

## Pleadings and Presumptions

Richard A. Epstein†

Throughout the formative years of the common law, the rules of civil procedure played a crucial role in the development of the substantive rules of law. Thus, the common law provided a distinct form of action for each kind of wrong and specified complex rules—some of general and some of particular application—for the elaboration of a case within the framework of its appropriate form. The forms of action have been abolished, as have most of the arcane rules of pleading that were so congenial to them. The rules of pleading today retain some of their original importance to the ordinary lawsuit, but their role is more modest. Under the most common view the pleadings are intended only to give to the adversary and the court “notice,” in a general way, of the kinds of contentions that the pleader is apt to make on his own behalf.<sup>1</sup> They are not designed to bind the pleader to a particular theory of claim or defense, nor to a particular means of proving his contentions. With the pleadings thus restricted to a notice function, the modern law instead draws upon an extensive arsenal of pre-trial devices to help determine the truth and the worth of the contentions raised by the parties to a legal dispute.<sup>2</sup>

In one sense the shift is a healthy one because it helps insure that a lawsuit will be decided on its merits, and not by the procedural slips and errors that occur in the course of a lawsuit. Nonetheless, I think that the shift in emphasis has gone too far, and that many of the prized modern reforms may be mistaken and ill-advised. Formal

† Visiting Associate Professor of Law, University of Chicago, Associate Professor of Law, University of Southern California.

<sup>1</sup> The only function left to be performed by the pleadings alone is that of notice. For these reasons, pleadings under the rule may properly be a generalized summary of the party's position, sufficient to advise the party for which incident he is being sued, sufficient to show what was decided for purposes of res judicata, and sufficient to indicate whether the case should be tried to the court or to a jury. No more is demanded of pleadings than this; history shows that no more can be successfully performed by pleadings.

C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 283 (2d ed. 1970). See also C. CLARK, *CODE PLEADING* § 11, at 57 (2d ed. 1947); F. JAMES, *CIVIL PROCEDURE* § 2.2, at 60 (1965); Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943).

<sup>2</sup> F. JAMES, *supra* note 1, § 2.1, at 55-56.

pleadings may not be the best devices for fleshing out the facts of a case; but facts alone do not permit the articulation of the general propositions of substantive law, the theories of claim and defense needed for the principled resolution of disputes. It is to this task of theory formation that the pleadings can make their contribution. The rules of pleading cannot by themselves determine the applicable rules of substantive law, but a set of rules that details the formal constraints on legal argument could help to shape the substantive inquiry in a manner that would aid the development of theories capable of both particular application and further elaboration. If the rules of pleading are understood as means of delineating the distinctive features of a legal argument, then there is much in the older systems of pleading that merits attention even after the abolition of the forms of actions.

### I. SUBSTANTIVE RULES AS PRESUMPTIONS

This article is concerned with the rules of pleading insofar as they represent the formal element in the law. The object of the inquiry does not concern the application of the principles of formal logic to the subject matter of law. While these rules must command respect in legal analysis, they do not govern every step in the process of judgment. Law is not a closed system of logical thought, nor even a science, like physics or economics, whose rules can be determined by a systematic examination and description of natural events or human behavior. Instead, in law, as in ethics, the purpose of the inquiry is to “give reasons” to judge and evaluate human conduct.<sup>3</sup> As Hume noted long ago, it is impossible, solely by use of the rules of logic to derive an ethical conclusion from premises that contain no ethical term.<sup>4</sup> Neither formal logic nor science can make judgments of value or worth. Yet it is essential for a system of law, like one of ethics, to move from the description of a state of affairs to a conclusion about the rights and duties of those involved. The rules of a legal system, unlike those of science and logic, must establish the relationship between the descriptive and the normative.

Legal systems use many of the terms that have a central place in both logic and the sciences, but often with subtle, though crucial, differences in meaning. One such term is of special importance here. The legal system uses the term “sufficient,” as in the expression “facts

<sup>3</sup> Thus, a system of legal rules has functions that go beyond compulsion and prediction. For a discussion of this “internal” aspect of rules, see H.L.A. HART, *THE CONCEPT OF LAW*, 55-56, 86-88 (1961).

<sup>4</sup> D. HUME, *A TREATISE OF HUMAN NATURE*, Book III, Part I, Section I, at 469 (L.A. Selby-Bigge ed. 1888).

sufficient to state a cause of action." But it would be a mistake to assume that this term carries over its logical connotation into the law. In logic, we say that A is a sufficient condition for B, when, if A is true, then B of necessity follows. When the law tries to generate absolute or universal propositions that make certain conditions sufficient, in the logical sense, for the creation of responsibility, there is always room to doubt whether the conclusion follows from the premise. Consider, for example, the proposition that a man should be held responsible to someone whom he harms.<sup>5</sup> The proposition has its appeal, but its truth is not absolute. To treat it as such would be unjust in at least some cases, for at the very least cases of consent and self-defense are apparent exceptions to the general rule.<sup>6</sup> Since there are exceptions, it is tempting to argue that the general principle is worth nothing at all; in logic, one counterexample would be sufficient to show that a supposedly general principle is false. If law were treated as a closed logical system, the specter of possible and plausible exceptions to every proposed rule would defeat all attempts to formulate general legal principles. But even if the law is not a closed system of logic, it does not follow that it is impossible to bring order to the legal system. The question is not whether there are exceptions to propositions that purport to be sufficient to create liability. Rather, the question is why it is necessary to think of exceptions to the general proposition at all.

Compare, for example, the proposition that a man should be held responsible because he has harmed another with the proposition that he should be held responsible because he has thought of another. Both statements purport to be universal, and both are in some sense false. There is, nonetheless, a crucial difference between them. The second proposition would not be entitled to a presumption of validity in any system of legal thought. One hardly feels compelled even to give a reason why a man who has thought of another should not be held liable to him. It is, however, arguable that the first proposition, though not conclusive, is entitled to a presumption of validity that retains its force in general even if subject to exceptions in particular cases. It may not by itself state all of the relevant considerations, but

<sup>5</sup> See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973), where I argued for this position on substantive grounds.

<sup>6</sup> Note, I do not discuss here the fact that many rules of law will take, for reasons of administrative convenience, an absolute form. It may well prove too costly to administer a set of "just" laws. But it is important to know what one thinks is right in the abstract, because only if that is known will it be possible to decide what substantive points must be sacrificed to administrative convenience.

it says enough that the party charged should be made to explain or deny the allegation to avoid responsibility; the plaintiff has given a reason why the defendant should be held liable, and thereby invites the defendant to provide a reason why, in this case, the presumption should not be made absolute. The presumption lends structure to the argument, but it does not foreclose its further development.

The frequent use of presumptions is enough to show that they are of great importance to the law. But there are areas of the law that are not amenable to their use. First, the use of presumptions does not imply that legal concept cannot, be defined in terms of logically necessary and sufficient conditions. Indeed, presumptions play no role in many legal definitions. Professor H.L.A. Hart has argued that the term "contract," for example, can be defined only by taking into account the possible defenses to an action for breach of contract.<sup>7</sup> But when we say that fraud in the inducement is a defense to an action on the contract, we do not define, in whole or in part, the term "contract." The defense of fraud presupposes the existence of a contract, however defined, and gives a reason why the plaintiff should not have a remedy for the defendant's failure to perform. It operates to defeat the inference of liability that would otherwise follow from proof of the assertion that the defendant did not perform his part of the agreement, but it tells us nothing of the meaning of the term contract. Defeasibility, regarded by Hart as an aspect of the definition of contract, is undoubtedly an important feature of legal thought, but it is a characteristic of the legal rules of obligation, and not of the definition of a legal concept.<sup>8</sup> A contract can be defined as an agreement between two or more parties for one or more of them to do, or to forbear from doing, a future act.<sup>9</sup> If this definition is unacceptable it is not because there are, unavoidably, exceptions or qualifications that can-

<sup>7</sup> H.L.A. Hart, *The Assumption of Responsibility and Rights*, in LOGIC AND LANGUAGE, 1ST SERIES (A. Flew, ed. 1965) 151, 155. Hart has indeed abandoned this article, at least so far as it defended the proposition that "[t]he sentences 'I did it,' 'you did it,' 'he did it' are . . . primarily utterances with which we confess or admit liability, make accusations, or ascribe responsibility" instead of describing conduct. *Id.* 160. Hart's abandonment of this article, see H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), was prompted by two excellent articles, Geach, *Ascriptivism*, PHILOSOPHICAL REVIEW 221 (1960); Pitcher, *Hart on Action and Responsibility*, *id.*, 226. Nonetheless, Hart's article is so rich in ideas that we can still profit from both its mistakes and its insights.

