ASYMMETRIC ERROR COSTS IN CIVIL LAW

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ABSTRACT

Most lawyers and legal scholars are familiar with the Blackstone ratio—"better that ten guilty persons escape, than one innocent suffer." That ratio recognizes that erroneous judicial decisions impose costs on society. The need to reduce error costs explains many aspects of criminal law, including the reasonable doubt standard of proof, which reflects the assumption that erroneous convictions are far more costly than erroneous acquittals.

In the civil law context, however, error costs have received much less attention. Scholars generally assume that error costs are symmetrical. In other words, an erroneous finding of liability is no more costly than an erroneous denial of liability. But it turns out that, as with criminal law, many areas of civil law involve asymmetric error costs, including antitrust, civil fraud, defamation, patent challenges, and cases involving liberty interests and other constitutional rights.

This article provides the first in-depth analysis of asymmetric error costs in civil law. It shows that courts frequently identify asymmetric error costs in civil law. Courts seek to address those costs with familiar doctrines, including raising the standard of proof from a preponderance of the evidence to clear and convincing evidence, shifting the burden of proof, and imposing scienter requirements similar to those in criminal law.

Courts take asymmetric error costs seriously, and they possess the necessary tools to address them. However, they have a mixed record of doing so, and they rely too heavily on the least reliable of the available tools: raising the standard of proof. Using examples from disparate areas of civil law, I identify the most effective tools to address asymmetric error costs and explain why courts use these tools infrequently. I also illustrate the inconsistent judicial treatment of asymmetric error costs, especially in cases involving reputational harms.

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I. INTRODUCTION

All legal decisions involve the possibility of error. In criminal law, the Blackstone ratio—"better that ten guilty persons escape, than that one innocent suffer"[1]—illustrates the idea that an erroneous criminal conviction is more costly to society, or at least more troubling morally, than an erroneous acquittal.[2] Courts compensate for this asymmetry by relying on the reasonable doubt standard along with other rules that favor the defendant.[3]

The Blackstone ratio is perhaps the leading example of an economic concept known as error costs.[4] That concept posits that social welfare is maximized when the cost of decision-making errors is minimized.[5] Decision-making errors, in turn, may be divided into either Type I errors, the "mistaken imposition of legal liability," or Type II errors, the "mistaken failure to impose liability."[6] Based on error cost analysis, an efficient legal system strives to reduce the frequency of more costly legal errors, even at the

1. Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *352). For explanation of the Blackstone ratio and its many variations, see *id.* at 175-77.

2. *See* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015) (discussing the history and criticism of the Blackstone ratio). *See also* FREDERICK SCHAUER, THE PROOF: USES OF EVIDENCE IN LAW, POLITICS AND EVERYTHING ELSE 52 (2022) ("The Blackstonian ratio supports the requirement of proof beyond a reasonable doubt in the criminal law because being imprisoned (or executed) is a pretty awful thing, making it important to get things right within the limits of reason and practicality. But it is also important to get things right in making policy-relevant attributions of causation, even if the desired ratio of false negative to false positives need not be the same as it is in the criminal justice system.").

3. Other rules that favor the defendant include the right to remain silent while in police custody and during trial, and the duty of the state to disclose exculpatory evidence. *See, e.g.*, Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 4 (1990).

4. *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 4 (2015).

5. Apart from the social costs resulting from the judicial system's errors in adjudicating cases, a full error cost analysis also considers the costs of operating the legal dispute-resolution machinery. For example, requiring the use of a costly judicial procedure that results in only a small reduction in judicial error costs would not improve social welfare. This article recognizes that the standard definition of error costs is the sum of both decision-making error costs and dispute-resolution costs but focuses primarily on decision making errors costs. *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-01 (1973); George M. Cohen, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. PA. L. REV. 1117, 1127 (1985).

6. Posner, *supra* note 5, at 401.

expense of increasing the frequency of less costly legal errors. In practice, this typically means tipping the judicial scale in favor of the criminal defendant.

Although courts rarely use the language of error cost analysis, they often rely on its logic. For example, instead of referring to error costs, judges sometimes refer to the "disutility"[7] of errors or simply say that convicting an innocent person is "far worse" than letting a guilty person go free.[8] But the concept is the same—judges compare the potential harms caused by the two different types of decision errors. As Ronald Coase observed in the most cited law review article of all time,[9] judges "often make, although not always in very explicit fashion, a comparison between what would be gained and what lost by preventing actions which have harmful effects."[10]

A substantial body of work analyzes asymmetric costs in criminal law by focusing on the reasonable doubt standard.[11] In contrast, few scholars have

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7. *See, e.g.*, *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."). *See also* Lawrence B. Solum, *You Prove It! Why Should I*, 17 HARV. J.L. & PUB. POL'Y 691, 701 (1994) ("[T]he burden of persuasion in a criminal case may be proof beyond a reasonable doubt, because the disutility of convicting an innocent person far exceeds the disutility of finding a guilty person to be not guilty: better that ten guilty persons go free than one innocent person be convicted.").

8. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring) ("[A] fundamental value determination in our society [is] that it is far worse to convict an innocent man than to let a guilty man go free.").

9. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

10. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 27-28 (1960).

11. That work addresses questions such as: What do the words of the standard mean? Can the standard be converted to a statistical probability which juries are instructed to use? And does the standard reduce the likelihood of conviction in comparison with other standards? I will revisit these questions in the context of civil law later in this article. *See, e.g.*, Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105 (1999); Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557 (2013); Olivia K. H. Smith, *The Beyond a Reasonable Doubt Standard of Proof: Juror Understanding and Reform*, 26 INT'L J. EVID. & PROOF 291 (2022); Jon O. Newman, *Taking "Beyond Reasonable Doubt" Seriously*, 103 JUDICATURE 32, 33 (2019); Richard Seltzer et al., *Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Gold?*, 100 JUDICATURE 56, 58, 64 (2016) ("These standards are uniformly expressed verbally rather than numerically. . . . The use of quantification of burdens of proof has been percolating in academic scholarship for decades without much adoption by the judiciary.").

With specific reference to error costs in criminal law, many studies contain aggregate estimates of the cost of crime, and a few consider the cost of wrongful convictions. None that I know of focus on the cost of wrongful exonerations which also would be required for an empirically-based error cost analysis. For aggregate cost of crime see, for example, David A. Anderson, *The Aggregate Cost of Crime in the United States*, 64 J.L. & ECON. 857 (2021); Ted R. Miller et al., *Incidence and Costs of Personal and Property Crimes in the USA, 2017*, 12 J. BENEFIT-COST ANALYSIS 24 (2021); Nyantara Wickramasekera et al., *Cost of Crime: A Systematic Review*, 43 J. CRIM. JUST. 218 (2015). For cost of wrongful convictions see, for example, Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Wrongful Convictions*, CRIMINOLOGY & PUB. POL'Y 691 (2021); Rebecca Silbert et al., *Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and*

investigated error costs in civil law.[12] This may be attributable to the general assumption that error costs in civil law are symmetrical—an erroneous finding of liability is no more costly than an erroneous denial of liability. Because of this assumption,[13] the prevailing standard of proof in civil cases is a preponderance of the evidence.[14]

But, this paper shows that the assumption does not hold. It turns out that in many contexts, courts have expressly recognized that an erroneous finding of liability is more costly than an erroneous denial of liability. Examples include cases involving involuntary commitment,[15] termination of parental rights,[16] deportation,[17] denaturalization,[18] withdrawal of life support,[19] fraud in some states,[20] defamation,[21] antitrust,[22] patent validity challenges,[23] challenges to wills, and attorney disciplinary proceedings.[24] In these areas, courts adopt rules that tip the scale in favor of the defendant. As discussed in Part III, four factors typically signal the presence of asymmetric error costs, and some are much stronger indicators of asymmetric error costs than others.

This article provides the first in-depth law and economics analysis of asymmetric error costs in civil law. To do so, the article shows how judicial recognition of asymmetric error costs shapes legal doctrines in disparate areas. Using multiple examples, I identify not only the factors indicating the presence of asymmetric error costs but also the primary tools that courts use to address asymmetric error costs to make it less likely that a defendant will be found liable. When courts identify asymmetric error costs,[25] they often

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Failed Prosecutions in California's Criminal Justice System, U. PENN L. SCH. PUB. L. RSCH. PAPER NO. 16-12 (2015).

12. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982); Ronald J. Allen, *Burdens of Proof*, 13 L. PROBABILITY & RISK 195 (2014); J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242 (1944); Posner, *supra* note 5, at 408-10; Brian Hedden & Mark Colyvan, *Legal Probabilism: A Qualified Defence*, 27 J. POL. PHIL. 448 (2019).

13. Allen, *supra* note 12, at 203; Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. EVID. & PROOF 5, 25 (2019).

14. Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.").

15. Addington v. Texas, 441 U.S. 418 (1979).

16. Santosky v. Kramer, 455 U.S. 745 (1982).

17. Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276 (1966).

18. Chaunt v. United States, 364 U.S. 350 (1960).

19. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

20. *See* discussion *infra* Section III.E.

21. Burke v. Deiner, 479 A.2d 393 (N.J. 1984).

22. *See* discussion *infra* Section III.C.

23. Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011).

24. *See* discussion *infra* Section III.E.ii.

25. Although some statutes specify the required standard of proof, "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" Santosky v. Kramer, 455 U.S. 745, 755-56 (1982) (quoting Woodby v.

respond by requiring a higher standard of proof: clear and convincing evidence. Other tools employed include burden shifting, e.g., antitrust rule of reason cases, or imposing intent requirements similar to those in criminal law, e.g., certain civil fraud cases.

Although courts take asymmetric error costs seriously and possess the necessary tools to address them, they have a mixed record in doing so. For example, the way courts view civil fraud in terms of the existence and degree of error cost asymmetry varies from one jurisdiction to another and between similar offenses even within the same jurisdiction. Also, in practice, the most frequently used tool for addressing asymmetric error costs in civil law—raising the standard of proof—is the least reliable of the tools I identify. Indeed, the Supreme Court itself has cautioned that jurors struggle to understand the meaning of different standards and that expectations regarding the impact of different standards of proof should be limited.[26]

The article proceeds as follows: Part II uses defamation law to illustrate the main tools that courts use to address asymmetric error costs. Part III shows how asymmetric error costs have shaped a wide variety of legal doctrines and identifies four factors that signal the presence of asymmetric error costs. Part IV evaluates the effectiveness of the tools used and discusses the inconsistent and sometimes ineffective judicial responses to asymmetric error costs. Part V highlights the need for a more systematic approach to asymmetric error costs that does not rely as heavily on raising the burden of proof.

II. ASYMMETRIC ERROR COSTS HAVE SHAPED DEFAMATION LAW

This Part discusses the important role of asymmetric error costs in shaping defamation law by focusing on *New York Times Co. v. Sullivan*.[27] *Sullivan* is important in understanding asymmetric error costs in civil law because it illustrates the range of tools courts use to address these costs.

