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Courts and commentators have recognized for some time that trial burdens of proof refer to the degree of belief a factfinder must reach to deem a fact true. They also have recognized that one can express these degrees of belief in terms of probabilities. In this article Professor McCauliff suggests that one can use probability theory to analyze the standards governing various other factual determinations as burdens of proof. She argues that these standards lie along a continuum that requires increasing certainty of decisionmakers. Professor McCauliff uses this concept to demonstrate the ambiguity in the standards governing these decisions and the inconsistency that ambiguity causes. To illustrate further the ambiguity of these standards, Professor McCauliff presents the results of a survey of all federal judges in which she asked the judges to give an absolute numerical definition of the certainty required by each of nine "burdens of proof" standards. Professor McCauliff concludes that because of the ambiguity of these standards, the standards confuse the decisionmakers they were intended to aid and endanger the interests—often constitutional rights—they were intended to protect.

I. Introduction

The most familiar connotations of "burdens of proof" are the jury instructions alerting the trier of fact that the prosecution must convince the jury of guilt "beyond a reasonable doubt," or that a "preponderance of the evidence" is sufficient to decide the outcome of a civil case. Even with respect to these commonplace uses of burdens of proof, confusion exists about whether "burden of proof" refers to the objective quantum of evidence or to the sub-

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jective conviction of certainty in the mind of the trier of fact. Professor McBaine in his classic article on burden of proof argues that the concept refers to degrees of belief in the mind of the decisionmaker rather than the intrinsic quality of the evidence to which the phrase "preponderance of the evidence" first directs the attention of the trier of fact.[1] Indeed, the terms "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt" are three separate and distinct criteria that the trier of fact may use to arrive at a conclusion. "Degrees of belief" is in essence a metaphor to express the results of the decisionmaking process. Burdens of proof are guidelines to degrees of belief that facilitate the decisionmaking process.

Jury instruction, however, is not the only context in which the application of burdens of proof arises. The traditional burdens of proof phrases are only a representative selection of a whole series of phrases that express a similar decisionmaking function for triers of fact other than juries or judges. These other phrases include the various stages of certainty required in a search and seizure context—such as "reasonable suspicion" and "reasonable" or "probable cause to believe"—and appellate and administrative review standards—such as "clearly erroneous" and "substantial evidence."[2] Moreover, as in the case of traditional burdens of proof, commentators disagree about whether these terms refer to the quantum of evidence or to the conviction of certainty in the mind of the factfinder.[3] In addition, any discussion of burdens of proof

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1. McBaine, *Burdens of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944) [hereinafter cited as McBaine, *Burdens of Proof*]. Some commentators interpret "preponderance of the evidence" to indicate the quantity of the evidence. *See, e.g.*, E. MORGAN, BASIC PROBLEMS OF EVIDENCE 23 (1962). Professor McBaine argues that Rule 1 of the Uniform Rules of Evidence, which provides that a fact may he proven "either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. . . .," UNIF. R. EVID. 1 (act superseded 1974) encouraged this dichotomy between degrees of belief and quanta of evidence. McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13, 14 (1954) [hereinafter cited as McBaine, *Presumptions*]. Professor Ball suggests that the dichotomy between objective and subjective approaches to hurdens of proof reflects the division of thought between the inductive theory of probability and the frequency theory of probability. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961).

2. At first glance these phrases seem foreign to traditional burdens of proof. The analytical inspiration for treating all of these phrases as burdens of proof arises from Judge Weinstein's application of degrees of belief in the search and seizure context, *see* United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), and Judge Weinstein's discussion of the burden of proof that judges must apply in a presentence hearing, *see* United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978).

3. *See infra* note 13 and accompanying text.

also must take account of the Supreme Court's recent delineation of the constitutional function of burdens of proof at trial.[4]

This Article analyzes the whole range of burdens of proof as well as their constitutional implications. Part II of the Article discusses the traditional burdens of proof and the use of probability theory in legal factfinding. Part III of the Article studies the decisionmaking processes of law enforcement officers, the judges that review their decisions, and the decisionmaking processes in appellate and administrative review. Part IV of the Article returns to the trial process and analyzes burdens of proof, not as degrees of belief, but as reflections of constitutional due process that mandate a required degree of belief for the trial of certain important rights. Part V of the Article reports the results of a survey of judges on the meaning of various burdens of proof. Finally, the Article concludes that the objective-subjective dichotomy is an attempt to express at pretrial and posttrial stages the same policy concern that the Supreme Court has set forth at the trial level: the importance of the interests at stake. The proliferation of new burdens of proof, however, obscures and endangers these interests by confusing the decisionmakers who must apply them.

II. Degrees of Belief

The theory of decisionmaking for most categories of cases tried—criminal, serious personal rights, ordinary civil suits—is clear: "When people take their disputes to court, or the state prosecutes an alleged offender for a crime, what has happened in the past must be determined."[5] Determinations of past events, however, cannot recreate those events with perfect knowledge. "Time is irreversible, events unique, and any reconstruction of the past is at best an approximation. As a result of this lack of certainty about what happened, it is inescapable that the trier's conclusions be based on probabilities."[6] In other words, because the trier of fact never can be absolutely certain that a particular fact is true, the parties only can persuade him to a particular *degree* of certainty

4. Santosky v. Kramer, 102 S. Ct. 1388 (1982).

5. McBaine, *Presumptions*, *supra* note 1, at 15.

6. J. Maguire, J. Weinstein, J. Chadbourn & J. Mansfield, Cases and Materials on Evidence 1 (6th ed. 1973). The inductive process rests on the theory of probability. "Perfect knowledge alone can give certainty, and in nature perfect knowledge would be infinite knowledge, which is clearly beyond our capacities. We have, therefore, to content ourselves with partial knowledge—knowledge mingled with ignorance, producing doubt." W. Jevons, Principles of Science 224 (Am. ed. 1874).

that the fact is *probably* true. The study of burdens of proof from the point of view of the factfinder thus turns upon a description of how persuaded the factfinder must be by the evidence before him. Once the trier of fact makes a decision in accordance with the required probability ("beyond a reasonable doubt," "clear and convincing evidence," or "preponderance of the evidence"), the finding is "true" for the purposes of entering judgment and settling the dispute with finality.[7]

This theory of probabilities assumes that the factfinder in a trial and, indeed, all rational human beings, naturally act in accordance with the theory of probabilities in making their decisions. The theory of knowledge and probabilities, however, is not universally accepted.[8] The idea that the theory of probability naturally operates in human reason certainly is not self-executing in jury room deliberations.

Jury instructions on burdens of proof are almost always vague and ambiguous and thus confuse the very jurors they were intended to guide. Judges, perhaps by design,[9] explain only cursorily the phrases that they use to convey the proper degree of certainty to the jury. Professor Morgan notes the lack of clarity in the usual jury instruction in a civil trial:

> [The judge] . . . explains that the preponderance of evidence does not signify the greater number of witnesses or the larger volume of testimony but denotes, rather, evidence of greater convincing force. But he goes no farther. He does not attempt to describe the state of mind of the jurors which the evidence must create as he does in criminal cases. All his emphasis is upon the

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7. J. MICHAEL & M. ADLER, THE NATURE OF JUDICIAL PROOF 49 (1931).

8. *See infra* notes 47-51 & 92 and accompanying texts. Professor Cohen suggests that "popular probability" has nothing to do with statistical probability, but is a distinct phenomenon not susceptible to precise quantification. Thus, legal proof is numerically inexpressible. L. COHEN, THE PROBABLE AND THE PROVABLE (1977).

9. *See generally* Broun & Kelly, *Playing the Percentages and the Law of Evidence*, 1970 U. ILL. L.F. 23 (demonstrating the utility of probability theory in trials and urging the admission of probability statements into evidence under certain circumstances); Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968) (examining the possible application of a mathematical decision theory to judicial decisionmaking).

Professor Tribe argues that quantifying burdens of proof, particularly "beyond a reasonable doubt," diminishes the symbolic function of burdens of proof discussed in part III of this Article. He hypothesizes that quantifying in jury instructions an acceptable risk of error to which the trier of fact deliberately may subject the defendant, even though quantifiable doubt exists in reality, will result in the utilization of a lesser standard that jurors otherwise should not apply. Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810, 1817 (1971); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1374-75 (1971) [hereinafter cited as Tribe, *Trial by Mathematics*].

means which call forth the state of mind.[10]

Further, the ordinary jury instruction on "clear and convincing evidence" does not "describe the requisite degree [of belief], hut emphasizes only the quantity and quality of the evidence necessary to create the conviction."[11] Professor Morgan concludes that these ambiguities in standard jury instructions call for "a rephrasing which will convey a clear and distinct idea to the average mind."[12] Similarly, Professor McBaine proposes to make jury instructions on burdens of proof clearer by applying probabilities in simple terms. "The only sound and defensible hypotheses are that the trier, or triers, of facts can find what (a) *probably* has happened, or (b) what *highly probably* has happened, or (c) wbat *almost certainly* has happened."[13]

Opponents of tlie use of the probability theory for clarifying jury instructions suggest tbat no language could convey to jurors guidelines enabling them to know when they liave reached their decision with the degree of certainty required by the type of case before them. Judge Frank in *Larson v. Jo Ann Cab Corp.*[14] expressed doubts that human language is capable of conveying proper guidelines to jurors. In *Larson* the trial judge made a long, obscure charge to the jury on preponderance of the evidence during which he spoke of "degree of conviction."[15] The jury subsequently returned to ask whether tbey should apply the "beyond the sbadow of a doubt" standard.[16] The trial judge did not explain to the jury that the use of "conviction" in this context referred not to a crime, but to the belief the jurors would reacli during their deliberations.[17] On appeal, Judge Frank noted tlie inability of humans to communicate effectively.[18] Metaphors, according to Frank, are the general mode of speech and thought; no communi-

10. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 64 (1933).

11. *Id.* at 66.

12. *Id.* at 67. A short time after Morgan called for new jury instructions, 681 jurors responded to the question, "What propositions of law were most difficult to understand?" Highest on the multiple choice list was "preponderance of evidence" (232 jurors). *Trial by Jury*, 11 U. CIN. L. REV. 119, 192 n.18, 195 (1937).

13. McBaine, *Burdens of Proof*, *supra* note 1, at 246-47 (emphasis in original) (citing Morgan, *supra* note 10, at 66).

14. 209 F.2d 929 (1954).

15. *Id.* at 929.

16. *Id.*

17. *Id.* at 930.

