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Easy Cases, Bad Law, and Burdens of Proof

Roger B. Dworkin*

I may be wrong, I sometimes am, but I never doubt.

Jessel, M.R., quoted in R. MEGARRY, MISCELLANY AT LAW 8 (1955).

Easy cases, as well as hard ones, sometimes make bad law. *Pickett v. Cooper*,¹ for example, was a straightforward automobile accident personal injury case. Defendant's car, on the wrong side of the road, collided with the car in which plaintiff was riding. Defendant contended that a tire blowout, rather than negligent driving, caused his car to be in the wrong lane, and he introduced evidence to support that contention. Instructing on the doctrine of "sudden emergency," the trial court told the jury to find for defendant if they believed "it [to be] as likely as not" that a tire blowout produced an emergency that was not defendant's fault, during which defendant operated his car as a reasonable person in the circumstances. The jury returned a verdict for defendant; the court entered judgment on it; and plaintiff appealed. The Virginia Supreme Court of Appeals reversed for error in the instruction, stating that the phrase "as likely as not" is "inapt and incorrect" in an instruction on burden of proof.

In this instance . . . [the phrase] placed the burden on the wrong party and in effect required the plaintiff to prove that the tire did not blow out. It was defendant's burden to explain the presence of his automobile on the wrong side of the road. The fact that it was there made a *prima facie* case of negligence for the plaintiff. The burden was then on the defendant to produce evidence to show why it was there. His evidence was that his tire blew out, creating an emergency and causing him to lose control. If the jury could reasonably believe from his evidence that the tire did blow out and create the emergency claimed by the defendant, the burden then was on the plaintiff to show by a preponderance of the whole evidence that there was negligence on the part of the defendant which was a proximate cause of her injuries.²

In other words, the instruction was wrong because it placed the burden of persuasion on the issue of negligence on the plaintiff when, in fact, that burden should have been placed on the defendant! Since the paraphrased holding reads like a typographical error, the contradiction inherent in the court's position should be clear.

Extensive criticism of *Pickett* is neither necessary nor fair, for the

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1. 202 Va. 60, 116 S.E.2d 48 (1960). For a companion case see *Cooper v. Pickett*, 202 Va. 65, 116 S.E.2d 52 (1960).

2. 202 Va. at 63, 116 S.E.2d at 51.

Virginia court is far from alone in its total lack of understanding of the concept of burden of proof. Indeed, understanding has not progressed far since Thayer suggested that someone explain the entire subject of burdens of proof and then decided not to do it himself.³ Some of the legion of cases demonstrating this confusion will be encountered by the reader of this essay. *Pickett* is only a particularly obvious example.⁴ Writers on this subject and the related one of presumptions long have recognized the existence of this confusion,⁵ but have been unable to remove the fog, despite substantial efforts at clarification.⁶

One possible explanation for this lack of progress is that later writers have eschewed—as do I—any pretense of doing the job Thayer suggested. Another possibility, the one I shall explore, is that the job cannot be done, not because it is so large and difficult,⁷ but because it

3. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 354 (1898) [hereinafter cited as THAYER].

4. For another see *Waco Transit Corp. v. Resvanis*, 364 S.W.2d 302 (Tex. Civ. App. 1963). “The burden was upon each of the parties to prove their claim to the right-of-way, and until this was done no subsidiary issues could be submitted.” *Id.* at 303, quoting *Pressler v. Moody*, 233 S.W.2d 165, 166 (Tex. Civ. App. 1950).

5. See, e.g., Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 491, 498-505 (1946); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937) (“Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.”); Roberts, *An Introduction to the Study of Presumptions*, 4 VILL. L. REV. 1, 22-29 (1958); Note, *The Effect of a Rebuttable Presumption in Montana*, 31 MONT. L. REV. 97 (1969).

6. Morgan’s dismay, as reflected in the language quoted in note 5 *supra*, is understood readily by tracing his valuable writings on the subject of burdens and presumptions through stages of creative excellence, compromise, and eventually capitulation as he strove first to achieve understanding and later mere conformity and ease of application. See Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937); Morgan, *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943); Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 491-505 (1946); Morgan, *Burden of Proof and Presumptions in Will Contests in Tennessee*, 5 VAND. L. REV. 74 (1951); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512 (1956). See also E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 70-105 (1956).

Many other writers have contributed to the effort to unravel the mysteries of burdens and presumptions. I have found the contributions of Dean Gausewitz and Professor Cleary particularly useful. See Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Gausewitz, *Presumptions*, 40 MINN. L. REV. 391 (1956); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952).

7. In conventional terms the job is large and difficult indeed. Since every case involves burdens of proof, full explication of the subject as traditionally conceived would be the work of several lifetimes. My very different purpose here is to make an unconventional proposal, which is no less tentative for being bluntly stated, in the hope that my position may help to reorient the way we look at burdens of proof and lead to further inquiry.

In order to avoid constitutional problems, see *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt constitutionally required to establish guilt in a criminal trial), and digressions from the central focus, discussion here will involve the burden of proof only in civil cases and will mention the criminal law only in passing.

is so small—some would say elusive—that it presents the same frustrations as searching for a needle in a haystack. Indeed, I shall push my mixed metaphor further and suggest that no needle is in the haystack, which, of course, is why no one can find it. The concept of burden of proof exists on a theoretical level because we believe it does. On a functional level, I shall argue that the concept does not do what it is supposed to do, but does do something else. Further, what it does is bad. Since it performs a bad function unrelated to its theoretical purpose, does not perform its supposed function, and badly confuses the law, we should abandon the entire notion of the burden of proof in order to simplify the law, stop fooling ourselves, and remove a misused tool from the hands of appellate judges.

I. THE BURDEN OF PROOF CONCEPT

Simply stated, the burden of proof is the obligation of a party to demonstrate the existence of facts that have a desired legal consequence. Everyone now recognizes that the term “burden of proof” is ambiguous because it embraces at least two different obligations. The first of these is the obligation to present sufficient evidence to permit the trier of fact to find for the obligated party on the issue in question. Whether this obligation has been satisfied is a question of law and is therefore determined by the judge, usually on a motion for directed verdict. Modern terminology refers to this burden as the burden of producing evidence.

The second obligation to which the term burden of proof applies is the obligation to persuade the trier of fact to find for the obligated party on the issue in question. The trier may be permitted to find for a party and not actually do so. The obligation to persuade thus may be more onerous than the obligation imposed by the burden of producing evidence. This obligation to persuade is generally referred to simply as the burden of persuasion.⁸

On each issue in a case some party must carry the burden of producing evidence or lose at the hands of the judge, and some party must carry the burden of persuasion or lose at the hands of the jury. Despite the different decision points and decision makers, however, the two burdens are not really very dissimilar. Since the jury theoretically

8. Some writers prefer the term “risk of non-persuasion” as more expressive of the fact that adverse consequences flow from the failure to persuade. This longer term seems to me without advantage, and in an already confused area, much can be said for terminological simplification. Fortunately, I do not believe that anyone yet advocates calling the burden of producing evidence the “risk of failing to produce evidence,” although that would be just as logical as using the “risk of non-persuasion” language.

weighs only the evidence—and not, for example, the arguments of counsel—in reaching its decision, a party carries the burden of persuasion the same way he carries the burden of producing evidence—by introducing evidence. The same amount of evidence may carry both burdens, or more may be required to persuade the jury than to avoid an adverse peremptory ruling from the judge. As a practical matter, of course, any attorney will present as much favorable evidence as he can on every issue unless some of the evidence will prove detrimental to his client on some other issue or in a way not involved in the trial at hand. Because the two burdens are carried in the same way, both in theory and in fact, the advocate is apt to treat them identically.

Moreover, the standard applied in deciding whether a party has carried his burden of producing evidence is determined by the standard to be applied in deciding whether he has carried his burden of persuasion. Thus, in a typical civil case, plaintiff is required to prove the elements of his case by a preponderance of the evidence. As frequently stated, he must convince the jury that his contention is more likely than not. In deciding whether to let the case go to the jury, the question for the trial judge is whether a reasonable jury could find that plaintiff's contention is more likely than not.⁹ In a criminal case, in which the jury must be persuaded of defendant's guilt beyond a reasonable doubt, the judge will direct a verdict for a defendant or grant his motion for judgment of acquittal¹⁰ unless the judge believes a reasonable jury could find defendant guilty beyond a reasonable doubt. As Professor McNaughton has put it, the burden of producing evidence is a function of the burden of persuasion.¹¹ Most importantly, the two burdens are designed to do the same thing—to determine the outcome of litigation in the event of a failure of proof. Studying the two parts of the burden of proof together thus has some utility, as long as one remembers the analytical distinction between them.¹²

The notion that proof is a burden is relatively recent. Originally, the opportunity to prove one's case was considered a benefit because the person who successfully made the proof won the case; accordingly, the chance to do so was a valuable right.¹³ Indeed, Pollock and Maitland

9. Hart & McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48, 53 (D. Lerner ed. 1958).

10. FED. R. CRIM. P. 29.

11. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

12. In this paper the term "burden of proof" will be used (1) when matters common to the 2 included burdens are being discussed and (2) when a case under discussion uses that term and understanding of the case requires that I use it also.

13. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 81, 107 (3d ed. 1923) [hereinafter cited as HOLDSWORTH].

discuss early English judges "awarding" the proof¹⁴ and note that defendants wanted to make proof rather than allow their opponents to do so.¹⁵ Early procedures reinforced the universal human desire to be permitted to tell one's own side of a story by giving real advantage to the party who was put to the proof.

First, in order even to have his claim considered, the plaintiff had to offer to prove it.¹⁶ The defendant not only would deny plaintiff's accusations, but also offer to prove the truth of his denial.¹⁷ The judge could award either party one of several available types of proof. If he did not choose proof by battle, which required each party to contribute to the proof, the judge improved the "burdened" party's chances of winning by assigning the proof to him. At first blush this may seem a strange statement to a generation of persons unlikely to fight for the privilege of carrying the red hot iron, but the little evidence we have on the point suggests that there was at least a 50 percent chance of vindication, even for the party "awarded" this type of proof.¹⁸ For other modes of proof the advantages are clearer. The defendant might be awarded proof by oath, for example, sometimes being allowed to prevail upon his oath alone, but more frequently being required to present several oath helpers to swear that his oath was true. Originally, these oath helpers had to be relatives of the defendant.¹⁹ Even later, when kinship was no longer required, it is not hard to understand why a defendant would want to be put to his proof if that meant merely choosing friends and neighbors to swear on his behalf. The advantage to a defendant became even clearer by the thirteenth century when a mode of proof open to plaintiffs was the production of a "suit" of "witnesses" who "proved" plaintiff's case by swearing an assertory oath in support of plaintiff's own oath.²⁰ If the case is to be decided on the oaths of one party and his friends and neighbors, each party surely will want to be the one called upon to prove his case.

As the short-lived²¹ trial by witnesses developed, each party began producing witnesses, and the judge decided the case by choosing which set of witnesses to believe. He made this decision, however, based upon the number of witnesses produced by each party and the consistency of

14. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 601 (2d ed. 1898, reissued 1968) [hereinafter cited as POLLOCK & MAITLAND].

15. *Id.* at 610.

16. *Id.* at 605-06.

17. *Id.* at 610.

18. *Id.* at 599 & nn.1 & 2.

19. *Id.* at 600.

20. *See id.* at 601.

21. *See* 1 HOLDSWORTH, *supra* note 13, at 302-05.

their stories rather than on an evaluation of the probable truth of the stories told. If plaintiff produced three consistent witnesses and defendant two, plaintiff would win. If, on the other hand, the story of one of plaintiff's witnesses was inconsistent with that of the other two, the inconsistency permitted defendant to prevail.²² Who won in the event that each party produced the same number of consistent witnesses is unclear.

The device that triumphed over trial by witnesses, of course, was trial by jury. At first any notion of burden of proof was irrelevant to trial by jury because the jurors found information on their own and simply answered a formal question presented to them by the court.²³ Only gradually did the jury lose its character as an investigating and witnessing body; it did not become solely a judging body until late in the seventeenth century.²⁴ The modern concept of burden of proof grew up as the jury slowly shaped itself into the fact-finding, law-applying body we have today.

Even under the relatively modern procedure of the middle and late nineteenth century, the burden of proof was not viewed as particularly burdensome. Litigants regularly fought to obtain the right to open and close the presentation of proof, a right that accompanied the burden of proof.²⁵ Thus, we see parties struggling to have the burden of proof imposed not on their opponents, but on themselves. In an Indiana case the court noted that it was "not improbable" that both sides made efforts to frame their pleadings to obtain the right of opening and closing, regardless of the burden assumed.²⁶ And in England the judges of the Queen's Bench worried about a rule permitting a defendant to open when his answer was a confession and avoidance, because the defendant might abuse the privilege by confessing the case against him and affirming as a defense something he knew to be false for the purpose of securing the right to begin.²⁷ Apparently, nineteenth century practitioners thought the burden of having to prove their case was slight when compared to the tactical benefit of being permitted to open and close.

Eventually, of course, fairly clear rules emerged to govern who could open and close different types of cases. Thus, by 1833 it was clear

22. *Id.* at 302-03.

23. For good accounts of the early history of trial by jury see *id.* at 312-50; 1 POLLOCK & MAITLAND, *supra* note 14, at 138-50.

24. 1 HOLDSWORTH, *supra* note 13, at 319, 332-37.

25. See *Judah v. Trustees of Vincennes University*, 23 Ind. 272 (1864); *McLees v. Felt*, 11 Ind. 218 (1858).

26. *Judah v. Trustees of Vincennes University*, 23 Ind. 272, 279 (1864).

27. *Mercer v. Whall*, 114 Eng. Rep. 1318 (Q.B. 1845).

in all actions for personal injury, libel, and slander that plaintiff could begin even though defendant admitted plaintiff's allegations and pleaded only an affirmative defense which, of course, the defendant had to prove.²⁸ By 1845, the same rule applied to actions on contract.²⁹ As these rules solidified, the benefit of being able to open and close, which had been an automatic incident of the burden of proof, became largely independent of it. With neither this benefit nor the advantages available to the proving party under early English procedure, litigants no longer had any incentive to obtain the burden of proof. Burden of proof litigation instead became a struggle to place the burden on the opposing party.

The vigor with which burden of proof battles have been fought ever since suggests that matters of the highest importance are at stake. Remembering our nineteenth century predecessors' willing acceptance of the burden in exchange for the opportunity to address the trier first may serve to keep the modern conflict in perspective.

II. THE MODERN UNDERSTANDING

James Bradley Thayer set the confines of contemporary burden of proof analysis in a brilliant treatment that described the burden of persuasion, the burden of producing evidence, and the difference between them.³⁰ This difference could not very well have been understood much before Thayer's time. The distinction is not an inevitable component of the notion of burden of proof; rather, it is largely a function of peremptory ruling practice, which emerged at about the same time that the focus of litigation was shifting from attempts to obtain the right to open and close to attempts to avoid the obligation to prove one's case.³¹ Only with the advent of peremptory ruling practice did it make sense to consider a burden of producing evidence apart from the burden of persuasion or, as it had previously been called without confusion, the burden of proof. The possibility of a peremptory ruling added a new decision point to the trial of a case. Now, for the first time, a burdened party had to present evidence to persuade two different triers—judge and jury—at two different times—motion for peremptory ruling and

28. *Carter v. Jones*, 172 Eng. Rep. 1147 (Nisi Prius 1833).

29. *Mercer v. Whall*, 114 Eng. Rep. 1318 (Q.B. 1845).

30. THAYER, *supra* note 3, at 355-59. Wigmore adopted, expanded, and disseminated Thayer's analysis, thereby making it the standard view. See generally 9 J. WIGMORE, EVIDENCE 266-86 (3d ed. 1940) [hereinafter cited as WIGMORE].

31. See Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 706 (1942).

deliberation after submission of the case—of two different, but related,³² things—that the jury reasonably could find for the party and that it should find for him. Thayer made clear the existence of these different decision points, decision makers, and issues. Unfortunately, he did not make clear the importance of his analytical distinction or the functional significance of the two burdens. He did, however, spell out different rules governing the actions of the two burdens. These rules and the debates they have engendered are in large part responsible for the confusion that now surrounds the entire subject of burdens of proof.³³

Thayer apparently accepted without question the need for a burden of proof concept. Certainly later writers have treated the burden of proof as an obvious requisite of a civilized dispute resolution system.³⁴ After all, they note, each party wants to know what facts he must prove,³⁵ and the fact finder must know what to do when his mind is in a state of equilibrium.³⁶ Moreover, the adversary nature of our system makes the assignment of burdens essential because the court conducts no investigation of its own and relies wholly on the parties for information. Some party must be forced to satisfy the court's curiosity.³⁷

However convincing or unconvincing these reasons may be, they plainly are not only part of the contemporary understanding of burdens of proof but also rationalizations for the premise that underlies it. Specific rules about burdens of proof developed in a context that accepted the need for burdens and assumed that the burdens would inform parties of what they had to prove, provide a cure for indecisive decision makers, and force litigants to produce evidence in court.

The burden of producing evidence was designed to serve the last purpose. It tells us who, if anyone, will win on an issue if no evidence or no more evidence is introduced. Thus it is supposed to goad the party who would lose without the introduction of any or further evidence into offering some. The thought seems to be that an automobile accident

32. See text accompanying notes 8-11 *supra*.

33. See, e.g., text accompanying notes 1 & 2 *supra*. The Virginia court in *Pickett v. Cooper* knew, as does every law student, that it was supposed to distinguish between the burden of persuasion and the burden of producing evidence. Also, like most law students, it had not the vaguest notion what the significance of the distinction was or of how to deal with it; the result was a ridiculous opinion.