<sup>8</sup> Pitcher makes a similar point when he notes "that it is the concept of being deserving of censure or punishment which is really the relevant defeasible one," not that of human action, Pitcher, *supra* note 7, at 235. However, this statement is not quite broad enough because it does not take into account cases of civil responsibility, as in tort, which operate in the same fashion even though neither censure nor punishment is involved.

<sup>9</sup> The definition could be rejected on the grounds that all contracts require *both* parties to perform some future act or forbearance. Such is the impact of the common law

not be captured by the logical model of necessary and sufficient conditions. Those exceptions and qualifications are of concern only if it is suggested that there should be a rule that a party to a contract invariably has a right to relief against another party who does not keep his part of the agreement.

The weakness of Hart's position is made clearer when we try to distinguish "legal concepts" from other concepts. "Legal concepts" are those that the law regards as material to the decision of legal issues. Thus, "possession" is a legal concept not because it has some unique logical feature or refers to some inherently legal phenomenon, but because it is used to decide legal disputes. "Cat" is not generally thought to be a legal concept, but it would become one if it were made an operative term in a Uniform Cats Act.<sup>10</sup> Indeed, the list of legal concepts could be expanded to include every word in the English language if the law of obligations were sufficiently transformed. If legal concepts could not be defined in terms of necessary and sufficient conditions, then no concept could be so defined, since every concept can be pressed into the service of the law. Hart's account of defeasibility, therefore, can and should be recognized as applicable to legal rules rather than to legal definitions. As such, it represents an insight of fundamental importance for the theory of legal argumentation.

A second area in which presumptions are of little use is in connection with those legal rules that do not, in terms, purport to answer questions of responsibility. The rule against perpetuities, for example, states that "no interest is good, unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>11</sup> This rule, famous for its mathematical structure, rests not on assessed probabilities of events, but only on the logical possibility

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doctrine of "consideration" which, in form at least, attempts to limit the class of contracts to the class of bargains.

Note, too, that the account given in the text differs from the standard definitions insofar as the latter tend to stress the notion of legal enforceability. Thus, a contract is an "agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." W. ANSON, *LAW OF CONTRACT* 11 (1st Am. ed. E. Hufcutt 1895), cited in A. CORBIN, *CORBIN ON CONTRACTS* (One Vol. ed. 1952). There are, however, many contracts which are unenforceable at least in some circumstances, such as illegal contracts. These, moreover, are not nullities; title to property for example, will pass under an illegal contract, but it will not pass by delivery absent agreement. It is better, therefore, to keep the notion of enforceability separate and apart from the definition of contract.

<sup>10</sup> Simpson, *The Analysis of Legal Concepts*, 80 L.Q. REV. 535, 547 (1964).

<sup>11</sup> J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. R. Gray 1942). There is, for example, the same kind of formal completeness in the rules of chess, to the extent

of remote vesting. The rule against perpetuities does not purport to state a cause of action or a defense. Its application presupposes that the instrument that governed the disposition of the res—be it deed or will—was valid as a matter of substantive law. And even then, the rule determines only whether a given person receives an interest in property under the instrument, not the rights and duties that ownership entails.

Even after these qualifications are taken into account, however, a system of substantive legal rules remains a complex network of presumptions—or to use Hart's language, of defeasible propositions—insofar as it seeks to establish the relationship between matters of fact on the one hand and judgments about responsibility on the other. The purpose of this article is to show what formal constraints must be imposed upon legal argument when it is viewed in this light. The nature of these constraints is best revealed by examining three distinct and familiar aspects of the law of pleading, in order to show how they relate both to each other and to our common theme. These are: (1) the distinction between conclusions of law and ultimate issues of fact; (2) the division of the elements of a case into a cause of action and the possible defenses thereto; and (3) the proper means of allocating the different elements of the case between the plaintiff and defendant.

## II. FORMAL CONSEQUENCES OF A SYSTEM OF PRESUMPTIONS

### A. Ultimate Issues of Fact and Conclusions of Law

The formal characteristics of a system of presumptions limit the kinds of allegations that are appropriate to any legal theory. Assume, for the moment, that the plaintiff's allegation, "the defendant unlawfully struck the plaintiff," states a prima facie case. What argument can the defendant make that admits the allegation in the complaint, yet supports the contention that he should not be held liable? Clearly, there is none. Once he has admitted that his conduct is "unlawful," it is no longer possible to find an excuse or justification appropriate to a plea in avoidance. The problem with this form of allegation, therefore, is not that it is too weak, but rather that it is too strong. The plaintiff's prima facie case should erect a presumption that shifts the burden of explanation to the other party; it should not foreclose all possibility of explanation.

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that they are designed to tell us what counts as a move within the game. But those rules quickly lose their mathematical texture insofar as they govern the rights and duties of the players. Witness here the disputes that surrounded the Fischer-Spassky match.

The same observation can be made with respect to certain pleas raised by the defendant. If the defendant pleads, in response to the allegation that he struck the plaintiff, that he did so with the plaintiff's "valid" and "binding" consent, the defense is too strong. The plaintiff cannot admit the sufficiency of the defense and still claim that he is entitled to recover, for example, on the ground that the consent was procured by fraud. Allegations using terms such as "lawfully," "unlawfully," and "validly" must be regarded as impermissible—as a logical matter—regardless of the substantive legal theory applicable to the case. Such allegations seek to create a logical basis for determining questions of responsibility that circumvents the normative process of judgment that must always be part of a system of law.

The same argument applies to another class of terms—murder, trespass, theft and the like—that also have their place in legal argument. Murder, for example, is usually defined as the deliberate killing of another person without lawful justification or excuse.<sup>12</sup> The last clause in this definition, however, assumes the conclusion that the conduct is unlawful. While deliberate killings may be excused or justified, by definition there can be neither excuse nor justification for murder. A system of presumptions, therefore, cannot on formal grounds alone accept the allegation that A murdered B. If, however, the "without lawful justification or excuse" clause is struck from the account of murder, then what remains of the definition says, in effect, that deliberate killing creates a prima facie case of murder. It would then be possible, through further pleas, to develop case by case the exceptions to the presumption suggested by the definition. Only after the presumption of murder is established in a particular case, and none of the exceptions is found to apply, is it possible to use the term "murder" as a premise of some further legal argument—for example, one that concerns the appropriate punishment for the crime.

There are, however, many allegations that contain terms with explicit "legal" content that do fit into a scheme of presumptions, and these should be regarded, to use the standard terminology, not as conclusions of law but as ultimate issues of fact. Assume the plaintiff alleges that his agent sold and delivered goods to the defendant for which he has not been paid. Although the allegation contains terms, like "agent," "sold," "delivered," and "paid," that presuppose the conceptual scheme of the law of contracts, it is perfectly permissible in a system of presumptions. The allegation allows the defendant to

<sup>12</sup> "Murder is homicide committed with malice aforethought," and, every intentional killing is with malice aforethought unless under the circumstances sufficient to institute (1) justification, (2) excuse, or (3) mitigation. R. PERKINS, CRIMINAL LAW 34, 35 (1969).

concede both its truth and sufficiency, and nonetheless to argue that there are further circumstances that excuse him from paying for the goods. Contrary to what Pomeroy long ago asserted, the parties need not be required to allege only the "bare" or "naked" facts in order to assure that their pleadings contain only ultimate facts.<sup>13</sup> Rather, they should be allowed to present legal issues in the same terms that judges use to formulate the rules of law. If a rule refers to agents, promises, sale and delivery, and the like, then the ultimate issues of a case must be framed in terms of those concepts.<sup>14</sup> They are compatible with a system of presumptions, and cannot be excluded on the ground that they represent conclusions of law. If propositions that contain them are to be rejected at all, it must be for substantive reasons.

