

EVIDENTIARY PROBLEMS IN—AND SOLUTIONS FOR—THE UNIFORM COMMERCIAL CODE

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The Uniform Commercial Code does not offer a systematic approach to the rules governing the evidentiary relationships of parties to commercial litigation. In this article, Professors Allen and Hillman present a general analytical approach to proof rules, highlight the shortcomings of the Code's evidentiary provisions, and discuss the inevitable confusion in the case law construing the Code. They propose an amendment to the Code designed to clarify and improve the Code approach.

Codification of the common law serves the primary values of coherency, clarity, and, perhaps most important of all, consistency in the treatment of litigants. The Uniform Commercial Code¹ has been at least moderately successful if judged by these values.² Despite its shortcomings,³ the UCC has effectively contributed to the clarity and consistency of commercial dealings in the United States.⁴ Indeed, a number of the Code's weaknesses result in large part from the drafters' understandable lack of prescience.⁵ One of the most evident, and now essentially unnecessary, examples of this problem is the proof rules that

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1. Hereinafter referred to as "UCC" or "Code."

2. There is some difference of opinion on the extent of the Code's success. See, e.g., J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 20-21 (2d ed. 1980).

3. See, e.g., Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C.L. REV. 335 (1981); Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

4. "If one puts himself in the position of a lawyer who is attempting to resolve a commercial law problem for a client in 1938 on the one hand and in 1978 on the other, would anyone doubt that the lawyer in 1978 would find the law more uniform, more certain, more precise, and more sensible?" J. WHITE & R. SUMMERS, *supra* note 2, at 21.

5. For example, electronic fund transfers may render much of Articles 3 and 4 obsolete.

govern litigation under the UCC.⁶ The UCC approach to the rules governing proof of facts at trial is remarkably casual, indeed almost haphazard. There are no general provisions constructing the evidentiary relationships of the parties, and the UCC's specific rules are insufficient to provide guidance on a host of significant and recurring problems. Predictably, the result has been that the goals of consistency and clarity in commercial law have not been achieved in the important area of evidentiary proof rules. This situation is now, however, amenable to change. Recent scholarship has illuminated the process-of-proof area and has made it possible to construct a straightforward and not unduly complex provision that would bring clarity and consistency to the UCC proof rules. This article proposes such a provision.

The article begins with a brief discussion of the appropriate analytical framework of proof rules,⁷ and then addresses the UCC's shortcomings in this regard.⁸ The article then presents a proposed addition to the UCC that would remedy these shortcomings and improve courts' treatment of burdens of proof in commercial cases.⁹ Finally, to demonstrate the proposal's utility, the article rigorously applies the proposal to one significant problem within Article 2 of the Code.¹⁰

I. THE ANALYTICAL FRAMEWORK

When the UCC was being drafted, a number of the rules governing proof of facts at trial were well understood. Explicit allocations of burdens of production and persuasion were unambiguous and the basic nature of judicial comment on the evidence was adequately perceived.¹¹ Other rules, however, were plagued by considerable confusion. For example, the nature of instructions on inferences and presumptions was ambiguous. It was not clear whether an instruction on an inference was like a comment on the evidence or whether it

6. For discussions of other evidentiary issues relevant to the UCC, see Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law with Those of Article Three of the Proposed Commercial Code*, 49 NW. U.L. REV. 417 (1954); Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three*, 65 MICH. L. REV. 1441 (1967); Note, *The Law of Evidence in the Uniform Commercial Code*, 1 GA. L. REV. 44 (1966).

7. See *infra* Section I.

8. See *infra* Section II.

9. See *infra* Section III.

10. See *infra* Section IV.

11. A contemporary debate is emerging as to the nature and appropriate contours of judicial comment on the evidence. Compare Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1582-87 (1981) with Allen, *More on Constitutional Process-of-Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1795, 1803-06 (1981).

should be analyzed from a different perspective.¹² Instructions on presumptions were even more troublesome. Legal scholars of that era spent endless hours and spilled untold amounts of ink attempting to isolate precisely what constitutes a presumption.¹³ Is a presumption like a bat fleeing the sun,¹⁴ or a bubble that bursts upon the happening of some poorly defined event,¹⁵ or does a presumption have a "stronger" effect than those colorful metaphors implied?¹⁶ Scholars also speculated that instructions on presumptions might be similar to instructions on inferences,¹⁷ differing perchance in some ill-perceived and mysterious way.¹⁸

Given these and other¹⁹ ambiguities, it is not surprising that the Code drafters largely ignored the proof rules and chose only to provide definitions of the word "presumption"²⁰ and the phrase "burden of establishing."²¹ Now that many of these ambiguities have been resolved, however, the UCC drafters' original choice may no longer be as cogent.

The evidentiary relationships of the parties to litigation emerge out of three issues:²² a party can be required to plead a matter, to bear a particular burden of persuasion, and the judge may attempt to influence the jury's deliberations by commenting on the implications of the evidence. The pleading requirement is fully understood today.²³ Thus, of these issues, only allocations of burdens of persuasion and judicial comments on the evidence require discussion. We will discuss these briefly to demonstrate their comprehensiveness and to lay a foundation for our proposed addition to the UCC.

12. See, e.g., McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 186-90 (1938). It was also unclear precisely what that different perspective would be.

13. The literature is vast. For a representative sample covering virtually all aspects, consult the sources cited in Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981).

14. *Mackowik v. Kansas City, St. J. & C.B. R.R.*, 196 Mo. 550, 571, 94 S.W. 256, 262 (1906).

15. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 821 (E. Cleary 2d ed. 1972).

16. See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 77-81 (1933).

17. McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291, 300-01 (1927).

18. See *infra* notes 34-40 and accompanying text (discussion of presumptions).

19. See generally Allen, *supra* note 13.

20. U.C.C. § 1-201(31) (1978).

21. U.C.C. § 1-201(8) (1978). The problem is not peculiar to the UCC. The drafters of the Federal Rules of Evidence did not do any better. See 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).

22. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 327-38 (1980).

23. See, e.g., C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* §§ 1181-1397 (1969).

That parties to litigation bear burdens of persuasion on various material issues is presently well known and widely accepted.²⁴ What is more problematic is the standard of proof that a party bearing a burden of persuasion must satisfy. In civil litigation, that standard is normally a preponderance of the evidence, but occasionally courts impose higher²⁵ or lower²⁶ standards. A comprehensive treatment of proof rules must define the appropriate standard.

Similarly, proof rules should either indicate who has the burden of persuasion, or at least provide a means of rationally answering that question. In the United States, plaintiffs and moving parties normally bear the burden of persuasion on all necessary issues. A major departure from that norm, however, is the affirmative defense.²⁷ A set of comprehensive proof rules, constructed to provide clarity and encourage consistency, should articulate both the rule and its exceptions.

Parties are also said to bear burdens of production independently of burdens of persuasion, as though each were a separate entity in need of regulation.²⁸ In a pragmatic sense, separate analysis of these burdens is sometimes warranted. The party with the burden of production must adduce sufficient evidence on an issue to raise a jury question, or, in other words, to avoid a directed verdict.²⁹ But a directed verdict is avoided when the trier of fact could find for either party. Thus, as Professor McNaughton accurately notes,³⁰ burdens of production are functions of, and are derived from, burdens of persuasion. Nonetheless, it is occasionally useful to allocate a burden of production to one party and the underlying burden of persuasion to another.³¹ Accordingly, a complete set of proof rules should indicate when, if ever, a separation between a burden of production and the underlying burden

24. See, e.g., C. McCORMICK, *supra* note 15, at 783-85, 793-96.

25. See *id.* at 796-98.

26. See *Schechter v. Klanfer*, 28 N.Y.2d 228, 233, 269 N.E.2d 812, 815, 321 N.Y.S.2d 99, 103 (1971).

27. See FED. R. CIV. P. 8(c); Allen, *supra* note 21, at 898-99.

28. See James, *Burdens of Proof*, 47 VA. L. REV. 51, 55-58 (1961).

29. If there is not a jury question, the judge will dispose of the issue by a partial directed verdict; thus the two phrases are in large measure functionally identical.

30. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1390 (1955).

31. Allocation of burdens to separate parties has more to commend it in criminal cases than in civil cases. As discussed *infra* at note 82, most of the reasons for manipulating burdens of production in civil cases are either unconvincing or can be satisfied in other ways. In criminal cases, however, constitutional constraints permit less judicial control of the proof process, thus making allocations of burdens of production, which is allowed in some circumstances, more appealing. For example, there is generally limited discovery in criminal cases. To compensate in part for this, burdens of producing evidence of defenses may be allocated to defendants.

of persuasion should occur, and should specify the level of persuasion needed to meet a burden of production.