34. F. JAMES, CIVIL PROCEDURE 249 (1965); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 242-43 (1944); Michael & Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224, 1251 (1934); Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 520-21 (1956).

35. 9 WIGMORE, *supra* note 30, at 274.

36. McBaine, *supra* note 34, at 243. See Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 492 (1946).

37. Morgan, *supra* note 36, at 491-92; Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 910-11 (1931).

victim who thinks the accident was someone else's fault, consults an attorney about the matter, brings a lawsuit, and appears for trial will not introduce evidence of the other party's negligence unless forced to do so by having a legal burden imposed upon him—a silly notion, and only theoretically a harmless one because it may make lawyers' tactical misjudgments unrelated to the merits of the case determinative. Moreover, the burden of producing evidence is not even well designed to achieve the objective of having further evidence offered at trial. Even if one assumes that parties willingly will withhold helpful evidence, the way to force them to produce it is to impose the sanction of defeat only for nonproduction of evidence caused by purposeful withholding or actual unavailability. If maximum evidentiary production is the goal, the motion for directed verdict should be replaced by a motion to produce more evidence. The party against whom an order to produce is issued could either reopen and present additional information or refuse to reopen and lose the case. The burden of producing evidence and peremptory ruling practices, however, force a party to gamble on the sufficiency of his evidence and impose the sanction of defeat for a wrong guess regardless of the probability that his position on the merits is correct. Present law provides no second chances.

No one seems to have trouble understanding that the burden of producing evidence on one issue may shift from party to party as the case progresses.³⁸ A plaintiff initially will be required to produce evidence of defendant's negligence in an action for negligent tort. At some point he may have introduced so much evidence, of such convincing force, that the defendant must offer conflicting evidence or lose on the issue of his negligence. As a practical matter, once reasonable men *may* find defendant negligent, he should introduce evidence to show he was not negligent or run the risk of incurring liability. As a legal matter, once reasonable men *must* find defendant negligent, he must introduce evidence to show he was not negligent, or liability will be imposed, absent some limiting factor like contributory negligence. At that point, the burden of producing evidence on the issue of negligence has shifted to the defendant. Conceivably, the defendant could shift the burden of producing evidence back onto the plaintiff by introducing overwhelmingly probative evidence that he was not negligent. Thus, as everyone agrees, the burden of producing evidence may shift back and forth throughout the trial.³⁹ Eventually, each party may be in a position to

38. THAYER, *supra* note 3, at 370; 9 WIGMORE, *supra* note 30, at 285-86.

39. There is another sense in which one might say that the burden of producing evidence shifts: once plaintiff has satisfied the burden of producing evidence of all the elements of his prima facie case, defendant has the burden of producing evidence of any affirmative defenses he wants

avoid a peremptory ruling on the issue in question. At that point the burden of producing evidence disappears and the burden of persuasion becomes relevant.

The burden of persuasion is supposed to tell the trier of fact what outcome to reach when a decision based on mental conviction is impossible.⁴⁰ On most issues in a civil lawsuit the burdened party must prove his case by a preponderance of the evidence; on a few issues the civil burden is described as clear and convincing evidence;⁴¹ and in criminal cases the prosecution must prove the defendant's guilt beyond a reasonable doubt.⁴² In all cases, of course, the question is really whether the trier of fact is in doubt and whether that doubt is reasonable. If degrees of doubt exist, the more serious the consequences of an adverse decision on the unburdened party are, the smaller is the amount of uncertainty in the trier's mind needed to constitute "reasonable doubt."⁴³ Thus what different burden of persuasion standards in different types of cases really attempt is to define the degree of doubt the trier may have and still find for the burdened party. That they are ill designed to achieve this purpose is clear. Nonetheless, everyone understands that a plaintiff may win a civil case even though the trier's mind is in great doubt, but the prosecution may not win a criminal case unless the trier's doubt is reduced substantially.

Litigation regarding the burden of persuasion ostensibly does not involve judicial determination whether a party has carried his burden because theoretically only the jury can determine that. Appellate opinions talking about burden of proof in the context of whether a party's evidence is sufficient are always talking about the burden of producing evidence. The question is whether the trial judge erred in permitting the case to go to the jury, not whether the jury was too easily persuaded. Burden of persuasion cases almost always arise in the context of an asserted error in the trial judge's instructions. The error may be of one

considered. It is now defendant's turn to present evidence or have issues like contributory negligence dropped from the case. Thus the burden of producing evidence has shifted from plaintiff to defendant, not on one issue, but in terms of preserving different issues for consideration.

40. See McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 190-91 (1938), in *SELECTED WRITINGS ON EVIDENCE AND TRIAL* 1010, 1014-15 (1957).

41. The standard "clear and convincing proof" is applied to determine, for example, the proof necessary for a charge of fraud and undue influence. 9 WIGMORE, *supra* note 30, at 329-34.

42. The beyond-a-reasonable-doubt standard is constitutionally compelled in criminal cases and juvenile delinquency proceedings in which a juvenile is charged with conduct that would be criminal if committed by an adult. *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (per curiam); *In re Winship*, 397 U.S. 358 (1970).

43. See Hart & McNaughton, *supra* note 9, at 54-55; Comment, *Evidence: The Validity of Multiple Standards of Proof*, 1959 WIS. L. REV. 525, 540.

of three kinds: the trial judge imposed too heavy or too light a burden on a party; the trial judge imposed the burden of persuasion on the wrong party; or having once imposed the burden of persuasion on the right party, the trial judge erroneously allowed the burden of persuasion to be shifted to the other party.

Litigation of these issues is continual and voluminous; we shall examine a few cases when they become relevant. For now, it would be too flippant to state that there is no modern understanding of the burden of persuasion, for certain articulable dogmas exist even though, as noted above,⁴⁴ at least part of the modern understanding is that no one understands. For our purposes, the assignment and especially the shifting of the burden of persuasion are of primary importance.

Several tests for the allocation of the burden of persuasion have been in favor from time to time.⁴⁵ One approach holds that the burden of persuasion rests on the party asserting the affirmative of the issue, but this is obviously unsatisfactory as a guide because any proposition can be stated affirmatively or negatively with fair ease. Similarly, the suggestion that the party to whose case proof of the issue is essential must bear the burden is worthless because it begs the crucial question: To whose case is the proof essential? Likewise, to say that the burden of persuasion follows the burden of pleading tells nothing about how to decide on whom the latter burden rests. Placing the burden of persuasion on the party with better access to the evidence obviously is not the general test because, for example, plaintiffs must prove defendants' negligence and vice versa. Nevertheless, this factor may sometimes be relevant in determining burden placement, as may the extent to which one party's contention departs from the ordinarily expectable. None of the simple tests controls the question of who has the burden of persuasion. Instead, substantive considerations—questions of policy and fairness—are determinative, and they, of course, will differ from case to case.

Despite the obvious impossibility of determining in advance the dictates of policy and fairness for all cases of one broad category, rules of burden of persuasion allocation are viewed as fairly inflexible. Most lawyers believe, for example, that once the substantive decision to require plaintiffs to prove defendants' negligence has been made, a reexamination of this decision on a case-by-case basis is unlikely. Thus the

44. See text accompanying note 5 *supra*.

45. The capsule summary and criticisms in the text following this note are taken largely from the following sources: F. JAMES, *supra* note 34, at 255-58; E. MORGAN, *supra* note 6, at 75-76; 9 WIGMORE, *supra* note 30, at 274-78; Cleary, *supra* note 6, at 11-13.

popular conception still seems to be that the burden of persuasion never shifts; it is allocated in advance to one party, and it stays with him throughout the trial.

Massachusetts' Chief Justice Shaw, writing in *Powers v. Russell*,⁴⁶ apparently is responsible for first stating that the burden of persuasion never shifts.⁴⁷ In the course of deciding to dismiss plaintiff's bill in equity to redeem real estate, Chief Justice Shaw wrote:

It was stated here that the plaintiff had made out a *prima facie* case, and, therefore, the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore, the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance or control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate.

But where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact.⁴⁸

Although Shaw's 1832 language may sound imprecise, the intended meaning is clear. Once a party makes out a *prima facie* case on an issue, his opponent must offer some contrary evidence on that issue or lose. As a practical matter, the burden of producing evidence has shifted to him. Indeed, *Powers* may be read to suggest that the burden of producing evidence has shifted as a legal as well as a practical matter. The correctness of that reading depends upon one's understanding of the term "*prima facie* case," a definitional problem that fortunately is irrelevant for present purposes. As Chief Justice Shaw pointed out, however, the "burden of proof"—by which he obviously meant what we now call the burden of persuasion, since he contrasted it with the weight of the evidence—does not shift, but stays "all along" on the party who made out the *prima facie* case. When a defendant wishes to assert an affirmative defense, he must prove it, and accordingly, the burden of proof shifts to him. This is merely a clumsy way of saying that different parties must prove different issues and is in no way a surprising statement. Thus, *Powers v. Russell* presents three different burdens of proof: what we call the burden of producing evidence, which shifts from party to party during the trial; what we call the burden of persuasion, which

46. 30 Mass. (13 Pick.) 69 (1832).

