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Presumptions and the Distribution of Argumentative Burdens in Acts of Proposing and Accusing

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Abstract:
This paper joins the voices warning against hasty transference of legal concepts of presumption to other kinds of argumentation, especially to deliberation about future acts and policies. Comparison of the pragmatics which respectively constitute the illocutionary acts of ACCUSING and PROPOSING reveals striking differences in the ways presumptions prompt accusers and proposers to undertake probative responsibilities and, also, points to corresponding differences in their probative duties. This comparison highlights significant contrasts between the way presumptions figure in legal reasoning as opposed to deliberation; the comparison also raises theoretically important questions about the norms governing persuasive argumentation. This paper is based on a broadly Gricean account of speech acts.

I. Introduction.

Richard Whately's *Elements of Rhetoric* adopted the legal concept of presumption as the definitional basis for its author's discussion of the probative duties in other fields of argumentation (Whately, 1963). This well-known appropriation of legal concepts established the idea that courtroom argumentation exhibits the essentials of how probative responsibilities are to be distributed in deliberative discourse, i. e., arguments regarding what policy or course of action should be adopted. Thus, the traditions of study which follow Whately faithfully repeat this basic dictum: just as in law a person is presumed innocent until proven otherwise, so too, in deliberation there is presumption favouring established institutions, generally accepted beliefs, prevailing plans and policies, and the burden of proof falls to advocates of change and innovation.[1]

That legal model for probative duties illuminates certain very broad aspects of deliberation, but it leaves critically important details deep in the shadows. Following Whately, scholars have come to understand (i) that in ordinary deliberative discourse advocates do commonly incur probative duties and (ii) that those burdens are distributed relative to presumptions. But reliance on the judicial model has not brought this relationship into sharp focus. Only marginal success has been achieved by efforts to identify a deliberative principle corresponding to the judicial maxim that the accused is to be presumed innocent until proven guilty. The presumption thought by Whately and his students to favour the status quo seems to have only limited application in deliberative contexts; just where and when it properly applies is far from clear (Goodnight, 1980; Marsh, 1964). On a related front, argumentation theorists have not been able to adequately identify standards of reason and evidence which deliberative advocates ought satisfy to discharge their burdens of proof (Kauffeld, 1995b; Scott, 1960). And it has been persuasively argued that reliance on judicial models of probative responsibility imports into deliberation the common judicial of abuse of trying to saddle opposing advocates with an unreasonably stringent burden of

proof (Gaskins, 1992). In sum, legal models for the burden of proof have not enabled argumentation theorists to formulate empirically and critically adequate accounts of how probative burdens arise in deliberation, nor have such models supported satisfactory identification of argumentative standards which deliberating agents must satisfy in order to discharge their probative responsibilities.

It has been suggested that the procedural formality of courtroom argumentation is responsible for this lack of progress. In judicial settings, procedures for allocating probative burdens are codified by legal rules with supporting bodies of precedent. "Unlike a trial, social controversy has no fixed beginning or completely standard relation between contending parties" (Goodnight, 1980), so, it has been argued, concepts analogous to the procedural rules of evidence in the courts cannot find clear purchase in the messy world of ordinary deliberation (Goodnight, 1980; Scott, 1960).

This explanation is unpersuasive. It focuses on an important but relatively superficial difference between deliberative discourse and judicial argumentation in the courts; whereas, deeper difference may well be involved. The codification of probative responsibilities in law is a procedural expression of underlying principles of fairness (Morton & Hutchison, 1987). Whately assumed that requirements of fairness, or closely analogous principles, also govern the distribution of probative responsibilities in deliberation (Whately, 1963). This unattractive assumption has not been widely embraced by his students,[2] a fact which ought to suggest that the application of legal models of probative responsibility to deliberation is limited by deep differences in the considerations which govern argumentation in these spheres of discourse.

The central question of this paper, then, asks whether the distribution of probative responsibilities in deliberative argumentation responds to considerations which differ fundamentally from those which govern judicial argumentation. The strategy for addressing this question draws on an insight from more formal studies of argumentation, *viz*., that probative burdens in argumentation are apportioned by key speech acts which occur at the outset of argumentative interactions and at critical moments during the interaction.[3] Two kinds of speech acts immediately suggest themselves for study: *accusing* and *proposing*. It is the case that many judicial arguments, both in the courts and outside in ordinary discourse, are initiated by accusations; while many deliberative arguments unfold from an initial proposal. By examining the genesis of discursive responsibilities in these two kinds of communicative act, it may be possible to gain a preliminary view of relevant differences between probative burdens in (at least some) judicial argumentation versus (at least some) deliberative argumentation. This approach to our question is also recommended on methodological grounds. *Accusing* and *proposing* belong to the broad class of speech acts which J. L. Austin identified as illocutionary acts. The work of Austin, Grice, Strawson, Stampe, Warnock and others in the philosophy of language provides a relatively clear guide to explicating the genesis of discursive responsibilities in members of this broad class of speech acts.[4]

II. Speech Acts and the Burden of Proof.

The illocutionary acts of *accusing* and *proposing* are of special interest to students of argumentation, in part, because in connection with these speech acts, speakers commonly undertake a burden of proof. This is shown by the fact that in response to each of these kinds of speech act, proof can properly be demanded of the speaker.[5] In all (serious) kinds of illocutionary acts, speakers incur responsibilities or burdens; in many the speaker incurs responsibility for the veracity of her utterances. However, the discursive responsibilities undertaken in performing many kinds of illocutionary acts do not specifically obligate the speaker to provide reason and evidence in response to demands for proof.[6] If Mary makes a suggestion and encounters a host of

objections with demands that she substantiate the view she has expressed, she can readily withdraw her proposition with a remark to the effect that what she had put forward was merely a suggestion. In many cases where a speaker has advised, warned, issued a command, reproached someone or apologized, she can quite responsibly reject the demand for proof by saying such things as 'Look you have my advice, I did not come here to argue about this' or 'I said that what you did is wrong and you should realize that it is; so far as I am concerned that is all there is to say about this matter' or 'I said I was sorry; what more could you want?'.