Sullivan made four important procedural and substantive changes from the common law—each designed to address asymmetric error costs and make it less likely that defendants will be found liable. The four changes the Court made to address asymmetric error costs in defamation cases are discussed below.

Immigr. & Naturalization Serv., 385 U.S. 276, 284 (1996)). Whether courts or legislatures are better positioned to evaluate and remedy asymmetric error costs is a topic for another article.

26. *See* discussion *infra* Section IV.A.

27. 376 U.S. 254 (1964).

A summary of these departures from common law defamation is that the Court: 1) raised the standard of proof from preponderance to "convincing clarity";[28] 2) placed the burden of proof on the plaintiff to show the falsity of the statement instead of the defendant (typically, the media), to show the truth of the statement;[29] 3) required plaintiffs who were public officials or public figures to show that the defendant made the statement with malice, i.e., with knowledge of its falsity or reckless disregard for the truth;[30] and 4) took the unusual step of providing independent appellate review of the facts.[31]

The Court acknowledged that its decision to impose fewer limits on speech would result in more false speech but said this tradeoff was necessary because the harm caused by erroneously limiting speech—the chilling effect on free speech—was far greater than the harm caused by permitting more false statements, so long as they were not made maliciously. Justice Brennan's opinion refers to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[32] and makes clear that a judicial error that stifles speech is especially costly. The importance of free speech, and therefore the cost of erroneously suppressing it, was perhaps best expressed by Justice Cardozo, in an earlier case, who described it as "the indispensable condition[] of nearly every other form of freedom."[33]

At issue in *Sullivan* was an advertisement by supporters of Martin Luther King Jr. published in the New York Times, which stated that "[i]n Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps . . . truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus."[34] Sullivan, the city commissioner, sued for libel, saying that although he had not been named, the ad contained untrue statements of fact and attacked his reputation.[35] The all-white jury awarded him $500,000 in damages, and the Alabama Supreme Court affirmed the judgment.[36]

Justice Brennan acknowledged that some of the statements in the ad were inaccurate but said that falsity was not enough to justify liability:

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28. *Id.* at 285-86.

29. *Id.* at 281.

30. *Id.* at 282-83.

31. Gerald R. Smith, *Of Malice & Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 49 (1992). *See Sullivan*, 376 U.S. at 277-78.

32. *Sullivan*, 376 U.S. at 270.

33. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

34. *Sullivan*, 376 U.S. at 257.

35. *Id.* at 256-58.

36. *Id.* at 256; John B. Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 12 n.65 (2014).

"[E]rroneous statement[s] [are] inevitable in free debate," he wrote, and "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[37] Referring to the tradeoff between Type I and Type II errors (although he did not use those terms), he said that "[w]hatever is added to the field of libel is taken from the field of free debate."[38] This weighing of error costs runs throughout defamation law. As Daniel J. Hemel and Ariel Porat observe, the "tradeoff between the interest in protecting victims and the interest in promoting free flow of information and ideas animates the constitutional law of defamation."[39]

A. RAISING THE STANDARD OF PROOF

In *Sullivan,* the Court raised the standard of proof from preponderance to clear and convincing evidence to make it more difficult for the plaintiff to prevail. Raising the standard of proof is not just the most common tool courts use to address asymmetric error costs; it is usually the only tool they use. In *Sullivan*, however, the Court used this tool in combination with three others.

Addington v. Texas,[40] the leading case on standards of proof,[41] describes the link between the standard of proof and error costs. There, Justice Burger wrote: "The standard [of proof] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[42] The default standard of proof in civil cases is the preponderance of the evidence,[43] which "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence.'"[44] Justice Burger explained that the preponderance standard is used because in a "typical civil case involving a monetary dispute between private parties . . . [s]ociety has a minimal concern with the outcome," and, therefore, the "plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion."[45]

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37. *Id*. at 271-72 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

38. *Id*. at 272.

39. Daniel Hemel & Ariel Porat, *Free Speech & Cheap Talk*, 11 J. LEGAL ANALYSIS 46, 48 (2019).

40. 441 U.S. 418 (1979).

41. *See also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (focusing on the reasonable doubt standard).

42. *Addington*, 441 U.S. at 423.

43. Conservatorship of Wendland v. Wendland, 28 P.3d 151, 169 (2001).

44. *In re* Angelia P., 623 P.2d 198, 203 (1981) (quoting *In re Winship*, 397 U.S. at 371-72.). *See also* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1256 (2013) ("As every first-year law student knows, the civil preponderance-of-the-evidence standard requires that a plaintiff establish the probability of her claim to greater than 0.5 . . . .").

45. *Addington*, 441 U.S. at 423.

Ronald Allen and Michael Pardo observe that "given certain assumptions, the preponderance standard is also thought to maximize overall accuracy (or minimize the total number of errors)."[46] And Christopher Slobogin writes that the preponderance standard is used in civil cases "because civil suit involves relatively equally situated private parties rather than the all-powerful government against a citizen."[47]

To my knowledge, there is no empirical evidence backing the assumption that the application of the preponderance standard in civil cases maximizes overall accuracy or results in a symmetrical distribution of errors. The assumption is best viewed as theoretical, not one that necessarily accurately represents the average empirical result. The same can be said of the role of the reasonable doubt standard in criminal law.[48]

Turning to the higher of the two common standards of proof in civil law, the clear and convincing standard, that standard is often described as the "highly probable"[49] standard.[50] In *Colorado v. New Mexico*,[51] a case involving the apportionment of water between the two states, the Supreme Court said that Colorado would succeed under the clear and convincing standard only if it "could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions [was] 'highly probable.'"[52] The Court said that the clear and convincing standard "reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of an erroneous decision."[53]

As noted, in most civil cases where the courts have found asymmetric error costs, including *Sullivan*, the remedy has been to raise the standard of proof to clear and convincing evidence (although *Sullivan* uses a slightly different wording: "convincing clarity"). Subsequent sections discuss civil cases involving termination of parental rights, deportation, denaturalization, withdrawal of life support, fraud, patent validity challenges, challenges to

46. Allen & Pardo, *supra* note 13, at 10.

47. CHRISTOPHER SLOBOGIN, ADVANCED INTRODUCTION TO U.S. CRIMINAL PROCEDURE 8 (2020).

48. *See, e.g.*, Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 809 (2012); McCauliff, *supra* note 12, at 1296; Thomas S. Wallsten et al., *Measuring the Vague Meanings of Probability Terms*, 115 J. EXPERIMENTAL PSYCH.: GEN. 348, 362 (1986).

49. McBaine, *supra* note 12, at 246-47 (describing the preponderance, clear and convincing, and reasonable doubt standards as "what (a) *probably* has happened, or (b) what *highly probably* has happened, or (c) what *almost certainly* has happened").

50. Allen & Pardo, *supra* note 13, at 10. The clear and convincing standard has also been defined simply as "requiring some level of proof between the preponderance and [beyond a reasonable doubt] standards." *Id.*

51. 467 U.S. 310 (1984).

52. *Id.* at 316.

53. *Id*.

wills, and attorney disciplinary proceedings where the courts have raised the standard of proof.

Apart from raising the standard of proof, the Court in *Sullivan* also used three other tools to address asymmetric error costs, including shifting the burden of proof, discussed next.

B. SHIFTING THE BURDEN OF PROOF

The function of the burden of proof[54] is "to apportion the task of presenting evidence."[55] The party having the burden of proof must "either come up with evidence supporting his position or suffer an adverse judgment on that issue."[56] Further, placing the burden of proof on one party increases the cost of litigation for that party and reduces the costs of litigation for the other party.[57] For that reason, it is often said that the burden of proof should be "placed on the party with better access to relevant information,"[58] thereby reducing the cost of litigation.

In *Sullivan*, however, the Court shifted the burden of proof from the defendant to the plaintiff not because the plaintiff had better access to information but instead to increase the costs for plaintiffs and to make it less likely that they would prevail. Before *Sullivan*, the plaintiff in a defamation case was required to prove only that the defendant "intentionally or negligently published a remark that defamed the plaintiff in the minds of the recipients."[59] As an affirmative defense, the defendant had the burden of proving that the harmful statement was true.[60] Marc A. Franklin and Daniel J. Bussell explain that the defendant "had a considerable number of potential defenses, but these defenses were generally burdensome to establish or defeasible, or both. Thus, the defendant bore the burden of proof on the crucial issues."[61]

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54. *See* David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429, 433-34 (2013). The burden of proof refers to a party's duty to present evidence and argument to prove his or her allegations. *Id.* The standard of proof refers to the degree of proof required to prove a specific allegation. *Id.* In this article, I typically refer to the standard of proof.

55. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 415 (1997).

56. *Id.* at 413.

57. *Id*. at 413-14.

58. Chris William Sanchirico, *A Primary-Activity Approach to Proof Burdens*, 37 J. LEGAL STUD. 273, 275 (2008).

59. Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 826 (1984).

60. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964) (discussing Alabama defamation law).

61. Franklin & Bussel, *supra* note 59, at 826.

Following *Sullivan*, however, the burden shifted to the plaintiff, who now bore the burden of proving both that the defendant's defamatory communication was false and that it was made with malice.[62] Shifting the burden of proof from the defendant to the plaintiff was an important tool used by the *Sullivan* Court to address asymmetric error costs in defamation cases and is an important tool that courts use to address asymmetric error costs in other areas of law, such as antitrust as discussed *infra* Part III.C.

C. IMPOSING INTENT REQUIREMENTS SIMILAR TO CRIMINAL LAW

A third important tool the *Sullivan* Court used to address asymmetric error costs was to introduce the malice requirement. More broadly, courts decrease the probability of an erroneous finding of liability by imposing intent requirements similar to criminal law or by raising the required level of scienter.

In *Sullivan*, the Court required plaintiffs who were public officials or public figures to show that the defendant acted with actual malice, i.e., with knowledge of the falsity of the statement or reckless disregard for the truth.[63] Before *Sullivan*, plaintiffs in common law defamation actions alleging libel or slander "were required to prove only that the publication was defamatory and that the publication referred to the plaintiff. Absent the affirmative defenses of truth or privilege, the publisher of defamatory statements was subjected to strict liability."[64] In short, *Sullivan* added an important new requirement of intentionality to defamation law.

The introduction of the malice requirement brings civil defamation closer to criminal law, where the intent requirement imposes a substantial hurdle to conviction. Introducing the actual malice requirement, along with the other changes brought by *Sullivan*, has made it very difficult for public figures to win defamation cases.

Recently, Justices Thomas and Gorsuch have questioned whether the Court has gone too far in favoring defendants in defamation cases. Justice Thomas questioned whether *Sullivan* reached the right balance of interests "between encouraging robust public discourse and providing a meaningful

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62. *See* John B. Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 20-21 (2014).

63. 376 U.S. at 279-80.