In addition to rules of pleading and assignments of burdens of persuasion, the third general method of affecting the proof process is through judicial comment on the evidence. The trial judge presumably can influence jury deliberations by explaining to the jury his perceptions of the evidence.³² If the judge exercises this power he can, in turn, influence the parties' presentation of evidence. If, for example, a party knows that the judge will inform the jury that evidence A is not highly probative of issue B, then the party will likely introduce additional evidence or argument to demonstrate that A is more probative of B in this case than in the normal case. Thus, a thorough set of proof rules should indicate whether, and to what extent, trial judges will be permitted to comment on the evidence.³³

Occasionally, trial judges also inject themselves into the fact finding process by instructing juries on inferences and presumptions. Properly understood, however, such instructions involve the application of one of the evidentiary devices previously discussed. For example, the debate over whether the "bursting bubble" theory is the "correct" model of presumptions or whether presumptions have "a greater effect," is simply an argument over whether a burden of production should be allocated to a certain party—as the "bursting bubble" theory does—or whether a burden of persuasion should be allocated instead—thus giving a presumption "a greater effect."³⁴

Other instructions on presumptions and inferences are only obscure and obfuscating comments on the evidence. These instructions come in many forms, but can be reduced to a limited number of generic types that vary primarily in their ability to confuse. A judge employing these instructions tells the jury that: 1) "from evidence A, you may infer, or presume, B," 2) "if you find A to be true, the law presumes, or permits a presumption of, B, but the burden of persuasion on B does not shift," or 3) "if you find A, that gives rise to a presumption of B that

32. This is an empirical question, to be sure.

33. Commercial litigation seems an especially appropriate place for judicial comment, as we discuss *infra* at note 93 and accompanying text.

34. Allen, *supra* note 13, at 849-53, 860-62. For example, assume a buyer seeks to avoid a price modification of a contract with a seller on the basis of duress, and because of the material nature of the price increase, the court raises a presumption of coercion. Under the "bursting bubble" theory the presumption would disappear if the seller introduces evidence sufficient to sustain a finding that there was no duress. In other words, the effect of the presumption would be to allocate the burden of production on the issue of duress to the seller. But a presumption with "a greater effect" would shift the burden of persuasion to the seller to show the absence of coercion so that if the evidence was in equipoise, the buyer's contention of duress would be sustained. See also *infra* Section IV.

is to be weighed as evidence of B.”³⁵ If taken literally, these instructions are either gibberish or seriously misleading. For example, by stating that something is “evidence” of some proposition when in fact it is not, such instructions allow the jury to react in any way it chooses.³⁶ But, of course, these instructions are not to be taken literally. Jurors are not supposed to puzzle over the mysticism of how “presumptions” transform into “evidence”; instead, they are supposed to understand that, if A is true, B is also likely to be true. Similarly, each of the other forms of inference and presumption instructions is designed to encourage the jury to find that B is true if it finds that A is true. In this context, however, “encouragement” means:

that the judge has indicated to the jury, with the hope of influencing it, the legislature’s or his own perception of the relationship between the facts proven at trial and the existence of the presumed fact. The judge might do this when he feared that the jury might fail to perceive or appreciate the relationship, and thus would be likely to reach what the judge thinks to be an erroneous result. Consequently, the instruction would be designed to guide a decisionmaker who did not perceive the relationship towards the same understanding as one who did. The effect of these instructions, then, is to modify the jury’s inferential process by enhancing the impact of fact A. That effect is functionally indistinguishable from the effect of a judicial comment on the strength of the evidence.³⁷

Unlike comment on the evidence, however, these instructions fail to provide the jury with any basis for rationally determining the extent to which it should be influenced by the judge’s “encouragement.” Explicit comment on the evidence aids the jury by informing its members of the possible relationships among the facts, while inference and presumption instructions merely direct the jury’s attention, without elaboration, to a permissible outcome. The jury is told that it “may” draw an inference, but it is given no reason for or against doing so.

Although instructions on presumptions and inferences promote an irrational decisionmaking process,³⁸ they do have one advantage: they permit the jury to be “encouraged” to a particular result while prohibiting the judge from expressing his personal views. Indeed, it was probably for that reason that such instructions arose. Reducing the judge’s personal input restricts the most problematic component of comment on the evidence—the personal, idiosyncratic views of a perceived

35. Allen, *supra* note 22, at 332-33.

36. *Id.* at 332-38.

37. *Id.* at 335 (footnote omitted).

38. *See id.* at 335-36.

elite³⁹—while allowing the jury some guidance.⁴⁰ Therefore, whether the positive effects of such instructions outweigh their potential for arbitrariness and irrationality, and whether there is a more desirable solution, are issues that must be considered in the context of a set of comprehensive proof rules for the UCC.

In summary, then, a comprehensive set of proof rules would establish who must bear the burden of pleading, of persuasion, and of producing evidence, and would define the appropriate contours of judicial comment on the evidence. Unfortunately, the very little the UCC does accomplish in this regard is often obscured by either the official commentary, which often seems to contradict the statutory language, or the apparently inconsistent usage of terms and phrases in the Code itself. These shortcomings of the UCC result in less than ideal Code interpretation, and highlight the need for a clarifying provision.

II. THE UCC'S PROOF RULES AND THEIR SHORTCOMINGS

The Uniform Commercial Code contains two general evidentiary provisions. Section 1-201(8) defines "burden of establishing" as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." Section 1-201(31) defines "presumption" or "presumed" to mean "that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence." Looking beyond the Code's choice of language, these two sections are analytically quite simple. Section 1-201(8) refers to the allocation of a burden of persuasion, and section 1-201(31) to the allocation of a burden of production. Indeed, had the Code drafters stopped at this point, the Code's approach to proof problems, if liberally interpreted, would have been nearly adequate. The Code could have been interpreted to place on plaintiffs and moving parties the burdens of production and persuasion on all issues—the normal rule—unless it specifically allocated one or the other burden by using the terminology of either section 1-201(8) or 1-201(31). Trial judges could then have determined pleading requirements and the scope of their authority to comment on the evidence by referring to their jurisdiction's procedural law. This approach would have sharply reduced the inconsistency among states on these issues. Unfortunately, the Code drafters confused matters by ignoring these definitions in favor of undefined terms.

39. Wright, *The Invasion of the Jury: Temperature of the War*, 27 TEMP. L.Q. 137, 137-39 (1953).

40. Allen, *supra* note 22, at 335-36.

For example, section 4-201 provides that for a certain time period, "unless a contrary intent clearly appears,"⁴¹ a collecting bank is the agent of the owner of any item, and any settlement given for the item is provisional. This section apparently provides that a person wishing to rely on "a contrary intent" would have to satisfy a burden of persuasion higher than a preponderance of the evidence.⁴² But, if this is what the drafters had in mind, why did they not use the phrase "burden of establishing," modified to reflect the higher level of persuasion? Moreover, if section 4-201 is designed to allocate a burden of *persuasion*, why does the commentary describe it as creating a presumption,⁴³ when that term has been defined to mean the allocation of a burden of *production*? Why did the drafters not rely on their own statutory language?⁴⁴

The Code fails to use defined terms in favor of undefined terms at other places as well. For example, the UCC uses the phrase "prima facie" and the participle "shown"⁴⁵ but does not define them.⁴⁶ According to normal canons of statutory construction, these terms should mean something other than "burden of establishing" or "presume" because the code defines those words. Nonetheless, it is difficult to see what other meanings "prima facie" or "shown" would have since, as we have demonstrated, there are no other pertinent evidentiary issues apart from allocations of burdens of persuasion or production. Moreover, because the Code uses and discusses "prima facie" at various places as an allocation of a burden of production,⁴⁷ as an allocation of a burden of persuasion,⁴⁸ and as a condition to the admissibility of evidence,⁴⁹ the defined phrase to which these undefined terms refer is

41. U.C.C. § 4-201 (1978). For a related discussion, see Bigham, *Presumptions, Burden of Proof and the Uniform Commercial Code*, 21 VAND. L. REV. 177 (1968).

42. How high is not specified beyond the word "clearly." But this interpretation appears to be consistent with some of the official commentary. See, e.g., U.C.C. § 4-201 comment 2 (1978).

43. *Id.* Other commentary is equally confusing. See, e.g., U.C.C. § 2-313 comment 6 (1978) (presumption not particularly strong).