It is only in some kinds of illocutionary acts that speakers necessarily or typically incur probative burdens.[7] These include *proposing* and *accusing*. Here a speaker cannot, other things being equal, responsibly dismiss an addressee's demands for proof. Suppose that instead of presenting her proposition as a suggestion, Mary puts it forward as a proposal. In that event, were she to respond to doubts and objections by withdrawing her proposition as 'merely a proposal', her response would seem to be a face saving joke, and she would be vulnerable to criticism for lack of due regard for other persons' time and attention. Similarly, the accuser could not easily get away with a disclaimer that she does not want to argue about the matter; she would then be subject to the complaint that the accused is suffering injury from having his good name called into question and, in fairness, deserves to know the grounds for the charges brought against him so that he can clear his reputation. The point here might be expressed as follows: in all illocutionary acts which require a speaker to seriously say that *p*, the speaker will incur responsibility for having made a reasonable effort to ascertain the truth of *p*; in proposing and accusing and some other illocutionary acts, the speaker characteristically incurs the further burden of providing on demand reason and evidence in support of the proposition put forward for the addressee's consideration, acceptance, belief or other response.

How and why do proposers and accusers take on probative responsibilities? What is it that speakers do in the course of performing these illocutionary acts which brings it about that they have burdens of proof, and why in practical terms do they take on such obligations? Consider first proposing and then accusing.

III. Proposing.

The act of making a proposal has these essential components: a statement of resolve, a commitment to advocacy, and an overt indication of the rationale for response from the addressee. That is, to propose that *p*, a speaker must at least

> (i) say that *p*, e.g., that we should invest in Northern Securities, and act as if *p* expresses a determination or conclusion the speaker has reached;
> (ii) openly give it to be believed that she is speaking with the intention of answering doubts and objections regarding *p*; and
> (iii) overtly intend that her statement and commitment to advocacy provide her addressee with reason to raise questions, doubts and objections regarding *p*.

It would be semantically odd for a person to say, speaking seriously and literally, 'I propose that we invest in Northern Securities; mind you, I'm not saying that we should do that'.[8] Similarly it would be odd to say 'I have been thinking over what we should do with our savings; I'm not yet ready to venture any conclusion about that, but I propose that we invest those savings in Northern Securities'.[9] A commitment to advocacy is also essential to proposing. Consider the anomalous nature of the following case. Were a speaker to imperiously say 'I propose that we invest in Northern Securities; that's that; now, don't bother me with questions and objections',

her utterance would seem odd. Nor do the proposer's statement of resolve and her commitment to advocacy stand as independent components of her illocutionary act; rather they are linked by the proposer's manifest intention that the statement and corresponding commitment to speak on its behalf are to provide the addressee with reason to raise questions, doubts, and objections. This manifest intention distinguishes proposals from attempts to provoke argument.[10]

Analysis, then, shows that the proposer must openly commit herself to speak in defense of her resolution. But from a practical point of view this at first seems to be a curious result. Apparently the proposer expects her statements to be effective. She makes one and commits herself to making others, and statements are often reliable means of securing belief, cooperation, consideration, etc. So, one wonders, why does the proposer *openly* commit herself to defending her resolution? Why not just state it and get on with its defense? This question directs attention to the rationale which underlies proposing and constitutes speech acts of this kind. It leads one to ask, what practical calculation could coherently combine the means which analysis shows are necessary to making a proposal, uniting them in a coherent ends-means design? And beyond that, why would both a statement of resolve and a commitment to its defense be necessary to making a proposal?

Answers to these questions are suggested by the fact that the proposer must act as if she is trying to provide her addressee with reason to raise questions and objections regarding her resolution. It is reasonable to suppose that this part of the proposer's performance typically is not a pretence, and this very plausible supposition suggests that the proposer characteristically aims at securing a response intermediate to consideration of her resolution. Thus one is led to conjecture that the act of making a proposal is at base calculated to induce tentative consideration of conclusions which otherwise would not appear to merit serious thought and attention. In this view, a commitment to defend one's proposal is characteristically designed to provide a presumably self-reliant addressee with reason to listen to and raise questions concerning statements which he is initially inclined to disregard. This conjecture can be seen to provide both a plausible view of the nature of proposing and the basis for a satisfactory explanation of why both a statement of resolve and a commitment to its defense are necessary to making a proposal.

There are, of course, a broad array of common strategies in which persons offer others inducements to try something, hoping that this tentative effort will lead to full engagement with the object sampled. Children, for example, are promised sweets in order to induce them to try a new and to them initially unappealing dish. 'Try it', we say hopefully, 'you'll like it'. The central strategy underlying *proposing* is a variant on this familiar strategy. The proposer commits herself to speaking on behalf of her proposal; she presents what she has to say as a basis for tentative consideration by her addressee; and her manifest willingness to answer doubts and objection is an inducement to test her arguments.

This conjecture has the merit of positing a coherent practical calculation which can plausibly be attributed to proposers. Various circumstances may make it necessary for a speaker to provide her addressee with reasons for attending to and considering what the speaker has to say, but the case of constitutional importance to proposing is that in which the speaker wants her addressee to consider and ultimately adopt some conclusion which bears on the addressee's interests but which strikes the addressee as contrary to the latter's preconceptions. In these circumstances a prudent addressee can be expected to be reluctant to attend to a speaker's views because he has good reason to rely upon preconceptions which indicate that the speaker's conclusions are not worth serious consideration. The resulting need to induce tentative consideration quite naturally prompts proposals.

