ON THE BURDEN OF PROOF IN ORDINARY ARGUMENTATION

By

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A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy
Graduate Department of Philosophy
University of Toronto

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On the Burden of Proof in Ordinary Argumentation

Doctor of Philosophy, 2001

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Abstract

In this thesis I argue that we need a philosophical approach to the subject of the burden of proof as it applies to cases of ordinary argumentation. I submit that the burden of proof is a conditional obligation to provide supporting grounds for an assertive speech act involving a constative, or fact stating or denying assertion, that a speaker incurs automatically when he performs an assertive speech act competently.

I argue that this conditional obligation (to be ready, willing, and able to discharge the burden of proof) can be converted into an actual obligation to discharge the burden of proof by a hearer who has the power to impose a request for supporting grounds on any speaker who has placed himself in a position of probative liability by competently performing an assertive speech act in accordance with certain constitutive rules. This actual obligation is a duty that needs to be discharged ateris paribus.

I also maintain that this ateris paribus condition involves issues that cannot be sorted out a priori by a systematic or theory oriented approach to the subject of the burden of proof. As a result, a rhetorical approach with its dedicated pursuit of context specific knowledge with which to analyse particular cases of argument seems to be the best complement to a speech act oriented approach to this subject.

This thesis ends by advocating a mixed methodological approach that sees speech act theory as contributing to a systematic approach to the subject of the burden of proof as viewed from a general perspective and rhetorical theory as providing the impetus for incorporating the context specific knowledge needed to make an informed judgement about how the burden of proof ought to function in certain particular cases of argumentation. Consequently, this thesis presents itself as a modest proposal for an approach or outlook to the subject of the burden of proof for those who wish to take a philosophical approach to making such judgements.
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Acknowledgements

I am, first and above all, indebted to Jack Stevenson. I shall always be profoundly grateful for his unflagging commitment to this project and for his sage counsel that I found immeasurably helpful in bringing this work to completion. I would also like to thank Andre Gombay and Paul Gooch for their help and guidance with this project. I would also like to thank Hans Hansen and Christopher Tindale of the OSSA (Ontario Society for the Study of Argumentation) for extending to me the opportunity to take part in their conferences on more than one occasion. As a result, I was presented with the rare opportunity of being able to present several of the ideas explored in this thesis to various colleagues in a critical yet warm and friendly setting.

In addition to a general debt of gratitude to all the members of the OSSA who welcomed me into their community of interests, thanks need to be extended especially to Fred Kauffeld and Igor Z. Zagar. I found their commentaries on the papers I presented to the OSSA to be quite profitable and helpful to me in thinking through several of the ideas in this work. I would also like to express my appreciation to Nando De Luca for his help with this project.

Closer to home, I must give special thanks to my wife Heather for being a constant source of strength and encouragement for me as I worked to complete this project. A special thanks also needs to be expressed to my sons Alexander and Jonathan who remind me every day, with a wisdom that is beyond their years, that what is most important in the life of any philosopher is something that no academic work can ever convey.
Dedication

This thesis is dedicated to my wife Heather Lee Thomson. Without her constant and unfailing love, support, and encouragement the completion of this work would simply not have been possible.
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Introduction

The issue that I discuss in the chapters to follow came to my attention several years ago in the form of a statement made by one of my professors. The statement was that in debates over the issue of whether God exists, it is the theist who ought to bear the burden of proof. I came to learn that this particular suggestion is tantamount to proposing that it is the theist's job to prove to the atheist that God exists, and not the other way around. Although I had no problem grasping the basic import of this statement the first time I heard it, what I did not immediately grasp was the reasoning behind this particular remark. In an effort to get a sense of this reasoning, I went to a follow-up tutorial that this professor conducted.

At this tutorial, I asked my professor why only the theist should bear the burden of proof in theistic debate. His answer was that confirming a statement cast in the universal negative (No God exists) was a difficult task in comparison with the relatively easier task of confirming a statement cast in the form of an existential particular (God or “a God” exists). Although this persuaded me for a while, I eventually came to question the efficacy of an explanation that relied solely on an insight about a statement’s logical form. Given certain truths about the Judaeo-Christian conception of God, it seemed to me that confirming a statement about His existence, even in existential form, might be comparable in difficulty to confirming its universally expressed opposite.

Furthermore, this explanation gives no clear answer to the question of how arguments with competing existential or universal claims ought to be arbitrated where these claims are at parity with each other. For example, competing religious claims may involve contrary expressions about the existence of a particular conception of deity. In debates over whether Allah or Yahweh (in the Judaeo-Christian sense) exists we seem to be faced with two competing existential claims. Which side ought to bear the burden of proof? Maybe the answer is that they both do.
Things can get more complicated even in cases of theistic debate involving propositions cast in the universal negative and in the existential particular because proponents on both sides of the theistic debate evince conflicting intuitions on this matter. Antony Flew, a non-theist, advocates that theists ought to bear the burden of proof and that non-theists do not. On the other hand, Keith Parsons, also a non-theist, contends that non-theists should not shy away from taking up the burden of proof in theistic debate. On the other side of this divide, theists like my former professor have intuitions that differ from theists, like Donald Evans, who suggest that theists and non-theists alike should be willing to take up the burden of proof.

Clearly, what appears to be needed is a systematic approach or a general rationale for approaching this issue as it arises in ordinary argumentation. It is needed for two reasons. First, as I have suggested above, there seems to be a marked degree of confusion present in discussions on this topic. This particular form of confusion seems to call for a philosophical effort to sort through this issue and devise a systematic approach for dealing with the burden of proof issue as it arises in ordinary argumentation. Second, as we shall see, allocating the burden of proof can, in certain instances, serve to influence the material outcome of ordinary argumentation. Consequently, in cases like these, it would appear to be worth our while as arguers to give this particular feature of ordinary argumentation some close attention.

In fact, this practical consideration is so general that it might be too confining to identify this as a "philosophical" difficulty. The burden of proof issue may also affect ethical, political, and cultural concerns that are expressed through argument. I should also make it clear that when I refer to "ordinary argumentation" my intent is to be taken as referring to the everyday practice of dialectical discourse that is commonly conducted in social contexts. On the other hand, when I refer to "an argument", I intend to be taken as referring to the de-contextualized or reconstructed product of the activity mentioned above. This raises the question of why I have chosen to focus my
analysis on ordinary argumentation. In answer to this, I am reminded of the reply given by a famous bank robber who was asked why he robbed banks. His reply was, "Because, that's where the money is.” I am interested in devising a systematic approach to the burden of proof in ordinary argumentation, because that is where I think the interesting issue is. I also think this point is heightened by the commonplace observation that ordinary argumentation appears to represent the dominate mode whereby individuals reason with one another.

With its thoroughly codified procedures at hand, forensic or formalised argumentation seems well equipped to handle questions about the burden of proof. On the other hand, ordinary argumentation seems to resist any straightforward treatment when it comes to dealing with the burden of proof. My own intuition on this matter is that there are context specific aspects of ordinary argumentation that serve to frustrate efforts to approach the burden of proof issue from a purely theoretical standpoint.

Having said this, I should comment on what I refer to specifically as “the burden of proof issue”. To begin with, the burden of proof issue is not something that can be expressed in a compact sentence. It is an expression that covers a particular kind of crisis in ordinary argumentation. Such crises arise in ordinary argumentation when speakers and their hearers find themselves at odds over substantive and procedural issues. In such cases, the “disagreement factor”, so to speak, cuts across several levels and leaves speakers at a loss about how they ought to proceed. It would seem that in such cases of “contentious” argumentation, several issues are up for grabs simultaneously. Consequently, the burden of proof issue appears to come down to finding a systematic approach for dealing with this particular kind of difficulty in ordinary argumentation.

As the next chapter will show, there are two very different outlooks on this issue that have tended to set the general tenor for this topic. The first outlook suggests that we can appeal to some kind of overarching basis for agreement as a means of getting out of this kind of difficulty. Under
this view, philosophy's task is to help disputants recognise and ascend to this transcendent point of common ground as a basis for settling or adjudicating their differences. The second outlook maintains that any appeal to an overarching basis for settling disputes is a chimerical solution because no such higher level of general truth exists. Under this view, philosophers who believe they can arbitrate cases of ordinary argumentation along the lines suggested in the previous outlook are being naïve about the impact of post-modern consciousness on current philosophical practice.

I want to work at breaking away from these two poles of thought by proposing what I think an optimal approach to the burden of proof issue might look like. I should hasten to qualify this statement of purpose by stating up front that my proposal does not hold out the promise that every difficult case of argumentation can be resolved perfectly. But even when this systematic approach falls short of resolving or adjudicating a given case of ordinary argumentation, it still has something constructive to contribute to those unsettled cases of argumentation that remain. In fact, it anticipates these difficult cases and suggests a few alternative courses of action that a speaker might find acceptable in lieu of a more complete resolution.

That being said, let us get to the burden of proof issue right away by asking three pivotal questions that will serve to guide this inquiry:

1. Exactly what is the burden of proof?
2. How can we decide who ought to bear the burden of proof in a given instance of ordinary argumentation?
3. How can we make cases of contentious argumentation more tractable?

I believe these questions are pivotal because they appear to reflect what a speaker needs to know in order to work through the burden of proof issue. But as our inquiry will show, what are lacking here are not answers. Various answers to these questions have been suggested in the philosophical literature on this topic. What is lacking is a systematic approach or a general rationale
for answering these questions. Unless something like a general rationale for handling the burden of proof issue is aimed for, the burden of proof will continue to be a confusing and difficult aspect of ordinary argumentation.

That being said, I ask the reader to keep these three questions in mind as we survey the various contributions that various thinkers have made on this topic and as we work toward formulating a systematic approach to this subject. As a means of accomplishing this end, this inquiry will proceed as follows. In Chapter One, I begin by discussing why I think the burden of proof issue merits philosophical scrutiny. I then offer some critical analysis. I conclude Chapter One with an examination of two different approaches to the burden of proof issue by thinkers who have adopted very different outlooks on the matter.

In Chapter Two, I survey some of the contributions that various philosophers have made to this topic and suggest that there are several serviceable insights to be found, but that these insights should be consolidated within a single philosophical treatment of this subject. In Chapter Three, I turn my attention to forensic or formal argumentation since its procedures are more conspicuous and amenable to analysis than the conditions under which ordinary argumentation takes place. Although direct comparisons between these two forms of argumentation are difficult to maintain, I believe that there are insights to be gained from seeing how the burden of proof functions in both domains.

In Chapter Four, I then turn my attention to ordinary argumentation from the perspective of rhetorical theory. Here both historical and modern rhetorical contributions are taken into account. I believe this is important because there are certain context specific aspects of ordinary argumentation that are best handled from a rhetorical perspective. Since my own inquiry purports to have a sincere interest in ordinary argumentation, I believe it is incumbent on me to acknowledge
some of the contributions that have been put forth on this topic by thinkers in the rhetorical tradition.

In Chapter Five, I look into the notion that a speech act perspective can be brought to bear on the idea of the burden of proof with positive results. I propose that there is a close relationship between the constitutive conditions for the speech act of assertion and the notion of the burden of proof. In short, I suggest that a systematic approach to the burden of proof can find a fixed point of reference by pointing to this close relationship between the notion of the burden of proof and the constitutive conditions for the speech act of assertion. Once we have reached this relatively fixed point of reference on this subject, I believe our prospects are good for developing a general overview of this issue that can help put other aspects of the burden of proof issue in proper perspective.

In the final chapter, I attempt to anticipate and respond to several possible constructive criticisms that could be presented to my proposal for a systematic approach to this subject in order to demonstrate that my approach is adequate for handling the subject of the burden of proof, or at least as adequate to the subject as the subject matter will allow. In the conclusion, I reiterate the basic points of my proposal, respond to the three questions on the burden of proof issue I have posed above on the basis of my proposed systematic approach, and speculate on what the future prospects might be for others who may be interested in taking up my proposal and conducting their own inquiries into this topic.
Chapter 1

Making the Case for a Philosophical Approach to the
Notion of the Burden of Proof

A. Philosophical Argumentation and the Burden of Proof.

I would like to begin by stating that my primary focus of interest is the notion of burden of proof as it is found in ordinary argumentation. By my use of the term “ordinary argumentation” my intent is to be taken as referring to what Trudy Govier has described as a social practice involving “the communication of claims, and the reasons for those claims” (Govier Philosophy 15). As Govier goes on to elaborate:

People argue back and forth because they have different beliefs, they try to convince each other of the correctness or the acceptability of these beliefs, and they try to bring about such conviction by offering reasons for such beliefs. In the process, information is exchanged, and both arguer and audience have an occasion to critically reflect on their own beliefs and reasons for belief. (Govier Philosophy 15)

Govier also goes on to highlight another aspect of argumentation that is important to bear in mind. She notes that:

When people, in certain contexts, make a series of statements in certain ways, others are apt to presume that these people are arguing, and treat them and their statements accordingly. They presume that these people are communicating their real beliefs,
which they are trying to back up with what they themselves see as good reasons.
That is, they presume a kind of argumentative sincerity. If this is lacking, the
statements are best understood not as argument, but as an attempt to persuade or
manipulate by means other than good reasons. A person who is not committed to
what he appears, on the surface, to be asserting as premises or arguing for as
conclusion is, in some fundamental sense, not really arguing at all — although he
might superficially appear to be doing so. (Govier Philosophy 15)

Under this outlook argumentation is viewed as a practice that not only involves the
communication of claims¹ and the process of supporting these claims, but is a practice that is
hallmarked by the inclusion of an element of personal commitment on the part of an arguer with
respect to the claims and reasons being advanced. Govier reinforces this point when she goes on to
state:

If an audience is to take seriously the arguments of an arguer, it must see that arguer
as *credible*. Many dimensions are involved here. There are epistemic dimensions —
the arguer must be regarded as someone who could or does know, or has good
evidence for, the claims he or she asserts. And there is an ethical dimension: the
arguer must be regarded as non-deceptive (not a liar) and as someone who is
genuinely doing what he or she appears to be doing. That is, he is regarded as giving
reasons for beliefs. (Govier Philosophy 16)

There is, I believe, nothing blatantly untoward about this particular starting point. There are,
of course, more technical approaches to argument. There are standardised definitions found in logic

¹ For the purposes of this inquiry, I want to limit the scope of this term to refer specifically to that class of
speech acts that J.L. Austin referred to as “constatives”. With this in mind, when I refer to such terms as “assert”,
“assertion”, “claim”, and “claiming” this is the point of reference I have in mind.
textbooks that describe "an" argument as an instance of inference, where specific propositions called conclusions are affirmed on the basis of other propositions known as premises (Copi and Cohen 5-6). Of course there is nothing wrong with this formal definition, and it is generally the case that in the course of arguing (as Govier describes above) people do in fact present claims and reasons to support those claims that can be described as following a formal pattern of this kind. My own intention is simply to focus on the practice of argumentation in order to get a better picture of the role that the burden of proof appears to play in this context.

At this early point in our discussion it could be said that there is nothing very complicated about the notion of the burden of proof itself. Straightforward definitions of this notion can be located in different works. Law dictionaries and works on legal evidence are replete with references to the burden of proof (Black 31, Keane 47-62, Eggleston 103-113, Sopinka, Lederman and Bryant 53-91). Reference works, both old and new, in rhetoric and logic can also be found to carry references to this notion (Mills 27-27, Kelley 148-149, Freeman 154, Walton Informal 59). The definition of the term "burden of proof" that is provided by Govier in her own textbook on informal logic is fairly representative of what can be found in various works. She notes that "The notion of the burden of proof is that of an obligation, or duty, to support one's claims" (Govier Practical 169).

From a practical standpoint this is a serviceable definition that can generally be used to determine who ought to bear the burden of proof in regular cases of argumentation that Govier has described above. From a philosophical standpoint, however, there are a couple of questions that can be asked concerning this definition of the burden of proof. First, what kind of obligation or duty is being referred to here? Is it a moral or prudential duty; or is it a responsibility of another kind entirely? What do we mean when we say that a speaker "ought" to bear or discharge the burden of proof?
Second, what is the scope of this duty? Is it absolute or provisional? Does anyone making a claim have to provide support for this claim? There is the suggestion here that an arguer is obligated to someone else, but whom? Perhaps an arguer is obligated to his audience: those to whom his claim is presented for consideration. This seems like a reasonable assumption to make at this point. Perhaps a fuller answer to the question of to whom and when an arguer must provide support for his claims needs to involve some reference to the expectations of an arguer’s audience. Perhaps an arguer only needs to support his claims on those occasions where an audience expects or requests that he do so.

This is not an entirely unreasonable supposition, especially when we bear in mind that the practice of argumentation generally takes place in a specific context that is defined by a myriad of background assumptions and beliefs. It has been suggested that in order for argumentation to “get off the ground”, so to speak, arguers and their audiences need to occupy some area of common ground, metaphorically speaking (Brooks and Warren 167-170). This would seem to reflect the literal truth that argumentation cannot proceed where there is a complete absence of shared beliefs. The natural complement to this insight is to note that an unqualified consensus between parties in every respect would also render the practice of argumentation, in our everyday sense, otiose.

This outlook on what we could call the general contextual conditions for argumentation suggests a full spectrum of possibilities between these extreme positions. There are cases of argumentation where there is so much overlap between each person’s “belief system,” that any use of the term “argumentation” is merely titular in nature. On the other hand, there are difficult cases

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2 Brooks and Warren explain their use of this metaphor by suggesting that it refers to the “remote and general assumptions” that speakers bring to an instance of argumentation. The idea seems to be that they are non-controversial assumptions that enjoy some kind of general acceptance among speakers. This makes it possible for speakers to implicitly rely upon them for the purposes of communication and argument.
of argumentation where the amount of shared belief between speakers is so low that the prospects for any kind of resolution appear doubtful.

Approaches to the subject of the burden of proof that link the burden of proof to the expectations of an arguer's audience do have some advantages in terms of explanatory power. Treating the burden of proof as a conditional duty appears to present a picture of the burden of proof that is more manageable and more realistic. If every claim advanced by an arguer incurred a burden of proof, then argumentation would get bogged down almost immediately. In order to defend or support a claim other claims need to be brought into the picture. These subsidiary claims need to be defended, and so on ad infinitum (cf. Govier Philosophy 215-216).

