

# HOW PRESUMPTIONS SHOULD BE ALLOCATED

## BURDENS OF PROOF, UNCERTAINTY, AND AMBIGUITY IN MODERN LEGAL DISCOURSE

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This symposium, precipitated by Richard Gaskins's new book and dedicated to exploring the implications of the concept of burden of proof, will seem odd though welcome to evidence scholars in this country. It will seem odd because Gaskins's book is premised in part on his belief that "[t]he term burden of proof has been relatively neglected even in legal commentary, and its implications in explaining current judicial practice have yet to be fully appreciated."<sup>1</sup> Although Professor Gaskins may be unaware of the fact, which suggests others must be as well, American evidence scholars over the course of this century have developed deeply and in detail the various aspects of the concept of burden of proof, as well as the implications of the concept's first cousin, presumptions.<sup>2</sup> That a scholar as well read as Gaskins could make

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1. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* 20 (1992).

2. In addition to the other citations scattered throughout this essay, I put together from my own research notes the following sources that proved useful to me during the period I was investigating burdens of proof and presumptions. I have also included some of my own work. My interest in the technical aspects of these matters waned about ten years ago, as it became increasingly obvious that the formal problems in the concepts had been solved. The following list does not, therefore, contain many of the numerous articles published over the last decade dealing with related matters, such as the large literature in recent years dealing with process of proof from a constitutional perspective. Because of space limitations, at the request of the editors, I also did not include many older articles or the approximately 50 student notes and comments that I found helpful for one reason or the other. This list therefore is not comprehensive, but representative of the over 200 articles on the subject. The materials cited below neither "neglect the term burden of proof" nor "fail to appreciate its implications." Quite to the contrary, they work out in great detail every conceivable aspect of the problem.

Henry M. Hart & John T. McNaughton, *Some Aspects of Evidence and Inference in the Law*, in *EVIDENCE AND INFERENCE* 61 (David Lerner ed. 1959); Bruce L. Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761 (1977); Julie B. Allen et al., *A Positive Theory of the Employment Discrimination Cases*, 16 J. OF CORP. LAW 173 (1991); Ronald J. Allen, *Evidence, Inference, Rules, and Judgment in Constitutional Adjudication: The Intriguing Case of Walton v. Arizona*, 81 J. OF CRIM. L. & CRIMINOLOGY 726 (1991); Ronald J. Allen, *More on Constitutional Process of Proof Problems*, 94 HARV. L. REV. 1795 (1981); Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence"*

such a statement indicates why this symposium will be welcomed by my evidence colleagues as a vehicle for disseminating the results of their research agenda to a wider audience. If there has been a relative lull over the last decade in this century's torrent of legal scholarship on burdens of proof and presumptions, it is because the evidence community is largely satisfied that the relevant analytical implications have been worked out, leaving only political arguments unresolved. Indeed, the agenda of evidence scholarship has moved from these well known and resolved problems to new problems that use the analysis of burdens of proof and presumptions as their base. I refer here in particular to the present focus of the field on the process of proof, how it is and how it should be that a rational actor draws inferences about historical facts and applicable standards.

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*Debate, the Meaning of "Evidence," and the Requirement of Proof Beyond Reasonable Doubt*, 65 TUL. L. REV. 1093 (1991); Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981); Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 Nw. U. L. REV. 892 (1982); Ronald J. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. OF CRIM. L. AND CRIMINOLOGY 1147 (1983); Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1981); Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 Nw. U. L. REV. 1080 (1984-85); Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOYOLA L. REV. 871 (1992); Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991); Ronald J. Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30 (1977); Ronald J. Allen & Lee Ann DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1 (1982); Ronald J. Allen & Robert A. Hillman, *Evidentiary Problems in—and Solutions for—the Uniform Commercial Code*, 1984 DUKE L. J. 92-119; Marina Angel, *Substantive Due Process and Criminal Law*, 9 LOY. CHI. L.J. 61 (1977); Mirjan Damaka, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Mirjan Damaka, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); George P. Fletcher, *Two Kinds of Legal Rules A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L. J. 880 (1968); Lon Fuller, *Legal Fictions* (pts. I-III), 25 ILL. L. REV. 363, 513, 877 (1930-31); W. Page Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEX. L. REV. 34 (1931); J. P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242 (1944); Charles T. McCormick, *The Validity of Statutory Presumptions of Crime Under the Federal Constitution*, 22 TEX. L. REV. 75 (1943); Charles T. McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938); Charles R. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1981); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979); James T. Ranney, *Presumptions in Criminal Cases: A New Look at an Old Problem*, 41 MONT. L. REV. 21 (1980); James B. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45 (1890); Laurence H. Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 810 (1971); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B. U. L. REV. 775 (1975).

