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THE DOCTRINE OF AFFIRMATIVE DEFENSE IN CIVIL CASES — BETWEEN COMMON LAW AND JEWISH LAW

Yuval Sinai†

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I. Introduction

Comparisons among different procedural systems have always provided an unending source of deep analyses in the theoretical literature of modern procedural law. These comparisons have also generated far-reaching changes in many systems of law that have endorsed elements imported in full or in part from other legal systems. As is well-known, there is a central axis of comparison between the adversary system practiced in common law legal systems (England and the United States), among others, and the inquisitorial system practiced in the continental-civil legal systems. There is, however, an additional axis of comparison which may be of particular interest, perhaps even more so than the adversary-inquisitorial axis: the procedural system of Jewish law. This axis of comparison between inquisitorial and adversary procedural systems and the procedural system practiced in Jewish law provides a broad basis for original and exciting legal literature.1 It presents a confrontation not only between different systems of law, but also between Western culture and Jewish culture. Some scholars are of the opinion that Jewish law provides a basis for the reform and development of Western law.2 In the United States, Jewish law is used—and often reinterpreted—to provide a requisite counter-

1 See Yuval Sinai, The Court's Intervention in Litigation According to Jewish Law (May 2003) [hereinafter Jewish Law] (unpublished Ph.D. Thesis, Bar-Ilan University, on file with author). It is well known that numerous difficulties attach to the identification of the pertinent sources in the literature of Jewish law and its accurate and efficient analysis. Naturally, these difficulties are largely responsible for the paucity of comparative research comparing Western procedural systems and Jewish law. Id.

model for contemporary U.S. legal theory.3

This article deals largely with comparative research and may serve as a paradigm for dealing with the subject of procedural systems from the perspective of the conflict between common law and the procedural model of Jewish law.

One of the central distinctions in evidence law, the source of which is the common law, is the distinction between two burdens of proof: the burden of persuasion and the burden of producing evidence.4 The burden of persuasion, which is the principal burden imposed on the litigant, requires him to prove the justice of his claims.5 The secondary burden of producing evidence is the duty required in order to discharge the burden of persuasion.6 Both in criminal and civil cases, the results of a trial are frequently determined in accordance with rules of the burden of persuasion.7 Scholars have referred to this as the risk of non-persuasion.8

A central portion of this article concerns one of the central burden-of-persuasion rules in Anglo-American law, the affirmative defense doctrine.9 The term affirmative defense is


4 See James B. Thayer, The Burden of Proof, 4 HARV. L. REV. 45, 46-47 (1890) [hereinafter Thayer]; JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898) [hereinafter TREATISE] (this pioneering research was published over 100 years ago).

5 See Thayer, supra note 4, at 46-47.

6 Its concern is with the sufficiency, or adequacy of evidence. This means that in terms of the amount of evidence, submitted, and assuming its reliability, the judge is permitted to make a finding. See TREATISE, supra note 4, 355-57.


8 If, upon the termination of hearing evidence, it transpires that a particular claim has not been proved to the level of persuading the court, the court will rule in accordance with the burden of persuasion, i.e., it will rule against the litigant who bore the burden of proving his claim. See, e.g., CROSS & TOPPER, supra note 7; MUELLER & KIRKPATRICK, supra note 7.

9 See MCCORMICK, supra note 7, at 584-93 (explaining that the traditional common law principle of confession and avoidance is similar to the affirmative defense doctrine).
traditionally used to describe the allocation of a burden, either of production, persuasion, or both, to the defendant in a criminal case. The burden is fixed by statute or case law at the beginning of the case and does not depend upon the introduction of any evidence by the prosecution. Positive law commonly requires criminal defendants to prove any affirmative defense, or—as in England—"any exemption, exception, proviso, excuse or qualification to a statutory offence by a preponderance of the evidence."

This article focuses primarily on the affirmative defense doctrine in civil cases. Under this doctrine, the defendant needs to prove any defense that qualifies as affirmative by a preponderance of the evidence. This category is very broad. It extends to any claim of a defendant that does not simply deny the facts underlying the claimant's cause of action. Affirmative defenses include frustration, estoppel, res judicata, waiver and forfeiture, pre-emption, statute of limitations, contributory fault, comparative negligence, and many others.

A defendant's responsive pleading must admit or deny each averment upon which the plaintiff relies. However, there are times when affirmation or denial is inadequate. For example, a responding party may be willing to admit a factual allegation but still contend that she had a justifiable reason for her action. At common law, this was called pleading in "confession and avoidance." It was a way of saying that even if the allegation can be proven, there is an excuse that is recognized under the law. It is different from a denial because it does not seek to deny an element of the opposing party's case, but sets out affirmatively a

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10 Id.
11 Id.
13 See McCormick, supra note 7, at 563.
14 Id.
15 Id.
16 Id.
19 See Joseph H. Koffler & Alison Reppy, Common Law Pleading 460-65 (1969); see also William B. Odgers, Odgers on Civil Court Actions 198-201 (1996); James F. Stephen, A Treatise on the Principles of Pleading in Civil Actions 229-46 (1895); Thomas Chitty, Treatise on Pleading 551-58 (1844).
new issue that goes beyond disproving that element.\textsuperscript{20}

Affirmative defense is the modern equivalent of the common law plea in confession and avoidance.\textsuperscript{21} There are two bases for defending against a civil law suit.\textsuperscript{22} First, the defendant may deny that the plaintiff's claim has any merit.\textsuperscript{23} Second, the defendant may prove an affirmative defense.\textsuperscript{24} The first approach forces the plaintiff to prove the claim by disputing the alleged facts and challenging the plaintiff's evidence. The defendant's objective is to prevent the plaintiff's claim from proving a cause of action.\textsuperscript{25} For example, the plaintiff claims, “You did it,” and the defendant responds, “No, I did not.” The second approach to defending against any civil action is to allege and prove an affirmative defense that avoids or defeats a plaintiff's claim.\textsuperscript{26} An affirmative defense overcomes the claim without regard to whether the claim is true and could be fully proven.\textsuperscript{27} An affirmative defense is one that “avoids” rather than “denies” the truth of a plaintiff’s allegation. For example, the plaintiff says, “You did it,” and the defendant replies, “Maybe, I did it, but I win anyway, because you or I did (or failed to do) something too.” The “something too” is the affirmative defense.

A defendant must plead an affirmative defense to use it in a case.\textsuperscript{28} Each affirmative defense only applies to certain causes of action. A defendant must prove each element of the defense, or it fails.\textsuperscript{29} In other words, a defendant has the burden of proving an affirmative defense, just as a plaintiff has the burden of proving a cause of action. Most affirmative defense must be proven by a preponderance of the evidence.

This article has four parts. Part II critically examines the doctrine of affirmative defense and the rules governing the burden

\textsuperscript{21} Id.
\textsuperscript{22} See William M. Hart & Roderick D. Blanchard, Litigation and Trial Practice for the Legal Paraprofessional 126-41 (2007).
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} See Fed. R. Civ. P. 8(b).
\textsuperscript{29} See Hart, supra note 22, at 126-41.
of persuasion in the common law. The examination will be conducted from the perspective of the central objectives of civil procedure.\(^\text{30}\) In modern law, increasing attention has recently been devoted to what is referred to as "procedural justice."\(^\text{31}\) Part II will examine whether the burden of persuasion rules, among them the doctrine of affirmative defense, indeed realize appropriate procedural objectives and values.

In Part II, this piece addresses some of the difficulties with the affirmative defense doctrine. Part II examines the doctrine from the economic cost-efficiency perspective, where difficulties are created due to the conduct of parties' whose litigation strategy is governed by their fear being trapped into affirmative defense situations. Clearly, this situation places an onerous burden on the court to uncover the truth and, in doing so, significantly increases the costs of the proceeding.

Part III presents a second procedural model based on Jewish law, which is based on the fundamental rule of "he who takes from his friend bears the burden of proof" (ha-mozi me-havero alav ha-rahyah), as well as the rules of "migo". Under the Jewish model, the burden of persuasion is usually imposed on the litigant seeking to take from his rival, typically the plaintiff. Quite often, though legal policy considerations dictate the imposition of the burden of persuasion on a particular party even if from a strictly legal perspective, that party cannot be regarded as a person "taking" from his friend. Part III will present a number of examples for deviation from the basic rule that "he who takes from his friend bears the burden of proof." The meaning of the migo plea is that the defendant making a certain claim will be believed because, had he wished to lie, he could have told a better lie that would have been believed. In other words, because he could have made a

\(^{30}\) Naturally, this article does not discuss all of the values that civil procedure attempts to attain and deals just with the values relevant to this subject. Extensive discussion of such topics can be found in various legal texts. See, e.g., William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840 (1984); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) [hereinafter Economic Approach].

stronger claim, and he waived the chance, he is believed regarding the claim he actually made. The migo doctrine is entirely different from the affirmative defense doctrine. In fact, the two doctrines produce diametrically opposed results. This article will show that the preference given to the party in possession—which is fortified by the migo doctrine—is just, moral, and conducive to truthful pleading. It is also economically efficient, as the migo doctrine encourages litigants to make truthful factual statements. The migo doctrine creates security and legal certainty and is also commensurate with the U.S. Constitution's protection of property rights. This article will bolster the argument of the Jewish law model being cost-efficient by using a game-theory: costly signaling. Part III will show how Jewish law, by use of legal tools, aims to ensure the veracity of the litigants' claims and facilitates credible costly signaling.

Part IV presents a concluding comparative analysis of the common law and Jewish law models.

II. The Doctrine of Affirmative Defense in the Anglo-American Law—Foundations and Difficulties

The doctrine of affirmative defense serves as a classic paradigm for the rules governing the burden of persuasion in the common law. The foundations of the affirmative defense doctrine are found in the old system of special pleading. Under common law pleading requirements, the parties pleaded against each other until they joined issue on a question of law or fact. Each time one party pleaded, the other had an opportunity to demur, to deny the truth of his opponent's allegations, or to introduce new matter and thus to confess and avoid the claim. In the earliest days of common law, unlike our modern era, denial and confession and avoidance were strict alternatives. The common law's nurturance of special pleas made contingent claims common. Parties could, and frequently did, confess and avoid the pleas of

33 Id.
34 Id.
35 Id.
36 Id. at 363-65.
their opponents.\textsuperscript{37} Thus, if a party pleaded the making of a contract, his opponent could specially plead that he was incompetent to contract because of age or some other reason.\textsuperscript{38} If a party pleaded that the defendant struck him, his opponent could specially plead that he was acting in self-defense. A special plea (confession and avoidance) by the defendant would open the door to further special pleading by the plaintiff.\textsuperscript{39} Ultimately, special pleading made lawsuits depend on narrow issues of fact or law, a result that seems alien to modern Anglo-American civil procedure. Nonetheless, the hierarchical imprint and doctrinal structure both remain.\textsuperscript{40}

The common law principle of confession and avoidance\textsuperscript{41} is a good example of one of the consequences of the affirmative defense doctrine. Ordinarily, the burden of proof is on the plaintiff—the party who initiates the action or proceeding.\textsuperscript{42} There is, however, no strict rule that the burden is on the party who brings suit.\textsuperscript{43} When the defendant admits the plaintiff's alleged cause of action, he absolves the plaintiff from the necessity of making any proof in support of his claim. Instead, the defendant then takes the role of actor in the suit and must satisfy the court of the grounds for any counterclaim initiated by him.\textsuperscript{44} According to the confession and avoidance principle, any litigant making an important claim in a trial bears the burden of persuasion in proving his claim. In usual debt claims, for instance, a defendant claiming that he has paid the debt bears the burden of persuasion in proving his claim.\textsuperscript{45}

This principal burden is permanent and is not transferred to the plaintiff at any stage in the trial. The payment claim is usually a claim of confession and avoidance. Effectively, the defendant admits all of the facts claimed by the plaintiff, which form the grounds of his action.\textsuperscript{46} However, he “avoids” the action by

\begin{itemize}
\item\textsuperscript{37} Id.
\item\textsuperscript{38} Id.
\item\textsuperscript{39} Id.
\item\textsuperscript{40} KOFFLER ET AL., supra note 19, at 460-65.
\item\textsuperscript{41} Id.
\item\textsuperscript{42} Id.
\item\textsuperscript{43} Id
\item\textsuperscript{44} TREATISE, supra note 4, at 369.
\item\textsuperscript{45} KOFFLER ET AL., supra note 19, at 460-65.
\item\textsuperscript{46} Id.
\end{itemize}
adding facts that indicate that the debt has expired. This claim exempts the plaintiff from the need to furnish any kind of proof. The concept of confession and avoidance is not limited to the payment claim and includes any claim having the same import. The nature of the risk involved in the confession and avoidance situation is noteworthy—the risk of non-persuasion. The defendant’s admission of the debt is effectively an admission of the grounds of the claim and he therefore runs the risk of being trapped by his admission, because he must prove payment. Should he fail to prove payment and fail to avoid the claim, the plaintiff receives a judgment in his favor based on the defendant’s admission, without having to prove his claim.

The next section of the article will examine whether the burden of persuasion rules, among them the doctrine of affirmative defense, indeed realize appropriate procedural objectives and values.

A. The Question of the Justification for Burden-of-Persuasion Rules

One of the most important procedural values of a legal system is the assurance of a rational legal proceeding. One cannot imagine a judge resolving a case, for example, by tossing a coin, even though it is a neutral, objective, and efficient method of decision making. Decision making procedures affect the basic rights of litigants, and decisions of this kind should not be irrational or arbitrary. This brings us to the issue of a rational, value based, and moral justification for a particular procedural arrangement. As noted above, any doctrine prescribing a burden for producing evidence or burden of persuasion must have a valid justification, because the decision to impose the burden of persuasion on a particular party decisively affects his chances in the trial itself. The reason is that after all the evidence has been submitted, if the court deems that a particular claim has not been proven to its satisfaction, it will rule in accordance with the burden of persuasion. For comparative purposes, the justification of the ancient rule in Jewish Law, “he who takes from his friend bears

47 Id.
48 Id.
49 Id.
50 See Resnik, supra note 3030, at 852-53.
the burden of proof,” (meaning that a legal “extraction” or “taking from” another person must be justified by evidence) is clear and simple.\textsuperscript{51} The next section of this article will show that nothing is more justified than imposing the burden of proof on the person attempting to appropriate a possession of his friend.

What then is the justification for the burden of persuasion rules of the common law? This article will use the doctrine of affirmative defense as a test case. Why should the defendant who needs to prove an affirmative defense be disadvantaged at trial? Why does he, and not his friend who wants to take money from him, run the risk of non-persuasion? How can a plaintiff win his trial without having adduced evidence that justifies his claim? The answer to these questions is far from simple and the classic responses do not provide adequate justification.

The burden of persuasion rules are rooted in the English Common law.\textsuperscript{52} For example, under English case law, when the defendant confirms that the plaintiff paid him a sum of money, absent any familial connection between them, it will be legally presumed that the plaintiff is entitled to demand payment of the debt.\textsuperscript{53} This is normally the case unless the particular circumstances negate the duty of return, i.e. the existence of previous debts of the plaintiff to the defendant, or payment having been made for consideration, all of which must be proved by the defendant.\textsuperscript{54} In light of this fact, this article will briefly review the foundations of the burden-of-persuasion rules in the common law.

\textbf{B. Burden of Persuasion Rules and Rationales in the Common Law—Major Difficulties}

\textit{1. The Affirmative/Negative Claim Doctrine}

The central doctrine in English common law is that the burden of persuasion in civil law is imposed on the party making an affirmative claim and not on the one denying a certain claim, or state of affairs (\textit{Ei qui affirmat non ei qui negat incumbit incumnet}.