This would seem to provide strong grounds for approaching the burden of proof as a conditional or a prima facie obligation, even if we have yet to determine specifically what kind of conditional obligation it denotes. But even with this preliminary determination in hand, another kind of difficulty arises. As we mentioned above, some cases of argumentation occur against a backdrop where there is a significant overlap in shared beliefs between an arguer and his audience (Brooks and Warren 167-170). If there is a contested claim, the implication is that if an arguer had to discharge a burden of proof with respect to it, he could do so by appealing to claims that an audience would find unobjectionable. That is to say, an arguer could appeal to other beliefs that (as far as the arguer's audience was concerned) had some presumption in their favour.

What concerns me is the fact that cases of argumentation appear to exist that I believe are deeply problematic, especially when these cases are approached from this perspective on the burden of proof articulated above. More to the point, determining when a burden of proof needs to be discharged and whether this can be done in a satisfactory manner seems to strongly presuppose that enough consensus exists between the interlocutors that an arguer, if need be, can appeal to some kind of "common ground" that can serve as the basis for making a successful appeal.
What makes matters especially difficult at this point is that some philosophers have actually suggested that this condition is characteristically absent in many cases of philosophical argumentation *per se*. Consider the following remarks made by philosopher J.J.C. Smart in his article *Why Philosophers Disagree*:

One trouble with philosophy is that philosophers are willing to question everything, not only the premisses of their arguments but the very canons of right reasoning and the methodology of argument. If this is not a recipe for circularity of argument and irresolvable dispute, what is? It is notable that when we do come across an argument that is accepted by pretty well all competent philosophers who consider it carefully, this comes on the edges of philosophy, where philosophy is liable to break away (or has already broken away) into some special science, such as mathematical logic, linguistics, or psychology. Another reason why some philosophical arguments may attain something like universal consent is that they occur in areas where cosmic emotions are not involved. (Smart 71)

Although this outlook presents a rather colourful picture of philosophical disputation, I prefer to adopt the attitude taken by Stanley Cavell when he submits that although philosophical problems may be "unsolvable," there are "better and worse ways of thinking about them" (Cavell 112). Now in any philosophical dispute there will be a central claim: something that the disputants disagree about. If the disputants adopt different positions with regard to this central claim, then we have the impetus for an argument to ensue. Let us begin by imagining the following scenario.

Alexander is in his freshman year at university. Jonathan is a second-year student at the same university. Alexander has not decided on a major and is taking various introductory courses, including an introduction to philosophy. Jonathan, on the other hand, is majoring in philosophy and, as a result, has some knowledge on the subject. On their way back to their dorm from class
Alexander decides to start up a conversation with Jonathan and does so by referring to something he believes he learned in class the day before. Their exchange goes as follows:

Alexander: Did you know that Hume was an Idealist?
Jonathan: I don’t think so, I seem to remember being told in my philosophy class last year that Hume was an Empiricist.
Alexander: I’m pretty sure he was an Idealist.
Jonathan: Well I’ve still got my old textbook back at the dormitory, let’s look it up when we get there.

The central claim in this case is whether David Hume, the philosopher, was an Idealist or an Empiricist. Alexander believes, wrongly in this case, that Hume was an Idealist. Jonathan dissents from this claim and gives his reason for doing so. Fortunately, the issue was one that could be settled by means of a straightforward \textit{ad rem} argument that appealed to an objective fact. In this case the objective fact at issue was recorded in a reliable source of authority — a philosophy textbook.\footnote{In his work \textit{Philosophy and Argument} Henry W. Johnstone, albeit indirectly, defines an \textit{ad rem} argument as one whose truth (like a scientific truth) can be confirmed through an appeal to objective facts (Johnstone \textit{Philosophy} 76). In another work Johnstone goes as far as to argue that “no genuine \textit{argumentum ad rem} is available to philosophy” (Johnstone \textit{Validity} 8). Others, like Smart, seem to think that once something like a genuine \textit{argumentum ad rem} can be presented, the issue then breaks off from philosophy and becomes a special science (Smart 71). This last suggestion seems to stand on the trivial point that philosophy is distinct from science and so questions that lend themselves to a scientific means of adjudication are no longer philosophical by definition. I prefer to stand modestly on the point that \textit{ad rem} arguments are simply very rare in philosophy.}

But not every issue can be adjudicated as straightforwardly as the one illustrated in the previous example. Imagine again that the same two students are now back at their dorm and the subject of religion comes up. Again, Alexander decides to start the conversation by giving Jonathan the benefit of his outlook on the subject, and makes the following claim:

Alexander: If you ask me, no one in his or her right mind seriously believes that God exists.
Jonathan: Oh I don’t know. I seriously believe that God exists and I consider myself to be in my right mind.

Alexander: I’m surprised that an educated person like you believes in the existence of God since there isn’t a shred of good evidence to support such a position.

Jonathan: I guess that depends on what you mean by “good evidence”...

Here the central claim is that no one seriously believes that God exists. Alexander’s implied claim seems to be that God does not exist, at least as far as he is concerned. Again, Jonathan takes a contrary position on this claim (and the implied claim) and the auxiliary issue of what would count as “good evidence” in support of the supposition that God exists is raised. The chances that this particular argument could be adjudicated in a straightforward ad rem fashion, like our previous example, do not look promising. Presuming that both Alexander and Jonathan are relatively well read and open-minded, it is still possible that they have encountered the same corpus of “evidence” and have come away with different assessments as to what the “facts” of the matter are. As Smart noted above, these are the kinds of deep disagreements that can serve to bring philosophical argumentation to a point of irresolvability.

This particular insight into philosophical argumentation has caused some philosophical thinkers to move off in different directions on this issue (cf. Rorty Linguistic 1992; cf. Flew Presumption 1972). Those, like Richard Rorty, who incline toward post-modernism suggest that we give up any pretension that philosophical disputes can be adjudicated on the basis of some overarching external source of authority. They go on to suggest that, if there is anything like a post-modern mode of argument, it needs to adopt a more rhetorical tack and pursue a more indirect means of championing a position that does not need to rely on appeals to a transcendent basis of authority (Rorty Philosophy 394, Leotard).
In addition, these champions of post-modern argumentation also appear to be pushing for a shift in grounds of a different type. Instead of lamenting the unavailability of a transcendent basis of authority to appeal to, they downplay this aspect and stress the virtue of argumentation that is capable of vindicating its claims within a particular context. This approach to argumentation is “particularist” because it assumes that even within a post-modern environment, individual successes in argumentation are a possibility.

Jonathan may never be in a position to provide an argument that is capable of convincing Alexander that his claim concerning theism is false or that his own stance on the issue of theism is true. On the other hand, Jonathan might be in a position to work toward a more modest end. If Alexander has made it clear that he himself finds a particular corpus of evidence on a subject more credible than another, then Jonathan might be in a position to present a case in favour of theism that relies on a particular category of evidence that Alexander might regard as credible. In such a case, Jonathan might be satisfied with the modified goal of supporting his stance on this issue merely to Alexander's satisfaction. Now as hopeful as this shift from absolute adjudication to the pursuit of modified objectives appears, a procedural problem remains that is not easily resolved.

Keeping the second example of argument in mind, this problem can be brought into sharp relief by asking the following question: Which disputant is obligated to advance a credible case to the other in support of his stance on the issue? Should Jonathan be the one to present a credible case in favour of theism to Alexander, or should Alexander have to take the initiative and render his position on the issue credible to Jonathan? The issue becomes particularly thorny when the substantive question, “Does God exist?” is superseded by the procedural question, “Is the theist or the non-theist obligated to present a credible case in favour of his position on this issue?”

Given what we have said earlier about this notion, the question of who ought to bear the burden of proof might not be seen as a rather deep problem at first glance. Why would either side
of a dispute pass up the opportunity to present a credible case in favour of their respective claims and thereby achieve success? This is the question that Archbishop Richard Whateley addressed in his 1846 textbook *Elements of Rhetoric*. In this watershed work, Whateley presents a tactical outlook on the burden of proof that takes as its starting point the view that, in cases of argumentation, an inverse relationship exists between what he called the “presumption” and the burden of proof.

Whateley's position is that the term “presumption” does not refer to the mere probability in favour of a supposition *per se*, but denotes a personal “pre-occupation of ground, as implies that it must stand good till some sufficient reason is adduced against it” (Whateley 112). That is to say there exists, Whateley believed, a pre-established position that serves as the default stance that people adopt on an issue until they are presented with reasons to change their outlook (cf. Quine Web 9-19).

Whateley argues that any issue that can be closely identified with this default stance enjoys what he calls “the presumption” (Whateley 112). Since it is the default stance, no positive case needs to be made out in its favour; it only needs to be defended from being impugned. Whateley's comments are also predicated on the belief that the task of impugning a position on an issue is easier than that of constructing a positive case on its behalf (Whateley 113-114). In this respect, I think Whateley is correct. All things considered, a default stance does seem to enjoy a marginal advantage because an audience's assessment on the outcome of an inconclusive argument tends to incline back toward the default stance. For these reasons, Whateley advises his readers that bearing the burden of proof is something to avoid (Whateley 113).

This leads us into the strategic aspect of this subject. Once the idea of allocating or shifting the burden of proof arises, then several questions arise. Is shifting the burden of proof a good thing or a bad thing? How is such an issue to be decided? If arguers could clearly articulate which stance on an issue ought to be deemed the presumptive or default position, and on what basis this could be
determined, then perhaps deciding where the burden of proof ought to be allocated would be a straightforward matter. But this raises another difficulty. How does someone go about making the case that a particular position ought to be regarded as “the” presumption on a matter?

Possible answers to this last question can vary. In cases where argumentation is constrained by some type of formal procedure, locating the proper locus of presumption on an issue and allocating the burden of proof accordingly appears to be fairly straightforward. For example, in forensic argument (such as formal debate and legal argumentation) there are constituting or constitutive rules that serve *inter alia* to define particular spheres of argument. These constitutive procedures are accepted by those involved as a condition for inclusion and participation in these particular spheres of activity. As a result, serious disputes over procedural matters in forensic argumentation tend to be avoided, or they take place at an entirely separate level of discussion (cf. Allan 628). Cases of ordinary argumentation that are not bound to a particular set of institutionally defined procedures are not so easily managed. *A fortiori*, philosophical arguments also present a difficulty because they too tend to fall within the category of ordinary argumentation.

In addition, there is another matter that can only be given passing acknowledgement right now; this is the relationship between argumentation and epistemological judgement. It does not require an undue amount of effort to point out that argumentative success and the idea of epistemological verisimilitude are not fungible categories. That is to say, achieving the former does not entail achieving the latter. Nevertheless, it is difficult to shake off the notion that argumentation does have some type of epistemological upshot, if only because few other means are available to us for critically testing knowledge claims. Consequently, because ordinary argumentation does appear to have some kind of epistemological upshot and because the burden of proof may affect the material outcome of cases of ordinary argumentation, the issue of who ought to bear the burden of proof in these cases should not be ignored.
In addition, because the issues at the centre of philosophical argumentation are seldom capable of being adjudicated on a simple _ad rem_ basis, a more nuanced approach to this problem of locating a proper locus of presumption and allocating the burden of proof accordingly appears to be required. If, as Whateley maintains, bearing the burden of proof places the bearer at a procedural disadvantage, then it makes sense to take up this burden only when it is necessary and to avoid it, or “shift” it away, when it is not. But making judgements about this particular necessity returns us to the question of who ought to bear the burden of proof in a given instance of ordinary argumentation. If a clear answer to this question cannot be provided, then it is difficult to know what to make of Whateley’s advice, or anyone else’s on this subject for that matter.

But here, it seems to me, is where the usual philosophical approaches to this subject falter somewhat (cf. Rorty _Philosophy_ 373-379). Approaches to this subject that are predicated on the assumption that determining where “the” default stance lies in cases of ordinary argumentation, let alone “ought” to be said to lie, is a straightforward affair, can be seen as taking too much for granted. That is to say, this kind of approach presumes that this kind of determination can be made in a straightforward and uncomplicated fashion. But in cases of ordinary argumentation, especially of the philosophical kind, that are set against a post-modern backdrop, it is becoming harder to uncover uncontroversial common ground upon which to make this kind of determination (Habermas _Pragmatic_ 403-406). Add to this the increasing trend toward the deconstruction of and the problematization of such common grounds for appeal, and the picture is complete (cf. Rorty _Philosophy_ 1979; cf. Derrida 307-330).

This fact does not bode well for current pedagogy in logic, nor for philosophical debate in general since some of the most interesting philosophical disputes tend to get mired down on the issue about what is properly presumptive from the outset. Consequently, sorting out the question of who ought to bear the burden of proof in a given case of ordinary argumentation, or what we have
referred to as the burden of proof issue, turns out to be a more complex affair than we might have expected it to be. That being said, let us examine two different outlooks on how to handle the burden of proof issue.

1. Two Outlooks.

In Antony Flew’s article “The Presumption of Atheism” he proposes that non-theists of a particular stripe ought to enjoy a presumptive or “default advantage” and that theists ought to bear the burden of proof if they want to convince others that theirs is a reasonable position. It is an intriguing attempt on the part of Flew to advance a particular procedural agenda for theistic debate by comparing his procedural proposal for ordinary argumentation to a procedure that can be found in legal argumentation. In short, Flew believes that he can present a credible case for decisively allocating the burden of proof in theistic debate. He believes he can make the case that theists should always bear the burden of proof in theistic debates. Whether Flew’s proposal comes across as credible or not, it does represent a philosophical perspective on the issue of the burden of proof that is by no means rare or unusual, and which merits some attention.

On the other side of this issue, Richard Rorty’s assessment of the ongoing philosophical debate between linguistic realists and anti-realists appears to represent a more pessimistic outlook on the burden of proof issue. A self-described post-modern “liberal ironist,” Rorty is sceptical of the prospects of any effort to advance anything like an objective or transcendent basis for adjudicating philosophical argumentation. This leads him to suggest that philosophical debates in general
represent little more than the ongoing effort by each side to cast the burden of proof onto the other side in a merely eristic\footnote{By “eristic” argument I simply mean to refer to argumentation that is designed to succeed even if spurious reasoning needs to be employed as a means to this end. The etymology of the word has its roots in the Greek word “erizein” meaning to wrangle or quarrel, which in turn has its roots in the Greek word “eris” or strife. See “Eristic” The American Heritage Dictionary.} effort to undermine the opposing position.

I hope to show that both of these perspectives represent extreme positions in the spectrum of possibilities, and that there is a more promising outlook on the burden of proof issue than those represented in the examples that follow. But before we get to this point, we need to carefully survey these particular contributions to this subject in order to reach an informed judgement on the burden of proof issue. That being said, let us start with the example provided by Flew.

1a. \textit{Antony Flew's “The Presumption of Atheism.”}

One perspective on the burden of proof issue can be found in Antony Flew's article “The Presumption of Atheism.” In it, Flew advances the proposal that theistic debates about the existence of God should be conducted in a particular fashion and that the atheist should enjoy what he calls “the presumption of Atheism” (Flew \textit{Presumption} 29-30). That is to say, that the theist should \textit{always} bear the burden of proof in debates where the existence of God is at issue. Let us take a look at an excerpt from Flew's article where his proposal is presented:

\begin{quote}
It is therefore, not only incongruous but also scandalous in matters of life and death, and even of eternal life and death, to maintain that you know either on no grounds at all, or on grounds of a kind which on other and comparatively minor issues you yourself would insist to be inadequate.
\end{quote}
It is by reference to this inescapable demand for grounds that the presumption of atheism is justified. If it is to be established that there is a God, then we have to have good grounds for believing that this is indeed so. Until and unless some such grounds are produced we have literally no reason at all for believing; and in that situation the only reasonable posture must be that of either the negative atheist or agnostic. So the onus of proof has to rest on the proposition. It must be up to them: first, to give whatever sense they choose to the word ‘God’, meeting any objection so defined it would relate to an incoherent pseudoconcept; and, second, to bring forward sufficient reasons to warrant their claim that, in their present sense of the word ‘God’, there is a God. The same applies, with appropriate alterations, if what is to be made out is, not that atheism is known to be true, but only — more modestly — that it can be seen to be at least more or less probable. (Flew *Presumption* 37-38)

There are several suggestions contained in just these two paragraphs. In order to get things clear let us separate out some of the key points advanced above and deal with them separately.

1. Unless we have good grounds for believing in God, we are not entitled to believe that God exists.
2. Because theists “maintain” or assert the proposition that God exists, the burden of proof in theistic debate ought to be borne by them exclusively as a matter of reasonable procedure.
3. Until and unless good grounds are produced to support a belief in God, the only reasonable doxastic stances are negative atheism or agnosticism.

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5 What I mean by the term “doxastic” is that which involves or pertains to the exercise of belief. The root of this term comes from the Greek word *doxa* meaning “belief.” See “Doxa” and “Doxastic Virtues” *The Oxford*
Flew anticipates the theist's reluctance to accept his suggestion for how theistic debate ought to be conducted and so he presents an argument in favour of adopting *mutatis mutandis* a convention of legal argumentation and applying it to philosophical argumentation. As Flew notes:

Counsel for theism no more betrays his client by accepting the framework determined by this presumption [the presumption of atheism] than counsel for the prosecution betrays the state by conceding the legal presumption of innocence.

*(Flew Presumption 34)*

Again, Flew stresses that his proposal is innocent of any charge of illicitly "foisting" atheism on an unsuspecting theist when he points out that:

Theists fear that if once they allow this procedural presumption they will have sold the pass to the atheist enemy. Most especially when the proponent of this procedure happens to be a known opponent of theism, the theist is inclined to mistake it that the procedure itself prejudicially assumes an atheist conclusion. But this, as the comparison with the legal presumption of innocence surely makes clear, is wrong. Such presumptions are procedural and not substantive; they assume no conclusion, either positive or negative. *(Flew Presumption 34)*

Because Flew's proposal claims to mirror the procedure used in criminal legal argumentation in criminal cases, we are told not to be worried. If we have no problems with one procedure, what is the objection to adopting a similar approach elsewhere? The problem is that Flew's proposal is not as purely procedural as he claims it is, and his comparison between legal and theistic argumentation suffers from a critical disanalogy that undermines his claim that his is a merely procedural proposal. But in order to show why this is so, several different points in Flew's article need to be addressed first.

*Companion to Philosophy.*
To begin with, Flew introduces four different positions on theism into his discussion that need to be carefully separated out in order to understand why he thinks that only the theist ought to bear the burden of proof. Let me present these in point form in order to make them clear:

A. Theism – the belief that God exists.
B. Positive Atheism – the belief that God does not exist.
C. Agnosticism - a neutral stance that withholding belief in both A and B.
D. Negative Atheism – a position that rejects the intelligibility of positions A and B and therefore is “completely non-committal” toward A and B and even C.

