THE MYTHIC DIFFICULTY IN PROVING A NEGATIVE

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An oft-cited proposition holds that there is inherent difficulty in proving negative averments.[1] Despite consistent scholarly attempts to refute this myth,[2] judicial reasoning continues to refer to this supposed difficulty to justify a "shift" in evidentiary burdens.[3]

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[1] *See, e.g.*, Walker v. Carpenter, 144 N.C. 674, 676, 57 S.E. 461, 461 (1907) ("The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative."), *cited with disapproval in* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 n.15 (E. Cleary ed. 1984). The *Walker* court may have been alluding to certain early English texts on evidence. *See, e.g.*, G. GILBERT, THE LAW OF EVIDENCE 104-05 (Dublin 1754). The simplicity of Sir Gilbert's reasoning is seductive:

> And here it is first to be considered [when analyzing proofs], that in all Courts of Justice the Affirmative ought to be proved, for it is sufficient barely to deny what is affirmed until the contrary be proved, for Words are but the Expressions of Facts, and therefore when nothing is said to be done, nothing can be said to be proved; and this is a Rule both in the Common and Civil Law. The Civil Law says *Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla est probatio.*

Id. at 4. The *Walker*/Gilbert reasoning is by no means a curiosity of legal history. *See, e.g.*, *In re* Rogers, 297 N.C. 48, 57, 253 S.E.2d 912, 919 (1979) ("The rationale for this rule [that the party who asserts an affirmative be required to bear the burden of proof on it] lies in the inherent difficulty of providing the negative of any proposition."); *see also infra* note 3.

[2] *See, e.g.*, W. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE § 255 (London 1849) ("[P]roof of a negative may often very reasonably be required when the qualifying circumstances are the direct matters in issue. . . ."); P. TAYLOR, A TREATISE ON THE LAW OF EVIDENCE § 364 (1887) (arguing that allocation of burden of proof to party asserting affirmative has been adopted as rule of convenience, and "not because it is impossible to prove a negative"); *see also* MCCORMICK, *supra* note 1, § 337 (labeling the rule as erroneous).

According to Best, the belief that a burden should shift from a party asserting a negative to the opposing party because of the supposed difficulty of proof is actually a misapplication of the Roman Code dictum that the burden of proof lies generally on the party asserting the affirmative. W. BEST, *supra*, § 255. *See supra* note 1 for a handy example of this type of misapplication.

[3] The proposition that negative averments are inherently difficult to prove has been applied in a variety of recent cases. *See, e.g.*, Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 629 F.2d 1327 (9th Cir. 1980) (availability of job opportunities); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (adequacy of government denial of electronic surveillance); Carson v. United States, 560 F.2d 693 (5th Cir. 1977) (assessment of wagering excise tax); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980) (negli-

This article will demonstrate why the folklore is incorrect. There is no special difficulty in proving a negative. There are statements whose logical form leads to difficulty in proof, but the difficulty arises not from the presence of a negative, but rather from a separate, though sometimes related, logical property. Emphasizing that other property will do more than exorcise the logical fallacies in the legal folklore. It will reconcile the differing treatments found in the case law and provide guidance for future decisions.

The first section of this article examines certain logical properties of propositions and identifies the property that leads to difficulty in proof. It also discusses why the difficulty has been attributed to the mere presence of a negative. Section Two examines several cases that have reached various conclusions regarding the degree of difficulty in proving a negative proposition, and how that difficulty should affect the proceeding. This article will illustrate how the varying conclusions reached by the courts may be reconciled through proper use of the relevant logical properties.

I. Logical Form and Difficulty of Proof

It is clear that for certain pairs of an affirmative statement and its negation the difficulties in proving the components are the same.[4] For example, of the pair:

(1) January 9, 1947 fell on a Tuesday.

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gence in failing to control minor's operation of a motor vehicle); *In re* L.A.G., 407 A.2d 688 (D.C. App. Ct. 1979) (sexual assault); Van Hoozer v. Farmers Ins. Exchange, 219 Kan. 595, 549 P.2d 1354 (1976) (uninsured motorist); Church of Scientology v. Minnesota State Medical Assoc., 264 N.W.2d 152 (Minn. 1978) (defamation); McFarland v. Skaggs Co., 678 P.2d 298 (Utah 1984) (proof of malice).