44. For other examples, see, e.g., U.C.C. §§ 2-206(1), 2-401(2) (1978).

45. U.C.C. § 3-307(3) ("after it is shown that a defense exists").

46. See, e.g., U.C.C. §§ 1-202, 2-719(3), 4-103(3), 4-201 comment 3 (1978).

47. See, e.g., U.C.C. § 1-202 (1978): "A document in due form . . . authorized or required by the contract to be issued by a third party shall be prima facie evidence of . . . the facts stated in the document by the third party." This appears to allocate a burden of production to a party contesting those facts, although the official comments are unclear. See also U.C.C. § 2-719(3) (1978).

48. See, e.g., U.C.C. § 4-103(3) & commentary (1978) (Comment 4 states: "The *prima facie* rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair.").

49. See U.C.C. § 1-202 (1978): "A document in due form . . . shall be prima facie evidence of its own authenticity and genuineness."

unclear. The result, of course, is that the Code and its commentary create confusion and ambiguity.

Even if the drafters had avoided using undefined terms, ambiguity sufficient to warrant a clarifying provision can be found in the Code's omissions. Although sections 1-201(8) and 1-201(31) set forth the burdens of production and persuasion, there is no provision describing how these should be allocated. Moreover, the Code neither provides a general pleading rule nor any guidance as to the conditions under which judicial comment on the evidence is appropriate. In light of these shortcomings, it is not surprising that the cases interpreting the proof rules of the UCC have been unable to advance the Code's goal "to make uniform the law among the various jurisdictions."⁵⁰ The following examples illustrate the Code's failures in this area.

Section 3-307(1) provides a specific pleading requirement concerning the validity of signatures.⁵¹ The section has been interpreted to require anything from a sworn plea, to a specific denial, to a plea that makes it clear what the defense is.⁵² In a matter as mundane as pleading requirements, there is little sense in not clearly defining each party's obligations. This is especially true where, as here, failure to abide by a mundane but unnecessarily complicated requirement can result in the dismissal of a case.

Section 3-307 also illustrates the Code's problematic use of burdens of production. The proper method of allocating a burden of production under the Code is by creating a "presumption" of the negative of the fact to be proved. For example, by creating a "presumption" of genuineness, section 3-307(1)(b) allocates the burden of producing evidence of the lack of genuineness of a signature to the party asserting lack of genuineness. This "presumption" should require that the signature be considered genuine until sufficient evidence to support a finding to the contrary is adduced. This, of course, is what is meant by a burden of production.

Notwithstanding the analytical simplicity of the concepts, the courts have provided varying views of the strength of the evidence needed to overcome the presumption of genuineness in section 3-307(1)(b). These views range from a requirement to adduce some evi-

50. U.C.C. § 1-102(2)(c) (1978).

51. "Unless specifically denied in the pleadings each signature on an instrument is admitted." U.C.C. § 3-307(1) (1978).

52. Compare *Guardian Bank v. San Jacinto Sav. Ass'n*, 593 S.W.2d 860, 862-63 (Tex. Civ. App. 1980)(requires sworn plea or competent summary judgment evidence) with *Virginia Nat'l Bank v. Holt*, 216 Va. 500, 502, 219 S.E.2d 881, 883 (1975)(requires specific denial) and *General Prods. Co. v. Bezzini*, 33 Conn. Supp. 654, 656, 365 A.2d 843, 845 (1976)(must apprise plaintiff of defense).

dence tending to prove each element of forgery⁵³ to a requirement that the evidence be sufficient to permit a finding of lack of genuineness.⁵⁴ Thus, the current Code provisions spawn a needless lack of consistency by employing the label "presumption" to refer to the rather simple idea of allocating a burden of production.⁵⁵ The alternative is to remove the "presumption" language and to provide directly for the desired procedural effect.⁵⁶

Examples abound of the difficulties resulting from the Code's ambiguous treatment of affirmative defenses. The Code could be interpreted to limit affirmative defenses to those situations where a "burden of establishing" a fact has been explicitly set forth, but that has not occurred. The courts instead have felt free to develop affirmative defenses, and thus to allocate burdens of persuasion, unconstrained by the implied limitation of section 1-201(8). A good example of this dynamic is the area of breach of warranty in Article 2 of the Code.

Article 2 provides detailed provisions concerning warranties,⁵⁷ but it fails to allocate the burden of proof. As a result, courts have structured the evidentiary relationships in varying ways.⁵⁸ For example, some courts have allocated to the buyer the burden of persuasion as to the propriety of his use of warranted goods,⁵⁹ whereas other courts have found that a "charge of improper conduct against the [buyer] is one which must be affirmatively proved."⁶⁰ Another court placed on the seller the burden of persuading the trier of fact that the buyer failed to notify him of a defect as required by section 2-607(3)(a),⁶¹ although most courts have required the buyer to establish that it notified the

53. See *Freeman Check Cashing, Inc. v. State*, 97 Misc. 2d 819, 822, 412 N.Y.S.2d 963, 965 (Ct. Cl. 1979).

54. See *Virginia Nat'l Bank v. Holt*, 216 Va. 500, 503, 219 S.E.2d 881, 883 (1975).

55. It would surprise us, at any rate, if the general confusion surrounding presumptions did not have a substantial impact here as well.

56. See *Allen*, *supra* note 13. It is possible that these cases may also be demonstrating loose use of language. For our purposes, though, we have to take the opinions at face value.

57. See U.C.C. §§ 2-312 to 2-318 (1978).

58. *But see, e.g., Boehm v. Fox*, 473 F.2d 445, 449 (10th Cir. 1973)(court applied normal rule of burdens of proof).

59. See, *e.g., Melcher v. Boesch Motor Co.*, 188 Neb. 522, 525-26, 198 N.W.2d 57, 61 (1972); *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 434, 422 N.Y.S.2d 969, 973 (1979)(buyer must show that he was free of negligence).

60. See, *e.g., Vernon v. Lake Motors*, 26 Utah 2d 269, 273, 488 P.2d 302, 305 (1971); see also *Jordan v. Whiting Corp.*, 396 Mich. 145, 149, 240 N.W.2d 468, 470 (1976)(per curiam (presumption of reasonable care of injured party)).

61. See *Reid v. Eckerd Drugs, Inc.*, 40 N.C. App. 476, 485, 253 S.E.2d 344, 350, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979), *holding repudiated in* *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 133, 273 S.E.2d 681, 683 (1981); see also *Dold v. Sherow*, 220 Kan. 350, 351-52, 552 P.2d 945, 947 (1976)(seller can waive objection of buyer's failure to plead and prove the statutory requirement of notice by failing to raise it at or before pre-trial conference).

seller of the breach.⁶² In none of these cases did the court focus serious attention on the parties' formal position as plaintiffs or defendants. Undoubtedly, the reason for these differing results in warranty cases⁶³ is the Code's failure to specify more carefully the evidentiary relationships of the parties. What is needed is some rational basis for allocating burdens of persuasion.

Yet another manifestation of this problem is the practice of some courts of requiring a very high level of proof to establish certain defenses.⁶⁴ Despite the wisdom of the results in some of these cases, the ad hoc nature of this practice makes it objectionable to the extent that the Code is designed to bring uniformity to the law.

The cases employing the Code's definition of "presumption" reflect the problems wrought by the drafters' decision to employ the "presumption" terminology. First, courts often create presumptions independently of the Code's provisions.⁶⁵ Moreover, after creating or applying a Code provision containing a presumption, a number of courts then proceed to disregard the Code's definition and instead to apply either a lower or a higher standard for rebuttal. This effectively

62. See, e.g., *S.C. Gray, Inc. v. Ford Motor Co.*, 92 Mich. App. 789, 804-05, 286 N.W.2d 34, 40 (1979). In addition, most courts require the buyer to establish the existence of a defect, see, e.g., *Alaska Rent-A-Car, Inc. v. Ford Motor Co.*, 526 P.2d 1136, 1138 (Alaska 1974), but at least one court has held that the buyer need not "pin point [sic] any exact mechanical deficiency," *Armour Elevator Co. v. Wood*, 312 So. 2d 514, 515 (Fla. Dist. Ct. App. 1975), cert. denied, 330 So. 2d 14 (Fla. 1976).