In this Article, I will describe the present understanding of burdens of proof and presumptions and how that analysis relates to the present concern with the process of proof. My objective will be to clarify the undeveloped treatment of these matters in the first 100 pages of Gaskins's book. Whether so clarified the law's treatment of the relevant issues still bears on the other questions that Gaskins pursues in such an interesting fashion is unclear to me. I would not presume to draw inferences about those fields, nor about the relevance of legal knowledge to the internal debates of those fields. Just as legal amateurs invariably get the law wrong, normally through over-simplification of complex phenomena, my colleagues trained in the law who purport to contribute to debates in other fields invariably fail adequately to appreciate the relevant subtleties. Accordingly, my objective is to explain what we know and what we do not know, and I leave to the experts in other fields to determine, and hopefully report back to all of us, whether this legal knowledge bears on the rest of the debates Gaskins analyzes.

In Gaskins's view, burdens of proof and presumptions are largely rhetorical devices used to advance an advocate's case at trial.

Skillful advocates in today's legal battles have perfected the art of shifting the burden of proof onto their opponents.<sup>3</sup> . . . The honorable path for a zealous seeker of favorable legal results is to try to shift that burden to the adversary whenever possible. That way your client wins, unless the opposing party can somehow make an affirmative case for a different version of the facts. In practice, courts permit these burdens to shift quite freely and have formalized a distinctive set of rules for easing the transition.<sup>4</sup>

These passages do not accurately portray either the relevant legal theory or the prevalent practices. Burdens of proof rarely shift at trial, and when they do—as for instance when a presumption is appropriately invoked—it is because of rules of law that virtually always preexist the trial. The only room for tactical maneuvering is to demonstrate that, as a factual matter, the case fits into one of the preexisting legal categories whose parameters are fairly well determined by statutes and precedents.

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3. GASKINS, *supra* note 1, at 20.

4. *Id.* at 26-27.

A perfect example of the stability of burden of proof practice is the doctrine of *res ipsa loquitur*, which Gaskins discusses, although to make the opposite point. Missing from his discussion is an articulation of the parameters of the doctrine. The California Supreme Court identified them in *Ybarra v. Spangard*:<sup>5</sup>

The doctrine of *res ipsa loquitur* has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'<sup>6</sup>

Gaskins believes that this doctrine is invoked to favor plaintiffs because as "[e]veryone knows . . . juries like to resolve . . . murky situations in favor of the suffering plaintiff."<sup>7</sup> Regrettably, we have here a case where conventional knowledge and truth part ways. Conventional knowledge may very well be as Gaskins asserts it, and for a perfectly plausible reason. Conventional knowledge about jury verdicts surely results primarily from following the discussions of trials in the mass media. This is a highly inaccurate source, however, for the media invariably report the aberrational case while failing to note the thousands of appropriate and thus mundane decisions. Of the thousands of trials involving bendeclin, for example, I am aware of only one that has resulted in a jury verdict that has been upheld on appeal.<sup>8</sup> If one mistakenly takes this one case as the standard rather than the exception that it is, perhaps an inference of jury bias can be understood. Whether understandable or not, it is clearly false. We have considerable data concerning jury verdicts, and whatever else they imply, they hardly demonstrate juries to be in general soft-hearted, or softheaded, returners of unjustified verdicts for plaintiffs. My colleague, Keith Hylton, in a very interesting article, has reported the data on plaintiff success rates at trial in federal dis-

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5. 154 P.2d 687 (Cal. 1944).

6. *Id.* at 689, quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 295.

7. GASKINS, *supra* note 1, at 27.

8. Richard Epstein, *Judicial Control Over Expert Testimony: Of Deference and Education*, 87 NW. U.L. REV. 1156, 1163 (1993). To be sure, reversal on appeal does not disconfirm Gaskins's point. What does is that a few, but only a few, jury verdicts have been rendered for plaintiffs. Another example is jury verdicts involving harm caused by smoking to smokers. Again, there is at present only one jury verdict holding cigarette manufacturers liable of which I am aware. Before arguments about jury bias are advanced, data such as these should be consulted and analyzed.

strict courts during the years 1978-85.<sup>9</sup> Although his data do not distinguish between judge and jury verdicts, the data must indicate the upper limit on the rate of jury verdicts for plaintiffs. Plaintiffs can demand jury trials and presumably would do so whenever they believed it to be in their best interests.

Of the fifteen categories of tort (personal injury and property damage) litigation, less than half (seven) had a success rate over 50 percent. Remarkably, in cases of medical malpractice, in which *res ipsa loquitur* is relatively often employed, the success rate was only 38 percent. Perhaps even more remarkably, the two categories with the highest plaintiff success rate involve defendants who should appeal to the sympathies of juries—students being sued in contract for defaulted loans and veterans being sued for the recovery of overpayment of veteran benefits—both of whom normally face an institution of government as their opponent. Nonetheless, plaintiffs won 84 percent of their suits to recover for defaulted student loans and 80 percent of their suits to recover overpayments of veteran benefits. Comparing the general categories of tort and contract litigation also may yield some insight into the “well known” proclivity of juries to decide with their hearts rather than with their heads. Tort litigation generally will involve a sympathetic plaintiff and contract litigation a sympathetic defendant. As I mentioned previously, most categories of tort litigation have less than a 50 percent recovery rate. Every single category of contract litigation had a greater than 50 percent recovery rate. In two-thirds of those categories (six out of nine), the recovery rate was 69 percent or higher.