[4] "Proof" and "prove" are variously defined. When concerned only with formal validity, we may be quite content with a definition such as "A proof (in L) of A is a deduction (in L) of A from no premises except the axioms (of L), if any." S. Haack, Philosophy of Logics 250 (1978); *see also* I. Copi, Introduction to Logic 311 (5th ed. 1978) ("We define a *formal proof* that a given argument is valid to be a sequence of statements each of which is either a premise of that argument or follows from preceding statements of the sequence by an elementary valid argument, and the last statement in the sequence is the conclusion of the argument whose validity is being proved.") (emphasis in original). Formal validity does not guarantee the truth of the conclusion but merely that it follows from the premises, which may or may not be true.

Legal proof, however, entails a broader and frequently less formal use of "premises" (including evidence) to establish the truth of a proposition. Proof at law "comprehends everything that may be adduced at trial . . . for the purpose of producing conviction in the mind of judge or jury, aside from mere argument." Black's Law Dictionary 1094 (5th ed. 1979). Although legal conclusions are not

and

(2) January 9, 1947 did not fall on a Tuesday.

neither proposition is more difficult to prove than the other.[5] In fact, the methods of proof would be identical. A calendar for 1947 could be consulted or, if the calendar were unavailable, weeks and days from a known date could be counted. Certainly there are more, or less, difficult methods of proof, but there is no reason why the proof of (1) would require a different method of proof than that of (2), or why the application of the method should be more difficult for one than the other.

Similarly, of the pair:

(3) The plaintiff is sane.

and

(4) The plaintiff is not sane.[6]

neither is the more difficult to prove. That is not to say that the proof of either one, given the available evidence in a particular case, is *never* more difficult than the other, but that the existence of a negative does not categorically make (4) more difficult to prove than (3).

Negative statements may, at times, be more difficult to prove than their affirmatives, but this is not an inevitable consequence of negative form. Consider the pair:

(5) There was a Hattiesburg policeman in the Kress store when Ms. Adickes entered the store on August 14, 1984.

and

(6) There was not a Hattiesburg policeman in the Kress store when Ms. Adickes entered the store on August 14, 1984.[7]

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bound by the same constraints as in formal, logical proof, there is a greater concern, at law, that the conclusions themselves be true.

Although this article is concerned with problems of the less formal proof used at law, certain parallel difficulties in formal proof will be briefly discussed in the footnotes.

[5] Of course, one statement of the pair is true and the other false. If "proof" is a showing that a statement is true, the proof of one of the statements is impossible. If "proof" is a showing that a statement is true *or* that it is false, each is provable with equal difficulty. In any case, any greater difficulty in proving one of the two results not from the affirmative or negative logical form of the statement but from the contingent truth or falsity of the fact in question.

[6] *See, e.g.*, Daniels v. Superintendent, 34 Md. App. 173, 366 A.2d 1064 (1976).

[7] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In *Adickes*, the Court imposed the burden of proof on the party having to prove the negative averment. *See id.* at 154-55. That party had the more difficult burden under the analysis to be explicated here. However, the issue arose in a summary judgment context, *see id.*, where the burden of proof is on the movant, even as to issues on which the other

Here, the statement in negative form appears to be more difficult to prove. To prove (5) one need only produce the policeman. To prove (6), however, one may have to establish the whereabouts, at the relevant time, of every policeman on the Hattiesburg force.[8]

When the propositions of an affirmative-negative pair are not equal in difficulty as to proof, it is not always the negative that is the more difficult. For example, of the pair:

(7) Every available job is beyond the capability of the plaintiff.

and

(8) Not every available job is beyond the capability of the plaintiff.[9]

the affirmative statement would be more difficult to prove. Statement (8) may be proved by finding a single job that is not beyond the plaintiff's capability. Proof of statement (7), however, would require an evaluation of *every* available job to be sure that each one is beyond the plaintiff's capability.[10]

Clearly, the claim that a negative is always more difficult to prove is overly broad, yet it persists in legal proceedings. The first step in correcting this fallacy is to distinguish the evidential difficulties of statements not by their affirmative or negative posture, but by an alternative characteristic called *quantification*.[11] Statements (1), (2), (3), and (4) are examples of unquantified statements of proposi-

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party would bear the burden at trial. *See, e.g.*, United States v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975).