(cf. Flew Presumption 30)

Flew claims that his position, at least for the purposes of this article, is that of negative atheism. To put it in analytic terms, both negative atheism and agnosticism have the advantage of not being committed to a proposition. They are non-committal positions with respect to the propositions “God exists” and “God does not exist.” Flew maintains on epistemic grounds that belief in $p$ must be justified in order to entitle the holder to believe that $p$. Otherwise, as Flew notes, the only “reasonable posture” must be either “negative atheism or agnosticism” (Flew Presumption 38).

Since much in this debate turns on what Flew means by the term “good grounds” (Flew Presumption 38), we should discuss this a bit. Let us assume for the sake of argument that a person’s doxastic attitude can be expressed on a scale of 0 to 1, with 0 representing a person’s absolute confidence in proposition not $p$ and 1 representing someone’s absolute confidence in $p$. In the middle we would have a measurement of $.5$ to represent a point of indifference or indecision about

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6 Flew is also consistent enough to recognise that belief in ‘not $p$’ under his proposal (positive atheism) also bears a burden of proof when he notes that: “The same applies [the need to supply sufficient reasons for belief] with appropriate alterations, if what is to be made out is, not that atheism is known to be true, but only — more modestly — that it can be seen to be at least more or less probable” (Flew Presumption 38).
proposition $p$. Perhaps the evidence is so evenly balanced (or so evenly lacking) that confidence one way or another cannot be reasonably maintained.

In addition, let us also assume that the probability of a proposition can be readily ascertained and expressed on a 0 to 1 scale, with 0 representing the absolute improbability of a proposition being true (it would be, simply put, false) and 1 representing the absolute truth of a proposition, that it is necessarily true. Again, a probability of .5 for a proposition would represent a balance of evidence both for and against $p$. Normally, we could say that a reasonable person proportions their degree of assent to a proposition in accord with its probability. If the probability in favour of $p$ being true is a mere .01, then a high degree of confidence in the truth of $p$ seems unwarranted. It would appear that we are not entitled, in this case, to reasonably believe that $p$.

On the other side, if the probability in favour of $p$ were something like .99, then it would seem that we are entitled to assent to $p$. For propositions with a probability of .5 it would seem at first blush that the most reasonable doxastic posture would be to withhold or suspend belief with respect to $p$ since the evidence is counterbalanced. A decision in either direction appears to be unwarranted. Traditionally this represents the point of view of the sceptic. But philosophers, and especially epistemologists, are divided as to whether the sceptic’s position is the only reasonable posture a person can adopt toward propositions whose measure of probability rests in the middle.

If we limit the act of belief to the mere act of mental assent, there seems to be no reason against permitting a person to believe that $p$ in cases where the level of probability in favour of $p$ is no more or less than .5. For example, I do not know whether the next Prime Minister of this

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7 It should be added that reasonable people also take into account various non-probabilistic and non-epistemic considerations when they proportion their degree of assent to a proposition. My account concentrates on a speaker’s personal assessment of a belief’s probability from an epistemic standpoint. Naturally any fair and complete assessment of the reasonableness of any person’s assent to a given proposition should take into account all the reasons that a speaker would bring to such an assessment. See Note 9 below.
country will be a Liberal or a Conservative. If the usual political indicators of such events fail to present evidence that is telling for one outcome or another, why am I not free to believe that the next P.M. will be a Conservative? Is this particular act of assent a grievous error? Must I necessarily refrain from assenting to \( p \) or not \( p \)?

The answer to this question is different depending on which position you take on the issue of how to handle propositions in which the measure of probability for and against them is evenly split or "counterbalanced." In epistemology there are two classic positions that take a different stance on this issue depending on what they see as the highest imperative for a reasonable person to follow in the pursuit of knowledge. One position sees the goal of avoiding error as the highest epistemic imperative. In order to meet this objective, it advocates not assenting to any proposition that fails to exceed a probability measurement of \( 0.5 \) so as to minimise the possibility of assenting to a proposition that turns out to be false. This position has its philosophical roots in W.K. Clifford's standard work *The Ethics of Belief* and might best be described as "epistemic conservatism." The epistemic conservative maintains that for propositions whose level of probability is \( 0.5 \) or less, our epistemic duty is to refrain from assenting to \( p \).

On the other hand, there is nothing patently unreasonable in the decision to make the goal of acquiring truth a fundamental goal. If a person's goal is not to disbelieve a true proposition, they will set the threshold for assent at \( 0.5 \) or more for assenting to \( p \). The stress in this instance will be on the believer's epistemic right in cases where the probability of \( p \) is \( 0.5 \) or more to assent to \( p \), if they choose to do so. This position can be labelled "epistemic libertarianism" and can be traced back to William James' classic essay "The Will to Believe" where he takes issue with Clifford's conservative epistemic perspective (James 1-31).

Both positions have existed side by side for some time in epistemology and I think the most sagacious thinking on this issue would recognise that there is something of merit in both
approaches. This same thinking would also recognise that neither epistemological outlook (always assenting or always dissenting in indeterminate cases) could have complete hegemony over the other without running into serious practical difficulties. Nevertheless, these positions represent the epistemic issues that are usually in the background whenever one philosopher or another cautions us about how we ought to exercise our belief. With this in mind, let us return to Flew's admonition to us about good grounds for believing:

Until and unless some such grounds are produced we have literally no reason at all for believing; and in that situation the only reasonable posture must be that of either the negative atheist or agnostic. So the onus of proof has to rest on the proposition. It must be up to them: first, to give whatever sense they choose to the word 'God', meeting any objection that so defined it would relate to an incoherent pseudoconcept; and, second, to bring forward sufficient reasons to warrant their claim that, in their present sense of the word 'God', there is a God. (Flew Presumption 38)

Although Flew makes no mention of a specific threshold for "good grounds," I think it is safe to say that his inclination is toward epistemic conservatism. I think this is especially important because it influences his assessment of the outcome of theistic debates. Setting aside non-epistemic reasons for belief in this context, a theistic debate in which the theist fails to discharge the burden

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8 There are all kinds of reasons for belief along with epistemic ones. A person can have moral and prudential reasons for believing that p. If someone assures me that his pit bull has never bitten anyone before and my chief personal goal is to avoid being mauled by a strong breed of dog, I will likely choose to believe that the animal is a possible threat to me. I think this would be my position even if on epistemic grounds it would seem that there is a prima facie epistemic case for believing that the dog will not hurt me. In this case, prudential reasons for belief end up taking precedence over purely epistemic considerations. In his essay "The Will to Believe" William James makes the definitive case for the legitimacy of reasoning non-epistemically. To take another example, even if I have good epistemic reasons to believe that my family home will never catch fire and burn to the ground, a good case can be made that I would be morally wrong to embrace this belief, especially if this belief led me to neglect another moral duty. For example, if I believed in this strongly enough to forego buying home insurance. It is interesting to note that Clifford's argument in his essay "The Ethics of Belief" in favour of his conservative ethics of belief employs a prudential argument to drive its point home.
of proof to the satisfaction of the agnostic could be seen as reaching an indeterminate outcome. The theist has failed to make a plausible case and the negative theist has not made a case in favour of his position either. The pivotal question here is what to make of the theist's failure to discharge the burden of proof.

Based on his comments concerning the reasonable exercise of belief, Flew appears to be suggesting that the theist who fails to discharge the burden of proof should seriously reconsider his position since he maintains that we ought not to believe propositions for which there is inadequate evidence. The implicit suggestion here is that the only reasonable posture at this juncture for the theist is "negative atheism or agnosticism" (Flew Presumption 38). But this conclusion is predicated on the supposition that everyone in the debate is proceeding from a position of doxastic conservatism. It assumes that both the atheist and the theist will exercise the same epistemic judgement and interpret failures at discharging the burden of proof as support for the contention that we are not entitled to believe in the proposition that "God exists." But should Flew be allowed to presume this? I am not inclined to think so for a couple of reasons.

First, since this shared orientation in epistemic values is pivotal to Flew's argument, it would seem that more than a few words of admonishment on how we ought to exercise belief are in order. At the very least, Flew's argument appears to stand in need of a supplemental explanation as to why it would be unreasonable for the theist to maintain a doxastically liberal stance in the event of an inconclusive outcome, otherwise Flew's argument seems to lose some of its force. Second, Flew seems to undercut his own case here when he discusses the legal presumption of innocence. In his own words:

If for you it is more important that no guilty person should ever be acquitted than that no innocent person should ever be convicted, then for you a presumption of
guilt must be the rational policy. For you, with your preference structure, a presumption of innocence becomes simply irrational. (Flew Presumption 37)

Flew then goes on to note, using rather loaded language, his opposition to a party that he believes would implement such a policy, namely, one that follows Leninism. He states that he would stand opposed to their policies, but then Flew adds the following remark about Leninist political policy.

Yet, I cannot say that for them, once granted their scale of values, it is irrational. (Flew Presumption 37)

Strange that those individuals with political values that are antithetical to Flew's are permitted to be recognised as rational agents, while theists who would refuse to interpret the failure to discharge the burden of proof as telling against their position, because of their commitment to epistemic libertarianism, are considered by Flew to be adopting an irrational stance. Moreover, another epistemic problem stems from Flew's preference for "negative atheism" over atheism or agnosticism. At first glance it would seem that the agnostic stance is all that Flew needs to maintain his non-committal posture that is so necessary for the success of his proposal. But Flew seems to want to place the theist at an added disadvantage from the outset by refusing to even acknowledge that the proposition that "God exists" is "cognitively meaningful" (cf. Martin 29).

As a result, the theist in Flew's proposal must argue that the proposition he assents to is intelligible and meaningful, and then argue that this proposition is true or at least probable. But in his zeal to station himself as the proponent of a non-committal stance, Flew neglects to consider that his negative atheism is predicated on a belief in the proposition that, "God talk is cognitively meaningless." But this proposition is by no means self-evident; therefore it seems that before anyone is justified in believing in such a proposition, they need to present good grounds for doing
so. So much for negative atheism representing a “completely non-committal” position (Flew *Presumption 30*).

Once we lay out Flew’s case along epistemic lines we can see where the problems lie. His claim to be advocating a purely procedural proposal loses its credibility once his substantive bias in favour of epistemic conservatism is uncovered. If the theist clearheadedly maintains an epistemically libertarian stance, then nothing compels him to accept Flew’s suggestion that a failure on the part of a theist to discharge the burden of proof in a theistic debate is telling against theism.

But what I find the most interesting about this argument is its overall strategy, although without a close look at the epistemic issues the important points of Flew’s argument strategy are easy to miss. It is interesting to note that theists and positive atheists both bear a burden of proof under Flew’s proposal. As we noted above, Flew carefully positions himself by espousing what he believes is the most non-committal position in this circumstance. It could be argued that Flew still has the option of reverting to an agnostic stance in order to avoid the awkwardness associated with negative atheism that we pointed out above. While I think this might solve one difficulty, it still leaves the problem of what we could call “epistemic value bias” unresolved.

I should quickly add that by calling Flew’s epistemic value orientation a “bias” I do not intend this to be taken in the pejorative sense. There is nothing wrong with having any kind of bias *per se* since a bias is simply another way of affirming that someone has a preference for one thing over another. The problem with Flew’s bias in this instance is that it is something that is presumed rather than argued for. Moreover, because this particular bias plays such a pivotal role in his proposal, we simply cannot allow him to beg the question on this point.

But this is exactly what Flew does. This is where his comparison with legal argumentation becomes critical. Flew argues that his proposed procedure for theistic debate is similar to the procedure of legal debate. The idea here being that if we are open to one particular procedure, then
we should be open to a similar procedure. But this analogical argument glosses over one critical point of disanalogy. In legal argumentation the presumption of innocence is maintained on the basis of certain moral-political value commitments. Within the English Common Law tradition, as we will see in Chapter Three, this commitment is usually expressed by the adage that "It is better that 10 guilty men be set free than to punish an innocent man" (Morton and Hutchison 4). This expresses a moral-political commitment on the part of a state and its citizens to avoid punishing the innocent (cf. Morton and Hutchison 4-5).

As citizens of a country that espouses English Common Law, individuals are presumed to share this particular underlying moral-political value. This kind of implicit constitutional commitment on the part of a state's citizens is what makes the "presumption of innocence" an acceptable procedural component of legal argumentation. Unless Flew can present a credible case that his epistemic conservatism does or should enjoy the same kind of universal acceptability as the moral-political injunction against unjust punishment in English Common Law, his analogy is in danger of collapsing.

What is important about Flew's argument for my purposes is his effort to decisively allocate the burden of proof to the theist. Flew accomplishes this by convincing the theist to espouse the presumption of atheism, but presumably only procedurally. But if the outcome of this procedure is not telling against the negative atheist, then the implied conclusion is that theism is an unreasonable position to maintain. But as our epistemological analysis revealed above, this assumes that a single epistemic value orientation is operative in this situation. The absence of a perspicuous argument in favour of a universal acceptance of this particular value orientation (epistemic conservatism) and the

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9 The argument here is actually one based on the principle of universalizability in moral theory, which suggests that if we ascribe a particular quality to A, then we are obligated to ascribe this quality to B, if A and B are similar in all the relevant aspects. For example, if we call a particular act "good," then we would appear to be obligated to call another act that is like it in all relevant aspects "good" also, unless we can point to a relevant difference between the two
use of a faulty analogy gives the impression that Flew is trying to foist his epistemic value orientation on unsuspecting theists.

From a philosophical standpoint, the issue of epistemic value orientation seems to be pivotal here. If a single epistemic value orientation can be advanced and maintained in this case, then Flew can make a plausible case for his presumption of atheism and for interpreting failures to discharge the burden of proof as telling against theism in favour of non-theism. From a general perspective we can see that in cases where the burden of proof is a response to a particular presumption, it is important to get a clear view of the process that gives rise to these particular presumptions and the role they play in the process of ordinary argumentation.

Processes that serve to firmly establish or even entrench presumptions tend to result in a decisive allocation of the burden of proof. For the most part, as we shall see in more detail later, the allocation of the burden of proof in criminal cases under the Common Law tends not to be seen as an issue open to serious question. It is unlikely that the presumption of innocence and the implicit moral-political value that served to help establish and eventually entrench this procedural presumption in law will undergo any serious challenge or revision, especially within the Common Law tradition.

While this is not the whole story about proof burden allocation, it is a significant piece of the puzzle. It represents, I believe, a typically philosophical approach to handling the issue of who ought to bear the burden of proof. Since, as we noted earlier, the burden of proof in ordinary argumentation can be seen as standing in proximate relation to a presumption on an issue and normally serves as a challenge to the same, it is not surprising that those with a vested interest in making a case in favour of decisively allocating the burden to a particular side of a debate would vie

actions (Mackie 83-102, Hare Freedom 7-29).
to present a case for the universal acceptance of a particular presumption that favours their position (cf. Whateley 113).

Presumably, this could be done in two ways. First, one could argue that a credible case in favour of accepting a particular presumption exists already and merely needs to be pointed out. In my brief discussion of legal argumentation I pointed to the pre-existing grounds for accepting the legal presumption of innocence that would persuade readers who live in areas of the world marked by an acceptance of the tradition of English Common Law. Second, someone could attempt to present a compelling case in favour of adopting a particular presumption. The more compelling the case, the firmer the presumption would be established. In turn, the more established the presumption, the better the case for decisively allocating the burden of proof to the other side.

The point here is to come up with an argument for how we ought to allocate the burden of proof in ordinary argumentation that does not wind up being hopelessly controversial. The philosophical solution of attempting to present a compelling case for the universal adoption of a particular presumption is becoming more and more difficult to maintain. As we have seen, recent philosophy seems to be preoccupied with a critical view to its own practices (cf. Rorty Philosophy 1979; cf Habermas Pragmatik 403-406). As a result, sound uncontroversial arguments in favour of universally adopting a particular presumption are getting hard to come by. With this in mind, let us examine another outlook on this topic.

1b. The Postmodern Abyss or “Rorty’s Scenario.”

Another perspective on philosophical argumentation is found in Richard Rorty’s discussion of the development of linguistic philosophy located in the introduction to his work The Linguistic Turn. Although Rorty lays out several strands of historical development in his discussion of the rise
of linguistic philosophy, I intend to cover only enough ground to flesh out his pronouncement on the burden of proof that he gives in his introduction. The general backdrop for Rorty's narrative is the ongoing debate between philosophers who have embraced the "linguistic turn," and those who have not. At the risk of speaking too broadly, the methodological issue in this case can be summarised with a description that runs something like this.

Traditionally philosophers have attempted to work out what they have seen as "problems" or "puzzles" that arise in our ordinary understanding of the world. A catalogue of these "problems of philosophy" can be found in any standard introductory text in the field. Historically speaking, some of these problems have been shown to be quite amenable to certain methodological approaches. As Smart noted, in such cases these areas of inquiry have "broken away" from philosophy proper and have developed into independent disciplines (Smart 71). However, other problems appear as intractable now as when they were first raised. Ethics, philosophical topics in religion, epistemology, and topics in metaphysics are frequently cited as areas of inquiry where persistent and intractable problems remain.

Linguistic philosophers argue that these problems persist because philosophy has taken an unreflective and uncritical approach to its own methods. Succinctly put, this approach has traditionally consisted of the effort to "dig beneath" ordinary language in order to get to the underlying reality of such matters. What complicates this story is the fact that Post-Wittgensteinian thinkers no longer accept this particular methodological approach in an uncritical fashion. Another complication in this narrative is the putative absence of any independent means of adjudicating this issue.