\textsuperscript{51} See \textsc{Rabbi Shlomo Yosef Zevin}, \textit{Encyclopaedia Talmudit} (Talmudic Encyclopedia), Vol. 9, 455 (1993).
\textsuperscript{52} See Thayer, \textit{supra} note 4, at 46-47.
\textsuperscript{53} See \textsc{Phipson}, \textit{supra} note 7, at 128.
\textsuperscript{54} Seldon v. Davidson, [1968] 2 All ER 755 (appeal taken from U.K.).
prosecution).\textsuperscript{55} This point was stressed by Lord Maugham in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corp., Ltd.*\textsuperscript{56} "It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons."\textsuperscript{57} United States court rulings have reflected the same considerations.\textsuperscript{58} Statements are found primarily in older cases to the effect that even though a party is required to plead a fact, it is not required to prove that fact if its averment is negative rather than affirmative in form.\textsuperscript{59}

In legal literature the doctrine of the affirmative claim test is supported inter alia by the commonplace understanding that negative facts are more difficult to prove than positive facts.\textsuperscript{60} For example, it is easier to prove the affirmative claim that a person paid his debt, or that his car hit a pedestrian, or that he possesses a license for working in a profession, than to prove the negative fact such as failure to pay a debt, lack of consent where consent is required, or unlicensed dealing in a profession. Similarly, it is easier to find a witness who will positively confirm that he had seen a particular item in a room than to find a witness who will confirm the opposite—a negative fact—that the object was not in the room.

However, this doctrine has been widely criticized. The assumption that it is easier to prove an affirmative fact than a negative one is also questionable.\textsuperscript{61} For example, the difficulty in proving that a debt was not paid as opposed to proof of payment is not the specific result of the affirmative or negative nature of the claims, but rather of the fact that non-payment of a debt extends over a larger period of time, making it difficult to prove that a person did not pay his debt on any particular day at all. The "I

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{59} MCCORMICK, supra note 7, at 564.
\textsuperscript{60} See PHIPSON, supra note 7, at 127.
\textsuperscript{61} See generally Kevin W. Saunders, The Mythic Difficulty in Proving a Negative, 15 SETON HALL L. REV. 276 (1985) (disputing that there are innate difficulties in "proving negative averments").
have paid" claim on the other hand is easier to prove because it relates to the specific point in time at which the debt was paid. Saunders suggests the same distinction with reference to the quantitative difference between a claim comprising numerous factual propositions (such as that a particular event never occurred at any point in time) and a claim consisting of an affirmative factual proposition (for example that the particular event occurred at a particular point in time). Another way of expressing this viewpoint is by distinguishing between a universal fact, some kind of comprehensive truth that is difficult to prove, and an existential fact, pertaining to a localized event, that is easier to prove.

Furthermore, even if the assumption is accepted that it is easier to prove an affirmative fact than a negative one, it remains unclear why this should justify imposing the risk of failing to discharge the burden of persuasion on the party making the affirmative claim. A litigant making an affirmative claim has committed no crime that justifies his placement in a procedurally inferior position to that of his rival who makes a negative claim.

Moreover, it has been correctly claimed that this doctrine places undue emphasis on a formalistic test that is ultimately dependent upon the pleading and the particular wording of the forms and claim sheets (affirmative or negative). It has been suggested that this doctrine is erroneously interpreted to mean that even though a party is required to plead a fact, proof is not required if the averment is negative rather than affirmative in form. The primary point behind this criticism is that language is too easily manipulated. As such, it offers a definite escape route to the litigant fearful of not discharging the burden of persuasion by enabling him to camouflage his affirmative claim in a contrived and convoluted wording that presents it in the negative form.

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62 Id.
63 See id. at 677-78.
64 This question could possibly be answered with claims of efficiency. See infra Part I.B.4.
65 See MCCORMICK, supra note 7, at 564, 590-91; CROSS & TAPPER, supra note 7, at 118-19; Lee, supra note 7, at 1.
66 See MCCORMICK, supra note 7, at 564, 590-91; CROSS & TAPPER, supra note 7, at 118-19; Lee, supra note 7, at 1.
67 See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.8, at 322 (3d ed. 1985); Charles V. Laughlin, The Location of the Burden of Persuasion, 18 Pitt. L. Rev. 3, 5-6 (1956).
68 A similar phenomenon exists regarding the escape routes from the burden of
In addition, the burden of persuasion is often imposed on the litigant making a negative claim. Saunders explained that this occurs in cases in which both claims comprise the same number of foundational facts. For example, where the dispute is over the sanity (or insanity) of a particular person, the negative claim is no harder to prove than its affirmative counterpart, and other rules are required for determining which party bears the burden of persuasion. In this context it has even been claimed that modern technological methods occasionally make the proof of the negative facts easier than it was in the past.

American case law also echoes the approach whereby facts of a negative nature do not transfer the burden of persuasion but will nonetheless affect the burden of producing evidence. The person bearing the burden of persuasion must be the party that opens with the presentation of prima facie evidence. However, in so far as the fact is a negative one, and hence difficult to prove, the court imposes a lower threshold of what constitutes prima facie evidence that discharges the burden of producing evidence, shifting the burden to the rival party to present refuting evidence. Further difficulties of the negative-affirmative test will be discussed in the next chapter, which deals with the major drawbacks of the affirmative defense doctrine.
2. The Accessibility to the Evidence Doctrine

Under the accessibility to the evidence doctrine, referred to quite frequently in Anglo-American case law and legal literature, where the evidence pertaining to litigation is naturally within the knowledge or possession of a particular party, the burden of persuasion is imposed on the party with greater accessibility to the evidence\(^7\) (even if he is claiming a fact of a negative nature\(^7\)). For example, the defendant must prove payment of his debts because his accessibility to the relevant evidence is greater than that of his rival, given his ability to submit a receipt, etc.\(^7\)\(^6\) This doctrine differs from the previous doctrine even though in many, but not all, cases it produces similar results.\(^7\) The reason is that, generally, the litigants making affirmative claims have greater accessibility to evidence than litigants making a negative claim.\(^8\)\(^)\(^9\) Imposing the burden of persuasion on the party with the greatest accessibility to evidence has also been supported for reasons of economic efficiency. On this basis, a test was established that imposes the burden of persuasion on the party capable of creating effective evidence at the cheapest price.\(^8\)\(^1\) This point was already made by Jeremy Bentham,\(^8\)\(^2\) the head of the utilitarian school in jurisprudence, who wrote that the burden of proof should be

\(^7\) See Metropolitan Dade County v. Hernandez, 708 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 1998); Allstate Finance Corp. v. Zimmerman, 330 F.2d 740, 744 (5th Cir. 1964); McCormick, supra note 7, at 564; Mueller & Kirkpatrick, supra note 7, at 117-18. (It is noteworthy that in some of the judgments, such as in Zimmerman, the courts rely not only on the special knowledge of one of the parties, but also on the fact that from his perspective the fact is a positive one, whereas for his rival, the fact is a negative one. However, the court did not make any distinction between these two reasons).

\(^7\) See, e.g., United States v. 6109 Grubb Rd., 886 F.2d 618 (3d Cir. 1989) (holding that a person seeking to prevent the forfeiture of his property must prove his status as an "innocent owner," i.e. that he had no knowledge of the illegal use made of the asset, or that he did not consent to its use in that manner, because these are with which he is particularly familiar); Pace v. Hymas, 726 P.2d 693 (Idaho 1986) (showing that the defendant was required to prove that the plaintiff's dismissal was the result of economic constraints. There was no other way of confronting the economic difficulty, other than by way of cutting down on manpower. These are facts, similar to the decisions that lead to the dismissal decision, that are known to the defendant).

\(^7\) See McCormick, supra note 7, at 564.

\(^9\) See id.

\(^8\) Id.


\(^8\) Jeremy Bentham, An Introductory View of Rationale of Evidence; For the Use of Non-Lawyers as well as Lawyers, in THE WORKS OF JEREMY BENTHAM 139 (1962) [hereinafter Bentham].
imposed on the party best positioned to bear it, "on whom it will sit the lightest."\textsuperscript{83} However, Bentham also expressed a different position in one of his other studies, which is discussed later in the article.\textsuperscript{84} Moreover, Professor Alex Stein has shown that in terms of economic theory, it is preferable to impose the burden of persuasion on the plaintiff even if he has less accessibility to evidence than the defendant.\textsuperscript{85} The following chapter will show that one of the central problems of the affirmative defense doctrine is that it encourages litigant dishonesty. As with the burden of persuasion, a similar problem exists with respect to the rationale of accessibility to the evidence. Stein points out the shortcomings of the evidence accessibility test from the perspective of economic efficiency, insofar as it fails to provide positive incentives to the honest litigant and to those who fear disclosing facts that are prejudicial to them.\textsuperscript{86}

In other words, the accessibility to evidence test is not friendly to the honest litigant, and the dishonest litigants may profit as a result. The real problem, however, is much deeper. The central critique of the utilitarian and economic approach is that it generally takes a monolithic view of benefit at the expense of other important questions such as substantive justice and fairness.\textsuperscript{87} In fact, in the current context, the question arises as to whether there is any justification for shifting the burden of persuasion to the party with greater accessibility to evidence. Why should he bear the risk of failing to discharge the burden of persuasion? Stein rightly notes that in the context of the accessibility to evidence test, a distinction must be made between the burden of persuasion and the burden of producing evidence.\textsuperscript{88}

\textsuperscript{83} Id.
\textsuperscript{84} See infra note 218 and accompanying text.
\textsuperscript{85} Alex Stein, Allocating the Burden of Proof in Sales Litigation: The Law, Its Rationale, a New Theory, and Its Failure, 50 U. MIAMI L.REV. 335, 335 (1996) [hereinafter Sales Litigation].
\textsuperscript{86} Id. at 337-38.
\textsuperscript{87} Obviously, this presentation of matters is a generalization, for there are significant differences between the extreme version of the utilitarianism of Jeremy Bentham, and the more complex doctrine of J.S. Mill and other supporters of utilitarianism. This view is presented and critiqued in JAMES W. HARRIS, LEGAL PHILOSOPHIES 40-50 (2nd ed., 1977). On fairness vs. efficiency see ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 214-44 (2005) [hereinafter FOUNDATIONS OF EVIDENCE LAW].
\textsuperscript{88} Sales Litigation, supra note 85, at 336. Stein made similar comments regarding the rationale of imposing the burden of persuasion on the party capable of creating the
Increased accessibility to evidence may justify imposing the burden of proof, but certainly cannot justify shifting the burden of persuasion.

The mere fact that one party to a proceeding holds relevant information or has peculiarly good access to some important evidence cannot be a valid reason for shifting the persuasion burden to him. Once his evidence is produced for examination at the trial, his advantage evaporates. Bentham's idea of placing the burden of proof "on whom it will sit lightest" should accordingly only apply to the production burden.

Allocation of the risk of non-persuasion should be grounded in other reasons, such as substantive legal preferences.\(^{89}\)

McCormick also stresses the danger of overemphasizing the importance of accessibility and awareness of proof, since the burden of proof will frequently be imposed on one party despite the other party's advantage in terms of accessibility to evidence.\(^{90}\) For example, in torts and breach of contract claims, the plaintiff generally bears the burden of proving the elements of the defendant's actions despite the defendant's obvious advantage in terms of his knowledge of the acts involved and his accessibility to the relevant evidence.\(^{92}\) Occasionally, however, the situation is reversed.\(^{93}\) For example, a defendant in a tort claim is required to prove the plaintiff's contributory negligence, despite the fact that the plaintiff himself is certainly aware of its existence.\(^{94}\) Accordingly, Wigmore contends that the aforementioned doctrine cannot be an exclusive test and must be combined with other considerations.\(^{95}\)

### 3. Other Doctrines

Another popular doctrine states that a litigant asserting an
essential claim in his case bears the burden of persuasion in proving that claim. This doctrine has been criticized even though substantively it contributes nothing. In essence, the doctrine is just a different formulation of the question of who bears the burden of proof. The inescapable question will still be: for which party is the claim or evidence essential? The answer to the second question is no easier than the answer to the first, especially when a particular subject is equally critical to both parties. In addition, the justification is unclear for the risk of non-persuasion being imposed specifically on the party raising a claim that is essential to his position.

When deciding which party bears the burden of proof, courts will often distinguish between proving the elements required to establish the grounds of a claim, which normally rests on the shoulders of the applicant, and proving the applicability of exceptions and qualifications to the rule, which will be imposed on the opposing party. This test is positivist and formalistic, as it fails to address the value-based justification of the legal norm, sufficing with an examination of its status and meaning. Moreover, McCormick notes that the use of this test occasionally produces an arbitrary allocation of the burdens, since it is based on the chance wording of the law; as the statutory language may be due to a mere casual choice of form by the draftsman.

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96 See First Nat'l Bank of Louisville v. Hurricane Elkhorn Coal Corp. II, 763 F.2d 188, 190 (6th Cir. 1985); Vance v. My Apartment Steak House, Inc. 677 S.W.2d 480, 482 (Tex. 1984).

97 MCCORMICK, supra note 7, at 564; MUELLER & KIRKPATRICK, supra note 7, at 116 n.9; Lee, supra note 7, at 1; see also Thayer, supra note 4, at 59-63; WIGMORE, supra note 7, at 288.

98 MCCORMICK, supra note 7, at 564; MUELLER & KIRKPATRICK, supra note 7, at 116 n.9; Lee, supra note 7, at 1; see also Thayer, supra note 4, at 59-63; WIGMORE, supra note 7, at 288.

99 MCCORMICK, supra note 7, at 564; MUELLER & KIRKPATRICK, supra note 7, at 116 n.9; Lee, supra note 7, at 1; see also Thayer, supra note 4, at 59-63; WIGMORE, supra note 7, at 288.

100 See ALAN TAYLOR, PRINCIPLES OF EVIDENCE 24 (2d ed. 2000).

101 See, e.g. Thorn v. Jefferson-Pilot Life Ins. Co. 445 F.3d 311, 321-22 (4th Cir. 2006); Donahue v. Consol. Rail Corp. 224 F.3d 226, 229 (3rd Cir. 2000); Kocsis v. Multi-Care Mgmt., Inc. 97 F.3d 876, 883 (6th Cir. 1996); MCCORMICK, supra note 7, at 564-565; CROSS & TAPPER, supra note 7, at 118-19.

102 According to one of the central claims of legal positivism, which was harshly criticized among the non-positivists, there is no necessary connection between law and morality, and the treatment of legal questions requires a distinction between the question of norms as legal norms and the question of the value-laden contents of legal norms. See H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49 (1983).

103 MCCORMICK, supra note 7, at 565; see also After Hunt, supra note 68.
Another important consideration in the determination of the burden of proof concerns the reasonability and probability of the factual claim. According to one doctrine, the burden of persuasion should rest with the party claiming the occurrence of an unusual event. According to this principle, courts make a judicial estimate of the probabilities of an outcome and accordingly assign the burden of proof on the party alleging the least-likely scenario. For example, two parties in a business relationship would not reasonably provide service to each other free of charge. As such, a party claiming that he received a gift would bear the burden of proving it, whereas the gift claim would certainly be reasonable in the context of intra-family relations, and the burden of persuasion would therefore rest on the party claiming that he is owed payment.

This doctrine is certainly preferable to its predecessors, even if it is not always followed. It would appear there is no problem in justifying the reasonability test. Intuitively speaking, and in terms of life experience, certain events are by their very nature rare and unlikely. Consequently, when the scales are even, it is only fair to decide the case in accordance with the initial assumption, and to place the risk of non-persuasion on the party claiming that such an exceptional event occurred. In fact, many presumptions are based on reasonableness and life experience, and it is commonplace that they are highly influential with respect to the burden of proof. A test related to reasonability is also likely to be accepted by supporters of the economic approach to law.

Certain scholars, however, have criticized the imposition of the burden of persuasion in accordance with the reasonability and

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(discussing extensively the various problems with this doctrine in the context of criminal law).

