Rethinking Credibility and the Burden of Proof

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Law school didn’t teach us about the real burden of proof. Let’s rethink it.

Shortly before the Senate was to confirm Judge Brett Kavanaugh for the Supreme Court, something unexpected happened: an accusation of sexual misconduct. Professor Christine Blasey Ford claimed that when she was 15, a 17-year-old Kavanaugh threw her on a bed, tried to rip her clothes off, and covered her mouth so that no one would hear her scream.

Kavanaugh denied it. He claimed that, if Blasey Ford had been attacked, it wasn’t him.

Two claims. She said; he said. Only one of their stories could be true.

The Senate Judiciary Committee decided to hold a hearing and give them each a chance to tell their stories, presumably so that the truth would emerge. After some wrangling over ground rules, including who would go first (it was Blasey Ford) and whether other witnesses could or should be called (they couldn’t and weren’t), the protagonists spoke, questions were asked, the Federal Bureau of Investigation (FBI) conducted a limited but private follow-up investigation of little consequence, the Republican majority on the committee recommended Kavanaugh’s confirmation, and that’s what the Senate did.

Those in the Blasey Ford camp were convinced that she was telling the truth, that her memory was accurate, and that the hearing was a sham. They believed that the ultimate confirmation vote was preordained, no matter what the evidence showed, and that the Republican leaders on the committee and in the Senate engineered the result, without treating Blasey Ford’s allegations with the seriousness they deserved.

Some in the Kavanaugh camp tried to treat Blasey Ford’s allegations, at least outwardly, with respect, but others treated them with disdain. In the end, the Kavanaugh backers chose to believe that Blasey Ford’s memory was faulty, pointing to Kavanaugh’s adamant denials as evidence of his innocence. They brushed aside the suggestion that more evidence was needed. They dismissed the argument that Kavanaugh so discredited himself in the hearing with his tirades and weeping that this alone should have disqualified him.

Biased Perception

We’ll come back to the Blasey Ford/Kavanaugh controversy in more detail later because it reveals much about how the real burden of proof operates. But to make more sense of it, we need to understand that what was overlooked in the Monday morning quarterbacking was a social science phenomenon that operated on both sides of the controversy, something called “motivated cognition” or “biased perception,” fancy terms for what Paul
The Real Burden of Proof

That’s what they taught us in law school. But they didn’t teach us about the real burden of proof, how it really gets assigned, what the real evidentiary standard is, who has the actual burden of persuasion, and what a party must in fact do to meet it.

Let’s start by focusing on an oxymoron that has lately found traction in emotionally charged controversies: “credible allegation.” An allegation is no more than an accusation, a claim that someone has engaged in wrongdoing of some sort. It is a prelude to an offer of evidence to prove that what an accuser contends happened did in fact happen.

Allegations do not have intrinsic credibility. Allegations standing alone are not, simply by having been made, entitled to be believed. They become credible and merit some variable measure of belief only when endowed with some form of external support, such as when made by a known credible source (the FBI, for example, won’t make an allegation until it has investigated the matter) or when buttressed by some evidence that lends credence to the allegation or when the allegation is made about a person who has a known history of similar behavior.

Until that happens, the most that people without personal knowledge can say is that the matter alleged might have occurred, but it also might not have. To say that an allegation is credible before it is buttressed by external support is to put a thumb on the scale in favor of the accuser. This is no more valid than talking about a “credible denial” before support surfaces. To do so places a thumb on the scale in favor of the accused.

We seem to have more tolerance for labeling allegations as “credible” when the allegation describes some form of predatory behavior. Predation is so repugnant, and the thought of it so disturbing, that the mere making of the allegation triggers an unnervingly uncomfortable image of it occurring. In turn, the image generates a sympathetic response for the alleged victim. This is no more valid than talking about a “credible denial” before support surfaces. To do so places a thumb on the scale in favor of the accused.

We have less tolerance for labeling an allegation “credible,” or more tolerance for labeling it “incredible,” when the allegation tends to victimize someone unfairly for reasons unrelated to the allegation itself. Through the lens of history, we tend to view the murder allegations against Sacco and Vanzetti as incredible, the product of fervent anti-immigrant feelings and of what was then a strong fear of people whose political views were sharply on the left. At the time though, the vast number of people who held those anti-immigrant and anti-left sentiments viewed the allegations as credible, no doubt fueled by those very sentiments.