To be precise, the allocation referred to in this paper and in the case law as the "burden of proof" is generally treated as a "shift" in the intermediate *burden of producing evidence* rather than in the ultimate *burden of persuasion. See, e.g.*, G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 15 (1978); MCCORMICK, *supra* note 1, § 337.

8 There may be a means of proof other than showing the whereabouts of each Hattiesburg police officer, but any such method must have the effect of demonstrating that each officer was not in the store.

9 *See* Barrett v. Otis Elevator Co., 431 Pa. 446, 246 A.2d 668 (1968).

10 As with statement (6), there may be other methods of proof, but any such method would have to show the unsuitability of each job.

11 Quantification results in general rather than singular propositions. For example, the propositions "footnote 12 of this article is boring" and "footnote 13 of this article is worth reading" refer to specific footnotes; they are singular propositions. On the other hand, the propositions "all law review footnotes are boring" and "some law review footnotes are worth reading" are general because they do not refer to any specific individual (*i.e.*, specific law review footnote(s)). The first general proposition may be expressed as "given any law review footnote, it is boring." "Given any x" or "for any x" is called the *universal quantifier*. The second general proposition may be quantified as "there is (or there exists) at least one law review footnote which is worth reading." "There is" or "there exists" is called the *existential quantifier. See* I. COPI, *supra* note 4, at 340-46; S. HAACK, *supra* note 4, at 38-40. Quantification theory has recently (and most dramatically) been applied to con-

tional logic,[12] while statements (5), (6), (7), and (8) are examples of quantified statements of predicate logic.[13]

Propositional logic analyzes statements about individual entities. An individual, the subject of the propositions, is said either to have or not have a particular property. There is nothing inherently more difficult in proving a proposition stating that an individual does not have a property than one stating that the individual does have the same property.[14] In each case the individual must simply be examined to see if the property exists.[15]

Predicate logic enjoys a wider range of application than propositional logic. It may be employed to analyze statements that attribute a property to unspecified individuals. The statements of predicate logic, like those of propositional logic, may be categorized as affirmative or negative. A more pertinent division for the purpose of this article is according to the type of quantification employed. Statements of predicate logic propose either that *some* individual has a particular property, or that *every* individual in the universe of discourse has some particular property.[16] The first sort are referred to as existential propositions.[17] Examples include the following:

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struct an ontological defense of language's ability to express particular truths. *See* D. DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 38-46, 210-14 (1984).

[12] Propositional logic is a formal system in which the only elements are variables that stand for propositions and connectives. Since there are only propositional variables and no individual variables, the logic is inadequate for the analysis of quantified propositions.

[13] Predicate logic contains the elements of propositional logic plus individual variables and quantifiers—"there is" and "for any"—operating on the variables. Predicate logic may be used to analyze arguments involving quantified propositions.

Some proofs within predicate logic will involve a combination of quantified and unquantified propositions. For example, "all men are mortal. Socrates is a man. Therefore, there exists a mortal," involves an unquantified premise, but proof of its validity requires predicate logic techniques.

[14] *But see supra* note 5.

[15] There may, of course, be other methods of proof. For example, a property known to be correlated to the property in question may be examined. Whatever method is employed, proof of the affirmative should be no more difficult than proof of the negative.

[16] Statements such as "there are at least two individuals that have the property P" are also predicate logic statements and are existential in form. The example may be rephrased as "there exists X and there exists Y such that X is not Y and X has property P and Y has property P." Multiplace predicates or relations may also be of interest, *e.g.*, "for any integers X and Y, X is greater than or equal to Y or Y is greater than or equal to X."

[17] *See supra* note 11.

(9) There is a cause of action for a violation of constitutional rights by a state official.

(10) For some injuries caused by the state there is no remedy.

and

(11) Some discriminatory practices violate Federal law.

Statement (5) is also an existential proposition, more clearly seen when rewritten as follows:

(5') There exists some person such that that person is a Hattiesburg policeman and that person was in the Kress store when Ms. Adickes entered on August 14, 1984.

Statements that attribute a property to every individual in a defined universe are referred to as *universal* propositions.[18] Examples include the following:

(13) Any criminal defendant has the right to confront the witness against him.

and

(14) All breach of contract actions must be brought within three years of the breach.

Statement (7)—"Every available job is beyond the capability of the plaintiff"—is also an example of a universal proposition.