As a result of these particular Wittgensteinian insights, Rorty suggests that some thinkers, linguistic philosophers especially, have been open to what he calls "methodological nominalism" which he explicates as follows:
... As I shall use this term, methodological nominalism is the view that all the questions which philosophers have asked about concepts, subsistent universals, or “natures” which (a) cannot be answered by empirical inquiry concerning the behavior of properties of particulars subsumed under such concepts, universals, or natures, and which (b) can be answered in some way, can be answered by answering questions about the use of linguistic expressions, and in no other way. (Rorty Linguistic 11) [Emphasis Mine]

This approach not only abandons any hope of uncovering the reality that lies beneath the surface of ordinary language; it also turns away from the presupposition that we can make sense of this very idea itself. This particular change in outlook constitutes what Rorty calls the “linguistic turn” in philosophy (Rorty Linguistic 8-10). What is interesting is that this particular methodological presupposition of linguistic philosophy is itself a substantive thesis that is difficult to marshal up a positive case for. To put it another way, how does one go about demonstrating that “no other way” of answering such questions will ever be forthcoming? The short answer is: It cannot be done. So how do linguistic philosophers manage to embrace an undemonstrable substantive position and stand their ground against their critics? Rorty’s answer to this question is as follows:

Here, then we have a presupposition of linguistic philosophy, one which is capable of being defended only by throwing the burden of proof on the opponent and asking for (a) a question about the nature of a particular concept which is not so answerable, and (b) criteria for judging answers to this question. (Rorty Linguistic 11) [Emphasis Mine]

Linguistic philosophy defends itself by asking for an example of a philosophical question that cannot be answered by means of methodological nominalism, and for a criterion to evaluate any possible answer that is not question begging. As Rorty explains it, such a counter-example is unlikely to be forthcoming. As he goes on to explain:
Debates about the existence of concepts or universals, or about whether we possess faculties for inspecting them directly, are irrelevant to this issue. When choosing a philosophical method, it is not helpful to be told that one is capable of intuited universals, or that man’s intellect is “a cognitive power ... irreducible to all of his sensitive faculties.” One needs to know whether one has intuited universals correctly, or whether one’s intellect is performing its irreducible function properly. (Rorty Linguistic 11)

With Wittgenstein clearly in mind, Rorty goes on to state that:

... no clear procedure has ever been put forward for determining whether or not a word did or did not adequately express a concept, or whether or not a sentence adequately expressed a thought. (Rorty Linguistic 11)

Once this Wittgensteinian point goes unchallenged, the debate between linguistic philosophers and their opponents reaches a standoff. Linguistic philosophers, frustrated by traditional attempts to uncover substantive answers that account for language use, can only recommend that these efforts be abandoned in favour of concentrating on language use itself. It is a pragmatic move, which is something that is not lost on Rorty, that is not recommended on the basis of any “deep” insight, but on the possibility that future prospects might be more fruitful once this change in philosophical gestalt is adopted. Opponents of linguistic philosophy are hesitant to adopt this tack and see this manoeuvre as tantamount to abandoning any effort at robust philosophical inquiry. Attempts at disparaging the process of linguistic philosophy notwithstanding, the proof-shifting manoeuvre on the part of linguistic philosophy has been largely successful.10 Its success can be attributed to a degree of shared recognition, on both sides of the debate, that Wittgenstein’s

10 For an example of an interesting attempt at deconstructing linguistic philosophy along the same lines as it has taken to deconstruct philosophy proper, I would recommend Ernest Gellner’s work Words and Things.
critique of the notion of a trans-linguistic basis for understanding the world (cf. Wittgenstein
Philosophical § 114), and the use of language that goes on within it, is an idea with some merit.

As a result, Rorty depicts the debate between linguistic philosophers and their critics as an elaborate run-around, with the critics of linguistic philosophy questioning and disparaging linguistic philosophy's methodological orientation and linguistic philosophers asking their critics to put up a feasible alternative. It is a fascinating narrative in which linguistic philosophy stands its ground by successfully shifting the burden of proof onto its opponents (cf. Rorty Philosophy 279). This particular insight into the development of linguistic philosophy leads Rorty to make the following pronouncement that merits quoting in full:

For, despite their dubious metaphilosophical programs, writers like Russell, Carnap, Wittgenstein, Ryle, Austin, and a host of others have succeeded in forcing those who wish to propound the traditional problems to admit that they can no longer be put forward in the traditional formulations. These writers have not, to be sure, done what they have hoped to do. They have not provided knock-down, once-and-for-all demonstrations of meaninglessness, conceptual confusion, or misuse of language on the part of philosophers they have criticised. But this does not matter.

In light of the considerations about presuppositionlessness advanced in Sections 1 and 2 above, it would be astonishing if they had done any of these things. *Philosophical discussion, by the nature of the subject, is such that the best one can hope for is to put the burden of proof on one's opponent.* Linguistic philosophy, over the last thirty years, has succeeded in putting the entire philosophical tradition, from Parmenides through Descartes and Hume to Bradley and Whitehead, on the defensive. It has done so by a careful scrutiny of the ways in which traditional philosophers have used language in the formulation of their problems. (Rorty *Linguistic 33*) [Emphasis Mine]
It is not surprising that Rorty makes the inductive leap of characterising philosophical discussion in general along the lines outlined in his narrative about the emergence of linguistic philosophy in particular. In an earlier section entitled “The Search for a Neutral Standpoint,” Rorty raises the issue of the absence of any type of trans-rational standpoint capable of informing philosophical discussion or supplying an uncontroversial criterion for adjudicating such exchanges. It should come as no surprise then to find that Rorty is inclined to take the leap into the void and point to the phenomena of unabashed proof shifting as philosophical discussion’s “best hope” (Rorty Linguistic 33). I cannot say that Rorty’s pronouncement evokes my unqualified approval; but after working on this issue for some time, I am in a position to be somewhat sympathetic to the sentiment behind his remarks here.

I present both of these examples in an effort to flesh out what I think is at issue when the topic of the burden of proof, or proof shifting is raised. In Flew’s case, we are presented with a vivid picture of a proposal where an attempt is made to promote one set of epistemic standards over another. It is, of course, Flew’s conspicuous commitment to a single overarching conception of what is reasonable or rational with respect to epistemic values that makes his argument a good example of a traditional philosophical approach to this issue. Such a traditional approach sees the burden of proof issue as a puzzle that can be solved quite easily once we manage to locate transcendent grounds to which both sides can appeal.

Oddly enough, Rorty’s stance at the other end of the spectrum also embraces this traditional picture of how philosophical discussions are managed, at least implicitly. But in the story that Rorty tells, the absence of a transcendent basis for adjudicating cases of ordinary argumentation renders the traditional solution otiose. All we are left with are exercises in pure eristics with each side jockeying for advantage at the expense of its opponent. I do not think it takes a lot of imagination
to see that this places Rorty's view on the burden of proof issue at the other end of the spectrum from the conservative stance reflected in Flew's position.

Instead of attempting to critique each of these approaches separately, I think we can cut to the chase by setting these extremes against each other, since each is the most felicitous critic of the other. Flew's adherence to the notion of a singular and exclusive criterion for determining what is reasonable with respect to belief succeeds only through a willful exercise of naiveté about the influence of post-modern consciousness in contemporary thought. By "post-modern" I mean to refer to the Leotardian sense of this term that defines it as "incredulity toward metanarratives" (Leotard xxiv). Flew's conception of reasonableness with respect to belief is persuasive, so long as no one seriously challenges his conservatively oriented epistemic value bias.

On the other hand, Rorty's claim that philosophical discussion is nothing but tactics "all the way down," loses much of its grip on our imagination when we extend the implications of his thinking to their logical consequence. Taken seriously, Rorty's pronouncement takes us to a place where all philosophical discussion is nothing but a narrow exercise in Wittgensteinian language games. To wit, if you are in a particular language game — you are in, and if you are not — you are not, and never the twain shall meet. The result is that philosophical exchanges are reduced to nothing but isolated pockets of idiolectic activity. Philosophical discussion, understood as a shared effort of rational inquiry into a subject, then falls into what I will call the "post-modern abyss" — never to be seen again.

The problem with this particular critique of philosophical communication is that it is so sweeping and subversive that its proponent winds up being hoisted by his own petard. Curiously, it has been pointed out that whenever Rorty gets close to this point of dissonance in his thought, he deftly switches tone and "re-describes" his pronouncements as "suggestions" and "playful remarks" that are not to be awarded so much gravity (Hall 138). Consequently, what begins as a bold
pronouncement on the nature of philosophical discussion eventually becomes downgraded, in a pinch, to an innocuous commentary.

At the very least, the dissonance between these views should give my own inquiry enough elbow room to suggest that if there is a satisfactory philosophical treatment of the burden of proof issue to be found, it will lie somewhere between the positions discussed in this chapter. With this in mind, I move onto a survey of some of the treatments of this topic from a philosophical standpoint in order to see what ground has already been covered and in order to assess this particular collection of received wisdom on the subject of the burden of proof.
Chapter 2

Casting About For a Philosophical Response

A. Philosophy's Traditional Outlook.

In no uncertain terms, philosophy's treatment of the notion of the burden of proof has tended to be uneven. Perhaps this is because the notion of the burden of proof does not fit comfortably within the traditional catalogue of philosophical interests. Moreover, I do not think it is an exercise in logic bashing to note that from a pedagogical standpoint there has not been a great deal of preoccupation with the dynamics of argumentation. Philosophy has traditionally been interested in arguments per se and the study of entailment. Insights into argument practice have generally been considered to be more apposite subject matter for rhetoric. This is unfortunate since the relationship between philosophy and rhetoric has not always been a congenial one.

Historically, philosophy has taken many of its cues on this matter from Plato's Gorgias and has accepted the demarcation between rhetoric and philosophy as running along the lines of "style versus substance." To put not too fine a point on it, philosophy has tended to accept the historical verdict that rhetoric is chiefly characterised by an interest in "mere" locutionary style at the neglect of substance. Fortunately, recent academic developments have served to mitigate this judgement.2

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1 Socrates refuses to call rhetoric an art because, as he sees it, its subject matter is not an object of knowledge. It is, he says, merely the ability that a speaker may have for flattering an audience that impersonates or passes for an art. (Gorgias 464-465).

2 For an interesting look at an alternative perspective on the "rhetoric versus philosophy" outlook I would recommend that the reader consult Edward Schiappa's work The Beginnings of Rhetorical Theory in Classical Greece.
In what is to follow, I want to examine and critically comment on some of the contributions that philosophers have made on the topic of the burden of proof. Following the traditional division in categories, I will divide my comments into two parts; I will look at formal logic first, and then at informal logic.

1. Formal Logic.

As the term itself conveys, formal logic is the study of argument form. As a result, it should come as no surprise that the topic of the burden of proof is seldom covered in formal logic. C.L. Hamblin, in his watershed work on fallacies, even noted sardonically that the idea of the burden of proof is “too often regarded as no business of the logician” (Hamblin 162). This is not to say that formal logic has no contribution to make whatsoever. On the contrary, I think it has a very interesting indirect contribution to make in this area in the way it goes about framing its subject matter. Formal logic begins by laying out what it considers to be the basic structure of an argument. This is the premise-conclusion framework into which an argument is cast. When formal logic seeks to analyse a sample of argument presented in natural language, it performs three operations.

The first operation consists in the effort to make all the parts of an argument explicit so they can be subject to analysis. This is especially important in cases where natural language arguments are examined since these tend to be enthymematic; that is to say, they rely on hidden premises (Copi 231-233). The second operation separates these parts into two basic categories; namely, it identifies the premise(s), and distinguishes this part from the conclusion. In the third operation, formal logicians then “translate” these units of ordinary language into symbolic notation in order to concentrate on the underlying form or structure of an argument. These operations are performed in order to facilitate the process of pure or abstract analysis. Once ordinary arguments cast in natural
language pass through this process, then they become a subject of interest for formal logicians.

However, what gets left behind by these operations has, on occasion, been a subject of interest to other thinkers. For example, the subject of enthymematic arguments and hidden premises has been of interest to informal logicians and argumentation theorists for some time. These particular specialists see a hidden dynamic that is at work in cases of ordinary argumentation. Henry W. Johnstone Jr., in his work *Philosophy and Argument*, presents an interesting outlook on this dynamic when he notes that the process of rendering premises explicit has the ability to change the nature of an argument. Rendering an argument's premises explicit can have the effect of lessening its force or, possibly, nullifying their force entirely.

As Johnstone notes:

> The question arises whether it is possible to lay out a philosophical argument with the premises on one side and the conclusion on the other without doing an injustice to the argument. One reason for thinking that this is not possible is a phenomenon that Gilbert Ryle has called attention to. When a philosopher attempts to argue from explicit premises, “the debate instantly moves back a step. The philosophical point at issue is seen to be lodged ... in those pretended premises themselves.” (Johnstone *Philosophy* 58)

Although rendering premises explicit might assist reconstructions in formal logic, Johnstone argues that in ordinary argumentation it has the practical effect of leaving an argument denuded, vulnerable, and open to attack. This insight might go a long way toward providing an answer to the question of why cases of philosophical argumentation appear to be especially difficult when it comes to reaching anything like a resolute conclusion. As Smart quite rightly points out, among philosophers there exists a tendency to “question everything.” As David Hall notes in his book *Richard Rorty: Prophet and Poet of the New Pragmatism*, one of the effects of extending the scope
of questioning indefinitely has been to introduce into philosophy an element of what he calls "hyperconsciousness." Hall goes on to describes this sense of hyperconsciousness when he states:

Ours is, largely due to Hegel himself, too self-conscious an age. We live in a world of warring second intentions. Already in the sixteenth century, Montaigne complained that there were more "books on books than books on things." In our age there are more books on theories than books on things. (Hall 51)

I think the term "warring second intentions" is a good description of what happens to philosophical discussions that move from their original subject matter to the underlying premises of such arguments, and the issues that surround them. As Hall notes, ours is an atmosphere of inquiry where the premise-conclusion structure of philosophical arguments is becoming a more conspicuous feature of argumentation itself. This sense of hyperconsciousness, when combined with a distrust of "meta-narratives" designed to impose allegiance to a particular set of norms (Leotard xxiv), epistemic or otherwise, ends up stultifying philosophical arguments.

This particular insight, made perspicuous by formal logic, goes a long way toward helping us understand how the "politics of suspicion" and "warring second intentions" have become central features of contemporary philosophical argumentation (Hall 51). Unfortunately, the tools of analysis provided by formal logic leave the interested thinker with little to go on with respect to how to deal with the burden of proof issue as it is found in contemporary philosophical argumentation. With this in mind, let us see what informal logic can tell us about our topic of interest.

2. **Informal Logic.**

Broadly put, informal logic has tended to turn its attention to those aspects of argument not covered by formal logic. In this section, I want to concentrate on the burden of proof as it relates to
a subdivision within informal logic, namely, fallacy theory. Proof shifting, or perhaps it might be more accurate to say illicit proof shifting, is occasionally addressed in various expositions on logical fallacies. Speaking historically, it has not played much of a role in earlier textbooks that tend to follow the Aristotelian catalogue of fallacies with little variance (Hamblin 9). Philosophers who are in the business of writing logic textbooks have recently begun to see the need to move outside the boundary of the “Aristotelian catalogue” in order to adapt to the changing exigencies of actual argumentation practice.

Consequently, room has opened up for examinations of the burden of proof issue, and the “fallacy” of illicitly shifting the burden of proof is showing up more frequently in pedagogical literature (Walton Informal 166; van Eemeren and Grootendorst Argumentation 120-122). However, the increase in attention to this topic is a bit of a mixed blessing. It appears to be good insofar as the main consumers of pedagogical literature, mainly students, are becoming more and more aware of the burden of proof issue and its role in argumentation. Unfortunately, because pedagogical works on fallacies are usually of an introductory nature, their treatment of the topic of the burden of proof tends to be brief. Here are just a few sample quotations on the burden of proof that illustrate this point:

1. “The notion of the burden of proof is that of the obligation, or duty, to support one’s claims.” (Govier 169)
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.” (Waller 35)
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." (Moore and Parker 193-194)

As we noted in the first chapter, the first two statements connect the burden of proof with the “act” of making a claim. The third connects the burden of proof with “a claim’s initial plausibility” as understood against the context of general background knowledge. The first two pronouncements are rather scant and the last pronouncement fails to go into detail about how such terms as “initial plausibility” and “background knowledge” are to be understood. What complicates this part of our analysis is the fact that fallacy theory is still struggling to present itself as a unified field in its own right and to break away from Hamblin’s charge that the standard treatment has been little more than a perennial and unsystematic rehash of the Aristotelian catalogue of fallacies (Hamblin 9-49).

Because of the lack of unity in fallacy theory, it is hard to anticipate what many informal logicians would say about the burden of proof even if they were inclined to go into this subject in more detail. Without a systematic approach to fallacy theory in hand, it is hard to determine where the subject of the burden of proof falls on the map of philosophical interests, or to say with any certainty what role it ought to play. For now, I will conclude this part of my discussion by leaving this particular matter open and move on to some of the more extended contributions that I have found from philosophers who have written articles on this topic.

3. Professional Articles.

I have to confess that I have yet to come across anything resembling a *locus classicus* on the
burden of proof issue in book form. On the other hand, one can find several articles on the topic of
the burden of proof in periodical literature. They are not a unified corpus of collective wisdom, but
when viewed together they do contain some interesting insights that have something to contribute
to this inquiry. Here are three of the most focused and seminal articles that I have found on the
issue of the burden of proof. I should also say at this point that my intent is not to give a complete
exposition of the views of any of these authors, but to highlight those elements in their exposition
that I think are particularly noteworthy for my own inquiry into the burden of proof issue.


Brown starts off his article with a summary dismissal of the idea that there exists a set of
general, indisputable statements that could serve in any type of “onus-assigning” capacity (Brown
74). He then wonders if something else could serve the same function instead:

If there is no set of propositions commonly accepted as onus assigning by all
philosophers, there may still be some propositions or procedural principles that are
commonly accepted by philosophers who find themselves at certain stages of
particular arguments, or at typical points within specific kinds of arguments. Thus it
may be a mistake to search for general propositions by which onus can be assigned.
Suppose that the legitimacy of onus-assignment depends on less general
considerations: for example, on each side agreeing that the premises of one side give
rise to a problem not produced by the premises of its opponent. (Brown 75)

Brown introduces three examples designed to suggest what these “less general”
considerations for the assignment of onus might look like. Interestingly, all three proposals are of a
procedural nature. Brown’s first example cites a proposal in favour of invoking a general policy that
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presumes univocality with respect to the use of terms within an argument. The implication would seem to be that, under this particular presumption, a charge of equivocation would *ipso facto* bear a burden of proof, whereas "normal" discourse would be accepted as the default stance.

Brown's second example cites a conservative policy for handling challenges to scientific theories within the scientific community. Counterexamples to a scientific theory, the suggestion is made, should not be admitted as a refutation of a scientific theory until it has been established that there is no "nontrivial auxiliary assumption" capable of preserving the integrity of the theory (Brown 77). In other words, bearers of counterexamples to established and presumptively favoured scientific theories would *eo ipso* bear a burden of proof and be required to show that there is no nontrivial auxiliary assumption that is capable of preserving the integrity of the theory.