47. See Reaugh, *supra* note 31, at 708-10.

48. 30 Mass. (13 Pick.) at 76-77.

never shifts; and the burden on the defendant to establish affirmative defenses.⁴⁹

Thayer adopted and thereby assured the continuing vitality of Shaw's assertion that the burden of persuasion never shifts.⁵⁰ More recently, Wigmore took the same position in most definite terms:

The *first burden* above described—the risk of non-persuasion of the jury—*never shifts*, since no fixed rule of law can be said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes beforehand the issuable facts respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's; and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's [T]he putting-in of evidence may . . . “shift” in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not “shift” in any real sense; for each may once for all ascertain beforehand from rules of law the ‘facta probanda’ apportioned to him, and this apportionment will always remain as thus fixed, to whatever stage the cause may progress.⁵¹

Other writers have continued to assert as undeniable truth that the burden of persuasion never shifts.⁵² One has even suggested calling the burden of persuasion the “fixed burden of proof” to emphasize “the vital distinguishing feature” of the burden.⁵³ And some who recognize the controversial nature of the assertion that the burden of persuasion never shifts are willing to argue not for the mere existence but for the wisdom of the rule.⁵⁴

Although the view that the burden of persuasion never shifts is not unanimously held, it is dominant at present. Most suggestions to the contrary have been restricted to arguments over the effect of presumptions.⁵⁵ Thus the modern understanding is that the burden of persuasion

49. This burden, too, is susceptible to division into a burden of producing evidence and a burden of persuasion.

50. THAYER, *supra* note 3, at 369-70.

51. 9 WIGMORE, *supra* note 30, at 285. Wigmore, of course, recognized that the burden of producing evidence, as well as “the putting-in of evidence,” does shift. *Id.* at 285-86.

52. Bridge, *Presumptions and Burdens*, 12 MOD. L. REV. 273, 274 (1949); Hanbury, *The Burden of Proof*, 61 JURID. REV. 121, 124-27, 132 (1949); Laughlin, *The Location of the Burden of Persuasion*, 18 U. PITT. L. REV. 3, 24-26 (1956); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 200-01 (1953); Stone, *Burden of Proof and the Judicial Process: A Commentary on Joseph Constantine Steamship, Ltd. v. Imperial Smelting Corporation, Ltd.*, 60 L.Q. REV. 262, 262-70 (1944).

53. Bridge, *supra* note 52, at 274.

54. Laughlin, *supra* note 52 (both articles); Ray, *Presumptions and the Uniform Rules of Evidence*, 33 TEXAS L. REV. 588 (1955); Comment, *Presumptions—The Uniform Rules in the Federal Courts*, 1964 DUKE L.J. 867, 883-87.

55. See, e.g., Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEXAS L. REV. 34, 46-47 (1931); Morgan, *Instructing the Jury upon Presumptions and Burden of*

is a fixed rule of law that is to be imposed permanently on a party before the trial starts according to one or a combination of unsatisfactory formulae to enable the jury to decide cases in which the jurors cannot decide which set of factual representations is correct. In the rest of this Article, I shall argue that this conception is incorrect, attempt to correct it, and then evaluate the burden of proof in the context of the corrected understanding.

III. USES OF THE BURDEN OF PERSUASION

A. *An Aid to Decision Making*

As we have seen, the modern understanding of the function of the burden of persuasion is that it makes possible the decision of cases that the trier of fact could not otherwise decide. The trier of fact in this context is always an individual. The jury or, in nonjury cases, the judge, decides issues of fact. In jury cases, however, the parties are entitled to the independent opinion of each juror, which is then expressed in the verdict of the jury as an entity.⁵⁶ Thus, when we say the plaintiff must prove the defendant's negligence by a preponderance of the evidence, what we mean is that in order for the jury to return a verdict for the plaintiff, each of the required number of jurors must individually find that it is more likely than not that defendant was negligent. If any juror cannot decide whether defendant's negligence or nonnegligence is more likely, he must vote for defendant. Thus, in a state requiring unanimity for civil verdicts, eleven jurors may believe absolutely that defendant was negligent, but be precluded from returning a verdict for plaintiff either by the remaining juror's contrary conviction or by his inability to decide. A hung jury is no evidence of the working of the burden of persuasion.

The more-probable-than-not standard and the requirement that each juror be persuaded to the requisite degree combine with certain psychological realities to make the burden of persuasion essentially useless as an aid to decision making.

First, even in theory, the burden of persuasion only applies when the fact finder's mind is in a state of complete equilibrium. Because the fact finder will always have been presented with evidence by skilled advocates of interested parties, the likelihood of his real indecision is small indeed, even apart from psychological factors.⁵⁷

Proof, 47 HARV. L. REV. 59, 79 (1933); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 911-12 (1931).

56. E. MORGAN, *supra* note 6, at 74; *see, e.g.*, CALIFORNIA JURY INSTRUCTIONS CIVIL [BAJI] No. 15.30 (5th rev. ed. 1969); *cf.* ILL. PATTERN JURY INSTRUCTIONS CIVIL No. 1.05 (1961).

57. *See* Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 185, 191 (1944);

Secondly, even though the applicability of the burden of persuasion standard to the state of mind of twelve different persons rather than one entity may at first blush seem to increase the likelihood that allocation of the burden affects the fact finder's decision, actually it decreases that probability. It is easy enough to imagine a body of twelve persons unable to decide an issue. If the burden of persuasion applied to the jury rather than to the jurors, a six-to-six deadlock resulting in a verdict for the unburdened party might occur frequently. However, as anyone who has ever served on a committee knows, the group may well remain deadlocked long after each of its members has made up his mind. Individual decision making, even in the face of argumentation, is much easier than group decision making.

Thirdly, a number of psychological and quasi-psychological forces operate to make juror indecision extremely unlikely. In considering these forces, one must remember the distinction between true indecision and stated indecision. A person who is not really undecided may state that he is for a variety of reasons. Thus we must examine both true and stated indecision in the trial context if we are further to evaluate the burden of persuasion as an aid to decision making.

Jury verdicts result in important consequences to real persons or other entities in disputes that frequently have implications beyond the immediate litigation. Anyone intelligent enough to be a juror knows this, and even the trappings of the courtroom setting are designed in part to enhance this awareness. Jurors, like everyone else, have a sense of justice—of the way things ought to be—and bring that sense to the trial of a case along with a full set of human prejudices and considerable information and misinformation. Based on what he feels, what he thinks, and what he thinks he knows, a juror begins the decision-making process with a sense of the utility or disutility of a given decision.⁵⁸ This is true regardless of whether he knows the precise consequences of each possible verdict. Thus, whether a jury member knows that defendant's insurance company is almost certain to pay plaintiff's judgment may affect his view of utilities, but neither his knowledge nor his ignorance will prevent him from having a view. If he knows the defendant is insured, he may feel either that it is better to err on the side of the plaintiff, whose resources are almost certain to be less than the insur-

Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245, 255 (1943). *But see* Reaugh, *supra* note 31, at 717-18.

58. For a good discussion of one model of decision making with emphasis on the role of the perceived disutility of a given decision see Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

ance company's, or that it is better to err on the side of the defendant, since plaintiffs' awards in tort litigation increase everyone's insurance premiums. What his views are is not important. What matters is that he has some views, and that they color the way he evaluates the evidence.

The juror's view of the relative disutilities of different verdicts will combine with the evidence presented to carry the day for the party whose victory is less unsatisfactory to the juror in those few cases in which the evidence really would leave the mind of a truly impartial juror—if there were such a creature—in a state of equilibrium. This leaves open one strange possibility: Suppose the evidence objectively favors plaintiff, but the juror's view of relative disutilities is sufficiently strong in favor of defendant to put the juror's mind into a state of absolute indecision. Will the placing of the burden of persuasion now control his vote?

Theoretically, the answer is yes. In fact, however, I suspect that the burden of persuasion is irrelevant even here. If the juror has been led to his state of indecision by unarticulated or subconscious disutility views, he may in effect weigh those views twice by articulating them to himself at this point and allowing them to control his decision. If he does that, the burden of persuasion has no impact. If he does not do that because he realizes that he has already considered his own views of disutility, he may concede that only those views make him unable to decide and fall back to the objective position, which causes him to vote for plaintiff regardless of burden of persuasion instructions. On the other hand, if he does not weigh his disutility views twice, either because he never becomes conscious of them or because good conscience compels him not to, he will vote for the party not having the burden of persuasion on whatever issue he cannot resolve, absent the operation of other factors.