Universal propositions are generally more difficult to prove than existential ones.[19] To prove an existential proposition one need only exhibit the individual possessing the property in question.[20] To prove a universal statement one must examine every individual in the universe of discourse to determine whether that individual has the property.[21] The difference in the difficulty of proving universals rather than existentials depends on the number of individuals in the universe of discourse. If there is only one individual, there is *no* difference in difficulty, and for a small number the

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18 *See id.*

19 The existential quantification of "A has property P" to "there is an *X* such that X has property P" is a rather simple translation, whereas the universal quantification of "A has property P" to "each *X* has property" requires a tracking of how "A has property P" was derived. *See, e.g.*, G. MASSEY, UNDERSTANDING SYMBOLIC LOGIC 278, 285 (1970) (explicating the Rule of Existential Generalization and the Rule of Universal Generalization).

20 It may, at times, be easier to prove existentials by conclusive evidence rather than through exhibition. For example, the statement "[t]here are at least two persons in New York City who have the same number of hairs on their heads" might be proved through the counting of hairs. However, logical proof from the premise that no one has as many hairs on her head as there are people in New York City is considerably less difficult. *See* M. COHEN & E. NAGEL, AN INTRODUCTION TO LOGIC 5-6 (1962).

21 Universals may, of course, be proved by logical means, but again the logical proof of a universal is more restricted than the proof of an existential.

burden of proving the universal is not much greater than proving the existential averment. As the universe of discourse grows, however, the difference in the difficulty of proof increases. For a very large universe, the difficulty may be insurmountable.[22]

If it is, in fact, *universals* that are difficult to prove, why does the belief persist that the difficulty is in proving *negatives*? The answer may be found through examination of claims that must be proven in litigation and of the logical relations among universal, existential, and negative propositions.

Goals in litigation generally focus on establishing existential, rather than universal propositions.[23] With respect to statement (5), for instance, the fact finder must determine whether there was a Hattiesburg policeman in the store, not whether every policeman was in the store.[24] Similarly, litigation concerning statements (7) and (8) would focus on whether there is some job that the plaintiff claiming disability can do rather than whether every job is one that the plaintiff can do.[25]

If an existential proposition supports a party's position, the negative of that proposition would be supportive of the opposing side. However, the negative of an existential is a universal.[26] Hence, in many legal cases proving the negative would be proving a universal and would indeed be more difficult.

The position of this article, that the difficulty is in proving a universal rather than in proving a negative, is more than an argument for linguistic accuracy. It must be remembered that not all cases turn on the establishment of an existential. The averment in dispute may be unquantified,[27] or resolution of the case may depend

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22 For large numbers, one may intuitively resort to induction. However, the inferences of induction lack the logical certainty of traditional, deductive logic. *See* Black, *Induction*, in 4 ENCYCLOPEDIA OF PHILOSOPHY 169, 170-79 (P. Edwards ed. 1967); *see also* S. HAACK, *supra* note 4, at 17 ("[T]here is no formal system of inductive logic which has anything approaching the kind of entrenchment that classical deductive logic enjoys."). Some philosophers have even exempted induction from the subject of logic. *See, e.g.*, W. KNEALE & M. KNEALE, THE DEVELOPMENT OF LOGIC 701 (1978).

23 If one party is attempting to prove an existential, the opposing party will be attempting to prove its opposite—a universal.

Consideration of the burden of proof under either the affirmative/negative case law distinction or of the logical rule argued here and the pleading requirements for a prima facie case most often focus on the existential.

24 *See supra* note 7 and accompanying text.

25 *See* New York Life Ins. Co. v. Stoner, 109 F.2d 874 (8th Cir. 1940).

26 If it is not true that there is an X such that X has property, P, then it must be true that every X dos not have property, P. *See* I. COPI, *supra* note 4, at 345-46.

27 *See, e.g.*, Snyder v. Wessner, 55 F. Supp. 971 (D. Minn. 1944); *infra* text accompanying notes 49-51.

upon establishing a universal.[28] In the former instance, a party attempting to establish the negative would face no more difficulty because of its logical form than would the party attempting to establish the affirmative. If a universal is in dispute, the negative would be easier to establish.[29] A recognition by courts of where the difficulty of proof actually resides would help prevent the granting of legally (and logically) impermissible concessions to parties facing the supposed difficulties of proving a negative.