18. *Id.* at 934.

cation is possible without them.[19] Probabilists, however, endow metaphors such as "preponderance of the evidence" with reality and utilize the analogy as a literal, comprehensive description of reality.[20] Judge Frank opined that effective metaphors "must be neither too 'far fetched' nor too 'nearly fetched.' "[21] Punning the words "preponderance" and "imponderables," Judge Frank suggested that because of the literal treatment of burdens of proof metaphors, "preponderance" and "conviction" have little or no meaning for modern jurors.[22] Thus, he upheld the jury instruction notwithstanding the trial judge's erroneous use of the term "conviction."[23]

Given these barriers to human communication, Judge Frank, like most opponents of the use of probability theory to simplify jury instruction, suggested that clarification of jury instructions on burdens of proof may be an impossible task.[24] He accepted the proposition that judges should use the words best understood by nonlawyers to revise jury charges, but expressed doubts that any revisions actually would improve the jurors' understanding of burdens of proof. To demonstrate the failures of human communication, Judge Frank enlisted the works of Alfred North Whitehead and Charles Corbin: "There exist no methods which will 'infallibly lead to one correct understanding' of another's words because in 'reading each other's words, men certainly see as through a glass, darkly.' "[25] Thus, Judge Frank responded to McBaine's proposed jury instructions[26] by stating that "[t]he suggestion may sound promising; but apparently McBaine has not attempted to try out these formulas on laymen."[27]

Professor McBaine's suggestions have not been adopted, and much opposition exists to using the language of probability theory in jury instructions. Judge Frank, for example, while challenging Professor McBaine to find clearer language and prove that the jury understands it, suggested that we would be nostalgic for ambiguity if Professor McBaine were to succeed.[28] Too much precision in jury

19. *Id.* at 932.
20. *Id.* at 932-33.
21. *Id.* at 932 n.14 (quoting C. BROOKS & R. WARREN, MODERN RHETORIC 426 (1949)).
22. 209 F.2d at 932 n.14, 933.
23. *Id.* at 935.
24. *Id.* at 934.
25. *Id.* at 934 (quoting C. CORBIN, 3 CONTRACTS § 535, at 16 (1960)).
26. *See supra* text accompanying note 13.
27. 209 F.2d at 934 n.25.
28. *Id.* at 934-35.

charges would diminish the "resources of ambiguity" that I. A. Richards wrote of.[29] Indeed, fear of precision may be at the root of much praise for the inscrutability of the jury. Likewise, some commentators fear that using probability theory in jury instructions may destroy the symbolism of the traditional burdens of proof.[30]

The *Larson* jurors may have made an even more telling objection to Professor McBaine's formulations: judges would not read Professor McBaine's charges in the (a) and (b) and (c) format presented by McBaine. Even under Professor McBaine's approach, the jurors would hear only (a) or (b) or (c), depending upon the type of case before them. Yet if the *Larson* example is representative, the jurors want the judge to tell them the whole alphabet and to say: "This is a regular civil suit exemplified by type (a), not a criminal case represented by type (c)." Telling the jurors only one letter of the alphabet fails to equip them with sufficient guidelines to know what degree of belief to apply, however intuitive the probability theory may be. The ambiguity, therefore, remains. This fear of losing the richness of ambiguity renders the jury instruction more a tool for appellate review than an actual guide to decisionmaking for the jurors.

III. Objective Quantum of Evidence or Subjective Belief?

Decisionmakers other than jurors decide pretrial and postrial issues and conduct appellate review. In some instances these decisionmakers apply the same burdens of proof—"preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt"—that the trier of fact uses at trial as guidelines for decisionmaking. In other instances these decisionmakers apply different burdens of proof, including "reasonable suspicion," "reasonable (or probable) cause to believe," "substantial evidence," and "clearly erroneous." The initial decisionmakers are law enforcement officials in search and seizure and other areas governed by constitutional considerations or administrative law judges and trial judges in questions of review.

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29. *Id.* at 935 n.31 (citing I. Richards, How to Read a Page 22 (1942); I. Richards, The Philosophy of Rhetoric 40, 72-73 (1936)).

30. *See* R. Eggleston, Evidence, Proof, and Probability 102, 137 (1978); Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. Ill. L.F. 763, 806.

A. Preliminary Questions of Fact

In some pretrial issues, especially in constitutional or criminal cases, the question arises whether the decisionmaker should use the same burden of proof that a trier of fact would utilize at trial. For example, in *Lego v. Twomey*[31] the trial court admitted defendant's confession into evidence after conducting a hearing outside the jury's presence, at which defendant testified that the police had coerced his confession, and the police officers testified that it was voluntary.[32] Defendant contended "that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence."[33] Utilizing only the three traditional trial standards, the Supreme Court urged sifting out consideration of trial values at the pretrial stage, even when constitutional rights are at stake and even when the case is a criminal case:

> Nothing is to be gained from restating the constitutional rule as requiring proof of guilt beyond a reasonable doubt on the basis of constitutionally obtained evidence and then arguing that rights . . . are diluted unless admissibility is governed by a high standard. Transparently, this assumes the question at issue, which is whether a confession is admissible if found voluntary by a preponderance of the evidence.[34]

According to the Court, the "preponderance" standard sufficiently addresses the reliability of a confession. "Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard."[35] Thus, *Lego* leads to the conclusion that the reliability of a confession is the most important pretrial concern; constitutional considerations allocating the risk of an incorrect decision operate at the trial level.[36]

Judge Weinstein in *United States v. Schipani*[37] had a similar occasion to analyze the three burdens of proof. In *Schipani* defendant moved upon remand of the case by the Supreme Court[38] to

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31. 404 U.S. 477 (1972).

32. *Id.* at 480.

33. *Id.* at 481. Illinois law provides that a confession challenged as involuntary can be admitted into evidence if, at a hearing outside the presence of the jury, the judge finds it voluntary by a preponderance of the evidence. *See* People v. Wagoner, 8 Ill. 2d 188, 133 N.E.2d 24 (1956).

34. 404 U.S. at 487 n.15.

35. *Id.* at 488.

36. For a criticism of *Lego*, see Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 277-80 (1975).

37. 289 F. Supp. 43 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

38. 385 U.S. 372 (1966).

suppress evidence allegedly obtained by the government as the result of a lead from an illegal wiretap. Judge Weinstein detailed the facts proven from the available information and the information obtained from the illegal taps. This information presented two questions to the court. "First, whether individual items of evidence used at the first trial were obtained, either directly or indirectly, as a result of illegal monitoring. Second, whether the entire investigation of the defendant was tainted because its intensity was substantially affected by the electronic surveillance."[39] To these facts Judge Weinstein applied the three burdens of proof and determined that the Government had the burden to prove "beyond a reasonable doubt" that it had not obtained the evidence as a result of illegal electronic surveillance; Judge Weinstein held that the Government failed to meet that burden with certain evidence.[40] The Government, however, had to prove only by a "preponderance of evidence" that the illegal leads did not affect substantially the total investigation, and it sustained that burden.[41] What is important about Judge Weinstein's analysis for the concept of burdens of proof is that he, as a decisionmaker, discusses all three burdens of proof and articulates his own level of conviction. At the same time, Judge Weinstein attempted to articulate the policy or value conveyed by each burden—as opposed to the clarity of what the standard requires.[42] This need to select a standard that conveys constitutional values in the allocation of the risk of an incorrect decision presents the most difficulty to decisionmakers.

Implicit in Judge Weinstein's analysis is the proposition that the burdens of proof are clearly definable, at least on a comparative basis. Judge Weinstein demonstrated the clear operation of the burdens themselves through two hypotheticals in which he defined burdens of proof in terms of percentages.[43] "Preponderance of the evidence" is perhaps the easiest burden to translate into percentages because the terminology itself suggests that it is something just over fifty percent. Defining other burdens in terms of percentages, however, is considerably more difficult. "Beyond a reasonable doubt," for example, must be something over ninety percent, although agreement on a particular figure will be rare.[44]

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39. United States v. Schipani, 289 F. Supp. at 45.
40. *Id.* at 59.
41. *Id.* at 64-65.
42. *Id.* at 54-59.
43. *Id.* at 57.
44. Judge Weinstein in *Schipani,* for example, utilized 95+% for "beyond a reasona-

Nonetheless, defining burdens of proof in terms of the probability theory and degrees of belief suggests that percentage definitions should attach to each burden and that the burdens lie along a continuum.[45] Indeed, Glanville Williams finds greater protection in such numerical quantification of risks than in the "gut reaction" of jurors.[46]

The desire to make the comparison of probabilities more precise by fitting the various burdens into a continuum or scale of percentages, however, has not received universal assent. One commentator, relying on the works of A.J. Ayer,[47] recognizes "statements of credibility" as one type of probability.[48] Ayer's "statement of credibility" is not a subjective belief but "the degree of credence which a rational man will give to something based on the evidence available to him."[49] While avowing that "there is nothing wrong in principle in the court attempting to quantify numerically the degree of probability to be reached before any doubt can be called unreasonable," the commentator, echoing Professor Tribe's description of "beyond a reasonable doubt" as a "fuzzy" term,[50] criticizes the quantification of burdens of proof:

> Of course the law could determine a numerical quantification on the level of doubt which is permissible. But the point is that the law does not do this. It leaves the standard of satisfaction required vague. It requires a credibility statement that the facts in issue occurred beyond reasonable doubt and not a statistical statement that the probability of the facts in issue is 0.99 or 0.999 and so on.[51]

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ble doubt." *Id.* at 57.

45. Beneath the legal concept of probability lies the mathematical theory of probability. Only occasionally does this break surface—apart from the concept of proof on a balance of probabilities, which can be restated as the burden of showing odds of at least 51 to 49 that such-and-such has taken place or will do so.

Davies v. Taylor, 1974 A.C. 207, 219 (Lord Simon of Glaisdale). This statement comports with Blaise Pascal's principles of probability. *See* B. PASCAL, PENSEES (1670). Subjective probability requiring actual belief that the fact in disputa exists is an alternative to the Pascalian "more probable than not" formulation. The classic case requiring actual belief by the jury is Sargent v. Massachusetts Accident Co., 307 Mass. 246, 29 N.E.2d 825 (1940). For a more detailed description of subjective probability, see R. EGGLESTON, *supra* note 30, at 109-11 (1978).

46. Williams, *The Mathematics of Proof*, 1979 CRIM. L. REV. 297, 340, 353.

47. *See* A. AYER, THE CENTRAL QUESTIONS OF PHILOSOPHY 163-74 (1973); A. AYER, PROBABILITY AND EVIDENCE Part 1, Chs. 2-3 (1972); B. RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 356-61 (1948).

48. Jackson, *Probability and Mathematics in Court Fact-Finding*, 31 N. IR. LEGAL Q. 239, 241 (1980).

49. *Id.* at 242.

