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Commentary on Kauffeld

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COMMENTS ON FRED KAUFFELD'S "PRESUMPTIONS AND THE DISTRIBUTION OF ARGUMENTATIVE BURDENS IN ACTS OF PROPOSING AND ACCUSING"

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Fred Kauffeld begins his paper by pointing out that Whately introduced the legal notion of presumption into "other fields of argumentation." That we may recognize presumptions and cognately burdens of proof in a number of areas is recognized by many authors, Nicholas Rescher in particular. In *Dialectics*, Rescher identifies four cases where presumption may arise: law, disputation, debate, and theory of knowledge.[1] Legal presumptions specify that from certain facts or their absence we are to draw certain conclusions until there is reason to set those conclusions aside. "A child less than seven years old is never to be taken as guilty of a crime." "As long as guilt is not proven, the accused is to be taken as innocent." The fields of disputation and debate include presumptions in favor of certain kinds of evidence such as "common knowledge" or the testimony of suitable experts—the epistemic *status quo* if you will—and more widely a presumption for the *status quo* in general.[2] Theory of knowledge—or at least one tradition within it—includes presumptions "in favor of the deliverances of memory and of the senses."[3]

Beyond acknowledging the legal origin of the concepts of presumption and burden of proof, Kauffeld speaks of a legal model of "how probative burdens are to be distributed in deliberative argumentation" and he claims that this model is not satisfactory for understanding how such burdens are in fact distributed in deliberative argumentation. But it is not clear to me—at least at this point—exactly what this legal model is. Kauffeld illustrates it with the dictum: "Just as in law a person is presumed innocent until proven otherwise, so too, in deliberation there is a presumption favoring established institutions,... and the burden of proof falls to advocates of change and innovation." Now although from this dictum it is clear that there are presumptions in both law and disputation, I do not follow how law is serving as a *model* for disputation. Hence, it is not clear to me, at least from what Kauffeld says here at the beginning of his paper, just what theorists are doing when they take a legal model of presumption and burden of proof or why their results are not altogether satisfactory.

Perhaps by a legal model one means that presumptions in these other areas arise in the same way as they arise in the context of legal proceedings. Legal presumptions and legal burdens of proof are distinctly stipulative. The presumption of innocence is laid down by judicial fiat in Anglo-American law, and other systems of jurisprudence may allocate the presumption differently. This does not imply that the Anglo-American system lacks any rationale for the way it assigns presumption and burden of proof. As Walton points out in "Burden of Proof," assigning the burden of proof to the prosecution is perfectly appropriate where one regards the conviction of an innocent person as a greater injustice than letting a guilty person go free.[4] Obviously if one had the opposite system of priorities, one would assign the burden of proof to the defense. The legal model for determining presumption and burden of proof then may be stipulating which party has the burden of proof in a way which preserves an underlying system of values. Kauffeld suggests this when he says that "the codification of probative responsibilities in law is a procedural expression of underlying principles of fairness."

Other contexts involve other ways to determine presumptions. In presenting his understanding of how Richard Whately's conception of presumption evolved, J. Michael Sproule<superscript>5</superscript> argues that Whately's conception of "presumption" and "burden of proof" underwent an evolution over the course of the successive editions of the *Elements of Rhetoric* in which they appear. Originally essentially legal notions, they developed in Whately's treatment into something determined by certain predispositions of the audience. Certain audiences may be inclined to accept certain claims and arguments or to find them persuasive. Audiences may also be inclined to find certain sources of information, including certain persons, as credible or authoritative. Arguers, then, who utilize these claims and arguments in defense of some thesis or who can enlist authoritative sources in support of their arguments will have something of a presumption in favor of their cases—a presumption deriving from audience perceptions and preferences.

Certainly we have here a non-stipulative view of presumption. That audiences are prepared to accept certain arguments and respect certain perceived authorities is a matter of empirical fact and not of fiat, legal or otherwise. One determines whether there is a presumption for a claim on the part of an audience by doing empirical audience research.