A further benefit is derived by recognizing the actual source of difficulty. Commentators have observed that whether a party will be required to prove a negative may depend solely on how that party's pleadings are worded.[30] Since every affirmative is equivalent to some negative, it is unreasonable that a burden of proof should "shift" or be reduced solely because of artful pleading. There is not, however, a similar equivalence between universals and existentials.[31] The evidentiary burdens imposed by the universal are determined by the nature of the action, not because of skillfully worded pleadings.[32]

II. Reconciling the Case Law

Once it is recognized that the difficulty generally attributed to proving negatives is in fact the difficulty of proving universally quantified statements, it is possible to examine the case law from a logically consistent perspective. Not all opinions have adhered to unqualified acceptance of the supposed difficulty of proving negatives,[33] though nearly all have cited the statement as true.[34]

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28 *But see supra* note 23.

29 Just as the negation of an existential is a universal, the negation of a universal is an existential. *See* I. Copi, *supra* note 4, at 345-46. Hence, the party proving the negative of the universal would face the easier task.

30 *See* 1 Jones on Evidence: Civil and Criminal § 5.8 (S. Gard ed. Supp. 1984) ("Allowing the presence of a negatively phrased averment to shift the burden unduly emphasizes what is really a matter of form under the loose idea that a party is not required [to prove] a negative averment."); 9 Wigmore § 2486, at 288 n.3 (J. Chadbourn ed. 1981) (" 'The burden [of proof] is on the party having the affirmative [or] that a party is not required to prove a negative . . . is not more than a play on words, since practically any proposition may be stated in either affirmative or negative form.' ") (citation omitted); *see also* McCormick, *supra* note 1, at 786 (acceptance of a negation-based rule in allocating burdens "would place an entirely undue emphasis on what is ordinarily purely a matter of choice of forms").

31 While the negative of an existential is a universal and the negative of a universal is an existential, an existential does not have an equivalent that is universal in form nor does a universal have an equivalent that is existential in form.

32 Pleadings may be worded so as to mask the nature of an averment, but proper structural analysis will yield a unique form that is correctly quantified.

33 *See, e.g., infra* note 65.

The various treatments of the supposed difficulty are difficult to reconcile with the general acceptance attributed it. When the cases are examined for the presence of universally quantified propositions, a consistency in the court decisions emerges.

Recent reference to the difficulty in proving a negative is found in *Professional Air Traffic Controllers Organization v. FLRA*.[35] The District of Columbia Circuit decided that the Professional Air Traffic Controllers Organization (PATCO) was required, under § 7116(b)(7)(B) of the Civil Service Reform Act,[36] "to produce evidence that it attempted to prevent or stop a strike. Were the section interpreted differently, it would require the [FLRA] to prove a negative. . . ."[37] The court's statutory interpretation is consistent not only with the assumed difficulty in proving a negative but also, more importantly, with a rule based on the presence of a universal quantifier. In *PATCO*, the union was asked to prove that there exists an act such that the act was performed by the union and was an attempt to prevent or stop a strike. Placing the burden of producing evidence on the FLRA would have required the agency to establish that each and every act of the union was not an attempt to prevent or stop a strike.[38] Placing the burden on PATCO required it to establish an existential proposition, whereas if the burden was on the FLRA, it would have had to have established a universal proposition. The difficult burden that would have been placed on the FLRA justifies the court's decision.

Similarly, in *Williams v. Frank*,[39] the Illinois appellate court determined that although the plaintiffs had raised the issue of non-provocation in their complaint, it would not automatically require them to prove non-provocation at trial. The court noted that "[i]t has long been established that a party is not required to prove a negative averment, the burden of proof being on the party who asserts the affirmative."[40] Again, the allocation of the burden by the *Williams* court corresponds not only with a belief that negatives are difficult to prove but also with the quantifier-based analysis. The defendant, under the court's ruling, simply

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34 *See supra* note 3.

35 685 F.2d 547 (D.C. Cir. 1982).

36 5 U.S.C. § 101 (Supp. IV 1980).

37 *PATCO*, 685 F.2d at 577 n.65.

38 The negation of "there exists an act X such that P" is "for each act X, not P." *See* I. COPI, *supra* note 4, at 345-46.

39 11 Ill. App. 3d 937, 298 N.E.2d 401 (1973).