50. Tribe, *Trial by Mathematics*, *supra* note 9, at 1375.

51. Jackson, *supra* note 48, at 253.

Because of the inability—and reluctance—to agree on the meaning of the various burdens of proof, judges continue to apply different burdens of proof even to preliminary questions of fact concerning constitutional claims. For example, defendant in *United States v. Thevis*[52] claimed that the Government had deprived him of his constitutional right to confront the witnesses against him. Judge Murphy examined the evidence proffered by the government to show that defendant had deprived the witness of his civil right to testify against defendant by murdering that witness and, therefore, had waived his constitutional right.[53] Like Judge Weinstein, Judge Murphy reviewed all three burdens of proof to determine which burden of proof should apply to defendant's constitutional claims and whether he waived those claims. Noting the *Lego* standard of "preponderance of the evidence," Judge Murphy nevertheless utilized the "clear and convincing evidence" standard to honor the importance of the constitutional right to confront adverse witnesses.[54]

B. Probable Cause

"Preponderance of the evidence," when described in terms of percentages, is set at fifty percent to indicate that a quantum over fifty percent constitutes a preponderance. The verbal definition of "preponderance" is "more probable than not."[55] Rightly or wrongly, commentators and judges have used these same definitions on occasion to define "probable cause" in determining the legality of searches and seizures under the fourth amendment.[56]

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52. 84 F.R.D. 57 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir. 1982).

53. *Id.* at 71.

54. Judge Murphy utilized the standard established in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) for deciding whether an individual had knowingly waived one of his constitutional rights. He then concluded:

> In summary, the Court finds clear and convincing evidence that defendant Thevis was aware that Roger Underhill would be a witness in the then-pending trial of this case. To prevent this testimony, defendant Thevis and others including defendants Hood and Evans conspired to murder Underhill, and on October 25, 1978, the objective of the conspiracy was successfully attained.
>
> The Court holds as a matter of law that the declarant is unavailable because of defendant Thevis' actions, and as a result of those actions, defendant Thevis waived his right to confrontation.

84 F.R.D. at 73.

55. C. MCCORMICK, EVIDENCE 794 (2d ed. 1972).

56. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters *and Beyond*, 67 MICH. L. REV. 40, 73 (1968). Professor LaFave, however, notes that the definition in percentage terms "is still open." 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 478 (1978).

This Article treats "probable cause" to obtain a search or arrest warrant or to search or arrest without a warrant as a burden of proof. Like the burdens already discussed, "probable cause" is a guideline denoting when the decisionmaker in question has reached the required certainty for the type of decision at hand.[57]

The Supreme Court set forth the modern definition of "probable cause" for fourth amendment purposes in *Carroll v. United States*.[58] The Court defined "probable cause" as "a belief, reasonably arising out of circumstances known to the seizing officer."[59] According to the Court, "probable cause" and "reasonable cause" are equivalent.[60] Subsequently, the Court expounded upon this definition in *Brinegar v. United States*.[61] Justice Rutledge, writing for

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57. Other commentators have treated probable cause as a point on the same scale as the trial burdens. E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN, & F. LEDERER, CRIMINAL EVIDENCE 215 (1979) [hereinafter cited as E. IMWINKELRIED] ("Although 'probable cause' means more than mere suspicion, it does not require proof sufficient to establish guilt beyond a reasonable doubt . . . ."); Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. BAR J. 137, 144 (1970) ("Probable cause lies somewhere between reasonable suspicion and proof of guilt beyond a reasonable doubt."); Professor Bacigal observes,

> The possible range from which the required level of certainty emerges is a mathematical scale from zero to one hundred percent. The Supreme Court, however, has refrained from expressing tbe required level of certainty in mathematical terms, relying instead on a scale of less exact but more familiar legal terminology.

Bacigal, *supra* note 30, at 771.

58. 267 U.S. 132 (1925). Earlier analyses of probable clause arose in the context of statutory rather than constitutional construction. The Court in Stacey v. Emery, 97 U.S. 642 (1878), which arose under the Collection Act of March 2, 1799, 1 Stat. 696 § 89, defined probable cause as the "facts and circumstances before the officer . . . to warrant a man of prudence and caution in believing that the offense has been committed." *Id.* at 645. After citing case authority for its definition of probable cause, the Court noted that the statute used the term "reasonable cause." The importance of *Stacey* is the Court's equating of the two phrases: "No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing." *Id.* at 646 (citations omitted). Not only do the cases equate reasonable and probable cause to believe, but they treat "a reasonable ground of suspicion" and "an honest and strong suspicion" as probable cause or belief. *Id.* at 645. Similarly, the Court in Locke v. United States, 11 U.S. (7 Cranch) 339 (1813), equated probable cause for seizure to "circumstances which warrant suspicion." *Id.* at 348. The *Carroll* Court relied on both *Stacey* and *Locke*. Carroll v. United States, 267 U.S. at 155, 161.

59. 267 U.S. at 149.

60. *Id.* at 155-56.

61. 338 U.S. 160 (1949). Both *Carroll* and *Brinegar* concerned the search of automobiles operated on public highways. In both cases federal officers enforcing federal liquor statutes had recognized the drivers and cars from prior involvement in illegal liquor transactions and searched the vehicles without a warrant. The *Brinegar* Court noted that *Carroll* "on its face most closely approximates the situation presented here" and that "the

the Court, emphasized the "large difference" between proof of guilt in a criminal case and "probable cause" for arrest or search.[62] He observed that the application of the "guilt beyond a reasonable doubt" standard to the situations governed by "probable cause" would curtail severely law enforcement activities.[63] "Probable cause" is simply a guide for routine law enforcement investigations, not all of which will lead to a criminal trial.[64]

> In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.[65]

The Court noted the distinctions between the formal and deliberate nature of proof at trial and the instantaneous decisionmaking by law enforcement officers on the streets.[66] The constitutional requirements of reasonableness in situations governed by "probable cause" are "a practical, nontechnical conception."[67]

In effect, the Court in *Brinegar* indicated that the real choice of standards governing law enforcement investigations is not the choice between "reasonable doubt" and "probable cause" but that between "probable cause" and "suspicion." Although the Court did not state that law enforcement officials can operate under a constitutional standard of "suspicion," it suggested that "probable cause" shades off into "suspicion" and that the two standards exist along a continuum:[68]

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basic facts held to constitute probable cause in the *Carroll* case were very similar to the basic facts here." *Id.* at 164, 165.

62. "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." *Id.* at 173.

63. *Id.* at 174.

64. *Id.*

65. *Id.* at 175. The Court described the standard of proof as less than "conviction" but "more than bare suspicion." *Id.* The Court's reference to probability as reflected in the word "probable" points to the common origin of both words from the word "proof"—"*probo*". See the definition of "probable" in 8 THE OXFORD ENGLISH DICTIONARY 1400 (1970).

66. 338 U.S. at 176.

67. *Id.*

68. *Id.* at 177. The Court in *Brinegar* stated that the *Carroll* facts "lay on the border between suspicion and probable cause." *Id.* The Court also quoted the definition of probable cause utilized in Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813): ["Probable cause] imports a seizure made under circumstances which warrant suspicion." 338 U.S. at 175 n.14. Without suggesting anything about the role of suspicion as a burden of proof at the time that *Locke* was decided, the Court noted that probable cause presently means more than suspicion. *Id.* at 175. In Draper v. United States, 358 U.S. 307 (1959) the dissent quoted from one of John Wilkes' 1777 parliamentary speeches: "There is not a syllable in

> The troublesome line posed by the facts in the *Carroll* case and in this case is one between mere suspicion and probable cause. That line necessarily must be drawn hy an act of judgment formed in the light of the particular situation and with account taken of all the circumstances.[69]

Thus, the Court in *Brinegar* fixes "probable cause" on a continuum between "suspicion" and "reasonable doubt." "Probable cause," therefore, is like the trial burdens of proof and may be analyzed in accordance with the theory of probability as it applies to Ayer's "credible statements."[70]

The questions of whether "reasonable" and "probable cause" are equivalent and whether "probable cause" should be defined as "more probable than not," however, have perplexed courts and commentators for decades.[71] The Supreme Court in *Brinegar* retained the *Carroll* Court's equation of "reasonable" and "probable cause,"[72] but the confusion nonetheless continues. The Commentary accompanying the arrest provisions in the Model Code of Pre-Arraignment Procedure (Code), for example, distinguishes "reasonable" and "probable cause."[73] The Code states that the "standard of belief necessary for an arrest" and for a search is "reasonable cause."[74] It does not use "probable cause" since the reporters wished to avoid the connotation between arrest and search standards and the probabilistic definition of "more probable (likely) than not" or "preponderance of the evidence."[75] In other words, while "reasonable cause" (or "probable cause") must be less than fifty percent certainty, the reporters concluded that any more precise definition in terms of percentages would be inappropriate.[76]

Similarly, the First Circuit's decision in *United States v. Melvin*[77] illustrates the disagreement of courts about the relationship between "reasonable" and "probable cause." The court in upholding the validity of a search warrant equated "probable cause" and

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the Bill of the degree of probability attending the *suspicion.*" *Id.* at 316 (Douglas, J., dissenting).

69. Brinegar v. United States, 338 U.S. at 176.

70. *See supra* text accompanying notes 47-51.

71. For example, Professor LaFave presents four categories of situations in which he argues that "it must be determined just how probable the probable cause must be." 1 W. LAFAVE, *supra* note 56, at 479-93.

72. Brinegar v. United States, 338 U.S. at 175-76.

73. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1 & comment 4, § 210.1 & comment 7. (Proposed Official Draft 1975).

74. *Id.* § 120.1 comment 4.

75. *Id.* § 120.1 comment 4, § 210.1 comment 7.

76. *Id.* § 120.1 comment 4.

77. 596 F.2d 492 (1st Cir. 1979).

"reasonable cause":

> First, appellant reads the phrase "probable cause" with emphasis on the word "probable" and would define it mathematically to mean "more likely than not" or "by a preponderance of the evidence." This reading is incorrect. The phrase is less stringent than that—the words "reasonable cause" are perhaps closer to what is meant. The Supreme Court has asserted that " 'reasonableness' is the overriding test of compliance with the Fourth Amendment," . . . has approvingly quoted authority equating "probable cause" with "reasonable grounds to believe," . . . and bas even used the phrases "reasonable cause" and "probable cause" interchangeably . . . .[78]

On the other hand, Judge Bownes, in dissent, seemed to define "probable cause" as more than fifty percent certainty:

> The majority states that probable cause is properly defined as reasonable cause . . . . The majority, by focusing narrowly on language relating to "reasonableness" compels the inference that the degree of probity required for probable cause to obtain a search warrant is somehow of a lesser calibre than other forms of probable cause. This is patently incorrect. Probable cause for a search warrant requires the same degree of certitude as probable cause to arrest. . . . While that degree need not be calibrated according to mathematical formula, the strong showing which must be made cannot be ignored.[79]

As the Commentary to the Model Code of Pre-Arraignment Procedure points out, however, even cases suggesting a "more probable than not" definition of "probable cause" do not apply the standard literally:

> [T]here appear to be no cases in which it [a more-probable-than-not standard] has been actually applied—e.g., when the evidence showed a 33 ⅓% chance that contraband would be found in a given place, and the application for a warrant was rejected because the degree of probability was less than 50%.[80]

The various standards of probable cause, therefore, present considerable confusion. Some commentators argue that since an officer must demonstrate "probable cause" to ohtain a warrant, courts should not apply a lesser standard for the officer acting without a warrant.[81] To encourage the use of warrants, some have suggested the converse of this proposition: the standard for obtaining a warrant should be less stringent than for police action without a warrant.[82] That confusing concept which Judge Bownes

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78. *Id.* at 495 (citations omitted).