Of course, other factors operate on the juror, though, and reduce still further the probability that the burden of persuasion will have controlling importance. Although each juror is to make up his own mind, he does so as a member of a very special group. The jurors realize that they have been selected to decide a case. The whole trial has built toward the group's decision; indecision would be intolerable. It would be difficult, indeed, for a juror to accept that his decision is based only on his own inability to decide. The members of the group have an interest—founded on pride and a desire to go home—in making a decision. They may bring pressure to bear on fellow jurors to reach a decision. Indeed, the trial judge's instructions are designed to facilitate even the reluctant minority juror's compliance by encouraging him not to state a position until he has had a chance to hear how the deliberations

are developing.⁵⁹ If compliance is easy for the minority juror, it is the natural course for the merely undecided one. This is untrue only when the jury is strongly polarized. In this situation, however, the burden of persuasion is irrelevant to the outcome because the undecided juror's influence on the outcome is nil. The result is the same whether the jury is split six to six, or six to five with one unable to decide.⁶⁰

The minute area in which the burden of persuasion even theoretically is supposed to control decision, the requirement of individual decision making by each juror, the formal context of litigation including everything from courtroom fixtures to jury instructions, and individual and group psychological pressures make true juror indecision a virtual impossibility and therefore make it almost impossible for a case to arise in which the burden of persuasion really permits a decision that otherwise could not be made.

Does the burden of persuasion permit decision making that would otherwise be rendered impossible by a juror's stated but not actual inability to decide? It is easy to suppose a juror who really can decide between two or more alternatives but who for some reason of his own prefers to say that he has not made up or cannot make up his mind. Is the burden of persuasion a useful device for helping him to render the decision he prefers without having to state his true reasons? I think not.

Most obviously, the burden of persuasion is useful for such a juror only if it lies on the party he thinks should lose. In the only instance in which the juror can rely on the burden of persuasion, therefore, he does so to reach the result he would reach if forced to decide without the burden of persuasion device. If he wants the burdened party to win, the burden of persuasion clearly is no help to him. By adding the psychological pressures we have observed, all of which push a juror toward stating a decision, the irrelevance of the burden of persuasion to the case of stated indecision is clear. The burden of persuasion simply is not an aid to jury decision making. If it has any function, we must find it somewhere outside the fact-finding context.

B. *A Mask for Substantive Legal Change*

In the well-known case of *Summers v. Tice*,⁶¹ plaintiff and the two defendants were hunting together. Plaintiff climbed a hill, placing the

59. See, e.g., CALIFORNIA JURY INSTRUCTIONS CIVIL [BAJI] No. 15.31 (5th rev. ed. 1969).

60. It is true, however, that compliance is not a strong force for decision making, and indecision may be important in jurisdictions that permit nonunanimous verdicts. If, for example, a 9-3 vote is all that is required, the undecided juror in an 8-3-1 split is important and is not helped much by pressures to follow the (split) group.

61. 33 Cal. 2d 80, 199 P.2d 1 (1948).

parties at the points of a triangle. Defendant Tice flushed a quail that flew between plaintiff and the two defendants. Both defendants shot in plaintiff's direction at the quail. Two pellets hit plaintiff, one in the eye and one in the upper lip. Plaintiff sought damages for his injuries from both defendants. At trial, admissions by defendant Simonson to third parties that he had fired the offending shot were introduced. Beyond that, plaintiff was unable to prove which defendant had shot him because defendants had used shotguns of the same gauge and the same size shot. Nevertheless, the trial judge, who heard the case without a jury, found that the shots struck plaintiff as a direct result of the shooting by defendants; that defendants were negligent; and that plaintiff was not contributorily negligent. He entered judgment for plaintiff against both defendants. They appealed.

On appeal, the Supreme Court of California recognized that the major item of damage was the injury to the eye and proceeded as if only one pellet had struck plaintiff. By doing so the court simplified analysis without sacrificing reality. Nothing indicated that one pellet had come from each defendant's gun, and focusing on each shot would have forced the court to repeat its analysis with no difference in reasoning or outcome.

The problem on appeal was obvious. Plaintiffs have the burden of proof on the issue of cause in fact in negligence cases, and plaintiff could not prove which defendant caused his injury. When two defendants act together, although not necessarily in concert, and both are negligent, may plaintiff recover despite this failure of proof? The court held that he could and affirmed the trial court's judgment.

The court noted that the trial judge apparently did not believe defendant Simonson's admissions. In finding that the negligence of both defendants with the cause of plaintiff's injury "or to that legal effect," the lower court recognized its inability to determine which defendant fired the crucial shot.⁶² On that state of the record the supreme court refused to take the easy way out by holding that defendants had acted in concert and therefore were joint tortfeasors.⁶³ Instead, the court determined that defendants should be liable because:

To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.⁶⁴

. . . . When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only,

62. *Id.* at 84, 199 P.2d at 2.

63. *Id.* at 84-85, 199 P.2d at 3.

64. *Id.* at 85, 199 P.2d at 3, quoting *Oliver v. Miles*, 144 Miss. 852, 860, 110 So. 666, 668 (1926).

a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury.⁶⁵

For the same reasons, the court concluded that the burden of showing any damage apportionment should rest on defendants. They will be treated as liable “on the same basis as joint tort feasons,” and for reasons of policy “the case is based upon the legal proposition that, under the circumstances here presented, each defendant is liable for the whole damage whether [defendants] are deemed to be acting in concert or independently.”⁶⁶

Thus for plausible reasons of policy the court permitted plaintiff to win a case despite his inability to prove one of the critical elements of his cause of action simply by shifting the burden of proof on that element from plaintiff to defendants. If the burden of proof the court was talking about was merely the burden of producing evidence, then *Summers v. Tice* contains nothing unusual; everyone knows that the burden of producing evidence shifts.⁶⁷ If, on the other hand, the court shifted the burden of persuasion, then it violated the widely held belief that the burden of persuasion never shifts.⁶⁸ In fact, the court did shift the burden of persuasion on the issue of cause in fact.⁶⁹

Because *Summers v. Tice* was tried to a judge rather than a jury and because the California Supreme Court used the ambiguous term “burden of proof” to describe the burden it shifted, some analysis is required to determine which half of the burden of proof was involved. The determination is not difficult in jury cases because we know decisions on motions for directed verdicts involve the burden of producing evidence and decisions about jury instructions involve the burden of persuasion. There are no instructions in a nonjury case, though, and absent a description by the judge of his thought processes, it is difficult to tell whether a finding against a burdened party is based upon the judge’s belief that reasonable persons could not find the party’s contention more likely than not or upon his belief that although reasonable

65. 33 Cal. 2d at 86, 199 P.2d at 4.

66. *Id.* at 88, 199 P.2d at 5.

67. See text accompanying notes 38-39 *supra*.

68. See text accompanying notes 46-55 *supra*.

69. 1 F. HARPER & F. JAMES, TORTS 704 n.72 (1956), agrees without discussion.

men could disagree, he does not find the contention more likely than not.⁷⁰

A few hints in *Summers v. Tice* suggest that the court shifted only the burden of producing evidence. First, defendants argued that there was not sufficient evidence to show which defendant's negligence caused the harm.⁷¹ This refers clearly to the burden of producing evidence. Of course, defense counsels' perception of the case as argued is but weak evidence of the court's perception of the case as decided. Secondly, the court did suggest that evidence was more accessible to the defendants than to plaintiff⁷² and analogized the case to and quoted language⁷³ from *Ybarra v. Spangard*,⁷⁴ a *res ipsa loquitur* case in which the court said that *res ipsa loquitur* shifts the burden of producing evidence. Finally, on the issue of apportionment of damages, the court discussed whether plaintiff was required to supply evidence for the apportionment and decided that he was not.⁷⁵ This, however, is not strong evidence that *Summers* is a burden of producing evidence case because normally the party with the burden of persuasion also initially will have the burden of producing evidence and plaintiff therefore would not have had to supply evidence for apportionment regardless of which burden was placed upon defendants. Even more important is the fact that the principal issue in the case was causation, so that the division of burdens on apportionment was tangential, at most, to the case's primary problem.

These small indications that *Summers* is a burden of producing evidence case are overwhelmed by evidence pointing in the opposite direction. First, the evidence at trial included admissions by defendant Simonson that he caused plaintiff's injuries. As to Simonson, at least, plaintiff thus carried his burden of producing evidence, and no need arose to shift it from him. Accordingly, any mention of shifting burdens must relate to the burden of persuasion. Moreover, the supreme court noted that the trial court apparently decided not to credit Simonson's admissions, a decision that it was justified in making.⁷⁶ This points strongly to the conclusion that *Summers* concerned the burden of persuasion since the credibility of the witnesses is to be determined by the

70. The unlikelihood that any aspect of the burden of proof really controls the judge's decision, see text accompanying notes 56-60 *supra*, and the close relationship between the burden of persuasion and the burden of producing evidence, see text accompanying notes 10-12 *supra*, may well explain the lack of care with which judges differentiate between the 2 burdens in nonjury cases.