40 *See id.* at 939, 298 N.E.2d at 403.

had to prove that there is an act of the plaintiff such that the act provoked the defendant. If the burden had been on the plaintiff, however, he would have had to have shown for every one of his acts that each act did not provoke the defendant.[41]

Another decision of the Illinois appellate court, *Shumak v. Shumak*,[42] also involved the issue of the presence or lack of provocation.[43] The court in *Shumak* held that when the negative averment pleaded by a party is essential to its cause of action "the burden is not to be shifted . . . because of the difficulty in proving a negative."[44] The burden of showing non-provocation, however, was eased. The *Shumak* court noted that "where a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties it is his duty to come forward with the proof."[45] The court further observed that plenary proofs of negative allegations were not required, and that "[i]t is enough that he introduces evidence as, in the absence of counter testimony, will afford reasonable ground for presuming the allegation is true; and when this is done the *onus probandi* will be thrown on his adversary."[46]

The *Shumak* court rejected the general negation-based rule but found the plaintiff's burden sufficiently eased through special rules—at least one of which recognizes a difficulty inherent in the proof of a negative—to uphold the lower court's finding of non-provocation.[47] Yet *Shumak* falls within the quantification-based rule without resort to special adaptation. To show non-provocation, the plaintiff would be required to prove a universal proposition. The difficulty inherent in doing so may, under the rule,

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41 *See, e.g.*, Levine v. Pascal, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968). In *Levine*, the negation-based rule was used to place the burden on the party asserting the affirmative. *Id.* at 55, 298 N.E.2d at 431. The issue was knowledge *vel non* of a secured interest. *See id.* In terms of events providing actual or constructive knowledge, the party claiming that there was knowledge had to prove the existence of one such event. The opposing party would have had to have shown that any event that occurred did not provide knowledge. The quantification-based analysis would yield the same result.

42 30 Ill. App. 3d 188, 332 N.E.2d 177 (1975).

43 *Id.* The issue on appeal was whether the trial court erred in granting the plaintiff a divorce based on the sufficiency of the evidence establishing lack of provocation with regard to the alleged mental cruelty of the husband. *Id.* at 190, 332 N.E.2d at 179-80.

44 *Id.*

45 *Id.* at 190-91, 332 N.E.2d at 180.

46 *Id.* at 190, 332 N.E.2d at 179-80.

47 *See id.* The *Shumack* court noted that where a party fails to produce evidence of facts peculiarly within its knowledge, "an inference or presumption is raised that the evidence, if produced, would be unfavorable to his cause." *Id.*

require that the burden shift. The court's "peculiarly within the knowledge" language is also consistent with the quantification-based rule. A party seeking proof of an existential proposition is more likely to have peculiar knowledge of the event proposed by the statement—in this case the act or incident constituting provocation—than would a party asserting a universal would have knowledge of every event occurring within the universe of discourse.[48]

In *Snyder v. Wessner*,[49] the United States District Court for the District of Minnesota rejected the defendant's contention that, since the defense required proof of a negative, only a minimum showing was required to shift a particular burden to the plaintiff.[50] As in *Shumak*, the court's rejection of the negation-based rule was based on limiting the rule to cases "where the means of disproving the negative are in the possession of the opposite party."[51] Again, a rule based on universal propositions would not require such an exception, but the reason for applying the rule would differ from that in *Shumak*. The plaintiff would have to show that he worked more than some fixed number of hours. The defendant would have to show that the plaintiff did not work that many hours. Since neither proposition is universally quantified,[52] logical form does not add to the difficulty of proving either claim and should have no effect on the allocation of burdens.

The Maryland appellate court, in *Daniels v. Superintendent*,[53] chose to reject the proof of negative rule rather than cite an exception.[54] The court held that "[t]he pleadings . . . provide the common guide for apportioning the burden of proof . . . even though one has the burden of proving a negative fact as part of his cause of action."[55] The perceived lack of justification for shifting the burden of proving the issue in dispute (whether the plaintiff, held in the state hospital, was still insane[56]) was a likely

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48 *See also In re* Chicago Rys., 175 F.2d 282 (7th Cir. 1949). The same analysis and special rules were employed in *Chicago Rys.*, where the issue was the existence *vel non* of notice, to reach a result similar to that of *Shumak*. *See id.* at 289-90.

49 55 F. Supp. 971 (D. Minn. 1944).

50 *Id.* at 975.

51 *Id.*; *see also* United States v. Denver & R.G.R.R., 191 U.S. 84 (1903).