79. *Id.* at 505-06 (Bownes, J., dissenting) (citations omitted).

80. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 73, § 210.2 comment.

81. *See, e.g.*, Player, *Warrantless Searches and Seizures*, 5 GA. L. REV. 269, 273 (1971).

82. Aguilar v. Texas, 378 U.S. 108, 111 (1964) ("Thus, when a search is based upon a magistrate's, rather than a police officer's determination of prohable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would

rejects apparently rests upon Justice Robert Jackson's point that magistrates will make the "usual inferences which reasonable men draw from evidence," thus rendering police action that has received prior approval by a neutral magistrate less vulnerable to later challenge.[83]

A related controversy is the debate over whether "probable cause" is objective or subjective and who should make the "probable cause" determination. While the *Carroll* test utilizes the objective, or reasonable, standard, one commentator has suggested that "courts are split over whether the probable cause test is an objective or objective-subjective test."[84] The *Carroll* Court defined "probable cause" as a "belief reasonably arising out of the circumstances known to the seizing officer" and noted that good faith is not enough to constitute "probable cause."[85] "That faith must be grounded on facts . . . which in the judgment of the court would make his faith reasonable."[86] Further, Justice Marshall in *United States v. Watson*[87] noted that when "the good faith of the arresting officers is not at issue," courts use an objective measure of "probable cause."[88] Another commentator, while apparently accepting the objective approach, finds the objective-subjective distinction irrelevant in light of the more important constitutional question of who determines "probable cause."[89]

> [A] reasonable man's conclusion that it is appropriate to search, based on a fifty-one percent likelihood of finding seizable items, does not guarantee that the search was constitutionally permissible under the reasonableness clause of the fourth amendment. . . . If the reasonable man's conclusion was the test for the constitutionality of an intrusion, fourth amendment issues could be taken from the courts and decided by juries or public opinion surveys. . . . Thus, application of the traditional probable cause approach requires a distinction between the reasonable belief standard—determined by the Constitution—and the degree of certainty that the authorities actually had—determined by the reasonable man standard.[90]

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have justified an officer in acting on his own without a warrant,'. . . .").

83. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

84. E. IMWINKELREID, *supra* note 57, at 216. *See* Beck v. Ohio, 379 U.S. 89 (1964); Giordenello v. United States, 357 U.S. 480 (1958). The objective test reviews the information the officer had and determines if "that information amounts to probable cause." The subjective test adds a third requirement that the officer subjectively believed he had probable cause. E. IMWINKELREID, *supra* note 57, at 216.

85. Carroll v. United States, 267 U.S. 132, 149, 161 (1925).

86. *Id.* at 161-62 (quoting Director General v. Kastenbaum, 263 U.S. 25, 28 (1923)).

87. 423 U.S. 411 (1976).

88. *Id.* at 435 n.1 (Marshall, J., dissenting).

89. Bacigal, *supra* note 30, at 772.

90. *Id.*

The "probable cause" determination, unlike the trial burdens and decisions of preliminary questions of fact, has two levels of decisionmaking: (1) the law enforcement officer who believes that he has "probable cause" to obtain a warrant or who in the absence of a warrant must show "probable cause" at a preliminary hearing or suppression hearing; and (2) the magistrate who issues or declines to issue the warrant and the judge who applies constitutional requirements to determine whether the officer had "probable cause." Judicial oversight of law officials' conduct, however, does not render the need for clarity of the standards any less acute since the officer makes the initial "probable cause" determination.[91] Nor does judicial oversight of "probable cause" determinations make them significantly different from a jury's decision at trial. Jurors decide guilt or innocence in accordance with the "beyond a reasonable doubt" standard. Probability theory analysis, therefore, is equally applicable to decisions made by magistrates, juries, and reviewing courts.[92] The difference between "probable cause" and the burdens of proof previously examined is simply the interposition of a neutral decisionmaker—the magistrate or reviewing court—between the law enforcement officer and the person searched or seized. Thus, "probable cause" shares some characteristics with appellate review standards.

C. *Reasonable Suspicion*

"Reasonable suspicion" applies to less intrusive searches and seizures, such as stop-and-frisk searches. A showing of "reasonable suspicion" traditionally has required less certainty than "probable cause," only "some appreciable probability of danger created by someone with a weapon"[93] that was "necessarily almost unreflective and reflexive."[94] The term "reasonable suspicion," however, is

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91. Professor Bacigal agrees: "[t]he less than forthright manner in which the Court has discussed the methodology used to identify 'reasonable helief' is cause for objection." *Id.* at 771.

92. Professors Broun and Kelly refer to probabilistic analysis of decisionmaking:

> Through proper statistical sampling, the probahility of the occurrence of historical events can indeed be estahlished within a reasonable degree of scientific certainty. Through statistical decision theory, hased on the laws of probability, decisions made by husinesses, governments, individuals and even judges and juries can he analyzed and evaluated in helpful mathematical terms.

Broun & Kelly, *supra* note 9, at 26.

93. United States v. Lopez, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971).

94. *Id.* at 1095.

"an objective standard, somewhat less exigent than the arrest standard."[95] Even if "suspicion" appears to suggest a subjective standard,[96] the emphasis is on the reasonableness of the suspicion. Thus, "reasonable suspicion" represents simply a lower standard than "probable cause."[97] The Supreme Court in *Terry v. Ohio*[98] subjected the police stop-and-frisk action to the "reasonable suspicion" standard and concluded that the patdown complies with the reasonableness requirement of the fourth amendment if the officer had "reasonable suspicion." The "reasonable suspicion" standard is satisfied if the officer observes "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous. . . ."[99]

"Reasonable suspicion" raises in a more pronounced form issues suggested by "probable cause." Judge Weinstein in *United States v. Lopez*[100] placed "reasonable suspicion" in the broad spectrum of burdens of proof:

> Implied in terms such as "probable cause" or "reasonableness" is a continuum of probability that the subject has been, is, or is about to be, engaged in criminal activity; it begins with no evidence of such conduct and extends to almost certainty. Ranked along this continuum are various degrees of probability justifying different types of intrusion upon the privacy of the individual. . . .

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95. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 73, § 110.2 comment 6.

> Part of the difficulty in developing a rule for frisks is that the policeman, assuming his good faith, will be acting on a subjective standard—his own immediate sense of risk to himself—while the court testing his action for purposes of admissibility will be acting on an objective standard—what a reasonably prudent policeman in his position would do after weighing the risks of harm from possible hidden weapons presented by the particular known circumstances against our society's aversion to physical intrusions on the person of a free man.

United States v. Lopez, 375 F. Supp. 1077, 1095 (E.D.N.Y. 1971) (citations omitted).

96. Criticism of the "reasonable suspicion" standard frequently rests on the concern that "temporary seizures for investigation will be undertaken upon the subjective judgment of police officers and that courts will be reluctant to second-guess them." LaFave, *supra* note 56, at 70.

97. For purposes of the fourth amendment, the important constitutional consideration is the distinction between "mere" suspicion and "reasonable" suspicion, or between "mere" belief, and "reasonable" belief. The concept of reasonableness is the significant legal determination; references to belief, suspicion and justification are surplusage. In fact, careful scrutiny of the Supreme Court's usage of the relevant terms reveals mere belief is no better than mere suspicion, while in some situations reasonable suspicion is every bit as good as reasonable belief.

Bacigal, *supra* note 30, at 781 (footnotes omitted).

98. 392 U.S. 1 (1968).

99. *Id.* at 30.

100. 328 F. Supp. 1077 (E.D.N.Y. 1971).

> An investigative "stop" requires one degree of probability, while a "frisk" in many cases requires a higher level. At other points on the scale are levels of probability justifying the various exigent circumstance intrusions typified by border searches, automobile searches, those occasioned by hot pursuit and the like. Finally, at the practical end of the continuum we find the classic "probable cause" levels which will justify the issuance of search warrants, and searches incidental to arrest with or without a warrant.[101]

This view of the scale of burdens of proof has gained wide acceptance and has helped the Supreme Court clarify "reasonable suspicion."

Three recent Supreme Court cases show the increased clarity of "reasonable suspicion." First, in *Ybarra v. Illinois*[102] the Court held that a law enforcement officer's suspicion must relate specifically to the suspect he wishes to search. The officers in *Ybarra* had a warrant to search a tavern. Once inside the tavern, they searched all customers and discovered illegal drugs on defendant's person. In holding the search unconstitutional, the Court explained that the grounds for a constitutional frisk would have had to include defendant's connection to the tavern and some individualized basis for suspecting that defendant was armed or in possession of drugs:

> Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons. The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked. . . .[103]

Ybarra equates belief and suspicion and requires that suspicion attach to the person to be searched. Thus, "unreflective and reflexive police behavior is not sufficient to give rise to reasonable suspicion."[104]

Similarly, the Court in *Michigan v. Summers*[105] focused on "the nature of the 'articulable facts' supporting the detention,"[106] and stated:

> It is also appropriate to consider the nature of the articulable and individualized suspicion on which the police base the detention of the occupant of a home subject to a search warrant. . . . The connection of an occupant to

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101. *Id.* at 1094 (citations omitted).

102. 444 U.S. 85 (1979).

103. *Id.* at 93-94.

104. United States v. Lopez, 328 F. Supp. at 1095. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975) for an earlier definition requiring reasonable suspicion to be particularized: "[W]hen an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881.

105. 452 U.S. 692 (1981).

106. *Id.* at 702.

> that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.[107]

Requiring that the police officer set forth the particular facts that gave rise to his suspicion makes the "reasonable suspicion" standard less vague.[108] The Court, however, has not attempted to define "reasonable suspicion" in terms of percentages or even in comparative terms with "probable cause."

Finally, in *United States v. Cortez*[109] the Court suggested that a totality of the circumstances approach leads to an objective and particularized basis for suspicion:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. . . .
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> . . .
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> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.
>
> . . .
>
> [T]he process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.[110]

This definition of "reasonable suspicion" places suspicion in the context of the practical theory of probabilities and recognizes that law enforcement officers and jurors alike are capable of making decisions that can be analyzed in terms of probabilities. Moreover, this definition treats reason, suspicion, and cause as equivalents or as points on the same scale or continuum. Thus, *Cortez* represents a serious attempt to clarify the previously vague definition of "reasonable suspicion," which now requires more studied action than

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107. *Id.* at 703.