Notice how easily one can form a belief or disbelief in an allegation not based on corroborating information but on factors that stand apart from the evidence. The Sacco and Vanzetti example is particularly illuminating because it shows how attitudes about an allegation can change over time, shaped and influenced by the periods in which we live and the historical context in which the allegation is made, all still unrelated to the evidence.

One’s attitude about an allegation can also be shaped by the non-evidence-based opinions of others. In the early stages of opinion formation, one might form a nascent belief in an allegation’s truth based on its imagined plausibility or on fragmentary evidence, scenarios, or explanations put forth by those on the other side. They seldom are aware of how their beliefs have been channeled into a conclusion by their education, life experience, and peer influences. All of these shape the cognitive structures that control how they perceive, interpret, and act on information.

That’s what this article is about. To be effective litigators, we need to rethink what we were taught about how factual disputes are resolved. We and our witnesses need to understand not only the formal ground rules about burdens of proof but the unwritten ones as well. We need to understand the social scientific foundations that support them, and how credibility determinations are actually made. Unless we understand this, we’ll be litigating from weakness and preaching only to our own choirs.

Here are the formal ground rules, familiar to every litigator:

First, identify the party who has the legal burden of proof. By convention and most often, that party is the accuser. At the outset, all facts, except those on which there is common agreement, are presumed to be contrary to that party’s position until that party offers evidence to establish otherwise.

Second, give the protagonists a chance to present evidence to a neutral fact finder. The party with the legal burden of proof presents first. This is the so-called burden of going forward. If that party’s evidence is insufficient, that party loses. But if someone could be persuaded by that evidence, the burden of going forward shifts, and the other party—generally the accused—can present his or her own evidence.

Third, when all the evidence is in, the neutral fact finder gives it such weight as the fact finder believes it deserves and then draws a conclusion about what happened, based on an evidentiary standard that can range from a mere preponderance (a feather more than 50 percent) to beyond a reasonable doubt (something like a moral certainty). If, under the applicable evidentiary standard, the evidence persuades the fact finder to believe that the party with the legal burden of proof is correct, then that party wins. If not, the other side wins. This is how the so-called burden of persuasion operates.

Illustration by David Vogin
evidence. The sharing of that opinion with others can cause the opinion to intensify and spread. People tend to conform their opinions to those of others with whom they identify because of the ease of adoption, the desire to go along, the discomfort of disagreeing, the fear of being rejected, the phenomenon of mutual reinforcement or confirmation, or any number of other peer-influencing factors. If one's friends or colleagues feel a certain way, it is much easier to concur with, adopt, and repeat their views than to dissent. This explains, for example, why juries can reach a unanimous result that seems so sharply at odds with an objective analysis of the credible evidence. Strongly held opinions by some jurors can lead those with weakly held opinions to follow suit.

In history, people have been executed based on no more than an accusation, followed by a fear or belief, however ill-formed, that the accusation might be true. The Salem witch trials come to mind. The Scottsboro Boys were almost executed.

In modern day, the Innocence Project reports that, by its 25th year, it had secured the release of 322 people wrongfully convicted after trial but later exonerated by scientific DNA proof. Many were convicted based on erroneous eyewitness identifications that a fact finder accepted as reliable proof of guilt beyond a reasonable doubt. Some 130 DNA-liberated exonerees had been convicted of murder and had faced either the death penalty or life in prison. These numbers reflect the work of only one agency. It's a safe bet that other wrongly convicted defendants have not yet been exonerated or might never be. Wrongful convictions happen.

Why didn’t the burden of proof work in these instances as it was supposed to? How could it have led to wrongful convictions? Who had the real burden of proof in To Kill a Mockingbird? Was it the prosecution or was it Atticus Finch’s client Tom Robinson, a black man accused of raping a white woman, being tried by a white jury in a town where racial prejudice was palpable? How easy is it for accusations to lead to pronouncements and firmly held beliefs of wrongdoing based on weak evidence or even without evidence?