71. 33 Cal. 2d at 83, 199 P.2d at 2.

72. *Id.* at 86, 199 P.2d at 4.

73. *Id.* at 86-87, 199 P.2d at 4.

74. 25 Cal. 2d 486, 154 P.2d 687 (1944).

75. 33 Cal. 2d at 88, 199 P.2d at 5.

76. *Id.* at 84, 199 P.2d at 3.

trier of fact. The trier of fact is the decision maker concerned with the burden of persuasion. The judge in his role of trier of law considering the burden of producing evidence would not have been justified in disbelieving a witness's testimony except in the most extreme cases. Furthermore, Simonson's admissions ought to have carried defendant Tice's burden of producing evidence. Nonetheless, Simonson and Tice both lost, again suggesting that the court shifted the burden of persuasion and not merely the production burden.

The supreme court stated that implicit in the trial court's finding that the negligence of both defendants caused the harm is the assumption that the court could not ascertain from which defendant's gun the offending shot came.⁷⁷ As we have seen, the whole idea of the civil burden of persuasion is that the trier is to use it to make decision possible when he is unable to make up his mind. Indecision is the furthest imaginable mental state from that involved in a burden of producing evidence case, in which the judge decides that the evidence is so clear that all reasonable men must see it one way. Therefore, *Summers v. Tice*, by its own language, is a classic example of the application of the burden of persuasion.⁷⁸

The court in *Summers v. Tice*, then, violated the dictum that the burden of persuasion never shifts by shifting that burden on the issue of cause in fact in a negligence case from plaintiff to defendants. The result was to permit plaintiff to win a case that the court's idea of sound policy demanded he win, but also one that established doctrine required

77. *Id.*

78. A few less significant indications also mark *Summers* as a burden of persuasion case. For example, the court quoted Wigmore as saying that in cases like this one each defendant has the "burden of proving" that the other caused the harm. *Id.* at 85, 199 P.2d at 3. Once Wigmore has established the distinction between the 2 parts of the burden of proof, he uses the term "burden of proof" only when referring to the burden of persuasion. See generally 9 WIGMORE, *supra* note 30, at 266-498.

Similarly, the court used the term "burden of proof" despite its quotation from *Ybarra v. Spangard*, which used the term "burden of producing evidence," thus showing the *Summers* court's awareness of the latter term. Moreover, careful courts always distinguish between the 2 burdens. Some call the burden of persuasion the burden of proof, but no court that distinguishes the 2 calls the burden of producing evidence the burden of proof. Furthermore, in discussing *Ybarra*, in which the court said it had shifted the burden of producing evidence, the *Summers* court said that *Ybarra* concerned whether plaintiff could rely on *res ipsa loquitur* rather than where the burden of proof lay, 33 Cal. 2d at 86, 199 P.2d at 4, again suggesting that the *Summers* court meant burden of persuasion when it said "burden of proof."

Similarly, the court quoted Professor Carpenter, saying that "there should be a relaxation of the proof required of the plaintiff," *id.*, quoting Carpenter, *Workable Rules for Determining Proximate Cause, Part II*, 20 CALIF. L. REV. 396, 406 (1932), which suggests that plaintiff's proof will no longer have to be so persuasive. Finally, the court said defendants' burden was "to absolve" themselves, *id.* at 88, 199 P.2d at 5, which again sounds like something more than merely presenting some evidence that tended to absolve them.

him to lose. Defendants were unable to carry the burden imposed upon them, since no one could prove whose shot hit plaintiff. The obvious effect of imposing an impossible burden on a party is that he loses the case; the placement of the burden of proof thus becomes outcome determinative.⁷⁹ Frequently, the outcome can be determined merely by manipulating the burden of producing evidence, but in *Summers* the lesser manipulation was insufficient because of Simonson's admissions, so the greater and theoretically forbidden manipulation had to be made.

The practical effect of *Summers* was, of course, to lay down a new rule of substantive law: Persons who shoot negligently in the direction of other persons will be liable for gunshot wounds contemporaneously suffered by a person in whose direction they fire. Lack of causation may or may not be an affirmative defense; however, the disregard of Simonson's admissions suggests that, if it is a defense, it will be disfavored and jealously applied.

The rule makes good sense if one believes that fault is the central criterion of tort liability. A person who negligently shoots in someone else's direction is culpable. He unreasonably creates the risk that someone will be shot. If someone is shot, why should the fortuity of another person's simultaneous negligence absolve the defendant? Why should the presence of two negligent persons allow both to escape at the expense of an innocent injured party? Won't whatever deterrent effect the law of negligence may have be weakened by insisting on causation in a *Summers* type case?

If, however, the primary focus of tort law is not on compensating the blameless at the expense of the blameworthy, the wisdom of the *Summers* result is less clear. In order to assess its economic impact accurately, for example, one would need fairly detailed information about the extent and availability of both liability insurance to hunters and health and accident insurance to hunters and the public generally. If plaintiffs are more likely to have some form of health and accident insurance than defendants are to have liability insurance, then *Summers* was wrong in terms of minimizing the economic impact of hunting accidents. If, on the other hand, no one is insured or the odds are better that at least one defendant will be insured than that plaintiff will be, then the decision was right, because the plaintiff could collect his entire award from either defendant—the richer or the one insured—or from both jointly.⁸⁰

79. "[I]t must be apparent that a complete lack of proof as to a particular element moves allocation out of the class of a mere handicap and makes it decisive as to the element, and perhaps as to the case itself." Cleary, *supra* note 6, at 12, *citing Summers*.

80. See CAL. CIV. PROC. CODE § 875 (g) (West Supp. 1972).

Whether right or wrong, the California court's substantive decision surely was neither ridiculous nor a decision of which to be ashamed. Why then did the court not state in a straightforward manner what it was doing instead of talking about the burden of proof? One can only guess. Perhaps the court knew that lawyers think in doctrinal terms and therefore believe in cause-in-fact cases although the court thought in more functional terms and believed not in cause cases but in gun cases.⁸¹ The court might not have been sure it was willing to do in a nongun case what it did in a gun case and thus attempted to create the impression that it was only tinkering with procedure. If this was the goal, the court was particularly clumsy in pursuing it. The court's substantial policy discussion obviously has impact beyond gun cases, and the absence of limiting language is likely to encourage lawyers to try to analogize their cases to *Summers*. In fact, lawyers have sought to have the *Summers* rule applied to a wide variety of nongun cases, including situations as diverse as falls on negligently maintained sidewalks⁸² and collisions between ice trucks and children.⁸³

Another possible explanation for the court's decision is that the court wanted to appear to be making a "conservative" decision rather than striking out in a bold new direction in negligence law. After all, "mere procedure" may be changed by a court almost at will. A major change in the substantive law, on the other hand, may be considered "judicial legislation."

This explanation seems implausible, however, for two reasons: first, the cases the court cited demonstrated a continuing development in the law of joint tortfeasors that would have permitted the court to reach its result in a just slightly new and hardly unexpectable way; secondly, if the court was trying to hide a major decision from the bar and the commentators, failure was inevitable. In one sense, *Summers* is anything but a conservative opinion. As noted, it violated the shibboleth about the burden of persuasion's never shifting and allowed a plaintiff to recover despite a clear failure of proof. Only one making the most insulting assumptions about the legal community reasonably could expect such a decision to pass unnoticed. In fact, every major torts casebook has included the case,⁸⁴ suggesting, at least, that torts

81. Compare C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* ch. 1 (2d ed. 1969) and W. PROSSER & J. WADE, *CASES AND MATERIALS ON TORTS* ch. 5 (5th ed. 1971), with L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS & A. SMITH, *CASES ON THE LAW OF TORTS* ch. 1, § 5 (1968) [hereinafter cited as L. GREEN].

82. *E.g.*, *Peters v. City of San Francisco*, 41 Cal. 2d 419, 429, 260 P.2d 55, 62 (1953).

83. *E.g.*, *Hilyar v. Union Ice Co.*, 45 Cal. 2d 30, 38, 286 P.2d 21, 25 (1955).

84. *See, e.g.*, M. FRANKLIN, *INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 25, 508 (1971); L. GREEN, *supra* note 81, at 69, 500, 735; C. GREGORY & H.

scholars saw something substantively significant in *Summers*. Every torts student since 1948 has studied *Summers v. Tice*, making it unlikely that the case has totally escaped the notice of the bar.