63. The warranty cases are only one set of examples from among a much larger group of cases that manipulate burdens of persuasion. See, e.g., *Barbour v. United States*, 562 F.2d 19, 21-22 (10th Cir. 1977)(no presumption that value of collateral equals secured debt where secured party failed to dispose of collateral in commercially reasonable manner); *Universal C.I.T. Credit Co. v. Rone*, 248 Ark. 665, 669, 453 S.W.2d 37, 39 (1970)("The burden of showing the giving of any notice required should properly devolve upon the secured party . . . because the proof with respect thereto is peculiarly within its knowledge."); *C.O. Funk & Sons v. Sullivan Equip., Inc.*, 89 Ill. 2d 27, 431 N.E.2d 370 (1982)(burden of persuasion apparently placed on that claimant with, in the court's view, the weaker theory of entitlement to proceeds of security interest); *Associates Capital Servs. Corp. v. Riccardi*, 408 A.2d 930, 933-34 (R.I. 1979)(secured party who failed to dispose of collateral in commercially reasonable manner must rebut presumption that the value of the collateral equalled the secured debt).

64. See *Davis v. Buchholz*, 101 Ill. App. 3d 388, 392, 428 N.E.2d 198, 201 (1981)(presumption of consideration given for negotiable instruments rebuttable by evidence of a very clear and cogent nature); *Blackhawk Prod. Credit Ass'n v. Bay*, 69 Ill. App. 3d 239, 245-47, 387 N.E.2d 382, 387 (1979)(same rebuttable by certain and unambiguous evidence); *H. Watson Dev. Co. v. Bank & Trust Co.*, 58 Ill. App. 3d 423, 431-32, 374 N.E.2d 767, 774 (1978)(that a promissory note, absolute on its face, does not reflect a debt owing from the maker to the payee must be shown by evidence of a very clear and cogent nature).

65. See, e.g., *Coyle v. Pan Am. Bank*, 377 So. 2d 213, 216 (Fla. Dist. Ct. App. 1979)("[a] deposit in a bank made in the ordinary course of business is presumed to be a general account."); *Commerce Union Bank v. Davis*, 581 S.W.2d 142, 144 (Tenn. Ct. App. 1979)("Receipt of benefits raises a presumption that a party's purpose is other than mere accommodation.").

turns a burden of production into a bastardized pleading rule,⁶⁶ a burden of persuasion,⁶⁷ an affirmative defense,⁶⁸ or even a burden of persuasion with an abnormally high standard of persuasion.⁶⁹

Judges also involve themselves in the deliberative process of the jury. Through comment on the evidence—presented in its standard forms,⁷⁰ including the use of “presumptions” as “evidence”⁷¹—and through other techniques not employing explicit judicial comment, judges attempt to influence the outcome of cases so that the result is consistent with their appraisals of the evidence. It is not unusual, for example, for judges to use special verdicts in commercial litigation; this procedural strategy has the capacity to influence jury verdicts by guiding the deliberative process.⁷² Moreover, judges also appear quite willing to take questions away from the jury either by deciding relevant facts themselves and consequently declining to instruct on relevant issues⁷³ or by issuing peremptory instructions.⁷⁴ Trial courts may also

66. It is “bastardized” in the sense that a middle ground between a pure pleading requirement and a burden of production is being constructed. *See, e.g., Freeman Check Cashing, Inc. v. State*, 97 Misc. 2d 819, 821, 412 N.Y.S.2d 963, 965 (Ct. Cl. 1979)(presumption is overcome when “some” evidence is introduced, it need not possess any particular degree of substantiality); *McCusker v. Fascione*, 117 R.I. 478, 484-85, 368 A.2d 1220, 1224 (1977)(once defendant denies validity of signature, the presumption of validity vanishes).

67. *See Associates Capital Servs. Corp. v. Riccardi*, 408 A.2d 930, 934 (R.I. 1979).

68. *See Sanders v. Stewart*, 153 Ga. App. 810, 814, 266 S.E.2d 801, 803 (1980); *Commerce Union Bank v. Davis*, 581 S.W.2d 142, 144 (Tenn. Ct. App. 1979)(person opposing presumption must carry burden of proof).

69. *See, e.g., H. Watson Dev. Co. v. Bank & Trust Co.*, 58 Ill. App. 3d 423, 432, 374 N.E.2d 767, 774 (1978)(presumption must be rebutted by evidence of a clear and cogent nature). Indeed, at least one court apparently has converted an explicit allocation of the burden of persuasion in section 1-208 into an allocation of a burden of production. *See Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196, 200 (Ky. 1964)(burden of establishing requires “submission to the jury unless the evidence relating to it is no more than a scintilla, or lacks probative value”). Another court has required the party in whose behalf a presumption was supposed to operate to produce evidence on the issue. *See Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017, 1027 (D. Conn. 1975)(presumption that a model creates an express warranty, nevertheless buyer required to produce expert testimony that variance in goods is sufficient to establish breach).

70. *See, e.g., Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 392 n.11 (5th Cir. 1982)(trial court instructed jury that there was “no credible evidence” on certain issues); *Sanders v. Stewart*, 153 Ga. App. 810, 814, 266 S.E.2d 801, 803 (1980)(acceptable for trial court to instruct that certain facts, “if proved to your satisfaction, would entitle the defendant to actual damages”); *cf. Rollins v. Leibold*, 512 P.2d 937, 943-44 (Alaska 1973)(jury should be instructed on establishment of presumptions in commercial litigation).

71. *Cf. Jordan v. Whiting Corp.*, 396 Mich. 145, 149 n.5, 240 N.W.2d 468, 470 n.5 (1976).

72. *See, e.g., LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 352 (8th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1209 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970).

73. *See, e.g., LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342, 346-47 n.6, 352-53 (8th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982).

74. *See Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 392 n.11, 396 (5th Cir. 1982).

create or employ "presumptions" designed to encourage outcomes consistent with their assessment of probabilities.⁷⁵ And, on occasion, appellate judges also replace a jury's judgment with their own.⁷⁶

Although it is impossible to be certain, our impression is that judges are more willing to interfere with the jury in commercial litigation than in many other kinds of litigation. There may be good reasons for doing so. First, the complexity of commercial litigation certainly makes a judge's desire to facilitate jury decisionmaking understandable. Second, modern judges are typically better attuned than a jury to the requirements of the Code and, perhaps more importantly, to the demands and customary practices of commercial dealings. Finally, the Code itself encourages judicial participation by assigning to the judge such questions of fact as unconscionability,⁷⁷ thereby suggesting that under the UCC judges are considered the more competent fact finders as to certain aspects of commercial litigation.⁷⁸

Regardless of the wisdom of letting judges affect the jury's deliberative process, certain difficulties appear in the examples discussed above. Typically, a judge's exercise of any of these methods of influencing jury deliberations appears to be ad hoc and standardless, and this raises a concern that litigants might be treated inconsistently. Similarly, employing presumptive language in order to encourage a particular result is likely to yield inconsistent results. The motivating factor in such cases is the judge's perception of what constitutes the most probable set of facts deducible from the evidence. The jury, however, will rarely be informed of that; it will be instructed only that, if certain facts are true, it can presume other facts. As a result, different juries will interpret such instructions differently.

The solution to these problems is to eliminate these indirect methods of accomplishing what can be accomplished directly. If it is be-

75. See *supra* note 63; cf. *Haskew v. Bradford*, 370 So. 2d 259, 262 (Ala. 1979); *B & Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 817 (Minn. 1979).

76. See, e.g., *Bryan v. Bartlett*, 435 F.2d 28, 33-34 (8th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

77. See U.C.C. § 2-302 (1978) (unconscionability is to be decided as a matter of law). See generally Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 302*, 67 CORNELL L. REV. 1 (1981). One can call such a determination "a matter of law" if one likes, but all the phrase means here is that the judge, not the jury, is to decide it.

78. Code commentary makes a similar suggestion. UCC section 4-103(3) makes certain actions "prima facie" the exercise of ordinary care. One would think that section 4-103(3) should have something to do with the burden of production, although the matter is not clear, see *supra* notes 45-49 and accompanying text, but according to the Code commentary it "confer[s] on the courts the ultimate power to determine ordinary care in any case where it should appear desirable to do so." U.C.C. § 4-103(3) comment 4. Why that should be the impact of the statutory language is a mystery.

lieved that judges are better fact finders in commercial litigation, we can effectuate that belief through the directed verdict standard. Similarly, if judges are to be encouraged to educate juries concerning the implications of evidence adduced at trial, a rule governing judicial comment on the evidence can define the limits of that educational effort. Our proposal endeavors to make explicit the standards that judges should employ to decide when and how to guide the jury in commercial litigation.

III. A PROPOSED AMENDMENT TO THE CODE

The Uniform Commercial Code addresses only a small portion of the proof rules relevant to litigation. Failing as it does to provide for the entire range, what it does provide is virtually useless. Surprisingly, however, a fairly compact provision can address the range of relevant proof rules. We suggest the following addition to the UCC:

Section 1-210. Rules Governing the Proof of Facts at Trial.