Litigating in the Real World
Cases are decided by humans. Imperfect humans. Sometimes biased humans. Sometimes humans with agendas. Humans with preformed perspectives, with different educations and life experiences. Humans who, when confronted with disorganized, conflicting, or ambiguous information, have a natural impulse to want to impose order on it.

When the world fails to operate as we hope and expect, we are in a state of uncomfortable disequilibrium. The urge is to try to banish the chaos and to reconcile the disorganization, the conflict, and the ambiguity by mentally adopting a narrative that makes the most sense, based on all the inputs that, to that point, have formed our worldview. For this reason, when faced with unclear or conflicting information, we tend to construe it in a way that confirms what we already believe and to interpret it in the easiest way we can.

The mere making of an accusation can often, by itself, create a presumption against the accused. If someone makes an accusation or recounts an occurrence, the listener can tend to believe it if the listener has no reason either to disbelieve it or to distrust the speaker. If the listener can imagine it as having happened, the listener’s belief in its truth intensifies. If the accusation or occurrence fits with the listener’s personal experience or understanding of how the world operates, the listener’s belief in its truth intensifies even more.

And if the listener has a reason to want to believe that the accusation is true—say because an assumption that it is false is too uncomfortable or because the listener has some agenda that would be well served if the accusation were true or because the listener’s friends believe it to be true or because the accusation simply sounds plausible—the listener will tend to credit any evidence consistent with the accusation’s truth and to view any evidence that tends to disprove the accusation as untrustworthy.

These are manifestations of motivated cognition or biased perception, the tendency to conform one’s beliefs to a desired outcome based on subjective or emotional factors unrelated to an impartial assessment of evidence. These tendencies, well documented in scientific studies and academic research, pervade nearly all spheres of cognitive activity, from information processing to decision making to self-assessment to recall to perception to judgment formation.

In a perfect world, legal disputes are resolved by neutral decision makers, influenced only by the evidence, not by unrelated emotional factors. Indeed, conventional thinking holds that there can be no due process or justice without having decision makers who are neutral. Traditional notions of who has the burden of proof and how it must be met are molded around the bedrock assumption that, in the end, the decision will be made by a neutral person or neutral jury after a dispassionate, objective evaluation of reliable evidence.

But we don’t litigate in a perfect world. Decision makers are human, not necessarily neutral. They have emotions and view the world through prisms. Some might be better than others in compartmentalizing their emotions and setting aside their prisms when considering the evidence. It would be dangerous, though, to assume that any specific decision maker will do that, or do it successfully, in any given case. And if a party fails to account for motivated cognition when making assumptions about who has the burden of proof and how it must be met, good luck. That party has a good chance of getting it wrong and seriously impairing the chances of prevailing.

The Run-Up to the Blasey Ford/Kavanaugh Hearings
To demonstrate, let’s focus on the run-up to the Blasey Ford/Kavanaugh hearings. If you weren’t distracted by the political maneuvering and the nonstop punditry, you would have seen
a pristine example of motivated cognition playing out on both sides of the national stage, and you would have been able to distill important lessons about the real burden of proof.

On one side were supporters of Blasey Ford who, based on the accusation and perhaps some limited related information, were persuaded that the accusation was true. A week before the hearing, Michelle Goldberg, a New York Times opinion columnist, wrote, “I believe Christine Blasey Ford . . . who says that Brett Kavanaugh sexually assaulted her . . . I believe her when she says that Kavanaugh, who she says was drunk, held her down, covered her mouth when she tried to scream, and ground against her while attempting to pull her clothes off.”

More significantly, before hearing the evidence, Senator Mazie Hirono, a Judiciary Committee member, also said she believed Blasey Ford: “Not only do women like Dr. Ford, who bravely comes forward, need to be heard, but they need to be believed. . . . We have to create an environment where women can come forward and be heard and be listened to. I want to thank Dr. Ford. I commend her courage. I believe her.”

Senator Kirsten Gillibrand said basically the same thing. In a television interview, after calling for the FBI to conduct an investigation before the Senate Judiciary Committee hearings were to begin, Gillibrand stated, “I believe her. She is credible.”