Was anything accomplished, then, by the California court's procedural smokescreen? I think not, unless confusing the bar is to be considered an accomplishment. Obviously, "to reject all desirable judicial accomplishments attained by devious paths would leave the common law poor indeed."⁸⁵ Yet deviousness is hardly an independent virtue, and when a device used to surreptitiously attain a desired end has no independent function and exists wholly to facilitate deviousness, one may well question its value in enriching the common law.⁸⁶

Professor Fuller has argued that one advantage of the legal fiction is that it can be removed easily.⁸⁷ It does not become a "vested interest" with a group of partisan defenders, and it is more readily displaced than a construction that appears nonfictitious. Courts that decide cases on the basis of a pretense may not have discovered the best principle, but at least they have not obstructed its later discovery.⁸⁸ However true or untrue this may be for fictions generally,⁸⁹ manipulation of burdens of proof to obtain substantive results in the manner of *Summers v. Tice* cannot be defended on this ground. The burden of proof is now so well established in our system that no one ever considers the need to defend it.⁹⁰ It muddies our law and impedes understanding and reform, not because it is a fiction, but because it is a fiction that everyone thinks is real. Even if a court uses burden manipulation as a signal of uncertainty concerning the merits of substantive change, the technique fails because the persons receiving the signal do not understand it as such. Because they believe in burdens of proof, they take the courts at their word, and because they know they are not supposed to understand burdens of proof,⁹¹ their inability to understand a decision cast in terms of burdens does not surprise them. Thus, rather than facilitating development, the

KALVEN, *supra* note 81, at 12; P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* 672 (1971); W. PROSSER & J. WADE, *supra* note 81, at 271, 379, 747; H. SHULMAN & F. JAMES, *CASES AND MATERIALS ON THE LAW OF TORTS* 313 (2d ed. 1952).

85. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 909 (1931).

86. See Cleary, *supra* note 6, at 24; cf. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 80 ("[T]o remove candor from one's description of the decisional process is to strike at the heart of the rule of law.").

87. L. FULLER, *LEGAL FICTIONS* 70-71 (1967).

88. *Id.*

89. Has the fiction of the reasonable man proved easy to displace and no obstruction to the improvement of tort law? Those who think the reasonable man lacks partisan defenders and is not a vested interest might consult any recent publication of the American Trial Lawyers Association.

90. See text accompanying notes 34-37 *supra*.

91. See note 5 *supra* and accompanying text.

use of the burden concept as a mask for substantive legal change hinders progress and confuses judges, lawyers, and the law. Such a use of any concept is undesirable. Such a use of a concept without independent validity is inexcusable.

Summers v. Tice is far from the only case that misuses the burden of persuasion as a mask for substantive legal change. Indeed, every judicial decision cast in burden of proof terms is essentially a substantive law decision.⁹² Decisions in which courts discuss shifting burdens are the best examples because they demonstrate most dramatically that the Thayer-Wigmore dogma is followed only as long as it is convenient.

Cases shifting the burden of persuasion arise in many contexts. In Georgia, for example, the burden of persuasion on the issue of validity in will contests shifts from the propounder of the will to the caveator upon proof of the factum of the will, the apparent mental capacity of the testator, and the voluntary execution of the will. The burden involved definitely is that of persuasion since the cases concern the propriety of jury instructions.⁹³ Similarly, the Supreme Court of Iowa has held—in *In re Estate of Lundvall*,⁹⁴ an action against an administratrix for an accounting—that a showing by plaintiff of a confidential relationship between deceased and the administratrix in which the administratrix was the dominant party shifts the burden of persuasion to show the absence of fraud onto the defendant administratrix. Citing negligence cases in which it had shifted the burden of persuasion on the negligence issue onto defendant common carriers after an initial showing of negligence by plaintiff passengers,⁹⁵ the Iowa court observed that “the burden of proof, as distinguished from the burden of going forward with the evidence, shifts to the defendant in a proper case,”⁹⁶ and said:

We hold that, in the class of cases discussed in this division, when a confidential or fiduciary relationship appears and there have been dealings between the parties, as soon as these things are shown the burden of proof in the sense of burden of persuasion shifts to the dominant party. . . . The technical arguments which hold that the burden of proof proper never shifts are overborne by the sound principle that the dominant factor should be called upon to explain and justify the fairness of his actions and to prove that the inferior party with whom he dealt had full freedom and understanding of what he did.⁹⁷

92. The federal courts have recognized this in conflict of laws situations. See, e.g., *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 622 (1940).

93. Note, *Shifting the Burden of Persuasion in Will Contests Involving Undue Influence in Georgia*, 22 GA. B.J. 555 (1960).

94. 242 Iowa 430, 46 N.W.2d 535 (1951).

95. *Id.* at 437, 46 N.W.2d at 539, citing *Crozier v. Hawkeye Stages*, 209 Iowa 313, 318, 228 N.W. 320, 322 (1929); *Weber v. Chicago, R.I. & P. Ry.*, 175 Iowa 358, 373, 151 N.W. 852, 858 (1915).

96. 242 Iowa at 437, 46 N.W.2d at 539.

97. *Id.* at 440, 46 N.W.2d at 540.

The burden-shifting phenomenon also is found in contract-agency cases, including those in which fiduciary relationships are not determinative. For example, once a plaintiff shows that defendant signed a contract with him, the burden shifts to defendant to show that his promise was made solely in the capacity of agent for a disclosed principal.⁹⁸ In other words, the burden of persuasion on the issue whether defendant was a party to the contract shifts from plaintiff to defendant.

Courts most frequently engage in decision by burden shifting, however, in negligence cases—with or without resort to the doctrine of *res ipsa loquitur*. The frequent use of this decision-making technique in negligence cases probably is attributable in part to the existence of the special doctrine and in part to the growing dissatisfaction with the doctrinal law of negligence.

Thus, the court in *Currie v. United States*⁹⁹ affirmed a judgment for plaintiff in a rear-end collision suit in which the trial court—applying Maryland law—held that by showing that defendant's brakes failed, plaintiffs had cast the risk of nonpersuasion on the issues of proper inspection and sudden failure without warning—*i.e.* the issue of negligence—onto defendant. Although the defendant government introduced evidence to show its lack of negligence, the judgment was affirmed because the trial court remained “unconvinced.”¹⁰⁰ Similarly, once a plaintiff has produced sufficient evidence of defendant's negligence to avoid a directed verdict, the Supreme Court of Vermont has held that both the burden of producing evidence and the “burden to persuade the jury that in the face of the danger that prevailed, he exercised the care and caution that might be expected of reasonable prudence” shift to the defendant.¹⁰¹

Numerous *res ipsa loquitur* cases, of course, involve shifting the burden of persuasion,¹⁰² and the question of the procedural effect of *res ipsa loquitur* is much mooted.¹⁰³

98. *Matsko v. Dally*, 49 Wash. 2d 370, 301 P.2d 1074 (1956).

99. 312 F.2d 1 (4th Cir. 1963).

100. *Id.* at 3.

101. *Wright v. Shedd*, 122 Vt. 475, 479, 177 A.2d 240, 243 (1962).

102. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 315-16 (1920); Roberts, *supra* note 5, at 21; Subrin, *Presumptions and their Treatment under the Law of Ohio*, 26 OHIO ST. L.J. 175, 204-05 (1965). For a recent case clearly using *res ipsa loquitur* to shift the burden of persuasion and citing numerous supporting cases from its own and other jurisdictions see *Weiss v. Axler*, 137 Colo. 544, 328 P.2d 88 (1958). *But see* Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 89-91 (1941).

103. *See generally* Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

In none of these cases was manipulation of the burden of persuasion necessary or even helpful in reaching the desired result. If voluntariness of execution is important to the validity of a will, all a jury need be told is that the will is valid only if voluntarily executed and that in determining voluntariness the jury may consider the credibility of the parties, the relationships among them and between them and the decedent, and the fact that the decedent himself obviously cannot testify. Although it retains the appearance of jury decision making, the inclusion of burden-shifting language in jury instructions merely increases the likelihood of error and provides a reviewing court an extra chance to reverse a decision with which it disagrees.

The point is even clearer in fiduciary cases like *Lundvall*.¹⁰⁴ Triers of fact are not fools: Common sense recognizes that if two persons are in a confidential relationship in which one is dominant, and if the will of the dominated party benefits the dominating party, then fraud or overreaching by the dominant party is likely. The likelihood increases as the benefit increases or as it entails depriving other obvious beneficiaries of the dominated person's largess. Why not recognize the incentive all parties have to produce as much favorable evidence as possible and let the fact finder decide the issue of fraud without considering who has the burden of persuasion, much less whether it has shifted? The policy favoring the shift is a mere recognition of a common-sense view of the world. When the law and common sense coincide, why confuse the decision-making process with burdens of proof? To the extent the burden shift may be designed to handicap the fiduciary more than common sense would, the notion of the burden as an aid to decision making rather than a disguised rule of substantive law becomes increasingly absurd. The defendant in *Lundvall* was forced to prove not only her own good faith, but also that her dead husband had acted voluntarily, freely, intelligently, and with full knowledge of all the facts when he made her joint tenant in much of his property. Because a showing of this nature always will be impossible, the court in effect decided that fiduciaries never can benefit from their positions of trust. Rephrased, the rule of *Lundvall* becomes simple, clear, unshocking, and a useful guide to future fiduciaries.