Gaskins's theory that *res ipsa loquitur* is the means by which the legal system gets doubtful cases to the jury to allow the jury to exercise its well known biases in favor of plaintiffs is impossible to reconcile with the facts. That is not surprising, because the doctrine arose not to favor one party over the other for ideological reasons but instead to restore the appropriate balance between parties when one party has access to information that the other lacks. As the California Supreme Court continued: “If the doctrine is to continue to serve a useful purpose, we should not forget that ‘the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evi-

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9. Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. OF LEG. STUD. 187, 206-210 (1993).

dence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."<sup>10</sup> This states the true purpose of *res ipsa loquitur*. The rule arose prior to the implementation of the thorough pretrial discovery systems for civil litigation that now exist in virtually all jurisdictions. It arose to offset systematic biases that were introduced into litigation as a function of access to evidence. Plaintiffs may very well have been wrongly injured, but they could recover only if they had evidence to establish their wrongful injury. If that evidence were in the hands of the opponent and the plaintiff had no legal tool to dislodge it, deserving plaintiffs would systematically lose. In order to avoid systematically erroneous decisions, the courts created doctrines such as *res ipsa loquitur* to require the party with the evidence to explain what occurred. There is nothing mysterious, malevolent, or politically motivated occurring here. *Res ipsa loquitur* is just one of many examples of courts acting through the common law process to maintain a reasonable balance between parties to litigation. The rule persists in these post-discovery days because of its added incentive to the full production of information, which is at the heart of modern litigation theory.

In the one example that Gaskins gives, we see less the results of an ideological struggle and more, much more, the legal system attempting quite pragmatically to work out solutions to difficult problems created by the need to reconstruct historical facts. Burdens of proof and presumptions, along with discovery in civil cases (and increasingly in criminal cases) are tools which the legal system employs to advance its objective of accuracy in fact-finding. In addition, they serve the purpose of constructing the boundary between judge and jury (and to a lesser extent between trial judge and appellate judge).

A major problem in the construction of a litigation system is the lack of information concerning disputed events. Whether for good or for ill, we have chosen to let the parties be responsible for providing that information.<sup>11</sup> In my view, this is to the good, for otherwise we would have to charge some agency of government with the obligation to secure information concerning the existence and merits of disputes. In a party-oriented system,

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10. *Ybarra v. Spangard*, 154 P.2d 687, 689 (Cal. 1944).

11. Anyone who would profit from richer footnotes throughout the next few pages should consult the materials *supra* note 2.

there is rather obviously a need for a mechanism to establish that a good enough reason exists to expend judicial resources on litigating any particular case and for a mechanism structuring the orderly presentation of information so that such a decision can be reached. Both problems are solved by burdens of production, the first of the two meanings to the phrase "burden of proof." Someone, almost always the moving party in litigation, is assigned this burden, which requires that party to produce enough information about the dispute to demonstrate that a legitimate dispute exists. When would that be true? When based on the evidence presented, a strong case for the party bearing the burden is demonstrated. How strong? At least strong enough so that reasonable people could disagree about who should win the case. But when is that? The answer to this last question requires that we address the second aspect of burdens of proof, the burden of persuasion.

The defining trait of litigation is decision under uncertainty. In virtually all cases, decision is reached by uninvolved third parties (judge or jurors) evaluating reports of events rather than by viewing the events themselves. In all such cases, the reports might be in error, and in many cases the reports offered at trial conflict. Indeed, that is usually why there is a trial. Even when primary data exist, such as exhibits or videos, typically those data must be interpreted, so again there is often a considerable distance between the actual event and the decision about that event. Consequently, decision must be taken under uncertainty, and the burden of persuasion merely provides the decision rule under uncertainty.

In civil cases, the decision rule is a preponderance of the evidence, which rather than being a "notoriously inexact quantitative standard"<sup>12</sup> is perfectly precise. As I will demonstrate below, it is flawed because of the precision, but it is precise nonetheless. The nearly universal standard in civil cases requires the person bearing the burden to establish the relevant elements to greater than a .5 probability. This, in turn, is understood as either a subjective probability or a relative frequency. The reason for adopting this standard is that, again *pace* Gaskins, to the legal system the typical civil case involves a contest between two indistinguishable parties vying over some good, and there is no reason in ad-

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12. GASKINS, *supra* note 1, at 21.

vance to favor one party or the other. We thus strive to treat them equally by making errors against them in a roughly symmetrical fashion, which under certain constraints the preponderance standard does.<sup>13</sup> When there is reason to prefer errors to be skewed against a class of litigants, such as if fraud is alleged in a civil case and in criminal cases generally, the burden of persuasion changes to reflect our preferences. We thus make it more difficult to convict individuals in criminal cases in the hope that doing so will protect some innocent people, admittedly at the cost of freeing many guilty people.