On the other side, supporters of Judge Kavanaugh believed his denials. In the week before the hearing, about 75 women held a press conference wearing “#IStandWithBrett” badges. Representatives from this group attested that the allegations against him were false. One spokeswoman said, “The reason that we know that this allegation is false is because we know Brett Kavanaugh. . . . We know the man, we know his heart, and we’ve known him over every aspect of his life. And the charge leveled against him is inconsistent with everything we know about him.”

Unlike the women in the #IStandWithBrett movement, senators on the committee who supported Kavanaugh had the good sense not to express their opinions on the allegations and denials before the hearings. Had they done so, they would have been roundly and justifiably criticized by Blasey Ford’s supporters for prejudging the issue before the evidence was heard, even though some of Blasey Ford’s supporters felt free to prejudge the issue before hearing the evidence. Such was the power of an accusation of predatory behavior and the resulting sympathies for Blasey Ford.

But Kavanaugh’s supporters gave other signals that betrayed their views of the allegations. Republican senators on the committee were openly hostile to requests from Blasey Ford’s counsel for more time to prepare for the hearings, for an FBI investigation to precede the taking of evidence, for other witnesses to be called in addition to the two protagonists, for Judge Kavanaugh to testify first, and for the questions to be asked only by the senators and not by counsel for the committee. These last two requests were hard to justify in a system where the legal and traditional burden of going forward belongs to the accuser and where examination by experienced counsel is considered necessary to get the full story out. The other requests, though, were eminently reasonable and would have made the fact-finding process more reliable.

Still, the Republicans on the committee would have none of it, arguing that the public deserved a speedy hearing. Of course, given the importance of the issues at stake, haste is often a poor substitute for doing things right. And the senators who rejected those of Blasey Ford’s requests that were plainly reasonable were, correctly as it turned out, viewed as favoring Judge Kavanaugh’s elevation.

It was against this backdrop that the Ford/Kavanaugh hearings took place. Before the committee took any evidence, neutrality had been squeezed away. Committee members had their favorites. For them to change their minds, the evidence would have had to have been overpowering in the direction that favored the other side.

And in the court of public opinion, the other forum in which this dispute played out, sides had also taken shape. Before hearing the evidence, many people, not just Michelle Goldberg, Senators Mazie Hirono and Kirsten Gillibrand, and the #IStandWithBrett women, had already decided whose account of this 30-year-old incident (or “alleged” incident, depending on one’s viewpoint) was truthful. As no evidence had yet been presented, those strongly held beliefs had to have been based on something else, like biased perceptions resting on hunches or arguments, which seemed to be batted up and down, back and forth, like badminton birdies.

Those who believed Blasey Ford found it significant that, in 2012, she reported the incident to her therapist, long before she knew there would be a Supreme Court nomination in the balance. Those who believed Kavanaugh dismissed this because she did not name the perpetrator at that time.

Those who believed Kavanaugh argued that he had a sterling reputation for personal integrity. Those who rejected Kavanaugh’s denials countered that Blasey Ford had put herself in great personal and reputational jeopardy by coming forward, knowing that Kavanaugh’s supporters would attack her character and that no rational person would do this if the accusations were untrue.

Then there were those who had not already prejudged the issue and were exhorting people to wait for the evidence before drawing any conclusions. The esteemed Harvard law professor and former federal judge Nancy Gertner wrote in an op-ed that the outcome needed to be based on evidence and that, until the evidence was heard, no one could decide who was right. New York Times opinion writer Bret Stephens echoed this view, bemoaning as “empirically worthless and intellectually dishonest” statements on the controversy that began with “I believe Blasey” or “I believe Kavanaugh,” as the evidence had not yet been presented.

The burden of proof was, to put it mildly, out of balance. In the pre-evidence phase, if people were not already persuaded about
whose account was truthful, tidal waves of firmly held opinions were still pushing in one direction or another, while more reasoned minds who understood how honest decision making should operate were vainly urging people not to believe either the accused or the accuser until the evidence could be collected, presented, and carefully evaluated. The more reasoned minds lost.