Brown's third example points to various time-honoured principles such as the principle of verification and the principle of parsimony (Occam's Razor) as possible default principles to be applied when competing hypotheses are vying for acceptance. In other words, if two different hypothesis are competing for acceptance within the scientific community, champions of the hypothesis that is deemed to be wanting with respect to these principles (relative to the other hypothesis) would be obligated to bear the burden of proof, if their hypothesis is to merit acceptance.

In principle, there seems to be nothing wrong with using any of these methodological principles. Naturally, individuals advancing proposals that ran up against these principles would bear the burden of proof. But as Brown notes, there is a practical limitation here. In order for these principles to serve in an *onus*-assigning capacity, they need to be applied in an uncontroversial fashion. This can only be accomplished by introducing guidelines that can serve to regulate the application of these *onus*-assigning principles. But in order for this to work these guidelines *themselves* need to be seen as uncontroversial constraints upon the application of these *onus*-assigning
principles. Of course rendering these guidelines uncontroversial would require additional supplemental principles. Of course, by the time we reach this point our reasoning is starting to move in the direction of an infinite regress, or perhaps a vicious circle. As a result, to the extent that these principles need to be supplemented in order to ensure their uncontroversial application, their effectiveness as an onus-assigning heuristic procedure is stultified.

This difficulty, in conjunction with Brown’s earlier comments on the absence of any substantive propositions that could serve in an uncontroversial onus-assigning capacity, leads him to speculate on the possibility of a third alternative. This alternative suggests that the capacity for onus-assignment is located neither with a set of special propositions, nor with a set of special procedural principles, but rather, as Brown puts it:

There are, it seems, only onus-assigning contexts or situations in which disputants find themselves, and in which they may legitimately lay a burden of proof upon one another. What is accepted or rejected in a given debate is the specific use to which a certain proposition or principle is put. The plausibility of that specific use depends upon the other premisses and conclusions with which the proposition or principle in question is conjoined. Since in theory any of them is open to attack, it is often no defense of a proposition to claim that it casts a burden of proof on its attacker. The premises by which this ascription is supported can themselves be rejected. But in advance of a given discussion we cannot know, except in the most general and unhelpful way which propositions and principles will lay a burden of proof against all future disputants.

Yet that is what we attempt to do when we advance the claims of particular propositions in ignorance of our opponents’ countering moves. If we describe a
specific set of such moves — a set of propositions or principles forming one side of a debate — then given this set we can legitimately ascribe onus. (Brown 81)

I believe this is one of the most insightful comments on the subject of the burden of proof. It acknowledges, rather candidly, the futility of any effort to establish a priori a set of conditions that could serve as a basis for allocating the burden of proof in an uncontroversial fashion. The idea that a fitting allocation of the burden of proof cannot bypass the process of empirically surveying and critically assessing the particulars of each argument on a case by case basis moves our discussion of the burden of proof issue in a more productive direction.

Brown then moves on to draw several consequences for philosophical discussion that are related to this need to attend to specific empirical details that he finds to be integral to the burden of proof issue. In one case, Brown uses the example of a lecturer going through Moore’s proof for the existence of an external world with his students. Brown asks where the burden of proof should lie in this case. Brown reconstructs Moore’s argument as saying there is a prima facie case for the contention that the external world exists, and that any contrary thesis bears the burden of proof.

Should the students accept this argument, and the implicit allocation of onus that follows, or should they adopt the tactic of turning Moore’s argument on its head and critically bear down on Moore’s prima facie case for presupposing the existence of an external world? Brown then makes what I find to be a fascinating statement. Its implied message is as intriguing as its overt meaning.

As Brown notes:

When the lecturer learns which claims the students take to be in doubt he will also learn what is to be proved. When he knows that, he will be in a position to judge the plausibility of the supporting argument. Yet the initial burden of proof still lies on the side with the weaker evidence — in the present case, that of the students. But if this is all that the assignment of onus comes to, then it has very limited uses as a
weapon in argument. When most wanted — to overthrow an opponent who rejects
an apparently conclusive argument — it cannot be employed, since onus cannot be
forced on a clear-headed but unwilling antagonist. For he can always appeal in
defense to a difference in premisses, if his other views permit this. (Brown 82)

There is a great deal to this statement. To begin with, it highlights a weakness in the view
that sees proof shifting à la Whateley, as an argumentative strategy. As Brown points out, and as our
analysis of Flew’s argument confirms, a clear-headed speaker can simply fasten upon a difference in
premises in a defensive effort to bring the discussion to a stand-off, provided “his other views
permit this” (Brown 82). In the event that they do not, Brown suggests that the participant
recognise that:

... laying the burden on him is merely to point out what his own arguments commit
him to establishing, and sometimes to indicate his errors in reasoning and his trifling
with evidence. So that if a philosopher is clear-headed he lays the burden of proof
on himself. In a successful discussion each participant recognizes this, and his
arguments are designed to discharge his burden. If the onus is laid on him by others,
and he agrees, it will be because he recognizes the logical powers of the propositions,
and the weight of evidence of the claims, to which he is committed. Onus-ascription,
then, is backward-looking, not forward looking. It is the register of agreement
achieved, or assumed, rather than being the reliable prediction of the future of a
dispute. Explicitly raising the question of onus is simply a way of flagging the
progress of an argument. (Brown 82)

This difficulty leads Brown to suggest that philosophers should adopt a different attitude
toward the burden of proof. Brown’s comments suggest that philosophers should adopt something
like an a posteriori approach to the burden of proof. I think that this suggestion has some merit and
is the beginning of a more nuanced approach to the burden of proof issue. But the devil is in the
details here, where Brown notes that: “If the onus is laid on him by others, \textit{and he agrees} [emphasis
mine] it will be because he recognises the logical powers of the propositions, and the weight of
evidence of the claims, to which he is committed.” (Brown 82)

But this is exactly the point at issue. The most interesting cases of ordinary argumentation
involving the burden of proof arise when someone does not agree with someone else in this respect.
Judgements about which propositions a participant “ought” to recognise can, on occasion, stand as much in need of supplemental support as the principles for \textit{onus}-ascription that Brown refers to earlier in his article. Without any further explanation, the mere presence of a proposition with “logical power” or a “weighty evidence claim” is also an insufficient basis for \textit{onus}-ascription. Perhaps a definite judgement could be pronounced upon an individual’s doxastic posture by appealing to an objective third party perspective or on the basis of trans-rational grounds with respect to this last point (Rorty \textit{Philosophy} 394, Leotard xxiv). But as we noted in the previous chapter, presenting a credible argument in favour of this kind of appeal that avoids coming across as just another case of special pleading or question begging, is tricky business.

Nevertheless, I find Brown’s comment on \textit{onus}-ascription as being “backward looking, not
forward-looking”, particularly noteworthy. It points to something I want to explore in more depth
later on; namely, that there is an empirical aspect of the burden of proof issue and that this is not peripheral to the subject. Returning to his example, Brown notes that once the professor “learns which claims the students take to be in doubt, he will learn what is to be proved” (Brown 82). In fact, Brown ends his article by noting that the notion of \textit{onus}-assignment is intimately related to such questions as:
What counts as an acceptable argument in this field? What sorts of premisses are plausible? What sorts of considerations are telling? What sorts of procedural principles are allowable? (Brown 82)

I think it is noteworthy that almost all of these are empirical questions. Consequently, I think if a robust, systematic, and realistic approach to the burden of proof issue is to be uncovered, it will have to follow Brown in this respect and acknowledge that an empirical approach to this issue will have to be part of the overall picture. With this in mind, I want to move on to the next article, one by James Cargile. His ruminations illustrate that the subject of the burden of proof can take on a distinctly epistemological bent.

3b. James Cargile’s “On the Burden of Proof.”

Cargile gets off to a good start by dealing with a common misconception surrounding the burden of proof notion. As Cargile notes, it is not uncommon to encounter the suggestion, or what he calls the “common principle,” that the burden of proof “lies with the affirmative” (Cargile 61-62). This is misleading for several reasons. I am inclined to think that this particular maxim is a misinterpretation of the legal maxim _ei incumbit probatio qui dicit, non qui negat_. Translated literally this states: “the onus of proof lies on him who affirms, not on him who denies.” It may be that at some point in the crossover of the burden of proof notion from law to non-specialised discourse it became easy to assume that any position that involved a denial or a negation was exempt from having to bear a burden of proof.

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3 This is a case where attention to detail pays since most legal scholars are quick to caution their readers not to be misled by the literal translation of this maxim into making certain assumptions about the burden of proof based merely on grammar. The idea that this maxim is meant to convey is that he who “asserts” a proposition (whether
Along this same line, it may also have been easy to overlook the equivocation that occurs when the term “affirm” in this instance is taken to refer to statements cast in the grammatical affirmative. As we noted earlier, this assumption also tends to be bolstered by a questionable argument that suggests that statements in a specific logical form (universal negative) are difficult to substantiate. As a result, it is not uncommon to see this observation being treated as a simple algorithm that can be applied without qualification to mean that in any exchange where someone advances a claim formulated in the “affirmative,” that individual bears the burden of proof ipso facto.

I think Cargile’s response to this suggestion clears up this particular confusion in non-legal discourse when he notes that:

‘Affirmative’ here must surely be taken to mean that the burden lies with one who positively asserts, that is affirms. It cannot be that one avoids the burden of proof by saying that Sam is not married but incurs it by saying that he is a bachelor, just because the former is grammatically negative while the latter is affirmative. Perhaps this is not as sure as it should be. There is the unfortunate slogan ‘You can’t prove a negative’. This could be combined with the thought that people should not be assigned obligations to do impossible things, to yield the common principle as a result. (Cargile 61)

The common principle Cargile refers to in the above quotation is, as we have noted, the maxim that the burden of proof always lies with the affirmative (Cargile 61). As a means of reorienting our thinking on this point he suggests that:

One response would be to move from the idea of being grammatically affirmative to that of being logically or really affirmative when expressed in a logically perfect

positive or negative) is the one who must prove it (Cutler 268-269, Nokes 469, Cross and Tapper 123-124 and Keane 50).
language. The distinction between logical and grammatical form is a valuable idea to study, and some will hold that it offers a hope of determining whether a given proposition is or is not truly negative. Nonetheless, it does not support the view that no negative is provable. It was also common to say that unrestricted universal affirmatives (All A’s are B’s) could not be proven (if they were not analytic).

The best interpretation of the common principle is in terms of affirming as asserting positively, whether what is asserted is ‘affirmative’ or not. The final position of the common principle is that when someone positively asserts that p, he acquires the obligation to defend his claim. (Cargile 62)

Unfortunately, Cargile does not discuss the ground or the nature of this obligation except to say that this needs to be understood “... relative to defending an affirmation in the course of a dialectical discussion, where there is some presumption of an obligation to participate” (Cargile 62). Further on in the next sentence Cargile notes only that this is a “vague requirement” leaving us at a bit of a loss on this particular point (Cargile 62).

Cargile then introduces the fictitious case of Jones who is an advocate of cruelty directed specifically against the homeless and Smith who opposes Jones’ position on this subject. Jones pitches his ideas on “urban blight” and how to deal with the homeless (by setting them on fire) to Smith who is repulsed and declines to respond to Jones by engaging him in argument. Moreover, Jones is disappointed that Smith refuses to reply to the case he has presented. Does Smith have a burden of proof here? No, says Cargile because his position enjoys “a proper presumption that recreational torture is evil...” (Cargile 64). Is Smith wrong in declining to even talk to Jones about this? Yes and no, depending on which aspect of the situation you want to emphasise.

Obviously, Smith seems to be to be on firm moral grounds for declining to, as the expression goes, “dignify” Jones’ proposal with a reasoned response. Engaging Jones might be
taken as a sign of tacit acknowledgement of the legitimacy of what Jones is proposing. On the other hand, there is another line of thought that suggests that Smith’s non-engagement does a disservice to Jones. It unfairly deprives him of an opportunity to subject his views to critical scrutiny and possibly to get some enlightenment on the subject. Which response is appropriate, Cargile says, depends on the standards that are appropriate to the context (Cargile 64).

Cargile then suggests that there is a “distinction between moral duty and ‘logical’ or ‘dialectical duty’” (Cargile 64). I think this notion of a dialectical duty is an important one that deserves more attention. Unfortunately, Cargile does not go on to give this notion much more analysis. He does say that in cases where assertions are made in a “non-cognitive” fashion there is no dialectical or logical duty appended to them, but again, no further explanation on this point is provided.

Cargile then goes on to raise the subject of the burden of proof and its relation to “received opinion” (Cargile 67). This, I think, merits scrutiny because it appears to be another area where the simplest formulation of the issue is often the only one considered. As Cargile notes:

It is sometimes said that one who makes a claim contrary to received opinion has the burden of proof. This may be encouraged by the fact that one who accepts received opinion is not thereby making a claim, but rather, is just going along with one. So he does not qualify for the burden of proof by the common principle, while the defier of popular opinion does. But it is not being opposed to popular opinion that should bring the burden, but rather, being committed to a position. (Cargile 67-68) [Emphasis Mine.]

Cargile then goes on to note that even though an individual will find it easier to defend his position when it conforms with popular opinion, this should not be taken to mean that “he has less of an obligation to defend it” (Cargile 68). As he goes on to note:
The strength or degree of the obligation should not be confused with the difficulty of fulfilling it. The position just cited, that a burden of proof should fall on one who is advocating a position contrary to received opinion, is related to the position that at least a heavier burden should fall on such a one. This involves the foregoing ambiguity. The burden may in fact be heavier, in the sense that the position may be harder to sell. But there is no reason why the obligation should be stronger merely for that reason.

When people are regarded as justified in assuming that p, then one motive for making the burden of proof for not-p 'heavy' is the feeling that success at carrying it would mean that the common presumption to the contrary is no longer justified. This feeling may be due in part to confusing skill in argument with justification.

(Cargile 68)

I think Cargile is right in suggesting that the burden of proof should be attached to "being committed to a position." This subtler view of the burden of proof would seem to preclude evasions of the burden of proof on the narrow grounds that an individual has not performed the mere act of issuing a "positive" assertion or that their stance already reflects received opinion. I think even a casual examination of the mechanics of actual exchanges shows that individuals whose doxastic stance is aligned with the consensus gentium still have some kind of dialectical responsibility.

Naturally, it is safe to assume that if an arguer's stance runs contrary to the consensus gentium they will have to work harder at championing a stance than they would if their position were in accord with it. But Cargile notes that we should not confuse this particular difficulty with the business of justification. If I understand Cargile correctly, the argument here is that we should not draw a close identification between the weight of responsibility a speaker takes on in the act of seeking to persuade another and the weight of responsibility a speaker takes on in the act of
providing justification or grounds. I do not think there is anything wrong with drawing this
distinction \textit{per se}. Cargile goes on to heighten this distinction when he notes:

\begin{quote}
It may seem, though, that even if we distinguish skilful sophistry from genuine
justification, the difference is not so clear when we come to \textit{real proof}. Real proof, it
may be said, is a guarantee of justification. The idea of a contrast between proving as
satisfying the standards of the audience, and some more context independent notion
of proof may be valuable. (Cargile 69) [Emphasis Mine]
\end{quote}

It is regrettable that Cargile does not go on to give concrete examples of these “real proofs.”

Nevertheless, I think Cargile’s attempt at demarcation here bears noting, and it is by no means new.

As we noted earlier, this picture that contrasts audience persuasion against some form of discourse
rooted in a “real proof” can be traced back to Plato. I suspect that part of the reason it has persisted
relates to the fear of being at the mercy of a mob mentality or of being involuntarily subjected to the
“tyranny of the majority.” I want to be able to say to myself in the middle of a flat earth society
meeting that, in spite of any possible loss in dialectical advantage, I am not bereft of justificational
grounds. Such “real proofs” appear to function as the philosophical bulwark against this particular
anxiety. Unfortunately, as we learned from our discussion of Rorty’s outlook on the burden of
proof issue, this philosophical bulwark is a device that is becoming harder and harder to rely on to
save the dialectical day.

That being said, I want to take a look at one last quote from Cargile that makes an
appearance more as an aside in thought when he says:

\begin{quote}
... in the dialectical method, there is a burden associated with making an assertion
which is akin to the burden of proof – the burden of explaining your utterance, of
making its meaning, if any, clear. In Plato’s dialogues, the discussion frequently
\end{quote}
focuses on the question whether some participant, in uttering some words, has been saying anything at all, and if so, what it is that he has said. (Cargile 70-71)

Instead of taking up this particular point right now, I will simply issue a promissory comment and say that there is more truth in this statement than first meets the eye. In fact, I suspect that the relationship between “explaining your utterance [and] of making its meaning ... clear” is intimately connected to the burden of proof issue, but this particular discussion can wait until later. Right now, I want to move on to Douglas Walton’s article on the burden of proof.

3c. Douglas Walton’s “The Burden of Proof.”

What I want to emphasise in this quick look at Walton’s article is his claim that the burden of proof plays a key role in how we ought to construe fallacies such as ad hominem, petitio principii, and ad ignorantiam. What is most intriguing about Walton’s exposition of the burden of proof and its relation to these informal fallacies is his suggestion that some, so called, fallacies and fallacious moves in argumentation are not always illicit manoeuvres in argumentation. In fact, some arguments that have traditionally been cast as fallacies can be shown, in certain cases, to involve perfectly reasonable persuasive strategies. Strategies that, as Walton notes, “reflect subtle shifts in the burden of proof that can be powerfully effective, yet go unnoticed in the heat of a dispute (Walton Burden 235). With that said, let us begin.

(1) The Burden of Proof and Argumentum Ad Hominem.