These considerations already give a positive answer to an even more general question than the one Kauffeld cites as central to his paper. They show that the distribution of probative responsibilities in some contexts, more specifically rhetorical contexts, responds "to considerations which differ fundamentally from those which govern judicial argumentation." What then of Kauffeld's central question concerning the distribution of probative responsibilities in *deliberative* argumentation? He contrasts proposing, which elicits a specific type of deliberative argumentation, with accusing. Both are types of speech acts and in both the speaker incurs a burden of proof. I shall not comment on his discussion of accusing since, as he points out, this speech act pertains to judicial or quasi-judicial argumentation. The question is whether in non-judicial forms of argumentation, such as deliberation, the burdens of proof are generated differently.

Kauffeld defines the speech act of making a proposal by saying that a speaker s proposes that p, where p is a statement of the form `We should do action X,' if

> (i) s asserts that p and acts as if p expresses the conclusion of some reasoning process;
> (ii) s displays overt signs that s intends to answer critical questions concerning that p;
> (iii) s intends that s's stating that p and being committed to arguing for the claim that p will give s's addressee reason to question critically that p.

From a rhetorical point of view, this proposed definition of "proposal" is very interesting. If rhetoric appraises the persuasiveness of communications, their ability to get an addressee or audience in general to accept or come to believe some claim, then we may very well understand why one would want to define a speech act in terms of certain persuasive behaviors and not simply in terms of illocutionary force. The speaker wants her proposal to be accepted. She anticipates that the addressee is inclined to disregard her statement. She thus accompanies it with indications that it is justifiable with the intention that the addressee will ask for such justification. The speaker wants to induce the addressee's tentative consideration.

Kauffeld sees this need as arising from a presumption of addressee self-reliance. "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 courses of action to adopt in matters related to their interests." I do not find this hypothesis of a presumption of self-reliance convincing. It seems contrary to what we know of how persons, including mature adults, form their beliefs. Many of our beliefs are simply based

on the testimony or words of others. We simply assent to what they say, taking a stance of what the epistemologist John Hardwig calls epistemic dependency. It is simply not true that people rely primarily on their own thought and experience in determining what to accept. Kauffeld may reply that this is true in general, but not when the issue of self-interest arises. I think such a reply would need to be argued. Surely if someone takes advice on an issue related to his self-interest, he is not relying just or even primarily on his own thought and experience. But people frequently ask for advice. Is there precedent for recognizing this presumption of self-reliance? Has it been previously recognized?

Not only do I question the presumption of self-reliance which Kauffeld sees as giving rise to many of the behaviors he incorporates into the definition of the concept of proposal, I do not find that definition itself persuasive for the following reasons. First, ordinarily, statements of the form

> I/We/Agent(a) should do X

are regarded as proposals. Fahnestock and Secor in *A Rhetoric of Argument* list a number of such statements as proposals:

> I should practice piano two hours a day.
> We should put a new septic tank in our back yard.
> Our community should build a new indoor swimming pool.[6]

Such statements may be argued for but it is the statements themselves which are the proposals. The notion of a proposal is defined according to its form. I do not understand what are these signs of rational deliberation which are supposed to accompany asserting a proposal that p. Surely a speaker can simply put forward a claim that we should do X even if she has only considered it lightly. Nor do I understand what are these signs of her being prepared to answer challenges to her claim that p. Surely a speaker could make a proposal and then withdraw it when challenged. Finally, I do not see why to make a proposal a speaker should intend that her asserting the proposal statement and indicating that she is prepared to argue for it should provoke critical questions. Shouldn't a speaker be delighted if her proposal that we should do X be greeted by immediate enthusiastic acceptance? If so, does that mean she is not proposing that we do X?

However, I think there is something insightful in the features Kauffeld associates with proposals, although I do not think they should be incorporated into the definition of the term "proposal." A speaker's proposal may not be met with acceptance but with critical question, at least by some challengers. The speaker's reaction to such critical questioning may be to answer these critical questions in a way showing that her proposal is the conclusion of a reasoning process. In such an exchange of proposal followed by a sequence of challenges and responses we have a dialogical or dialectical situation. The conditions Kauffeld would incorporate into a definition of proposal are features of such dialectical situations in which a proposal is made and argued for.