(1) Definitions

(a) A burden of production is a requirement that a party produce sufficient evidence on an issue to avoid a directed verdict on that issue. The phrases "to presume" or "prima facie case," and any derivations thereof, shall be interpreted to refer to a burden of production, unless expressly provided otherwise.

(b) A burden of persuasion is a requirement that a party convince the finder of fact to a previously specified level of certainty of the truth of an issue. The phrases "to establish" or "to show" and any derivations thereof shall be interpreted to refer to a burden of persuasion, unless expressly provided otherwise.

(2) General Provisions

(a) Pleading. Unless expressly provided otherwise, all pleading matters shall be governed by the Rules [or Code] of Civil Procedure.

(b) Burden of Production and Persuasion. Unless expressly provided otherwise or unless the interests of justice clearly require otherwise, plaintiffs and moving parties shall bear the burden of production and persuasion on all contested issues. The justification for any judicial exception must be specifically provided by the trial court and is subject to review on appeal. A question of fact upon which allocation of a burden of production or persuasion is conditioned shall be decided by the court for the purpose of allocating the burden of production or persuasion.

(c) Standard of Persuasion. Unless expressly provided otherwise or unless the interests of justice clearly require otherwise, a burden of persuasion is satisfied if the party bearing it convinces the fact finder that the existence of the fact is more probable than its non-existence, and a burden of production is satisfied if the court determines that a reasonable person could so find. The justification for

any judicial exception must be specifically provided by the trial court and is subject to review on appeal.

(d) *Peremptory Instruction or Ruling.* The trial court may remove an issue from the consideration of the jury if reasonable persons with an understanding of the commercial practices involved would not disagree about the matter.

(e) *Order of Proof.* The trial court may require the presentation of evidence in the order that it determines would best facilitate the trial process.

(f) *Judicial Comment on the Evidence.* After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence or examine the implications of the evidence, or both, for the benefit of the jury. Notice of intended comment shall be provided to counsel, and an opportunity to respond with evidence or argument shall be permitted.

Collectively, these provisions provide for the rational exercise of every power necessary to the structuring of the proof process at trial. To be sure, they also reflect certain value judgments that we reveal below. The advantages of these provisions will be explained in the context of the following discussion of each subsection.

Section 1-210(1)(a) defines "burden of production" as an obligation to produce enough evidence to avoid a directed verdict. If that standard is not met, the issue is decided against the party having the burden. This section also defines the phrases "to presume" and "prima facie case," thereby eliminating ambiguity. The last phrase is an escape clause rendering this section inapplicable when another Code section expressly provides a different meaning.⁷⁹

To illustrate this section's operation, a Code provision setting forth a "presumption" of fact B if fact A is true would simply mean that the party opposing fact B would, once A is established, bear a burden of producing evidence to show that B is not true. Similarly, a section specifying that fact C establishes a prima facie case of fact D would simply mean that, if C is established, the question of the existence of D is for the trier of fact to determine. In this connection, as we state in greater detail below, the last sentence of section 1-210(2)(b) directs the *court* to determine whether fact A or fact C is true, but only for the purpose of determining the allocation of the burden of production.⁸⁰

79. For example, UCC section 1-202 does this by providing for a "presumption" as a means of satisfying authentication requirements.

80. It is also conceivable that other statutes than the UCC would prove relevant to commercial litigation under the UCC. For example, a statute may create a "presumption" of some fact that is relevant to a particular suit arising out of commercial affairs. Moreover, the proof rules we have propounded here are likely to differ from the general proof rules of a state. If so, the conflict could be resolved either by applying the jurisdiction's general proof rules to the particular fact in issue or by applying our proposal to it, notwithstanding general state practice to the contrary in

Section 1-210(1)(b) defines "burden of persuasion" and clearly states that the phrases "to establish" and "to show," and their derivatives, refer to this burden. This section does not define the standard of persuasion, a matter addressed in section 1-210(2)(c), but it does require a standard specified sometime prior to trial. This is to reduce ad hoc manipulation of the burden of persuasion at trial, resulting in greater uniformity among cases, and to ensure that parties will have a clear understanding of their obligations prior to trial.⁸¹

Section 1-210(2)(a) incorporates the pleading rules of a state's rules of civil procedure, unless a Code section expressly provides to the contrary. The reason for this is our view that specialized rules of pleading contribute no particular benefit sufficient to outweigh the costs of consequent increased complexity. Indeed, we view explicit pleading requirements such as section 3-307's specific denial of signatures as creating unnecessary complexity. Because the pre-trial process in civil cases generally provides ample opportunity for both sides to specify the contested issues, our choice is to minimize the uniqueness of commercial litigation by treating it like all other civil actions.

Section 1-210(2)(b) allocates burdens of persuasion and production on all "contested issues" to plaintiffs and moving parties. The section anticipates that the pre-trial process will specify the relevant disputed issues, and then treats the issues uniformly, allowing exceptions only where explicitly provided in the Code and where the courts conclude that the "interests of justice clearly so require." Because the allocation of burdens of production and persuasion can affect the outcome of litigation and the other justifications for manipulating burdens of proof are generally unconvincing,⁸² we think the primary responsi-

the non-UCC context. Our preference is for the latter, but we will not pursue the matter further here.

81. If a burden of persuasion is allocated based on the existence or nonexistence of some other fact, the parties would not know before trial who ultimately will bear the burden. They would know, however, precisely what that determination is to rest on.

82. Allocations of burdens of proof are sometimes based on which party has better access to evidence. It is difficult to see, however, what a shift in a burden of proof will add in this context to discovery devices and sanctions. For example, consider a secured party under Article 9 of the Code who claims priority over another creditor with respect to certain collateral on the theory that the collateral is identifiable proceeds. A court might allocate the evidentiary burdens to that party because of the party's access to bank records, sales receipts, and other evidence concerning whether the security interest is traceable to the proceeds. But modern discovery devices ensure that the competing claimant also has access to that evidence, which suggests that allocation of the burdens should be on other grounds. *See also* Allen, *supra* note 21, at 896-97 (suggesting that if sanctions for failing to abide by discovery regulations are inadequate, shifting the burden of production would be futile).

The suggestion that courts should allocate burdens based on a priori assessments of probability is also generally unsatisfactory. Shifting a burden of production will change outcomes

bility for deviating from the normal rule assigning burdens of proof should lie in the legislature. This appears to be especially cogent in the context of a complex statutory scheme that yields little doubt about the legislative competence to adjust the relative positions of classes of litigants. Indeed, we would be content with the normal rule in all cases, absent a contrary Code section. We suspect, however, that the courts would evade such a rule in compelling situations. Thus, to accommodate reality, our proposal both permits the common law allocation of burdens of proof where the need is compelling, and refers to the legislative power to allocate burdens.

When may a court find that there is a compelling need? A number of possibilities come to mind. Compelling need may be found when public policy interests are at stake—when, for example, parties allege fraud or wrongdoing. Need may also be compelling when the normal allocation of burdens, even in conjunction with comment on the evidence, is inadequate to ensure rational decisionmaking. We explore this possibility in greater detail in Section IV. The requirement that judicial exceptions to normal allocation must be specifically articulated is designed to bolster the limited role for common law allocations. The intent here is not to encourage ad hoc determinations by trial courts; instead, it is to allow general common law exceptions to the normal rule for allocating burdens.

The last sentence of section 1-210(2)(b) makes it clear that judges are to decide facts necessary to allocate burdens of proof. Thus, if a fact is relevant both to the litigation and allocation of a burden of proof, the judge decides it only for the latter purpose. The jury would not be informed of that decision unless the judge comments on the evidence. The jury would still decide, applying the burden of proof given it by the judge,⁸³ whether the fact is true for purposes of resolving the dispute. This eliminates the complex and sometimes unintelligible jury

only where a party has virtually no evidence. In such a case, that party will probably lose in any event. Indeed, the most likely class of cases to be affected by a shift in burdens of production are those where neither side has much evidence. It is only here where it makes sense to shift a burden of production to accord with a priori assessments of probability. Similarly, shifting a burden of persuasion theoretically will only affect this same class of cases, plus those cases where the jury is in equipoise, although admittedly juries may employ burdens of persuasion in ways not anticipated by the evidentiary theory.

Disfavoring claims as a basis of allocating burdens of proof falls prey to similar objections. If courts wish to nudge juries toward the correct outcome, normally the most appropriate means is by comment on the evidence. *But see infra* Section IV.