If this view is accepted instead of Pomeroy's, it is incorrect to argue, as did Walter Wheeler Cook, that the difference between ultimate issues of fact and conclusions of law is at best one of degree and not of kind. Cook puts the argument as follows:

Suppose I am looking out of the window of the room in which you and I are and you ask me: "What do you see?" Any reply I make, assuming I see 'something,' will be a 'statement of fact.' Suppose my reply is: "I see an object": this tells you something but not much; nevertheless it is a 'statement of fact.' Perhaps you ask for a more detailed statement. I reply: "I see an inorganic object." You now know more than before, but perhaps you are still not satisfied, and my next reply may be: "I see a vehicle." This is equally a 'statement of fact,' as will be a statement that "I see an automobile." I may under your urging go on to more and more detailed statements, such as: "I see a five passenger sedan;" "I see a 1935 Ford four-door sedan, with blue body and black wheels"; and so

<sup>13</sup> J. POMEROY, REMEDIES AND REMEDIAL RIGHTS §§ 530, 532 (3d ed. 1894).

<sup>14</sup> Those results, of course, are pretty much obtained in the cases. Thus, to take only one line of cases, allegations have been held proper which state that one is the "owner" of property, *Peninsula Properties Co. v. Santa Cruz*, 34 Cal. 2d 626, 629, 213 P.2d 489, 490-91 (1950); an act was "negligently" done, *Rannard v. Lockheed Aircraft Corp.*, 26 Cal. 2d 149, 154, 157 P.2d 1, 4-5 (1945); an employee "was acting within the scope of his employment," *May v. Farrell*, 94 Cal. App. 703, 707, 271 P. 789, 791-92 (1928); plaintiff's name had acquired "a secondary meaning," *Dino, Inc. v. Boreta Enterprises, Inc.*, 226 Cal. App. 2d 336, 338, 38 Cal. Rptr. 167, 168 (1964). In the last of these cases the court said that the allegation is "obviously" a conclusion of law, but allowed the allegation on the grounds that the defendant had specific information about the case which made more detailed pleading unnecessary. Given the tests in the text, the term cannot be regarded as a conclusion of law regardless of the defendant's state of knowledge because the defendant could concede that the plaintiff's name has received a secondary meaning and still explain why he should be allowed to use it. If the defendant does not know enough about the facts of the plaintiff's case to conduct his defense, he should resort to some form of pre-trial discovery.

on. Each statement becomes more and more detailed, tells you more and more about what you could see if you were to look.<sup>15</sup>

He concludes from the above that "the time-honored distinction between 'statements of fact' and 'conclusions of law' is merely one of degree, comparable to the difference between saying: "I see an object" and "I see a sedan" in the example given above."<sup>16</sup> A given state of affairs may indeed be described in a large, possibly infinite, number of ways, but the relationship between this observation and the distinction between issues of ultimate fact and conclusions of law is not at all clear. As Cook correctly points out, the "facts" of the case will not present themselves. But there is no reason to believe that the distinction between ultimate issues of fact and conclusions of law should present them for us; that is a task for the substantive law.<sup>17</sup> Thus, allegations about the year and body type of an automobile can be struck from the pleadings because, as a matter of substantive law, they are insufficient, in conjunction with other allegations, to create or limit responsibility: generally, tort remedies do not depend upon the descriptions of the property damaged, however useful they may be to identify it. If the applicable substantive theories were changed to subject 1935 Fords to special rules, however, the stricture against pleading conclusions of law would not prevent their inclusion in the case of either party, for the only function of the distinction between ultimate issues and conclusions of law is to exclude those allegations that cannot fit into a system of presumptions.

To make the discussion concrete, consider the alternative allegations that, Professor James suggests might be made by a plaintiff in a typical accident case:

1. Defendant is legally liable to plaintiff for damages.
2. Defendant negligently caused plaintiff injury.
3. Defendant negligently caused plaintiff bodily injury through the operation of a motor vehicle.
4. Defendant negligently drove a motor vehicle against plaintiff who was then crossing [named] highway. As a result plaintiff was thrown down and had his leg broken, etc.
5. Same as # 4 with an added paragraph following the first, as follows:

The defendant was negligent in that he failed to keep a proper lookout, drove at excessive speed, etc.

<sup>15</sup> Cook, *Facts and Statement of Fact*, 4 U. CHI. L. REV. 233, 241 (1937).

<sup>16</sup> *Id.* at 244.

<sup>17</sup> There is an important distinction between those pleas which are rejected because they are conclusions of law and those which are legally insufficient. With the scheme of

6. Same as # 4 with an added paragraph following the first, as follows:

The defendant was negligent in that he was looking at a passenger in the back seat of his automobile and not in the direction in which he was going; in that he was driving at a speed of 43 miles per hour, etc.<sup>18</sup>

Each of these allegations raises different problems. The first allegation does not on its face purport to state a prima facie case that admits of exceptions; it is clearly a conclusion of law and, hence, is impermissible in a system of presumptions. In contrast, none of the other propositions is necessarily inconsistent with the conclusion that the defendant is not liable. Nonetheless, they too have difficulties of their own.

The substantive law of negligence requires the plaintiff to show, prima facie, that the defendant owed him a duty of care, that the defendant breached that duty, and that the breach caused (in a weak sense) injury to the plaintiff.<sup>19</sup> None of these elements is put into relief if the plaintiff alleges—as the Federal Rules of Civil Procedure allow—only that the defendant "negligently caused plaintiff injury," or "negligently drove a motor vehicle against plaintiff."<sup>20</sup> Indeed, the allegation that the defendant's automobile struck the plaintiff is in itself of no legal significance once a trespass theory is discarded. In this form, the pleadings offer only the most general structure of analysis, with no

a multiple staged pleading, a plea which is formally adequate though legally insufficient can be reintroduced at a further stage in the argument. A plea, however, which is defective on formal grounds can never be reused, no matter how many stages the argument is taken.

<sup>18</sup> F. JAMES, *supra* note 1, at 70.

<sup>19</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30 at 143 (4th ed. 1971). Note that causation is used here in the sense peculiar to negligence law, as a peculiar amalgam of "but for" causation and proximate cause. For a substantive criticism of these two notions, see Epstein, *supra* note 5.

<sup>20</sup> 2. On June 1, 1936, in a public highway called Bolyston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Form 9, FED. R. CIV. PRO. Note the one advantage of the Federal Rules is that they reduce the problems of variance because one does not need to specify the particulars of negligence at the outset. Still, that practical advantage is not decisive given the easy opportunity for amendment both before and at trial. FED. R. CIV. PRO. Rule 15(a)-(b). But there also may be practical disadvantages to the Federal system. Assume that one pleads in the fashion of Form 9 and that during discovery some theories of negligence are probed, but others are not. Should one of the unexamined lines of inquiry be the decisive line of proof, there will be at trial no need for amendment, and great difficulty, perhaps, in getting a continuance for want of a variance, even in cases of genuine surprise.

clues as to the relevant particulars. "Negligently" is but a shorthand for the complex of relations that are material to the statement of a prima facie case set out above. It should be necessary to identify the duty, the breach, and the causal relationship of the defendant to the harm that the plaintiff has suffered. Otherwise the pleadings do not raise the ultimate issues of the case.