Walton cites Richard Whateley’s example of an ad hominem where a sportsman who is accused of being cruel to hares and trout by hunting them, questions his critic’s own meat eating
practices that ultimately involve cruelty to “harmless cattle.” Walton explains the *ad hominem* and the role the burden of proof plays in this “fallacy” as follows:

The rhetorical effectiveness of the sportsman’s rejoinder as a ploy in argument is to be sought in the way it shifts the burden of proof onto the critic. By appearing to make the critic responsible for the very type of act he condemns, the question puts the critic on the defensive. For the question has made the critic appear to be inconsistent in word and deed. But if the critic gives in to this demand to justify his own non-vegetarian practices, he will have succumbed to the ploy. What he should do instead is to shift the burden of proof back onto the question by citing the failure of parallel between these two propositions: (1) the barbarity in hunting, and (2) the eating of meat. For no inconsistency between these two propositions has yet been established. The burden of proof to show that there is an inconsistency remains on the questioner. (Walton *Burden* 236)

I think Walton is right here. The problem is not that the sportsman has pointed to an inconsistency in practice on the part of a critic; the problem is that this is presumed rather than demonstrated. It is an illegitimate shift in the burden of proof, but this does not call into question the act of proof shifting itself. By implication, it leaves room for us to presume that there is a licit proof-shifting manoeuvre to be found here. If the critic’s inconsistency were evident or made evident by the sportsman, then we would appear to have an interesting example of proof shifting as a legitimate argumentational manoeuvre. Generally, because proof shifting has tended to be depicted as a “fallacious” manoeuvre *per se*, proof shifting has traditionally been seen as a bad thing in general. But Walton’s discussion of the fallacy of *ad hominem* leaves us room to consider the possibility that not every classified example of “fallacious” proof shifting is necessarily spurious. Once we see this, we are well on our way to accepting the possibility that not all cases of proof
shifting are illicit manoeuvres.

(2) The Burden of Proof and *Petitio Principii*.

In cases of *petitio principii* or begging the question, the burden of proof plays an even more pivotal role. After taking care to note that there is a difference between begging the question and arguing in a circle, and that in cases of circular reasoning there are vicious and benign examples, Walton makes the following statement about the *petitio principii* and the burden of proof:

... begging the question would appear to be best construed as an argument that should be open to serious criticism whenever it occurs in reasoned dialogue. The reason for this thesis is that the very idea of begging the question is linked to the context of dialogue where there is an obligation to prove. Begging the question is inappropriate precisely because the thesis to be argued for is “begged for” instead of being proved. The basic idea behind this failure is that an arguer must *prove or give evidence* for his conclusion. He cannot just ask for it, in this context, as an assumption to be freely granted by his opponent in dialogue at no cost. By this conception, begging the question is an improper move whenever it occurs in reasoned persuasive dialogue. An argument that begs the question could be formally valid, but it is not useful to persuade a rational opponent in dialogue precisely because it fails to meet the requirement of burden of proof. So it is the burden of proof that makes begging the question a species of vicious circle. (Walton *Burden* 236-237)

I do not find anything questionable about this description of the role of the burden of proof as it stands. In fact, it is interesting to see the notion of the burden of proof identified as an integral feature of an explanation that sets out to account for why a particular instance of a fallacy is an
example of illicit reasoning.

(3) The Burden of Proof and *Argumentum Ad Ignorantiam.*

As a general rule, *ad ignorantiam* arguments are described as erroneous attempts to draw a conclusion about the truth of a proposition on the basis of a putative inability to make a determination about the truth value assessment of a contrary proposition. In plain language, *ad ignorantiam* arguments assume that if A is not shown to be false, then we are free to assume A is true. In their crudest form, it is not hard to see why these arguments are sometimes cast as forms of erroneous reasoning. This can be seen by borrowing an example from Walton’s own textbook in informal logic:

Some philosophers have tried to disprove the existence of God, but they have always failed.

Therefore, we can conclude with certainty that God exists. (Walton *Informal* 44)

Cast in this bald form, the erroneous leap is quite conspicuous. This error becomes compounded when this kind of reasoning is used to generate some presumption in favour of the conclusion in order to shift the burden of proof onto anyone holding a contrary position on the issue. But when the conclusion is cast in a more moderate form, it becomes difficult to sort out fallacious cases from reasonable exercises in judgement in a simple fashion. Many day to day judgements need to be made on the basis of less than perfect knowledge under conditions of uncertainty. In such cases, *ad ignorantiam* inferences are not always mistakes in reasoning. The examples Walton provides in his textbook, and in his article “The Burden of Proof,” illustrate this point. The first example is from his textbook:
Mr. X has never been found guilty of breaches of security, or of any connections with the KGB, even though the security service has checked his record.

Therefore, Mr. X is not a KGB spy. (Walton Informal 45)

If the conclusion is interpreted in apodictic terms, for example, that we can determine for certain that Mr. X. is not a spy, then it is a spurious inference. But if the conclusion is taken as expressing a more probabilistic assessment, for example, that it is only likely or probable that Mr X. is not a spy, then the inference appears to take on a different look. What more could one expect from a security check than to uncover no evidence of a security breach? And if this would not be enough for an employer to reach some kind of tentative conclusion about the security risk that Mr. X poses, what would the practical alternative be?

The other example Walton uses to show that, under conditions of uncertainty, non-conclusive but reasonable prudential *ad ignorantiam* inferences can be made is his “loaded gun” example. Quoting from his article:

Suppose Larry picks up a gun, but has no information on whether the gun is loaded or not. It may make sense for him to presume that the gun is, or may be loaded, and to suit his actions of handling the gun to accord with that presumption. (Walton Burden 238)

Since Larry absolutely cannot afford to be wrong about this issue, it is prudent for him to presume that the gun is loaded, even if he has no “positive evidence that the gun is loaded” (Burden 238). Although this inference on Larry’s part resembles an *ad ignorantiam* argument, it does not appear to be a spurious piece of reasoning. This leads Walton to suggest, and I think here rightly so, that *ad ignorantiam* inferences may not always be cases of erroneous reasoning per se.

When *ad ignorantiam* arguments are taken as an expression of strict logical entailment, the result is usually a case of illicit inference. But in cases where an *ad ignorantiam* is advanced as a less
rigorous form of inference, the result is not always an illegitimate form of reasoning. Only a shrewd exercise in judgement can sort out reasonable *ad ignorantiam* arguments from less reasonable ones. Consequently, it seems possible that legitimate shifts in the burden of proof can, under the right circumstances, take place by means of a reasonable reliance on an *ad ignorantiam* argument. This should give us some pause for thought before we agree with suggestions that proof shifting that rests on an *ad ignorantiam* argument is always a fallacious and spurious manoeuvre *per se*.

In certain matters, it seems, uncovering what is of central importance involves attending closely to the particulars involved. Walton’s point is that enlightened judgements about fallacious reasoning need to be performed on a case by case basis. Success in doing this will be more a matter of exercising shrewd judgement about the relevant particulars in a given argument, than of relying on a standard formulation in an unreflective fashion.

I think this is an important point that carries over to understanding the notion of the burden of proof. It goes a long way toward making the point about how recommendations about the burden of proof ought to be handled. Such recommendations need to be formulated carefully and it needs to be recognised that no one single rule or policy is going to apply smoothly across the board to individual cases of ordinary argumentation.

Before moving on I want to say that even though I have surveyed these various sources and have taken issue with some of the points they raise, this should not be taken as a sign on my part that these sources have not got it right. On the contrary, I think these authors have provided detailed and enlightening descriptions of what they found to be interesting about the notion of the burden of proof.

Some thinkers, like Brown, prefer to approach the burden of proof issue from an empirical perspective. Their judgement about how the burden of proof issue ought to be handled seeks to be informed by an *a posteriori* approach to the *de facto* conditions surrounding each case of
argumentation where the burden of proof is an issue. Other thinkers, like Cargile, approach it from a traditional perspective and prefer to handle the burden of proof issue by suggesting that we appeal to the notion of an objective or "real" proof. Some, like Walton, want to discriminate between legitimate and illegitimate shifts in the burden of proof. They see the notion of the burden of proof as coming to play an integral and *bona fide* role in the elaboration of a theory of fallacy within recent approaches to informal logic (cf. Johnson).

The overall result of surveying these particular contributions is an interesting, but disconnected collage of insights and advice. If I had arbitrarily wished to extend this chapter, I could easily have included insights from several articles written from a descriptive perspective by communication theorists who also see the burden of proof as a live topic within their domain of interest (Cronkhite; Parrish; Pence; Day). But the end result, I believe, would be much the same.

What is needed, I believe, is a systematic approach to the burden of proof issue that is capable of putting all of these insights into perspective. Just as importantly, this perspective needs to be informed by other areas of inquiry. The notion of the burden of proof is neither a modern invention nor was it generated out of an intellectual vacuum. It has a fairly long and intricate intellectual history that can only be appreciated by those who are willing to look beyond the confines of any one discipline. With this outlook in mind let us look at one developing field of study that attempts to bring several resources to bear on the subject of argumentation and, consequently, to the subject of the burden of proof.


To begin with, modern argumentation theory appears to represent a break with those philosophical approaches to the study of argumentation that have traditionally relied on the
resources of FDL, "Formal Deductive Logic," which concentrates its focus on the study of implication (Perelman and Olbrechts-Tyteca, 10, Toulmin 6-7, Johnson 90-94) and on an approach to fallacy theory that uncritically relies on the Aristotelian catalogue of fallacies and the enumeration of these in lieu of a systematic handling of this subject (Hamblin).

Responses to this focus and this approach can be divided into several camps. First, there are those who have worked to reform the study of informal logic (Walton Informal; Govier Practical, Philosophy; Johnson). Second, there are those who look to rhetorical theory for inspiration for approaching the study of argumentation (Gilbert Colescent; Willard Theory; Argumentation). Third, the proponents of Discourse Analysis focus on argumentative exchanges from a particularist and descriptivist standpoint to determine which rules and norms the participants appear be following (Jackson and Jacobs). Fourth, there is the Pragma-Dialectical Approach to Argumentation Theory that has been developed by Amsterdam theorists Frans van Eemeren and Rob Grootendorst. They see argumentation as being constrained by a set of norms that serve to facilitate, and ultimately achieve, the resolution of disputes (van Eemeren and Grootendorst Rationale, Rules, Argumentation, Speech).

Although all of these approaches have interesting things to say about argumentation, and in some cases about the burden of proof, I will limit my own survey of this field to an examination of what van Eemeren and Grootendorst have to say on the subject of the burden of proof since a consideration of their approach is considered by some to be de rigueur when it comes to Argumentation Theory.
4a. Van Eemeren and Grootendorst’s Pragma-Dialectical Approach to Argumentative Discussions.

In their 1984 Handbook on Argumentation Theory, van Eemeren and Grootendorst critically surveyed several preliminary attempts by scholars in various fields to propose a systematic approach to the study of argumentation practice, taking seriously the challenge found in Hamblin’s work on fallacies (Hamblin 1970). This was done with an eye toward developing a unified theory of fallacies to supplement and possibly replace the traditional ad hoc reliance on the Aristotelian catalogue of fallacies.

In a later work entitled Argumentation, Communications and Fallacies, van Eemeren and Grootendorst take up this challenge in a positive fashion by advancing what they call a “pragma-dialectical” approach to argumentation. This approach sees an argument as a “complex speech act” that is advanced by a speaker in order to achieve the pragmatic goal of contributing to “the resolution of a difference of opinion, or dispute” (van Eemeren and Grootendorst Argumentation 10). In addition to this, van Eemeren and Grootendorst also advance for consideration a set of rules that, if followed, also serve to facilitate the pragmatic goal of resolving disputes in a reasonable fashion. Fallacies, van Eemeren and Grootendorst claim, can be construed as systematic breaches of one or more of these rules (van Eemeren and Grootendorst Argumentation).

What is interesting for our purposes is that van Eemeren and Grootendorst’s second pragma-dialectical rule for argumentation appears to relate directly to burden of proof. If, as they suggest, the burden of proof arises as a matter of following a particular pragma-dialectical rule of argumentation, then an examination of these rules and their status within argumentation could lead us toward some interesting insights into the notion of the burden of proof. First, this kind of examination could provide us with some insight into how the burden of proof obligation arises for
an arguer. Second, such an examination could go some way toward explaining what makes this obligation normative for an arguer. With this in mind, let us begin by surveying the rules themselves.

(1) The Pragma-Dialectical Rules for Argumentative Discussions.

The pragma-dialectical rules that are advocated by van Eemeren and Grootendorst for the governing of argumentative exchanges are as follows:

1. Parties must not prevent each other from advancing or casting doubt on standpoints.
2. Whoever advances a standpoint is obligated to defend it if asked to do so.
3. An attack on a standpoint must relate to the standpoint that has actually been advanced by the protagonist.
4. A standpoint may be defended only by advancing argumentation relating to that standpoint.
5. A person can be held to the premises that he leaves implicit.
6. A standpoint must be regarded as conclusively defended if the defence takes place by means of arguments belonging to the common starting point.
7. A standpoint must be regarded as conclusively defended if the defence takes place by means of arguments in which a commonly accepted scheme of argumentation is correctly applied.
8. The arguments used in a discursive text must be valid or capable of being validated by the explicitization of one or more unexpressed premises.
9. A failed defence must result in the protagonist withdrawing his standpoint and a successful defence in the antagonist withdrawing his doubt about the standpoint.

10. Formulations must be neither puzzlingly vague nor confusingly ambiguous, and must be interpreted as accurately as possible. *(Rationale 281-282)*

(2) **On the Burden of Proof from a Pragma-Dialectical Perspective.**

According to van Eemeren and Grootendorst, these rules are designed to facilitate a critical but fair exchange of viewpoints between persons who wish to critically exchange and compare points of view with a goal to minimising dissent (cf. *Rules* 505). This is not to say that complete compliance with these rules will amount to a satisfactory argument. They are necessary, but not sufficient conditions for the satisfactory presentation of an argument. Now the question as to how the burden of proof arises for an arguer appears to be related to the role an arguer takes up within an argumentational context (cf. Rescher).

Under van Eemeren and Grootendorst's view there is a strict division of role functions in argumentation. Arguers who advance or champion a particular claim are referred to as **protagonists**; those arguers whose function is restricted to calling these claims into question are referred to as **antagonists** *(Rationale 283)*. From a pragma-dialectical perspective determining where the burden of proof ought to be properly allocated is simply a matter of determining (in each case) who has taken up the role of protagonist with regard to a particular claim that constitutes the point at issue.

Once the participants have adopted these roles, they can then agree to place themselves under van Eemeren and Grootendorst's proposed rules in order to satisfactorily resolve their
dispute. The rationale provided in support of proposing these rules casts the burden of proof in an interesting light. The overall tenor of their discussion of the rationale behind their pragma-dialectical rules would seem to suggest that what renders these rules normative for a speaker relates chiefly to a specific function they perform. Let us see what they have to say on this point.

(3) **The Rationale Behind the Pragma-Dialectical Rules.**

In what is to follow, I intend to adopt the simple hermeneutic convention of taking van Eemeren and Grootendorst’s comments on the status of their pragma-dialectical rules in general to apply *a fortiori* to their second pragma-dialectical rule. That is, unless anything is presented that would explicitly suggest that this particular rule should be treated in an exceptional manner. That being said, I want to turn the reader’s immediate attention to some of the statements that van Eemeren and Grootendorst have made that appear to set the stage for an assessment of how they intend their “pragma-dialectical” rules to be taken.

In their 1984 work *Speech Acts in Argumentative Discussions* van Eemeren and Grootendorst assert the following “statement of purpose:”

> We have therefore made it [our] statement of purpose to draw up a code of conduct for rational discussants. The practical value of the rules to be proposed depends on the degree to which they further the *resolution of disputes*. (van Eemeren and Grootendorst *Speech* 151)

They go on to add:

> The rules formulated in this chapter are designed to further the resolution of disputes about expressed opinions by means of argumentative discussions. In other words, they are intended to enable language users to conduct themselves as rational
discussants, and they are also calculated to prevent anything that might hinder or obstruct the resolution of a dispute. (van Eemeren and Grootendorst *Speech* 151)

These comments appear to set the general theme concerning how the pragma-dialectical rules are to be understood. It is a goal-oriented picture of rule utility and it suggests why these rules should be binding for participants in argumentation. This would appear to be confirmed in their 1988 article *Rules for Argumentation in Dialogues* where van Eemeren and Grootendorst state that “the argumentation rules form an adequate procedure for resolving disputes which is *intersubjectively* valid for discussants wishing to solve their disputes (*Rules* 508) [Emphasis Mine].

In fact, this inter-subjective aspect of the pragma-dialectical rules appears to contribute to van Eemeren and Grootendorst’s adoption of a “two part criterion” for the reasonable resolution of disputes; namely, that of *problem solving validity* and *conventional validity*. This dual sense of validity is explicated along the following lines:

This means that the discussion and argumentation rules which together form the procedure put forward in dialectical argumentation theory, should on the one hand be checked for their adequacy regarding the resolution of disputes, and on the other for their intersubjective acceptability for the discussants. With regard to argumentation this means that soundness should be measured against the degree to which the argumentation can contribute towards the resolution of the dispute, as well as against the degree to which it is acceptable to the discussants who wish to resolve the dispute. (van Eemeren and Grootendorst *Rationale* 280)

These paired senses of validity and a sense of exactly how they are to be taken are discussed later on in the same commentary with the following affirmation:

The claim of acceptability which we attribute to these rules is not based in any way on metaphysical necessity, but on their suitability to do the job for which they are
intended: the resolution of disputes. The rules do not derive their acceptability from some external source of personal authority or sacrosanct origin. Their acceptability should rest on their effectiveness when applied. Because the rules were developed exactly for the purpose of resolving disputes, they should in principle be optimally acceptable to those whose first and foremost aim is to resolve a dispute. This means that the rationale for accepting these dialectical rules as conventionally valid, is philosophically speaking, *pragmatic*. Pragmatists judge the acceptability of rules on the extent to which they appear successful in solving the problems they wish to solve. In fact, to them a rule is a rule only if it performs a function in the achievement of objectives set by the pragmatist. (*Rationale* 285)

This, as clearly as any statement offered on this subject by van Eemeren and Grootendorst, appears to encapsulate the general attitude that we are encouraged to adopt with respect to the pragma-dialectical rules. These rules are binding because they "do the job for which they are intended" and (as we have seen) the specific job for which they are intended is facilitating the resolution of disputes. Add to this the suggestion that in order for the pragma-dialectical rules to even be seen as rules *perse* they must be inter-subjectively ratified among the participants, and the picture of how we ought to construe van Eemeren and Grootendorst's pragma-dialectical rules is more or less complete — or is it?

(4) *A Closer Look.*

So far, this approach accounts for who ought to bear the burden of proof in an argumentational context and what can be accomplished by an arguer who does so, but it does not explain specifically "why" a protagonist incurs a burden of proof except to say that bearing the
burden of proof seems to have a certain degree of instrumental value for a speaker who wishes to engage in an argumentative discussion.