Immediately, then, it becomes apparent that there are not two analytically distinct components to burdens of proof; as Professor McNaughton saw many decades ago, burdens of production are a function of burdens of persuasion.<sup>14</sup> A burden of production is satisfied when a reasonable person applying the relevant burden of persuasion could find in favor of the person bearing the burden of persuasion. Together, they operate to bring order to the evidentiary process at trial.

Order is not the only thing burdens of proof bring to trials, however; they also bring judicial control over juries, and here perhaps lies some grist for Gaskins's ideological mill. Judges must decide if a burden of production is satisfied, which means that the judge must decide whether reasonable jurors could disagree about the proper outcome in the case. If reasonable jurors could disagree, the judge must send the case to the jury. If the judge thinks that reasonable jurors could not disagree, the judge has the power to decide the case, save only criminal cases against the accused. There are two justifications for this power. The first is that it saves time and money; the second is that it avoids mistaken jury verdicts. The first justification is clear and convincing; the second is enormously troubling for obvious reasons.

There are many other juridical tools, some of which are also jury control devices and some of which are not, but all of which are driven by the concept of burden of persuasion. For example,

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13. See, e.g., David H. Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; David H. Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L. J. 101; Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance of the Evidence Standard*, 131 U. PA. L. REV. 1159 (1983). However, Kaye's work is limited to the special case of a single litigated element. See Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 409-412 (1986).

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

prior to seating a jury, the judge can enter summary judgment deciding the case for one party or the other. When should that be done? When no reasonable person could find for the losing party, which obviously is a function of the burden of persuasion. After a party has entered its evidence, many jurisdictions permit a judge to enter a directed verdict, which again will be driven by burdens of persuasion. More subtle forms of jury control devices are judgment notwithstanding the verdict and new trials. Here the judge waits to see the result of jury deliberations, and if unsatisfied enters a verdict for the side disfavored by the jury or orders a new trial. While more subtle, these are more troublesome, for here the only justification is jury control; economic arguments cut in the opposite direction. Again, though, these should be employed only when no reasonable person could come out as the jury did. This standard, although often articulated, is always honored in the breach, however, and again here may lie some support for ideological arguments about the trial process. That the jury came out as it did is essentially irrefutable evidence that a reasonable person could so conclude.<sup>15</sup> We thus see that the pragmatic power of the judges theoretically extends beyond its justification. I say "theoretically" because jury verdicts are rarely disturbed, most likely because most judges realize how odd is the claim that six to twelve ordinary persons are irrational. New trial motions are much more commonly entered because of some judicial error at trial.

Yet another pragmatic tool for fashioning litigation is driven by burdens of persuasion. Often some facts are so well known that there is no justification for litigating them. An example might be whether the lake contiguous to the eastern border of Chicago is Lake Michigan. Similarly, on occasion litigants fail to provide evidence of obviously true facts that are crucial to a particular cause of action. For example, a prosecutor in a grand larceny case may neglect to put in evidence that the diamond necklace that was

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15. Damages, and perhaps negligence, are different matters, precisely because data about such matters are not part of conventional human experience. How much is an arm or a life worth? How do the costs balance in determining whether to put an eight or ten foot high fence around a swimming pool? These are not questions we normally face in life, and thus decisions about them by juries tend to be scattered. Judges are "better" decision makers in such contexts only because they have observed prior similar trials, which provides them a baseline for questions such as the value of an arm or a life. The resultant consistency is often taken by critics of the jury system as evidence of greater accuracy. The critics overlook that the judges might be consistently wrong in their judgments.

stolen was worth more than \$500. What connects these examples is the inefficiency in proceeding in the normal juridical fashion. There is no reason to require evidence that this is Lake Michigan outside my window. Similarly, there is little (perhaps some, but little) reason to let a grand larcenist go free because of a trivial failure of proof at trial. How do we know, though, whether an absence of proof should be forgiven because of its uselessness or triviality? Again the answer is a function of the burden of persuasion. If upon the receipt of evidence no reasonable person could disagree about the outcome on the fact in question, given the relevant burden of persuasion, little harm is done by excusing its production. One way to excuse its production is to take judicial notice of the fact in question, as all modern evidence schemes allow, and notice may be taken at any point in the proceedings. Thus, the appellate court may take judicial notice that the value of the diamond necklace exceeds \$500 and may legitimately disregard the failure of evidence.

