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Commentary on van Eemeren & Houtlosser

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This brief note offers some reflections on the essay by Frans H. van Eemeren and Peter Houtlosser (2001), entitled “Strategic Maneuvering with the Burden of Proof,” in order, I hope, to stimulate further discussion of the subject.

Those authors begin with some observations about the relations of dialectic, logic and rhetoric but, curiously, acknowledge just two meta-perspectives in the study of argumentation, those of dialectic, “focusing on critical debate,” and of rhetoric “concerned with the most appropriate means of persuasion.” My own preference has been to identify three meta-perspectives that are of first importance to argumentation theory. They are the perspectives of logic, concerned with the soundness of arguments, dialectic, concerned with procedures for critical discussion, and rhetoric, which is concerned with effective adaptation of discourse to various purposes (Wenzel 1980, 1990).

I certainly agree with van Eemeren and Houtlosser (2001) when they say, “We view dialectic as the heart of the study of the argumentative process of critically testing opinions.” I, too, have argued that dialectic is central to the critical functions of argumentation because it provides the optimum conditions for the disciplined exercise of rhetoric and for maximally effective logical evaluation:

Rhetorical skill enables us to express our understandings; dialectical procedures enable us to test them. . . . The logical perspective, likewise, comes into full force under dialectical conditions—the suspension of the constraints of action, the thematizing of doubted claims, the portrayal of whole argument structures, and the free movement to and from all levels of reflection. These are the optimum conditions for logical analysis, criticism and judgment (Wenzel 1979, 94).

Thus, we have a broad base of agreement on the purview and the value of a dialectical approach. Nevertheless there are some differences in the way we think about a concept like the burden of proof.

It is not surprising that scholars in argumentation, coming from several different disciplines, as we do, each tend to privilege one disciplinary perspective over another. And so it is here. Van Eemeren and Houtlosser privilege their pragma-dialectical theory and bring in rhetorical considerations as subsidiary concerns within their framework for critical discussion. Rhetoric enters into critical discussions, they say, as “strategic maneuvering” by which protagonist and antagonist seek to gain advantages for their positions in ways that may be legitimate or not according to rules for critical discussions. Strategic maneuvering arises from a certain tension, or “potential discrepancy,” between dialectical and rhetorical aims.
Incidentally, if I may be allowed a brief digression, I would point out that the tension between rhetorical aims and dialectical obligations has long been a matter of concern to writers on argumentation both in philosophy and within the rhetorical tradition. So, Henry W. Johnstone, Jr. (1982, 99) wrote on bilaterality in argument as a condition in which “each interlocutor speaks as if the others were capable of propagating a message fully as credible as his own. He treats his hearers with respect rather than merely as means to the end of their own credulity.” And rhetorical theorist Douglas Ehninger (1970) in a seminal article on “Argument as Method,” called argument a “person-risking” enterprise in which the arguer, while seeking to change another’s mind, accepts the possibility of being changed herself. An arguer, he wrote, “must play the role of a restrained partisan—must stand poised between the desire to maintain his present view and a willingness to accept the judgment which a critical examination of that view yields” (104). In other words, it is well understood that an advocate employing what I call “the rhetoric of argumentation” must also abide by dialectical norms in the interest of achieving a critical decision.

Turning back to van Eemeren and Houtlosser’s paper, we see that having established pragma-dialectical theory as a foundation, and having explained their notion of strategic maneuvering, the authors go on to consider the burden of proof and how it may be strategically managed. They do this in two steps, and it is important to note that both steps are undertaken strictly in terms of pragma-dialectical theory’s conception of and rules for a critical discussion. They do not propose to give a general or universal account of burden of proof. Their first step is to raise and answer a series of questions about the nature of the burden of proof and its functioning as a procedural principle. Then, in the final substantive section of the essay, they describe many of the ways that advocates can attempt strategic maneuvering in relation to burdens of proof in each of the stages of critical discussion posited by pragma-dialectical theory.

I do not intend to discuss that final section of the paper except to say that I appreciate, especially, the discussion of specific ways in which strategic maneuvering can become fallacious. The treatment here is brief, but can be found in a more elaborated form in van Eemeren and Grootendorst’s (1992) Argumentation, Communication, and Fallacies. In general, the description of strategic maneuvering with the burden of proof, considered from the vantage point of pragma-dialectical theory, is clear and seems to be comprehensive.

Turning back to the section in which the authors discuss the burden of proof more generally, I will touch on a few of the same questions that they raise, consider them from a rhetorical perspective, and see how that contrasts with the pragma-dialectical point of view. I do this, not to suggest that one view is better or more correct than the other, but just to help us appreciate the different insights afforded by different theoretical perspectives.