52 Both proofs would be of existential propositions. The plaintiff's averment would be that there exists a fixed number of hours worked by the plaintiff, whereas the defendants must simply show that there exists a fixed number of hours worked that is less than plaintiff's allegation.

53 34 Md. App. 173, 366 A.2d 1064 (1976).

54 *See id.* at 180-81, 366 A.2d at 1069.

55 *Id.* (citation omitted).

56 *See id.* at 175-81, 366 A.2d at 1066-69.

catalyst for rejecting the negation rule. The quantification-based rule, however, need not be abandoned to account for the rationale of the court. Since the proposition in question (the plaintiff's sanity) is unquantified, the negative is logically no more difficult to prove than the affirmative. Hence, there is no reason to shift or modify the burden of proof.

The Eighth Circuit, in *New York Life Insurance Co. v. Stoner*,[57] relied on an exception to the negation-based rule in allocating a particular burden of proof.[58] The circuit court noted that, where an affirmative case required proof of a negative, the burden was on the party making the negative allegation, " 'especially where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation.' "[59] This somewhat cryptic justification indicates an awareness that although the plaintiff was required "to show that the defendant was not totally disabled,"[60] such a burden calls only for proof that there exists a job that the defendant could do. The plaintiff must establish an existential. This is easier than if a universal required proof—that for each and every job the defendant is incapable of doing that job—and any difficulty arising from this logical form is to be faced by the defendant.[61]

In *Barrett v. Otis Elevator Co.*,[62] the Pennsylvania Supreme Court came close to recognizing the factor that is of real concern in placing the burden in disability cases. "If for no other reason than the quantity of evidence, it certainly is more difficult to prove *conclusively* that no jobs are available [to a disabled plaintiff] than to prove *conclusively* that a job is available. . . ."[63] Although the court acknowledged that proof of the negative proposition (no available job) even by a preponderance of the evidence was not odious, it nonetheless placed the burden on the defendant employer to show the availability of work.[64] The *Barrett* court seems to have inarticulately recognized that universal quantification is the source of the difficulty in proof. While it did not find

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57 109 F.2d 874 (8th Cir. 1940).

58 *Id.* at 878.

59 *Id.* at 876 (quotation omitted).

60 *Id.*; *see also* Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor, 629 F.2d 1327 (9th Cir. 1980).

61 *See* Erler v. Five Points Motors, 57 Cal. Rptr. 516, 249 Cal. App. 2d 560 (1967) (burden on defendant to show plaintiff could have taken employment to mitigate damages).

62 431 Pa. 446, 246 A.2d 668 (1968).

63 *Id.* at 455-56, 246 A.2d at 673 (emphasis in original).

64 *Id.* at 456, 246 A.2d at 673.

the difficulty particularly acute, the *Barrett* court nevertheless placed the burden on the party faced with proving the existential averment.

Reconciling the case with the burden-placing rule based on the supposed difficulty in proving a negative has required adoption of a complicated procedure to determine burdens.[65] The variety of approaches, together with their increased complexity, indicates the need for a logically consistent unifying principle. The recognition that it is the existence of a universal quantifier rather than negative form that makes proof difficult fulfills that need. Even in situations that have led courts to reject the negation-based rule, the universal quantification-based rule may still be applicable.

III. Conclusion

There is no difficulty inherent in proof of negative propositions, despite persistent claims to the contrary. It is, however, more difficult to prove a universally quantified statement than it is to prove one that is existentially quantified. Since the negation of an existential is a universal, negation may appear to make proof more difficult, but that is so only when it is an existential that is negated.

The folklore that a negative proposition is difficult to prove should be rejected. The logically based principle that should be understood and accepted is that there *is* difficulty in proving a universal, and any deference formerly afforded to parties faced with proving a negative should be granted instead to parties faced with the task of proving a universal. This change would do more than clarify the language of the case law. It would also reconcile cases that could not otherwise be reconciled without difficulty and without adoption of special rules. The change would

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65 The procedure was enunciated by the Supreme Court in United States v. Denver & R.G.R.R., 191 U.S. 84 (1903), in which the Court noted:

> When a negative is averred in pleading, or a plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is on the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

Id. at 92.

also lessen the likelihood that a proposition appearing difficult under a negation-based rule, but in fact no more difficult than its opposite affirmative proposition, will unjustly afford its proponent the benefits of whatever burden-modifying principle is automatically but erroneously implied because of the form of the averment.