104 McCormick, supra note 7, at 565.
105 Id.
107 Gibson v. McCraw, 332 S.E.2d 145, 152 (W.Va 1985); McCormick, supra note 7, at 475-76. English law also recognizes the presumption that funds, assets, or services are given free of consideration within the family and for consideration outside the family. See Tribe v. Tribe, [1995] 4 All E.R. 236 (appeal taken from U.K.); Seldon v. Davidson, [1968] 2 All E.R. 755 (appeal taken from U.K.).
108 For the different kinds of presumptions and their effect on evidentiary burdens, see McCormick, supra note 7, at 572-83; Cross & Tapper, supra note 7, at 122-24; Phipson, supra note 7, at 135-36; Mueller & Kirkpatrick, supra note 7, at 125-26.
109 See McCormick, supra note 7, at 148 n.56.
probability test.\textsuperscript{110} They claim that the determination of which claim is more reasonable is itself dependent on the court's determination after having been persuaded by the parties' pleadings.\textsuperscript{111} Another practical criticism of the reasonability test is that it is often impossible to make an advance determination of which claim is more reasonable prior to hearing the evidence.\textsuperscript{112}

4. \textit{The Absence of a Single Rule Applicable to All Cases}

The confusion prevailing in the common law over the question of who should bear the burden of proof finds expression in the following concluding comments of McCormick,\textsuperscript{113} who candidly admits:

> In summary, there is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any of several factors, including: (1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.\textsuperscript{114}

It is interesting to note Wigmore's characteristic and unequivocal position, adopted after surveying the various rules of the burden of proof.\textsuperscript{115} "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different

\textsuperscript{110} \textit{See} \textit{TREATISE, supra} note 4, at 59-63; \textit{Stein, supra} note 85, at 338-39.

\textsuperscript{111} \textit{See} \textit{TREATISE, supra} note 4, at 59-63; \textit{Stein, supra} note 85, at 338-39. In this context, one should remember the important warning of Professor Ball against the frequently committed mistake of the double consideration of the reasonability factor which may lead to distortions in the determination of the burden of persuasion. See V.C. Ball, \textit{The Moment of Truth: Probability Theory and Standards of Proof}, 14 \textit{VAND. L. R.} 807, 817-18 (1961).

\textsuperscript{112} \textit{Sales Litigation, supra} note 85, at 338-39.

\textsuperscript{113} \textit{McCormick, supra} note 7, at 565. In what follows, no distinction is made between the burden of persuasion and the burden of adducing evidence, because in the author's opinion, in most cases both of these onuses should be imposed on the shoulders of the same party. \textit{Compare} \textit{Hazard, supra} note 67, at 322 99("There is no satisfactory test for allocating the burden of proof in either sense on any given issue. The allocation is made on the basis of one or more of several variable factors.").

\textsuperscript{114} \textit{McCormick, supra} note 7, at 565.

\textsuperscript{115} \textit{Wigmore, supra} note 7, at 291.
In the absence of a single, overarching rule applicable to all cases, Wigmore claims that the determination of who carries the burden of proof is frequently a difficult decision. In a slander suit, for example, keeping in mind some of the rules mentioned above (like the accessibility to evidence), the burden of persuasion should rest with the plaintiff who bears the burden of proving that the defendant's comments were fundamentally false. On the other hand, it is both more fair and just to require the defendant to prove that he spoke the truth. In a tort action too, the accepted rules of burden of persuasion do not answer the question of whether to saddle the plaintiff with proving negligence or the defendant with proving the absence of negligence. Summing up his discussion of the rules governing the burden of persuasion, Wigmore states unequivocally:

There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it is accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

This article has briefly addressed some of the central difficulties and deficiencies of determining who bears the burden of persuasion, chief among them being the lack of a satisfactory justification for the burden of persuasion rules in the common law. Naturally, these difficulties also characterize the doctrine of affirmative defense that places the burden of persuasion on the defendant without sufficient justification. The following

\begin{enumerate}
\item[116] Id. at 292.
\item[117] Id.
\item[118] Id.
\item[119] Id.
\item[120] Id.
\item[121] Id.
\item[122] As discussed above, most of the tests for determining the burden of persuasion do not provide sufficient justification. And, as stated, the reasonability test is justified but is not relevant to cases of confession and avoidance because there is no reason to assume that the "I paid" claim is an unreasonable claim that justifies shifting the burden of persuasion to the defendant's shoulders.
\end{enumerate}
chapter deals with additional difficulties with this doctrine.

C. The Doctrine of Affirmative Defense—Additional Difficulties and Drawbacks

This section addresses some of the additional difficulties with the affirmative defense doctrine (and the common law principle of confession and avoidance) and goes beyond the major justificatory difficulties discussed in the previous chapters. Section D will address the difficulties with the affirmative defense doctrine from the economic cost-efficiency perspective.

1. The Influence on the Conduct of Litigation Proceedings Between the Parties

The central problem with the affirmative defense doctrine concerns the doctrine’s influence on the litigation proceedings between the parties. Here, I will diverge from the discussion of fundamental and rational considerations for the burden of persuasion dealt with in the previous section, and instead, deal with more realistic issues. This section focuses on the connection between the rules of persuasion and their effect on our friend the “bad man,” who tempts honest people to adopt evil ways and was underscored by the eminent American, Justice Oliver Holmes. As mentioned in the beginning of this article, the risk that accompanies the shifting of the burden of persuasion in affirmative defense and in the confession and avoidance situation may be far-reaching, to the extent of losing the trial. Accordingly, this risk confronts every litigant, and it need not surprise us that many defendants suddenly seek desperate escape routes from the “trap” of confession and avoidance. This point is addressed by Jacob:

A plea of confession and avoidance may be, and often is, raised as an alternative to a traverse of the allegations made in the statement of claim, and this is the safe course, as the defendant gets the best of both worlds, since he denies those allegations, but alternatively confesses and avoids them.

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125 *Id.*
English attorneys are similarly guided with respect to the wording of statements of defense in Odgers' famous book *Odgers on Pleading*:\(^{126}\)

All matter in confession and avoidance must be pleaded specially. The pleader must not attempt to insinuate it under an apparent traverse; he should state clearly and distinctly and in a separate paragraph. At the same time, he should not confess and avoid where a mere traverse is sufficient. For he will thus introduce collateral matter which his client may have to prove, instead of putting the plaintiff to prove his allegations.\(^{127}\)

Odgers later presents the optimal-tactical claim which preserves the majority of the procedural advantages:\(^{128}\)

In confessing and avoiding, as in traversing, the plea must be neither too wide nor too narrow . . . Be careful not to make too wide an averment, whereby you will take on your shoulders an unnecessary burden or too narrow an averment which will fetter your hands at the trial.\(^{129}\)

This way of escaping from the "trap" of confession and avoidance or affirmative defense is relevant to the modern U.S. litigant. There is an assumption that a modern litigant has two primary strategies for defeating an adverse claim.\(^{130}\) He can deny the claim in its own terms or defeat it with an affirmative defense or similar contingent claim.\(^{131}\) However, this assumption is problematic, as pointed out by Allen et al.:

A potential client, ignorant of the law, has one option—not two. He must deny the claim against him in its own terms. Of course, if potential clients were always honest, they would never deceitfully deny claims. We assume that individuals will sometimes be dishonest, in pursuit of their self-

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\(^{127}\) Id. at 171.

\(^{128}\) Id. at 146-47.

\(^{129}\) Id. at 166-67.

\(^{130}\) Allen et al., *supra* note 32, at 365.

\(^{131}\) *Id.*
interest.\textsuperscript{132}

Pleadings set out according to these tips will not always reflect factual truth, instead creating a tactical, calculated game, played with "hidden cards," in which each litigant presents the version most convenient to him procedurally and tactically. Not surprisingly, the tactical tips mentioned above and adopted by the defendant to extricate himself from the trap of confession and avoidance are widely accepted in England, which has an adversarial system.\textsuperscript{133} Failure to speak the truth in pleadings, as discussed below, is an integral part of the traditional adversary system.

In theoretical legal literature, an adversarial trial judge's role is generally compared to that of a referee in a game in which he plays no active part,\textsuperscript{134} his role being restricted to ensuring the parties' compliance with the rules of the game.\textsuperscript{135} The adversarial conception has even been compared to a competitive conception wherein a party breaching the game rules incurs a technical loss, and in which the winner is determined by comparison of the parties' respective competitive levels at the end of the game.\textsuperscript{136} It has been claimed that the adversary system is based on the conception that each of the parties is best positioned to know just how to manage its own affairs and as such should have a monopoly on the conducting of its own litigation.\textsuperscript{137} This conception expresses the value of preserving individual freedom in a democratic society, because the litigants express their freedom in the conduct of their legal affairs.\textsuperscript{138} The judge also expresses these values through self-restraint and eschewal of interference in the

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} Lord Denning, Jones v. Nat'l Coal Bd., [1957] 2 Q.B. 55. "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society in large." \textit{Id.} at 63.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} Mirjan Damaska, \textit{Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study}, 121 U. PENN. L. REV. 506, 581 (1973) [hereinafter \textit{A Comparative Study}]. The subject was clarified and elaborated on in a later study devoted to the theoretical conflict between the two procedural systems. \textit{See generally} \textit{Damaska}, supra note 31.

\textsuperscript{137} \textit{See} Mirjan Damaska, \textit{Structures of Authority and Comparative Criminal Procedure}, 84 YALE L.J. 480, 535 (1974) [hereinafter \textit{Structures of Authority}].

\textsuperscript{138} \textit{Id.}
parties’ handling of the proceedings.\textsuperscript{139} The doctrine of affirmative defense encourages litigant prevarication as a means of transferring the burden of persuasion to the other side; this conception is deeply rooted in the adversary system. In fact, in the classic English adversarial system, the accepted conception was that the defendant is under no obligation to elaborate on his claims.\textsuperscript{140} In the past, defendants in the King’s Bench court were permitted to enter a plea of general denial and thereby compel the plaintiff to prove all of his claims, with no exceptions;\textsuperscript{141} a false denial was considered a legitimate tactic on the defendant’s part, especially if it afforded him a tactical advantage over the plaintiff. In the common law, allegations and denials in the answer do not have to be consistent with one another (“pleading in the alternative”).\textsuperscript{142} For example, an answer may deny that the plaintiff and defendant entered into the contract. At the same time, the answer may allege that the plaintiff’s claim on the contract is barred by affirmative defense such as accord and satisfaction, release, fraud, and waiver, which apply only if the contract had been made.\textsuperscript{143} In trial practice, whenever possible, a defendant’s two-pronged defense strategy should be to attack the merits of the plaintiff’s claim while at the same time attempting to establish whatever affirmative defenses are available.\textsuperscript{144} There is no doubt that our friend the “bad man” rubs his hands in glee in confronting this procedural system.

The doctrine of confession and avoidance, or affirmative defense, thus provides a disincentive to the honest person interested in giving a full and complete story but who is dissuaded from doing so due to his fear of being “punished” by having the burden of persuasion transferred to him. It provides a positive incentive for our friend the “bad man,” who does his best to create

\textsuperscript{139} Id.

\textsuperscript{140} This has changed in the contemporary U.S. legal system. See FED. R. CIV. P. 8(b).

\textsuperscript{141} See Alfred T. Denning & Arthur Grattan-Bellow, BULLEN & LEAKE’S PRECEDENTS OF PLEADING 543 (9th ed. 1935).

\textsuperscript{142} See FED. R. CIV. P. 8(e). Nevertheless, if the obligations of representations to the court have been violated, then the court may impose an appropriate sanction upon the attorneys, law firms, or parties for the violation, although in practice this is not widely used. See FED. R. CIV. P. 11(b).

\textsuperscript{143} See FED. R. CIV. P. app. forms 20 and 21 (providing examples of answers and their responses to allegations).

\textsuperscript{144} See Hart, supra note 22, at 138.
difficulties for the other party. The result is that the doctrine of affirmative defense, especially in situations of "confession and avoidance," actually incites the litigant to mendacity, in the knowledge that even if he is found to be a sinner his acts will also profit him. It also encourages the parties to abuse their right of access to legal authorities, thereby impairing the rights of access of the other side.

2. Uncertainty

An additional difficulty of the doctrine of affirmative defense, or confession and avoidance, has to do with uncertainty. The previous section dealt with the confusion prevailing with respect to the burden of persuasion rules and the various tests and considerations operating in that context. Indeed the question of who should bear the burden of persuasion is by no means simple and both litigants and the courts confront difficulties that are not always solved by way of the aforementioned tests and considerations. Furthermore, there appear to be real difficulties in the application of these tests and considerations, and they often lead to different and anomalous, if not unacceptable, conclusions. Quite frequently, it is difficult to determine who bears the burden of persuasion and whether or not the situation is one of confession and avoidance or of affirmative defense. Determining the latter is dependent upon resolving a second question, which is in effect the major question: What is included in the elements of the grounds of action or offense? The second question is no more pliable than the first and is occasionally given to different interpretations between which it is difficult to decide from a substantive-formal perspective. Occasionally the interpretations are expressions of legal policy intended to prevent the escape from a position of confession and avoidance and the desire to retain the validity of the evidential rule.

Some scholars mention the problem of the creation of affirmative defense doctrine in criminal cases. The Patterson case tied the question of the constitutionality of affirmative defenses directly to the formalistic notion that a true affirmative defense is one that does not simply go to negate an element of an

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145 MCCORMICK, supra note 7, at 590-91.
The question remains as to when something is an element of an offense. Many cases have looked only to the language of the statute, although some have considered how the statute has been interpreted by the state courts. Moreover, as emphasized by these scholars, no court has used an alternative approach suggested in law journals to limit the use of affirmative defenses. Instead, the courts have relied upon the safer, formalistic notions of \textit{Patterson}. The same formalistic view applies in civil cases.

Notably, the phenomenon of allocating a portion of the burden of persuasion on a formalistic test, which examines the components of the ground of action, does not just characterize situations of confession and avoidance and affirmative defense. It also operates in other contexts related to the determination of the burden of persuasion in the civil law. As noted, the courts do not impose the burden of persuasion on the basis of a coherent, standardized rule, but in accordance with policy considerations flowing from the application of the specific substantive rule governing the question under consideration. In view of the serious implications of the risk of non-persuasion, many litigants certainly confront the questions posed by Wigmore. "Each party wishes to know of what facts he has the risk of nonpersuasion. By what considerations is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means."

In sum, the doctrine of affirmative defense spawns uncertainty in the question of who bears the burden of persuasion in both criminal and civil cases.