Rhetoricians and pragma-dialectical theorists construe burdens of proof differently in large part because of a fundamental difference in their models of argumentative interaction. On the one hand, pragma-dialectics envisions a critical discussion which may be ideally analyzed in terms of specific stages in which particular speech acts are used to accomplish the goal of resolving a disagreement over one or more expressed standpoints. Regardless of the number of
actual participants in a discussion, the analytic reconstruction following pragma-dialectical rules personifies the arguers as a single protagonist and a single antagonist. Given the rules of encounter, the burden of proof, like all other agreements and commitments made for the sake of a resolution, is a matter to be negotiated by the protagonist and the antagonist.

In contrast, rhetoric typically (though not exclusively) envisions advocates engaged in the messy business of public discourse. Further, unlike the highly focused normative goals of pragma-dialectics, rhetorical theorizing seeks understanding of the suasory potential in virtually all forms of human symbolic communication. Rhetoric’s normative goals come into play when the arts of language are employed for purposes of critical decision-making as, for example, in law, science and policy formation. I have been calling this specialized approach to persuasion the “rhetoric of argumentation.” Yet, even when we narrow the scope of rhetoric in that way, it remains the case that rhetoric envisions a much wider range of discursive formats and arenas than does pragma-dialectics. And the ways in which burdens of proof arise, get assigned, and so forth, are correspondingly varied.

Writers on argumentation in the rhetorical tradition generally begin their discussion of burden of proof with Richard Whately (1846, 112) and the concept of presumption, which that author defined as follows:

A “Presumption” in favor of any supposition, means, not (as has been sometimes erroneously imagined) a preponderance of probability in its favor, 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.

Of course, no one in our time automatically accepts the specific presumptions Whately mentioned, such as the presumption in favor of every existing institution. In their paper, for example, van Eemeren and Houtlosser cite Gaskins (1992, 45-46) on the apparent reversal of that presumption in current public debate. Nevertheless, the general idea that a burden of proof rests on one who seeks to overturn a presumption is commonly accepted as an important principle. In one of the best textbooks on argumentation written by rhetoricians (now sadly out of print), Douglas Ehninger and Wayne Brockriede (1972, 83-84) added a useful distinction to the concept of presumption, observing that it may be either natural or artificial. “Natural presumption,” they wrote, “reflects things as they are viewed in the world about us,” or as I would put it, natural presumption reflects the existing state of belief in some audience to be persuaded, regardless of how that belief relates to an actual status quo. Artificial presumption, on the other hand, is the result of argumentative ground arbitrarily assigned, as when a judge instructs a jury about the presumption of innocence, in effect telling them to adopt a certain state of mind.

The principle that the burden of proof falls on anyone who seeks to overturn a presumption, whether natural or artificial, comports well with the idea of a rhetorical situation as the place where arguments originate. Lloyd Bitzer (1968, 5) describes a rhetorical situation as

. . . a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance; this invited utterance participates naturally in the situation, is in
many instances necessary to the completion of situational activity, and by means of its participation with situation obtains its meaning and its rhetorical character.

In the pragma-dialectical system, the burden of proof, van Eemeren and Houtlosser say, “is given a purely methodological status,” and does not depend upon any other considerations of an epistemological, ideological, ethical, or moral kind. Considered rhetorically, however, a situation calling for argumentation may very well contain exigencies in the form of presumptions of those and other kinds. An advocate who ignored such presumptions would have no chance of success at all. From a rhetorical perspective, therefore, burdens of proof may be seen as the realistic demands of rhetorical situations, rather than as merely methodological.

Another contrast between a pragma-dialectical perspective and a rhetorical perspective becomes apparent in contemplation of the question, “what means can be used to meet the burden of proof?” Pragma-dialectical theory admits only arguments that are based on the starting points established in the opening stage of the discussion or implicit commitments that, when challenged, are able to pass the appropriate “intersubjective testing procedure.” In other words, the materials of argumentation are limited to those on which the advocates can agree. Naturally, no such limitations apply to argumentation in the public sphere, or even in institutionalized rhetorical contexts. Unlike the dialog between protagonist and antagonist seeking to resolve a difference of opinion between themselves, the rhetorical perspective typically envisions advocates addressing a third-party audience, such as a jury, a learned society of peers, or a public with power to act on some matter of policy. Consequently, rhetors employ whatever arguments and appeals they think will persuade the audience. And, it must be acknowledged that rhetoric as an art of persuasion cannot, by itself, guarantee the cogency or legitimacy of arguments thus made. So, we return to the starting point of this excursion, where we acknowledged dialectic as that member of the triad of controversial arts that informs us about procedures necessary to promote the critical testing of arguments and positions. But, inasmuch as logic, dialectic and rhetoric must all feature in a complete theory of argumentation, it is gratifying to see efforts such as this one by Frans van Eemeren and Peter Houtlosser to integrate perspectives.

References