64. Joseph K. Brown, *Florida Defamation Law & the First Amendment: Protecting the Reputational Interests of the Private Individual*, 11 FLA. ST. U. L. REV. 197, 206 (1983) (footnote omitted) (first citing RESTATEMENT (FIRST) OF TORTS § 578 (1938); and then citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 773 (4th ed. 1971)).

remedy for reputational harm."[65] He pointed out that "public figure or private, lies impose real harm."[66] Separately, Justice Gorsuch argued that technological changes have impacted the balancing of interests in defamation cases and that "over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability."[67] Whatever the merits of these arguments, it is clear that the imposition of the malice standard has strongly tilted the decision scale in favor of defendants in defamation cases.

D. INDEPENDENT APPELLATE REVIEW OF THE FACTS

Before leaving *Sullivan*, it is worth pointing out one more tool the Court used to tilt the decision scale in favor of defendants to accomplish the Court's goal of reducing erroneous liability judgments. This was to reserve the right to independent appellate review of the facts, thereby giving the Court the ability to override not just legal but also factual conclusions of the court below.

Normally, appellate courts accept the factual findings of the court below. In *Sullivan*, though, the Court decided to "examine for ourselves the statements in issue and the circumstances under which they were made."[68] Why did the Court take this unusual step? The likely answer is that the Court did not trust Alabama judges and juries to apply defamation law as it intended. D.A. Anderson writes that the Court's decision "appeared to be nothing more than a discreet way of saying that the Court did not trust the Alabama courts to faithfully apply the new rule."[69] Richard Posner writes more generally of the "traditional and well-grounded suspicion of the impartiality of efforts by [the] government to repress speech critical of it."[70]

Because the Court did not have confidence that the law would be applied as instructed, it asserted the right to override the decisions below on both legal and factual grounds. Unlike the previous three tools used to address asymmetric error costs, this tool is not widely used. In *Sullivan*, the Court asserted the right to independently review the facts to make it more difficult

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65. McKee v. Cosby, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari) (mem.).

66. Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from the denial of certiorari) (mem.).

67. *Id.* at 2428 (Gorsuch, J., dissenting from the denial of certiorari).

68. 376 U.S. at 285.

69. David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGER WILLIAMS U. L. REV. 1, 4 (2015).

70. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 43 (1986).

for the plaintiff to prevail, but there is no guarantee that other courts would use this tool for the same purpose.

How important was each of the four tools in making it less likely that the defendant would be found liable in defamation cases? Assessing the contribution of each tool is difficult. Recently, judges and academics have focused more on the impact of imposing the actual malice standard than on the other tools, although in *Sullivan* that alone may have been insufficient to persuade the Southern jury not to find the New York Times liable.[71] In any event, in the aggregate, the four tools the Court used to change defamation law made it much more difficult for plaintiffs to prevail and, correspondingly, much more likely that defendants could make untruthful statements without liability.

Overall, *Sullivan* is unusual in using four different tools to address asymmetric error costs. Most commonly, courts use only one. However, *Sullivan* provides an example of how judicial recognition of asymmetric error costs impacts important legal doctrines and the array of tools available to the courts.

III. ASYMMETRIC ERROR COSTS HAVE SHAPED MANY OTHER LEGAL DOCTRINES, AND FOUR FACTORS SIGNAL THE PRESENCE OF ASYMMETRIC ERROR COSTS

This Part identifies four factors that signal the presence of asymmetric error costs. Courts are more likely to find asymmetric error costs when: 1) a liberty interest or other important constitutional right is at stake, 2) liability would result in a serious harm that is permanent, 3) liability would mean revocation of an important right previously granted, or 4) liability would result in a stigma similar to a criminal conviction. The first of these factors is the strongest indicator of the presence of asymmetric errors.

I discuss these factors as part of my examination of the role of asymmetric costs in shaping a wide variety of legal doctrines, including those in due process cases involving liberty interests or other important constitutional rights, in antitrust law, and in cases of civil fraud and professional misconduct. Asymmetric error costs also explain the application of the presumption of validity afforded some governmental and private actions, and the principle of stare decisis.

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71. *See, e.g.*, Anderson, *supra* note 69, at 3-4 ("Alleviating the chill of libel law was not accomplished solely, or even primarily, by the actual malice rule. The rule merely added another element to the libel plaintiff's burden and by itself would have had limited effect.").

A. CASES INVOLVING LIBERTY INTERESTS OR OTHER IMPORTANT CONSTITUTIONAL RIGHTS

Addington v. Texas[72] is the best known in a line of cases finding that the deprivation of liberty interests[73] or other constitutionally protected rights creates substantial error cost asymmetries[74] and therefore implicates due process rights. This "liberty interest" factor is one of the four factors that often signal the presence of asymmetric error costs. At issue in *Addington* was the standard of proof to be applied for determining whether to involuntarily commit someone to a state psychiatric hospital for an indefinite period. The Supreme Court's holding rested on its finding "that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[75]

To determine whether an individual received due process in these cases, courts typically apply the balancing test of *Mathews v. Eldridge*,[76] which is widely used in cases where the government seeks to deprive a person of life, liberty, or property.[77] Frank H. Easterbrook, prior to his appointment as a Seventh Circuit judge, said that in many of these cases "the amount of process that was due varied directly with the Court's assessment of the weight of the interest at stake. The greater the interest, the more errors matter to the affected people; the more errors matter, the more society should be willing to spend to prevent errors . . . ."[78] He concluded that "the more [society] should be willing to spend, the more the Constitution requires it to spend.[79] In other words, when a great interest is at stake, such as the right to liberty, the cost of erroneously depriving an individual of that right is very high, and society should invest accordingly to minimize that error.

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72. 441 U.S. 418, 423 (1979).

73. For useful description of liberty interests, see *Amdt14.S1.5.2 Liberty Deprivations and Due Process*, CONST. ANN., https://constitution.congress.gov/browse/essay/amdt14-S1-5-2/ALDE_00013748 (last visited Mar. 16, 2024).

74. Schneiderman v. United States, 320 U.S. 118, 159-60 (1943); Chaunt v. United States, 364 U. S. 350, 353 (1960); Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 286 (1966); *In re* Winship, 397 U.S. 358, 372 (1970); Santosky v. Kramer, 455 U.S. 745, 759 (1982); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990).

75. *Addington*, 441 U.S. at 425.

76. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

77. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 594 (4th ed. 2011).

78. Frank H. Easterbrook, *Substance & Due Process*, SUP. CT. REV. 85, 89 (1982).

79. *Id*.

In Easterbrook's view, the *Mathews* test used in these cases relies on standard error cost analysis. With reference to the *Mathews* test, he explained that "[t]he goal of due process is to hold as low as possible the sum of two costs: the costs created by erroneous decisions, including false positives and false negatives, and the cost of administering the procedures."[80] This is the standard formulation of error cost analysis.

As illustrated in *Addington* and similar cases, the high valuation of liberty interests means that an error that would result in the deprivation of an individual's liberty, a Type I error, is especially costly, much more costly than an error that would result in the preservation of an individual's liberty, a Type II error. Therefore, in these cases, courts must tilt the evidentiary scale to reduce the likelihood of Type I errors.

The Court in *Addington* said that it was "mindful that the function of legal process is to minimize the risk of erroneous decisions"[81] and therefore needed to "assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof."[82]

The Court acknowledged that involuntary civil commitment can "engender adverse social consequences to the individual. Whether I label this phenomenon 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual."[83] Note that when a finding of liability has a strongly associated stigma, this is another of the four factors courts have listed as signaling the presence of asymmetric error costs.

As to the state's interest in confinement, the Court said that because "the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."[84] Under these circumstances, the Court concluded "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[85] In short, the Court recognized that, under these circumstances, an erroneous commitment was more costly

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80. *Id.* at 110. See discussion *supra* Introduction and *supra* note 5 for standard formulation of error cost analysis.

81. Addington v. Texas, 441 U.S. 418, 425 (first citing *Mathews*, 424 U.S. at 335; and then citing Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

82. *Id*.

83. *Id.* at 426.

84. *Id*.

85. *Id.* at 427.

than an erroneous failure to commit and therefore the "more likely than not" preponderance standard would not satisfy due process.

Turning to the possible application of the still higher reasonable doubt standard used in criminal cases, the Court in *Addington* said that "we should hesitate to apply it too broadly or casually in noncriminal cases."[86] The Court observed that although there is some stigma associated with involuntary commitment, it is also the case that an individual "suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma"[87] even when that individual is not committed. In addition, "[i]n a civil commitment state power is not exercised in a punitive sense."[88] Thus, the Court found that in a civil commitment case, the cost asymmetry between the two types of errors, while significant, is less than in a criminal case. The Court also concluded that, because of the uncertainty of psychological diagnosis, "there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."[89] For these reasons, the Court held that the reasonable doubt standard was not applicable and that the clear and convincing standard should be applied.

Having an important liberty interest at stake, as in *Addington,* is typically sufficient by itself to trigger a finding that substantial asymmetric error costs are involved and must be addressed. Of the four factors listed as signaling the presence of asymmetric error costs, this factor is the most strongly predictive. The other factors that signal the presence of asymmetric error costs are: 1) when liability would result in a serious harm that is permanent[90]—discussed in the next two sections, Sections III.B and III.C; 2) when liability would mean revocation of an important right previously granted—discussed in Section III.D; and 3) when liability would result in a stigma similar to a criminal conviction—discussed in Section III.E.[91] Each of these other factors indicates some degree of error cost asymmetry, but whether any of these other factors by themselves are sufficient to trigger a judicial remedy is heavily dependent on the facts.

I now turn to the second factor that signals the presence of asymmetric error costs—when liability would result in a serious harm that is permanent.

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86. *Id.* at 428.
87. *Id.* at 429.
88. *Id.* at 428.
89. *Id.* at 429.
90. Santosky v. Kramer, 455 U.S. 745 (1982).
91. *See Addington*, 441 U.S. at 423; Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 n.18, 286 (1966).

B. LIABILITY WOULD RESULT IN A SERIOUS HARM THAT IS PERMANENT

Three years after *Addington*, the Supreme Court in *Santosky v. Kramer*[92] considered the due process required in a parental rights termination proceeding,[93] focusing on both the important liberty interest at stake and the permanency of the loss. Commenting on the effect of using only the preponderance standard, the Court compared the cost of an erroneous termination of parental rights, a Type I error, with that of an erroneous failure to terminate those rights, a Type II error. The Court said, "For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family."[94] The Court concluded that the preponderance standard, which "allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity."[95]

In considering whether to require a higher standard of proof, the Court said, "Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss."[96] Referring to *Lassiter v. Department of Social Services*,[97] decided a year earlier, the *Santosky* Court discussed both the important liberty interest at stake and the permanency of the loss:

> [A] natural parent's "desire for, and right to, the companionship, care, custody, and management of his or her children" is an interest far more precious than any property right. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.[98]

The Court reinforced these points by comparing parental rights termination cases with other cases that warranted an elevated burden of proof, such as juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, concluding that those cases "at least to a degree, are all

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92. 455 U.S. at 745.