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\begin{itemize}
  \item \textsuperscript{147} \textit{Id.}
  \item \textsuperscript{148} MCCORMICK, \textit{supra} note 7, at 587145.
  \item \textsuperscript{149} \textit{Id.}
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} \textit{Id.}
  \item \textsuperscript{152} See WIGMORE, \textit{supra} note 7, at 291; KEANE, \textit{supra} note 7, at 58.
  \item \textsuperscript{153} See WIGMORE, \textit{supra} note 7, at 291.
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Id.} at 287-88.
\end{itemize}
3. The Effect of Constitutional Considerations

Lastly, it is appropriate to examine the effect of constitutional considerations on the formulation of the burden of persuasion rules. Serious constitutional questions are raised by the use of affirmative defenses in criminal cases.156 Recent years have brought some developments with regard to the constitutionality of the affirmative defense doctrine in criminal trials, cases, or proceedings.157 Historically, many states in the United States placed both the burden of persuasion and the burden of production on the accused with regard to several classic affirmative defense, including insanity and self-defense.158 The real revolution in thought with regard to affirmative defense occurred in the mid-1970's with two pivotal Supreme Court decisions.159 In Mullaney v. Wilbur,160 the placement of the burden of reducing the degree of a homicide on the defendant was said to violate the principle that the due process clause requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.161 Several state courts read this opinion as constitutionally compelling the prosecution to bear the burden of persuasion with regard to various affirmative defense.162 However, the holding in Mullaney was limited by Patterson v. New York.163 In Patterson, the Court decided the constitutionality of the allocation of the burden of proof by a formalistic analysis of state law; due process was not violated because the defendant did not have the burden of proof on any fact that the state law had identified as an element of the offense.164 Despite significant and persistent criticism, the durability of this approach was confirmed in Martin v. Ohio.165 "The analysis in Patterson and Martin deals only with the allocation of the burden of persuasion. As suggested by dicta in Patterson, the courts have had no trouble with an

156 See, e.g., MCCORMICK, supra note 7, at 585-87.
157 Id.
158 Id.
159 Id.
161 Id. at 686; MCCORMICK, supra note 7, at 585-87.
162 MCCORMICK, supra note 7, at 585-87.
164 MCCORMICK, supra note 7, at 586-87.
165 480 U.S. 228 (1987).
affirmative defense that simply requires the defendant to bear a burden of production.\textsuperscript{166} Some scholars think that in criminal cases the prosecution should be required to disprove beyond all reasonable doubt any justificatory defense that the defendant might raise.\textsuperscript{167}

Although there are constitutional considerations involved in the allocation of burdens of proof and the use of presumptions in civil cases, some scholars are of the view that the problems are simply not of the same magnitude.\textsuperscript{168} In a criminal case, the scales are balanced in favor of the defendant by the requirement that the prosecution prove each element of the offense beyond a reasonable doubt. Any rule that has even the appearance of lightening that burden is viewed with the most extreme caution.\textsuperscript{169} However, according to this approach, there is no need for special protection for any one party to a civil action.\textsuperscript{170} The burdens of proof are fixed at the pleading stage, not for constitutional reasons, but for reasons of probability, social policy, and convenience.\textsuperscript{171}

I disagree with this approach. This article previously touched upon the first seeds of a new legal policy found both in Israeli case law and Israeli legal literature.\textsuperscript{172} This policy demurs regarding the imposition of the burden of persuasion on the defendant in a civil trial because of the constitutional protection of the defendant's property rights.\textsuperscript{173} Arguably, the defendant's property right is countered by the plaintiff's own property right that there be no change of circumstances in the interim period that could impair his right should there be a post-facto judicial determination that the plaintiff's right is substantial and intact.\textsuperscript{174} However, it would seem that the plaintiff's right is weaker than the defendant's right because it has yet to be proven by way of fully fledged evidence.\textsuperscript{175} In U.S. law too, which protects the parties' rights by

\begin{footnotes}
\item[166] McCORMICK, supra note 7, at 530.
\item[167] FOUNDATIONS OF EVIDENCE LAW, supra note 87, at 149-51, 180-83.
\item[168] McCORMICK, supra note 7, at 583-84.
\item[169] Id.
\item[170] Id.
\item[171] Id.
\item[172] See Yuval Sinai, Burden of Persuasion in Civil Cases: A New Model, 24 MEHKERE MISHPAT (BAR ILAN LAW STUDIES) 165-92 (2008) [hereinafter A New Model].
\item[173] Id. at 182-93.
\item[174] Id.
\item[175] Id.
\end{footnotes}
force of due process in the Fourteenth Amendment of the U.S. Constitution, there is evidence of a traditional tendency to provide greater protection to the defendant against violation of his property rights and other constitutional rights.\textsuperscript{176} This tendency is especially true where there is an attempt to negate the defendant’s property rights even before judgment is given against him or when the jury awards prohibitively high sums in punitive damages.\textsuperscript{177} Considerations of this type may also militate against imposing the burden of persuasion on the defendant in situations of affirmative defense.

\textit{D. Difficulties of the Affirmative Defense Doctrine — The Economic Cost-Efficiency Perspective}

The economic analysis of law approach provides that:

[A]djudicative fact-finding needs to be cost-efficient. To maintain cost-efficiency, fact finders need to minimize the total cost of errors and error-avoidance. The value of the entitlements that the legal system fails to enforce and the utility of liabilities that it fails to impose determine the errors’ cost. The cost of error-avoidance is comprised of the aggregate cost of trial and pretrial procedures and decisions that enhance accuracy in fact-finding. Fact-finding is efficient whenever it minimizes the sum of the two costs. Fact finding is inefficient whenever it fails to minimize this sum.\textsuperscript{178}

Is the doctrine of affirmative defense an appropriate doctrine from the economic cost-efficiency aspect? Professor Posner thinks that this doctrine is efficient,\textsuperscript{179} but I disagree. Indeed, as

\textsuperscript{176} U.S. CONST. amend. XIV.
\textsuperscript{177} See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (finding excessive punitive damages); BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (holding that punitive damages in a 500 : 1 ratio was excessive); N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (finding a violation of due process when defendant was not granted a hearing or notice before garnishment of his property); Paul DeCamp, Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages, 27 HARV. J. L. & PUB. POL‘Y 231 (2004); but see Leubsdorf, supra note 30, at 588, 608-10 (criticizing the tendency of protection of the defendant in order to avoid discriminating against the plaintiff).
\textsuperscript{178} FOUNDATIONS OF EVIDENCE LAW, supra note 87, at 141.
\textsuperscript{179} POSNER, supra note 17, at 618.
Posner asserted, "[i]t would be particularly inefficient to require the plaintiff to anticipate and produce evidence contravening the indefinite number of defenses that a defendant might plead in a given case. Such a requirement would also force the plaintiff to do the defendant’s legal research for him.” However, this argument is not persuasive enough to justify adopting the doctrine of affirmative defense. At the most, this argument is relevant for the allocation of the burden of production; as “[a]t the trial stage, the production burden requires the party with the best access to evidence to produce that evidence.” As a matter of fact, Alex Stein showed that “[f]rom the efficiency perspective . . . defendants only need to bear the burden of adducing evidence (the production burden) in relation to any defense not qualifying as an excuse.” Thus, the cost-efficiency aspect does not lead to the main consequence of the affirmative defense doctrine—the allocation of the burden of persuasion to the defendant. There are other costs of the affirmative defense that were not taken into account by Posner.

Attaining the goal of efficient fact-finding, as Stein asserts, requires addressing two obstacles. The first obstacle is the difference between the private and social benefits that adjudication engenders. This difference is responsible for the fundamental misalignment between the private incentives that operate in adjudication and the social desiderata. In criminal trials, for example, society is interested in convicting the guilty and in acquitting the innocent. Naturally, guilty defendants have a different motivation. These defendants do not assist the discovery of the truth and often attempt to prevent it. Innocent defendants’ incentives also do not support social interest. These defendants only care about their own acquittals and expenses. Unnecessary civil litigation features a similar misalignment between social and

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180 Id. at 618; see also Lee, supra note 7, at 33 (suggesting economic theories which might explain the doctrine of affirmative defense but stressing in his conclusion: "The economic model developed in this Article cannot provide an easy answer as to how to balance the cost considerations identified above . . . this article does not provide any universal maxim for the assignment of legal burdens in all cases.").

181 FOUNDATIONS OF EVIDENCE LAW, supra note 8787, at 154.

182 Id. at 151.

183 Id. at 141.

184 Id.

185 Id.
private interests. Here, too, society is interested in minimizing the incidence of both false negatives (erroneous refusals to impose liability) and false positives (erroneous impositions of liability). Litigants, however, have an altogether different objective in mind. Both plaintiffs and defendants chase trial victory and the corresponding private gain irrespective of the truth. They do not care about the social interest that civil adjudication elevates.\footnote{Id.}

The second obstacle of the cost-efficiency doctrine concerns private information.\footnote{Id. at 141-42.} Parties and witnesses hold unobservable information, which remains private throughout the trial.\footnote{Id. at 142-43.} "The private nature of such information . . . creates an opportunity for cheating that litigants can exploit. Litigants . . . not only have the motive to behave opportunistically . . . more often than not, they have the opportunity and the means . . . [T]o tackle this problem, the legal system needs to discourage opportunistic behavior."\footnote{Id. at 143.} In this context, Section B discussed the shortcomings of the evidence accessibility test from the perspective of economic efficiency, insofar as it fails to provide positive incentives to the honest litigant, and to those who fear disclosing facts that are prejudicial to them.

The previous chapter showed that there are other costs of the affirmative defense doctrine that were not taken into account by Posner.\footnote{See generally POSNER, supra note 17, at 618; see also Lee, supra note 7 (containing the same lack of discussion of other costs of the affirmative defense doctrine as Posner).} The affirmative defense doctrine spawns uncertainty in the question of who bears the burden of persuasion in both civil and criminal cases, causing the waste of valuable judicial time. In this context, there have already been those who have noted the prohibitive costs, in economic terms, occasioned by the complex rules governing the burden of persuasion, from which the judge must choose in each and every case.\footnote{FOUNDATIONS OF EVIDENCE LAW, supra note 87, at 343 n.39.} However, it would seem that the inefficiency is not expressed only in the waste of judicial time; it also finds expression in difficulties created by the conduct of parties whose litigation strategy is governed by their fear of being trapped into confession and avoidance situations. As noted
above, this concern induces the parties to adopt "hidden cards" litigation,\textsuperscript{192} untruthful pleadings, and to wantonly create difficulties both for the court and the rival party. Clearly, this situation places an onerous burden on the court in its efforts to uncover the truth, and significantly increases the costs of the proceeding. These costs would have been saved had the governing procedural-evidential doctrine been to encourage the parties to enter truthful pleadings. The next part of this article proposes such a doctrine.

III. The Jewish Law Perspective

In Part III, the article will present an alternative procedural model based on the principles of Jewish law. This section will scrutinize the principal legal foundations of the Jewish doctrine, "he who takes from his friend bears the burden of proof"\textsuperscript{193} and the doctrine of migo, both of which possess foundational status in Jewish legal procedure.\textsuperscript{194} This section will analyze their advantages in comparison with the burden of persuasion rules endorsed by common law.

A. "He who takes from his friend bears the Burden of Proof"

1. The Elements of the Rule and Its Advantages

Under the principle of "he who takes from his friend bears the burden of proof" (ha-mozi mi-havero alav ha-re'ayah), in a plaintiff's action to take something from the defendant, the plaintiff is required to prove his right of claim, unless there is a legal presumption (praesumptio juris) which exempts him from proving his claim.\textsuperscript{195} Naturally, but not always (as explained in the following), this rule dictates the order of pleading, and hence as a rule the plaintiff begins with the submission of proof.\textsuperscript{196} The Sages\textsuperscript{197} regarded this principle as a "fundamental principle in

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\textsuperscript{192} Hidden cards litigation refers to litigation where one does not reveal facts that do not support the litigants' claims. ALLEN ET AL., supra note 32, at 366.

\textsuperscript{193} See ZEVIN, supra note 51, at 455.


\textsuperscript{195} See ZEVIN, supra note 51, at 451-59.

\textsuperscript{196} See SHULCHAN ARUCH, HOSHEN MISHPAT 24.1 (as per the Halakhic ruling in TALMUD, BAVA KAMA 46b).

\textsuperscript{197} The Tanna'im & Amora'im—the Rabbis of the Mishnah and Talmud. See NAHUM
law,” based both on verses in the Bible and on common sense.

The Sages deduced from the Biblical verse \"[i]judge righteously\" this principle: “The righteous litigant brings a just claim and offers just evidence.” For example: A is wrapped in his cloak while B says, “it is mine”; A plows with his cow, while B says “It is mine”; A holds possession of his field while B says, “It is mine”; A dwells in his house, while B says, “It is my house.” Hence, Scripture says: “and judge righteously” - the righteous litigant brings a just claim and offers just evidence [and regarding all of them it states that the plaintiff must bring proof].

Indeed, no principle seems more logical and more justified than the principle dictating the imposition of the burden of proof on the plaintiff. In the Talmud, Rav Ashi bases this rule on logic and common sense, comparing it to a situation where a person goes to the doctor indicating where it hurts, rather than the doctor running around to seek out the sick. This is also applicable to a plaintiff with a claim against his friend. The plaintiff must bring proof to substantiate his claim, and the defendant is not required to initially prove that he owes anything.

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198 See Talmud, Bava Kama 46a.
200 Deuteronomy 1:16 (Finkelstein ed.).
201 Id.
202 See id. The conclusion in brackets is according to the version appearing in the Midrash Tannaim.
203 See Talmud, Bava Kama 46b.
204 Id.
205 See, Shalom Albeck, Ha’rayaot B’daynei Ha’Talmud (Evidence in Talmudic Law) 324 (1987). This work attempted to give a probability based explanation to the rule that "the plaintiff bears the burden of proof": it states the following: Why does the defendant in possession win and the plaintiff lose, despite their equivalence in terms of evidence and pleadings? The reason is based on an empirical majority-based presumption. In the majority of real life situations, the concrete situation in reality also reflects the situation in law, and where a person challenges that reality, seeking to change it—in the majority of real life situations his claims are not legally based, and only in the minority of cases is his claim legally substantiated. Consequently, if the plaintiff lacks proof that is stronger than the majority based presumption, by law he will lose. The question, however, is whether Albeck's probability based presumption has any empiric basis. Furthermore, why should one necessarily rely on the (presumed) majority of cases? Perhaps the determinative majority should be the majority of law suits. Consequently, it is difficult to accept the probability foundation as the basis for the rule the plaintiff bears the burden of proof. Id.
with respect to the claim.\textsuperscript{206}

The rule of "he who takes from his friend bears the burden of proof" has two meanings: (a) when the defendant is not currently in possession, but where the item was his before the doubt arose, referred to as \textit{hezkat mara kamma} ("original owner’s possession right"); or (b) when the defendant physically possesses the matter under discussion, which is referred to as "the possessory right" (\textit{hezkat mammon}).\textsuperscript{207}

Essentially, these two rights are legal presumptions (\textit{hazakot}), and Halakhic authorities dealt extensively with their relation to the rule that the plaintiff bears the burden of proof.\textsuperscript{208} It is important to note that the "original owner’s possession right" means that money whose ownership is in doubt is presumed to belong to the previous owner, even if he is not currently in possession thereof, and "the possessory right" means that money whose ownership is in doubt will not be removed from the person in possession thereof.\textsuperscript{209}

It bears emphasizing that there is a difference between the principle of "he who takes from his friend bears the burden of proof" in its Jewish law accepted meaning, and the principle of common law (and other legal traditions) that the Burden of Proof is with the plaintiff. The common law principle that the burden of proof is assigned to the plaintiff is based on a pleading-subjective test; the party who initiates the action or proceeding bears the burden of proof.\textsuperscript{210} However, the Talmudic principle of "he who takes from his friend bears the burden of proof" is based on an objective test—the possession of the objects under dispute.\textsuperscript{211}

Therefore, according to Jewish law, sometimes the plaintiff does not bear the burden of proof, such as when the defendant’s objects are in the plaintiff’s possession.\textsuperscript{212}

It emerges that the principle that "he who takes from his friend bears the burden of proof" does not only refer to and rely upon the right conferred by physical possession of the asset, but also

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{See ZEVIN, supra note 51, at 455.}

\textsuperscript{208} \textit{See id. at 451-59.}

\textsuperscript{209} \textit{See id. at 455.}

\textsuperscript{210} \textit{TREATISE, supra note 4, at 369.}

\textsuperscript{211} \textit{See ZEVIN, supra note 51, at 455.}

\textsuperscript{212} \textit{Id.}
derives from the interest in preserving legal stability and security. This consideration dictates the preservation of the status quo, as the litigant seeking to alter the status quo bears the obligation of persuading the court that it is appropriate to do so.\textsuperscript{213}

A number of powerful considerations underlie the rule that "he who takes from his friend bears the burden of proof." The rule is just and moral, and it preserves legal stability and security. Moreover, in terms of economic efficiency, it appears that this is the most desirable rule with respect to the burden of persuasion in civil cases. Professor Kraus examined the possibility of imposing the burden of persuasion on the party attempting to change the status quo, and rejected it, claiming that it does not provide a rationale that promotes aggregate efficiency.\textsuperscript{214} However, on this count Professor Stein has argued that this assumption is mistaken; his unequivocal conclusion is that from the perspective of economic theory, it is the plaintiff who should bear the burden of persuasion.\textsuperscript{215}

The principle is the following:
The plaintiff's burden in an ordinary civil case is to show that his position is more likely than not correct . . . This makes a plaintiff who gives no evidence very likely to lose; so it makes sense, as a way of economizing on the time of the tribunal (as well as of reducing nuisance litigation), to require the plaintiff, as the precondition to getting to trial, to submit evidence that if believed would be likely to carry the day with the jury, before the defendant is required to submit any evidence.\textsuperscript{216}

Some scholars present further economic efficiency justifications for the default rule that assigns the burden of proof to the plaintiff.\textsuperscript{217} Finally, it bears mentioning that even in Bentham's writings, it is suggested that the plaintiff should bear

\textsuperscript{213} Id.
\textsuperscript{214} Kraus, supra note 81, at 142 n.43.
\textsuperscript{215} See generally Sales Litigation, supra note 85 (arguing against Kraus' assertions).
\textsuperscript{216} POSNER, supra note 17, at 617-18 (assuming that the cost to the plaintiff of obtaining this evidence is not disproportionately greater than the cost to the defendant of obtaining contrary evidence (if there is any). But, as Posner wrote, this assumption is reasonable; modern pretrial procedures for discovering evidence in the possession of the opposing party make the costs of searching for evidence fairly symmetrical).
\textsuperscript{217} Lee, supra note 7, at 12-15.
the burden of persuasion, because he is the one who is liable to benefit from the judicial decision.