Why should the burden of proof be on the speaker in such a dialectical situation to come forward with reasons for her assertion that we should do X, reasons which hopefully are the result of reasoning on her part? Why is the addressee's challenge of the proposal legitimate? Why is there not a presumption in favor of the proposal from the addressee's point of view? Kauffeld believes that addressees are initially inclined to disregard proposals. "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." But would the addressee be justified in simply dismissing the speaker's proposal if she did not provide reasons for it? Kauffeld would explain this by saying that when making a proposal, the speaker's presumption of veracity would be undercut. This hypothesizes another

presumption which I also question. A presumption of trust or truthfulness is recognized in the literature. There is a presumption that a speaker will truthfully report what she has experienced or the conclusions to which her reasoning has led her. But in addition is there a presumption that she has reasoned properly to those conclusions? I question this. Is it part of the *status quo* that people generally reason well? Can we agree with Kauffeld when he says that "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 why she says?" I am not convinced of this point.

But I think we can explain why in general there is not a presumption for a proposal in a dialectical situation, why the burden is on the speaker to argue for it, without appealing to a presumption of veracity. A statement of the form `I/We/Agent(*a*) should do X' is an evaluation.[7] Unlike many descriptions, we do not come to believe or accept evaluations through our perception of the external world or an immediate awareness of our own internal states. There is not a presumption of reliability for the mechanism generating evaluative beliefs as there is for perception. I think we can readily see why if we follow an ethical intuitionist account of evaluations. A judgment that a particular state of affairs is actually good, as opposed to being *prima facie* good, is the result of weighing the *prima facie* goodness of that situation against its *prima facie* badness. This weighing is an inductive process and a necessary condition that it be done reliably is that the various *prima facie* good making and bad making features of the situation be taken into account. Whether one has done this is a matter of the will. Is there a presumption of virtue that someone has taken the relevant features of the situation into account and thus has arrived at the belief in its intrinsic goodness or badness reliably? I do not see why we should maintain that there is such a presumption. Likewise, if the issue is some proposal, whether one has come reliably to accept that proposal depends on whether one has weighed the various *prima facie* duties and other values involved. This again is a voluntary matter. Again I do not see a presumption of virtue here, a presumption that a speaker has arrived at her belief reliably. Hence there is not a presumption for it; the challenger may properly ask for reasons to justify it, and the burden is on the speaker to provide such justification through argument.

Notice that although we have provided a different account of how a speaker incurs probative burdens of proof in making proposals from the account Kauffeld gives, we nonetheless agree with him that there are burdens of proof in connection with making proposals and that they differ from how legal burdens of proof are incurred. The probative responsibilities of a speaker putting forward a proposal stem not from some "procedural expression of underlying principles of fairness," but from the nature of epistemic presumption, more specifically for the conditions under which there is a presumption of reliability for some belief-generating mechanism. We thus have come by a different path to an answer for the question Kauffeld regards as central for the paper—"whether the distribution of probative responsibilities in deliberative argumentation responds to considerations which differ fundamentally from those which govern judicial argumentation." We agree with Kauffeld—they do.

Notes

1. Nicholas Rescher, *Dialectics: A Controversy-Oriented Approach to the Theory of Knowledge* (Albany: State University of New York Press, 1977), pp. 36-37.

2. Rescher, pp. 36-37.

3. Rescher, p. 37.

4. See Douglas N. Walton, "Burden of Proof" *Argumentation*, 2, 244.

5. See "The Psychological Burden of Proof: On the Evolutionary Development of Richard Whately's Theory of Presumption," *Communications Monographs*, 43 (1976).

6. Jeanne Fahnestock and Marie Secor, *A Rhetoric of Argument* (New York: Random House, 1982), p. 245.

7. See my presentation for this conference, James B. Freeman, "What Types of Statements are There?" for a discussion of the difference between evaluations and descriptions in particular.