93. *Id.* at 755-56 (noting that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve'" (quoting *Woodby*, 385 U.S. at 284)); *see* Steadman v. SEC, 450 U.S. 91, 96 n.10 (1981) (discussing how the legislature generally has the power to determine the standard of proof in a statutorily created cause of action).

94. *Santosky,* 455 U.S. at 765-66.

95. *Id.* at 766.

96. *Id.* at 758.

97. 452 U.S. 18 (1981).

98. *Santosky*, 455 U.S. at 758-59 (cleaned up) (quoting *Lassiter*, 452 U.S. at 27).

reversible official actions. Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable. Few forms of state action are both so severe and so irreversible."[99] On this basis, the Court ordered that the clear and convincing standard be applied in parental rights termination proceedings.

As in *Addington*, the Court applied the *Mathews* test,[100] which it summarized as requiring the balancing of "the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."[101] In *Santosky*, the Court concluded that in parental rights proceedings, "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."[102] Although the Court does not specify what the countervailing governmental interest is, presumably, the government has a strong interest in the welfare of children. Thus, while the government's interest may be "comparatively slight" in relation to parental interests, it is certainly not slight when a child's health or safety is at stake.

In summary, in cases involving liberty interests and other important constitutional rights, courts have addressed asymmetric error costs by raising the standard of proof to clear and convincing. Factors such as the permanency of the loss and whether liability would mean the revocation of an important right previously granted increase the likelihood that courts will recognize the presence of asymmetric error costs and apply a remedy. The permanency of the loss, also important in antitrust law, is discussed next.

C. ANTITRUST LAW – ANOTHER APPLICATION OF THE "SERIOUS HARM THAT IS PERMANENT" FACTOR

Antitrust law has been heavily influenced by error cost analysis.[103] Since the 1980s, the prevailing judicial view has been that a Type I error in antitrust—an erroneous condemnation of beneficial business conduct—is more costly than a Type II error—an erroneous failure to condemn anticompetitive conduct.[104]

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99. *Id*. at 759 (citation omitted).

100. *Id.* at 754.

101. *Id.* at 745, 767. Unlike *Addington*, the *Santosky* Court took into account administrative costs when it observed that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Id.*

102. *Id.* at 758.

103. Baker, *supra* note 4, at 4-6.

104. *See* Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293 (2022). *See also* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 98 (2021) (citing Verizon Commc'ns Inc. v.

Frank Easterbrook said that because of stare decisis "[i]f the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits."[105] On the other hand, "[i]f the court errs by permitting a deleterious practice . . . the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry."[106] In other words, in antitrust, an erroneous finding of liability is more costly than an erroneous denial of liability because an erroneous finding of liability would result in a serious harm that is permanent or at least long lasting. The risk of serious permanent harm is one of the four factors that typically signal the presence of asymmetric error costs.

In a 2021 case, Justice Gorsuch, writing for the majority, sounded this same theme: "Even [u]nder the best of circumstances, applying the antitrust laws can be difficult."[107] "[M]istaken condemnations of legitimate business arrangements 'are especially costly, because they chill the very' procompetitive conduct 'the antitrust laws are designed to protect.'"[108] Further, "[j]udges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."[109]

Although largely accepted by the courts over the past forty years, Easterbrook's argument has been debated by scholars and policymakers. Jonathan Baker points out that "[e]rroneous precedents may not disappear overnight, but nor do cartels or single-firm dominance."[110] He argues that error cost analysis should not be distorted by antitrust conservatives who "systematically overstate the incidence and significance of false positives, understate the incidence and significance of false negatives, and understate the net benefits of various rules by overstating their costs. Collectively, these errors inappropriately tilt the application of a neutral economic tool, decision theory, against antitrust intervention."[111]

L. Offices of Curtis V. Trinko, LLP., 540 U.S. 398, 414 (2004)); Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 U. KAN. L. REV. 1097, 1099 (2020) ("[This] central idea appears to underlie most of the U.S. Supreme Court's recent antitrust decisions.").

105. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984).

106. *Id*.

107. *Nat'l Collegiate Athletic Ass'n*, 594 U.S. at 99 (quoting *Verizon Commc'ns*, 540 U.S. at 414) (cleaned up).

108. *Id.* (quoting *Verizon Commc'ns*, 540 U.S. at 414).

109. *Id.* at 106.

110. Baker, *supra* note 4, at 24.

111. *Id.* at 2.

The merits of both sides of the argument are well-analyzed elsewhere.[112] What is important here is that courts have recognized the existence of asymmetric error costs in antitrust cases for decades. The judicial response in antitrust has not been to raise the standard of proof—the preponderance standard remains in effect—but instead to subject different types of conduct to different levels of scrutiny and to shift the burden of proof.

Antitrust law categorizes different types of conduct as per se illegal, subject to a quick look, or subject to a rule of reason. Eric Posner writes that "the law applies the rule of reason to transactions that are not likely to be anticompetitive, and it declares per se illegal those transactions that are likely to be anticompetitive."[113] Thus, these judge-made categorizations provide an initial screening of different types of conduct based on the likelihood of anticompetitive harm. Fred McChesney explains that applying a rule of reason emphasizes avoiding Type I errors while applying a per se rule emphasizes avoiding Type II errors "such that more defendants whose acts truly are anticompetitive will be found guilty."[114]

When the challenged conduct is categorized as subject to a rule of reason, courts shift the burden as follows. Plaintiffs must first show that the conduct has caused competitive harm. If plaintiffs meet their initial burden, then the burden shifts to the defendant to show a procompetitive justification for the challenged conduct. If the defendant makes this showing, the burden then shifts back to the plaintiff to demonstrate that the procompetitive efficiencies claimed could be reasonably achieved through less anticompetitive means.[115] The result of using this burden shifting approach has been that in nearly all cases where practices have been challenged under a rule of reason, the defendant has prevailed.[116]

As noted, despite judicial recognition that erroneous findings of antitrust liability are more costly than erroneous denials of antitrust liability, the preponderance standard remains in effect for antitrust cases. The antitrust statutes make no reference to the standard of proof,[117] and, to our knowledge,

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112. *See* Hovenkamp, *supra* note 104; JONATHAN B. BAKER, THE ANTITRUST PARADIGM 81-95 (2019); Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75 (2010); Lambert, *supra* note 104, at 1099.

113. ERIC A. POSNER, HOW ANTITRUST LAW FAILED WORKERS 109 (2021).

114. Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMPETITION L. & ECON. 11, 15 (2010).

115. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 103-04 (2018); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

116. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009). *See also* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 97 (2021). Courts have "disposed of nearly all rule of reason cases in the last 45 years" without ever getting beyond the first step. *Id.*

117. *See* Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, 1 ISSUES IN COMPETITION L. & POL'Y 125, 128 (2008).

courts have not discussed why they have not raised the standard to reduce the probability of erroneous findings of liability.

These cases often turn on the credibility of dueling economic experts whose predictions about economic effects are far from certain. Herbert Hovenkamp points out that "[t]he requirements for a rule of reason case—market power and anticompetitive effects—can be very difficult to prove."[118] And Justice Gorsuch has suggested that judges "must be mindful . . . of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships"[119] and must recognize "the inherent limits on a court's ability to master an entire industry."[120] He has cited Judge Easterbrook's observation that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion."[121]

I hypothesize that in rule of reason cases, courts may think it unlikely that any plaintiff could meet the clear and convincing standard and that imposing that standard would only create confusion. Maybe the preponderance standard—"more likely than not"—is the best that can be expected of any factfinder required to make a liability decision on the basis of predictive and uncertain expert analysis. Even while retaining the preponderance standard, the imposition of burden-shifting in antitrust has sharply altered the outcome of rule of reason cases to favor defendants.

I turn next to the role of asymmetric error costs in cases where liability would result in the revocation of an important right previously granted.

D. LIABILITY WOULD MEAN REVOCATION OF AN IMPORTANT RIGHT PREVIOUSLY GRANTED

Schneiderman v. United States, which deals with evidentiary standards in denaturalization cases, discusses the impact of revoking an important individual right previously granted.[122] In *Schneiderman*, the government accused the petitioner of having obtained his citizenship unlawfully because he had long supported the Communist Party's goals and the use of violence to accomplish those goals.[123] The government argued that the preponderance

118. Hovenkamp, *supra* note 115, at 101-02.

119. *Nat'l Collegiate Athletic Ass'n*, 594 U.S. at 106.

120. *Id*. at 89.

121. *Id.* (quoting Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986)).

122. 320 U.S. 118, 125 (1943).

123. *Id.* at 126-29.

of the evidence standard was sufficient to determine whether Schneiderman should lose his citizenship.[124] However, the Court disagreed, observing:

> This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty.[125]

The Court held that under these circumstances, the government must prove its case by clear and convincing evidence because "rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted."[126]

The presumption accorded important rights previously granted will be discussed again in Section III.F in connection with presumptions of validity for governmental actions. I turn next to the role of asymmetric error costs in cases where liability would result in stigmatizing the defendant.

E. LIABILITY WOULD RESULT IN A STIGMA – CIVIL FRAUD AND PROFESSIONAL MISCONDUCT

Asymmetric error costs are an important consideration in civil fraud and professional misconduct law. In contrast to the cases discussed so far, however, courts are more likely to draw divergent conclusions about the importance of the individual rights at stake in these cases and about the relative costs of a mistaken finding of liability versus a mistaken denial of liability. As a result, in cases involving civil fraud or professional misconduct, courts sometimes reach different conclusions about the required standard of proof.

i. Civil Fraud

Since common law fraud is a civil action involving only money damages, one might logically wonder why courts find these cases to involve asymmetric error costs. Arguably, it is equally costly for a deserving plaintiff to be denied recovery as it is for an innocent defendant to be required to pay damages. If so, the applicable standard of proof should be the preponderance

124. *See id.* at 125.
125. *Id.* at 122.
126. *Id.* at 125.

standard. Any other standard would favor one party.[127] However, the *Addington* Court noted that in "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing,"[128] the courts have applied the clear and convincing standard on the ground that these cases involve interests "more substantial than mere loss of money"[129] and that doing so "reduce[s] the risk to the defendant of having his reputation tarnished erroneously."[130] This "stigma" factor is one of the four factors that signal the presence of asymmetric error costs.

The underlying idea is that being labeled a defrauder imposes an additional "stigma cost" for the defendant beyond money damages and, in doing so, makes an erroneous finding of liability more costly than an erroneous denial of recovery. Courts in common law civil fraud cases, because of their concern about the possible stigma created by an erroneous finding of liability, require the plaintiff to prove that the defendant intended to defraud, and they impose special pleading requirements.[131] "The essential elements of common law fraud are: (1) a false representation, (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation."[132] Although the concept of mens rea, a guilty mind, generally underlies criminal law, not civil law, this concept is incorporated in common law civil fraud.[133] Separately, many jurisdictions favor defendants in these cases by requiring "allegations in civil cases of fraud or of activity that would be criminal to be proven by clear and convincing evidence."[134]

But how serious is the stigma attached to being a losing defendant in a civil fraud case? Perhaps in the past, the stigma was very serious, with a finding of civil fraud liability considered a Scarlet Letter indicating a grave moral failing. Indeed, Michael Loban writes that the Victorians were "devoted to an idea of freedom of contract, [but] Victorian values also deplored deception."[135] It is likely still the case that being adjudicated as

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127. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983).