This need to induce tentative consideration emerges in connection with the presumption that our associates will rely primarily on their own thought and experience in determining what beliefs to accept and which courses of action to adopt in matters related to their interests. That *presumption of self-reliance*, as it may be called, is a standing presumption; it is engaged by suppositions we make about mature and prudent persons.11 As a deep seated conversational practice, we do presume a certain minimum of self-reliance on part of prudent associates in matters related to their interests. This standing presumption profoundly affects what a speaker can reasonably expect to accomplish by means of statements about matters related to his addressee's interests. If the matter to be discussed is complex, and if the speaker's conclusions do not appear to square with a presumably self- reliant addressee's preconceptions, the latter can be expected to accept and act on what he is told only after he has considered the matter and reconciled the speaker's conclusions with his own experience. However, in these circumstances, an addressee is often unwilling or at best reluctant to give much thought to the representations a speaker wants to make. Such reluctance may be prudent and reasonable. A prudent person does not consider just any representation made to him about his interests. Considering a matter takes time and effort; prudence requires that one not waste those assets on representations which do not merit thought and attention. Since a good deal of both may be required to ascertain a representation's actual merit, a prudent person often must rely on his preconceptions and on appearances to initially assay a representation's apparent merit as an object for consideration.12 While these are very fallible bases for any determination, in regard to matters which effect a person's interests, he may reasonably be inclined to rely upon them and, so, may be strongly disinclined to consider the speaker's proposition. Faced with a predicament of this kind, a speaker might try to get his addressee to take what the speaker has to say as a basis for tentative consideration in the hope that this trial effort might bring recognition that the speaker's conclusion merits fuller consideration.

At least in favourable circumstances, a speaker can reasonably expect to provide the inducement needed to overcome a skeptical addressee's preconceptions by making a proposal. In the performance of her illocutionary act, the proposer openly commits herself to answering her addressee's questions and objections. This commitment to defend her resolution can generate a presumption regarding the merit of what she has to say, and that presumption will often have enough weight to induce the tentative consideration which the proposer seeks. How is this presumption of merit engaged by proposers? When the proposer makes known her willingness to answer questions and objections regarding her proposal, she openly takes responsibility for her projected conversational effort and its foreseeable consequences. Those consequences prominently include the prospect that she will have made imprudent use of her addressee's time and attention if, given the opportunity to speak, she does not have satisfactory answers. In view of this commitment, the addressee can be expected to reason that the speaker would have carefully prepared answers to his questions and objections rather than subject herself to inevitable criticism and resentment for wasting his time. In order to prepare satisfactory answers, the proposer would need to think through the reasons for her resolution and make reasonably certain that she could defend it as the truth about matters of interest to her addressee. Presuming this meritorious state of readiness to speak, the addressee may conclude, and can reasonably be expected to conclude that, though other appearances are to the contrary, the proposer's resolution and what she has to say on its behalf may prove to be of interest. The conjecture that *proposing* is at base designed to induce tentative considerations has been seen to posit a potentially efficacious strategy for solving a problem speakers recurrently encounter.

It can now be seen in practical terms why the proposer needs to supplement her statement of resolve with an overt commitment to advocacy. In some circumstances, a statement expressing the conclusion a speaker has reached would suffice to engage an addressee in tentative consideration of what the speaker has to say. If a speaker says that *p*, then presumably as a matter of veracity the speaker has made a reasonable effort to ascertain the truth of what she says;13 and if the speaker further indicates that *p* is a conclusion that she has

reached in her thinking, her addressee might suppose that the speaker has learned something which is similar to what the addressee could learn were he to investigate the matter himself; thus, the addressee may be inclined to take what further the speaker has to say as a basis for tentative consideration. But a statement of resolve cannot be expected to be this efficacious in the circumstances which characteristically call forth proposals. In those circumstances the presumption of veracity engaged by the speaker's statement would be too nebulous to provide the assurance needed to overcome the addressee's initial skepticism. A presumption of veracity implicates that the speaker has made a reasonable effort to ascertain the truth of the proposition she expresses, but this presumption is vague as regards just what the speaker's preparation has taken into account. Thus the presumption of veracity does not provide a skeptical addressee with reason to suppose that the speaker has avoided mistakes and/or that the speaker has taken the addressee's interests into account. To provide such reason the proposer needs to supplement her statement with a commitment to advocacy. As we have seen such a commitment can generate an enlarged presumption regarding the merit of what the speaker has to say, and (in favourable circumstances) that presumption may suffice to provide the addressee with reason to suppose that the speaker has carefully considered the matter and taken the addressee's interests into account.

IV. Accusing.

Attention now turns to *accusing* and the genesis of the accuser's burden of proof. To make an accusation a speaker must at least (i) state her charges by saying that some party (the accused) did *x*, implying that the speaker believes it may be wrong of the accused to have don *x*; and (ii) demand that the accused or his or her representatives answer the charge by way of a denial, admission of guilt, justification, excuse, etc.; and (iii) act as if she intends that the charge and her demands provide her addressee with reason to answer to her charges. A speaker will have made an accusation then, if she says, e. g., that this party (the accused) broke Aunt Maude's lamp, implying that she believes it may be wrong of the accused to have done that, if she further gives it be known that she wants the accused to answer the charge, and if she acts as if she wants her charge together with her demand for an answer to provide her addressee with reason to provide or secure the desired answer.

