts;

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1134 (2003) (criticizing sufficiency doctrine in civil cases); Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 998–1000 (1993) (criticizing sufficiency review in criminal cases).