128. Addington v. Texas, 441 U.S. 418, 424 (1979).

129. *Id*.

130. *Id. See also* Woodby v. Immigr. Naturalization Serv., 385 U.S. 276, 287 n.18 (1966).

131. Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977) ("Fraud is never presumed and must be particularly pleaded."). *See also* FED. R. CIV. P. 9(b). The circumstances constituting fraud shall be stated with particularity. *Id.*

132. *Bennett*, 377 A.2d at 59.

133. In a case involving the False Claims Act, Justice Thomas referred to "the traditional common-law scienter requirement for claims of fraud." United States *ex rel*. Schutte v. SuperValu Inc., 598 US 739, 750 (2023).

134. Allen, *supra* note 12, at 204.

135. Michael Lobban, *Misrepresentation*, *in* THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME XII: 1820-1914 PRIVATE LAW 400 (William Cornish et al. eds., 2010).

liable in a civil fraud case and required to pay damages causes reputational harm; however, the resulting social opprobrium may have diminished substantially over time. Reasonable people may disagree on the seriousness of the stigma that remains.

The opposite error from an erroneous finding of civil fraud is an erroneous finding that the defendant did not commit fraud when in fact she did. How serious are the consequences of allowing a fraudster to avoid liability for her actions?

Times have changed; before the late 1800s, there were almost no large corporations, yet they now dominate the economy.[136] In *Blue Chip Stamp v. Manor Drug Stores*, the Supreme Court recognized this change of circumstances by noting that the "typical fact situation in which the classic tort of misrepresentation and deceit evolved was *light years away from the world of commercial transactions* to which [securities fraud] Rule 10b-5 is applicable."[137] As applied to corporate fraudsters, society may now view the cost of an erroneous denial of recovery as very high because such denial may enable the corporate fraudster to continue to engage in fraud on a large scale. Thus, the argument that civil fraud inherently involves greater error costs for the defendant is probably less valid than in the past, both because the stigma may have decreased over time and because corporate fraudsters, if undeterred, may be able to continue engaging in widespread fraud.

For these reasons, it is not surprising that some states and federal agencies use the clear and convincing standard of proof for civil fraud while others use the lower preponderance standard.[138] Decision makers seem to agree on the applicable factors to use in their analyses, but they do not always reach the same conclusions regarding the degree of error cost asymmetry involved or the remedy required.

Minnesota courts, for example, apply the preponderance of the evidence standard in fraud cases unless otherwise required by specific legislation.[139] In *State* ex rel. *Humphrey v. Alpine Air Products, Inc.*, the Minnesota

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136. *See* Ralph Edward Gomory & Richard E. Sylla, *The American Corporation*, DÆDALUS 102 (2013).

137. 421 U.S. 723, 744-45 (1975) (emphasis added).

138. Cases where the clear and convincing standard is required to prove fraud: Merit Ins. Co. v. Colao, 603 F.2d 654, 658 (7th Cir. 1979) (Illinois law); Minter v. Bendix Aviation Corp, 97 A.2d 715, 717 (N.J. Super. Ct. App. Div. 1953) (New Jersey law); Ajax Hardware Mfg. Corp. v. Indus. Plants Corp., 569 F.2d 181, 186 (2d Cir. 1977) (New York law); Weissberger v. Myers, 90 A.3d 730, 735 (Pa. Super. Ct. 2014) (Pennsylvania law); Stiley v. Block, 925 P.2d 194, 200 (Wash. 1996) (Washington law, which requires clear, cogent, and convincing evidence).

Cases where the preponderance standard is required to prove fraud: State v. Alpine Air Prods., 500 N.W.2d 788, 792 (Minn.1993); Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC, 572 S.W.3d 213, 221 (Tex. 2019); State v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986).

139. Chancellor Manor v. Thibodeaux, 620 N.W.2d 193, 197 (Minn. Ct. App. 2001).

Supreme Court explained why it does so in consumer fraud cases.[140] After first reviewing *Santosky* and *Addington*, the Court quoted Justice Marshall from *Herman & MacLean v. Huddleston*, a civil securities fraud case:

> On the one hand, the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct. . . . On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover.[141]

The Minnesota Court also pointed out that the interests of defendants in a securities case "do not differ qualitatively from the interests of defendants sued for violations of other federal statutes such as the antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices."[142]

Thus, in Minnesota and some other states, the stigma argument used to support the application of additional safeguards for defendants in civil fraud cases no longer carries the day. While an erroneous finding of civil fraud liability may continue to impose some reputational cost on the defendant, courts, and legislatures increasingly recognize that erroneous denials of recovery are also costly and, therefore, that it may not be necessary to tilt the evidentiary scale to benefit defendants.

As noted, courts struggle with consistency in dealing with asymmetric error costs in civil fraud actions. Even within the same state, fraud committed in slightly different contexts may be subject to different standards. For example, the Maine Supreme Court in *Arbour v. Hazelton* applied the clear and convincing evidence standard in a claim that a real estate agent representing the seller of a store had fraudulently misrepresented the source of the store's gross sales.[143] But, the same court in *Harmon v. Harmon* applied the preponderance standard in a claim based on the use of fraud to tortiously interfere with a property bequest.[144] The two cases are difficult to distinguish on the basis of error cost analysis.

Punitive damages cases provide another example of the inconsistent role of stigma in signalizing asymmetric error costs. In general, punitive damages are awarded "when a defendant's conduct [i]s driven by evil motive or intent, or when it involve[s] a reckless or callous indifference to the constitutional

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140. 500 N.W.2d 788 (Minn. 1993).

141. *Id.* at 792 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983)).

142. *Id.* (quoting *Huddleston*, 459 U.S. at 390).

143. 534 A.2d 1303, 1305 (Me. 1987).

144. 404 A.2d 1020, 1026 (Me. 1979); *see also* Petit v. Key Bank of Me., 688 A.2d 427, 431 (Me. 1996).

rights of others."[145] Logic suggests that because of the quasi-criminal nature of punitive damages and their strong association with stigma, punitive damages are likely to be awarded only in cases where the underlying wrongful acts have been proven by clear and convincing evidence. However, this is not necessarily the case. The Ninth Circuit has written that the required standard of proof depends in large part on the standards applicable to the underlying claim, noting that

> several states in the Ninth Circuit require proof by clear and convincing evidence before punitive damages are awarded on a state law claim. On the other hand, a preponderance of the evidence standard has been upheld for punitive damages in certain federal claims. *See, e.g., In re* Exxon Valdez v. Hazelwood, 270 F.3d 1215, 1232 (9th Cir. 2001) (holding that preponderance standard applied to punitive damages claim in maritime case, citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991)).[146]

Ultimately, I am left with the conclusion that a higher level of stigma makes it more likely that courts will find error costs to be asymmetric and apply a remedy, typically, the clear and convincing standard. However, the level of stigma associated with particular conduct and the countervailing importance of protecting victims are very much in the eyes of the beholder.

ii. Professional Misconduct

The standard of proof applied in disciplinary actions against lawyers, doctors, and other professionals turns on the courts' determinations regarding asymmetric error costs, with results that are sometimes inconsistent. Attorneys, in particular, seem to be treated differently than other professionals for reasons that are unclear.

David Appel reports that in attorney misconduct proceedings, a majority of both state and federal jurisdictions require a standard of proof higher than the preponderance standard—most require the use of the clear and convincing standard.[147] However, work by the Federation of State Medical Boards shows that most medical boards instead use the preponderance

145. Morgan v. Woessner, 997 F.2d 1244, 1255 (9th Cir. 1993) (quoting Davis v. Mason County, 927 F.2d 1473, 1485 (9th Cir.1991)).

146. U.S. Cts. Ninth Cir., *5.5 Punitive Damages*, MANUAL MODEL CIV. JURY INSTRUCTIONS (Mar. 2018), https://www.ce9.uscourts.gov/jury-instructions/node/111 [https://perma.cc/9ADT-ZCKV].

147. David M. Appel, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275, 284 (1995).

standard in medical license revocation cases.[148] In other words, in many states, a medical license can be revoked based on evidence that the doctor was just slightly more likely than not to have violated medical practice requirements, while revocation of a license to practice law requires evidence that the lawyer was highly likely to have violated legal practice requirements. In both cases, courts have justified the required standard on the basis of error cost analysis.

Turning first to the lower standard used in medical cases, in *In re Polk*, Dr. Irwin J. Polk argued that the New Jersey State Board of Medical Examiners was required to use the clear and convincing standard in deciding whether to revoke his license to practice medicine, and that failure to do so violated his due process rights.[149] Citing *Santosky,* the New Jersey Supreme Court acknowledged that the "permanency of the loss of a substantial private interest is clearly a factor militating in favor of great protection."[150] (This is one of the four factors that signal the presence of asymmetric error costs.) The court recognized that the doctor's interest was "substantial and the potential deprivation great," but it found as well that the "[g]overnment has a paramount obligation to protect the general health of the public" and the right of physicians to practice their profession is "necessarily subordinate to this governmental interest."[151]

In applying the *Mathews* test, the court considered whether the use of the preponderance standard engendered "an intolerable risk of error"[152] and whether the use of a higher evidentiary standard would eliminate or reduce that risk. After reviewing the opportunities for the doctor to present evidence and expert testimony, the court concluded that the preponderance standard did "not create an unreasonable risk of mistake."[153] The court also noted that in *Steadman v. SEC*, a case dealing with the antifraud provisions of the securities laws, the U.S. Supreme Court "implicitly and without discussion concluded that there was no fundamental constitutional liberty interest at stake in a proceeding to revoke a license to pursue a profession or occupation,

148. *Standard of Proof, Board-by-Board Overview*, FED'N ST. MED. BOARDS (Jan. 2023), https://www.fsmb.org/siteassets/advocacy/key-issues/standard-of-proof-by-state.pdf [https://perma.cc/VG3N-ME6A]. Forty-four medical boards report exclusively using the preponderance standard compared with ten that exclusively use the clear and convincing standard. *Id.*

149. 449 A.2d 7, 14 (N.J. 1982).

150. *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 758 (1982)).

151. *Id.*

152. *Id.* at 15.

153. *Id.* at 16. The Court noted as well that the State Board of Medical Examiners could mete out discipline that "falls short of a permanent loss of licensure," although this discretion does not help a doctor whose license has been permanently revoked, nor does it distinguish medical cases from attorney discipline cases where the same argument can be made. *Id.* at 14.

and hence found no due process entitlement to a burden of proof greater than a fair preponderance."[154] For these reasons, the New Jersey Supreme Court found that the clear and convincing standard was not required in a medical license revocation case.