2. Deviation from the Rule—Considerations of Its Legal Policy

Quite often, legal policy considerations dictate the imposition of the burden of persuasion on a particular party, even if, from a strictly legal perspective, that party cannot be regarded as a person “taking” from his friend. A number of examples can be cited for deviation from the rule that “he who takes from his friend bears the burden of proof” by virtue of special considerations, and this section presents three classic ones.

The first example is the Talmudic case known as the rule of *Mari bar Isak*. According to this rule, if the court deems that witnesses are afraid to give testimony because the defendant is a violent person, it may impose the burden of proof on the violent defendant in order to force him to ensure that the witnesses are brought, notwithstanding that they will not necessarily testify in his favor. As such, it is a prima facie contradiction to the rule that “he who takes from his friend bears the burden of proof.” An interesting broadening of the *Mari bar Isak* ruling was given effect in a ruling of the Tel-Aviv Rabbinical Court. The case concerned a divorce action filed by a husband against his wife by reason of her illness. The Rabbinical Court ruled that even though the husband generally bears the burden of proof (to prove grounds for divorce), the only way of proving his claim in this case was by examination of the wife, because she had prevented the doctors from testifying regarding her sickness. The rabbinical court therefore imposed the burden of proof on her. This rationale is similar to one of the principles of the evidential damage doctrine, which can shift the burden of persuasion to the defendant whenever the latter is responsible for inflicting

218 J. Bentham, A Treatise on Judicial Evidence 195-96 (1825) [hereinafter *Judicial Evidence*]; but see Bentham, supra note 82 (presenting a different position).
219 See Talmud, Bava Mezia 39b.
220 Id.
221 Id.
222 See Judgments of the Rabbinical Courts of the State of Israel vol.7, at 224.
223 Id.
224 Id.
225 Id.
evidential damage on the plaintiff.\textsuperscript{226} Indeed, the shifting of the burden of proof to the defendant in the context of tort law was mentioned by one of the great Halakhic authorities of the last generation, who was of the opinion that in cases where the plaintiff incurred damages in an event where the defendant was present, the defendant bears the burden to prove that he did not cause the damage.\textsuperscript{227} It bears mentioning that a similar approach was presented by one of the contemporary legal scholars that suggested an economic-cost-efficiency justification for departing from the default rule (that the plaintiff bears the burden of proof) "in cases in which defendants are statistically likely to be liable."\textsuperscript{228}

A second example of deviation from the rule that "he who takes from his friend bears the burden of proof" concerns cases where the evidence supporting the plaintiff's claims is in the hands of the party in possession (i.e. the defendant), and the plaintiff proves that only the defendant in possession is capable of bringing the evidence in support of the plaintiff's claims.\textsuperscript{229} In such a case the rabbinical court may impose the burden of proof on the defendant.\textsuperscript{230}

In the common law adversarial system, where the tribunal does not participate in the search for evidence, there is great importance in the burden of producing evidence to the tribunal, as distinct from the burden of persuading.\textsuperscript{231} However, in Jewish law, the court is inquisitorial in many respects, so the distinction between the two aspects of the burden of proof is not as clearly emphasized as it is in the adversarial system. Nevertheless, though an unequivocal determination is problematic, in the cases mentioned above it might seem that the burden transferred is that of producing evidence, whereas the burden of persuasion stays permanently with the plaintiff.\textsuperscript{232} As such, even according to

\textsuperscript{226} See generally Ariel Porat & Alex Stein, Tort Liability Under Uncertainty 160-206 (Oxford University Press 2001) [hereinafter Porat] (identifying the legal doctrines that handle the evidential damage problem).

\textsuperscript{227} See Hazan Ish, Talmud, Bava Kama, 7:7.

\textsuperscript{228} Lee, supra note 7, at 27.

\textsuperscript{229} See Shulchan Aruch, Hoshen Mishpat 16:3.

\textsuperscript{230} Id.

\textsuperscript{231} Posner, supra note 17.

\textsuperscript{232} See Bava Mezia, supra note 219 (regarding the first case in which there was a dispute between the Rishonim on the question of the burden born by the violent litigant: Is he obliged to actually find the witnesses or also to ensure that they testify explicitly in
some of the Halakhic authorities in Jewish law, a distinction must be made between the burden of persuasion and the burden of bringing proof, but this matter requires further examination, which is beyond the scope of the present article.

A third and final example pertains to a particularly controversial issue in modern law, namely, who carries the burden of proof in appeals on tax assessments. For comparative purposes, one should recall that in English law it is accepted that the burden of proving overpayment of tax is generally imposed on the assessee. In the United States, on the other hand, even though the law has traditionally adopted this approach, in 1998, Congress pushed through a legislative reform on the issue, the framework of which determined that under certain circumstances the burden would be transferred to the State. This would occur, for example, where the assessee presents reliable evidence concerning a relevant factual issue. On the other hand, it has also been claimed that the change is not as drastic as it seems. Another view is that the exception is broad to the extent of “swallowing” the basic rule regarding the imposition of the burden on the assessee.

What then is Jewish law’s position on the matter? The strict interpretation is that the rule “he who takes from his friend bears the burden of proof” applies to both actions against an individual and actions between an individual and the community.

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his favor?).

233 See, e.g., Eagerpath Ltd. V. Edwards (Inspector of Taxes), [2001] S.T.C. 26, [4] (Eng.) (explaining that the assessee's special knowledge of his business affairs and profits is a reason for imposing the burden on him).


239 See ZEVIN, supra note 51, at 455.
community is powerless to enact regulations against this overarching rule. In fact, an ancient rule in Jewish communities, rooted in the early Middle Ages, was that in appeals against tax assessments collected by the community, "any person who claims that he has no obligation, must first pay and then adjudicate." This matter was addressed by Maharam of Rothenburg, one of the leading poskim in the medieval period, regarding the Jewish custom. Maharam stated that:

[T]ax matters depend neither on reasoning nor on the law set forth in the Talmud, but on the custom of the locality. It seems to me that the practice in all the communities with which I have become acquainted is that whenever an individual has a dispute with his community concerning tax matters the community first collects the tax. Afterwards, if he so desires, they will submit to adjudication the issue of whether they took more from him than is lawful and if so the judges will order them to return it. The community wishes to be considered as the party in possession—as the defendant and not the plaintiff. Thus even when the taxpayer has retained possession [of the sum in dispute] the burden of proof nevertheless rests with the taxpayer and not the community.

This approach was codified as settled Jewish Law in the Shulkhan Aruch, to the effect that in disputes between the community and the individual in tax matters, the “community are

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240 Id.  
241 See Rabbi Shlomo Ben-Aderet, Teshuvot HaRashba (The Rashba’s Questions), vol. 3, n.398 (attesting to this kind of regulation in Barcelona). The regulation is attributed to as ancient an authority as Rabbenu Gershon, the Luminary of the Diaspora; see Responsa Maharik no.17, Maharik Hachadashim (The New Maharik) (Jerusalem 1970); Responsa R. Benjamin b. Mattathias, Greece (first half of 16th century) (Jerusalem, 1959) n.29; see also Menachem Elon, Taxation, Encyclopedia Judaica 863-65 (1975).  
242 Poskim are religious legal scholars who decide issues of the Halakha (religious law) when other sources of the law are inconclusive or otherwise vague. See Zvi Cahn, The Philosophy of Judaism 408 (1962).  
244 See Baruch, supra note 243, at n. 106, 915.
regarded as being in possession with respect to the individual.”

Regarding the reason for this custom of the community being the party in possession, Maharam of Rothenburg writes, inter alia:

If this were not the law, everyone would declare to his community: ‘I am exempt according to the law’ or ‘I have paid my tax’, and if you wish to take it from me, I will take an oath that I have paid it, or you will [have to] swear [that I did not pay it]. Then, rather than have every member of the community take an oath concerning his small share [of the disputed tax] the community would choose to relinquish its claim, and as a result, the community will suffer loss!

Maharam of Rothenburg also adds that if the community was not regarded as being in possession with respect to the individual, then the public would have no remedy; everyone could act wrongfully thinking that no one would sue him because the custom is that an individual takes greater efforts to prove his claim than does the public. A number of sources illustrate that the Sages protected the loss of the public. The comments of Maharam of Rothenburg thus indicate that the rule that in tax matters the public is considered to be “in possession” and hence the doctrine of the burden of proof is not generally applied to the public, in economic-social considerations.

B. The Migo Doctrine

1. General Foundations

Jewish procedural law recognizes two stages in the judicial process: the pleadings of the litigants, which are conducted orally

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245 See Shulchan Aruch, Hoshen Mishpat 4.1.
246 See Baruch, supra note 243, at nos.106, 915; but see Ben Aderet, supra note 241 (“Indeed it has been enacted everywhere that no-one may declare ‘I will not pay until there is an adjudication on my claim of non-liability’, as otherwise everyone will make such a declaration, and the tax will never be collected to the profit of the swindlers”).
247 See Talmud, Bava Bathra 24b (regarding which Maharam cites the well known Talmudic aphorism, “a pot with two cooks is neither hot nor cold”).
248 See Baruch, supra note 243, at n.106; Talmud, Bava Bathra 24b; Mordekhai, Talmud, Bava Bathra 174.
249 See Baruch, supra note 243, at no.106.
at the court session, and the stage of submitting evidence.\textsuperscript{250} The pleadings of the litigants are not regarded as part of the evidence because according to Jewish law a person cannot testify for himself.\textsuperscript{251} The oral pleading is one of the most important elements of the judicial process, and the decision may already be given at that stage, even before the parties have been permitted to present their evidence.\textsuperscript{252} In the framework of the Laws of Pleadings (toen ve-nit'aan) there are laws which are partially based on logic and partially on life experience. The court evaluates the litigants' pleadings, and to the extent that the pleadings are substantiated and assisted by these rules, the litigant has a greater chance of succeeding in his claim.\textsuperscript{253} The evaluation of claims is not purely a matter for the exercise of the court's judicial discretion according to its own subjective evaluation of the witnesses and their testimony.\textsuperscript{254} Testimony must also comply with a number of rules which are conditions for its admissibility, or else the claims may be questioned by the litigant.\textsuperscript{255} Next, this article discusses the general foundations of migo, and does not purport to exhaust this extensive and complex subject.\textsuperscript{256}

The most important rules of migo are based on common sense and logic.\textsuperscript{257} The meaning of the migo plea is that the claimant

\textsuperscript{250} See, e.g., Jewish Law, supra note 1 (in the framework of the rabbinical courts jurisdiction in the State of Israel, the parties must submit a written statement of action, but this does not exempt them from the need to orally state their claims at the beginning of the litigation, as specified in The Rabbinical Courts Procedure Regulations, §60, 62 (1993)).

\textsuperscript{251} See Talmud, Yebamoth 25b (telling that a person is close to himself and relatives are disqualified as witnesses); Shulchan Aruch, Hoshen Mishpat 33 (the approach in Jewish law is that the litigant is not a witness as distinct from what is accepted in other legal systems, which enables the litigant to testify in his own case).


\textsuperscript{253} See Asher Gulak, Yesodei ha-Mishpat Ha-Ivri (The Foundations of Hebrew Trial) 73 (vol.4, Tel-Aviv, 1967).

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} The subject of migo has been treated extensively in Hebrew research literature of Jewish law. See, e.g., Gulack, supra note 253, at 101-08; Meir D. Cohen, The Migo Doctrine, 11 Sinai 247, 252 (1942-43); Yosef Rivlin, Migo—Evidence in Jewish Law, (1978) (unpublished M.A. dissertation, Tel-Aviv University); Albeck, supra note 205, at 172-80; Yesahayahu Ben-Pazzi, Mahoot Ha 'Ta’anah B'Mishpat Ha 'Ivri (The Essence of “the Claim” in Jewish Law), 6 Megal 97-114 (1988); Yifrach, supra note 194, at 349-50.

\textsuperscript{257} See generally Gulack, supra note 253, at 101-08; Cohen, supra note 256; Rivlin, supra note 256; Albeck, supra note 205; Ben-Pazzi, supra note 256; Yifrach, supra note 194, at 349-50 (addressing the extensive treatment of the subject of migo in Hebrew research regarding Jewish law).
making a certain claim will be believed, because had he wished to lie, he could have told a better lie, which would have been believed. In other words, because he could have made a stronger claim, and he waived the chance, he is believed regarding the claim he actually made.

The \textit{migo} doctrine is entirely different from the confession and avoidance claim or the affirmative defense doctrine, and the two doctrines produce diametrically opposed results. The confession and avoidance doctrine splits the defendant's claim, accepting its confession admission component and requiring him to prove the avoidance component as an affirmative defense. The \textit{migo} doctrine views the defendant's claims—both those that he made and those which he could have made—as one integral, indivisible unit. For instance, consider the classic example of the defendant who claims, "I paid" (\textit{paraati}), in the refutation of a debt claim for which the plaintiff adduced no proof. Whereas under the doctrine of confession and avoidance, the burden of persuasion would be transferred to the defendant, under Jewish law the defendant would be believed, because given that the plaintiff had no proof, the defendant could have told a lie and said "No such thing ever occurred." Had he made that, he would have been believed, and this being so, he should also be believed when he claimed, "I paid," which is a weaker claim because he concedes the existence of a debt, claiming only that he has paid it.

This means that the litigant whose case is impaired by a weak claim can be assisted by the \textit{migo} option if available; and if

\begin{footnotes}
\item[258] See GULACK, supra note 253, at 101-08.
\item[259] Id.
\item[260] Cohen has already pointed out that \textit{migo} is one of the legal concepts that has no parallel in other ancient legal systems of other nations, chief among them in Roman law. Cohen, supra note 256.
\item[261] KOFFLER ET AL., supra note 19, at 551-58.
\item[262] See GULACK, supra note 253, at 101-08.
\item[263] Id.
\item[264] See, e.g., TALMUD, YEBAMOTH 25b; SHULCHAN ARUCH., HOSHEN MISHPAT 33 (clarifying that the use of the word "believed" may be confusing for the reader not familiar with Jewish law because believability or credibility in modern law is a feature pertaining to witnesses and testimony, and not to the claim in and of itself. However, for current purposes I have used the term "believed" in accordance with its connotation in Jewish law, and with respect to claims made by the litigants, even though—as indicated at the beginning of this section—Jewish law makes a clear distinction between litigants and witnesses).
\item[265] See GULACK, supra note 253, at 101-08.
\item[266] Id.
\end{footnotes}
the other party does not have any evidence, the party pleading migo will win the case.\textsuperscript{267} The significance is that in Jewish law, the defendant claiming “I paid” is not required to prove his claim and is believed, and the burden of proof remains with the plaintiff.\textsuperscript{268} Regarding this point, Meir D. Cohen has noted that in other legal systems we do not find the migo procedure, which gives force to an “eventual claim,” because in so far as it was not expressed, no weight attaches to it, and all claims and defenses are evaluated exclusively in terms of their internal consistency and internal logic.\textsuperscript{269} The following chapter will elaborate on the rationale underlying the migo doctrine.