The kind of information required to raise the ultimate issues of the prima facie case only begins to appear in the more detailed of James's versions of the complaint, those alleging "excessive speed" or "failure to keep a proper lookout." These versions of the complaint, however, still fail to specify the duty incumbent on the defendant; for example, the complaint does not allege the speed limit applicable to the case, that the defendant exceeded that limit, or that the plaintiff's harm could have been avoided had the defendant complied with the limit. It is not helpful merely to allege, as in James's sixth alternative, that the defendant drove at forty-three miles per hour. That is only one of a range of speeds consistent with the plaintiff's prima facie case. If the defendant had been traveling at any other speed over the limit it would not alter the theory of relief, even if it could affect the proof of causation or the measure of damages. Similarly, the defendant's failure to keep his eyes on the road may constitute, prima facie, a breach of a duty owed to the plaintiff, but it is not ultimate, for it is of no moment to the theory of recovery whether the defendant looked at a passenger in the back seat or fell asleep.

These remarks illustrate the importance of an exact knowledge of the substantive theory in question in order to distinguish ultimate issues of fact from the questions of proof that they raise.<sup>21</sup> Furthermore, they support the conclusion that, in a system of presumptions, the distinction between ultimate issues of fact and conclusions of law is one of kind and not of degree.

#### B. Division of Elements of a Case into Claim and Defense

The simple division of the elements of a lawsuit into claim and defense, generally accepted in the modern law, cannot be retained in a system of rules based on presumptions. To see the weakness of the division, we need only consider the options available to the defendant once the plaintiff has stated what he regards to be his prima facie case.

<sup>21</sup> The distinction between ultimate facts and evidence thus also makes good sense as well. Indeed, the only way in which one can tell whether a given piece of evidence is relevant to an issue is to know the issue to be decided. The rule against pleading evidence will not tell us what an ultimate issue is, but identification of the ultimate issue, coupled with the rules of relevance, should tell us what counts as evidence.

First, in any system of pleading, the defendant can deny the truth of the plaintiff's allegations. A denial does not speak to the legal sufficiency of the plaintiff's allegations; it raises an issue of fact. The question could be simple: did the defendant have the green light when he entered the intersection? Or it could be quite complex: did the activities of the defendant amount to an unreasonable restraint of trade? Whatever the question, a denial will in the end require a judgment of true or false.

Second, if the defendant is unable or unwilling to dispute the truth of the plaintiff's allegations, he can argue that, as a matter of legal policy, the allegations made do not give any reason for the court to disturb the parity that existed between the parties at the outset of the lawsuit. The defendant's demurrer assumes the truth of the plaintiff's allegations but challenges their legal sufficiency. It does not tell us how to decide the legal issue it raises, for it only responds to the formal needs of the system. If the demurrer is sustained, then the defendant's conduct is, in effect, held not to require any explanation, and we reach a dead end in the development of substantive law that makes further pleas neither possible nor necessary. As it has so often been said, a bad plea is a sufficient answer to a bad cause of action.<sup>22</sup>

Where it is not possible to question either the truth or the sufficiency of the plaintiff's prima facie case, the defendant's third course is to enter a plea in avoidance.<sup>23</sup> Since the allegations of a prima facie case can create only a presumption of liability, the defendant must be allowed to offer an explanation of the conduct alleged in the complaint. That explanation must admit the truth of all the plaintiff's allegations, and concede that the complaint states a prima facie case. It must also allege "new matter," consistent with all prior allegations, sufficient to defeat the inference from facts to liability that the plaintiff seeks to establish.

As we have seen, if the defendant chooses to deny or demur, issue is joined and it remains only to decide a question of fact or a point of law. When, however, an affirmative plea in avoidance is entered, the issue cannot, as a matter of logic, be joined. The plaintiff must be allowed to respond to the defendant's affirmative plea in any of the

<sup>22</sup> C. CLARK, *supra* note 1, § 83.

<sup>23</sup> At common law, the plea was known as one of confession and avoidance. The term "confession" was added because the defendant could not plead in avoidance if he denied or demurred. As an administrative matter, there was no doubt much efficiency to this system of elections, but it was doubtless productive of much injustice as well. Today, the defendant is allowed in most jurisdictions, a free choice amongst these alternatives. But these rules of election are of no concern here because we are only interested in seeing how these options fit into the formal structure of a legal argument.

three ways that were open to the defendant after the plaintiff stated his prima facie case. Denial of the defendant's allegations is as appropriate as a denial of the allegations in the prima facie case, for their truth could be disputed in either case.<sup>24</sup> Similarly, a demurrer is appropriate to determine the legal sufficiency of the defense. What is crucial, however, is that a further plea in avoidance is proper as well. Once the model of logically sufficient conditions is abandoned, the plaintiff must speak in terms of presumptions and not of absolute rules. The same requirement applies to the defendant: the modern division of a case into claim and defense should not obscure the fact that we work within a system of presumptions. The defendant's plea in avoidance only raises a presumption that the defendant can explain the conduct attributed to him. That explanation should in principle be subject to a further exception, again introducing new matter, consistent with all prior allegations, to override the defense established by the defendant's plea.

Indeed, three stages of pleading may not be enough, for there is no logical point at which the legal system, rather than the parties, can decide that all matter relevant to the lawsuit has been introduced. If the plaintiff replies with a further plea in avoidance at the third stage of the case, the defendant must be given a further opportunity to counter the plaintiff's affirmative plea—the explanation of the explanation—by a further plea in avoidance. The system presupposes the "essential incompleteness of legal rules," for the case remains subject to further elaboration until one of the parties decides to join an issue either of law or of fact. As the common law system of special pleadings, with its uncouth replications, rejoinders, surrejoinders and the like, recognized, some cases can only be adequately framed after many rounds of argument.<sup>25</sup> The federal rules, with their reduced emphasis on the pleadings, do not allow the parties to develop the case in the manner required by a system of presumptions because the pleadings typically end at the second stage.

The strengths of a system of indefinite pleas can be illustrated by a simple three-stage argument. Let "X" represent the plaintiff's prima facie case, "Y" the defendant's plea in avoidance, and "Z" the plaintiff's response thereto.<sup>26</sup> Is it necessary to put the argument in this form, or

<sup>24</sup> The Federal Rules do not provide for joinder of issue where the plaintiff wishes to deny affirmative defenses raised in the answer. FED. R. CIV. PRO. Rule 8(d).

<sup>25</sup> See B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING, §§ 13, 14 (3d ed. II. Ballantine 1923).

<sup>26</sup> Note that these three allegations must be consistent with each other since the pattern of argument assumes that all of them can be true at one time. The requirement of consistency does not apply, however, whenever one of the inconsistent pleas will be immaterial after the introduction of the evidence. Thus there is no reason to say that the de-

could it be said that X and Z together make a prima facie case to which Y is an insufficient defense? If it could, then the two-staged argument of modern pleading systems sets out, and in a more efficient form, all of the information conveyed by the complicated structure of common law pleading. As reformulated into two stages, however, the argument does not indicate how the case should be decided if X is true, and both Y and Z are false. The two-stage argument indicates that X and Z together make a prima facie case, but it does not and cannot tell us that while X is always material, Z is relevant to the argument if and only if Y is true. If Z is intended to be an exception to an exception (here Y), it cannot be treated as a part of the prima facie case.

To give the argument concrete form, assume that X is "the defendant did not keep his part of the bargain," Y is "the defendant was an infant," and Z is "the plaintiff delivered necessaries to the infant in the performance of his part of the bargain." If these allegations are true, then it does not matter whether the parties are limited to pleading single statements of claim and defense or are allowed to continue indefinitely until one of them decides to join an issue. Both theories yield the same substantive result. Even if the plaintiff is required to prove as part of his prima facie case both that the defendant did not keep his part of the bargain (X) and that the plaintiff provided necessaries when he kept his (Z), he will be able to recover, as a matter of substantive law, regardless of whether the defendant can show that he is an infant (Y).