That these conditions are essential to *accusing* is shown by the following considerations. The analytical necessity that the speaker state her charge is shown by the anomalous nature of such utterances as 'I accuse Smith of breaking Aunt Maude's lamp; mind you, I am not saying that he broke it'. The implication that the accuser believes that what the accused did may be wrongful, blameworthy, or reprehensible in some sense cannot be cancelled and accusation still have been made. It would be odd to say 'I accuse you of ruining my reputation with your jokes, though I see nothing wrong with your telling them'. The accuser openly speaks with an intention which resembles the purpose speakers have in asking questions, viz. the intention of securing an answering response from the accused. Of course, it is not necessary that an answer be sought as a direct and immediate conversational sequel to the accusation. The intention with which an accuser speaks may involve a complicated calculation about how the mediation of third parties will bring the accused to answer. But as in the case of someone who seriously and literally asks a question, it would be semantically odd for a speaker to both purport to make an accusation and to deny that she is trying to get the accused to answer her charge, e. g., 'I accuse you of breaking Aunt Maude's lamp, and I just don't care what you have to say about it'. Finally, accusations are made with the overt intention that the speaker's charges and demand for an answer are to serve as reason for providing the desired reply. This intention serves to distinguish *accusing* from cases in which one person uses demands for answers as a means of castigating another.[14]

Accusing, as ordinarily conceived, is an intentional act which can be successfully executed in appropriate circumstances. The preceding analysis has identified conditions which are conceptually necessary and sufficient for the truth of reports that an accusation has been made. But since it can be true that someone has been accused of something when just those conditions are satisfied by what a speaker says and does, it seems reasonable to suppose that our analysis has also identified the elementary means which are *practically* necessary and sufficient to making an accusation, at least, in relatively simple cases and under favourable circumstances. Of course, there is enormous variation across acts of *accusing*, and in more difficult circumstances one must do more than the bare minimum, if one is to mount a successful accusation. Still, it seems methodologically safe to suppose that underlying the ordinary concept of accusing is a practical paradigm in which the conceptual essentials of this illocutionary act are the constituents of potentially successful performances. Attention now turns to that practical paradigm and the ends-means calculation which constitutes it.

Two questions present themselves in regard to the practical rationale underlying elementary cases of *accusing*. The paradigm cases of this illocutionary act are instances in which the accusation is directly addressed to the accused. There are, of course, many cases in which accusations are addressed to third party judges, but these are best understood as more complex variants on the basic paradigm.[15] With respect to accusations addressed directly to the accused, one wonders, first, why is the accused supposed to respond to the charges levelled against him? Confronted, that is, by a person who believes the accused has acted wrongly and who is manifestly disturbed by this belief, what reason is the accused expected to have for answering his accuser? And second, why is it necessary for the accuser to state that the accused did whatever he is accused of doing? This latter is particularly puzzling for, in stating her charges, the accuser is telling the accused something which she must suppose he already knows. What could be the point of that?

Consider the following conjecture about the practical calculation underlying our ordinary concept of *accusing*. Accusations, it seems, are typically made in circumstances where the speaker is certain that the accused did something which the speaker believes to be in the nature of an offense and where the speaker wants to give the accused a chance to respond to the charge but where the speaker supposes the accused will be reluctant or unwilling to discuss the matter. Such situations are common enough. Mrs. Jones is certain that Mr. Smith broke the treasured lamp she inherited from her Aunt Maude; she strongly suspects that his actions were at least negligent; she is manifestly upset by her beliefs about Smith's actions; nevertheless, she wants to afford him the opportunity to explain or justify or excuse or voluntarily make amends for what she believes he did; and she reasonably expects that Smith will be reluctant to talk to her about his conduct. In these circumstances, the speaker may well believe that the offending party owes her an answer; *accusing*, we may hypothesize, affords a speaker means for imposing on the accused an obligation to answer the charges made.[16] Support for these conjectures follows.

Notice that persons do quite commonly fall under an obligation to explain their behaviour. This often happens without any accusation having been made. A person naturally *incurs* an obligation to explain his behaviour where (a) his conduct causes another to be angry, upset, disturbed, etc., (b) the party taking offense is forbearing retribution, revenge, and so forth, while relying on the offender for an explanation of his conduct, and (c) responsive to the requirements of veracity it can be said that the offender committed the offense.[17] If Tommy breaks Bernard's window or if George spills his drink on Martha or if what Bill says about Henry turns out to be false and damaging, one is inclined to believe that the agent responsible for the harm has an obligation to rectify the situation—to replace the window, to mop up his mess, or to retract his statements as the case may require. The redressable damage resulting from a person's behaviour includes harmful beliefs, attitudes, doubts, etc., which may foreseeably arise in parties aggrieved by his conduct. If Smith breaks Aunt Maude's lamp, Jones may

be angered, outraged, upset, disturbed, etc., by the fact that Smith destroyed her treasured possession. These states of disequilibrium are themselves harmful. If the offender has something to say in the way of an explanation or an apology which would redress that harm, then he will, under certain circumstances, have an obligation to provide his explanation, apology, or excuse. Very commonly when persons recognize that they have this obligation, they respond by providing an appropriate account of their actions. But it does happen that parties who are believed to have committed offenses sometimes (predictably) try to evade the burden of explaining their behaviour.

At base, *accusing* is calculated to impose the obligation of explaining behaviour on persons who might be inclined to dodge that duty. In the elementary paradigm, accusations are designed to ensure that the obligation to explain behaviour is in place in spite of a rather specific deficiency which may arise, or be anticipated, in the conditions under which that burden naturally would be incurred, *viz*., the deficiency which is created when an offender denies that he did whatever gives offense. Suppose Jones asks Smith why the latter broke Aunt Maude's lamp, purporting thereby to have an explanation coming from Smith. If Smith is disinclined to explain the matter, he may respond, e.g., 'I don't owe you an explanation for that, I did not break your lamp'. By saying that he did not break the lamp, Smith generates a presumption of veracity on behalf of his denial. As long as that presumption stands unchecked, it is also to be presumed that Jones's beliefs about Smith's conduct are not the truth; the obligation to explain why Smith broke the lamp, which Jones believes Smith has, would then be void.