Thus far, I have been examining the implications of burdens of persuasion on the level of the elements of the cause of action. Judges have felt the need, whether justifiably or not, for control over the evidentiary process at a more discrete level. Here is where presumptions come into the picture. In the era before the onset of mature discovery systems, judges needed a means to pry information from litigants, in particular litigants who did not have a burden of production or persuasion. The doctrine of *res ipsa loquitur* is one means by which this was accomplished, and as the Supreme Court of California recognized, *res ipsa loquitur* is in essence an example of creating a presumption. By creating presumptions, courts could accomplish many tasks. In addition to creating incentives to the production of information, presumptions were used to favor or disfavor claims (presumption of innocence, of marriage, of death based on seven years absence, and so on). Presumption instructions were also used as indirect judicial comment on the evidence designed to encourage the jury to return a verdict for one party or the other. The justification for such instructions is the necessity of offsetting a high probability of the jury miscalculating certain evidence. The knowledge of this possibility, and here again is some room for ideological concerns, comes from judicial observation of many similar cases where erroneous verdicts have been reached. Note again, and here Gaskins has it right, that these various uses of presumptions

are driven by burdens of proof, usually but not always burdens of persuasion. In virtually all cases, however, the trial judges were, and are, constrained by the decisional and statutory law of their jurisdiction. Presumptions for the most part were not, and are not, used to accomplish idiosyncratic goals of individual judges, but instead given when the law of the jurisdiction so demands. Of the many complaints that can be lodged against the use of presumptions, this is not one of them.

Presumptions served another purpose historically, although this particular use is dying out. Interestingly, it is the one use of presumptions that, although unmentioned by Gaskins, may be consistent with his analysis. Presumptions have been used to introduce substantive innovations in the law. A perfect example of this is the present day system of traffic offenses.<sup>16</sup> When automobiles were first introduced, accidents involving them were handled as all other negligence cases at the time. A party alleging the negligent operation of a car or truck had to establish that the vehicle was being driven at the time in a negligent fashion. Soon local officials began to recognize that certain conditions of the roadways gave rise to particular operational hazards, and signs were posted to that effect, for example suggesting that because of the upcoming curve a driver should slow to no more than 15 m.p.h. Many of these postings seemed quite sensible, and courts soon began to adopt them as presumptions of what we would call *prima facie* standards, meaning only that a party who did not operate consistently with them had the burden of producing evidence that the operation of the vehicle was not negligent. All this means, of course, is that a presumption had been created that shifted a burden of production to a defendant. Subsequently, again based on the judicial experience that these postings were generally quite sensible, the courts strengthened the presumption to one shifting a burden of persuasion, so that now a defendant had to convince the fact-finder of the careful operation of the vehicle. And finally, the courts (and numerous legislatures) concluded that these postings were so valuable that no evidence of lack of negligence could suffice to rebut them, thus creating what is known as irrebutable presumptions. If a driver violated a

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16. The text describes the progression of the law in the nation as a whole. Any particular jurisdiction may have followed this path more or less precisely.

posted limitation, negligence was irrebutably presumed.<sup>17</sup> That means that liability is determined not by negligence but by behavior inconsistent with the postings, and an important modification of the law was achieved.

But was it achieved for any deep ideological reasons? Obviously not, and in fact changing the law through the slow development of irrebutable presumptions demonstrates just how stable the substantive law is. As the judges have always recognized, the power to articulate the law is tolerated only to the extent that the judges are committed to the rule of law, which is the opposite of the ideological forces that play a heavy explanatory role in Gaskins's analysis. Thus, the common law judges knew full well that their claims to law articulation tied them to a rigorous system of precedent. Overruling or disregarding of cases implies a disregard of the law that would not be tolerated in those sworn to apply the law. And this is why very few cases have been overruled in our history.

Nonetheless, social conditions change, and what was an acceptable rule at the time announced may become positively destructive. In a time prior to active legislatures, what was a court to do? It now perceived a strong need for a change but knew that its own legitimacy rested on its commitment to its prior decisions. Faced with this dilemma, the courts searched for a solution, and found it in the slow modification of the law through the introduction of presumptions, first mild ones that shifted only burdens of production followed by more rigorous ones culminating in irrebutable presumptions that brought the law-changing process to an end. Using presumptions has the twin advantage of introducing change slowly, thus encouraging other governmental actors to intervene, and appearing to be more law-like than direct impositions of judicial will, thus at least providing some protection against claims of judicial usurpation of authority. At no time must a court overrule or disregard a previous case; it merely need announce that the presumption discovered in some previous case has a slightly different effect than previously recognized.

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17. More recently, a very similar process has occurred with respect to the relationship between blood alcohol content and intoxication. Results of breathalyzers were first taken as evidence of various stages of intoxication. In many states today, driving with certain levels of blood alcohol is a crime itself. The evidence that gave rise to the "presumption" of negligence has now become the crime itself. So it is that presumptions tend to mutate from effecting evidentiary relationships to determining substantive law.

