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# ON THE BURDENS OF PROOF IN ORDINARY LANGUAGE ARGUMENTATION

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*Abstract:*

Various textbooks in logic and rhetoric seem content to treat the notion of the burden of proof as if it were a simple obligation associated with the act of proffering statements for another's consideration. Nevertheless, we can uncover cases in argumentation where both sides champion statements but only one side bears a burden of proof. I believe that an explanation for this difference in emphasis will involve distinguishing between two different (but not unrelated) burdens of proof that can come to bear in the course of an argument.

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*1. On the problem of illicit tactical advantage in argument or "Why should I be interested in the burden of proof?"*

What I would like to do in this paper is examine and discuss the following question:

In any given case of ordinary language argumentation, who should bear the burden of proof?

In other words, how do we go about determining (in a particular case of argumentation) who should prove what to whom? Perhaps it might help if I fleshed out this question with a specific example that illustrates what I have in mind. In theistic debate, to take one instance, is it the duty of the theist to prove that God exists or is it the duty of the non-theist to prove the contrary? Does it even make sense to speak of such a thing as a prevailing duty in this case? How would we begin to go about making such a determination and on what basis? What makes these questions particularly pressing is the suggestion that (in certain circumstances) an ignorance of the issues they raise can be exploited in order to secure an unfair advantage in argumentation. For example, it has been suggested that taking on the burden of proof can put one at a decisive disadvantage in argument since one is then obligated to argue one's case to the satisfaction of another in order to successfully "discharge" the burden of proof. In such cases what opponent would be able to resist raising the standard for successfully discharging such an obligation, particularly if the success of his or her position hinged on his or her counterpart's failure to present a persuasive argument?

With this in mind, we can take such a strategy one step back and imagine a shrewd tactician dedicating a modest amount of effort toward securing such an advantage from the outset of a dispute either by convincing his or her opponent that he or she is for some reason exempted from bearing the burden of proof or that his or her opponent is uniquely obligated to bear the burden of proof from the outset of a debate. After such a maneuver, winning an argument would be simply a matter of setting an unattainable standard for discharging the burden of proof upon one's opponent. What we need here, it would seem, is some means of determining where the burden of proof ought to be allocated in particular cases, if only to circumvent this kind of tactical abuse.

Perhaps we can take this concern with the subversion of the argumentation process as our impetus to look into the question of who ought to bear the burden of proof in more detail. Consequently, a good starting point might

be to try to determine with some precision what is meant when we say that someone ought to bear the burden of proof. In other words, we need to ask ourselves exactly what kind of obligation are we trying to press upon another when we make this type of assertion. A clear answer to this question might go a long way towards supplying an adequate answer to our original inquiry. Unfortunately, we seem to be presented with a stumbling block from the outset that we need to address before we can make any progress toward such an answer.

## *2. On the burden of proof as a confused notion*

The problem is that there seems to be a general confusion over what is meant by the term "burden of proof" itself. What makes this especially daunting is that this confusion appears to be engendered by the very genre of literature that should be helpful on such matters. Textbooks on informal logic, critical thinking and rhetoric are more than ready to offer up their respective pronouncements concerning what it means for someone to bear the burden of proof in cases of ordinary language argumentation and why they ought to do so. Unfortunately, the level of harmony in such pronouncements appears to be low at best. To illustrate what I am getting at here I would like to offer up a few of these dicta for consideration.

- (1)The notion of the burden of proof is that of the obligation, or duty, to support one's claims.
- (2)Anyone making a claim or an accusation or an assertion bears the burden of proof for that claim/accusation/assertion. It is up to the individual making the claim to prove it true.
- (3)In most cases, the initial plausibility of the claim itself determines whether the burden of proof should fall more on those who advance a claim or more on those who object to it. A claim's initial plausibility is determined in turn by how it 'fits' with our background knowledge. A claim that is consistent with our background knowledge has more initial plausibility than one that conflicts with it. The less initial plausibility a claim has, the greater the burden of proof that falls on one who advances the claim.
- (4)Those who put forward proposals or advocate new ideas assume the burden of proof that obligates arguers to provide good and sufficient reasons for changing what is already accepted. Those who defend existing beliefs and practices enjoy the presumption that is the predisposition to favor an existing practice or belief until some good reason for changing it is offered.