How Cases Are Really Decided

The didactic value of the Kavanaugh/Blasey Ford dispute is so high because this dispute exposes how the real burden of proof operates and lets us understand how cases are really decided, not just in high-profile controversies like this one—although this one certainly trained a spotlight on it—but in everyday ones.

Cases start with accusations. These are powerful things. They are not made in a vacuum or on a blank slate. Many believe that someone would not make an accusation unless something happened. Those who tend to believe an accusation upon hearing it regard the accusation to be like smoke, evidence of a fire somewhere, not realizing that sometimes accusers are only blowing smoke and that there is no fire. Accusations have the power to conjure up images, even before the evidence is heard. The images seem real enough. They become the reality in the minds of easily persuadable people who have little built-in skepticism.

Some images, however, will not always match the accusation. Accusations from sources thought to be untrustworthy can conjure up an opposite image, like that of an overly motivated accuser scheming to harm the accused through fabricated allegations.

Blasey Ford accused Kavanaugh of attempted rape. Those who were cognitively motivated to accept her story formed a mental image of Blasey Ford on the bed and of Kavanaugh atop her. It seemed real to them. If those people were the relevant decision makers, Kavanaugh would have had the real burden of proving that Blasey Ford was mistaken.

But Kavanaugh was an accuser as well. A strongly voiced denial is, in effect, an accusation that the primary accuser is mistaken or lying. Those who were cognitively motivated to accept his denial formed a mental image of a confused Blasey Ford trying to cobble together fragments of an imperfect memory to create a damning story about an innocent Kavanaugh. Someone more cynical might have formed a mental image of a politically motivated Blasey Ford, intent on torpedoing the Kavanaugh candidacy. If those who were cognitively motivated to accept Kavanaugh’s denial were the relevant decision-makers, Blasey Ford would have had the real burden of proving that Kavanaugh’s denial was fabricated to cover up some awful conduct.

This leads us to two fundamental lessons about the burden of proof. First, the real burden of proof is defined by the images that root in the decision-maker’s mind: Once an image takes hold, the real burden of proof is all about reinforcing or dismantling the image, depending on whether the party’s truth is consistent or in conflict with the image.

Second, the real burden of proof belongs to the party who has a vested interest in having the decision maker decide in its favor. So that there is no confusion, this means that each side in a dispute has the real burden of proof. Neither side can afford to rest comfortably on how the law or custom technically allocates it, nor can either side assume that the decision maker is neutral or leaning its way. Even before the evidence comes in, decision makers are seldom in decisional equipoise. They lean toward one side or the other, maybe slightly, maybe a lot. While the protagonists might make an educated guess about the direction and angle of the lean, placing too much stock on such guesses is rarely safe.

To be effective litigators, we need to rethink what we were taught about how factual disputes are resolved.

This is why, in their opening statements, savvy defense lawyers will seldom tell a jury in a civil case that the evidence will not support the plaintiff’s allegations or that the plaintiff will not meet his or her burden of proof. Such a position is too lame. Instead, they act as if the burden of proof belongs to them. They own it. They embrace it and confidently declare “We will prove to you that the machine was made correctly and that the plaintiff injured herself because she violated a well-known safety instruction.”

The Four Stages of Credibility

But how should someone go about meeting his or her real burden of proof? How should someone go about moving the decision maker away from any preformed beliefs or images that stray from that party’s story? How should someone go about getting the decision maker to accept that party’s story? The key is in understanding the four stages of credibility.

The first three stages come, oddly enough, from the field of marketing: know, like, and trust. In short, marketing theory holds that the way to earn someone’s business is get the buyer to know the seller, then like the seller, and then come to trust the seller. Only when the seller can go through these steps and

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attain the buyer’s trust will the buyer be comfortable giving business to the seller.

This theory can be applied across disciplines and contexts. In mercantile transactions: Know, like, trust . . . buy. In political decisions: Know, like, trust . . . vote. In interpersonal decisions: Know, like, trust . . . lend the car.