108. For summary of criticism on the vagueness of the reasonable suspicion standard, see LaFave, *supra* note 56, at 68 n.137.

109. 449 U.S. 411 (1981). Other fourth amendment issues requiring application of a particular burden of proof include border and administrative searches. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) ("[W]hen an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (probable cause is required for the search); Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967) (lesser standard of probable cause applies to health and housing inspections than to ordinary criminal cases).

110. United States v. Cortez, 449 U.S. at 417-18.

the "unreflective and reflexive" reaction to danger.[111] Rather than clarifying the degree of certainty required by "reasonable suspicion" relative to "probable cause," however, the Court emphasizes the factual basis for "reasonable suspicion." The question remains, therefore, whether "reasonable suspicion" is equvalent to "probable cause" or whether it is less stringent.

D. Posttrial Considerations and Appellate Review

The role of burdens of proof as a guide to decisionmaking in posttrial proceedings is much less clear than in the pretrial and trial phases of the legal process. Indeed, some justification exists for treating posttrial matters differently from preliminary questions of fact since admissibility issues resolved before trial still leave credibility to be determined by the factfinder. On the other hand, posttrial matters often may involve issues not determined at all by the trial. The purpose of this section, therefore, is not to advocate only one standard of proof for decisionmaking at the posttrial stage, but simply to demonstrate the appropriateness of considering burdens of proof in the resolution of posttrial issues. The theories of burdens of proof may aid such posttrial decisions as presentence hearings, parole and probation revocation hearings, and declarations of mistrial for manifest necessity. Although this Article does not catalogue all areas of judicial decisionmaking that burdens of proof may measure, the exploration of this emerging area to which burdens of proof will find greater application is beneficial.[112] Similarly, the Article examines briefly the standards of the appeal process itself in terms of their operation as a description of the appellate decisionmaker's conviction about trial errors.

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111. *See supra* text accompanying note 94.

112. The list is suggestive rather than exhaustive because one purpose of this Article is to show the applicability of burdens of proof to prevent endless proliferation of new terminology when the standard of proof in two different types of situations is the same. For example, section C does not discuss strip and body cavity searches, although the Supreme Court arguably has established a "clear indication" burden of proof for blood samples and body cavity searches. *See* United States v. Schmerber, 384 U.S. 757, 769-70 (1966). Moreover, the Ninth Circuit has held that "mere chance" is not enough for a narcotics body cavity search: "There must exist facts creating a clear indication, or plain suggestion, of smuggling. Nor need these facts reach the dignity of the equivalent of 'probable cause . . . .'" Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). Is this simply a reasonable suspicion standard? In United States v. Clymore, 515 F. Supp. 1361 (E.D.N.Y. 1981) the court held that strip searches and medical body cavity searches are "governed by different standards"—reasonable suspicion governs the strip search and "probable cause" governs the body cavity search. *Id.* at 1366-68.

1. Parole and Probation Revocation Hearings

The Supreme Court has not set specifically a burden of proof requirement for parole and probation revocation hearings. The Court in *Morrissey v. Brewer*[113] held that a parolee is entitled to preliminary and final revocation hearings, but it did not specify the burden of proof required in the final hearing. To hold the parolee for a final hearing, officials must demonstrate "probable cause"; for final revocation officials must find "more than" "probable cause."[114] Similarly, a probationer in *United States v. Smith*[115] challenged the "reasonably satisfied" standard used to determine whether he had violated his probation conditions and argued that "preponderance of the evidence" was the proper standard. The Seventh Circuit cited *Morrissey* for the proposition that due process requires no more than "reasonable satisfaction" and concluded that defendant had violated his probation.[116] The court, however, did not explain how much less certainty "reasonable satisfaction" requires than does "preponderance of the evidence." Moreover, the court did not relate "satisfaction" to "probable cause."

2. Presentence Hearings

The exploration of due process requirements at sentencing has focused upon the burden of proof required at a presentence hearing. The Second Circuit in *Hollis v. Smith*[117] applied the protections of due process to a repealed New York statute permitting indeterminate sentencing.[118] The court held that only proof of the fact which triggers the sentencing provision by "clear, unequivocal and convincing evidence" may trigger the sentencing provision because of the seriousness of the values at stake in indeterminate

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113. 408 U.S. 471 (1972).

114. *Id.* at 487-88.

115. 571 F.2d 370 (7th Cir. 1978).

116. *Id.* The court also cited Gagnon v. Scarpelli, 411 U.S. 778, 789-90 n.12 (1973) and cases from the various circuits deriving "reasonable satisfaction" as the appropriate hurden of proof in the absence of the Supreme Court's imposition of a standard.

117. 571 F.2d 685 (2d Cir. 1978).

118. At that time § 243 of the New York Penal Code provided:

> [A]ny person convicted of assault upon another with intent to commit the felony of rape in the first degree, rape in the second degree, sodomy in the first degree, sodomy in the second degree or carnal abuse may be punished by imprisonment for an indefinite term the minimum of which shall be one day and the maximum of which sball be the duration of his natural life.

N.Y. PENAL LAW § 243 (McKinney 1950) (repealed).

sentencing.[119] The provision for enhanced sentencing in *United States v. Fatico*[120] gave rise to similar due process considerations. Defendant's membership in an organized crime family triggered the enhanced sentencing provision, although this alleged membership was not relevant at trial. In recognition of the values considered in *Hollis*, Judge Weinstein selected the "clear, unequivocal, and convincing evidence" standard.[121]

3. Manifest Necessity

The fifth amendment double jeopardy protection bars reprosecution after the court declares a mistrial unless the trial was ended because of "manifest necessity."[122] Courts arguably could analyze the decision to declare a mistrial for manifest necessity in accordance with burden of proof theory. In *United States v. Mastrangelo*[123] the trial court declared a mistrial after the murder of a prosecution witness. Defendant argued that the court could not find manifest necessity "without an actual showing of the defendant's complicity in the death of the witness."[124] The Second Circuit chose not to analyze the facts from the perspective of burdens of proof:

> It is simply impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month.
>
> The test, therefore, is not whether the defendant was in fact involved in the witness's deatb, nor even whether under a preponderance of the evidence or some lesser evidentiary standard the court finds it probable that the defendant has participated in the murder. . . . Rather, the test must be simply whetber at the time the trial judge is faced with the question he *reasonably concludes that there is a distinct possibility* that the defendant participated in making the witness unavailable . . . .[125]

In choosing this lesser standard the court in effect utilized a standard similar to the "reasonable suspicion" standard of a decade ago: the "unreflective and reflexive action" of the law enforcement officer faced with danger.[126] The dissent argued that the "heavy

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119. The court derived this standard from Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 285 (1966).

120. 458 F. Supp. 388 (E.D.N.Y. 1978).

121. *Id.* at 408.

122. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *see* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1276-81 (1964).

123. 662 F.2d 946 (2d Cir. 1981).

124. *Id.* at 951.

125. *Id.* at 951-52 (emphasis added).

126. *See supra* notes 93-94 and accompanying text.

government burden" of manifest necessity is an independent burden of proof and charged the majority with ignoring "the heavy burden and 'high degree' standards enunciated" by the Supreme Court.[127] According to the dissent, the majority's holding was "a tortured analysis of the standard of proof."[128] If more cases arise in this context, the applicability of burdens of proof to a finding of manifest necessity will receive fuller treatment and perhaps raise the standard of proof required.[129]

4. Appellate Review

The Federal Rules of Civil Procedure provide for appellate review of the factual findings as follows: "Findings of fact [by the court without a jury] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[130] Despite the seeming clarity of the rule, dispute over the scope of appellate review is widespread.[131] The Supreme Court in *United States v. United Gypsum Co.*[132] defined "clearly erroneous": "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[133] This description, which focuses on "the definite and firm conviction" of the reveiwing court, permits analysis as a burden of proof. Just as the factfinder at trial must have the required degree of conviction to reach a decision, the appellate court must have an established degree of conviction to reverse the trial court. Although the Supreme Court has not articulated a definition of "clearly erroneous" with specificity, the Court's language describing the clearly erroneous standard is like the language used to define other burdens of

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127. 662 F.2d at 953-54.

128. *Id.* at 954. The dissent suggested that the reason the majority used the "distinct possibility" standard had to do with the problems of presenting evidence against more than one defendant under Bruton v. United States, 391 U.S. 123 (1968).

129. Now that the court has gotten its eighteen feet wet in the murky waters of stop and frisk, there is ample reason to anticipate further classification of the grounds for stopping. . . . *Terry* is not the end; it is the beginning, and more specific limits will later emerge by a process of judicial inclusion and exclusion.

LaFave, *supra* note 56, at 70, 73.

130. FED. R. CIV. P. 52(a).

131. *Cf.* Royal Business Machines, Inc. v. Lorraine Corp., 633 F.2d 34 (7th Cir. 1980); William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262 (3d Cir. 1975); United States v. Hunt, 513 F.2d 129 (10th Cir. 1975).

132. 333 U.S. 364 (1948).

133. *Id.* at 395.

proof.[134] Judge Nangle finds the *Gypsum* definition unsatisfactory because it only "muddle[s] an already elusive standard."[135] The *Gypsum* forumulation has not

> truly captured the essence of the Rule. . . . Being convinced that a view is erroneous . . . is not the same as being convinced that a view is clearly erroneous. . . . Whether the requirement that the appellate court be "definitely and firmly" convinced of the correctness of its choice actually provides a solution for this problem is questionable.[136]

Judge Nangle is concerned with the choice of the wider scope of review permitted by the "clearly erroneous" standard.[137] Commentators and judges alike have criticized variations by the courts of appeals on the Supreme Court's consistent application of the "clearly erroneous" standard.[138]

Courts also have confused at times the "clearly erroneous" rule with the "substantial evidence" test used for review of agency findings. This confusion arises from the attempt to restate the rule for appellate review.[139] The Supreme Court clearly defined "substantial evidence" as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[140] Substantial evidence "must do more than create a suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[141] The wording of this

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134. R. ALDISERT, THE JUDICIAL PROCESS 691 (1976).

135. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U.L.Q. 409, 416 (1981).

136. *Id.*

137. *See* Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 505 (1950).

138. The Supreme Court has applied consistently the *Gypsum* definition. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 n.19 (1978). For an early study of the departures from the intent of FED. R. CIV. P. 52(a), see Clark, *supra* note 137, at 505-06.

139. "[C]ourts of review would add more light to the standard of 'clearly erroneous' by avoiding [concurrent] use of the term 'substantial evidence.' " Jackson v. Hartford Accident & Indem. Co., 422 F.2d 1272, 1277 (8th Cir.) (Lay, J., concurring), *cert. denied*, 400 U.S. 855 (1970). The Supreme Court in Woodby v. Immigration and Naturalization Serv., 385 U.S. 276 (1966) stated that "judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment." *Id.* at 282.

140. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See* Steadman v. SEC, 450 U.S. 91, 101 n.21 (1981) ("[T]he substantial-evidence test became the scope-of-review standard because of a desire to have courts review agency decisionmaking more carefully than under the then prevalent scintilla-of-evidence-test.").

141. NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

standard, like the "clearly erroneous" standard, is strikingly similar to jury instructions on burdens of proof and is at least as clear.

The controversy over the proper standard of appellate review remains:

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry.[142]

The "clearly erroneous" and "substantial evidence" standards are arguably so close in meaning that the choice between them will make no difference in whether an appellate court reverses.[143] Thus, measuring the two standards in terms of percentages probably would not decrease the strong disagreements over which standard ought to govern appellate review. Unlike the gradual growth in clarity of the standard used in situations such as frisks[144] and the possibility for the same growth in various other posttrial situations,[145] the standards for appellate review do not need clarification. Acceptance of the "clearly erroneous" standard, however, may be growing, if greater uniformity in application is indicative of assent.[146]

IV. Constitutional and Symbolic Functions of Burdens of Proof

During the last decade the Supreme Court has dealt with the values that trial burdens of proof express. The Court has concentrated not only on criminal cases but also on serious civil suits concerning deprivation of liberty and important personal rights, such as civil commitment, loss of citizenship, and termination of parental rights. In effect, the Court has constitutionalized burdens of proof. As the most recent civil cases show, the Court's articulation of the function of burdens of proof in supporting societal values has grown clearer, although factfinders and other decisionmakers today do not enjoy similar clarity about the meaning of particular burdens of proof. Nonetheless, decisionmakers continue to disagree

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142. Universal Camara Corp. v. NLRB, 340 U.S. 474, 488-89 (1951).

143. *See* NLRB v. Southland Mfg. Co., 201 F.2d 244, 250 (4th Cir. 1952).

144. *See supra* notes 109-11 and accompanying text.

145. *See supra* note 129 and accompanying text.

146. *See* Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 St. John's L. Rev. 68, 84, 90 (1977).

about the meaning and role of burdens of proof.

The state initiates many of the civil suits concerning important individual rights, and, thus, questions arise concerning fundamental fairness and fourteenth amendment due process rights for the individual. The Supreme Court in *Mathews v. Eldridge*[147] set forth three considerations that courts must weigh to determine what procedures due process requires: (1) the private interest to be determined in the proceeding; (2) the risk of error created by the state's proceeding; and (3) the state's interest in using that particular type of proceeding.[148] Under this balancing test the allocation of due process rights for the individual litigant usually includes a provision for notice, a hearing, and, in some instances, counsel. Federal courts usually do not address the burden of proof to apply at the hearing, or they just leave that decision to the discretion of the states.[149] For example, the Court in *Morrissey v. Brewer*[150] concluded simply that final hearings must be based on more than "probable cause."[151] In some recent cases, however, the Court has chosen to single out the role of burdens of proof in ensuring the process due. These cases have focused on the symbolic role of burdens of proof in promoting the societal values at stake in the litigation.

In *Addington v. Texas*[152] the Court emphasized that burdens of proof not only indicate the degree of belief required for the particular type of case, but also underscore the relative societal importance attached to the decision in the particular type of case. The Court recognized that "the law has produced across a continuum three standards or levels of proof for different types of cases."[153] While burdens of proof analyzed from the point of view of the decisionmaker emphasize degrees of belief and the operation of probability theory, the same burdens examined from the point of view of societal values focus on the risk that the decision is incorrect. The risk element reflects societal values because society establishes the permissible risk in accordance with the due process requirements of the fourteenth amendment. The less important

147. 424 U.S. 319 (1976).

148. *Id.* at 335.

149. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (probable cause to detain); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Coleman v. Alabama, 399 U.S. 1 (1970) (probable cause to indict).

150. 408 U.S. 471 (1972).

151. *Id.* at 488.

152. 441 U.S. 418 (1979).

153. *Id.* at 423.

the outcome to societal values, the more society wishes to minimize the risk of an incorrect verdict. Thus, in purely private disputes plaintiffs and defendants bear equally the risks of an erroneous verdict. The private character of the suit is what leads the Court to accept preponderance of the evidence as the appropriate burden of proof in the usual civil suit. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. . . . [S]ociety has a minimal concern with the outcome of such private suits. . . ."[154] By contrast, when the state initiates a civil suit to decide an individual's important rights protected by the Constitution, "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[155] Thus, the Court utilizes the "clear and convincing evidence" standard to reflect the more important interests at stake in state-initiated civil cases and quasi-criminal suits. Since the symbolic choice of this burden purposefully alters the allocation of the risk of an erroneous decision, the individual whose important rights are at issue bears less of the risk of loss than those parties whose claims are decided by a "preponderance of the evidence."

The Court does not attach a percentage of certainty to any burden but abstracts from the probability theory a risk of loss factor. The isolated risk factor, however, represents the symbolism of each burden of proof. In a "preponderance" standard the parties bear the risk of an erroneous verdict equally. In a "clear and convincing" standard the state bears more of the risk than the individual. In a "reasonable doubt" standard society bears "almost the entire risk of error."[156] The Court in *Speiser v. Randall*[157] explained the rationale for isolating the risk factor in burdens of proof to symbolize the protection of societal values:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[158]

154. *Id.*
155. *Id.* at 424.
156. *Id.* at 428.
157. 357 U.S. 513 (1958).
158. *Id.* at 525-26.

Similarly, the Court in *In re Winship*[159] suggested that placing this risk factor on the prosecution reassures society:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[160]

The ambiguity in jury instructions and the consequent possible lack of jurors' comprehension of the certainty required in the particular decision may affect the operation of the symbolic function of burdens of proof.[161] In addition, the jurors may be unaware of the symbolic significance of the particular burden of proof that the judge instructs them to apply.[162] The *Addington* Court noted this possibility, but offered no solution. "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise . . . ."[163] The Court nevertheless insisted that society's choice of a burden of proof to comport with the constitutional requirements of due process reflects the societal values at issue. Yet if jurors who receive instructions about the applicable burdens of proof do not understand the instructions, then the standards probably do not successfully instill the desired confidence in "every individual." Since the differences in outcome resulting from the symbolic function of burdens of proof are more likely to occur on appeal, the Court perhaps is relying on the appellate process to implement the symbolic function of burdens of proof. In this event the Court assumes that the symbolic function of burdens of proof operates in each case to be decided, and " 'reflects the value society places on individual liberty.' "[164]

The Court may be on firmer ground about the symbolism of the "reasonable doubt" standard when it speaks of "society" rather

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159. 397 U.S. 358 (1970).

160. *Id.* at 364. *See* Allen, *The Restoration of* In Re Winship: *A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977).

161. Addington v. Texas, 441 U.S. 418, 424-25 (1979).

162. *Id.*

163. *Id.* at 424.

164. *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom.* Murel v. Criminal Court, 407 U.S. 355 (1972)).

than each individual. In *Patterson v. New York*[165] the Court attempted to specify the risks society has assumed:

> The requirement of proof beyond a reasonable doubt in a criminal case is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." . . . The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is thus an increased risk that the guilty will go free. While it is clear that our society has willingly chosen to bear a substantial burden in order to protect the innocent, it is equally clear that the risk it must bear is not without limits."[166]

The use of percentages may help explain the risk that society has assumed. If "beyond a reasonable doubt" is set at 95%, the risk factor shows that society prefers twenty guilty to go free before the conviction of one innocent person. Similarly, if a "reasonable doubt" requires 99% certainty, the risk factor indicates that one hundred guilty people go free. This risk factor, consistently emphasized by the Court, determines the Court's choice of a burden of proof in accordance with the due process clause of the fourteenth amendment.[167]

The Supreme Court's most recent application of the symbolic function of burdens of proof is *Santosky v. Kramer*.[168] The sole question for the Court was whether this standard was the proper burden of proof under the due process clause of the fourteenth amendment. In *Santosky* the state brought neglect proceedings in family court to terminate petitioners' rights as natural parents in their three children.[169] State law permitted the family court judge to terminate permanently the natural parents' rights in the child if the state supported its allegations by "a fair preponderance of the evidence."[170] The Court ordered a new hearing using the "clear and convincing evidence" standard and suggested that the higher burden of proof would have "both practical and symbolic consequences" in the present case.[171] According to the Court, the true parties in the suit were the state and the natural parents.[172] The

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165. 432 U.S. 197 (1977).

166. *Id.* at 208.

167. The court in *In Re* Ballay, 482 F.2d 648 (D.C. Cir. 1973), related the degree of certainty to the risk of loss: "Broadly stated, the standard of proof reflects the risk of winning or losing a given adversary proceeding or, stated differently, the certainty with which the party bearing the burden of proof must convince the factfinder." *Id.* at 662.

168. 102 S. Ct. 1388 (1982).

169. *Id.* at 1393.

170. N.Y. FAM. CT. ACT. § 622 (McKinney 1975 & Supp. 1981-82).

171. 102 S. Ct. at 1400.

172. *Id.* at 1397.

Court discounted the child's risk of an "erroneous failure to terminate" since the child in the event of an erroneous decision only would continue to live in a state institution or foster home and remain unavailable for adoption. The "relative severity" for the parents is greater, however, since the parents will lose all opportunity to establish a permanent home with this child.[173] On the contrary, the child, although less adoptable as it grows older, nevertheless still may be adopted if a future termination proceeding proves judicially successful.[174] In effect, the Court's conclusion is that the higher burden of "clear and convincing evidence" will reduce the risk of erroneous termination. The majority assumes that the use of a higher burden of proof "will impress the factfinder with the importance of the decision."[175] That practical effect however, will not follow, if the factfinder is unclear about the meaning of the burden he must apply. The "clear and convincing" standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusion necessary to satisfy due process"[176] only if the factfinder understands it.

The dissent in *Santosky* agreed that "normally, the standard of proof is a crucial factor in the final outcome . . . ."[177] According to the dissent, however, the state had identified correctly the interests and had balanced the rights possessed by the child with those of the natural parents.[178] Thus, "preponderance" is a constitutionally permissible standard.[179] The *Santosky* majority and dissent clearly demonstrate their agreement that probability theory operates to allow factfinders to know when they have reached their decision properly. The majority and dissent also agree that the choice of a burden of proof reflects the acceptable risk factor for an erroneous determination. The disagreement is over the interests being balanced in this case. Thus, the symbolic applicability of "clear and convincing evidence" does not command the consistent action of the Court that "beyond a reasonable doubt" does. These deviations by decisionmakers on the practical meaning of burdens of proof could affect the outcome in the marginal cases perhaps as much as the choice of a burden of proof itself.