83. If the preliminary fact determines the allocation of a burden of production, the trial judge would then decide if the burden has been satisfied.

instructions that result from the use of presumptions to allocate burdens of proof.⁸⁴

Section 1-210(2)(c) provides the normal rule that a burden of persuasion is satisfied by a preponderance of the evidence,⁸⁵ and that a burden of production is satisfied if the court determines that reasonable persons could find that a fact has been established by a preponderance of the evidence. As in section 1-210(2)(b), however, the courts are authorized to modify the normal rule if "the interests of justice clearly require." It is worth reiterating that this provision is not intended to give the courts authority to engage in ad hoc manipulation of burdens. It is designed, as is section 1-210(2)(b), to permit common law exceptions, but with a view toward treating litigants consistently. Moreover, the section 1-210(1)(b) requirement of a "previously specified" standard of persuasion is relevant here. Thus, courts may modify the normal standards of persuasion, but they must do so prior to trial.⁸⁶

Section 1-210(2)(d) provides a standard for removing an issue from the jury that appears to increase judicial authority over the proof process. Section 1-210(2)(c) provides the traditional definition of burden of persuasion that does not qualify "reasonable persons." Section 1-210(2)(d), by contrast, allows the court to dispose of a fact "if reasonable persons with an understanding of the commercial practices involved would not disagree about the matter." This allows the court to bring its expertise to bear in commercial litigation, and that, of course, is the reason for the provision.

This suggestion poses some superficial problems. It appears to structure two different standards of proof, one for the determination of facts and one for peremptory rulings. In this context, one might indeed ask what standard is applied in a trial without a jury. The implication of this section is that the court would view such a case from the perspective of a reasonable person cognizant of commercial dealings. In a jury trial, our judicial system is designed to educate the jury about the relevant context. Thus, if the system works as it is designed to, jurors applying the preponderance standard of section 1-210(2)(c) would also

84. See Allen, *supra* note 13, at 867.

A remaining point concerns the first sentence's exception for specific code exemptions. The sources of that authority are existing code allocations, such as in section 2-719(3) and prospective amendments of the UCC, although we do not expect frequent examples of the latter. Section 2-719(3) (1978) provides: "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable." Proposed section 1-210(2)(b) makes it clear that in applying section 2-719(3) the statutory allocation controls, as is also the case in section 1-210(2)(c) of our proposal.

85. *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719, 723 (5th Cir. 1977).

86. There is one other difficulty, however, and that is the present use of ambiguous phrases in the Code, such as the section 4-201 provision "unless a contrary intent clearly appears." This kind of ambiguity requires amending the Code to remove the provision or to specify what is meant.

analyze the facts from the perspective of a person cognizant of commercial affairs.⁸⁷ If the system does not work correctly, section 1-210(2)(d) authorizes the court to intercede. Thus, the *apparent* inconsistency between these two sections is not real, and section 1-210(2)(d) merely views burdens of persuasion as they should be viewed—from the perspective of persons who understand commercial transactions.⁸⁸

Section 1-210(2)(e) merely reflects the normal authority of the court to structure the presentation of evidence in a way that expedites the trial and ensures a comprehensible presentation of evidence.⁸⁹ It is included here only to emphasize that trial judges should participate actively in complex litigation. This section would be superfluous in many jurisdictions.

Section 1-210(f) reiterates the common law power of the trial judge to summarize and comment on the evidence.⁹⁰ In one sense this proposal is the most problematic because a number of states prohibit judicial summary, comment, or both.⁹¹ One significant effect of such prohibitions, however, has been the creation of numerous methods of avoiding them. Courts use presumptions, instructions on inferences, allocations of burdens of proof, and other artifices to nudge juries towards what judges see as the proper results. Our view is that these techniques should not be used to accomplish indirectly what may be done directly. Direct comment on the evidence,⁹² which examines the implications of the evidence for the benefit of the jury, can prevent the arbitrariness and caprice that indirect methods can inject into jury deliberations. Without explicit comment, the trial bench will probably continue to intrude into jury deliberations. Explicit comment on the evidence merely manifests this intrusion in a form more likely to have a rational effect, and in a way that is subject to effective appellate review.

Further encouragement of judicial comment in commercial litigation derives from the judiciary's superior knowledge of commercial affairs. The complexity of commercial litigation, and the expertise of trial judges, make it particularly appropriate for judges to offer their own

87. This, in part, is the impact of instructions that juries must determine if activity is "commercially reasonable." See, e.g., *Universal C.I.T. Credit Co. v. Rone*, 248 Ark. 665, 670-71, 453 S.W.2d 37, 40 (1970).

88. We have chosen not to add to our proposal the analytically related areas of judgments notwithstanding the verdict and judicial notice. Our choice is the pragmatic one that enough is enough for now.

89. See, e.g., FED. R. EVID. 613.

90. See Allen, *supra* note 22, at 351.

91. Wright, *supra* note 39, at 161.

92. Summary is a subset of comment, which is why we discuss only the latter.

reasoned examination of the implications of the evidence for the benefit of the jury.⁹³

We recognize that this proposal rests upon policy and empirical judgments that are open to dispute, and we certainly do not pretend to resolve these matters. Nonetheless, one fact strikes us as crucial. The courts have, on their own and with the approval of the legislature, traditionally exercised substantial control over the process of commercial litigation. We do not think that this is likely to change, and thus we prefer to see it done in a way that minimizes the unfortunate consequences of indirect judicial intervention.⁹⁴ Any comment, however, should be accurate and fair, should explain the implications of the evidence,⁹⁵ and should be given only after the parties are provided notice, and a realistic opportunity to respond.⁹⁶ Beyond that, we commend the matter to the good judgment of the trial bench.

This is our proposal. Although it may be controversial in certain respects, it effectively provides for the rational exercise of the authority necessary to structure the evidentiary relationship of parties to commercial litigation. To be sure, our proposal significantly changes the

93. One caveat is in order here. There is one branch of legal historical scholarship, the best known proponent of which is Morton Horowitz, of the view that "a minority comprised of merchants, industrial entrepreneurs, and lawyers foisted a new legal order on an unwilling—or at least a hoodwinked—general populace." Presser, *"Legal History" or the History of Law: A Primer on Bringing the Law's Past Into the Present*, 35 VAND. L. REV. 849, 859 (1982); see also Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. REV. 700, 721 (1977). To the extent one accepts this position as factually accurate and finds it lamentable as well, one would probably oppose increasing the power of the judiciary to affect jury deliberations.

94. Without explicit approval of judicial comment, courts will undoubtedly continue to instruct juries on "inferences" and "presumptions" without satisfactorily explaining to the jury, in comprehensible language, the meaning of the terms. We do not address special verdict forms in our proposal, and are presently content to leave that issue for another time.

95. A much more complicated provision could be written to specify in greater detail the obligation of the trial judge to be fair to the parties and not to engage in idiosyncractic tirades. See, e.g., Allen, *supra* note 21, at 908, proposing an addition to FED. R. EVID. 301:

Rule 301-2: Comment on the Evidence in Civil Actions and Proceedings

After the close of the evidence and arguments of counsel, the court may accurately sum up the evidence and comment upon the weight of the evidence and the credibility of the witnesses, provided that the court does not intrude upon the prerogative of the jury to determine the weight of the evidence and the credibility of witnesses. The court may examine the logical implications of the evidence for the benefit of the jury, and may provide the jury with the court's opinion as to the significance of the evidence; but the court shall not instruct the jury on an inference without explaining the basis of that inference, nor shall the court employ any presumption as a form of comment. Notice of intended comment shall be provided to counsel, and an opportunity to respond with evidence or argument shall be permitted.

In our proposal here, the phrase "accurately and impartially" is designed to capture the meaning of proposed Rule 301-2, and we think it does. Accordingly, we opted for simplicity, although again perhaps caution would suggest spelling out in greater detail the implications of the proposal.

96. For a more detailed elaboration of these themes, see Allen, *supra* note 22, at 348-54.

present proof rules⁹⁷ and encourages reconsideration of various substantive Code provisions.⁹⁸ It does these things, however, by attempting to strike a balance between encouraging legislative dominance of the area and preserving useful judicial discretion. The remainder of this article applies our model to an important commercial problem to illustrate how it works and that it is needed.

IV. APPLICATION OF THE PROPOSAL TO THE PROBLEM OF COERCION IN CONTRACT MODIFICATIONS UNDER ARTICLE 2 (SALES)

Contracting parties often seek to modify their agreements to reflect changes of circumstances and changes of mind.⁹⁹ Because the rules governing modification enforceability comprise a significant component of the law of sales, and are representative of similar problem areas in Article 2, they will be the focus in the application of our model. First, we offer a brief description of the modification problem, then we will apply the evidentiary model.