Elementary accusations are designed to remedy this deficiency by impugning the accused's conduct. By stating the charge, the accuser generates a presumption of veracity calculated to counteract the accused's (anticipated) denial; she thereby calls his conduct into question. The duty of resolving this question about his behaviour may then fall on the accused, notwithstanding the presumed veracity of his denial. A person may fall under an obligation to explain his conduct even though he did not do what he is believed to have done, providing that a responsible effort to determine the truth could not be expected to find that he committed the offending act. If Jones secures the presumption that she has made a responsible effort to determine that Smith broke Aunt Maude's lamp, then Smith's denial would merely avert the burden of explaining why he broke it and would leave him the burden of explaining the facts which cause Jones to be upset.

However, such efforts to impose an obligation to explain behaviour by impugning a person's conduct contain a potential and crucially important source of embarrassment to the accuser. Calling someone's behaviour into question causes him harm; there is something odd about the very notion of harmlessly impugning a person's conduct. This harm is a potential source of difficulty for the accuser. The obligation she is trying impose will hold only if she is refraining from retribution or revenge, but it can seem that she is causing the accused retributive harm by the very act of casting doubt upon his conduct. Accordingly, Smith could evade the obligation to explain his behaviour by protesting that Jones's allegations damage his good name. To avoid this potential embarrassment accusers temper their charges by engaging an auxiliary presumption of fairness. Accusations, that is, are typically designed to impose an obligation on the accused by impugning his conduct, while having it presumed that the accuser, nevertheless, is exercising forbearance in an effort to treat the accused fairly.

These conjectures about the practical rationale underlying *accusing* posit a strategy which, in favourable circumstances, a speaker could reasonably expect to implement using the means which analysis shows to be essential to speech acts of this kind. Clearly, by saying that the accused, e. g., broke Aunt Maude's lamp, the accuser can impugn the accused's conduct. In making that statement the accuser engages a presumption of veracity on behalf of her charge; that presumption would suffice to offset the presumed veracity generated by denials the accused might make and, so, would make it the case that a question had been raised about the

accused's conduct. The essentials of *accusing* also afford means for engaging an auxiliary presumption of fairness. Recall that in addition to stating her charge, the accuser must openly give it to be believed that she wants an answering response from the accused. Here, as is rightly the case when a person gives it to be known that she is trying to secure a certain response, the speaker overtly incurs responsibility for her effort and for its foreseeable consequences. By incurring this responsibility, she makes herself vulnerable to criticism for unfairly causing harm to the accused should she receive an apparently adequate answer and nevertheless persist in her resentment of the accused's behaviour. It may be inferred (presumed) that, rather than inescapably subject himself to such criticism, the accuser is following a course of forbearance and fairness.18 As long as this presumption of fairness remains intact, the accused will have an obligation to explain his behaviour even though the accuser has impugned the accused's conduct. In many (elementary cases) the prospect that this obligation cannot be displaced by mere denial is practically sufficient to deter a (false) denial and, so, leads to a confession, apology, justification, excuse, etc.

It is now possible to see why the accuser must state that the accused did whatever she charges him with doing, even though she must suppose that he already knows what she is telling him. The necessity for an accusation-making statement is explained by the accuser's practical need to have it presumed that she has made a reasonable effort to determine the truth of her beliefs about the accused's conduct. Per conjecture, an alleged offender will have an obligation to explain his behaviour only if the accuser believes the culprit did something which is in the nature of an offense. In order to impose that burden in the face of the accused's denial, the accuser needs to make known the relevant beliefs such that she openly takes responsibility for having made a reasonable effort to determine their truth. Wherever a person utters *p*, gives it to be believed that she believes that *p* and thereby openly takes responsibility for the truth of *p*, it will be true that she has said that *p*.19 Thus, in conjunction with a broadly Gricean analysis of statements, our hypothesis explains the logical necessity for an accusation-making statement in terms of the fact that to impose on an offender the obligation to explain his conduct one must do those things which make it true that one has said he committed the offense.

How, then, does the accuser ordinarily incur a burden of proof? In elementary cases the accuser does not overtly commit herself to substantiating her complaint, and she may well secure a satisfactory answer without being called upon to prove her charges. So, how does the burden of proof enter this picture? To answer this question it is necessary to consider certain foreseeable complications which often beset the accuser's illocutionary efforts. Ordinarily, the accuser's probative obligations arise as a practical consequence of the commitments to veracity and fairness initially undertaken in making her accusations, and typically her burden of proof is generated by challenges and protests from the accused or his partisans which, given the accuser's initial responsibilities, obligate her to substantiate her charge. Recall that accusations do commonly occasion challenges, i.e., warranted demands that the accuser vindicate the fairness, truthfulness, and/or reasonableness of her charge. Challenges to an accusation can be raised in a variety of ways. Where Jones accuses Smith of breaking Aunt Maude's lamp, Smith might respond by saying, e.g., that he does not see how Jones could believe that he broke the thing. And he might add that he does not see why Jones is so upset about the loss. Here Smith would speak in an injured or outraged tone of voice which indicates that he expects Jones to withdraw the charge or substantiate it with reason and evidence. His first complaint addresses the truthfulness and/or fairness of the allegation; his second reaches beyond the allegation to challenge the reasonableness and fairness of Jones's beliefs about the harmfulness or wrongfulness of the conduct alleged. Often the tone of such challenges—the attitude manifest in raising them—is more strident: 'How dare you accuse me of that', 'You haven't a shred of evidence for that', 'That's the most unfair thing I have heard in a long time' and so on. Such challenges implicate a demand on the order of 'Prove it, if you can'. Often the accused can easily provide a foundation for such potentially efficacious challenges to an accusation. To do so he need only secure a *presumption* of innocence, i.e., the presumption

that he cannot discern a responsible basis for the charge. The accused can generate this presumption simply by making some appropriate statement, e.g., 'I don't see how you could believe I broke the lamp', 'I don't understand why you are so upset about the loss of that thing', 'Look, all I know is that I did not destroy your precious lamp'. If the accused makes some such statement, then as a matter of his presumed veracity it is to be supposed that he cannot see adequate basis for the accusation. This ordinary presumption of innocence is functionally similar to the standing presumption recognized in English and American criminal courts. A legal presumption of innocence, however, is far less widely available than its ordinary counterpart. The latter is not restricted to contexts in which it is directly mandated by rule or custom. The ordinary presumption of innocence is just a specific form of the presumption of veracity; in principle, it can be engaged wherever an appropriate statement can be made.