Suppose, however, that the plaintiff proves that the defendant did not keep his part of the bargain (X), and that the defendant is not an infant (not Y). Under these circumstances, it is not clear whether the plaintiff should be allowed to recover without also proving that he provided necessaries (Z). In the previous hypothetical, where X, Y, and Z were true, the plaintiff was required to show, as part of his prima facie case, both that he had provided necessaries and that the defendant did not keep his part of the bargain. If that requirement accurately reflected the requirements of the substantive law, then the plaintiff does not make out a prima facie case by showing only that the defendant did not keep his part of the bargain. Under the substantive law, however, this allegation does state a prima facie case. It is not clear, therefore, why

defendant cannot plead two inconsistent affirmative defenses in response to a prima facie case, so long as each of those answers is consistent with it. Here the inconsistency in the pleadings do not signal a permanent defect in the structure of the argument. The Federal Rules are clearly correct from a pleading standpoint when they allow inconsistent allegations to be made alternatively in a claim or defense, or indeed in any other plea as well. FED. R. CIV. PRO. 8(e)(2).

the plaintiff should be required to include in his *prima facie* case an allegation that he provided the defendant with necessities when the defendant's infancy might never be put in issue. If the delivery of necessities (Z) is material only if it can be shown that the defendant is an infant, then it follows that the issue of necessities should be raised only after the infancy question is pleaded as a defense.<sup>27</sup> That is the result under a system of indefinite pleas: the plaintiff's provision of necessities is a sufficient reply to the defense of infancy, which raises only a presumption that the defendant is not liable. It is thus possible to treat the proposition "defendant did not keep his part of the bargain" (X) as the entire *prima facie* case even though it does not contain all the allegations that the plaintiff may need to prove in order to recover.

A system of staged pleadings can also help to clarify difficult issues of substantive law, a point illustrated by the case of the infant's contract. When the plaintiff states a *prima facie* case merely by alleging that the defendant did not keep his part of the bargain, the appropriate measure of damages is the value of the defendant's performance to the plaintiff, that is, the price of the goods. The defendant then relies on the defense of infancy, which, in effect, reduces the measure of damages to zero. Since the plaintiff may plead further, however, the issues of liability and damages are not yet finally resolved. When the plaintiff shows that he provided the defendant with necessities, he is again entitled to recover. But now the appropriate measure of damages is the value of the plaintiff's performance to the defendant, if it is less than the value of defendant's promise.<sup>28</sup> The measure of recovery thus depends upon the last valid plea in the case shown to be true. A system of staged pleadings shows that it is futile to search for a single standard of recovery applicable to every contract case.

The three-stage argument also illustrates how difficult it is to classify actions by their theories of recovery. The *prima facie* case in the example above is appropriate to a contract action. To the extent that

<sup>27</sup> The common law system of staged pleading is used to account for infant's liability in *Guardians of Pontypridd Union v. Drew*, [1927] 1 K.B. 214. "The old course of pleading was a count for goods sold and delivered, a plea of infancy, and a replication that the goods were necessities; and then the plaintiff did not necessarily recover the price alleged, he recovered a reasonable price for the necessities." *Id.* at 220.

Two points should be noted about the argument. First, it is not clear that the *prima facie* case need contain an allegation that the goods were delivered, since the nonperformance of a fully executory contract is in general actionable. The delivery of the goods should be raised in the replication. Second, it does not follow that this form of pleading "does not imply a consensual contract" for the supply of the goods alone is insufficient without the agreement. See generally Miles, *The Infant's Liability for Necessaries*, 43 L.Q. REV. 389 (1927) (discussion of the basis of infant's liability).

<sup>28</sup> G.C. CHISHIRE & C.H.S. FIFOOT, *THE LAW OF CONTRACT* 370 (7th ed. 1969).

considerations of jurisdiction, venue, statutes of limitations, conflicts of law and so on turn on the characterization of the *prima facie* case, the action must be treated as one in contract. When attention is directed to the third stage of the argument, however, the action seems to be based on quasi-contractual notions; the defendant has been unjustly enriched in that he received from the plaintiff a benefit for which he has not paid. Nonetheless, since the plaintiff must plead and prove the agreement between the parties in order to reach the third stage of the argument, the action should not be classified as quasi-contractual. It cannot be said simply that the defendant "is bound, not because he has agreed, but because he has been supplied."<sup>29</sup> The case has two "because's," the first of which is the agreement to purchase. Had there been no agreement between the parties, the plaintiff might still be able to recover, but not on the simple allegation that he provided the defendant with necessities. The allegation presupposes the two prior stages of the argument, the first of which alleged the agreement. By itself it does not state a cause of action. The formal rules of pleading do not provide the basis of a "pure" theory of quasi-contract, apart from agreement, but they do help identify those situations in which one is necessary for the plaintiff to recover.<sup>30</sup> The prohibition against pleading conclusions of law clearly will not allow the plaintiff to allege only that the defendant was "unjustly" enriched at his expense.

### C. Allocation of Issues in a Case

The last problem raised by a system of presumptions concerns the proper allocation of issues between the parties. It is, moreover, a problem that must be faced whether we adopt the conventional two-staged

<sup>29</sup> *Id.*

<sup>30</sup> See *Leoni v. Delany*, 83 Cal. App. 2d 303, 188 P.2d 765 (1948), for a situation which raises the same question where the defendant is able to interpose the statute of frauds in a contract action. The court allows the plaintiff to plead a quasi-contractual count as an alternative to the contract action. The court treats the two counts as though they stated separate and independent causes of action, but that cannot be the case because the second complaint is good only because there is the first claim which pleads the bargain and its nonperformance which is met by the statute of frauds. The court does note that: "It is the unenforceability of an otherwise valid contract which gives rise to the right of relief through the medium of the common count. The law contemplates that when one receives a benefit at the expense or the detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received." *Id.* at 307, 188 P.2d at 767. The second proposition is broader than the first, and of itself suggests that even a person who intended his services as a gift could afterwards recover damages to the extent of their value. The proposition only makes sense, therefore, to the extent that it presupposes that the contract is "unenforceable" because of the statute of frauds. The entire matter can, moreover, be better stated if one dispenses with the notion that there are two distinct actions, and says instead that the allegation of a benefit provided is a good reply to the defense based upon the statute of frauds.

system of argument or the more complex system of multiple staged argument just developed and explained, for in both cases the plaintiff and the defendant must share the burden of raising the material issues in a case.

In the two-staged system this question has been treated as one of allocating a case between its "ifs" and its "unlesses," where the "ifs" are those allegations assigned to the plaintiff, and the "unlesses" are those assigned to the defendant.<sup>31</sup> In the context of this system, the solution to the allocation problem has only limited substantive significance. True, it is important that the plaintiff state at least some reason why he should be able to recover; otherwise who would hesitate to sue? But once a bare minimum of issues is allocated to the plaintiff, there are many issues that could be allocated to either party without substantive effect.<sup>32</sup> No matter how the infancy issue in a contracts case is allocated, for example, the plaintiff will be able to prevail only if the defendant is not an infant; otherwise he must fail. The allocation of that issue only determines whether infancy is treated as an indispensable part of the prima facie case—an "if"—or, in the alternative, as an absolute defense—an "unless." In a two-staged system, the infancy of the defendant thus appears to be a logically sufficient condition for the defeat of the plaintiff's contract claim. That result may not correspond to the substantive law, but the pleading rule that limits the argument to two stages makes it appear plausible by suggesting that a defense, unlike a prima facie case, is never subject to exceptions.

Questions of allocation take on greater importance when the parties are allowed to plead indefinitely until issue is joined, because now the allocation of a single issue can determine the structure of the case at all

<sup>31</sup> See Cleary, *Presuming and Pleading: An Essay on Juristic Immunity*, 12 STAN. L. REV. 5, 6 (1959).