The first citation appears to be the least questionable in that it simply states that the burden of proof is the simple obligation to support one's claims. I suspect that if there is a common thread that runs through these discussions concerning the burden of proof, this would be it. As a result, I would like to suggest that we take this as our leitmotif in that from here on in we can regard our task (at least in part) as one of coming to a better understanding of the nature of the obligation denoted by this basic definition.

According to our second citation this obligation is linked with or is associated with the "act" of making an assertion. If the burden of proof speaks to the obligation to support one's claims and the act of making an assertion is a claim, then the connection between making assertions and bearing the burden of proof is fairly straightforward. If it helps, we could consider the second dictum an elaboration of the first. With this in mind we can turn to the third citation.

Here the suggestion is made that in certain cases the burden of proof can be described as falling decisively on

one side of a dispute. Speakers who advance initially implausible statements (implausible here meaning that these statements are not in accord with our background knowledge) are seen as being obligated to show why these statements should be accepted by their respective audiences. This brings us to our fourth citation that appears to reflect an obligation to recognize and respect an audience's general reluctance to alter their doxastic stance, unless or until good grounds are presented for doing so.

So what kind of obligation is denoted by the term burden of proof? Is it the general obligation on all persons to support the claims they present for the consideration of others? If so, what are we to make of those statements that suggest that the obligation at issue here reflects the specific parochial requirement that improbable and heterodoxical statements that are advanced for consideration be adequately supported by a speaker in order to be viable candidates for an audience's acceptance? Perhaps what we need to take seriously here is the suggestion that it is both.

### *3. One or two burdens of proof?*

If there is a relation between these respective obligations that we have (until now) referred to simply as the burden of proof, it is one that has not been well defined by the relevant body of literature. How do we distinguish between cases where the burden of proof should fall equally on both sides of a dispute from those in which it appears to only fall on one particular speaker? I must confess that I am not optimistic that a single set of guidelines or rules will serve to provide an answer to this particular question. My pessimism on this point is rooted in my own conviction that at this point in our analysis we are no longer dealing with one uncomplicated sense of obligation.

In fact, my contention is that the sense of obligation suggested by the first two citations is distinct enough from the sense of obligation suggested by the latter two citations that it would serve us better to treat these as two separate obligations. Consequently, I would argue that there are two burdens of proof that can come to bear in cases of ordinary language argumentation. If this is so, then an explication of these burdens of proof might go a long way towards clearing up some of the confusion that appears to surround this issue. That is to say, before we can say anything important about who ought to bear the burden of proof in any particular case, we need to be clear about what kind of obligation is at issue.

In order to achieve this particular end I would like to outline and present for consideration two burdens of proof which I will call the "verbal" and "rhetorical" burdens of proof. After discussing these separately I will attempt to re-address my original question and the problem that appeared to give the question its urgency.

### *4. On the verbal burden of proof*

To convey what I mean when I suggest that we countenance the idea of a verbal burden of proof I would like to rely on the work of Paul Grice. In his book *Studies in the Way of Words* Grice introduces what he regards as an indispensable prescript that he believes makes successful communication possible. The name that Grice gives to this prescript is the "Cooperative Principle" and the rationale that undergirds this Cooperative Principle can be sketched out roughly as follows.

In order for communication between persons to be successful, it is necessary for individuals to make certain assumptions concerning the intentions and abilities of other speakers. The most basic of these assumptions is that when we take up the activity of communication we are essentially engaged in a co-operative enterprise. Unless we could rely on such an assumption, any effort at communication would not be capable of being coordinated or maintained.

Grice's own formulation of the principle that facilitates this process is as follows:

Make your conversational contribution such as is required, at the stage which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.

In other words, speakers need to make their conversational contributions appropriate to the circumstances in which they occur. Grice presents for consideration four "maxims" or sub-principles that serve to specify how one can follow the Cooperative Principle. In short, they are as follows:

#### The Maxim of Quantity

1. Make your contribution as informative as is required (for the current purposes of the exchange).
2. Do not make your contribution more informative than is required.

#### The Maxim of Quality

1. Do not say what you believe is false.
2. Do not say that for which you lack adequate evidence.

#### The Maxim of Relation

1. Be relevant.

#### The Maxim of Manner

1. Avoid obscurity of expression.
2. Avoid ambiguity.
3. Be brief (avoid unnecessary prolixity).
4. Be orderly.

I believe that the obligation reflected in Grice's Maxim of Quality accounts for the suggestion made in our first two citations that the burden of proof reflects a general obligation on the part of all speakers to substantiate their assertions. My contention is that this particular burden of proof, or what I would now like to call the "verbal" burden of proof, is the upshot of this Gricean requirement that our verbal contributions be both sincere and well grounded. I would also contend that what makes this verbal burden of proof multilaterally binding is that it reflects a constitutive condition of discourse.