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173. *Id.* at 1400-01.
174. *Id.* at 1407.
175. *Id.* at 1400.
176. *Id.* at 1402-03.
177. *Id.* at 1411 n.12 (Rehnquist, J., dissenting).
178. *Id.* at 1412-13 (Rehnquist, J., dissenting).
179. *Id.* at 1411-12 (Rehnquist, J., dissenting).

V. JUDICIAL SURVEY ON BURDENS OF PROOF

Surveys of judges and juries over the last half century have shown that these decisionmakers are not unanimous in their definitions of various burdens of proof.[180] Judge Weinstein has suggested that wide variation among decisionmakers justifies a "high probability requirement in criminal cases partly on the ground that some triers would tend to shave the barriers to a finding of guilt."[181] In *United States v. Fatico*[182] Judge Weinstein surveyed the judges in the Eastern District of New York about their assessment of probabilities for four burdens of proof.[183] Table 1 sets forth the results of Judge Weinstein's survey:

TABLE 1

PROBABILITIES ASSOCIATED WITH STANDARDS OF PROOF
JUDGES EASTERN DISTRICT OF NEW YORK

Judge	Preponderance	Clear and Convincing	Clear, Uniquivocal and Convincing	Beyond a Reasonable Doubt
1	50+%	60-70%	65-75%	80%
2	50+%	67%	70%	76%
3	50+%	60%	70%	85%
4	51%	65%	67%	90%
5	50+%	Standard is Elusive and Unhelpful		90%
6	50+%	70+%	70+%	85%
7	50+%	70+%	80+%	95%
8	50.1%	75%	75%	85%
9	50+%	60%	90%	85%
10	51%	Cannot Estimate Numerically		

Source: United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978).

Judge Weinstein's survey of judges provided the format for a similar questionnaire sent to all active, senior, and retired federal

180. *See* H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 187 (1966); Becker, *Surveys and Judiciaries or Who's Afraid of the Purple Curtain?*, 1 LAW AND SOC'Y REV. 133 (1967); Simon, *Judges' Translations of Burdens of Proof into Statements of Probability*, 13 TRIAL LAW GUIDE 103 (1969); Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW AND SOC'Y REV. 319 (1971); Winter, *The Jury and the Risk of Nonpersuasion*, 5 LAW AND SOC'Y REV. 335 (1971); L.S.E. Jury Project, *Juries and the Rules of Evidence*, [1973] CRIM. L. REV. 208; *Trial by Jury*, *supra* note 12, at 192.

181. United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978).

182. *Id.*

183. The Supreme Court has used occasionally the fourth burden of proof, "clear, unequivocal, and convincing evidence," which is simply a variation on "clear and convincing evidence." *See supra* note 118; *see also* Addington v. Texas, 441 U.S. 418, 424, 432 (1979); C. MCCORMICK, *supra* note 55, at 796; 9 J. WIGMORE, EVIDENCE § 2498 (3d ed. 1940).

judges in 1981.[184] The results of that survey are produced in tabular form below.

A. *Beyond a Reasonable Doubt*

In the present survey 171 judges assigned a percentage to "beyond a reasonable doubt." Table 2 sets forth the results:

TABLE 2

PERCENTAGES ASSOCIATED WITH BEYOND A REASONABLE DOUBT

Percentage	Number of Judges
50%	1
55%	0
60%	1
65%	0
70%	1
75%	8
80%	14
85%	20
90%	56
91%	0
92%	1
93%	1
94%	1
95%	31
96%	0
97%	1
98%	6
99%	8
100%	21

Source: author survey

184. The author sent to all federal district and circuit judges and justices of the United States Supreme Court questionnaires asking for comparative numerical ranking of nine phrases treated as burdens of proof and absolute definitions of the certainty required by each phrase on a scale of zero percent to 100%. The nine phrases are "beyond a reasonable doubt," "probable cause to believe," "reasonable cause to believe," "reasonable suspicion," "clear and convincing evidence," "clearly erroneous," "substantial evidence," "preponderance of the evidence," and "more probable than not." The numerical rankings permit easier tabulation. One hundred ninety-five judges filled out and returned the questionnaire. Of these 195, 28 did not rank all the burdens numerically and their results on the ranking could not be tabulated. In addition, 60 judges expressed their attitudes toward burdens of proof in letter form, thus giving a total of 255 useful responses. Twenty-one judges wrote letters stating either that they do not answer questionnaires or that they do not answer them without official sponsorship from an agency such as the Federal Judicial Center or the Administrative Office of the Courts. Two judges simply wrote to express their criticism of the project. Several other judges' staffs wrote to say that the judge was ill or an inactive senior judge.

No judge thought that "beyond a reasonable doubt" meant less than fifty percent certainty. Twenty-one judges assigned 100% to "beyond a reasonable doubt." Three of these judges explained why "beyond a reasonable doubt" is 100%. According to one judge, "proof beyond a reasonable doubt must be 100% beyond a reasonable doubt, and if there is any reasonable doubt, it is in the degree of 0% so far as the burden of proof goes." Another judge cited Devitt and Blackmar[185] to show that "beyond a reasonable doubt," "preponderance of the evidence," and "substantial evidence" each required 100% certainty. Finally, one judge cautioned against reading too much into the answers of respondents and explained that he could not fill out the questionnaire partly because of his analysis of "beyond a reasonable doubt": "(1) Assume all the evidence is before the court. (2) Discard any evidence which creates doubts which are unreasonable, and is therefore incredible. (3) One hundred percent of the remaining reasonable and credible evidence must mandate a guilty verdict."[186] The views of this third judge comport with Tribe's views: the factfinder must be certain of guilt and have no doubts except unreasonable or fanciful doubts.[187] Professor (now Judge) Winter, commenting on a prior survey of jurors and judges, suggests that judges should instruct the jury to return a guilty verdict only if (1) it "believes" subjectively in the defendant's guilt and (2) the "probability is as great" as the jury itself requires to risk comparable interests of its own.[188] The jury, in Judge Winter's view, should act as the voice of the community in

185. E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (3d ed. 1977).

186. The table does not include tbis conclusion, since the judge did not fill out the questionnaire. In Professor Simon's survey of 400 responding state and federal judges, approximately one-third of the judges placed "reasonable doubt" at more than 80%, one-third at 90-95%, and one-third at 100%. Simon, *supra* note 180, at 108. Professor Underwood opines that the "judges may have been stating what they thought was correct legal doctrine, rather than describing what they would do as judges." Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 n.46 (1977). She gives no reason for this assumption. Simon asked the judges to rate "beyond a reasonable doubt" and "preponderance of the evidence" on a scale of 1 to 10 with respect to (a) how they personally would rate them; (b) how they thought a juror would rate them; and (c) how they should be rated in a bench trial. Simon, *supra* note 180, at 106-07. The distributions were "almost identical across the three situations." *Id.* at 108.

187. Trihe, *Trial by Mathematics*, *supra* note 9, at 1372-75. Weinstein adheres to the better majority view: beyond a reasonable doubt "can never he set as certainty or 100% probability. . . . Setting the standard at 100% in order to avoid any chance of convicting the innocent would thus result in a zero conviction rate and acquittal of all the guilty." United States v. Fatico, 458 F. Supp. 388, 411 (E.D.N.Y. 1978).

188. Winter, *supra* note 180, at 342.

setting "how much risk of convicting an innocent man can be taken."[189]

B. *Probable Cause and Reasonable Cause*

In the present survey 166 judges assigned a percentage to "probable cause to believe" and "reasonable cause to believe." Table 3 sets forth the results:

TABLE 3

PERCENTAGES ASSOCIATED WITH PROBABLE CAUSE AND REASONABLE CAUSE

Probable Cause		Reasonable Cause	
Percentage	Number of Judges	Percentage	Number of Judges
10%	2	10%	3
20%	5	20%	9
30%	27	30%	52
40%	44	40%	32
50%	52	50%	40
60%	25	60%	22
70%	8	70%	5
80%	2	80%	1
90%	1	90%	1
		100%	1

Source: author survey

Although the Supreme Court equates "probable cause" and "reasonable cause,"[190] the judges responding to the survey assessed "reasonable cause" to require less certainty than "probable cause." "Probable cause" perhaps suggests by its name just over 50% certainty.[191] Nonetheless, the survey suggests that the connotation of "probable cause" has changed because "probable cause" originally did not import probabilistic notions.[192]

C. *Reasonable Suspicion*

In the present survey 164 judges assigned a percentage to rea-

189. *Id.*

190. *See supra* notes 60 & 71-76, and accompanying texts. *See also* Carroll v. United States, 267 U.S. 132, 162 (1925); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Warden v. Hayden, 387 U.S. 294, 307 (1967); Gerstein v. Pugh, 420 U.S. 103, 111 (1975).

191. *See supra* note 55 and accompanying text.

192. *See supra* note 65. Percentages were not assigned to burdens of proof during the eighteenth century, nor do they convey the primary meaning of the warrant clause of the fourth amendment. For an early attempt to treat burdens of proof as degrees of belief, see 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 71-109 (1827).

sonable suspicion. Table 4 sets forth the results:

TABLE 4

PERCENTAGES ASSOCIATED WITH REASONABLE SUSPICION

Percentage	Number of Judges
0%	2
10%	24
20%	33
30%	49
40%	21
50%	23
60%	9
70%	2
80%	0
90%	0
100%	1

Source: author survey

One judge who completed the other parts of the questionnaire left out "reasonable suspicion" because he had "never heard of this one." A few other judges felt that *ex parte* investigative standards—including "probable cause" and "reasonable cause"—should not be considered burdens of proof and could not be compared with the burdens of proof used at trial.

D. Clear and Convincing Evidence

In the present survey 170 judges assigned a percentage to "clear and convincing evidence." Table 5 sets forth the results:

TABLE 5

PERCENTAGES ASSOCIATED WITH CLEAR AND CONVINCING EVIDENCE

Percentage	Number of Judges
50%	1
55%	3
60%	14
65%	13
70%	24
75%	59
80%	28
85%	10
90%	14
95%	3
100%	1

Source: author survey

The judges in Judge Weinstein's survey assessed "clear and convincing evidence" to be between 60% and 75%. In the present survey 112 of the 172 judges rate "clear and convincing evidence" between 70% and 80%. While Weinstein's survey ranked "clear, unequivocal and convincing evidence" as a separate burden, which perhaps accounts for the differentiations in the two surveys, the judges in Judge Weinstein's survey ranked "reasonable doubt" between 76% and 95%, with only one judge rating "reasonable doubt" at 95%. The relative closeness of the percentage ratings between the "clear, unequivocal and convincing" standard and the "reasonable doubt" standard in the Judge Weinstein survey suggests that "clear, unequivocal and convincing evidence" may be almost as severe a burden as "reasonable doubt," or as the "reasonable doubt" standard for civil cases. Indeed, one judge in Judge Weinstein's survey rated the "clear and unequivocal" standard at 90% and "reasonable doubt" at 85%. The ten judges in Judge Weinstein's survey nevertheless seem to rate both the "clear and convincing standard" and the "clear, unequivocal, and convincing" standard fairly low. Judge Weinstein's survey, however, does suggest that the courts do not need a fourth standard and that such a standard is extremely difficult to differentiate from the other three burdens, which judges rate very closely on the scale. The proliferation of standards does little to clarify the level of certainty needed for the decision in question.