But the New Jersey Supreme Court reached a different conclusion regarding attorney misconduct on facts that appear very similar. In *In re Pennica*, the court acknowledged that in an attorney disciplinary matter, "the primary purpose is not to punish an offender; it is to protect the public."[155] Presumably, similar reasoning applied in the *Polk* medical license case. Further, "[t]he proceeding is not criminal in character; it is *Sui generis,* stemming from the inherent power of the court to regulate the practice of law and the admission of persons to engage in that practice."[156] Again, presumably, similar reasoning applies to doctors. Surprisingly, however, the court went on to say that "[b]ecause of the dire consequences which may flow from an adverse finding," discipline or disbarment is warranted against an attorney only where there is clear and convincing evidence of unethical conduct or unfitness to practice.[157] Unlike the New Jersey Supreme Court's opinion in *Polk,* its opinion in *Pennica* does not set out its error cost analysis, so I cannot say exactly why the court treated the two situations differently.

In Minnesota, which, like New Jersey, also uses different standards for attorneys versus other professionals,[158] the distinction has been challenged as "unfair or even unconstitutional."[159] But the Minnesota Supreme Court said that "attorney disciplinary proceedings, which are under the supervision and control of the judiciary, have historically been regarded as unique."[160] Why so? In *In re Wang*,[161] the Court provided this unsatisfying explanation: "Attorney misconduct, striking as it does, at the administration of our justice system, gives society a heightened interest in the outcome of attorney discipline. A high standard of proof is indicated."[162]

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154. *Id*. (citing Steadman v. SEC, 450 U.S. 91 (1981)).

155. 177 A.2d 721, 730 (N.J. 1962).

156. *Id.* (emphasis added).

157. *Id.*

158. *In re Polk*, 449 A.2d at 16 (applying the preponderance standard against licenses for a medical doctor); Bernstein v. Real Est. Comm'n, 156 A.2d 657, 663 (Md. App. Ct. 1959) (a real estate broker); *In re* Wang, 441 N.W.2d 488, 492 (Minn. 1989) (a dentist); Bd. Educ. St. Charles Cmty. Unit Sch. Dist., No. 303 v. Adleman, 423 N.E.2d 254, 256-57 (Ill. App. Ct. 1981) (dismissing a teacher).

159. Barry Greller, *Evidence*, *in* MINNESOTA ADMINISTRATIVE PROCEDURE §10.3.2 (Stephen Swanson ed., 3d ed. 2014), https://mitchellhamline.edu/minnesota-administrative-procedure/chapter-10-evidence/#10-3-2-standard-of-proof [https://perma.cc/GCT5-D7NN].

160. *Id.*

161. 441 N.W.2d at 488.

162. *Id*. at 492 n.5.

In summary, courts are sensitive to asymmetric error costs in civil fraud and professional licensing cases. However, their assessments of the importance of the individual rights at stake and the relative costs of a mistaken finding of liability versus a mistaken denial of liability vary considerably. The next Section discusses two legal doctrines that are based at least in part on the concept of asymmetric error costs: the presumption of validity that applies to many legal and contractual actions and the common law doctrine of stare decisis.

F. PRESUMPTIONS OF VALIDITY AND STARE DECISIS

Many governmental and private actions, such as patents, deeds, and some types of contracts, are presumed to be valid. At first glance, the presumption of validity that applies to these actions may seem unrelated to asymmetric error costs. The closest factor that signals the presence of asymmetric error costs is "when liability would mean revocation of an important right previously granted."[163] However, the difference is that the presumption of validity does not necessarily favor the preservation of an important right previously granted over the termination of that right. Instead, it favors the status quo—the *decision* already made. The two concepts are different but related.

The presumption of validity typically brings with it the application of the clear and convincing standard; to overcome the presumption, the plaintiff must do so with clear and convincing evidence, which means that the status quo is favored to continue. Thus, the presumption treats decision-making errors that would disrupt decisions already made as more costly than decision-making errors that would leave those decisions in place. Stare decisis, the doctrine of precedent, has a similar economic rationale. The economic purpose of both doctrines is to increase the stability of rights and avoid disruption unless the benefits are clear. These concepts are discussed below.

i. Presumptions of Validity

An example of the presumption of validity afforded to many governmental actions is that patents are presumed to be valid, and therefore, courts have applied the clear and convincing standard to patent challenges.[164] Courts typically offer little explanation for this presumption other than "the

163. *Supra* note 91 and accompanying text.

164. Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011); *see also* Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc., 98 F.3d 1563, 1569 (Fed. Cir. 1996) (holding an accused infringer must show by clear and convincing evidence that a patent is invalid).

basic proposition that a government agency . . . [i]s presumed to do its job."[165] Similarly, an article on patent challenges concludes that "[t]he main rationale for requiring a higher evidentiary standard . . . is deference to the decision of the United States Patent and Trademark Office (PTO) to grant the patent in the first place after considering any relevant 'prior art.'"[166]

Doug Lichtman and others argue that the presumption of validity for PTO patent grants is unwarranted: "[T]he reality is that PTO expertise is brought to bear under such poor conditions that any advantages associated with expertise are overwhelmed by the disadvantages associated with insufficient funding and inadequate outsider information."[167] Still, the presumption remains.[168]

In real estate law, where the presumption of validity applies, a plaintiff must meet the clear and convincing standard to successfully challenge ownership of titled real assets.[169] The same is true of challenges to property tax assessments,[170] which are presumed valid on the "assumption that these local officers [i.e., property tax assessors] will act from a sense of duty."[171] In contract law, clear and convincing evidence is required to reform a merger

165. Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1359 (Fed. Cir. 1984); Joseph Scott Miller, *Error Costs & IP Law*, U. ILL. L. REV. 175, 178-79 (2014) (describing the scant Supreme Court references to error costs when considering intellectual property statutes as: the "[r]umblings . . . are faint").

166. Irina Oberman, *Maintaining the Clear and Convincing Evidence Standard for Patent Invalidity Challenges in Microsoft Corp. v. i4i Limited Partnership, 131 S. Ct. 2238 (2011)*, 35 HARV. J. L. & PUB. POL'Y 439, 440 (2011).

167. Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law's Presumption of Validity*, 60 STAN. L. REV. 45, 47 (2007); Ryan R. Klimczak, *i4i and the Presumption of Validity: Limited Concerns Over the Insulation of Weak Patents*, 27 BERKELEY TECH. L.J. 299 (2012). *See also* David O. Taylor, *Clear but Unconvincing: The Federal Circuit's Invalidity Standard*, 21 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 293 (2011). Patents are assumed to be valid—even those that are almost certainly invalid—and can only be set aside in litigation upon clear and convincing proof of invalidity. *Id.* This is a huge and often unfair advantage for the patent holder. *Id.*

168. Joseph Scott Miller focuses on a separate asymmetric error cost issue regarding patents: whether courts should favor a broad or a narrow interpretation. Miller, *supra* note 165. In addition, Keith N. Hylton & Wendy Xu analyze the cost of false positives and false negatives in patent antitrust law and argue that because patent and antitrust law have contradictory goals, patent antitrust law should err on the side of protecting innovation incentives. Keith N. Hylton & Wendy Xu, *Error Costs, Ratio Tests, and Patent Antitrust Law*, 56 REV. INDUS. ORG. 563 (2020).

169. *See, e.g.*, CAL. EVID. CODE § 662 (West 1965); Vill. of Seaman v. Altus Metals, Inc., No. 99 CA 683, 2000 WL 331596 (Ohio Ct. App. Mar. 24, 2000). For discussion of some issues with the clear and convincing standard, see Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, 73 WASH. & LEE L. REV. 3, 28 (2016).

170. Appeal of Pub. Serv. Elec. & Gas Co., 87 A.2d 344, 347 (N.J. Super. Ct. App. Div. 1952); Graham v. Ocean City, 119 A. 772, 773 (N.J. 1923).

171. Cent. R.R. Co. of N.J. v. State Tax Dep't, 169 A. 489, 490 (N.J. 1933) (quoting Mich. Cent. R.R. Co. v. Powers, 201 U.S. 245, 295 (1906)).

agreement on the basis of a mutual mistake of fact.[172] Also, in contract law, a party seeking to avoid a signed release of liability on the basis that it was procured under duress is required to prove duress by clear and convincing evidence.[173] And in trust and estate law, the plaintiff must meet the clear and convincing standard to reform a will or trust to fix a mistake in the expression of the testator/settlor's intent.[174] In all of these cases, the economic reasoning is similar—requiring the clear and convincing standard to successfully challenge actions already taken increases the stability of rights and avoids disruption unless the benefits are clear.

ii. Stare Decisis

Similarly, the principle of stare decisis,[175] which strongly favors judicial decisions already made over challenges to those decisions, involves the application of the concept of asymmetric error costs. Upholding precedent tilts the decision scale in favor of the status quo and avoids disrupting reliance interests. Justice Breyer, writing about stare decisis, observed that:

> Individuals and firms may have invested time, effort, and money based on [a judicial] decision. The more the Court undermines this kind of reliance, the riskier the investment becomes. The more the Court engages in a practice that appears to ignore that reliance, the more the practice threatens economic prosperity.[176]

In addition, stare decisis reduces judicial costs because judges don't need to constantly reconsider legal rules once established.[177]

Kurt Lash concludes, "Stability, predictability, and public confidence in the presumptive legitimacy of current law all can be undermined by departures from, or formal overruling of, prior precedent. The prudential

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172. Cerberus Int'l, Ltd. v. Apollo Mgmt., 794 A.2d 1141 (Del. 2002); *see also* Ross v. Food Specialties, Inc., 160 N.E.2d 618, 618 (N.Y. 1959) (requiring "clear, positive and convincing evidence" for contract reformation).

173. Lucarell v. Nationwide Mut. Ins. Co., 97 N.E.3d 458, 462-63 (Ohio 2018).

174. *In re* Estate of Duke, 352 P.3d 863, 875 (Cal. 2015).

175. *See* Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989).

176. STEPHEN BREYER, AMERICA'S SUPREME COURT: MAKING OUR DEMOCRACY WORK 152 (2010).

177. *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 252 (1976); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 449-50 (1973); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 648-53 (2000); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

doctrine of stare decisis is meant to ameliorate these costs by counseling judicial adherence to precedent . . . ."[178] In terms of error costs, he explains:

> In cases where theory suggests the costs of judicial error are relatively low, avoiding substantial harm to the rule of law might reasonably suggest that the Court should "stand by" the flawed decision. Where theory suggests the costs of error are high, however, only the most severe disruption to the rule of law can justify maintaining a flawed precedent.[179]

He writes that this type of error cost balancing occurs in "all judicial applications of stare decisis, though not always in a transparent manner."[180]

The same reasoning applies to the Supreme Court's holding in the water rights case *Colorado v. New Mexico*.[181] There, the Court focused on the possible disruption of an established water right, observing that "[t]he harm that may result from disrupting established uses is typically certain and immediate, whereas potential benefits from a proposed diversion may be speculative and remote."[182] As a result, the Court said that Colorado, which had proposed to disrupt established water rights, "should bear most, though not all, of the risks of erroneous decision."[183] The Court mandated the use of the clear and convincing standard, which it said "accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses."[184]

In sum, the *Colorado* Court decided that errors that disrupt reliance interests in water rights are likely to be more costly than errors that preserve these reliance interests, and therefore, it tipped the decision scale accordingly by requiring the clear and convincing standard.