By this I have in mind John Searle's remarks about constitutive rules that are presented in his essay "What is a Speech Act?" According to Searle constitutive rules serve to define a particular form of activity and can generally be formulated as "X counts as Y". In other words, if an individual would wish to achieve or bring about Y, then they must fulfill the conditions stipulated by X. For example, if I wish to checkmate my opponent in a chess match, then I must bring it about that I place his king in check and leave it no alternative square to move to;

anything else simply would not count as a checkmate.

Consequently, I would suggest that the Gricean Maxim of Quality is a constitutive condition for discourse. That is to say, that unless all language users are prepared to submit to this particular condition, they cannot be regarded as *bona fide* participants in the dialogic process. Naturally such a condition is instrumental in the sense that if someone has no wish to communicate, then the requirement to be ready with the grounds for their assertions is not binding for them. Fortunately, such intractable cases are (for our purposes) marginal enough that we can safely bypass them and continue on.

I think I have said enough by now, in the way of explanation, to convey what I mean by my use of the expression the "verbal" burden of proof. I now wish to explain what I mean by my use of another expression that also refers to an obligation a speaker can incur in the context of argumentation. An obligation different from the one just discussed; different enough (in my opinion) to merit the appellation the "rhetorical" burden of proof.

#### *V. On the rhetorical burden of proof*

At this point I would like to take on the task of explicating what I mean by the expression the "rhetorical" burden of proof. To accomplish this I would like to introduce for consideration some remarks from a writer who has grappled with this particular subject matter. The writer I have in mind is Richard Whately and much of what he has to say on this subject can be found in his work *Elements of Rhetoric*. In it he addresses what he sees as the relationship between the "Presumption and Burden of Proof" as the subtitle of his text announces.

What Whately describes as simply the burden of proof, I contend, ought to be distinguished from the verbal burden of proof I introduced above. We can begin by turning to Whately's comments on the subject of presumption. His commentary on this term runs as follows:

According to the most correct use of the term, a "Presumption" in favour of any supposition, means, not (as has been sometimes erroneously imagined) a preponderance of probability in its favour, but, such a *pre-occupation* of the ground, as implies that it must stand good till some sufficient reason is adduced against it; in short, that the *Burden of Proof* lies on the side of him who would dispute it.

I am inclined to take this passage at face value as suggesting that the term "presumption" denotes a type of bias or partiality that an audience may have toward a particular supposition. Presumption then, plainly put, can be understood as an audience centered disposition to be favorably disposed toward a supposition presented by a speaker.

Consequently, any speaker who would put forth a supposition that challenges or merely fails to be in accord with the preferences of a particular audience would, according to Whately, bear the burden of proof, in that they would incur the obligation of showing why a particular audience should alter their doxastic stance and favor this novel supposition. As a result, we appear to be presented with a burden of proof that appears to imply an obligation (again on the part of a speaker) to recognize that the audience he or she addresses will countenance certain doxastic policies, doxastic policies that, if may help ourselves to Chaim Perelman's terminology, enjoy a type of "doxastic inertia." Like their physical counterpart, a sufficient diverting force appears to be necessary before any change in policy can occur.

Specifically, Whately's presumption appears to arise as a consequence of an audience's espousal of a *conservative* doxastic policy that favors resisting any kind of doxastic change without sufficient grounds for such a modification. Correspondingly, Whately's burden of proof appears to be suggesting that any speaker wishing to advance heterodoxical and novel suppositions must do so with respect to their audience's particular doxastic policy. Interestingly enough, presumptions and what we can call the presumptively favored perspective, appear to be categorically exempt from bearing the burden of proof as far as Whately is concerned. Presumably this is because there is no practical need to champion or adequately ground an already accepted perspective.

Consequently, we have a rather modest but workable outline of what Whately seems to be talking about when he refers to the "burden of proof" and what I want to call the "rhetorical" burden of proof in contradistinction to the burden of proof discussed earlier. According to Whately, a speaker is obligated to bear the "rhetorical" burden of proof when:

The audience he or she addresses is unfavorably disposed to the supposition that has been advanced.

With these distinct burdens before us, I think we are now in a better position to return to our original query.