All of these issues, and many others involving related matters, have been thoroughly worked out by legal scholars over the last fifty years.<sup>18</sup> These topics are the object of discussion in the legal literature today primarily from the perspective of giving advice to rule-makers concerning how to translate the rich complexity of the common law into a usable rule of evidence. Some attention is given to the constitutional implications of presumptions and burdens of proof, but none of this work even purports to be adding to our understanding of the evidentiary issues. Rather, the constitutional work is singlemindedly advocatory, arguing for substantive constitutional outcomes. The now universally accepted understanding of burdens of proof and presumptions provides the platform for the present research agenda dominating the field of evidence, which is focusing on the nature of proof. Here Gaskins's analysis is incomplete, although not erroneous. He focuses on the relationship between burdens of proof and presumptions on the one hand and what he calls the argument from ignorance on the other.<sup>19</sup> He is right that such a relationship exists, but he is wrong to suggest that it covers the field. We have come to realize over the last twenty years that legal disputes can be afflicted with both too little and too much information. Presumptions and burdens of proof are the means by which both conditions are accommodated.

Gaskins is correct that burdens of proof can be outcome-determinative in the face of ignorance, although again his analysis suffers from its lack of familiarity with the scholarship on this topic. For example, he does not seem to recognize that allocation of burdens of production probably will affect outcomes as much as, perhaps more than, allocations of burdens of persuasion. This counterintuitive result is upon reflection rather obvious. Shifts of burdens of persuasion will affect outcomes only in the condition of equipoise (depending, of course upon how the instructions are understood<sup>20</sup>). For example, only if a fact finder thinks in a civil case that the probability of liability is .5 will allocation of the burden of persuasion affect the outcome. By contrast, allocation of burdens of production will affect the outcome in every case in which neither party has access to good evidence. If neither party

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18. *See supra* note 2.

19. GASKINS, *supra* note 1, at 1 *et seq.*

20. *See, e.g.,* Rita J. Simon & Linda Mahan, *Quantifying Burdens of Proof: A View From the Bench, the Jury, and the Classroom*, 5 *LAW & SOC. REV.* 319 (1971).

has access to good evidence, whoever has the burden of production will lose. Note further that in such a case, it is not true that allocating the burden of persuasion will make a difference. Assume that party A has the burden of production and persuasion on some fact X, and that neither party has any evidence relevant to that fact. If the burden of persuasion on fact X is shifted to party B, party A still has the burden of production. But party A has no evidence of X. Consequently, party A cannot meet its burden of production and will lose, even though party B could not possibly meet its burden of persuasion.

Perhaps Gaskins does not recognize these subtleties because he was looking for evidence for his ideologically informed thesis, and as a result failed to appreciate the wonderful pragmatism of this aspect of the law. That pragmatism must reach beyond the concerns of limited knowledge, however, for we often face the problem of too much knowledge rather than too little. The single most shocking passage in Gaskins's book to a person like me relates, although unintentionally, to just this point. He writes:

The traditional process for determining underlying facts in legal disputes emphasizes the immediacy and autonomy of the evidence to be inscribed on the blank tablets of jury or judge. It essentially ignores the more likely possibility that evidence in all forms passes through special cognitive filters, which are easily colored by social, psychological, or dogmatic predispositions.<sup>21</sup>

Ever since evidence emerged as a discipline, its very point has been to administer the problems that result from the interaction of data with the background and experience of the decision maker. But the problems press deeper than Gaskins appears to realize. It is not "more likely . . . that evidence in all forms passes through special cognitive features," it is absolutely essential that it does so. Suppose that it did not; suppose that evidence is "inscribed on the blank tablets" of the fact-finder. After the inscription was completed, what would we have? Rather obviously blank tablets with meaningless marks upon them. Evidence cannot announce its own implications; implications of evidence can only emerge from the application of some form of reasoning.<sup>22</sup>

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21. GASKINS, *supra* note 1, at 23.

22. For a brief but to the point discussion (indeed the discussion is barely longer than the title), see Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence Debate," the Meaning of "Evidence," and the Requirement of Proof Beyond Reasonable Doubt*, 65 TUL. L. REV. 1093 (1991).

Human reasoning in part is a product of one's experience, from which it follows that "cognitive filters" are hardly "special" but instead always crucial. The argument that began thirty years ago, and began to dominate the field of evidence ten years ago, is over the nature of those cognitive filters, how they are employed, and how they should be employed. Once one recognizes that evidence is less what is produced at trial and more the interaction of what is produced with the background and experience of the fact finder, one immediately sees that the problem can be just as much complexity as ignorance. The concern is not just with some limited data set, but with the virtually infinite data sets represented by the human decision makers, and now things get interesting. Precisely why they do and what the present thinking about these matters is requires a brief explanation of the scholarly development of these problems.