In actuality, the know-like-trust model is an imperfect and oversimplified explanation of what really happens. The ultimate decision seldom follows this pattern. We buy from people based on recommendations of others or on advertising or impulse or need or inadequate access to information or on the lack of qualified alternatives. We vote based on images made during the campaign, fueled in part by how other like-minded people say they intend to vote, and we typically vote for the most palatable or least offensive of only two candidates. We lend our cars to friends not based on trust. We do it based on fear of spoiling the friendship.

But when seeking to be favored with a credibility determination in a dispute resolution environment, earning the decision maker’s trust is key. To do this, to meet the real burden of proof, the party or witness must form a connection and establish a relationship with the decision maker. The know-like-trust ladder is perhaps the most effective way of creating that connection and of reaching the fourth and final stage: believe.

Simply stated, decision makers more readily believe the people they like. Parties, protagonists, or witnesses can’t be liked until they show enough of themselves so that the decision maker gets to know them in some relevant and favorable way. Getting to the first rung—“know”—is a huge step because whatever the decision maker comes to learn about the party or witness will control whether the party or witness is on the right pathway. If parties and witnesses don’t reveal enough of themselves to enable the decision maker to know them in a positive way, then the chances of moving up to the second rung—“like”—and of ultimately meeting the real burden of proof are next to nil.

If a party or witness shows enough favorable attributes to the decision maker, then the party or witness will have likely moved up to the “like” rung. These attributes include such things as whether the person is easily understandable, is sincere, speaks confidently, helps the decision maker learn what happened, communicates verbally and nonverbally in ways that suggest an earnest interest in the truth, or reveals experiences much like those with which the decision maker is familiar. These and other similar factors make it easier for the decision maker to like the party or witness.

Once on the “like” rung, it’s a short move up to the penultimate step: the “trust” rung. “Trust” inevitably follows “like,” unless something affirmative happens to cause the decision maker to distrust the party or witness. It’s natural to want to trust people we like. We feel safe when we surround ourselves and associate with those people. Distrusting them takes effort and some discomfort.

Parties and witnesses on the “trust” rung need not do much to ascend to the “believe” rung. Those who are trusted will almost automatically be believed. For a party or witness to lose this position, the decision maker would typically need to come across something that erodes the trust.

The tug-of-war between competing versions of events—the struggle over the burden of proof—is typically fought on the know-like-trust-believe ladder. Cross-examination is generally the major weapon, although collateral attacks through presentation of other evidence are common too. To undermine the opponent’s credibility and meet the real burden of proof, the protagonist is not simply trying to raise his or her own standing on the ladder but to suppress the opponent’s.

If we can identify something truthful about the opponent that surprises the decision maker and compels a reassessment, the protagonist might keep the opponent from reaching the top rung or topple the opponent altogether. Unexplainably inconsistent statements, affiliations that bespeak a motive or bias, bad behavior on earlier occasions—these are examples of weights that can bring the opponent down or missiles that can knock the opponent off. The challenge for the opponent is to answer in ways that will strengthen his or her foothold on any rung already earned and move him or her up the ladder to the “believe” position.

The movie A Few Good Men shows a successful attack at a key adverse witness’s position on the “trust” rung. The prosecution was trying to prove that the defendants killed a fellow Marine in a personal squabble. Defense counsel was trying to prove that the Marine died accidentally during a disciplinary hazing incident, known as a Code Red, ordered by a high-ranking colonel. The colonel denied issuing such an order, claiming he had instead ordered the Marine transferred to protect him from the defendants, but the defendants attacked the Marine before the transfer was to occur. This put the defense attorney in the position of having to impeach the colonel’s testimony, a risky tactic in a military tribunal where high-ranking officers are presumed credible and where a failed attack on a colonel’s credibility could lead to stiff sanctions. The presumption of credibility, the virtual automatic placement on the “trust” rung, arises largely because military judges tend to equate rank with honor and are thus cognitively motivated to accredit what high-ranking officers say.

Through skillful questioning, the defense attorney first got the colonel to admit that he ordered his commanding officer and the men under him not to touch the Marine. He then got the colonel to testify that the commanding officer and the men would not have questioned his order or taken matters into their own hands because they were trained to obey all orders without question. The defense attorney then pointed out that, if the colonel’s orders were always obeyed, there would have been no reason to order the Marine transferred. Having been caught in a logical contradiction, the colonel tried to come up with another
reason for the transfer order, but by then the credibility attack had succeeded. The colonel toppled from the “trust” rung and ultimately confessed to ordering the Code Red. The defendants were acquitted.