An accuser is not likely to credit the accused's protestation of innocence; nevertheless, she often must expect that it will provide a basis for at least temporarily fending off her demand for an explanation from the accused. An ordinary presumption of innocence immediately casts reasonable doubt on the legitimacy of the accuser's demands. If it is to be presumed that Jones cannot discern responsible basis in reason and truth for Smith's accusation, then there is reason to doubt whether Smith is prepared to treat Jones fairly and truthfully in accord with the responsibilities Smith openly assumed in making his accusation. Given the nature of *accusing*, this doubt raises a question about whether Jones has any obligation to answer, and that question ramifies into reasonable doubt about whether Smith has any right to accuse Jones. Moreover, the presumption of innocence does not just ground doubts about the legitimacy of an accusation, it also provides a foundation for challenges which place the burden for resolving those doubts on the accuser.

Working from the responsibilities the accuser openly incurs in making her accusation together with reasonable doubt about the legitimacy of the charge, *the accused can readily impose on the accuser an obligation to substantiate her accusation*. Confronted with a doubtfully legitimate attempt to impugn his conduct, which has been initiated by a party openly committed to treating him fairly, the accused need only give a few indications of his state of mind in order to warrant the demand that his accuser ought substantiate or withdraw the charge. Given the circumstances, the accused may quite reasonably be disturbed by his doubts about the legitimacy of the charge and, without seeming to be unreasonable, can indicate that he is suffering this agitation. Moreover, since the accuser has openly taken responsibility for the fairness and truthfulness of her charge, the accused can, without appearing unreasonable, give it to be believed that he expects the accuser to relieve his distress by withdrawing the accusation or vindicating it. And finally, since the accuser openly led the accused to expect that he would be treated fairly and truthfully, the accuser will have acted falsely, if she does not make a reasonable effort to comply with the accused's demands. Thus, by challenging the accusation the accuser can impose on the accused an obligation to substantiate the charge. If the accuser is then unwilling to meet this challenge, it can reasonably be asked, e.g., 'Who does she think she is putting herself above criticism like that?'.

V. The Burden of Proof in Proposing Compared with Probative Burdens in Accusing.

Reverting now to the central question raised at the outset of this essay: Does the distribution of probative responsibilities in deliberative argumentation respond to considerations which differ fundamentally from those which govern judicial argumentation? Where deliberative argumentation arises from a proposal and where judicial discourse is initiated by an accusation, it is apparent that there are basic similarities between the genesis of proof burdens in these two spheres. In both *proposing* and *accusing*, argumentative responsibilities are

characteristically undertaken, in part, because circumstances of doubt, disagreement, distrust, or opposition stand to impair the efficacy of statements. In more favourable circumstances, the aims which typically lead a speaker to perform these illocutionary acts could be secured simply by making the requisite statements. *The problems which typically animate proposing and accusing arise because the presumption of veracity, upon which statements fundamentally depend for their efficacy, does not carry enough practical weight to fulfil the speaker's purpose in the face of doubt, disagreement, evasion, and opposition*. Moreover, there is a *corresponding similarity in the design of these strategies. Each is fundamentally calculated to augment a presumption of veracity by engaging a larger special presumption, and in each the speaker's argumentative responsibilities are incurred in connection with that larger presumption*. Again the details differ. The proposer generates a presumption regarding the merit of what she has to say; the accuser engages a special presumption of fairness; but in each case the larger presumption is characteristically designed to complement and lend needed weight to a presumption of veracity, and jointly these presumptions fix the speaker's argumentative responsibilities.

But beyond these basic similarities, there are deep differences in the genesis of probative responsibilities in *proposing* as contrasted with *accusing*. First, as noted above, there is an essential difference in how probative responsibilities are incurred in these illocutionary acts. The proposer openly takes on a burden of proof as part of what is essential to the performance of her illocutionary act; the accuser typically incurs probative responsibilities as a consequence of what she must at a minimum do to make an accusation. Second, a contrast should be noted in the nature of the actions typically performed by speakers in these two types of communicative exchange. The proposer characteristically tries to induce tentative consideration from her addressee; the accuser characteristically tries to impose an obligation on the party to whom she speaks. Thus, the inception of probative responsibilities in these two kinds of illocutionary act differ both with respect to how the burdens of proof are incurred and with respect to the nature of the considerations which generate probative burdens.

These contrasts ramify into important differences in the content of the probative responsibilities undertaken in these two kinds of illocutionary act-differences, that is, in the argumentative duties which the speaker incurs. In the course of generating her inducement to tentative consideration, the proposer establishes a relatively clear criteria for assessing the apparent quality of her argumentation: it is to be well thought out and ought take her addressee's interests into account. The test here is whether she can make it apparent that her proposal takes into account all those doubts and objections which merit consideration. The accuser's argumentation, on the other hand, must make it apparent that the accused (now) knows what the accused did which reasonably gives cause for offense. Were the accuser unable to show this, she would forfeit her right to make demands on the accused.

VI. Some Matters for Further Thought and Investigation.

The preceding comparison suggests the undesirability of using judicial conceptions of probative responsibility as models for deliberative argumentation. The following remarks are on the order of considerations which may merit further thought and investigation.

In the first place, it is no longer necessary to rely on judicial models to elucidate the distribution of proof burdens in deliberative discourse. It may be that Whately had little choice but to adopt the jurist's conception of presumption and the burden of proof as the basis for his discussion of probative burdens in argumentation at large. Today, at a time of greater analytical sophistication, it should be possible to identify the way probative burdens are undertaken across a variety of speech acts and, thereby, to reduce the tendency to reduce distinct

sphere of argumentation to some preferred model.