The problem of complexity was always intuited in that the object of the law of evidence was always to facilitate the introduction of relevant evidence and retard the introduction of prejudicial evidence. Burdens of proof entered the complexity picture over a decade ago when it was discovered that the conventional understanding of the burden of persuasion could not possibly be right.<sup>23</sup> The conventional understanding of the burden of persuasion is that it applies to each element, and its purpose, as I mentioned above, is to allocate errors consistently with our sense of the relevant utilities. In civil cases we want to allocate errors equally over plaintiffs and defendants, and thus assign the burden of persuasion as a preponderance of the evidence. However, if a cause of action has two stochastically independent elements and each is proven to a .6 probability, what is the probability that they are both true? The answer is their multiple, .36. But that means that the probability of at least one not being true is  $1 - .36 = .64$ . If we return a verdict for the plaintiff, there is almost a two-thirds chance that we have made an error. Relaxing the assumption of stochastic independence merely reduces this effect, and increasing the number of elements exacerbates it.

It turns out that there are many other paradoxes of proof.<sup>24</sup> They collectively captured the imagination of the field of evidence, which generated in turn many more puzzles. For exam-

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23. See Allen, *supra* note 13; L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* (1977)

24. See COHEN, *supra* note 23; Allen, *supra* note 13.

ple, how exactly does one integrate the trial data, the "evidence," with one's prior beliefs? This question stimulated an exploration of Bayes' Theorem, which uncovered yet another complexity problem. Bayes' Theorem was the best available explanation of reasoning under the conditions at trial, but it imposes impossible computational demands. To use Bayes' Theorem requires that one compute the conditional relationships among the pieces of evidence offered to prove some proposition, which results in a combinatorial explosion. Suppose there are only ten pieces of evidence offered as relevant to some proposition. To apply Bayes' Theorem to appraise the probability of that proposition being true requires a thousand computations. In the understated language of Gilbert Harman, "To be prepared for twenty evidence propositions, one must record a million probabilities. For thirty evidence propositions, a billion probabilities are needed, and so forth."<sup>25</sup> And so forth.

Then another problem was recognized. What exactly does it mean to find some fact to, say, a .6 probability? This cannot refer simply to a subjective probability. Rather obviously, the question at trial is what happened, rather than the subjective state of mind of the decision maker. Similarly, rarely could it refer to a relative frequency or a propensity, for the simple fact that rarely does any relative frequency or propensity data exist. A new conceptualization of factual ambiguity was needed for various reasons, and attention turned to the concept of stories. Rather than parties having to prove discrete elements to a specified burden, perhaps their obligation is to prove fully integrated stories.<sup>26</sup> Here the difficulty was soon recognized to be the lack of any concept of an insufficient case.<sup>27</sup> Suppose a plaintiff has to establish its story of liability. When exactly is that accomplished? To answer by saying that the plaintiff must establish its story by a preponderance of the evidence is merely to reinvolve the old problems. The next to last step in this development was then taken, which was to recognize the comparative nature of juridical proof. In civil trials, both parties tell stories, one side of liability and the other of nonliabil-

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25. GILBERT HARMAN, *CHANGE IN VIEW: PRINCIPLES OF REASONING* 26 (1989).

26. This insight was stimulated by the excellent work of Pennington and Hastie, which is summarized in Nancy Pennington & Reid Hastie, *A Cognitive Theory of Jury Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 513 (1991).

27. This was the crucial limitation of Pennington and Hastie, *id.*

ity, and a "preponderance of evidence" simply refers to which is more plausible.<sup>28</sup>

But, the objection was interposed, there is never a single story of liability; there are always an infinite number of stories of liability and nonliability.<sup>29</sup> This led to the latest step in this development, which is the recognition that parties are as much, indeed much more, ambiguity discards as ambiguity generators. Sometimes ignorance in the sense that Gaskins means it is the problem at trial, but much more typically the intractable complexity of the human condition is. That unruly enterprise is made manageable by the discarding of ambiguity by the parties, with the resultant reduction of any particular litigation to a narrow band of ambiguity over which decision normally will be made.<sup>30</sup>

This brief and simplified description of our present understanding of burdens of proof, presumptions, and more generally the nature of juridical ambiguity, is simply designed to indicate how much richer the actual accommodation of ambiguity is in the legal system than Gaskins accounts for. I have left out many interesting and subtle developments. For example, we have come to realize that "uncertainty," which might be a synonym for "ignorance," means many different things. Compare two cases. In the first, you know that an urn has 60 black balls and 30 red balls in it. Yesterday one ball was drawn at random, and the question is what color that ball is. In the second, you know that two days ago three balls were drawn from an urn containing 90 balls, two were black and one was red. Yesterday one ball was drawn at random, and the question again is what color that ball is. Are these the same case from the juridical point of view? Perhaps yes, and perhaps no, but clearly they are different. The first is a case of uncertainty and the second of ambiguity.<sup>31</sup>

But do any of these things I have written about apply to constitutional litigation, which is the focus of Gaskins's account? If not, then constitutional litigation is a special case of the judicial system rather than representative of it, and Gaskins's argument then cannot be that aspects of the judicial system are informative about debates in other areas. He would have to make the much

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28. See Allen, *supra* note 13.