<sup>32</sup> Occasionally there will be reasons apart from the structure of the legal argument, to decide how a particular issue will be allocated. For example, a party may try to bring or remove his case into federal court under its "federal question" jurisdiction. In order to do that, he must show that his case is one which "arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1970). That requirement has been construed to mean that plaintiff must show that the federal question is raised as part of his complaint, which in turn means that this test will be operative only if there is some theory which tells us that the question of allocation is not arbitrary. Thus, in *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), the Supreme Court held, on its own motion, that a case could not be removed to a federal court where the only federal questions concerned the application and construction of a federal statute which in terms forbade railroads from issuing free passes. The court held that the contracts case did not arise under the federal statute because it had to be pleaded as an affirmative defense in the ordinary contract action. Perhaps the Supreme Court has adopted an unfortunate test to determine its federal question jurisdiction. See generally C. WRIGHT, *supra* note 1, at 60. Given that test, however, it appears that the result is correct once it is accepted that the prima facie case need only allege that the defendant did not keep his half of the bargain.

further stages in its development. Consider again the infancy issue in contracts cases. When it is allocated to the defendant, it can no longer be viewed as an absolute defense because, even if true, the plaintiff could plead, for example, that he delivered necessities to the plaintiff. There is, however, no orderly way to raise this last issue if the question of infancy is treated as part of the plaintiff's prima facie case. The plaintiff will, consistently with his interest, allege that the defendant was not an infant, and at that point the defendant has no need to interpose an affirmative plea of his own. He will be able to rest his case on the denial of the plaintiff's allegation of, as it were noninfancy. There will thus be no opportunity for the plaintiff to raise the issue of necessities, for a reply can be made only after a plea in avoidance, and never after a denial.

The shape of the legal argument has changed, and with that change the need to allocate issues between the parties takes on new urgency. It is no longer adequate to speak about the "ifs" and the "unlesses" of a case, as it was in two-staged systems. Some "ifs," like the plea of necessities, presuppose an "unless," while others do not. Some "unlesses" presuppose not only the prima facie case, but a defense and a reply as well. Further complications follow as a matter of course. It is therefore necessary to develop rules that determine not only who is under a duty to raise a given issue—who bears the burden of allegation, so to speak—but also at what level in the argument it is to be raised.

Traditionally, the allocation of issues between the parties has been treated as a formal question, to be answered by formal means: the party with the affirmative side of an issue was required to plead it. While this test will cause complications in particular cases, it does offer a principled means by which to allocate issues in advance of trial. It also makes it possible to decide questions of allocation without looking to the substantive validity of the plea in question, and thus provides a method of allocation not only of standard pleas whose validity is unquestioned, but also of issues of first impression where the substantive questions have not been settled.

In spite of its advantages, this method of allocation has been subjected to spirited attack in recent years. Professor Cleary argues that "this [method of allocation] is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form. Thus a plaintiff's exercise of ordinary care equals absence of contributory negligence, in the minority of jurisdictions which place this element in plaintiff's case."<sup>33</sup> Yet the very example he uses casts doubt on

<sup>33</sup> Cleary, *supra* note 31, at 11.

his general position. When the issue of contributory negligence is raised as an affirmative defense, the thrust of the plea is that the plaintiff's negligence contributed to his own harm.<sup>34</sup> It asserts a causal relation between the plaintiff's negligence and his own injury. The reference to this causal connection is not preserved, however, if the plaintiff must allege only that he exercised ordinary care, for then the plaintiff could not show that he was careless, but only in a way that was causally unrelated to the occurrence of his injury, as the law of negligence indeed entitles him to do.<sup>35</sup> The causation issue could be reinserted into the case only if the plaintiff were to allege that, though he did not exercise ordinary care, his negligence did not cause his harm. But that proposition is in the negative form, which Cleary claimed could always be avoided in the statement of the issue.

The point, moreover, can be generalized because it is possible to apply a requirement of affirmative form to all allegations about a party's acts or duties. Under a theory of strict liability, for example, the prima facie case will take the form the defendant hit the plaintiff. One might object to the theory on substantive grounds, but if the allegation is material to a case at all, then it should be raised by the plaintiff. There is no assertion in a negative form that has the same meaning; "X did not hit the plaintiff," for example, will not suffice.<sup>36</sup> The test of affirmative form thus resolves the question of allocation between the parties in unique fashion. Moreover, it applies not only to cases where the plaintiff makes a good plea, but also to those in which his allegations are deficient on substantive grounds. The plaintiff could allege that the defendant brushed his teeth in the morning, for which there is no negative reformulation. Yet there is no way that the allegation could be

<sup>34</sup> Here I use the shorthand that the "negligence" causes the harm in question, even though a more complete statement of the issue would require the duty analysis discussed in text at notes 24-26 *supra* and notes 45-46 *infra*. In its complete form the want of equivalence is even more apparent because the defendant's plea of contributory negligence will identify the specific requirement placed on the plaintiff and the relationship between the plaintiff's noncompliance with it and his harm. The possibility that noncompliance with the standard is causally irrelevant cannot be brought out if the plaintiff pleads that he complied with this standard; reference to the specific standard is lost if the plaintiff says only that he has satisfied the relevant requirements of due care.

<sup>35</sup> "Plaintiff will not, of course, be barred by contributory negligence unless his negligence was a proximate cause of the damage sued for." 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 22.2, at 1199 (1956) (emphasis in original); cf. *Mayer v. Petzelt*, 311 F.2d 601 (7th Cir. 1962).

<sup>36</sup> Indeed, as a substantive matter, the distinction between trespass cases and Good Samaritan cases rests on the fact that it is impossible to transform the proposition "A did not help B" into the proposition that "A hurt B." The second embodies notions of causation that are foreign to the first. See Epstein, *supra* note 5, at 190-91.

struck from the complaint on formal grounds even though it could not (I assume) withstand an attack under a general demurrer.

In those areas of the law, however, in which the defendant is held liable when he has not acted, this rule of allocation requires further refinement. A contract or a statute, for example, may create a duty to act. Cases brought under such a contract or statute rest on the assertion that the defendant has not done what he is prima facie supposed to do. Consequently, it would not make sense for the law of pleading to require the plaintiff to allege only affirmative acts. There is no affirmative equivalent to the proposition that the defendant did not keep his part of the bargain. It will not do to assert that the defendant breached the contract, because that is a conclusion of law, which, unlike nonperformance, admits of no excuse or justification.<sup>37</sup>

As a reflection of the substantive law, the rules of pleading should require in these cases an affirmative allegation of the source of the defendant's duty and an assertion of the defendant's nonperformance thereof. Thus, in contract cases, it should be necessary first to allege the bargain that prima facie created the duty and then that the defendant did not keep his part of it.<sup>38</sup> The complaint must take the affirmative form only insofar as the formation of the obligation is concerned, a constraint that renders it improper to allege that there is no duty because there is no bargain.<sup>39</sup> The variation required for cases involving statutory duties follows the same pattern.

<sup>37</sup> "Breach of promise may be called nonfulfillment." F. JAMES, *supra* note 1, at 255. One could perhaps eliminate the objection based upon pleading conclusions of law by saying that the plaintiff's prima facie case should be "the defendant broke his promise." Note, however, that the verbs "breach" and "break" are both odd in that they are not verbs of action. One does not break a promise, for example, in the same way that he breaks a chair. These two verbs, though not verbs of action, are most probably used in contracts cases because of the close relationship they have to "the act" in the law of tort. Even if the proposition, "you breached your promise" were treated as an exact equivalent to the proposition that you did not keep your promise, there would still be no real allocation problem because both of these formulations require the plaintiff to raise the issue.