Second, reliance on judicial conceptions of probative responsibility confounds issues regarding the considerations which underlie allocation of probative burdens with issues related to the procedural requirements of various forums. The judicial rule that persons are to be presumed innocent until proven guilty seems to be a procedural requirement designed to ensure fairness in courtroom argumentation which grows out of accusations. By its very nature, *accusing* leaves ample opportunity for errors which could impair the fairness of an accusatory exchange. A fair distribution of probative responsibilities in any particular ordinary case of accusation depends upon whether the contending parties foresee certain consequences and on whether appropriate protests and complaints are lodged. In criminal trials, where fairness is a paramount concern and very difficult cases abound, there is every reason to formalize accusatory proceedings with rules and precedents so as to minimize the possibility of error. However, given that proposers openly incur probative responsibilities as part of what is essential to their illocutionary efforts, it is not at all clear that a corresponding formalization has similar practical or procedural importance in deliberative contexts. Moreover, it does seem that maxims or rules which might be established to formalize probative allocation in deliberative settings ought to be formulated with a view to the peculiar requirements of deliberative forums and their need to distinguish between matters which merit consideration and those which do not.

Thirdly, the judicial model of presumption and the burden of proof seems to be misleading as regards the basic considerations which generate probative responsibilities in deliberation. Accusations give rise to probative burdens as a matter of sustaining a presumption of fairness in regard to the treatment of persons suspected of wrong-doing. Here a presumption of innocence is rightly understood as an advantage or protection afforded the accused in the interest of fairness. While important, fairness does not similarly predominate in the proposer's assumption of probative responsibilities. Here the generative considerations are respect for the prerogatives of self-reliant persons and presumptions concerning what matters merit serious thought and attention. Typically, probative burdens are not a liability imposed upon the proposer to protect other persons; rather, the proposer characteristically undertakes probative obligations in order to create an opportunity for her proposition to receive consideration from persons whose prudence she respects. It would seem to be systematically misleading to construe factors which serve to create an opportunity as matters which make for a liability or an advantage for others.

Differences in the inception of probative responsibilities as between proposing and accusing also have wider theoretical implications for studies of argumentation. Since Whately, students of argumentation have been inclined to attribute greater homogeneity and unity to the norms governing argumentation than seems to be warranted. This tendency can be seen in the comprehensive program for studies of argumentation articulated by Frans H. van Eemeren, Rob Grootendorst, Sally Jackson, and Scott Jacobs. Applying Grice's cooperative principle, these theorists hold that argumentation is ideally a collaborative activity in which the arguers' speech acts ought to be designed to secure a mutually satisfactory resolution of their disagreement based on the merits of the case (van Eemeren et al., 1993). In their view, the norms which properly govern argumentation ought to be deduced from this idealized objective together with an understanding of what must be done to approximate this ideal in the actual circumstances of day-to-day arguments.

It is not easy to square this pragma-dialectical view of argumentation with the pragmatics of *proposing* and *accusing*. These speech acts point to normatively significant obligations which govern arguments and which fix standards for argumentative adequacy but which do not seem to issue from a collaborative or otherwise cooperative effort to arrive at a mutually satisfactory resolution of disagreements based on the merits of the case.

The proposer makes what she has to say available to her addressee as the basis for tentative consideration of her proposition, and one might be inclined to say that the addressee "cooperates" by taking the addressee's utterances as a basis for tentative consideration. But the standard of argumentative adequacy established by the act of *proposing* does not issue from this "collaboration" regarding the merit of the proposer's argumentation; rather that standard is set by her effort to induce tentative consideration. It is far from clear that such efforts are cooperative in nature or that there is anything to gain from a theory which construes them as ideally collaborative. Much the same point can be made about *accusing*. It might be suggested that the accuser and the accused cooperate to this extent: when discharging his probative burden the accuser is putting the accused in a position to answer the charge and, correspondingly, the accused is moving into position to make such a response. But this is not only an overly pretty picture, it also misses the point that the norm which governs the adequacy of the accuser's argumentation is established in a communicative exchange which can hardly be described as cooperative or collaborative but is rather in the nature of an effort to impose a duty on persons unwilling to cooperate.

VII. Concluding Summary.

This essay has compared the complex interactions between presumption and probative burdens in two kinds of illocutionary acts-proposing and accusing. In making a proposal the speaker characteristically undertakes a burden of proof in order to induce tentative consideration of propositions her addressee might otherwise be inclined to disregard. Typically, the proposer presumes self-reliance on the part of her addressee, she offers what she has to say on behalf of her proposal as the basis for testing whether her proposition is worth considering, and she openly undertakes a burden of proof in order to generate the presumption that what she has to say merits tentative consideration. The accuser typically tries to impose on the accused an obligation to answer her charges. To this end, she impugns the accused's conduct, and she tries to have it presumed that she is, nevertheless, prepared to treat the accused fairly. Given these commitments, the accused can impose a burden of proof on the accuser by challenging the accusation and protesting his innocence. Comparison of the strategies which respectively constitute proposing and accusing reveals significant differences in the content of probative obligations incurred in performing these illocutionary acts; moreover, the comparison argues against theoretical approaches which model probative responsibility in deliberation on legal concepts of the burden of proof. Fundamentally, the contrasts between proposing and accusing show two distinct uses of reason and argument; to reduce the one to the other unjustifiably trammels practical and theoretical understanding of the utility of argumentation.