A. *The Modification Problem.*

To enable contracting parties to adapt freely to changing circumstances, the Code framers provided for the enforcement of a contract modification without requiring the party seeking enforcement to supply additional consideration.¹⁰⁰ Thus, although the common law pre-existing duty rule rendered unenforceable a buyer's promise to pay \$2500 for goods that the seller had already agreed to sell for \$2000 unless the seller had supplied additional consideration, under the Code a lack of consideration would be no bar to enforceability.¹⁰¹

The drafters correctly realized, however, that a contracting party needs protection from his contracting counterpart's attempts to achieve a favorable modification through coercion. In addition, they realized

97. UCC sections 1-201(8) and (31) would have to be repealed, and much case law would be rejected as well.

98. For example, the requirement of UCC section 3-307 that signatures must be specifically denied is not compatible with our proposal. See also UCC section 4-201 (1978), discussed *supra* at notes 41-44. Such tensions, however, are not necessarily arguments against what is proposed here; rather, they may indicate needed changes in the Code.

99. See Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 681 (1982).

100. See, e.g., 2 WILLISTON ON SALES § 12-2, at 3 (A. Squillante & J. Fonseca 4th ed. 1974). Section 2-209(1) provides that "an agreement modifying a contract within this article needs no consideration to be binding."

101. Comment 1 to UCC section 2-209 explains that the section "seeks" to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."

that a party who has relied on a contract may become especially vulnerable to coercion.¹⁰² For example, a buyer may have limited his future choices by foregoing an opportunity to purchase elsewhere, thereby increasing the likelihood that he will accept a modification if faced with the threat of nonperformance.¹⁰³ The Code approach to preventing such coercion is the obligation of good faith performance.¹⁰⁴ The challenge in this area, then, is to promote enforcement of voluntary modifications while denying enforcement of coerced modifications.¹⁰⁵

The Code approach is problematic because it offers little guidance on the kinds of factors that are relevant to the "good faith" determination. The cases have not provided much help, either.¹⁰⁶ For example, what market factors, if any, should enable the seller in our problem to hold out for additional compensation? How relevant is the availability to the buyer of alternative market choices? In addition, neither the Code nor the cases clearly speak to any aspects of the proof problems present when such a case comes to litigation.¹⁰⁷ Who has the burdens of production and persuasion when the seller sues the buyer for refusing to pay the additional \$500 for the goods or when the buyer sues seeking the return of the \$500? What quantum of evidence is necessary to satisfy these burdens? For that matter, under the Code's present evidentiary framework, what precisely do these burdens mean? What, if any, are the appropriate roles of presumptions and inferences? Finally, may the judge comment on the evidence to the jury?

Recent scholarship on the problems of modification enforceability has identified factors that appear to be probative of the voluntariness of a contract modification.¹⁰⁸ In an approach modeled after the rules of economic duress, it has been suggested that if the party opposing the

102. See, e.g., J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 4-8, at 146-47 (2d ed. 1977).

103. See Hillman, *supra* note 99, at 682.

104. See U.C.C. section 1-203 (1978). Comment 2 to section 2-209(1) states that:

Modifications. . . must meet the test of good faith imposed by this act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith.

U.C.C. § 2-209 comment 2 (1978).

105. Hillman, *supra* note 99, at 681.

106. See generally Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849 (1979).

107. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 145-48 (6th Cir. 1983); *Fratelli Gardino, S.P.A. v. Caribbean Lumber Co.*, 587 F.2d 204, 208-09 (5th Cir. 1979); *Morgan Bros. v. Haskell Corp.*, 24 Wash. App. 773, 781-82, 604 P.2d 1294, 1299 (1979).

108. See Hillman, *A Study of Uniform Commercial Code Methodology: Contract Modification Under Article Two*, 59 N.C.L. REV. 335, 353-56 (1981); Hillman, *supra* note 106, at 880-99.

modification—here, our buyer—had no reasonable alternative but to accept the modification, and if the means employed by the other party—our seller—were unreasonable, then the modification is most likely involuntary. Factors relevant to the issue of reasonable alternatives include market conditions and access to the market.¹⁰⁹ Factors probative of whether the party seeking to enforce the modification used unreasonable means include the manner in which the modification is presented to the other party,¹¹⁰ whether the original contract was unenforceable because of mistake, impracticability or for other reasons, whether the party urging modification could perform without a modification and, if that party could not so perform, the reasonableness of that party's conduct in attempting to avoid his inability to perform.¹¹¹

If we assume that the parties are rational economic actors, the materiality of the modification is another important factor in determining voluntariness. Reasonable persons ordinarily will not forfeit significant contract rights without gaining something of nearly equivalent value in return. The greater the net amount given up by a party, the more suspect the modification.¹¹² Courts may draw the line between material and immaterial net loss modifications by referring to the common-law material breach doctrine. This doctrine discharges an injured party from further performance when, because of breach, that party fails to receive substantially what was bargained for.¹¹³ A material net loss modification, then, is one that prevents a party from receiving substantially what was bargained for under the original contract.¹¹⁴

Of course, contracting parties may not seem to act with economic rationality when one exchange is viewed in isolation. Such an agreement may be only a small part of a much more extensive relationship between the parties.¹¹⁵ In fact, a party may sacrifice gain in the short run to insure greater gain in the future.¹¹⁶ Thus, the materiality of the modification is a significant but not conclusive factor concerning the voluntariness of a modification.

How can these various elements of proof be structured to permit an orderly development of the evidence at trial and to further the sub-

109. On these and other "choice" factors, see Hillman, *supra* note 106, at 890-93.

110. For example, did our seller seek to renegotiate the price term or did it deliver an ultimatum that it would not perform unless the buyer acceded to the seller's demands?

111. For further elaboration, see Hillman, *supra* note 106, at 894-98.

112. *Id.* at 887.

113. See, e.g., RESTATEMENT OF CONTRACTS §§ 274, 275 (1932).

114. Hillman, *supra* note 106, at 887-88.

115. See Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018 (1981).

116. *Id.* at 1047-48.

stantial goals of section 2-209(1)? Comment 2 to section 2-209 apparently suggests that in some cases the burden should be placed on the party urging enforceability of the modification to prove that a modification was made in good faith.¹¹⁷ Beyond this, however, the Code does not go.

One of your authors, employing the Code's present evidentiary approach and traditional terminology, has suggested that a material net-loss modification should raise a presumption that it was a product of duress and is unenforceable.¹¹⁸ The presumption could be rebutted by evidence of alternatives available to the party opposing the modification's enforcement or the propriety of the means by which the proponent achieved the modification.¹¹⁹ This proposal offered at least some guidance to the court on the allocation of the burden of proof. Because of the Code's vagueness and general failure to set forth sufficient guidance on evidentiary issues, however, even this proposal left open the following questions: What standard of persuasion would be required to rebut this presumption of coercion? What would be the presumption's effect once rebuttal evidence is introduced?¹²⁰ Would juries sufficiently appreciate the presumption's nuances so that decisions would be generally consistent with a rational assessment of the probability that a material net-loss modification was the product of coercion? Let us now answer these questions by analyzing the modification problem according to our evidentiary proposal.

B. *Application of the Model.*

Let us assume that our hypothetical buyer seeks to recover the additional \$500 paid to the seller for the sale of the goods. The general rule of proposed section 1-210(2)(b) would allocate the burdens of production and persuasion to the plaintiff-buyer.¹²¹ The burden of production under section 1-210(2)(c) would require the buyer to produce sufficient evidence so that a reasonable person could find that the modification was a product of coercion.¹²² The buyer would thus avoid a directed verdict under section 1-210(1)(a).¹²³ To meet the burden of

117. Good faith "may in some situations require an objectively demonstrable reason for seeking a modification." U.C.C. § 2-209 comment 2 (1978).

118. Hillman, *supra* note 106, at 883-84; *see also* Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 368 (1970).

119. Hillman, *supra* note 106, at 883-84.

120. *See* Bigham, *supra* note 41, at 183.

121. *See supra* notes 82-84 and accompanying text.

122. *See supra* notes 85-86 and accompanying text.

123. *See supra* note 79 and accompanying text.

persuasion, section 1-210(2)(c)¹²⁴ would require the buyer to convince the trier of fact that it is more probable than not that the modification was involuntary.