How much stare decisis tilts the decision scale depends on how individual judges apply the principle.[185] For example, views differ among

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178. Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2189 (2014).

179. *Id.* at 2190.

180. *Id*.

181. 467 U.S. 310 (1984).

182. *Id.* at 316 (quoting Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

183. *Id.*

184. *Id.*

185. As a separate matter, this same type of analysis could be used to explain the different standards of review on appeal. Amanda Peters, *The Meaning, Measure, And Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 235, 235 (2009) ("The standard of review guides the appellate court in determining 'how "wrong" the lower court has to be before it will be reversed.'" (quoting MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 12 (2d ed. 2006))). For analysis of impact of different standards of review, see Colter Paulson, *How Important Are Standards of Review?*, 6TH CIR. APP. BLOG (May 15, 2012), https://www.sixthcircuitappellateblog.com/news-and-analysis/how-important-are-standards-of-review/ [https://perma.cc/LN4J-29WY].

Supreme Court justices on when precedent should be overturned.[186] Richard Posner explains:

> The rule of stare decisis, which requires that a court adhere to precedent, is founded, in part anyway, on an awareness of the costs in uncertainty of changing rules. Courts in this country do not follow the rule rigidly. It would be highly inefficient for them to do so. As a precedent "ages," a point is eventually reached at which the social costs generated by its imperfect fit with current reality exceed the benefits of having minimized uncertainty as to which rule would be followed.[187]

All else equal, it is easy to see how an error that extends the status quo may be less costly than one that disrupts it. Whether this is so in individual cases and, if so, how much less costly one type of error is than the other is highly dependent on the facts.

I now look at several concepts that appear to be related to asymmetric error costs but, on closer analysis, turn out to be entirely different.

iii. Concepts that Appear Related to Asymmetric Error Costs but Are Not

When courts apply one or more of the tools discussed previously—raising the standard of proof, shifting the burden of proof, or imposing intent requirements similar to those in criminal law—it usually means that they have identified and are addressing asymmetric error costs. But in some cases, courts use these same tools to address informational limitations that, while problematic, are not indicative of asymmetric error costs. Since the courts sometimes confuse this issue, I address it below.

In some types of cases, including equity cases, the courts have said that informational limitations make it more difficult for the factfinder to decide

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186. *See, e.g.*, June Med. Serv. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring) ("Stare decisis is not an 'inexorable command.' But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered."), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part). To overrule a prior constitutional decision, the Court must ask: "First, is the prior decision not just wrong, but grievously or egregiously wrong? . . . Second, has the prior decision caused significant negative jurisprudential or real-world consequences? . . . Third, would overruling the prior decision unduly upset reliance interests?" *Id*. *See also* Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162, 2180-90 (2019) (Kagan, J., dissenting); Allen v. Cooper, 589 U.S. 248, 267-69 (2020) (Thomas, J., concurring in part and concurring in the judgment); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013).

187. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 278 (1974).

the case, and therefore, they apply a higher standard of proof. In *In re Polk*, the New Jersey Supreme Court said that the clear and convincing standard may be required because of informational issues where: (1) "the subject matter itself is intrinsically complex and not readily amenable to objective assessment,"[188] e.g., in cases involving parental fitness or mental competence; (2) "reliable evidence is not generally available,"[189] e.g., in cases involving oral commitments; and (3) "most of the relevant evidence is accessible to or in the exclusive control of only one of the parties,"[190] e.g., in cases involving undue influence on a testator. I discuss these factors below.

In *Santosky*, the Supreme Court dealt with information limitations that fall within the first *Polk* factor (the subject matter is "intrinsically complex and not readily amenable to objective assessment") in a parental rights termination case, where it found that "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."[191] Further, the Court found that "[i]n appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweight probative facts that might favor the parent."[192]

Accepting for the sake of the argument that parental rights proceedings have imprecise substantive standards resulting in an unusual degree of discretion for the judge, it is not apparent why this in and of itself would make the court lean towards one party versus the other. There is also no reason to believe that the existence of "imprecise substantive standards" makes the cost of an erroneous decision higher for one party than the other, which is the definition of asymmetric error costs.

These same issues arise generally in cases where reliable evidence is not available—the second Polk factor. A high degree of uncertainty in judicial decision making is a serious problem because, at some point, the case outcome becomes a lottery. No one wants that. Nevertheless, the cost of errors may be equal for both parties in cases where reliable evidence is

188. *In re* Polk, 568, 449 A.2d 7, 16 (N.J. 1982) (citing Santosky v. Kramer, 455 U.S. 745 (1982)) (parental unfitness); Addington v. Texas, 441 U.S. 418 (1979) (mental incompetence); State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (reliability of hypnotically-refreshed testimony); Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 892 (N.J. 1981) (undue influence upon testatrix); Sartre v. Pidoto, 324 A.2d 48, 51-52 (N.J. Super. Ct. App. Div. 1974) (paternity).

189. *In re Polk,* 449 A.2d at 16 (citing *In re* Dodge, 234 A.2d 65 (N.J. 1967)) (transactions with decedent or person adjudged incompetent); Gabel v. Manetto, 427 A.2d 71, 73-74 (N.J. Super. Ct. App. Div. 1981) (oral revocation of express inter vivos trust); Aiello v. Knoll Golf Club, 165 A.2d 531, 533-35 (N.J. Super. Ct. App. Div. 1960) (parol gift of land under circumstances where the grantor was alleged to be estopped from pleading the statute of frauds).

190. *In re Polk,* 449 A.2d at 16 (citing *Haynes*, 432 A.2d at 890).

191. 455 U.S. at 762.

192. *Id.*

unavailable. The problem is one of excessive uncertainty of the outcome, not one of asymmetric error costs.

Historically, a higher standard of proof was applied "in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule."[193] The equity courts required a higher standard because "experience had shown [these types of claims] to be inherently subject to fabrication, a lapse of memory, or the flexibility of conscience."[194] The higher standard has been described as a compromise between the courts "becoming a mecca for the trumped-up prayer for relief" and refusing to grant equitable relief altogether.[195] In the modern era, courts continue to face difficult information problems where reliable evidence is unavailable, and evidence is subject to fabrication. While courts may appropriately impose different evidentiary burdens in these cases, this does not mean that an erroneous decision in favor of one party would be more costly than an erroneous decision in favor of the other, which is what asymmetric error costs are about.

The third *Polk* informational issue—most of the relevant evidence is accessible to or in the exclusive control of only one of the parties—presents an information asymmetry problem but not an error cost asymmetry. The party with exclusive access to the evidence has an advantage in proving its case, which increases the probability of a wrongful decision in its favor in the absence of some judicial intervention. Once again, however, a situation where there is a greater probability of a wrongful decision in favor of one party is different from one where a Type I error would be substantially more costly than a Type II error. The focus of this article is on identifying and remedying situations where Type I errors are substantially more costly than Type II errors, not on the separate problem of remedying advantages that one party has over another in cases where error costs are symmetrical.

To summarize, when courts apply one or more of the tools used to address asymmetric error costs, this commonly signals the presence of these costs. However, some of these same tools, especially raising the standard of proof, are also used for other purposes that have little or nothing to do with asymmetric error costs, e.g., they may be used to deal with excessive decisional uncertainty that creates lottery-type results or to deal with

193. Herman & MacLean v. Huddleston, 459 U.S. 375, 389 n.27 (1983).

194. Note, *Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence*, 60 HARV. L. REV. 111, 112 (1946). See also summary and citations in Samir D. Parikh, *The Improper Application of the Clear and Convincing Standard of Proof: Are Bankruptcy Courts Distorting Accepted Risk Allocation Schemes*, 78 U. CIN. L. REV. 271, 278-79 (2009).

195. *Appellate Review*, *supra* note 194, at 112.

informational asymmetries that benefit one party at the expense of the other. These situations involve informational limitations, but they do not involve asymmetric error costs.

IV. EVALUATING THE EFFECTIVENESS OF JUDICIAL EFFORTS TO DEAL WITH ASYMMETRIC ERROR COSTS

As illustrated in the preceding sections, courts use three main tools to reduce asymmetric error costs. Typically, they raise the standard of proof from a preponderance of the evidence to clear and convincing evidence. They also employ burden shifting procedures and impose intent requirements similar to those in criminal law. This section addresses the following questions: Which tools are most effective at addressing asymmetric error costs? And how effectively do courts use these tools?

A. THE MOST-FREQUENTLY USED TOOL IS THE LEAST RELIABLE

As illustrated, in defamation cases, courts have effectively addressed asymmetric error costs by imposing an intent requirement similar to criminal law; in fact, some argue that the malice requirement in defamation has been too effective in reducing the likelihood that defendants will be found liable. Similarly, in some types of civil fraud cases in some states, courts have addressed asymmetric error costs by imposing an intent requirement. In these cases, the question is not whether the imposition of an intent requirement reduces the likelihood of liability—it surely does—but whether error costs are asymmetric in the first place so as to warrant the imposition of the intent requirement.

Another measure used by the courts to address asymmetric error costs is to employ burden shifting procedures, notably in both defamation and antitrust cases. In defamation cases, the Supreme Court simply transferred the burden of proof from the defendant having to prove the truth of the alleged defamatory statement to the plaintiff having to prove the falsity of the statement. In rule of reason antitrust cases, the Court changed the categorization of some types of violations from per se violations, where the plaintiff simply had to prove that the prohibited conduct occurred, to rule of reason violations, where plaintiffs must first show competitive harm, with subsequent steps involving alternating burdens. Many other variations of burden shifting are conceivable that would have the effect of reducing the likelihood of defendants being found liable.

While effective, both burden shifting and intent requirements are more difficult to apply than simply raising the standard of proof because these tools must be adapted to fit specific areas of law. The language must be

customized. Also, these tools are likely to require refinement over time through subsequent caselaw, as has happened in both defamation[196] and antitrust.[197] This may be why these effective tools are not used more often.

Raising the standard of proof to clear and convincing evidence is clearly the "go to" tool for addressing asymmetric error costs. Raising the standard of proof, however, is the least reliable of the tools and is unlikely to effectively address asymmetric error costs by itself. A runaway truck speeding downhill on a mountain road may be slowed by downshifting to a lower gear, but ultimately, a runaway ramp may be necessary to safely stop the truck. In theory, the ability to impose the clear and convincing standard instead of the preponderance standard enables courts to reduce the frequency of costly decision errors in civil cases. But in practice, the different standards are confusing, and higher standards of proof, even when they do not suffer from a lack of clarity, may not in and of themselves put enough additional weight on the side of the decision scale favoring the defendant.