But in van Eemeren and Grootendorst's work *Speech Acts in Argumentative Discussions* a slightly different view of what makes their second pragma-dialectical rule binding for a speaker can also be found. Under this view, van Eemeren and Grootendorst suggest that in advancing a claim, or propounding a point of view, a speaker is advancing an "assertive" or a speech act complex that is functionally equivalent to what Searle has called an "assertive" (van Eemeren and Grootendorst *Speech* 96). Invoking Searle's (and Grice's) approach to speech act theory, van Eemeren and Grootendorst suggest that in the act of issuing an assertive, an arguer incurs an obligation to defend his statement as a matter of meeting the preparatory condition necessary for performing this particular kind of speech act (van Eemeren and Grootendorst *Speech* 159; cf. Searle *Speech* 64).

What is interesting, for our purposes, is that at this point we appear to be presented with an outlook on what makes the burden of proof normative for a speaker that runs deeper than van Eemeren and Grootendorst's pragmatic description of what makes their pragma-dialectical rules obligatory for a speaker. From a pragmatic perspective, the pragma-dialectical rules for rational discussion appear to be advanced as "proposals that come into force when they have been accepted by the language users who fulfil the roles of protagonist and antagonist" (van Eemeren and Grootendorst *Speech* 163).

Under the pragmatic view, these rules represent a convention that speakers can be bound to once they have agreed to submit to the pragma-dialectical rules. Speakers agree to submit to these rules, van Eemeren and Grootendorst propose, in order to facilitate the resolution of disputes. From a speech act perspective, however, speakers respond to challenges from an antagonist, and thereby discharge their proof burdens, because this response arises as a consequence of having to
fulfil certain conditions that need to be satisfied in order to competently perform the speech act of issuing a Searlean "assertive."

But this particular level of activity appears to be considerably less circumscribed than acts that are described as engaging in argumentational discussion. While assertive speech acts would certainly appear to be an integral component of argumentation or argumentative discussions, they can also be found in exchanges that fall outside of this rubric. A simple request from one speaker to another to "elaborate or explain" a particular remark appears to give occasion for something like a probative obligation to arise for a speaker — even if this exchange would not be classified as an argumentative discussion.

This, it seems to me, is a limitation in van Eemeren and Grootendorst's discussion concerning the burden of proof. If the normative grounds for their pragma-dialectical rules are limited to an application designed to achieve a specific goal, then their commentary on its speech act underpinning is difficult to understand. Perhaps a more charitable reading would see the theoretical underpinning of speech act theory as a preliminary requirement that a speaker needs to meet before that same person could take upon themselves the specific goal of submitting to a particular set of pragmatic rules in order to participate in argumentative discourse.

In other words, speakers need to be ready, willing, and able to meet certain conditions for communicative competence, in order to participate in more specified forms of dialogical exchange. In all fairness, van Eemeren and Grootendorst do appear to have this picture in mind when they expound their pragma-dialectical outlook, but their "speech act oriented" theoretical underpinning is difficult to fit into their explanation of what makes their pragma-dialectical rules normative for an arguer who adopts a protagonistic role.

Their second pragma-dialectical rule cannot "merely" be pragmatic for a speaker who wants to engage in argumentative discussions. It must be pragmatic in a much more universal or broader
sense. In order to understand the notion of the burden of proof, I think we need to take a step back from van Eemeren and Grootendorst's pragmatic outlook and look more closely at a speech act oriented approach that views the issue from a communicative perspective. Speakers discharge burdens of proof in order to argue competently and effectively, but essentially they need to be understood as competent communicators. This is what a narrowly pragmatic outlook on the burden of proof issue threatens to overlook.

A systematic and philosophical approach to the burden of proof will not, and should not, be content with an analysis that does not seek to uncover an approach to this notion with the most explanatory power. Van Eemeren and Grootendorst's inclusion of speech act theory appears to point in the right direction, and I am convinced that much more can and ought to be said about this. Before doing this, however, I think it is important to survey a couple of other sources on this subject. I think that a survey of forensic argumentation is important because many thinkers have sought to compare the extra-legal notion of the burden of proof with its legal counterpart. Flew, for example, presents an argument that relies heavily on this comparison. Rhetorical theory has also made a contribution to this topic that any rigorous philosophical approach would be remiss to pass over without, at the very least, critically surveying what it has to say on this topic. Consequently, in the next two chapters we will see what insights can be gained from these two very different outlooks on argumentation and the notion of the burden of proof.
Chapter 3

On the Burden of Proof in Forensic Argumentation

When I use the term "forensic argumentation" I simply mean to refer to argumentation that is constrained by a firm set of formal rules and procedures. In this chapter I present two different forms of forensic argumentation for the reader's consideration. The first is taken from Nicholas Rescher's work Dialectics. In this work he presents a model of argumentation fashioned after the scholastic exercise of disputatio that is highly constrained by a set of a priori rules designed to achieve a specific epistemological effect.

Because the procedures of formal disputation in Rescher's model are laid out in a clear and conspicuous fashion, the element of ambiguity in determining how to allocate the burden of proof in a fair manner is reduced to a minimum. I believe that the ability of Rescher's model of argumentation to straightforwardly allocate the burden of proof merits our attention and some analysis. This kind of marked attention on the part of formal disputation to its own procedures will also serve to highlight something about the burden of proof that we touched on in the previous chapter, namely, that the burden of proof is something that arises as a consequence of asserting something. I believe this also deserves some of our attention.

The other form of forensic argumentation that exhibits an impressive ability to handle questions about the proper allocation of the burden of proof is legal argumentation. Procedural strictures, informed by a backdrop of collective jurisprudential wisdom, appear to make allocating the burden of proof in this area a relatively straightforward affair also. This feature of legal argumentation, I would submit, also deserves some of our attention and analysis. In addition, it is
not uncommon for thinkers dealing with the burden of proof, or the burden of proof issue, to draw comparisons between the burden of proof as it is found in ordinary argumentation and the burden of proof as it is found in legal argumentation. In order to decide how fitting these comparisons are, some kind of survey of legal argumentation and the conditions under which it is conducted needs to be made. That being said, let us begin with Rescher’s disputational model.

A. Nicholas Rescher’s Formal Dialectic.

In his work entitled *Dialectics: A Controversy-Oriented Approach to the Theory of Knowledge*, Rescher presents his reader with a model of argumentation fashioned after the scholastic notion of a “formal disputation” or *disputatio*, in which the participants argue in accordance with a strict set of rules (Rescher 5). On the basis of his remarks on this subject, the value of engaging in such an activity seems to be measured in terms of its epistemic consequence.\(^1\) *Disputatio* or formal disputation serves to put ideas or notions to a critical test (Rescher 3).

This test consists of a cyclical process of critique that follows the simple formula of one side issuing an assertion and the other side criticising this assertion. The first side then issues a qualified restatement of the original in such a fashion that the original criticism is no longer applicable to this new formulation. Either a new criticism is advanced and this process begins anew, or the reformulated assertion survives critique and emerges both unscathed and vindicated (Rescher 17-18).

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\(^1\) On a historical note, Rescher informs us that *disputatio* was “modeled rather straightforwardly on the precedent of legal practice” (Rescher 2).

\(^2\) In Rescher's own words, “It is worthwhile to study this process of disputation closely because it offers — in miniaturised form, as it were — a vivid view of the structure and workings of the validating mechanisms which support our claims to knowledge” (Rescher 3).
An additional condition of this process is that neither side is permitted to retread ground that has been covered earlier (Rescher 11).

In order for this process to work, participants in a formal dispute must take on specific roles and follow the rules for operating within these roles. It is important to remember that in Rescher’s model of formal disputation the assignment of roles, and the rules that are attached to each of these roles, must be followed without fail (Rescher 6). Now the “must” in this case appears to have constitutive force.\(^3\) That is to say, these rules (like the rules in chess) need to be followed in order for a person’s participation in the process to count as an authentic case of engaging in formal disputation. Naturally, the main force of this constitutive “ought” in this instance will depend on an individual’s desire to participate in this particular process.

With this in mind, let us begin our analysis of Rescher’s approach with a general description of a formal dispute and who is involved.

A disputation, as we have seen, involves three parties; the two disputing adversaries, namely the proponent and his opponent (or opposing respondent), and the determiner who presides as referee and judge over the conduct of the dispute. (Rescher 4)

These roles are not idle designations and they are not interchangeable\(^4\). It is the proponent’s exclusive responsibility to introduce a thesis statement for consideration. Correspondingly, it is the opponent’s exclusive responsibility to provide critical responses to the proponent’s thesis statement.

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\(^3\) We will also discuss this aspect of language in more detail in Chapter Five.

\(^4\) Individuals are certainly free to adopt different roles, but the result is that they are no longer engaging in formal disputation. Individuals who argue for mutually contradictory theses are described by Rescher as engaging in a “symmetrically contradictory debate” (Rescher 18).
The role of the judge or determiner is, as one might suspect, to adjudicate this exchange and decide whose position is ultimately successful (Rescher 4). I use the term “exclusive” to describe the respective responsibilities of the proponent and opponent because this particular form of disputation involves a very rigid “etiquette” (Rescher 5). As Rescher puts it, one of the chief strengths of this particular approach to argumentation lies in the fact that it “makes it relatively easy to systematise (at least approximately) the formal moves and countermoves that compose the dialectical fabric of a disputation” (Rescher 5).

As a result of the strictures that inform these roles, an interesting form of exchange comes about. Both participants are limited to employing specific types of utterances and to employing specific inferential-type relations to support their respective positions. Under this model, the proponent’s statements must always be categorical assertions designed to bolster his original thesis. The opponent’s statements must always be carefully advanced provisos designed to undermine the proponent’s categorical assertions and, ultimately, the proponent’s original thesis statement (Rescher 18).

By assigning definite roles accompanied by rules designed to ensure that these roles are not departed from, this formal model of disputation maintains an almost aesthetic purity. Ambiguities in procedure are significantly reduced, if not virtually eliminated, making it possible to get a clear outlook on certain aspects of formal disputation. Particular attention should be paid to the distinctively “asymmetrical” character of formal disputation. As Rescher notes, in this form of exchange there are “crucial role-governed asymmetries or disparities in position between parties” (Rescher 17). I believe it would be helpful here to present Rescher’s description of these “asymmetries” in detail. As he states:

1. The proponent must inaugurate the disputation. And he must do so with a categorical assertion of the thesis he proposes to defend.
2. All countermoves involving categorical assertion (conditioned counter assertion, strong counter assertion, strong distinction) are open to the proponent alone. Moreover, the proponent's every move involves some categorical assertion: he is the party on whom it is incumbent to take a committal stance at every juncture. The burden of proof lies on his side throughout. [Emphasis Mine]

3. All countermoves involving a challenge or cautious denial (including provisioned detail and weak distinction) are open to the opponent alone. Moreover, the opponent's every move involves some challenge or cautious denial; he is the party who need merely call claims into question and carries no responsibility for making any positive claims. (Rescher 17-18)

On the basis of the second point we can infer two things about the proponent in a formal dispute. First, he is the party who bears the burden of proof exclusively throughout the exchange. Second, that the burden of proof in this instance seems to be related to the activity of making "categorical assertions" — something that only the proponent is permitted to do. Again, as we noted in the previous chapter, the burden of proof here is not characterised merely as an obligation to respond to a presumption, but is also described as arising as a consequence of doing something, namely, making categorical assertions. I suspect that if we could encounter in more detail the relation between making categorical assertions and incurring a burden of proof, it would go a long way toward enlightening our view of the subject.

Unfortunately, Rescher does not go into a great amount of detail about this relation, but he does make a comment that points to a possible answer when he states:

Every step taken by the proponent involves a commitment of some sort [Emphasis Mine], and the proponent is liable for the defence of all of these — he is vulnerable at every point to a call to make good his claims. The opponent, on the other hand, need
make no positive claims at all. He need merely challenge the proponent's claims, and his work is adequately done if he succeeds in bringing to light the inadequacy of one of the claims on which the proponent's case rests. (Rescher 18)

The first sentence of this citation is notable for anyone interested in the burden of proof. What kind of commitment is Rescher referring to? Rescher gives us a clue of sorts about what he has in mind when he states later on that: "the proponent alone maintains an ever-changing variety of commitments during the course of the disputation — a shifting constellation of theses to whose defense he stands committed" (Rescher 20). On its face, this seems to be a restatement of the first sentence of the above quotation. Perhaps I can illustrate what I find difficult here by posing the question of "why" I should meet this commitment to "defend" a thesis that I wish to maintain. Rescher's explanation on this subject appears to contain several references to commitment and to a speaker's commitments, but not a lot that actually explains why a speaker is "committed" to the defense of a claim. Perhaps it might be best to look for a more definitive answer elsewhere. For now, I think it is enough to come away from Rescher's model simply with the knowledge that the burden of proof appears to arise as a consequence of making and being committed to an assertion, whatever this means.

In a way Rescher's formal model of disputation, because of its perspicuous procedures, does serve to at least illustrate, if not account for, the point made by some of the thinkers in the previous chapter. The point being, that the burden of proof appears to reflect an obligation that a speaker incurs as a consequence of making an assertion. In this sense, analysing Rescher's model was helpful in illustrating this point. But the lack of a deeper explanation is only part of the difficulty that comes with attempting to draw insights about the burden of proof from Rescher's model.

That is to say, Rescher's model is an efficient means of achieving a specific epistemic outcome, but its insights into the burden of proof have to be applied carefully to ordinary
argumentation. In ordinary argumentation the disjunctive roles are not fixed. Consequently, a sound effort to grasp the burden of proof issue needs to be made with an awareness of the presence of particular audience presumptions and the influence of various practical exigencies that serve as the complex backdrop for this less formal mode of argumentation. With this contrast in mind, I would submit that what Rescher's firmly structured model presents us with is a good start by giving us a look at the "bare bones" of the burden of proof notion, so to speak.

That being said, let us look at the burden of proof in another form of forensic argumentation, namely, legal argumentation.

B. The Burden of Proof in Legal Argumentation.

1. Drawing Comparisons between Legal and Ordinary Argumentation.

I think it is important to examine the notion of the burden of proof in legal argumentation because there is a general temptation toward trying to get a better understanding of the burden of proof in its ordinary sense by drawing comparisons with the burden of proof in its legal sense. As we noted earlier, Flew compares his presumption of atheism to the presumption of innocence found in Criminal Law. Flew allays the theist's concerns that his proposal is a ruse designed to gain tactical advantage by likening his procedural proposal to the procedures found in the Common Law.\(^5\) The argument is that if one procedure is acceptable, then the other should also be acceptable \textit{mutatis mutandis}. A great deal turns here on the question of whether Flew's analogical argument is a sound

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\(^5\) By Common Law I mean to refer to that system of law that governs most English-speaking countries and has its historical roots largely in English Law. (David and Brierly 285-417).
comparison between these two domains of argumentation. As a result, a look at the burden of proof in the legal domain might be a good idea.

2. The Legal Burden of Proof.

With this in mind let us work toward sorting out, or getting the experts to help us sort out, the notion of the burden of proof in legal argumentation. I want to make it clear to the reader that what follows is not intended to be a complete exposition on the burden of proof in legal argumentation. It is intended to serve only as a broad sketch of the role that the burden of proof plays in ordinary argumentation, which touches upon pertinent issues such as proof shifting and the standard of proof. Since Sopinka, Lederman and Bryant’s work The Law of Evidence in Canada contains one of the best expositions on this subject, I will rely chiefly on their work where they state:

The incidence of the legal burden of proof means that the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil or criminal standard; otherwise that party loses on that issue. The substantive law, such as the law of torts or the criminal law, and not the adjectival law of evidence, governs which party has the burden of proof in relation to a fact or issue. (Sopinka, Lederman and Bryant 57)

At the heart of every case there is an issue or a matter that is before a court. This matter is what a given case of legal action is about. In a criminal case, the person accused is usually charged with committing a serious crime of some type against the state. In a civil case, a person is generally

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6 There is an entire body of legal literature dealing with this topic under the general heading of “evidence” or the “rules of evidence.” Some of the authors that I have found helpful on this topic, in addition to Sopinka, Lederman and Bryant, have been Keane, Nokes, May, Cross and Tapper, Morton and Hutchison, Eggleston, and Roberts. Their texts on this subject have been cited at the end of this work.
accused of having committed some wrong or having inflicted some harm against another individual. What is central to both of these cases is the question of whether in fact these persons have committed the wrongs they have been charged with. The legal burden of proof amounts to an obligation to prove these central facts in issue to the satisfaction of a tribunal of some kind, whether it is a judge or jury (Sopinka, Lederman and Bryant 56).

If for some reason these facts are not proven, then the court will, in all likelihood, decide that there is no case against these accused individuals. Because the outcome of the case itself rests on proving this central fact, bearers of the legal burden of proof have also been described as bearing the burden of non-persuasion7 (Keane 47). This appears to be just another way of expressing how central the legal burden of proof is in a case of legal argumentation.

Now the question of whether a party in a case of legal argumentation has discharged or met their legal burden rests on what is known as the standard of proof. As Sopinka, Lederman and Bryant note, the standard of proof is different for criminal and civil cases (Sopinka, Lederman and Bryant 154). In the criminal case, the fact at issue must be proved "beyond a reasonable doubt"8; whereas, in civil cases, the fact at issue needs to be shown only "on a preponderance of evidence."9 I will return to exactly what these expressions mean and what significance they have for our inquiry a little later on. For now I want to continue on and discuss how the legal burden of proof gets allocated or assigned to a particular party in cases of legal argumentation.

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7 Several terms have been attached to this particular burden that makes the literature on this subject a bit of a difficult read at times. Some describe the legal burden as the burden of proof in the "strict sense" (Cross and Tapper 110) and others have described this as the "persuasive burden" (May 40).

8 See "Reasonable Doubt" Canadian Law Dictionary (177).

9 See "Preponderance of Evidence" Canadian Law Dictionary (166).
As a general rule, any individual who brings a legal action against another bears the legal burden of proof since he is the one who wishes to present an issue before a court. In criminal cases, prosecutors, acting on the government's behalf, present the issue of a person's having committed a crime before the court (Keane 51). In civil cases, the person bringing an action against another is called the "plaintiff", and generally the plaintiff presents the issue of someone having committed a wrong before the court (Keane 57). Now the reason the legal burden of proof should be allocated to these persons from the outset is not very unusual.