The term migo does not appear in Tannaitic literature, but the rule of ha-peh she-asar hu ha-peh she-hitir (the mouth that forbade is the mouth that permitted), is mentioned, and has been accepted by many of the traditional commentators as well as by modern scholars, as being substantively identical to the migo claim mentioned in Talmudic sources.\textsuperscript{270} According to the principle that “the mouth that forbade is the mouth that permitted,” a person who informed us of something which we would not have known of from any other source other than him (“the mouth that forbade”) is believed for purposes of eliminating the consequences of his first statement (“is the mouth that permitted”), because all of the information at the court’s disposal regarding the litigant’s obligation comes from him, and he is therefore believed for purposes of limiting or interpreting the scope of the information that he himself supplied.\textsuperscript{271} The choice of the court is either to accept the words of the litigant, \textit{in their entirety}, i.e. the debt and its defrayal, or not to accept them at all.\textsuperscript{272}

A classic example of where the court makes this kind of decision appears in the Mishnah.\textsuperscript{273} David tells Solomon that the field now in David’s possession used to belong to Solomon’s father, but David bought it from him.\textsuperscript{274} According to the

\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Cohen, \textit{supra} note 256, at 248.
\textsuperscript{270} \textit{See}, MEIRI, BETH HA\textit{CHEHIRA}, KETHUBOTH 15b.
\textsuperscript{271} \textit{See} ZEVIN, \textit{supra} note 195, at 733-35.
\textsuperscript{272} Id.
\textsuperscript{273} KETHUBOTH 2.2.
\textsuperscript{274} Id.
affirmative defense doctrine, this is a classic confession and avoidance claim; David should be believed with respect to his admission that the field once belonged to Solomon’s father, but should not have been believed with respect to his additional statement that he purchased the field from Solomon’s father, unless he proved that fact with convincing evidence. Under the Talmudic doctrine “the mouth that prohibited is the mouth that permits,” David’s claim that he purchased the field is believed, even in the absence of any additional proof because it was David’s “mouth” that established in the first place that the field had belonged to Solomon’s father. In its absence, one would not have known that Solomon had any right at all to the field because he has no witnesses that it belonged to his father. Consequently, the reader is also prepared to believe David’s claim (to permit) that he purchased the field from the previous owners. Naturally, if the knowledge of Solomon’s right did not originate in David but in witnesses brought by Solomon as evidence of the field having belonged to his father, then David’s claim of rightful ownership would not be believed on the strength of his statement alone, and he would have to adduce further proof, by witnesses or a bill of sale.

The Talmud states that the principle of “the mouth that forbade is the mouth that permitted” is based on common sense and logic, both of which compel the conclusion that if the actual right to the field was established exclusively by their testimony, then the mouth that established the right should also be relied upon to claim that the right no longer exists (or to permit the prohibition). What this means is that the peh she-asar doctrine is nothing more than a litigant’s admission to facts, which inure, either fully or partially, to the benefit of his opponent, but which the litigant supplements with further facts in his favor, and by which he should win his trial despite his admission. The litigant is able to deny all the facts against him, claiming that “no such thing

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275 Id.
276 Id.
277 Id.
278 See TALMUD, KETHUBOTH 2.5 (the principle of ha-peh she asar is not only applicable to civil law, but also applied in the realm of ritual law (issur ve-heter)).
279 See TALMUD, KETHUBOTH 22a.
280 Id.
ever occurred,” and he would be believed because there are no witnesses.\textsuperscript{281} Since the litigant did not make the claim but instead admitted to his rival litigant the facts that if not admitted to would not have been proved, he is therefore believed regarding the additional facts claimed in his favor.

The rules of \textit{migo} and its limitations have been dealt with at length in numerous works\textsuperscript{282} of prominent authorities in Jewish law who elaborated the cases in which the rule can be used and in which it cannot.\textsuperscript{283} In the following comments, this article will adumbrate some of the rules which attest to the role of \textit{migo} in Jewish law as a law located at the crossroads between the laws of pleadings and evidentiary law.\textsuperscript{284}

The \textit{migo} claim is limited to being a plea in defense and not a claim by which a plaintiff can win his trial.\textsuperscript{285} It is not considered powerful evidence and generally valued as logical proof to be considered by the court when assessing the parties’ pleadings and in the absence of more substantial evidence.\textsuperscript{286} It must be stressed that not only is the \textit{migo} doctrine consistent with the rule of “he who takes from his friend bears the burden of proof,” the \textit{migo} doctrine also supplements and fortifies the rule, because it strengthens the defendant’s claims in cases in which he does not have evidence.\textsuperscript{287} Halakhic codifiers generally endorse the broad rule that “we do not use \textit{migo} in order to extract [money]”\textsuperscript{288} because in order to win a trial, the party taking from his friend must provide positive evidence for his claims, and the \textit{migo} does not constitute that kind of evidence.\textsuperscript{289} According to another

\begin{footnotes}
\footnotetext{281}{\textit{Id.}}
\footnotetext{282}{\textit{See, e.g., R. Shimon Mekinon, Tractate Keritut 372-83 (1965); Shulchan Aruch., Hoshen Mishpat 82.}}
\footnotetext{283}{\textit{See Arye Karlin, Torat Hoshen HaMishpat (Foundations of the Torah in the Court) 60 (1947) (proposing a reasonable explanation for the proliferation of rules, most of which restrict and qualify the use of \textit{migo}). In Karlin’s view, cheats and liars illicitly used \textit{migo} as a loophole for evading their debts and commitments. Reliance on claims without witnesses became widespread, creating a stumbling block for the wicked. It was therefore appropriate and necessary to restrict and qualify the \textit{migo} rule. \textit{Id.}}}
\footnotetext{284}{This issue exceeds the boundaries of this study. \textit{See, e.g., Yifrach, supra note 194, at 377-79 (elaborating on the effects that the idea of \textit{migo} has had on presenting claims in Jewish law).}}
\footnotetext{285}{\textit{See Shulchan Aruch, Hoshen Mishpat 82:12.}}
\footnotetext{286}{\textit{See id.}}
\footnotetext{287}{\textit{See supra Part III.B.2.}}
\footnotetext{288}{\textit{See Shulchan Aruch, Hoshen Mishpat supra note 285.}}
\footnotetext{289}{A different explanation is offered by Albeck, \textit{supra} note 205, at 176:}}
\end{footnotes}
foundational rule, *migo* does not stand up against another piece of substantial evidence.\(^{290}\)

In cases in which there is no evidence, the court is entitled to decide in reliance on the *migo* rules, which evaluate the litigants’ claims purely by force of their internal logic.\(^{291}\) Insofar as the *migo* doctrine’s probative power lies exclusively in its logic, it is incumbent upon the court to be cautious in relying on the doctrine, and establish clear boundaries, which define the scope of its use and immunize the court from mistake and exaggeration.\(^{292}\) As such, in cases in which the court deems that the *migo* claim is not suited for the matter at hand, leading to mistaken conclusions, the judges can reject it as misguided logic and rely on their own discretion.\(^{293}\)

2. **Two Legal Models: The Credibility of the Claim Doctrine and The Potentiality of the Claim Doctrine**

The comments below focus on two categories of claims that have received recognition in writings of scholars of Jewish law,\(^{294}\) and which also may be at the basis of the *migo* doctrine.

The first model is the doctrine of the “credibility of the Claim” and is connected to a frequently cited Talmudic maxim in the context of *migo*: “Why should I lie” (*Ma li leshaker*).\(^{295}\) Indeed this is the simplest and most frequently cited explanation of *migo*. Its import is that the plaintiff’s claim will be accepted without

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\(^{290}\) See Gulack, *supra* note 253, at 105-06 (the Halakhic authorities therefore determined that the *migo* is not effective where the claim (supported by *migo*) is contested by witnesses, or where there is a bill of proof, or where it contradicts a probable presumption).

\(^{291}\) See GULAK, *supra* note 253, at 107-08.

\(^{292}\) Id.

\(^{293}\) See SJAFTIE COHEN, HOSHEN MISPAT (FOUNDATIONS OF THE COURT) 82 ("You must know that in a number of cases the *migo* is rejected as a mistaken supposition").

\(^{294}\) See OZAR MEFARSHI HATALMUD, BAVA MEZIA (COLLECTION OF COMMENTARY ON THE TALMUD) 48 n.303 (Shemuel Kibelviz, ed. 1998) (listing numerous sources treating this issue, primarily in the literature of Aharonim (Halakhic authorities of the past few centuries)). This topic is expanded on by Rivlin, *supra* note 256, at 376-78.

\(^{295}\) See TALMUD, BAVA BATRA 5:2.
requiring proof because it is assisted by a migo—namely that had he wished to lie, he could have made an even stronger claim. 296 The litigant who does not lie should not be in a worse position than the litigant who may be lying, but who would at some events be believed. 297 In other words, “the credibility of the claim” doctrine helps establish the reliability of the claim that was actually made by the litigant and significantly influences the laws of evidence. 298

The second model, the doctrine of “potentiality of the claim,” examines an array of claims that the litigant could have made; it is a more complex model and requires more extensive explanation. 299 According to this doctrine, the total number of pleadings that a person could have raised attests to the degree of power and possession that the litigant has over the money; if a certain claim had the power to totally refute the claims of his friend, and yet he made a weaker claim, it indicates that his possession of the money carries greater weight than his friend’s possession, and as such, his friend bears the burden of proof. The second model was developed and refined primarily by Lithuanian Heads of Yeshiva in the previous century, 300 but it has its roots in earlier sources. 301

The question that arises in the potentiality doctrine is why the court should even relate to a potential claim that was neither made nor is even supported by a factual foundation its entire power residing in the circumstances in which it was made.

Two approaches have been offered by rabbinical authorities over the last generations. 302 One approach is that of Rabbi Shlomo

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296 See GULAK, supra note 253, at 102; ALBECK, supra note 205, at 172.
297 Id.
298 Id.
299 See, e.g., R. SHIMON YEHUDA SHKOPP, TALMUD, BAVA MEZIA s. 5 (providing an explanation of this model in Jewish Rabbinical literature).
300 The most prominent of them being R. Shimon Yehuda Shkopp, who repeats this idea a number of places, emphasizing the distinction between this and what we have referred to as the “credibility of the claim” doctrine. See, e.g., id. (there were other Heads of Yeshiva too who substantiated and refined the "potential of the claim" doctrine—which they variously refer to as "power" or "right" or "claim" or "credibility"). See, e.g., RAV ELCHANAN WASSERMAN, KOBETZ SHIURIM, pt.2 §§ c–d. For a full list of the many sources dealing with this subject, see ÖZAR MEFARSHEI HATALMUD, supra note 294.
301 See, e.g., RAV AVIGDOR AMIEL, HAMIDOT LEHEKER HAHALAKHAH (THE EXTENT OF UNDERSTANDING THE HALAKAH) 121 (1939).
302 See Yifrach, supra note 194, at 377-78. In comments below, this article uses Rav Yifrach’s definitions regarding the approach of the Aharonim.
Fisher,\(^{303}\) who regards the plaintiff as "he who takes from his friend" (mozi me-havero) and as the party bearing the burden of proof.\(^{304}\) The power of the migo rule lies in the fact that the defendant could have chosen to offer an alternative claim and a new interpretation of the evidence submitted by the plaintiff.\(^{305}\) This interpretation would have totally neutralized the probative power of the plaintiff's claims, by presenting an equally legitimate alternative explanation for the facts noted above.\(^{306}\) This approach was ably explained by Rabbi Yehuda Yifrach,\(^{307}\) according to whom migo's power lies in the fact that the very option of providing a new explanation to the facts tells us something about the facts. Equivocal facts that can substantiate the plaintiff's claims, but which can also be explained from an entirely different perspective, are not facts which will suffice for extracting money.\(^{308}\) This possibility forces one to recognize that the plaintiff's version of events is a narrative and not just one of the possibilities of explaining the dispute, and as such, is insufficient for taking money.\(^{309}\) In other words, according to Rav Fisher, the claim's power lies in the fact that it presents an alternative explanation to the plaintiff's evidence and thus undermines the power of his evidence.\(^{310}\)

Another way of understanding the power of the claim according to this approach appears in the writings of Rabbi Shimon Shkopp.\(^{311}\) His contention is that the migo doctrine strengthens "the possessory presumption of the claimant because he could have won the dispute in another way, and his possessory presumption is therefore stronger."\(^{312}\) According to this approach, the presumption that dictates the imposition of the burden of proof is based partially, and not solely, on physical possession of the asset.\(^{313}\) It is also based on control of the asset—the ability to

\(^{303}\) See Rabbi Shlomo Fisher, Beth Yishai (Teachings of Yishai), pt.2 § 389.
\(^{304}\) Id.
\(^{305}\) Id.
\(^{306}\) Id.
\(^{307}\) See Yifrach, supra note 194, at 349-50.
\(^{308}\) Id.
\(^{309}\) Id.
\(^{310}\) Id.
\(^{311}\) See SHKOPP, supra note 299.
\(^{312}\) Id.
\(^{313}\) Id.
change its legal status. A person capable of receiving the asset effectively has control thereof, and hence any person attempting to challenge his possession (in its broadened, legal sense) is the "party taking" and must bring proof. A person's possessory right in money is attended by a number of other rights, including all of the potential claims that inure to the party with a possessory right. In view of this bundle of potential claims, and not just the actual claim that was made by the litigant himself, the court can determine the property rights of the parties. This point was already made by A. Karlin, who argued that the migo claim should be understood in light of the legal principle governing monetary matters in Jewish law, whereby the thrust of the obligation vests in an action and that the law is not created within the parameters of the pleadings but rather by the material facts as they relate to the plaintiff and the defendant. This is also the root of the rule that in certain situations and under certain conditions the court will, on its own initiative, raise all the claims that are available to a particular party but which were not raised for reasons unconnected to the fault of that party. In such cases, it is not the concrete claim itself that is decisive but rather the legal picture that materializes out of the action and the claim. If the picture emerging before the court weighs in favor of one party insofar as the essence of the evidence, and its analysis tends to substantiate his basic claim, even if he did not make all the possible claims, then the accumulation of these claims will induce the court to exercise its discretion in his favor. This then, on one leg, is the basis of the migo rule in Jewish law according to the

314 Id.
315 See Rabbi Yisrael Yaakov Kanievsky, Bava Mezia, KEHILLOT YAAKOV (ASSEMBLY OF JACOB), § 3. According to Kanievsky, a person whose claim is supported by migo enjoys a certain degree of control over the asset, similar to the control exercised by the possessor of an asset. The possibility of winning the asset, being dependent on the testimony of the litigant, constitutes a kind of abstract presumptive right. By force of this presumptive right, the claimer of migo attains a legal advantage that compels his rival litigant to present unequivocal evidence in order to refute the presumption.
316 Id.
317 Id.
318 KARLIN, supra note 283, at 59.
319 Id.  
320 See Jewish Law, supra note 1, ch. 6.
321 KARLIN, supra note 283, at 59.
322 Id.
“potential of the claim” approach.\textsuperscript{323}

The two aforementioned models (the “credibility of the claim” and the “potential of the claim”) are not necessarily contradictory or mutually exclusive.\textsuperscript{324} Rather, they express different perspectives. On the one hand, there is a degree of reliance or credibility attributed by the court to the person making the claims and on the other hand, the aggregate number of claims available to the defendant. However, it seems that from the perspective of modern law,\textsuperscript{325} the “potential of the claim” doctrine has the upper hand for two reasons.

The first reason relates to the legal rationale underlying each of the aforementioned models. The initial presumption of the credibility doctrine is, as stated, that when a litigant chooses to make a weak claim (such as “I paid”) whereas he could have made a stronger claim (“the whole thing never happened”), it indicates that he is telling the truth.\textsuperscript{326} The reason is that had he been a liar, he would have denied all the facts, and the \textit{migo} doctrine states that we should therefore believe him because had he been a liar he could have made a better claim, which would have enabled him to win the case.\textsuperscript{327} It seems, however, that notwithstanding its attraction and its congruity with human psychology, the credibility doctrine’s basic assumptions are questionable. It relies on the highly questionable assumption that litigants are experts in calculating the significance and weight of their claims, and that they take these factors into account when making a particular claim. Furthermore, does the mere fact that a litigant made a certain claim instead of making another, better claim, necessarily lead to the conclusion that the claim he made is true? Conceivably, the claim he is making is false, and he was driven by various motives to make that claim.\textsuperscript{328}

\textsuperscript{323} \textit{Id.}

\textsuperscript{324} In fact, the leading Yeshiva Heads referred to above, \textit{supra} note 300300, made simultaneous use of the two models, seeing them as being complementary models.