Credibility contests, to say the least, are not pretty. Sadly, they are often not fair either. Some contestants, like the colonel, are presumed trustworthy from the beginning, simply by circumstance, without needing to earn positions on the “know” or “like” rung. When credibility is presumed but undeserved, the effective burden of proof is on the opponent, who needs to work harder to expose the truth.

But even when each contestant starts out with no presumption of credibility, credibility contests are shaped and handicapped by the decision maker’s cognitively motivated perceptions and filters. Except in settings like the Ford/Kavanaugh hearings where the decision makers were pretty transparent, contestants typically have few clues about the mental framework the decision makers may already have brought to the task.

To add to the difficulty, contestants are often confronted by aggressive opponents who will readily manipulate information to portray the contestant in an unfair light. While the contestant is doing the good work needed to rise up the credibility ladder and earn a spot on the top rung, the opponent is doing its best to trap the contestant and suppress the contestant’s upward mobility or keep the contestant off the ladder altogether.

When a contestant understands that these are the dynamics at work and that the objective is to establish a strong position on the credibility ladder’s top rung, the pathway to meeting the real burden of proof then comes into sharp focus. The object isn’t simply or necessarily to demonstrate why the opponent is unworthy of being believed, although that can certainly help a great deal. The object is also to establish and protect the contestant’s own credibility, no matter how the law technically assigns the burden of proof. And to win this credibility contest, the contestant must understand how to establish a relationship of trust, not just with decision makers who already sympathize with the contestant or share the contestant’s worldview but, more importantly, with those who don’t. The task might be daunting, but that’s the task that must be achieved.

Kavanaugh’s supporters saw him as the victim of an easily made allegation by someone whose memory, while perhaps real to her, could not be trusted due to the passage of time and who might have been influenced by a desire to keep Kavanaugh off the Court, leading to misremembered events or missing gaps filled with imagined facts. To them, the supporting evidence was too unreliable to mete out a punishment or deny Kavanaugh a seat.

No one’s mind changed. The Judiciary Committee vote broke along party lines. Not one committee Republican credited Blasey Ford’s allegations. All 11 voted to recommend confirmation. Not one committee Democrat sided with Kavanaugh. All 10 voted against confirmation.

Those who are trusted will almost automatically be believed.

Each protagonist seemed to reach the credibility ladder’s top rung in the minds of those predisposed to believe them. In the minds of those predisposed in the other direction, the protagonist stumbled somewhere on the “know,” “like,” or “trust” rung. While the testimony of each protagonist enabled that protagonist’s supporters to claim that the allegation was credible or that the denial was credible, the decision went not for the party who changed decision makers’ minds but for the party who had more decision makers already cognitively motivated to support that party.

This merits one more observation about the real burden of proof. When passions run high or when decision makers have already formed strong impressions based on incomplete or preliminary information, process matters. In these circumstances, one person’s word against the word of another will seldom be enough to discern the truth. The truth will more readily emerge when a person’s words are subjected to effective cross-examination, when other evidence bearing on the allegations is allowed to surface, and when that evidence is subjected to sufficient scrutiny. An effective process allows parties to make a legitimate effort to earn a coveted place on the credibility ladder’s top rung. Otherwise, no one’s beliefs are apt to change or, alternatively, be validated. And if decision makers do not form conclusions during a process that invites reliable credibility determinations, but instead go with their initial cognitively motivated impressions, truth will be the loser and justice, if done, will only be coincidental.

Back to the Kavanaugh Hearing

How did this play out in the Kavanaugh hearing? It seemed neither protagonist succeeded in shifting anyone’s preformed opinions. To her supporters, Blasey Ford came across as someone who indeed had a traumatic teenage sexual encounter with Kavanaugh, who had indelible memories of Kavanaugh as the perpetrator, and whose memory gaps of other details were normal and excusable. They saw Kavanaugh’s defense as too combative, too staged, the type of defense that would be offered by someone who was culpable.