Empirical studies show that jury instructions regarding standards of proof are poorly understood. C.M.A. McCauliff concludes that these instructions "are almost always vague and ambiguous and thus confuse the very jurors they were intended to guide. Judges, perhaps by design, explain only cursorily the phrases that they use to convey the proper degree of certainty to the jury."[198] Thomas S. Wallsten points out that individual differences in interpreting "vague meanings of [statistical] terms," such as the standards of proof, are large and depend on context.[199]

Referring to the reasonable doubt standard, the Seventh Circuit in *United States v. Hall* said that "at best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt. An attempt to define reasonable doubt presents a risk without any real benefit."[200] And Louis Kaplow, in a well-known article on the burden of proof, observes: "The question of what probability factfinders actually associate with, say, the preponderance of the evidence rule—and how that minimum required probability varies by context—is an empirical one. Furthermore, it is one about which little is known."[201]

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196. *See, e.g.*, Douglas R. Matthews, *American Defamation Law: From* Sullivan*, Through* Greenmoss*, and Beyond*, 48 OHIO ST. L.J. 513 (1987).

197. *See, e.g.*, William H. Rooney et al., *Tracing the Evolving Scope of the Rule of Reason and the Per Se Rule*, 2021 COLUM. BUS. L. REV. 1 (2021).

198. McCauliff, *supra* note 12, at 1296.

199. Wallsten et al., *supra* note 48, at 362.

200. 854 F.2d 1036, 1039 (7th Cir. 1988).

201. Kaplow, *supra* note 48, at 809.

Further complicating the situation is that judges are getting less and less experience evaluating trial evidence and guiding juries on how to do so. Almost no civil cases go to trial anymore. In 2022, only 0.7 percent of all civil cases filed in federal court were resolved by trial, with jury trials making up about two-thirds of those or 0.4 percent. Precise figures for state courts are not available, but the percentage of civil cases reaching trial in state courts is likely even lower.[202]

In the few cases that reach juries, courts generally prohibit the assignment of numerical probabilities to the standards of proof.[203] And without the assignment of numerical probabilities, mock jurors have difficulty distinguishing one standard from another.

In one of the few empirical studies on the effects of different standards of proof on jury verdicts, Dorothy K. Kagehiro and W. Clark Stanton tested the preponderance, clear and convincing, and reasonable doubt standards in an experimental setting using jury instructions that explained the relevant standard as either a fifty-one, seventy-one, or ninety-one percentage probability of truth ("quantified definition") or as a conventional model jury instruction that did not explicitly quantify each standard ("legal definition").[204] The results were that although "verdicts favoring the plaintiffs decreased as the standard became stricter . . . these differences were only statistically significant for the quantified definitions" and not for the legal definitions.[205] In other words, when the different standards were explained to jurors using the wording judges actually use,[206] jurors were unable to meaningfully distinguish among the three.

Arguably, jurors should at least be able to convert the legal definition of the preponderance standard (which includes "more likely than not" or similar language) into a numerical probability of just over fifty percent, but they struggle even to do that.[207] And a separate study of the reasonable doubt standard involving 645 college students found that "the students had a substantial lack of understanding of the basic concept, as exhibited in the large variability of the [numerical probability] scores"[208] they associated with

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202. Figures on the number of federal trials are derived from Table C-4 of the Annual Reports of the Administrative Office of the U.S. Courts. *See also* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 28 (2017).

203. Seltzer et al., *supra* note 11, at 58.

204. Schwartz & Seaman, *supra* note 54, at 441 (summarizing results from Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 L. & HUM. BEHAV. 159, 161-64, 168 (1985)).

205. *Id.*

206. Seltzer et al., *supra* note 11, at 64-65.

207. *Id.*

208. *Id.* at 60.

it. In short, juries are unlikely to receive instructions that contain percentage probabilities and, as a result, have difficulty understanding each standard of proof and distinguishing between different standards.

Returning to *Addington*, the foundational standard of proof case, the Court cautioned that expectations regarding the impact of different standards of proof should be limited and that "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."[209] The Court said, "[H]ow the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country."[210] And in a particularly damning statement regarding the clear and convincing standard, the *Addington* Court said, "We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence."[211]

It's not clear why the Court in *Addington* thought that the effect of standards of proof on decision making was "unknowable." Because judges rely heavily on different standards of proof to accomplish important goals, it is surprising that there has been so little serious study of their impact in real cases.

The *Addington* Court tempered its skepticism by concluding that, nevertheless, a "standard of proof is more than an empty semantic exercise" and that in cases "involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'"[212] If so, perhaps the main function of raising the standard of proof in civil cases is to provide a warning to the decision maker—make your decision carefully and give the benefit of the doubt to the defendant. Indeed, Justice Burger says as much in *Addington* when he observes that "[i]ncreasing the burden of proof is one way to impress the factfinder with the importance of the decision."[213] Still, the Court's initial observation regarding jurors' limited understanding of different standards of proof is important and is consistent with the experimental evidence.

The next Section assesses the overall effectiveness of judicial efforts to deal with asymmetric error costs in civil law.

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209. Addington v. Texas, 441 U.S. 418, 424 (1979).
210. *Id.* at 424-25.
211. *Id.* at 425.
212. *Id*. (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).
213. *Id.* at 427.

B. COURTS TREAT ASYMMETRIC ERROR COSTS INCONSISTENTLY

To evaluate the effectiveness of judicial efforts to deal with asymmetric error costs in civil law, the subject can be divided into three questions: Do courts take a systematic approach to error cost analysis? Do they usually recognize the presence of asymmetric error costs? And do courts take effective action in response? My view is that courts take asymmetric error costs seriously but do not take a systematic approach to error costs, nor do they consistently recognize asymmetric error costs or effectively respond to them.

Courts do not take a systematic approach to error cost analysis. Some courts conduct traditional error cost analysis, which takes into account the broader social costs resulting from both a) the judicial system's Type I and Type II errors in adjudicating cases and b) the administrative costs (the litigation costs) of making the decision. Many courts, however, focus on only Type I error costs (the costs of mistaken liability). They ignore Type II error costs and administrative costs altogether. And they often consider only error costs that directly affect the individual, i.e., the private interest involved. As an example, most would agree that academic cheating causes broader social harms, yet courts do not consider this factor in determining the due process required in academic discipline cases.[214] The result is a hodgepodge of judicial approaches to error cost analysis.

Courts do best in recognizing error costs when dealing with liberty interests and other important constitutional rights. There is clearly something different about an involuntary commitment to a psychiatric hospital or a revocation of citizenship than a routine contract dispute, and courts treat these cases differently. In other situations, however, courts do less well in recognizing the existence and degree of error cost asymmetry. Sometimes, they rely too heavily on historical precedents, such as rules established to deal with historical equity proceedings. Other times, they see asymmetric error costs where they may not exist, for example, in attorney disciplinary cases.

As discussed, courts typically signal their recognition of the presence of asymmetric error costs by raising the standard of proof. Yet they apply both the preponderance and clear and convincing standards to cases where the relevant factors influencing error costs appear to be indistinguishable. For example, courts in different states apply different standards of proof to licensing cases involving the same professions, and courts in the same state apply different standards of proof to licensing cases involving different

214. *See* Robert A. Hazel, *The Law and Economics of Online Cheating*, 52 J. L. & EDUC. 104, 117-19 (2023).

professions with similar characteristics. A similar example of inconsistent treatment is in civil fraud cases. Courts in different states apply different standards of proof to civil fraud cases, and courts in the same state apply different standards of proof to various torts that appear closely related to civil fraud. Samir D. Parikh writes that "[t]he haphazard manner in which many courts decide which standard to apply represents a process failure."[215]

Another issue is that courts often impose a higher standard of proof primarily to favor reliance interests, e.g., in many cases involving presumptions of validity, yet do so without explanation. However, the importance of reliance interests in relation to other interests varies widely from case to case. For example, the importance of the reliance interest at stake in a case such as *Colorado v. New Mexico*,[216] which involves the diversion of scarce water from one state to another, is clear. However, the importance of the reliance interest at stake in a newly granted patent issued by an overworked patent examiner is quite different.[217] Therefore, courts should explain their reasoning when they raise the standard of proof primarily to favor reliance interests.

When courts detect the presence of substantial asymmetric error costs, they have the necessary tools to tilt the scale. This is illustrated by the powerful tools the courts use in defamation cases and rule of reason antitrust cases. In fact, in both areas, critics have questioned whether the tools used may tilt the scale too much. In most cases, however, courts rely simply on the easiest tool to apply—raising the standard of proof. It takes relatively little thought to change the standard of proof from preponderance to clear and convincing evidence, and doing so enables courts to report that they have shifted the risk of error in a meaningful way. As noted, more effective tools, such as burden shifting and imposing intent requirements, take more thought to choose and apply, singly or in combination, and they are likely to need refinement in subsequent cases.[218] Still, it is surprising that courts rely so heavily on raising the standard of proof without calling for evidence that it works and despite admitting skepticism that it does work.

V. CONCLUSION

Courts recognize that asymmetric error costs are important not only in criminal law but also in civil law. They use four factors to identify these costs. Courts are most likely to find that error costs are asymmetric when: 1) a

215. Parikh, *supra* note 194, at 274.
216. 467 U.S. 310 (1984).
217. *See* Lichtman & Lemley, *supra* note 167; *see also* articles listed *supra* note 167.
218. *See* Gavil, *supra* note 117.

liberty interest or other important constitutional right is at stake, 2) liability would result in a serious harm that is permanent, 3) liability would mean revocation of an important right previously granted, or 4) liability would result in a stigma similar to a criminal conviction.

When courts identify error costs, their usual response is to raise the standard of proof from preponderance to clear and convincing evidence. But that tool is unreliable because jurors struggle to understand the meaning of different standards and to distinguish one standard from another. Indeed, judges themselves have limited expectations regarding the impact of different standards of proof. Fortunately, courts also have more reliable tools available, including burden shifting and scienter requirements similar to those in criminal law. These tools make it much less likely that courts will find defendants liable in rule of reason or defamation cases—areas of law where courts have, rightly or wrongly, determined that a mistaken finding of liability is far more costly than a mistaken denial of a plaintiff's claim.

As the unwarranted reliance on raising the standard of proof illustrates, it is time for courts to think more systematically about asymmetric error costs. This means courts should do three things: First, they should apply *Mathews* to conduct standard error cost analysis, i.e., they should take into account *both* Type I and Type II errors, along with administrative costs. Second, courts should reconsider their reliance on raising the standard of proof as the primary, and often sole, tool to address asymmetric error costs. Third, using civil fraud as just one example of inconsistent judicial treatment of error costs, courts should take notice of their current hodgepodge treatment of closely related legal doctrines concerning the standard of proof and bring some doctrinal consistency to it.