<sup>38</sup> On this view the allegation of nonpayment in the typical contracts case must be treated as part of the prima facie case, even though the Federal Rules require the defendant to plead it as an affirmative defense. If the Federal Rules were correct, then it should follow that the plaintiff can succeed in a contracts case without mention of a possible breach of obligation. It also follows that it is most awkward for the defendant to excuse his nonperformance, since it is not possible to avoid the implications of an allegation not yet made. See C. CLARK, *supra* note 1, § 45, at 285-86; Reppy, *The Anomaly of Payment as an Affirmative Defense*, 10 CORNELL L.Q. 269 (1925). Nor can the result be justified on the ground that it is easy for the plaintiff to prove payment by a receipt or some other means. The burden of proof need not follow the burden of allegation. See note 43 *infra*.

<sup>39</sup> Thus, in *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), the argument is in effect that the plaintiff should not be allowed to say that the federal statute placed

Allegations about mental states raise many of the same problems as those about duties. The crucial point here is that negative expressions in allegations about mental states are proper only if they go to the content of the mental state and not its existence. Thus it is proper for the plaintiff to allege that the defendant intended to harm him, not because the defendant had an intention to act, but because the allegation makes reference to his mental state. By the same token, the plaintiff can allege that the defendant intended to be of no assistance to the plaintiff in his time of need, for the negative portion of the assertion only goes to the content of the defendant's intention. Nonetheless, the formal constraints will prohibit the defendant's allegation that he had no intention to harm the plaintiff, because it is not an allegation about a specific mental state.<sup>40</sup> In both these cases, the issue can of course be raised, but only by the plaintiff in its proper form, where its sufficiency can then be judged on substantive grounds.

These arguments show that the requirement of affirmative form, far from being unintelligible, allows most issues to be allocated in a perfectly straightforward way. There are, however, some cases that create difficulties for this formal test, even as refined. The issue of infancy, for example, raises a question not of the defendant's conduct but of his status. The test of affirmative form offers no guidance as to whether the plaintiff should be required to allege, as part of his *prima facie* case, that the defendant was an adult when he entered into the contract in question, or whether the defendant must raise the issue of infancy. There are, however, other formal considerations that indicate the way the problem should be handled. In a system of staged pleas the substantive law would be altered if the plaintiff were required to raise the question of age, because it would then be impossible ever to recover against an infant on his contract. In addition, if the issue of age is allocated to the plaintiff, it would be necessary as well to require the plaintiff to allege that the defendant was not insane, not in prison, and not under any other form of personal disability recognized by the applicable substantive law. Raising all possible questions of status as part of the *prima facie* case would, at the very least, make it difficult to treat them in different ways if that should seem appropriate. These complex issues can-

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no duty upon the defendant which excused him from the performance of his half of the bargain.

<sup>40</sup> This indeed is part of the so-called plea of inevitable accident: the defendant was not negligent and did not intend to harm the plaintiff. The plea was used as a transitional device to convert the older system of strict liability to one of negligence and harmful intent. But as a formal matter, the allocation it requires is quite unsound given the position in the text, and today the plaintiff must allege affirmatively either negligence or intent. *Cf. Fowler v. Lanning*, [1959] 1 Q.B. 426; *Stanley v. Powell*, [1891] 1 Q.B. 86.

not be broken down into their component parts for analysis unless each of them is the subject of its own affirmative defense. Where the test of affirmative form cannot resolve the problem of allocation—as it cannot in cases of status—we should select that allocation that tends to simplify the content of a particular plea, for it is always possible in a system of indefinite pleas to raise the omitted point later in the argument. The desired simplification in status cases requires the defendant to plead specially the particular disability upon which he chooses to rely, which is indeed the law today.

Another case where the test of affirmative form cannot resolve the problem of allocation is the defamation case in which one of the parties wishes to place in issue the truth or falsity of the defendant's statements about the plaintiff: what is true is not false, and vice versa. As in the infancy case, it is necessary to determine which allocation better reduces the burden on each plea and thereby extends the number of possible pleas in the argument. If the plaintiff must show that the defamatory statements are false, an element is added to the *prima facie* case, and, in addition, the plaintiff is foreclosed from recovering for the injury caused by a true but defamatory accusation. Neither of these difficulties is encountered if the issue of truth must be raised by a plea in avoidance. Happily, present law does allocate the issue to the defendant under the rubric of "justification."

The allocation rules developed above can be used to determine whether a particular issue should be allocated to the plaintiff or to the defendant. But the task is not complete, for in a system of staged pleadings it is also necessary to decide at which stage in the argument a particular allegation should be introduced. The appropriate stage is best determined, I believe, by using the common law doctrine of surplusage. Under that doctrine, if the plaintiff is entitled to the same relief with allegations A, B, and C as with A and B alone, then C must be struck from the complaint. The *prima facie* case, and by extension all pleas, must not only be sufficient, they must be minimally sufficient as well. The test in effect requires an economy of means to achieve a given end. The extra allegations, even if proper in form, serve no useful function; should they become material at some later stage in the argument, they can then be raised. To return to the example of the infant's contract, if the allegation that the defendant did not keep his bargain states a *prima facie* case, the plaintiff need not, and should not be allowed to, allege in his complaint that he has provided the defendant with necessaries. When and if the defendant has raised the sufficient defense of infancy, the plaintiff will be free to make his further allegations.

Together, the formal rules discussed above are sufficient in almost

every case to provide a principled determination of both the party to whom an issue should be allocated and the stage at which it should be raised. Nonetheless, it is quite clear that these rules do not represent the current view on allocation of the burden of allegation. That view, it seems, looks at the question of allocation not in relation to the formal structure of legal argument, but in terms of the impact that alternative allocations are apt to have on the subsequent course of the lawsuit, particularly at trial. In any event, three general guidelines are usually offered as capable of providing a principled resolution of most, if not all, allocation questions. They are commonly styled the test of "policy," the test of "fairness," and the test of "probabilities." All of them suffer from the objection that they cannot tell us how to allocate issues which, if they prove insufficient as a matter of law, will never give rise to questions of fact. Yet they are worth examining in some detail because they are in clear conflict with the formal principles of allocation developed above.

1. *The Test of "Policy."* Simply put, the test of policy says that a party will be required to introduce as part of his case any "disfavored" contention of substantive law on which he wishes to rely.<sup>41</sup> A typical application of this rule involves the issue of a contributory negligence. Judges in some jurisdictions do not like the doctrine of contributory negligence because they believe that it is harsh to excuse a negligent defendant merely because the plaintiff has been negligent as well. The test of policy helps, it is claimed, to avoid the disfavored result because it requires the defendant to plead the issue in his answer and to prove it at trial in order to escape liability.

This argument, which does not turn on formal principles, is subject to grave objections. As a pleading requirement, its only possible impact is pernicious. Once the allocation question is settled, any defense lawyer who wants to rely on the doctrine of contributory negligence will know that he is required to plead it specially. The disfavored contention will be made in all relevant cases save those few in which the defendant's lawyer makes an elementary mistake. It is hard to see why a modern system of procedure should take comfort in such slips.

Moreover, the allocation of contributory negligence to the defendant will not, even to the extent that it controls the burden of proof—either production or persuasion—have much effect on the outcome of a case. Where there is no evidence of plaintiff's negligence, or where the evidence is in equipoise, the burden of proof will effectively deny to the defendant the benefit of the doctrine of contributory negligence. In

<sup>41</sup> C. CLARK, *supra* note 1, § 96, at 609; Cleary, *supra* note 31, at 11-12.

most cases, however—particularly if cases that never go to trial are taken into account—the evidence on the issue will point clearly one way or the other, and the defendant will not be hurt because the burden of proof falls on him at the outset. Even in close cases, he will prevail if the bare preponderance of evidence supports his defense of contributory negligence.<sup>42</sup> In any event, his burden is no greater than that placed on the plaintiff, who must plead and prove the defendant's negligence even before his own negligence becomes material. But no one would claim that negligence actions are disfavored. There are better ways to make proof of contributory negligence more difficult, if that is desired; the defendant could, for example, be required to prove his case beyond a reasonable doubt, be limited to using only certain kinds of evidence or be denied the benefits of doctrine of *res ipsa loquitur*.<sup>43</sup>

Its defects in practice to one side, the most basic assumption of the policy test—that a valid plea should be treated as disfavored—is quite indefensible. The doctrine of contributory negligence has been reexamined countless times and still remains in most jurisdictions an integral part of the law of torts. The courts should not use the rules of procedure to frustrate the doctrine's application, even as they concede its place in the substantive law. One may properly argue that the defense of contributory negligence should be replaced by a rule of comparative negligence, or that it should be subject to an exception based on the doctrine of last clear chance. But once the substantive question has been decided, the decision should not be undermined by manipulating procedural rules.