\textsuperscript{325} Modern law seeks a rational and useful legal model, as distinct from the perspective of the scholar of Jewish law, or the historian, who seeks a faithful description of the historical perspective of Jewish scholars over the generations.

\textsuperscript{326} \textit{See} \textit{Gulack, supra} note 253, at 101-08.

\textsuperscript{327} \textit{Id.}

\textsuperscript{328} However, there is no fear that the litigant will purposely choose a weak claim in order to benefit from the \textit{migo} claim because at all events he will find himself in the same legal situation as he would have been had he made the stronger claim, and as such he does not profit specifically by reliance on the \textit{migo} claim. This point should be noted.
In fact, arguably, the logic of this approach leads to precisely the opposite conclusion. That is to say, a person pleading "I paid" should not be believed, because the claim may be false. The defendant has not in fact paid the debt, but he is afraid to absolutely deny the existence of a debt, preferring a partial denial by admitting to the existence of a debt, and claiming its payment, all of which places him in the category of confession and avoidance.

Notably, in Jewish law there is also a situation governed by the basic presumptions of confession and avoidance and the affirmative defense doctrine. Where a defendant partially admits to the plaintiff's claim, he is required to take a biblical oath with respect to the section denied. The Talmud offers the following explanation for this rule:

For Rabbah said: The reason the Torah has declared that he who admits part of his opponent's claim must take an oath is the presumption that nobody would take up such an impertinent attitude towards his creditor [as to give a complete denial to his claim]. The defendant [in this case] would have liked to give a complete denial, but he has not done so because he has not been able to take up such an impertinent attitude. On the other hand, it may be assumed that the defendant would have been ready to admit the whole claim, and that he has not done so because of a desire to put the claimant off for a time, thinking: 'When I shall have money, I shall pay him.' Therefore the Divine Law imposes an oath upon him, so that he may admit the whole claim.

A partial admission of the claim provides grounds for the Talmud's assumption that the claim in its entirety was justified carefully.

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329 See Talmud, Bava Mezia 3a-b.

330 Such as when Yaakov sues Yitzhak for a debt of $100, and Yitzhak admits to a debt of fifty but denies more than he admits to (in other words, he admits to part of the claim). In this case, Yitzhak would take an oath that he does not owe another fifty dollars to Yaakov, and he would pay what he admits to and be exempt from paying the balance. If he failed to take an oath, then he would also be required to pay the part that he did not admit to.

331 See Talmud, Bava Mezia 3a-b; Talmud, Shebuoth 42b.
and that the defendant offered a partial denial only as a means of delaying payment until such time as he was able to pay the entire debt. Consequentall, the litigant who admits to part of the claim is required to take a biblical oath with respect to that part of the debt which is contested. This assumption, which is similarly based on human nature, is diametrically opposed to the point of departure underlying the *migo* doctrine according to the credibility model. Then, why isn’t the partial admitter exempted from the obligation of taking an oath, and believed based on the *migo* doctrine to the effect that if he was a liar he would have denied the debt in its entirety? This question poses a real challenge to many of the commentators, who offer a variety of answers, and resort to complex legal presumptions taken from the areas of civil law and the laws of oaths. In any event, none of the answers provided by commentators nullify the fact that there are essentially two theories antithetically opposed to each other.

One may therefore conclude that there are grounds for doubting the basic rationale and basic psychological assumptions underlying the credibility doctrine. The legal rationale for the “potentiality of the claim” doctrine, on the other hand, stands on far firmer ground because it does not rely on questionable psychological assumptions that support putting trust in particular claims. Rather, it is based on a clarification of the potential legal pleadings.

The second reason for the modern lawyer to prefer the potentiality doctrine over the credibility doctrine relates to the character of the adjudicative proceeding and the manner in which judgment is reached according to each of the models. If the court ascribes importance to the manner in which a pleading is made, as per the credibility doctrine, the suspicion is that the entire litigation will take on a subjective, artificial character, because the form and procedure for presenting the pleadings to the court bear no connection at all to the litigant’s real legal position but rather to

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332 See Talmud, Bava Mezia 3a-b.

333 Id.

334 See Talmud, Tosafot in Bava Mezia 3a ("mipnei ma amra hatorah" discussing at length why *migo* in this case would be of no effect); see also Ozar Mefarshei HaTalmud, Bava Mezia (Collection of Commentary on the Talmud) at 114-15 (for a survey of the varying responses on this matter); Albeck, supra note 205, at 183-91 (discussing the subject at length).

335 See Ben-Pazzi, supra note 256, at 98-99.
his character. Conceivably, a particular litigant may be capable of lying outright with equanimity, and without batting an eye. On the other hand, another litigant may begin stammering and become confused when presenting his claims, despite their veracity. This ambiguity is also the case regarding the manner in which the judge concludes that a particular litigant is telling the truth. Professor Gulack notes the difficulty in positing fixed criterion for the evaluation of matters on which there is no substantive proof, and in which the court attempts to read the minds of the parties and assess their claims, their plots and devious schemes by means of logical theories. Gulack questions whether it is even possible to use logic as a tool for deciding the degree of trust to place in litigants' claims when they are so different from one another in terms of their virtues and the manner in which they plan their affairs.

On the other hand, if we wish to have judgments that are based on objective considerations, then there is no place for undue emphasis on the manner in which claims are made in the court as is the case under the credibility doctrine. The potentiality doctrine, however, appropriately answers these issues. The court does not determine the weight of the claim as a function of what was actually claimed. Rather, the probative degree of a certain claim is based on a priori considerations: the total number of claims that the litigant had the ability to raise determines the court's assessment of a particular claim raised before it.

Finally, it is noteworthy that the doctrine of the claim's potential, being mainly concerned with the total number of potential claims attaching to the possessory right of the litigant on the asset and which attest to it, is congruent with the evidentiary rule of "he who takes from his friend bears the burden of

336 Id.
337 GULAK, supra note 253, at 101.
338 However, Gulack's answer is, "Our legal doctrine does not leave the evaluation of litigants' pleadings to judicial discretion only, but rather provides the judge with fixed criterion for his evaluation of the claims, and in accordance therewith to determine the degree of belief which each of them merits." See Gulack supra note 253, at 101 (at the same time, the implementation of these rules is largely dependent on the subjective evaluation of the Judge regarding the nature of the litigant's pleadings).
339 Presumably, this is one of the central objectives guiding the modern lawyer.
340 See GULAK, supra note 253, at 101
341 Id.
proof." The latter gives priority to the person in possession of the money and even substantiates his claim. We emphasize once more that not only is preference given to the party in possession of the money substantiated by the migo doctrine; but it is also justified from a moral perspective because it provides security and certainty and is consistent with the constitutional protection of property rights.

3. The Migo as an Incentive for Truthful Claims

This section addresses a particularly important procedural aspect of the migo doctrine, one that has been neglected and rarely discussed in the rich literature dealing with migo. As noted, one of the most severe problems with the affirmative defense doctrine is that it encourages the defendant to make false claims to avoid being saddled with the burden of proof. This problem does not exist with respect to the migo doctrine. Maimonides's rulings regarding adjudication procedure and pleadings are particularly illuminating on this point. At the beginning of Chapter six of his Laws of Pleading, Maimonides outlines the procedure governing the parties' pleadings:

If litigants came to court and one of them said, "I have with this man a mina which I lent to him," or "deposited with him," or "which he took from me unlawfully," or "which he owes me in wages," and the like, and the defendant answered, "I do not owe you anything," or "You do not have anything in my hands," or "You are making a false claim," it is not a proper answer.

342 See discussion supra Part III.A.
343 See Ben-Pazzi, supra note 256, at 99. Ben-Pazzi also clarifies that "this approach does not claim that the aggregate of all potential claims establishes the probative value of the claim that was actually made, but rather they create the presumption in his favor. It would be correct to argue that by virtue of his ability to dismiss his rival, the strength and intensity of the legal presumption (of ownership) exceeds that of his rival, and his rival hence bears the burden of adducing evidence. The fact of his benefiting from this presumption means that irrespective of his claim, however weak, he will always trump his opponent until the latter produces clear evidence that contradicts his claim." Id. at 97, n. 1.
344 See discussion supra Part II.C.1.
The court will say to the defendant: “Make answer to his claim and be as specific in your answer as he was in his claim; say whether you borrowed money from him or you did not borrow money, whether he deposited anything with you or he did not deposit, whether you took anything from him unlawfully or you did not take, whether you hired him or you did not hire,” and so with respect to other claims.  

Maimonides’s comments indicate that the court must instruct the parties to clarify and detail their claims, as well as present them precisely. He then presents the reason for this requirement: And why is such an answer not acceptable? For fear that the defendant errs in his opinion and that he may thus unwittingly come to swear to a falsehood, since it is possible that the plaintiff lent the money to the defendant, as he claims, and that the defendant returned the debt to the plaintiff’s son or wife . . . and that he thinks that he has thereby been discharged of the debt.

The defendant is therefore told, ‘How can you say you are not liable in anything, when it is possible that you are liable at law to pay without your knowing it; inform the judges of the specific meaning of your words and they will advise you whether or not you are liable.’

Maimonides stresses that the litigant must present his factual claim (and its precise significance) and is forbidden to raise legal claims which require familiarity with the intricacies of civil laws, since it is unclear whether he possesses such knowledge. Nor is he entitled to make a claim (such as “I do not owe him”); such claims require expertise in legal matters, and it is doubtful whether he possesses that expertise, “for fear that the defendant errrs in his

346 Id.
347 Id. at 213.
348 Possibly, according to Maimonides, if the litigant does not elaborate on his claim, he will lose the case. See, e.g., Shulchan Aruch, Hoshen Mishpat 75; Rabbi Yair Chaim Bach, Chavot Ya’ir (Commentaries on the Shulchan Aruch) (noting that in this respect Maimonides differs from Asheri, who is cited in the Arba’ah Turim).
349 Maimonides, supra note 345, at 213.
opinion." Legal claims are only made at the second stage when the court establishes the legal significance of the parties' pleadings, "Inform the judges of the specific meaning of your words and they will advise you whether or not you are liable."  

Maimonides' statements apparently complement his statements at the end of Chapter 21 of Hilkhot Sanhedrin. According to Maimonides, it is precisely the litigants' lack of legal knowledge that enables the disclosure of the factual truth. Parties who are aware of the legal significance of their acts will be wary of telling the simple, unadulterated truth to the court and will endeavor to create as many obstacles as possible for their opponents. They will not admit to a fact if their opponent possesses no admissible and conclusive proof. According to Maimonides, it is precisely the layman litigant, ignorant of the ins and outs of halakha, who is liable to disclose the truth in order to concede or settle the justified claim of his rival. The Jewish system of law is based on the assumption that the direct confrontation between the parties, unmediated by attorneys, is liable to lead to the disclosure of the truth; the judge's role is limited to the role of guiding the confrontation without assisting the parties in their factual pleadings. One of the central features of the Jewish procedural system is its suitability for laymen who are not conversant with the intricacies of the law. In fact, court procedures during the hearing stage are particularly simple, characterized by one-on-one confrontation between litigants and judges, without the desires of the litigants being sieved through the channels of complicated formalism.

In the Laws of Pleading, Maimonides exposes a weakness in

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350 Id.
351 Id.
353 Id. at 123-27.
354 Id.
355 Id.
356 Id.
357 Id.
358 Sinai, supra note 352, at 123-27.
359 Id.
his theoretical procedural model. The system of a direct confrontation between the litigants may disclose the factual truth when both parties lack legal knowledge, but what happens when one of the parties is particularly clever and also versed in the law? The clever person will hesitate before clarifying his statements, being aware of the implications of a true statement of fact when its legal clout is weak. Maimonides addresses this point, stating that:

Even if the defendant is a great scholar, he is told, “You will incur no disadvantage by answering the plaintiff’s claim and by informing us as to why you are not liable—whether because no such thing ever occurred or because you paid what you owed—since we always apply the inference of credibility.

What does Maimonides add in the last sentence? Apparently he is explaining that one can ensure the disclosure of the factual truth even when dealing with a clever person who hesitates in making a true factual claim due to its legal weakness. Maimonides explains that the migo rule enables the clever person to give a true statement despite its weakness in the legal sense. A litigant will always retain the legal right to make a more powerful claim in terms of legal import because the court always adjudicates having consideration for what he could have said. Incidentally, this reality highlights another interesting aspect of the migo claim. Generally, the migo is understood as a logical-evidential doctrine that buttresses the claims of the party making the claim. However, Maimonides’ ad loc also alludes to its importance on the procedural level because the migo rule enables the party to give his true statement.

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360 Maimonides, supra note 345, at 213.
361 Id.
362 Id.
363 Id.
364 Id.
365 See, e.g., AMIEL, supra note 301, at 121 (noting the fact that these comments are consistent with Maimonides wording may indicate his tendency towards the potentiality doctrine as the basis of the migo rule).
366 See GULACK, supra note 253, at 118; Cohen, supra note 256; Rivlin, supra note 256; ALBECK, supra note 205, at 172-80; Ben-Pazzi, supra note 256; Yifrach, supra note 196.
367 See Maimonides, supra note 345, at 213.
A similar rationalization is made in a contemporary legal study by Allen et al. supporting contingent claims as rationalizing the attorney-client privilege. According to the authors' views, people must be encouraged to make such claims because they give potential clients "an incentive to substitute away from dishonest denials." The attorney-client privilege is especially designed to encourage clients to divulge unfavorable information on which legal claims frequently depend. In sum, the attorney-client privilege "facilitates inquiry into legal claims beyond the ken of lay persons. By doing so, the values that underlie contingent claims are furthered, and contingent claims, no less than others, produce real benefits." Among these benefits is "the decrease in fraud in the system, which occurs each time an individual who otherwise would have committed fraud in litigation is channeled to litigate a truthful contingent claim." Under this theory, the ultimate justification for the privilege lies in the improvements in behavior that result from the increased availability of contingent claims. The same theory, regarding a different doctrine and a different legal system, was given to the migo doctrine by Maimonides.

Indeed, there is a certain similarity between the migo doctrine in the Jewish procedural system and the possibility of raising alternative claims in the Anglo-American procedural systems, but there is a central difference between the two systems. Migo posits a positive-educational imperative: tell the truth even if your claim is weak; abide by it as though it were a superb claim. The message in the common law system is different: do whatever you want, honestly or dishonestly, provided that the burden of proof is imposed on your opponent.

On the other hand, the problem of the litigant’s fear of the consequences of telling the truth is not totally solved by the migo

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368 ALLEN ET AL., supra note 32, at 362-69.
369 Id. at 366.
370 Id.
371 Id.
372 Id.
373 Id.
374 See Maimonides, supra note 345.
375 See Rivlin, supra note 256, at 127.
376 Id.
doctrine because the fear still exists in those cases in which the migo plea does not apply for various reasons (such as failure to satisfy one of the many threshold conditions required for the migo claim). This, however, does not detract from the basic contention that the migo doctrine, far more than the doctrine of confession and avoidance, encourages litigants to make truthful statements. At the same time, it is clear that the migo doctrine alone is insufficient to ensure truthful factual pleadings on the part of litigants; rather, it is just one component of a broader procedural environment (presented in the next chapter) that is conducive to the realization of that objective.