#### 6. *So who bears the burden of proof?*

I'll close by presenting what I believe are three reasonably representative scenarios that a speaker can encounter in ordinary language argumentation and attempt to give an adequate answer to the question of who should be seen as bearing the burden of proof in each.

##### Three Scenarios

1. There is *no* localized presumption regarding an issue. (Perhaps the topic is too trivial to merit their concerns one way or another or not regarded as pressing enough to form a firm opinion on.)
2. There is a strong localized presumption *on one side* of an issue. (The issue may be seen as perspicuous or as a matter of fact or the obvious consequence of common sense reasoning.)
3. There are strong localized presumptions *on both sides* of an issue. (The issue is contentious in that received wisdom or common sense brings people to different end points when they reflect on this issue.)

With respect to the first two scenarios our distinction shows its utility right away. In the first scenario, it would appear that if our speaker broaches the issue from either side he or she bears what we have called the verbal burden of proof since (as we noted) this burden of proof is a general and constitutive obligation to substantiate one's assertions and in this case there are no localized presumptions that can serve to give rise to the rhetorical burden of proof. As long as our speaker substantiates his or her remarks, he or she will have met and satisfactorily discharged this particular burden of proof.

In the case of the second scenario, it would appear that if our speaker broaches the issue in a fashion not in accord with the prevailing localized presumption, he or she bears the rhetorical burden of proof. His or her audience might still be under a latent verbal burden of proof regarding their doxastic stance but this particular

burden will be (for all practical purposes) subsumed under its rhetorical counterpart. If he or she broaches the issue from the vantage point of the presumption then, of course, he or she bears no rhetorical burden of proof.

In the case of our third scenario it would seem that determining where the burden of proof ought to be allocated is not so straightforward. We may recall that much of our discussion concerning the rhetorical burden of proof was predicated on the idea that it reflects a speaker's obligation to address or speak specifically to an audience's doxastic stance. Consequently, we appear to be moved to the suggestion that in cases where more than one set of germane doxastic stances is involved the rhetorical burden of proof ought to rest with both sides of a dispute.

Although I do not think that such a suggestion should be rejected *tout court*, I think it needs to be weighed in light of the fact that, as we noted earlier, the rhetorical burden of proof was also shaped, in part, by a speaker's respect for an audience's policy of doxastic conservatism. This particular form of conservatism concerning belief acquisition was reflected by an agenda that, for the most part, preferred resisting change without sufficient grounds to do so.

The hard truth here, I believe, is that the same doxastic conservatism that gives rise to the obligation underlying the rhetorical burden of proof also serves to frustrate the task of allocating this burden of proof in contentious cases of argumentation. Each side of a contentious dispute will (in all likelihood) be unfavorably disposed towards the presumptions of the other side. The upshot of this is that each side will be strongly inclined to view the other as chiefly responsible for bearing the rhetorical burden of proof.

As a result of such an impasse it is not surprising that in such difficult cases of argumentation our original question concerning the allocation of the burden of proof often gets bypassed in favor of the following question which reflects the desire that such difficult cases can be resolved at another level; namely:

In a given case of ordinary language argumentation, which (or whose?) presumptions should prevail?

By prevail I mean, of course, whose presumptions should be seen as having primacy in a particular case of argumentation. The problem here seems to be that it is not at all certain what kind of answer we could expect to such a question. What kind of answer would not wind up begging the question at some level? Any attempt at a cogent answer seems to presume some type of trans-epistemic or trans-linguistic perspective that is unlikely to receive an uncritical reception in our post-modern philosophical climate. In short, it would appear that we have returned to our original concern in that this area of presumptive indeterminacy appears to leave us with no answer to our original concern with the subversion of the argumentation process.

If we cannot say with reasonable certainty where the rhetorical burden of proof ought to be allocated in such difficult cases, then it would appear that we are no better off than when we first started our inquiry. Are we then at a complete loss of recourse with regard to preventing the subversion of argumentation by means of illicitly shifting the burden of proof? I wouldn't say so. The success of such a subterfuge seems to rest on the ability of our shrewd tactician to convince his or her opponent that (in cases of presumptive indeterminacy) a particular doxastic stance ought to be taken as prevailing for the purposes of a particular case of argumentation.

My own intuition here is that it is unlikely that such arguments can be presented without some kind of reliance on presumptions as debatable as those which constitute the original dispute. Presumptions that when brought to light will likely open up new avenues of dispute that are unlikely to lead to any simple resolution. Although, this may not be the type of answer we had in mind at the outset of our inquiry, it may be the most honest answer we are in



a position to provide.

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