2. *The Test of "Fairness."* The second suggested standard for allocation decisions, that of "fairness," is not intended to have an ethical connotation.<sup>44</sup> It suggests only that each issue and its burden be allocated for reasons of efficiency to the party with superior access to the evidence necessary to resolve it as a matter of fact. If the evidence is in his favor, he will have every incentive to make it known. If it goes against him, his own silence will seal his defeat.

Clearly, there are difficulties involved in using the test of fairness. Suppose the defendant has better access to evidence on all issues. Does

<sup>42</sup> Cleary notes that the burden operates "as a theoretical, though perhaps not a practical, handicap." Cleary, *supra* note 31, at 11.

<sup>43</sup> "It is not inconsistent to require the defendant to plead contributory negligence if he wants to raise the issue, and yet put the burden of proof on the plaintiff if the issue is raised." *Sampson v. Channell*, 110 F.2d 754, 757 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

<sup>44</sup> See Cleary, *supra* note 31, at 12.

that mean, under the rule, that the plaintiff need not state a prima facie case at all? Again, questions of allocation must be resolved not case by case, but for a whole class of cases, all of which raise a common legal issue. Contributory negligence must, if only for practical reasons, be allocated to all plaintiffs or to all defendants. Before the trial, the legal system cannot appraise each party's access to evidence in each of the myriad of factual situations that may underlie a common legal issue. A uniform rule of pleading is required, but the rationale of the test of "fairness" implies that no uniform rule of allocation of a particular issue will always be "fair." In some cases the plaintiff will have better evidence; in others the defendant. In most, it will be possible to answer the question only after it has been raised and joined. Considerations of access could not, then, govern the question of who should raise an issue at all.

Moreover, whenever the question of access is crucial, there are better techniques available for handling it. First, discovery procedures can largely eliminate the problem of unequal access. Under most modern systems, pre-trial discovery rules enable each party to obtain from his adversary all relevant evidence, regardless of whether it is admissible at trial.<sup>45</sup> And the full scope of discovery is available to both parties no matter who has the duty to raise a certain issue.<sup>46</sup> Second, the burden of proof need not follow the burden of allegation. The burden of proof can be allowed to shift during the course of trial to the party who has the better access to needed evidence. Indeed, the doctrine of *res ipsa loquitur* appears in part to have just this function, particularly in malpractice cases.<sup>47</sup> These shifts can be made on a case by case basis, eliminating the need to tamper with the universal form used to allocate issues in the pleadings. Since the problems of access can be handled by these techniques, therefore, the pleadings need not be used to deal with them, but can be left to help structure the rules of substantive law, the one task they can do well.

3. "*The Probabilities of the Situation.*" On any disputed question of fact, one party is probably in the right and the other is wrong. From this truism it is sometimes argued that it should be possible to require the party who is more likely to be wrong to plead the issue and to prove the relevant facts.<sup>48</sup> For example, if it could be shown that plaintiffs are usually not contributorily negligent, the proposed rule would place on the defendant the duty to plead and prove contributory

<sup>45</sup> FED. R. CIV. PRO. 26(b)(1).

<sup>46</sup> See *id.*

<sup>47</sup> *E.g.*, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944).

<sup>48</sup> See *Cleary*, *supra* note 31, at 12-14.

negligence. Where there is no evidence on the question, this burden of proof would be decisive in the individual case, while in the class of cases, we would more often than not achieve the correct results.

Factual probabilities are, of course, difficult to ascertain and to apply.<sup>49</sup> No one has made, or most likely ever will make, the kind of statistical inquiry into contributory negligence, for example, that would render respectable the use of a probabilistic statement of this sort. Hence, to rely on the probabilities of the situation, judges would be forced to make intuitive estimates of the probabilities that in most cases will at best be of uncertain worth. Even an intuitive estimate of the probabilities suggests a great variation across the range of negligence cases, indicating, as with the fairness test, that no uniform pleading rule is possible. What do we need to know to decide whether it is more likely than not that the plaintiff is guilty of contributory negligence in a two car collision? Not all collision cases are alike; yet there is no way to accommodate these differences in a single plea of contributory negligence. The "probabilities of the situation" test may bear on questions of proof but it has no importance in pleading matters.

Each of the three suggested criteria for allocation has serious internal weaknesses. Assuming, however, that each of the tests points to one result or the other, how does one balance and weigh their results when they conflict? The "policy" test suggests, for example, that the issue of contributory negligence should be allocated to the defendant's case, while the access test would place it with the plaintiff, at least if he is alive. The probabilities test does not appear to point in either direction. There is no basis for giving either of the conflicting tests any greater weight than the other; nor does it seem possible to find a mathematical rule, or an intuitive substitute, to reduce these distinct tests to a common measure.

Even when they point in one direction, the three tests can produce results that should give us reason to pause. With regard to the issue of the defendant's negligence, for example, the combined application of the three tests may well indicate that the defendant himself should raise the issue. Negligence actions are not disfavored; the probabilities do not appear to cut strongly either way; and the defendant generally does have better access to the relevant evidence about his conduct. The indicated allocation is unacceptable on substantive grounds, of course,

<sup>49</sup> See the extensive debate on the desirability of the use of statistical evidence for the resolution of disputed questions of fact in Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); Finkelstein & Fairley, *A Comment on "Trial by Mathematics,"* 84 HARV. L. REV. 1801 (1971); Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810 (1971).

because the plaintiff would not have to allege anything on his own behalf in order to upset the initial balance between the parties.

That none of the tests alone nor all of them together can resolve questions of allocation should not be surprising. The need for an allocation of issues between the parties did not arise to solve the problems of proof at trial, but on account of formal considerations; the logic of legal rules, of presumptions and exceptions, requires an indefinite alternations of pleas between the parties, whatever substantive legal theories may be involved. The reasons that make some allocation necessary demand that it be done by formal means alone, and not by the pragmatic tests offered to replace them. The rules of form developed above are, no doubt, far from perfect, but at least they are a step in the right direction.

#### IV. CONCLUSION

Many of the views expressed in this article were accepted at one time as part of the law of pleading. All of them rest on the assumption that the legal rules of entitlement and responsibility form not a system of absolute rules, but rather a system of presumptions. From that premise at least three conclusions follow. First, it is both possible and necessary to distinguish between ultimate issues of fact and conclusions of law. Second, the structure of a legal argument cannot be limited arbitrarily to the presentation of claim and defense, but must, as at common law, be extended as far as the parties to the lawsuit want to take it. Third, there must be some formal means, such as the rules of affirmative form and minimum sufficiency, to allocate the issues of a case not only between the parties to the suit but also among the stages of the legal argument.

Today the parties to a lawsuit do not plead their case in accordance with the common law rules set out in this article, and, of course, there is no reason to reinstitute the worst features of the forms of action at common law by insisting that they be complied with at the earliest stages of a case. Nonetheless, an appreciation of these rules could be of use in the conduct of litigation. It could help attorneys to identify the strengths and weaknesses of their case before they commit themselves to costly litigation, assist at pre-trial conference in isolating the issues to be tried, and facilitate the more precise formulation of legal issues on appeal. Even if the rules could not do much to improve the operation of the legal system, they remain of great value in efforts to systemize the rules of substantive law and thus to make them both more coherent and more just.

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