Section 1-210(2)(b) would provide that the "normal" assignment of burdens of proof could be altered if the applicable section—here, section 2-209—so provided or if the court found that the interests of justice so required.¹²⁵ For the reasons previously stated,¹²⁶ the probability that a material net-loss modification is the product of coercion is sufficiently high that section 2-209(1) probably should be amended to assign the burdens of proof to the modification's proponent in cases involving such modifications. Employing the definitions set forth in section 1-210(1),¹²⁷ the amendment would simply state that "the burdens of production and persuasion that a modification involving a material net-loss to the party opposing its enforcement was not a product of duress are on the party seeking to enforce the modification."

If section 2-209 were so amended, section 1-210(2)(b) and its commentary would allow the judge to decide the materiality issue for the purpose of allocating burdens of proof and the jury would decide whether the modification was material for purposes of determining whether it was the product of coercion.¹²⁸ This dual approach avoids the need for confusing jury instructions regarding the effect on the burdens of proof of a particular finding on the materiality issue. Thus, in our hypothetical, if the court determined that the parties' modification was material, the court would allocate the burdens of proof to the seller and the jury would consider the issue of materiality in deciding whether to enforce the modification.

Even assuming that section 2-209(1) is not amended,¹²⁹ a court could comment on the evidence or, alternatively, assign the burdens according to the materiality approach "if the interests of justice clearly required." Clearly this is an area where that might be the case. In our hypothetical, the goal of rational fact finding requires that the jury appreciate the significance of a material modification for the purpose of determining voluntariness. Conceivably, in light of the evidence adduced at trial, the trial judge might conclude that the jury can adequately address that issue. If, however, the trial judge is uncertain whether the jury can appreciate the implications of a material modifi-

124. See *supra* notes 85-86 and accompanying text.

125. See *supra* notes 82-84 and accompanying text.

126. See *supra* notes 112-14 and accompanying text.

127. See *supra* note 79 and accompanying text.

128. See *supra* notes 83-84 and accompanying text.

129. See *infra* note 134 and accompanying text.

cation, our proposal would allow the judge to comment on the evidence for the benefit of the jury. This would entail the judge presenting a careful, balanced critique and appraisal of the evidence and its implications. It is important to bear in mind, however, that this is to be done to benefit the jury, not to preempt it. Accordingly, the court should strive to make clear both the basis of its comment and the fact that the jury is free to accept or reject it—a difficult, but not impossible task. If, by contrast, the court wishes to preempt the jury, it may do so by applying the directed verdict standard of section 1-210(2)(d).

It is possible, however, that a judge might conclude that, given the kind of case before the court and notwithstanding comment, the jury is still likely to make an error. In other words, the judge may see some factor in this type of case that is likely to lead juries to irrational results. For example, the court might conclude that in light of their unfamiliarity with commercial transactions, no amount of judicial comment will assist the jury in rationally evaluating the implications of what the party opposed to the modification has given up.¹³⁰ If so, the court has two further options short of directing a verdict under section 1-210(2)(d): it may either allocate the burden of persuasion contrary to the normal rule or raise the required standard of persuasion.

Under the normal rule of section 1-210(2)(b) and (c), our hypothetical buyer would have to prove lack of voluntariness by a preponderance of the evidence. If the court concludes that this allocation will lead to too many errors notwithstanding comment on the evidence, it could, under our proposal, impose the burden of persuasion of voluntariness on the seller.

Merely placing the burden of persuasion on the seller, however, might be inadequate. It would only affect those few cases where the jury is near equipoise. Similarly, if the seller is suing the buyer for the \$500, the seller would already bear the burden of persuasion under the normal rule. In either case, the court would have the further option under our proposal of raising the standard of persuasion on the issue of voluntariness to some higher level, such as “clear and convincing evidence.” This should have the effect of increasing the number of jury findings of lack of voluntariness.

130. There are other examples of distrust of the jury in commercial litigation. For example, under UCC section 9-312(5)(a), dealing with priorities between competing secured creditors, knowledge of an earlier competing but unperfected security interest will not defeat the first filer's priority. See U.C.C. § 9-312 comment 5, example 1 (1978). The rule is based on the recognition “that factfinders might, in an unusually high proportion of . . . cases, find knowledge when it did not exist, or find lack thereof when it did exist.” Summers, *General Equitable Principles under § 1-103 of the Uniform Commercial Code*, 72 Nw. U. L. Rev. 906, 938 (1978).

Whatever option the court chooses, our proposal would also require that the court provide an explanation in an opinion. The reason for this should now be clear. The courts should be engaging in these manipulations of burdens only where the need is compelling. Requiring an explanation should limit the departures from the normal rule. Requiring an explanation will also encourage the courts to look beyond the peculiar facts before them, a result that, in turn, should introduce greater uniformity in litigated cases and reduce gratuitous inconsistency among litigants.

To be sure, there would most likely be a third consequence of our proposal — it would probably lead to fewer deviations from the normal rule concerning burdens of proof. When a court feels inclined to deviate, the proposal reinforces the idea that, to do so, it must undertake a very complicated assessment of empirical reality. The rules should not dissuade a court from proceeding when it feels it has a clear case but, by the same token, if the court realizes the appropriate nature of the inquiry, the court probably will proceed cautiously.

Finally as a last resort, a judge could direct a verdict on the materiality issue under proposed section 1-210(2)(d) if “reasonable persons with an adequate understanding of the commercial practices involved would not disagree” that the modification was or was not material.¹³¹ Because the materiality approach is derived from the material breach principle, which itself involves sophisticated analysis, it is important that the judge have the power to employ his or her understanding of this complex commercial problem when appropriate.

Our proposal offers increased certainty and rational guidance, and would thereby increase the consistency of the courts’ approach to difficult proof problems. Although we have focused on only one significant proof problem under Article 2, that problem illustrates the vacuum in the Code that we seek to fill.¹³²

131. See *supra* notes 87-88 and accompanying text.

132. For example, the issue of materiality of harm to a contracting party, which is the foundation for our example of the evidentiary approach, is central to many other Article 2 problems that, therefore, call for similar evidentiary approaches. Sections 2-207(1) and (2), for example, provide that material additional terms in an acceptance or written confirmation do not become part of a contract between merchants unless specifically agreed on, whereas immaterial additional terms do become part of the contract. The rule is based on the probability that a merchant offeror would consent to immaterial additions to the contract, but not material ones. Section 2-615, which excuses a party’s performance when impracticable, rests at least partially on the theory that a reasonable contracting party would not have agreed to perform under the unforeseen onerous circumstances. In addition, section 2-719(3) states that a limitation of consequential damages for injury to the person of a consumer is “prima facie” unconscionable, because no reasonable consumer is likely to freely assent to such a provision. In each of these areas, and in others, see, e.g., U.C.C. §§ 2-306, 2-309 (1978), our analysis suggests that, when confronted with material harm to

V. CONCLUSION

This article has described some of the UCC's present evidentiary shortcomings. It has also attempted to provide an alternative that would greatly ameliorate these problems. In doing so, however, we have not addressed directly whether the Code is the proper place for the development of evidentiary requirements and rules, and it is obvious that our proposal would extend the Code's treatment of evidentiary matters. The primary objection to extending the Code to evidentiary matters is that such matters are procedural rather than substantive and are adequately handled elsewhere.¹³³

In our judgment, the Code should be concerned with such matters, at least in the process-of-proof area. Regardless of the label applied to evidentiary rules in that area, they affect the rights and obligations of identifiable classes of individuals and, therefore, are of sufficient importance to be treated directly by a major codification such as the UCC. Moreover, the treatment of these rules in other areas—such as the area of evidence and procedure—is decidedly insufficient. Thus, another justification for our proposal is that it would bring some badly needed clarity to a horribly muddled area. Finally, the present Code does treat selected portions of the proof rules, although it does so badly. If the Code is going to address these matters, it should do so competently.

We have no illusions, however, that our proposal will have a significant immediate impact. The confusion surrounding proof rules is certainly too deeply entrenched to allow that. Moreover, there will be those who disagree with the underlying assumptions of portions of this article. Finally, the permanent editorial board has, at times, been rather intractable about proposed amendments to Article 2.¹³⁴ Accordingly, we will view the effort well made if it advances consideration of these complex areas and perhaps plays a small role in sensitizing those in the commercial area to the nature of the problems.

the party seeking to avoid the contract, it may be appropriate either to place the burdens of production and persuasion to show agreement on the party seeking to enforce the contract or, if the case is insufficiently compelling, to permit the judge to comment on the probability that the weaker party has, in fact, agreed to the onerous terms.

133. See, e.g., Britton, *supra* note 6, at 448-50.

134. See Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 224-26 (1967).