E. Clearly Erroneous and Substantial Evidence

In the present survey 153 judges assessed the "clearly erroneous" standard in percentages and 162 judges assessed "substantial evidence." Table 6 sets forth the results:

TABLE 6

PERCENTAGES ASSOCIATED WITH CLEARLY ERRONEOUS AND SUBSTANTIAL EVIDENCE

Clearly Erroneous		Substantial Evidence	
Percentage	Number of Judges	Percentage	Number of Judges
20%	2	10%	2
30%	5	20%	7
40%	2	30%	25
50%	8	40%	40
60%	14	50%	25
70%	28	60%	29
80%	50	70%	18
90%	29	80%	13
100%	15	90%	2
		100%	1

Source: author survey

While the "clearly erroneous" standard traditionally provides for a broader scope of review than "substantial evidence,"[193] many more judges thought that the reviewing court had to have greater certainty before reversing a decision under the "clearly erroneous" standard. Several judges noted that standards for judicial review and administrative standards should not be considered burdens of proof. More of those judges objected to the inclusion of "clearly erroneous." One circuit judge observed that the judicial system "places confidence" in the factfinders and wishes to leave it to them. Another circuit judge, formerly a district judge, stated that evidence can be quantified at the trial level but not on appeal. A third judge talked about the "factfinder mind set and the appellate mind set" to explain the relatively few reversals of criminal convictions as compared with administrative decisions, stating in effect that types of cases override considerations of burdens of proof. Another judge expressed a similar thought by stating that the difficulty of the burden of proof may matter little in terms of the difficulties inherent in obtaining a reversal on appeal; focusing on burdens of proof, he said, is misleading.

F. Preponderance and More Probable Than Not

In the present survey 175 judges assessed "preponderance of the evidence" and 174 judges assessed "more probable than not."

193. *See supra* notes 139-41 and accompanying text.

Table 7 sets forth the results:

TABLE 7

PERCENTAGES ASSOCIATED WITH PREPONDERANCE AND MORE PROBABLE THAN NOT

Preponderance of the Evidence		More Probable Than Not	
Percentage	Number of Judges	Percentage	Number of Judges
0%	1	20%	3
10%	0	25%	0
20%	0	30%	1
30%	0	35%	1
40%	0	40%	3
50%	111	45%	2
60%	43	50%	108
70%	7	55%	24
80%	7	60%	23
90%	3	65%	4
100%	3	70%	2
		75%	3

Source: author survey

While the definition of "preponderance of the evidence" is "more probable than not,"[194] the judges rated "preponderance" higher than "more probable than not." Winter suggests that because of television shows, jurors have heard only of "beyond a reasonable doubt" and do not know the difference between the burdens in civil and criminal cases.[195] They therefore apply "beyond a reasonable doubt" in civil cases. Winter's solution is to instruct the jury (1) that "beyond a reasonable doubt" is for criminal cases and (2) that if the parties tie, the defendant wins.[196] Winter suggests that the judge's emphasis on that difference between civil and criminal burdens of proof easily can cure the jurors' error.[197]

G. Burdens of Proof in General

In the present survey 167 judges ranked the nine burdens of proof on a descending scale from nine to one. Table 8 sets forth the average ranking and percentage of probabilities:

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194. C. MCCORMICK, *supra* note 55, at 794.
195. Winter, *supra* note 180, at 337-38.
196. *Id.* at 339.
197. *Id.* at 338.

TABLE 8

AVERAGE RANKING AND PERCENTAGE OF PROBABILITIES OF BURDENS OF PROOF

Burden of Proof	Average Ranking	Average Percentage	Number of Judges
beyond a reasonable doubt	8.85	90.28%	(171 judges)
clear and convincing evidence	7.39	74.99%	(170 judges)
clearly erroneous	7.08	73.83%	(153 judges)
preponderance of the evidence	5.35	55.33%	(175 judges)
more probable than not	4.50	52.56%	(174 judges)
substantial evidence	4.18	48.63%	(162 judges)
probable cause to believe	3.23	44.52%	(166 judges)
reasonable cause to believe	2.78	40.73%	(166 judges)
reasonable suspicion	1.26	29.59%	(164 judges)

Source: author survey

Several judges who wrote letters rather than filling out the questionnaire directed their comments to their inability to use percentages. The most common complaint was that percentages are misleading because burdens of proof deal with qualitative judgments rather than quantitative judgments. Other comments included: percentages (1) do not lead to certainty; (2) they are too theoretical; (3) they are mechanical, unrealistic, and unknown to the law; (4) they are not the terms in which judges think; (5) they change their meanings according to their contexts; and (6) they are only the "multiplier" and the judge does not know what the "multiplicand" should be. Most judges who filled out the questionnaire, however, said little about percentages.[198]

Other judges criticized the ranking of burdens of proof by number and stated that the practice is misleading. The phrases used in the survey, they argued, were *not* all burdens of proof, such as standards of appellate or administrative review and requests for *ex parte* investigative actions. Several judges said that the class of case is the important factor—not the burden of proof—since the context of a particular case plays a large role in many judgments of whether a litigant has met the prescribed burden. Indeed, one

198. Professor Simon specifically polled the judges for a policy recommendation on the use of percentages or probabilities: "The judges were almost unanimous in their rejection of the proposal for both criminal and civil trials." Simon, *supra* note 180, at 113.

judge suggested that without a case to be decided, any statement on burdens is purely "subjective." Other comments included the following: The same words have "different meanings" in different contexts. "Simplicity" (simplification of the present burdens of proof) will not increase certainty, fairness, or justice. Burdens of proof are "semantics." Burdens are "only for lay people," with "no meaning in the theory or practice of law." One judge said that the only meaningful statement about burdens is, "Are the factfinders satisfied?" Several judges said that the need to compare two burdens of proof had never confronted them in a case and that they therefore found the questionnaire an artificial exercise. One judge said he was "not prepared to make the fine distinctions required" by the survey.

The judges who do not find burdens of proof useful simply will ignore a proliferation of burdens. The proliferation, meanwhile, simply will confuse those judges who find the concept useful. Thus, fine calibrations with different phrases and percentages assigned to each phrase will not contribute to better or easier decisionmaking.

VI. Conclusion

The symbolic and practical functions of burdens of proof appear to operate independently of one another in the opinions of the United States Supreme Court, perhaps because the Court has exercised little control over the practical operation of burdens of proof in the outcome of a decision. Nevertheless, the Court ultimately interrelates both functions because it uses the symbolic role of burdens to select the particular burden to apply in the various types of cases.[199] The constitutionalization of stop-and-frisk procedures in the last fifteen years demonstrates most clearly how the symbolism of the interests at stake influence the level of certainty required to reach a decision. Before the Supreme Court recognized stop-and-frisk as an investigative tool of law enforcement, uniform judicial oversight of fourth amendment protections against the patdown was rare. Upon initial judicial recognition of the patdown, the Court left its delineation of "reasonable" police procedures vague by utilizing the "unreflective and reflexive action" standard. As judicial control over "reasonable suspicion" grew, the balance between the significance to society of law enforcement operations and the importance of the individual's constitutional rights made the standard of "reasonable suspicion" for a patdown more severe.

199. Addington v. Texas, 441 U.S. 418, 423-26 (1979).

Although the Court clarified its own thinking, the constitutional standard of "reasonable suspicion" can only achieve its practical purpose if it deters illegal police misconduct. If general police willingness to comply with constitutional standards exists, then law enforcement officers and the neutral magistrates and judges who make the finding of constitutionality must have clear guidelines from the Court to make their everyday, working decisions. Only clarity in the practical role of "reasonable suspicion" will promote greater uniformity in the application of fourth amendment safeguards by initial decisionmakers.

While the Court has clarified the "reasonable suspicion" standard, it has not provided juries any significantly better guidance in reaching their decisions. The emergence of the "clearly erroneous" standard for use in significant civil suits by the federal or state government against an individual may or may not impress the factfinders with the importance of the decision to be made.[200] Further, the "clearly erroneous" standard may not give the decisionmaker a clear guideline with respect to the level of certainty required to reach a decision. While the factfinder may recognize the importance of the individual's right being decided in the case whatever the burden of proof, the explanation of the burdens may not alert the factfinder to the required certainty. Indeed, the Supreme Court itself refers to the misleading aspects in the nomenclature of "preponderance of the evidence" as a reason to require "clear and convincing evidence" in important civil cases brought by the government against an individual.[201] Jury instructions on these burdens, however, may impress the factfinder only with the notion that it is not to apply the "reasonable doubt standard." Thus, the factfinder may not know whether to apply the "reasonable doubt standard," particularly if it has heard of neither of the other standards apart from the reference in the jury instructions.[202] Winter points out that even those private individuals involved in suits to which a "preponderance" standard applies deserve to have their interests decided on the basis of "preponderance" and not on a higher burden.[203]

Uniformity, to the extent that it is possible to achieve, is likewise desirable for standards used by judges. Moreover, uniformity is essential if judges are to treat like cases alike and promote the

200. *Id.* at 427.
201. Santosky v. Kramer, 102 S. Ct. 1388, 1400 (1982).
202. Larson v. Jo Ann Cab Corp., 209 F.2d 929, 929-30 (1954).
203. Winter, *supra* note 180, at 336.

integrity of the judicial system. Indeed, lack of uniformity of application in appellate review standards troubles the commentators more than the expansion in recent decades of the reviewing powers of the appellate courts.[204] While the application of probability theory and percentages to burdens of proof never may—and perhaps never should—find its way into jury instructions, the use of percentages clearly demonstrates that a proliferation of burdens of proof will not aid decisionmaking. Decisionmakers must have a clearly prescribed level of certainty; proliferation of burdens, however, will give rise only to more confusing terminology and will result in multiple burdens of proof occupying the same points on the scale. The use of percentages in analyzing burdens of proof also demonstrates that the need to clarify jury confusion about the meaning of the various burdens is as pressing now as it was half a century ago. Perhaps judges can prevent misapplication of the burdens in marginal cases by giving the jury a definition of the "preponderance" standard and the "clear and convincing evidence" standard in terms of the other standards. Greater precision in the use of currently existing burdens and arrest of the proliferation of new phrases intended to convey burdens of proof only can contribute to better decisionmaking and greater respect for the integrity of the judicial system.

204. *See, e.g.*, Nangle, *supra* note 135, at 416.