The point can be made in any context. The law could permit the jury to exercise common sense in deciding that, absent some reason to believe the contrary, the signer of a contract signed for himself or a driver whose faulty brakes caused a rear-end collision was negligent.

104. 242 Iowa 430, 46 N.W.2d 535 (1951).

Or the law could exceed common sense by invariably imposing liability on all such signers and drivers. Manipulating the burden of persuasion achieves nothing otherwise unattainable, confuses the law, and of course, leads to appellate litigation. And what is accomplished by the Vermont rule that could not be achieved simply by telling the jury to decide whether defendant was negligent and to impose liability on him only if he was?

Burden of persuasion language adds nothing to any of these cases. Yet the notion that burdens are important to decision making is so firmly established that commentators occasionally even attempt to explain important substantive decisions as if they involved mere procedural manipulations. Professor Roberts, for example, has suggested that *Brown v. Kendall*,¹⁰⁵ the landmark case in the development of the law of negligence, involved nothing more than a reallocation of the burden of proof.¹⁰⁶ No one can deny that Chief Justice Shaw's *Brown* opinion discussed allocation of the burden of proof and made clear that the plaintiff had to persuade the jury of defendant's negligence in order to prevail.¹⁰⁷ It is also clear, however, that *Brown* caused a substantial reorientation of tort law, and to suggest that the law since *Brown* has been to the effect that defendants-are-strictly-liable-regardless-of-fault-but-they-may-escape-liability-by-showing-unavoidable-accident-except-that-plaintiff-has-the-burden-of-persuading-the-jury-that-the-accident-was-not-unavoidable hardly promotes clarity or aids analysis—but then burden of persuasion language never does.

The burden of persuasion does not aid the trier of fact. Rather, it provides appellate courts an unnecessary device for hiding their substantive decisions. This "benefit" is gained at the cost of substantial confusion and undoubtedly increases significantly the time lawyers must spend researching cases and judges deciding them. Should we then, at this late date, think seriously about doing without the burden of persuasion altogether? And if we stop using the burden of persuasion concept, what will become of the burden of producing evidence? And what difference will that make?

IV. CONCLUSION: ABOLISHING BURDENS OF PROOF

Procedural rules exist for the primary purpose of facilitating the application of the substantive law.¹⁰⁸ While they may serve other pur-

105. 60 Mass. (6 Cush.) 292 (1850).

106. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 203-04 (1965).

107. 60 Mass. (6 Cush.) at 297-98.

108. See Cleary, *supra* note 6, at 5; Michael & Adler, *supra* note 34, at 1230; Weinstein,

poses as well,¹⁰⁹ they must never become ends in themselves. When a rule acquires independent life, it becomes a substantive rule of law that must be judged by the same standards as other substantive rules.

We have demonstrated already that the burden of persuasion has no procedural effect¹¹⁰ and that the burden of producing evidence performs an unnecessary function with an inappropriate procedural effect.¹¹¹ Moreover, the burden of persuasion masks substantive decision making by permitting appellate courts to change the substantive law without appearing to do so. Thus it becomes a substantive rule for all meaningful purposes. When a court makes substantive law by manipulating the burden of persuasion—and not by forthright substantive legal change—the court creates an intolerable condition in which two conflicting substantive rules govern the same situation. Thus, after *Summers v. Tice*, factual causation is and is not prerequisite to a plaintiff's recovery in a negligence case. This differs from having a rule with exceptions because the procedural blind hides the rule-exception boundary and permits the court to choose at will what result to reach in a given case. Moreover, by pretending to make a procedural rather than a substantive decision, the *Summers* court decided without considering—or at least without explicating—the critical question whether causation always should be prerequisite to recovery for negligence. If not, when, if ever, should it be prerequisite?

The *Summers* decision shows one court's belief that causation should not be required in all cases, that is its belief that the substantive law which invariably requires causation is wrong because application of the rule sometimes leads to bad results. Thus the court thought it was confronted with an example of a problem recognized by Professors Michael and Adler—a case in which the substantive law can lead to a correct result only when an incorrect answer is given to a question of fact.¹¹² That is, the court believed the only way to achieve the correct result in view of the substantive requirement of causation was to make the erroneous factual conclusion that both defendants caused plaintiff's injury. Obviously, if correct factual conclusions lead to wrong results—or if wrong factual decisions lead to right ones—the substantive law is wrong.¹¹³

Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 COLUM. L. REV. 223, 243 (1966).

109. Michael & Adler, *supra* note 34, at 1230; Weinstein, *supra* note 108, at 241.

110. See Part III A *supra*.

111. See pp. 1158-59 *supra*.

112. Michael & Adler, *supra* note 34, at 1230-31.

113. *Id.*; see Weinstein, *supra* note 108, at 243.

If a court believes a substantive rule is wrong because it sometimes leads to wrong results, is the court justified in obscuring that fact by pretending to make a merely procedural decision? Of course no one would argue that "procedural law should be *primarily* an instrument for correcting the substantive law, whose application to particular cases it governs."¹¹⁴ Since we already have demonstrated that this is not only the primary, but the sole function of the burden of persuasion, the impropriety of using this device should be apparent. One need not reject all deviousness to reject deviousness for its own sake.¹¹⁵

What I have characterized as deviousness, however, others might denominate the generation of "stop-gap rules"¹¹⁶ or a compromise between achieving procedural justice, or regularity, and justice in a concrete case.¹¹⁷ Can the use of the burden of persuasion as a stopgap or compromise be justified sufficiently to warrant retaining the notion as part of our law?

Simply stated, the stopgap theory is that the burden of persuasion provides a useful tool for achieving correct decisions in particular cases before a court is sure it really wants to change the law. The related compromise theory recognizes both the desirability of uniformly applied rules and the possibility that a given rule may lead to bad results in some cases, even if it usually leads to right ones, and suggests that burden manipulation offers an opportunity to do justice to individuals without overturning generally desirable rules.

Neither argument justifies burden manipulation. First, the stopgap-compromise approach is too simple and unprincipled. In the vernacular, it is a "cop out." It permits courts to decide hard questions without considering them fully and deprives the courts of the benefit of outside analysis that forthright presentation of a problem might engender. Courts have many other stopgap techniques available: they may, for example, distinguish cases on their facts, create exceptions to rules, and develop rules slowly on a case-by-case basis. These techniques permit the law to grow by recognizing the impossibility of perfect knowledge and leaving room for backing, filling, and correcting. They all differ from use of the burden of persuasion, however, by forcing the courts both to consider the long-range implications of their decisions and to

114. Michael & Adler, *supra* note 34, at 1231 (emphasis in original).

115. See text accompanying notes 85-86 *supra*.

116. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 894 (1968).

117. For a useful discussion of the dichotomy between procedural and concrete justice in an area closely related to the subject of this Article see Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 331 (1952).

avoid the temptation of deciding cases on the basis of sympathy or prejudice.

Secondly, using burdens of persuasion as stopgaps or compromises on the road to law reform is too confusing. We have discussed at length the confusion engendered by burden of proof usage. All this can be avoided by forthright searching for appropriate substantive rules.

Thirdly and most importantly, burden manipulation is unlikely to lead to correct specific results; thus the weakening and confusion of the substantive law will not be offset by the promised benefit of justice to particular litigants. As we have seen, the burden of persuasion is a device courts use to control juries. But juries are the judicial system's tool for compromising the substantive law, mitigating its harshness, and providing stopgap relief when the substantive law changes too slowly. Because the burden of persuasion is unlikely to affect the jury's decision,¹¹⁸ manipulation by an appellate court can only undermine the jury's softening function. Thus, if anything, concrete justice becomes less rather than more likely to be achieved by continuing to use the burden of persuasion device, and all that is accomplished by its continued existence is the fouling of the substantive law. We should stop assigning and manipulating burdens of persuasion.

Once burdens of persuasion are eliminated, burdens of producing evidence fall of their own weight. The latter are a function of the former,¹¹⁹ and without burdens of persuasion, burdens of producing evidence make little sense: they serve no real function and sometimes cause parties to lose lawsuits because of an attorney's tactical misjudgment.¹²⁰

I propose the total rejection of the concept of burden of proof and the substitution for it of a privilege to open the proof, a motion to produce more evidence, and a style of jury instructions that will speak solely in terms of the substantive law.¹²¹ This change will simplify the law, provide an improved chance for substantive law improvement without affecting the fact-finding function of courts, and make it harder for easy cases to make bad law.

118. See Part III *A supra*.

119. See note 11 *supra* and accompanying text.

120. See pp. 1158-59 *supra*.

121. See Lawson, *The Law of Presumptions: A Look at Confusion, Kentucky Style*, 57 Ky. L.J. 7, 14-15 (1968).