Notes

1. For discussions of Whately's influence, see Parish 1929, Pence 1953, and Sproule 1976. 

2. Contemporary students of argumentation influenced by Whately recognize three prominent interpretations of presumption: "(1) a contextual rule derived from Anglo-American jurisprudence; (2) a psychological or sociological predisposition on behalf of the audience; and (3) a logical constant in a theory of decision making" (Cronkhite 1966; Goodnight 1980; Sproule 1976). As Goodnight notes, some theorists have thought that something like considerations of justice require a presumption in favour of the status quo, but there has been little

sustained argument for this view.

3. Notice the role of speech acts in the confrontation and opening stages of the pragma-dialectical model for critical discussion (Van Eemeren and Grootendorst 1990, 1991, 1992; van Eemeren, Grootendorst, Jackson and Jacobs 1993).

4. Austin 1961, 1962; Grice 1957, 1969; Stampe 1967, 1970, 1975; Strawson 1964; Warnock 1973. The methodological platform for this paper also draws heavily on the account of intentional concepts developed by Anscombe 1967.

5. Whately's commonsense guide to when a speaker has a burden of proof is whether proof can fairly be demanded of the advocate (Whately 1963).

6. For an alternative view of speech acts and burdens of proof, see van Eemeren *et al*. 1993.

7. One can easily fail to notice that speakers do not incur a burden of proof in all serious illocutionary acts because speakers often find it practically useful to substantiate their position even though they may be under no particular obligation to do so.

8. Unless otherwise indicated the utterance examples provided above should be read as instances of serious and literal speech.

9. In making a proposal the speaker at least acts as if she is presenting a conclusion or resolution she has reached through some consideration on her part. Sometimes the proposer's statements explicitly identify her proposal as a conclusion, e.g., 'I've thought through what we should do with our savings, and I've concluded that we should invest in Northern Securities'. But the proposer need not *say* that she is expressing a conclusion she has reached. Were Smith told that Jones had not even acted as though he had reached a conclusion about their savings, Jones would, I submit, have reason to doubt the truth of the report that Smith had proposed investing in Northern Securities.

10. Consider what might be described as an evidently provocative resolution. Gloria, an outspoken feminist, knows that her co-worker, Bill, is easily angered by aggressive feminist statements. Experience has taught her that as a result he is easy to manipulate. To start an argument with him, Gloria says that they should get rid of segregation by sex in the cafeteria. She intends that Bill recognize her intention to provoke an argument and, thereupon, to angrily raise objections which she can turn to her advantage. In this case Gloria both intends that Bill raise objections for her to answer and that he recognize her deliberate effort to get him to do that. But no proposal has been made. Were Bill to say 'Now Gloria, just what are you proposing we do?' she might respond, 'Look, I'm not proposing anything; I'm telling you what should be done, and you know I'm right'.

11. 'Presumption' is used here in the plain sense of the word. Ordinarily a presumption is an inference taken, or available for the taking, by reason of the risk of resentment. That is, a presumption is a supposition to be taken on the ground that someone has or will have made that supposition to be the case rather than risk resentment, criticism, reprobation, loss of esteem, or even punishment for failing to do so. The expression 'He/she would not dare (do anything so outrageous as) ...' is commonly used to frame presumptive inferences. Thus a teacher might hold the expectation that students in her classes will turn their papers in on time, and when ask for the grounds on

which her apparent optimism rests she might reply 'They wouldn't dare turn them in late; I dock tardy papers a full letter grade and accept no excuses'. Her utterance reflect the familiar structure of a presumption, i. e., an inference taken by reason of the risk of resentment.

It is useful distinguish between *standing presumptions*, which are simply available given the circumstances at hand and the rules, norms, etc. of a culture or forum, and *special presumptions*, which are deliberately generated by a person's conspicuously making themselves vulnerable to criticism should they fail to act as presumed (Kauffeld, Kauffeld, 1995a).

12. For an interesting discussion of the role prudence plays in allocating scarce cognitive resources, see Petty and Cacioppo 1981. Daniel O'Keefe (1995) casts light on the kind of practical problem *proposing* is calculated to resolve in his keynote address to the Third ISSA Conference on Argumentation.

13. Grice 1989; Stampe 1967, 1975.

14. Consider the following case which resembles but is not a case of *accusing*. A wife confronts her late-returning husband, telling him that she knows he has been out on the town again, intending that he confess, but wanting his confession only as part of her general attempt to punish him by what she says. Here the wife can sensibly deny that she is accusing her husband of anything; she just want him to suffer as she has.

15. It might seem odd to take the case of accusation directly addressed as the practical paradigm for this illocutionary act. But that choice is strongly suggested by analysis. It can be true that an accusation was made even though no third party judge was addressed.

16. Were an accuser asked why the accused is supposed to answer the charges addressed to him, the answer one would get would be on the order of 'Because he owes me an explanation for his conduct, if he has got one' or 'Because I've got an explanation coming from him' or simply 'Because he's got a lot of explaining to do'. Similarly, were a person to refuse to answer an accusation, he might do so by saying, e.g., 'I don't owe you an explanation for that' or 'You've no explanation coming from me'. These responses plainly suggest that the accused is expected to respond to the charges because he is under an obligation to do so.

17. Warnock (1971) argues, convincingly I think, that at least some kinds of obligation are incurred where (i) it is foreseeable that others will suffer or will continue to suffer harm in the event the obligee does not act; (ii) others are counting on his acting in order to avert, prevent, ameliorate, or rectify that harm; and (iii) he must so act in order to avoid speaking or having spoken or even having acted falsely.

18. The fact that *accusing* enables a speaker to engage a presumption of fairness seems to explain much of the usefulness of this illocutionary act as a means for approaching third party judges. Often the accused must depend on the intervention of neutral third parties to secure the answer she believes are her due. But others may be unwilling to become implicated in an offended parties demands for answer from the suspected offender. The presumption of fairness engaged in making an accusation enables the accuser to provide neutral third parties with reason to believe that she is committed to a course of forbearance and fairness.

19. For this Gricean analysis of saying something, see Stampe 1967, 1975.

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