29. Richard D. Friedman, *Infinite Strands, Infinitesimally Thin: Storytelling, Bayesianism, Hearsay, and Other Evidence*, 14 CARDOZO L. REV. 70 (1992).

30. See Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 Nw. U. L. REV. 604 (1993).

31. See *id.*

different claim that the peculiarities of constitutional litigation are somehow informative. That may be right, but I should note that constitutional litigation is also dominated by conditions of uncertainty, again whether from too much or too little information, and I am of the view that the analysis of factual ambiguity applies to constitutional litigation.<sup>32</sup> Indeed, given the practically unamendable nature of constitutional litigation, I would insist even more strongly that constitutional courts in large measure constrict their decision to the questions and answers propounded by the parties.<sup>33</sup>

Suppose we did not wish to constrain a constitutional court to the sense of the case possessed by the parties. Perhaps we would decline to do so because we believe that the court's obligation is to get the right answer to constitutional cases. This is surely a laudable goal, but is it achievable? Let me add one more finding of complexity theory for consideration. In order for a court to get correct decisions, it would have to get consistent decisions. Consistency may not guarantee correctness, but inconsistency will guarantee error. Suppose that prior Supreme Court cases are collapsed to single propositions, even though obviously that would oversimplify them all. Suppose further in the next case that comes along that the justices want to check the consistency of various possible results with the Court's prior decisions:

How large a belief set could an ideal computer check for consistency in this way? Suppose that each line of the truth table for the conjunction of all these beliefs could be checked in the time a light ray takes to traverse the diameter of a proton . . . and suppose that the computer was permitted to run for twenty billion years, the estimated time from the "big-bang" dawn of the universe to the present. A belief system containing only 138 logically independent propositions would overwhelm the time resources of this supermachine.<sup>34</sup>

We thus see that even the simpler realm of legal decision (simpler than factual decision) contains too much complexity to be dealt with through formalisms. Juridical ambiguity generally, whether of its legal or factual variety, requires other means of reaching decision than the admonition to get correct results. As with factual ambiguity, the legal system handles legal ambiguity

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32. Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 Nw. U. L. Rev. 436 (1993).

33. For an elaboration, see *id.*

34. CHRISTOPHER CHERNIAK, *MINIMAL RATIONALITY* 93 (1986).

by assigning the largest role to the parties, and for the same reasons. The parties know their dispute better than anyone else. If a decision in any particular case fails to take into account a factor that will detrimentally affect some uninvolved third party, that person may press the point in subsequent litigation. Thus it was, and thus it is, that courts decide, and should decide, only the case before them. There is too much ambiguity for any other principle.

None of this is to say that courts, including constitutional courts, never realize that placing a burden of proof on a party can be outcome-determinative, especially when the same court gets to decide whether adequate evidence of the relevant proposition has been adduced. Of course courts realize this, and sometimes they act on it, and perhaps the Warren Court was particularly guilty of the practice (as Gaskings implies<sup>35</sup>). If so, it is a reflection of that Court's difficulty in distinguishing where the law stopped and its will began. The implications of that difficulty may have been expressed from time to time in terms of presumptions and burdens of proof, but those words were merely the incidental instrument of the Court's will, and they were by no means the only instruments. The interesting question here, or so it seems to me, has little to do with presumptions and burdens of proof; the interesting question instead has to do with the conditions that give rise to courts that apparently feel only marginally constrained by the rule of law.

Does any of this bear on Gaskins's larger task? As I said at the beginning of this brief essay, that is for others to judge. I have only one brief comment, which may suggest that a full understanding of juridical ambiguity may lead in a different direction from that which Gaskins pursues. At the end of his book, he offers what for me was a quite interesting attempt to bridge the gap between Hegel and Kant. He laments here the overuse of "polarized arguments"<sup>36</sup> and expresses the hope that "dialectical reasoning offers everyone a less divisive accommodation with arguments-from-ignorance."<sup>37</sup> Whatever the prospects for this development in nonlegal realms, if the story I am telling is true, there is no hope for it within the law. Adversarial presentation is the only hope for accuracy within the legal system. This conclu-

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35. GASKINS, *supra* note 1, at 50-74.

36. *Id.* at 240.

37. *Id.*

sion reached through the arguments adumbrated above is intuitively obvious as well. The parties know the nature of their dispute better than anyone else. Any other system than a party-oriented one would have to replicate that knowledge somehow. Doing so completely is impossible—one always knows more than one can relate—and adequately approximating the task would be enormously expensive, if not impossible. And in addition to replicating the data, the judgment necessary to decide what aspects of the dispute are the crucial ones must also be recreated. So long as private interests are integral to judicial decisions, adversarialness will be with us.