C. Procedural Atmosphere: Legal Tools that Induce the Litigants to Raise Truthful Claims

1. General

The late Israeli Supreme Court Justice Haim Herman Cohn stated: "The system of Jewish law is without parallel among all the other systems of law in its disclosure of truth as an element of justice, and its subordination thereto."377 Jewish law is a religious law, and, as such, the central objective guiding the judge is truth-based litigation, an objective which is even imposed on him as a religious obligation.378 This obligation has implications in a number of dimensions.379 The disclosure of the truth is perhaps the most central value to have shaped Jewish law’s approach to the nature of litigation.380 Against this background, this article presents the procedural atmosphere in the Jewish law with respect to the pleadings of the litigants, as structured to induce truthful pleadings. In that context, there are a number of the legal tools conducive to the attainment of that comprehensive goal. For example, according to litigation procedure in Jewish law, there are no exceptions to the duty of raising truthful claims and the prohibition on lying is total; even if the litigant did not intend thereby to distort the truth and, even if it means incurring a loss he

378 See Jewish Law, supra note 1, at 352-53.
379 See id. (discussing the repercussions of that obligation on the formulation of the modes for the court’s intervention in the judicial proceeding in view of the sources of Jewish law).
380 Id.
is not permitted to lie. In this context, it is not only forbidden to lie, but it is also forbidden to create an impression intended to mislead the other party.

In the Jewish system of procedural law, the duty to raise truthful claims is not only a moral one, but also a legal one with far-reaching repercussions. If a litigant makes a claim that subsequently proves to be false, he is then presumed to be a liar and is not believed regarding any further claims that he may have in that particular trial. The following example illustrates the broad implications of being caught in a lie and presumed thereafter to be a liar.

David sued Solomon for the repayment of a loan. According to David, the debt originated from an oral loan and therefore he does not require a bill attesting to the note. Solomon claims that the oral loan never happened. Should Solomon’s claim be refuted by witnesses’ testimony after he retracts his denial and claims that “I paid,” Solomon will be regarded as having impeached himself, presumed to be a liar, and will be obligated to pay. Even if the witnesses to the loan subsequently testify that he paid the debt, it cannot exempt Salomon, because the rule in Jewish law is that “Whoever says I did not take a loan is regarded as having claimed I did not pay,” and a person is believed with respect to himself more than one hundred witnesses. This example indicates the extent of loss incurred by the lying litigant. Had Salomon claimed, “It is true that I borrowed, but I paid,” he would not have been obligated to pay because the other party (David) would have carried the burden of proof, and in the absence of a note is unable to force Solomon to pay. However, insofar as Salomon raised a false claim he worsened his position. This example demonstrates that the procedural rules of the Jewish law create a real deterrence against raising false claims.

The presumption that the litigant is a liar does not mean that he is forever stigmatized as a liar who cannot be trusted in any litigation; the presumption only applies to the litigation in which he was found to have lied. The underlying rationale is quite

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381 See Ben-Aderet, supra note 241, at n.81.
382 See id.
383 See SHULCHAN ARUCH, HOSHEN MISHPAT 79:5.
384 See SHULCHAN ARUCH, HOSHEN MISHPAT 79:1,5.
385 Id.
386 See SHULCHAN ARUCH, HOSHEN MISHPAT 79:5.
simple. At the moment that one of the litigants is found to have lied with respect to one of the main points being decided upon, it becomes clear that his version is either totally or partially untrue, which leads the court to believe the other litigant.

A result of the duty to make truthful claims and the prohibition against false claims is that Jewish jurisprudence does not recognize the institution of alternative factual claims, which is the practice in the common law adversary system. The Jewish Rabbinical Court will therefore refuse to accept a claim of “I did not borrow” and alternatively, “I borrowed but have repaid.” Under the adversary system, if the defendant makes this claim and witnesses testify that he indeed borrowed, he does not thereby forfeit his right to make the alternative claim, even after the refutation of his first claim, and he is now entitled to raise and prove his alternative claim of having paid the debt. This situation is not possible in the Jewish procedural system, for having been proved to have lied in his first claim, the defendant is presumed to be a liar and will not be believed regarding his second claim; the plaintiff will be believed and will hence win the trial. On this point, one of the foremost Halakhic authorities (Rishonim) claimed that even if the defendant’s original claim was not refuted by witnesses he would nonetheless forfeit his reliability in relation to that claim by making the alternative claim.

Finally, it bears mentioning that Jewish procedural law contains additional rules that aim to ensure the truthfulness of litigants’ claims. Jewish procedural law institutionalizes direct contact between the court and the litigants and between the litigants themselves, including the prohibition of written pleadings, the limitation of attorney assistance, the litigants’ duty of being personally present when hearing their claims, and

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387 See, e.g., Jacob, supra note 124, at 88-89.
388 See id.
389 See Ben-Aderet, supra note 241, at n.91:4.
390 See Resp. Ribash, n. 298. The rationale for this is that hearing the oral pleadings of the parties themselves may indicate which of them speaks the truth whereas experience with claim sheets demonstrates that the judge is unable to learn anything because they are usually worded by another person (usually an advocate), who words them according to legal considerations, even if they do not reflect the truth.
391 See SHULCHAN ARUCH, HOSHEN MISHPAT 14:5. The reason for this halakhah is that when the opposing party is not present, the litigant making his claims can present untrue claims in the guise of truth without being confronted by a party who is aware of
limitations on hearing of pleadings by way of an interpreter.\textsuperscript{393}

2. \textit{Cost-Efficiency and Costly Signaling}\textsuperscript{394}

The argument for the cost-effectiveness of the Jewish law model is strengthened using a game-theoretic approach. Credibility rules, as Stein noted, often "involve a . . . game-theoretic technique: costly signaling. By making his or her signaling costly, to himself or herself, a person may separate it from cheap talk and make the prospect that fact-finders will find his or her signaling credible [and] more probable."\textsuperscript{395} To avoid the inefficiency of cheap talking, according to this approach, evidence law needs to encourage witnesses and litigants to use credible signaling.\textsuperscript{396} The Jewish law facilitates costly credible signaling. The general tendency of the \textit{migo} doctrine, as presented in the end of Part III, is to allay the litigants' fears regarding the repercussions of testifying truthfully. This tendency is supplemented by the general procedural environment that was presented above, and especially the basic rule that if a litigant is found to have lied, he is presumed to be a liar and will no longer be believed in any of his claims in that trial. The personal risk the litigant assumes qualifies as a costly signaling that bolsters the credibility of his statements.\textsuperscript{397}

The conclusion is that the tendency evidenced by the \textit{migo}
doctrine fits smoothly into a general normative procedural environment, which aims to ensure the veracity of the litigants' claims by use of legal tools. The procedural environment in Jewish law is decidedly different from the procedural environment in adversary proceedings, which are not overly perturbed by false pleadings of litigants. Arguably, the differences between the migo doctrine and the affirmative defense doctrine derive from more profound, general differences between the world view underlying the adversary system and that of Jewish law.

IV. Concluding Comparative Analysis

Part II of this article is devoted to a critical analysis of the doctrine of affirmative defense and the rules governing the burden of persuasion in common law. This article addresses some of the doctrine's central difficulties and deficiencies, chief among them being the lack of a satisfactory justification for the burden of persuasion rules in common law.\(^{398}\) Naturally, these difficulties also characterize the doctrine of affirmative defense that places the burden of persuasion on the defendant without sufficient justification.

The central problem with the affirmative defense doctrine is its influence on the conduct of litigation proceedings between the parties.\(^{399}\) The doctrine of affirmative defense provides a negative incentive to the honest person interested in giving a full and complete story and dissuades him from doing so due to his fear of being "punished" by having the burden of persuasion transferred to him. The result is that the doctrine of affirmative defense, especially in situations of confession and avoidance, actually incites the litigant to mendacity in the knowledge that even if he is found to be a sinner, his acts will also profit him. It also encourages the parties to abuse their right of access to legal authorities, thereby impairing the rights of access of the other side. From the economic cost-efficiency perspective, this situation places an onerous burden on the court in its efforts to uncover the truth, as well as significantly increases the costs of the proceeding.\(^{400}\) These costs would be saved if the governing

\(^{398}\) See supra Part II.A, II.B.
\(^{399}\) See supra Part II.C.I.
\(^{400}\) See supra Part II.D.
procedural-evidential doctrine encouraged the parties to enter truthful pleadings (like the Jewish law model). The doctrine of affirmative defense also spawns uncertainty in the question of who bears the burden of persuasion in both criminal and civil cases.\textsuperscript{401} Constitutional considerations (protection of property rights in civil cases) may also militate against imposing the burden of persuasion on the defendant in situations of affirmative defense.\textsuperscript{402}

Part III of the article presented a procedural model based on the principles of Jewish law. It analyzed the legal bases of the fundamental rule “he who takes from his friend bears the burden of proof” and of the \textit{migo} doctrine, indicating the advantage of these two rules in comparison with the affirmative defense doctrine and the burden of persuasion rules as practiced in the common law. In Part III.A, the article argues that there is no principle more justified than the principle that “he who takes from his friend bears the burden of proof,” which does not only pertain to the physical presence of assets in the possession of the defendant but is also motivated by the interest in preserving legal security and stability. This consideration dictates the preservation of the status quo, and consequently, the litigant attempting to change the status quo bears the burden of persuading the court that it is appropriate to do so. The principle that “he who takes from his friend bears the burden of proof” is justified by considerations of morality, legal stability, and security. From the perspective of economic efficiency, it is the most appropriate rule for determining the burden of persuasion in civil cases, and it is also consistent with the constitutional protection of property rights. Quite often legal policy considerations dictate the imposition of the burden of persuasion on a particular party (i.e., the defendant), even if from a strictly legal perspective that party cannot be regarded as a person “taking” from his friend. This article presents three examples for deviation from the basic rule that “he who takes from his friend bears the burden of proof.” The basic principle of the first example is similar to one of the principles of the evidentiary damage doctrine which can shift the burden of persuasion to the defendant whenever the latter is responsible for inflicting evidentiary damage on the plaintiff. A second example

\textsuperscript{401} See supra Part II.C.3.
\textsuperscript{402} See supra Part II.C.3.
of deviation from the rule that "he who takes from his friend bears the burden of proof" concerns cases where the evidence supporting the plaintiff's claims is in the hands of the party in possession (i.e., the defendant), and the plaintiff proves that only the defendant in possession is capable of bringing the evidence in support of the plaintiff's claims. In such a case the rabbinical court may impose the burden of proof on the defendant. The third example pertains to a particularly controversial issue in modern law: who carries the burden of proof in appeals on tax assessments? The Jewish law approach indicates that whenever an individual has a dispute with his community concerning tax matters the community first collects the tax, and even when the taxpayer has retained possession of the sum in dispute, the burden of proof rests with the taxpayer and not the community.

Part III.B focused on the migo doctrine, which strengthens a claim made by a litigant in cases where he could have made a better claim which would have been believed. Insofar as he could have raised a more powerful claim, but chose not to raise it, he is also believed regarding the claim that he actually made. The migo doctrine is categorically different from the affirmative defense doctrine (and the confession and avoidance principle); both lead to diametrically opposed results. Halakhic authorities accept the broad rule that migo cannot itself form the grounds for a claim because in order to succeed, the plaintiff must submit substantial evidence, and migo does not fall into that category. According to another basic rule, migo is not effective against substantial evidence. Not only is the migo rule consistent with the rule "he who takes from his friend bears the burden of truth," but it also supplements and strengthens that rule, because it strengthens the defendant's claim in cases in which the plaintiff does not have any proof.

The migo doctrine is anchored in two legal models. According to the first model—the doctrine of the "credibility of the claim"—the defendant is believed even without producing evidence because had he wished to lie, he could have chosen a stronger claim: "such a thing never occurred." This claim constitutes a blanket denial, and it would have compelled the plaintiff to prove his claim in its entirety. The rule applying to a litigant who is apparently not lying is no less beneficial to him than the rule applying to a litigant who may very well be lying. Under the
credibility model, *migo* helps establish a degree of credibility to the actual claim made by the litigant.

The second model is the "potentiality of the claim" doctrine, according to which the total number of claims that a litigant can potentially claim attests to the degree of power and possessory right exercised by the litigant in respect of the asset in dispute. The later Halakhic authorities adopt a number of approaches in explaining the probative value of the *migo* according to the potential of the claim doctrine. Rabbi Shimon Shkopp contends that a person's ability to dispose of his rival litigant by force of a particular claim proves that his possessory right in the asset is stronger than that of his rival, and as such, the rival bears the burden of proof. A person's possessory right over an asset bestows him with a number of other rights, inter alia all of the potential claims that a person holding a possessory right can make in his favor with respect to the asset in his possession. Rabbi Shlomo Fisher took the view that the *migo* claim undermines the plaintiff's claim, because the mere possibility of offering an alternative explanation of the plaintiff's claims and evidence attests to the nature of his claims and evidence. The *migo* claim thus demotes the plaintiff's claims to that of a narrative only. In other words, the *migo* claim is a possible, non-exclusive way of explaining a particular set of facts.

The two aforementioned models do not necessarily contradict each other; rather, they reflect two different perspectives. However, the modern lawyer would most likely still prefer the potentiality doctrine over the credibility doctrine. The advantage of the potentiality claim lies in the fact that this doctrine is primarily concerned with the total number of potential claims that accompany the litigant's possessory right of the asset, and which attest to it, thereby fortifying and supplementing the central evidential rule that "he who takes from his friend bears the burden of proof," and is generally consistent with the doctrine of possessory rights.

Another procedural advantage of the *migo* doctrine pertains to one of the gravest pitfalls of the affirmative defense doctrine, namely the encouragement it offers to defendants to avoid truthful testimony for fear of being saddled with the burden of proof. This problem is non-existent in the *migo* doctrine, and even if the problem exists, then it is not of the same gravity. The *migo* rule
enables the litigant to present his true claim, despite his awareness of the legal weight and significance of the claim, and even if the claim is legally weak. The reason is that he will always benefit from the legal right conferred by the stronger claim in terms of its legal significance. The *migo* doctrine frees the litigant from fear of the consequences of telling the truth (the like of which we observed in the affirmative defense doctrine). It blends seamlessly into a broader normative framework which uses legal tools to facilitate truthful pleadings by litigants.\(^{403}\)

This article bolstered the argument of the Jewish law model’s cost-efficiency by using a game-theoretic: costly signaling. This approach demonstrates how Jewish law uses legal tools to ensure the veracity of the litigants’ claims and facilitates costly credible signaling. The general tendency in the *migo* doctrine is to allay the litigants’ fears regarding the repercussions of making a truthful claim. This tendency coheres with, and indeed is supplemented and fortified by the general procedural environment previously discussed. Of particular importance is the basic rule that if a litigant is found to have lied, he is presumed to be a liar and will no longer be believed in any of his claims in that trial. This personal risk that the litigant assumes qualifies as a costly signaling that bolsters the credibility of his statements. The *migo* doctrine also attains the goal of efficient fact-finding by neutralizing the two obstacles which are relevant in the affirmative defense, as mentioned above. The first obstacle is the divergence between the private and the social benefits that adjudication engenders. The second obstacle is the unobservable private information that parties and witnesses hold, which remains throughout the trial hidden and private, as opposed to open and public. Indeed, the *migo* doctrine and the Jewish procedural environment tackle these obstacles by encouraging and facilitating truthful pleadings by litigants, and as a result, these legal tools reduce the divergence between the private and the social benefits that adjudication engenders and encourages exposure of private information.

The procedural atmosphere in Jewish law differs categorically from the procedural environment in an adversarial system, for as previously discussed, the latter is not particularly concerned by the

\(^{403}\) *See supra* Part III.C.
prospect of false statements in the pleadings. The differences between the migo doctrine and the affirmative defense doctrine are a direct result of the more profound and general differences between the world view underlying the common law procedural approach and that of Jewish law. There is a central difference between the two systems. The migo doctrine posits a positive-educational imperative: tell the truth even if your claim is weak; abide by it as though it were a superb claim. The message in the common law system is different: do whatever you want, honestly or dishonestly, provided that the burden of proof is imposed on your opponent. However, seeds of change are appearing. In England itself, the birthplace of the adversarial system, recent years have seen a number of significant retreats from the adversarial approach and the transition to a game of "open cards." A similar retreat from the extreme adversarial system is also evident in American law. I believe that the gradual transition from this system to a more inquisitorial system is commendable and certainly desirable, because it contributes to the discovery of the truth. If the tendency towards the "open cards" game and disclosure of truth gains momentum, one may expect a renewed examination of the implications of the affirmative defense doctrine and its ability to cause honest people to be hesitant in entering factually honest statements because of their fear of being saddled with the burden of persuasion.