In both criminal and civil law there is a general maxim that encapsulates the general rationale for allocating the legal burden of proof. This maxim is: *E iuravit probatio qui dicit, non qui negat* or "the burden of proof is on him who affirms, not him who denies.” Keane notes that this maxim probably reflects a matter of common sense involving a general need for economy and efficacy in practical matters (Keane 57). That is to say, if someone brings a case to court, they ought to show that their action merits the court's consideration, otherwise the result may be a waste of the court's time and effort.

Now at this point things can get confusing. Although the legal burden of proof is normally allocated to the party who brings a legal action before a court, it is not uncommon for someone to come across a description of the burden of proof that suggests that this legal burden or obligation can "shift" from one party to another. What is disconcerting for anyone who wants to come to an understanding of the ordinary burden of proof by comparing it to the burden of proof in legal argumentation is the fact that this is a misleading expression (Sopinka, Lederman and Bryant 71).

As Sopinka, Lederman and Bryant point out, and this cannot be stressed enough, the legal burden of proof is allocated in a fashion prescribed by law (Sopinka, Lederman and Bryant 57).

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10 Morton and Hutchison claim that this concept can be traced all the way back to the Institutes of Justinian (Morton and Hutchison 2).
Legal burdens can come to be altered or “shifted,” in a manner of speaking, and presumptions in law can be rebutted, but only in accord with carefully prescribed conditions that are contained in statutes on legal procedure (Sopinka, Lederman and Bryant 71). In order to illustrate Sopinka, Lederman and Bryant’s point about legal burdens of proof not shifting, let us introduce into the discussion a fictitious, but relatively straightforward, example of a criminal case.

Mr. Green is charged with having committed murder. Mr. White is Green’s defense lawyer, and Mr. Black is the prosecuting attorney assigned to this case. It is Black’s job to bring this case before the court. That is to say, Black bears the legal burden of proof to prove that Green has committed the crime he has been accused of. On the other hand, White has no legal burden of proof. He does not have to show that Green is innocent of the crime. Under the Common Law Green enjoys what is known as the “presumption of innocence.” This term does not reflect any kind of substantive judgement about whether or not Green did what he is accused of. Rather, it is a formula of sorts that expresses an expectation of how the court intends to proceed. This expectation is: If Black fails to prove his case and thereby discharge his legal burden of proof “beyond a reasonable doubt,” then Green is free to go, even if his attorney (White) has not shown him to be innocent of the crime.

So why does White not bear a legal burden of proof? In short, because Green’s innocence is never an issue before the court. Green’s innocence is the fallback or default position that the court takes

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11 For an extended, yet readable, work on this particular presumption I recommend Morton and Hutchison’s excellent work The Presumption of Innocence.

12 Another way of putting this is to say that this is what the court intends to take as its starting point when it proceeds to deliberate on this case. This can be said to apply broadly to presumptions in general. They represent facts that the courts tend to hold or maintain until evidence is presented that would suggest another position be taken in these matters. Presumptions can also represent what it is reasonable or logical for the court to infer based on the introduction of other facts. For example, a person missing for seven years is presumed to be dead under the Common Law. Broadly put, presumptions fill in as starting points and bridges in reasoning for courts that usually have to work under less than ideal conditions of knowledge. For a detailed discussion of the legal notion of presumption, I recommend Chapter 4 of Sopinka, Lederman and Bryant’s work.
under the Common Law if the legal burden of proof in criminal cases is not discharged. This in turn raises the question of why it is the default position. Why is it not the other way around? Why is it not the case that both sides bear the legal burden of proof in criminal cases under the Common Law? These are not easy questions to give a definitive answer to, but the evidential literature on this topic suggests that this unilateral allocation of the legal burden of proof in criminal law under the Common Law can be supported by an appeal to three points of rationale, so to speak.13

First, as we noted earlier, there is a legal burden of proof on anyone who brings an issue before the court. In criminal law the prosecution performs this action and therefore the prosecution incurs a burden of proof (Morton and Hutchison 2). Second, it appears to reflect an awareness of the fact that an action brought against an individual by the state (arrest, imprisonment, etc) can serve to place a criminal defendant at a marked disadvantage (Morton and Hutchison 3). Procedurally mandating that the state take on the responsibility of making its case before the court seems to level the playing field a bit with respect to the disparity in levels of power. But neither of these grounds, even when taken together, seems to provide a sufficient basis for decisively allocating the burden of proof in criminal law without reference to the overall axiological orientation of moral-political values under the Common Law.

The roots of this moral-political orientation in values can be traced as far back as the fourteenth century (Morton and Hutchison 4). In short, under the Common Law tradition it is presumed that the goal worthy of the highest respect is to avoid or decrease the conviction of innocent individuals (Morton and Hutchison 5).14 As a result of this orientation in values, the

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13 Although isolated references can be found in various works to these three points, I am indebted to Morton and Hutchison whose excellent work on this subject lays these points out in concise detail (Morton and Hutchison 1-6).

14 Naturally this particular value orientation needs to be approached from a mature perspective. Refusing to arrest anyone committing a crime would result in a decrease in the conviction of innocent individuals as well. It should go without saying, in order to avoid an absurd reading of this particular value orientation, that this cardinal value is best
accused appears to be given as much of the benefit of a doubt, in terms of procedure, as a just process can stand. The presumption of innocence appears to reflect just this particular axiological orientation by rejecting any suggestion that an accused should ever be in the unduly onerous position, given our first and second points above, of having to prove his or her innocence.\(^{15}\) It also accounts for the application of a higher standard of proof for the bearer of the legal burden in criminal law, but more on this later.

Consequently, for the reasons mentioned above, prosecuting attorney Black bears the legal burden of proof, and this does not change throughout the trial. As we noted, Green’s guilt is not an issue for White to contend with, and Green’s innocence is not an issue that White is required by the court to maintain. Now this is not to say that White will never be in the position of having to bring an issue before the court. In fact several possible circumstances could occur that would result in White’s having to maintain an issue to the court.\(^{16}\) I will introduce a common exception to the presumption of innocence and follow Sopinka, Lederman and Bryant in their contention that even in this instance the burden of proof does not shift. I will also try to show what does appear to account for the common intuition that legal proof burdens shift from one side to another.

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\(^{15}\) This insistence on the prosecution having to bear the weightier evidential task is commonly referred to as the “golden thread” that runs throughout English Common Law (Richard 87; Morton and Hutchison 2).

\(^{16}\) There are, in fact, several exceptions to the presumption of innocence where the accused in a criminal case may need to bear a legal burden of proof before the court. These exceptions fall roughly into two categories. The first involves defences claiming that the accused was in a state of non animo merito. This is the exception that my fictitious example below is designed to illustrate. The second involves what are known as “statutory exceptions.” These exceptions come into play when an individual commits a criminal act and the applicable statute for that offence “expressly puts the burden on the accused” (May 49-54). For example, being in possession of lock picking equipment is a statutory offence that places a “rebuttable reverse onus” on the accused to “prove his innocence” (Morton and Hutchison 27).
Let us take the more straightforward task first. It is possible, given the procedures found in the Common Law, for White to have to bear a legal burden of proof, even in the case against Green described above. But the mechanics surrounding proof burden allocation need to be attended to closely. Even in those cases where White takes up a legal burden of proof, a legal burden is not actually shifted. In order to see what does happen, let us go back to our fictitious case against Green and have White argue that Green was insane, and therefore not guilty by reason of insanity.

It is not uncommon to hear it said that in an insanity defense, it is the defense that bears the legal burden of proof (Sopinka, Lederman and Bryant 58; May 48-49). This is true. But what is not true is the assumption that the prosecution’s legal burden has shifted to the defense. What happens is a bit more complicated and bears some attention in order for us to get a grasp of how the legal burden of proof works in this domain. Under normal circumstances, Black would have to prove two distinct elements in order to make a criminal case against Green. The first is the actus reus, which establishes that the accused committed the guilty act in question, and the second is mens rea, the presence of a guilty mind or intent (Sopinka, Lederman and Bryant 72; Morton and Hutchison 131-132). Now Black has some help on the second element insofar as law courts tend to rely on presumptions about what is usual or normal to set the stage for what can and cannot be assumed by the parties involved.

As a general rule, individuals are presumed to be sane and to intend the consequences of their actions. In short, this presumption allows tribunals to assume that if someone has committed a criminal act, they intended to do so unless grounds could be presented to suggest otherwise. This

17 This general presumption of sanity that extends to anyone who stands accused in a criminal case falls under what are known as the “McNaughton Rules” (Cross and Tapper 125). Morton and Hutchison also note that this particular aspect of the criminal law is explicitly set down in Canada’s criminal code (Morton and Hutchison 30).
is where the insanity defense comes in. If White wants to claim that Green is not guilty on the grounds that he was insane, he needs to do two things.

First, he needs to stipulate that Green committed the *actus rei*. This is only reasonable since an insanity defense pleads that there was an excuse for committing the act that militates against treating it as a criminal act on the part of the accused. Without stipulating to the *actus rei*, a defense based on excuse would be moot. This relieves Black of having to establish the *actus rei*. This leaves the *mens rea*. What White needs to contend is that in Green’s case the element of *mens rea* was absent. This is necessary in order to show that the remaining critical element that is necessary to establish that the crime occurred does not exist. However, in order to do this White needs to argue that (at the time of the act in question) Green was in a state of *non compos mentis*\(^{18}\) that made it impossible for him to form the mental intent necessary to commit a crime. If White can show that Green was insane at the time he committed the criminal act, then he can argue that Green was in a state of *non compos mentis* and therefore not legally responsible for the crime.

But as soon as White resorts to this avenue of defense, he runs up against the presumption of sanity that we mentioned earlier. So inasmuch as White needs to rebut the presumption of sanity in order to establish a successful defense, he bears a legal burden of proof to prove to a legal tribunal that his client did not possess the mental wherewithal to form a criminal intent. If White cannot discharge this legal burden of proof, then he will lose because the presumption of sanity will remain the default stance and the *actus rei* will have been stipulated to. But it is important to note that the legal burden of proof that White takes upon himself here, is not the same legal burden of

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\(^{18}\) A distinction needs to be made here. *Non compos mentis* does not mean insanity. It simply refers to the inability of a person to form the mental intent or the *mens rea*, necessary to be legally responsible for having committed a crime. Insanity is just one possible condition that can result in someone being *non compos mentis*. Automaton defences, where the accused has a history of somnambulistic or “sleepwalking” behaviour, can also establish a state of *non compos mentis* effectively eliminating the possibility of establishing the presence of an *actus rei*. 
proof that was allocated to Black at the outset of this case. Moreover, this feature of criminal cases is rather easy to overlook unless careful attention is paid to detail.

Now it might be assumed that the procedures for civil law might be a radical departure from the procedure outlined above. In fact, they are very much the same with respect to the allocation of legal proof burdens (Sopinka, Lederman, and Bryant 58). In civil cases there is a legal burden of proof that is allocated to the plaintiff who, in turn, runs the risk of non-persuasion if the issue he wishes to maintain before a legal tribunal is not established to their satisfaction. Again let us use a fictitious example for purposes of illustration. Mr. Brown slips on the icy sidewalk outside of Mr. Grey's restaurant. Brown decides to take Grey to court for negligence because Grey's inattention to the icy sidewalk conditions has caused harm to Brown, as well as forced Brown to incur a loss. Let us presume that Brown cannot work for a month and, as a result, loses a month's pay.

As the plaintiff or the initiator of the civil action, Brown bears the legal burden to show that Grey has a responsibility to keep his sidewalk clear, that Grey failed to do this, and that Brown's injury is the direct result of Grey's negligence. If Brown fails to meet this legal burden, then he will lose his case. Much like the case above, Grey has no legal burden of proof since he is not bringing an issue before the court. He may wish to contest the issue that Brown intends to bring before the court, but this is not the same thing as actually bringing a case of your own before a tribunal. If Grey were to do this, then he would be engaged in presenting a "countersuit" or an issue of his own before the court. In turn, this countersuit would then give rise to its own legal burden of proof.

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19 These are the three conditions that Keane lays out in his work (Keane 57).

20 This might take place if Grey decided to (or was required to) set out to prove "contributory negligence." In which case, he would set out to prove that Brown's own negligence was the cause of his accident and that if it were not for Brown's own negligence in this regard, he would not have injured himself. See "Negligence" Canadian Law Dictionary.
We are now in a better position to appreciate (and as our fictitious examples were designed to underscore) Sopinka, Lederman and Bryant’s key insight on this matter, namely, that under the Common Law in both criminal and civil cases, legal burdens do not shift. So why are we left with such a strong impression that they do? In order to get at this we need to take a look at the “other” burden of proof in legal argumentation, namely, the evidential burden of proof.

3. The Evidential Burden of Proof.

Now as I mentioned above, outside observers of the process of legal argumentation are left with the strong impression that there is a proof burden that shifts between parties. It is hard to explain why this is so without discussing what is known as the evidential burden of proof and yet, strangely enough, this burden does not exactly shift between parties either. In an effort to sort through this issue let us look at what Sopinka, Lederman and Bryant say about this evidential burden of proof. As they note:

The incidence of an evidential burden means that a party has the obligation to adduce evidence or to point to evidence on the record or to raise an issue. Like the legal burden of proof, an evidential burden relates to a particular fact or issue, and where multiple facts or issues are disputed, the evidential burden in relation to different facts or issues may be distributed between the parties. The incidence of the evidential burden, the sufficiency of the evidence required to satisfy it, and the evidentiary effect of its discharge are all questions of law. (Sopinka, Lederman and Bryant 59)

Like its legal counterpart, the evidential burden has been described as shifting under certain circumstances. But as Sopinka, Lederman and Bryant note, the evidentiary burden of proof, like the
legal burden of proof, also answers to a set of legal prescriptions that dictate in precise terms how one is to present a particular fact before a legal tribunal.\textsuperscript{21}

But if legal and evidentiary proof burdens do not shift, why are we left with this perception that they do? I think Sopinka, Lederman and Bryant answer this question nicely when they note that introducing a fact at trial can sometimes be disadvantageous for the other side. It becomes necessary to contest or call this fact into question, and this is frequently described as placing a “tactical” burden of proof on the other side.\textsuperscript{22} That is to say, they recognise the necessity of having to respond to the introduction of this new fact, or risk having it recognised by the court.\textsuperscript{23} Again, it might be helpful to go back to one of our fictitious examples and re-examine our case of Brown vs. Grey. Brown, as we noted, was bringing a lawsuit against Grey for negligence. As a result, Brown bears the legal and evidential burden of proof to show that he was harmed as a result of Grey’s negligence.

If he fails in this, his case before the court will fail also. Recognising this, Brown sets out to argue his case by bringing in a witness, Mrs. Blue, who is willing to testify that she and Brown were walking past Grey’s restaurant and that Brown slipped on a patch of ice outside. At this point Brown appears to have met his legal and evidentiary burden in order to have the fact of his accident and Grey’s negligence recognised before the court. If Grey has nothing to say on his own behalf,

\textsuperscript{21} As if things were not complicated enough in attempting to distinguish between these burdens, Sopinka, Lederman and Bryant are also good enough to point out that the legal and evidential burdens are frequently conjoined (Sopinka, Lederman and Bryant 61 and 63).

\textsuperscript{22} Tapper and Cross use the term “provisional burden” to describe the burden that is “borne by the opponent of an issue after the proponent has discharged his evidential burden” (Tapper and Cross 117).

\textsuperscript{23} At the same time Sopinka, Lederman and Bryant are firm in their contention that the “tactical” burden of proof is not a legal burden of proof in a strict sense of the word. It denotes, they suggest, a practical or common sense recognition that the introduction of certain facts into the trial process will affect the outcome to some degree (Sopinka, Lederman and Bryant 54). I take this to mean that insofar as someone has a vested interest in the outcome, there will be a felt (but not strictly speaking “legal”) need or burden to respond in a suitable fashion to a situation that they feel is not turning out to their advantage.
then Brown's lawsuit will be decided against Grey. In order to avoid this consequence Grey needs to assume what we have called a "tactical burden." He needs to introduce some fact (or facts) into evidence or challenge the facts that Brown has introduced into evidence in order to alter the court's assessment of the facts that Brown has presented for their consideration.

Fortunately, Grey has had a problem with vandals in the past and so he has installed security cameras to monitor the front of his property. After reviewing the tapes, Grey discovers that Mrs. Blue has a penchant for eating bananas while she is out walking. He discovers this because she has been caught on tape eating a banana and then carelessly dropping the peel outside of Grey's restaurant, whereupon Brown can be seen stepping on it and falling to the ground. Grey's investment in a security camera has paid off well because he has also managed to get a shot of his nephew clearing off the sidewalk and salting it before the arrival of Mr. Brown and Mrs. Blue.

Grey comes into court the next day and maintains what he has seen on the tape as a fact and introduces the tape as evidence in support of the fact, thereby discharging his evidential burden of proof. As a result of meeting this evidential burden, Grey has managed to shift the tactical burden back to Brown. Brown's case has now suffered a "reversal of fortune." If the court accepts what Grey has presented to the court as a matter of fact, then it goes a long way toward undermining Brown's case. It is important to note that neither the legal burden nor the evidential burdens in this case have shifted. But what does appear to have shifted back and forth is the tactical burden. That is to say, the necessity to respond to facts and issues that have been brought before the court that can serve to turn the outcome of a case in favour of the other side.

Now because this tactical burden attends so closely to the evidential burden, it is easy to assume that the evidential burden shifts. In turn, it is easy to assume that because of its close relation with the evidential burden, the legal burden of proof also shifts. But as Sopinka, Lederman
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and Bryant have already noted, these proof burdens shift only under conditions that are prescribed by legal statute, and even in these cases proof burdens are not actually exchanged or shifted.

Now Brown, realising that he may lose his case, attempts to call in a multimedia expert to verify that the tape was not altered in any way. If Brown can get an expert to testify that the tape Grey presented to the court has been tampered with, then there is a chance that the tactical burden will shift back to Grey. Unfortunately none of the experts he has consulted will confirm Brown's suspicions in court since they can find no signs of tampering on the tape. Brown, who is beginning to get desperate, decides to merely suggest to the court that Grey may have doctored a tape in his own support.

As we might expect, the case is decided against Brown. The question of fact concerning whether Grey had tampered with the security tape remained undecided. But after weighing all of the facts before the court the judge decided “on a preponderance of evidence” that Grey was not guilty of negligence. Now at this point it might be helpful to contrast the burdens of proof in civil law with criminal law. An important distinction between these two domains (as we noted earlier) is that in civil law, the legal burden of proof needs to be proven “on a preponderance of evidence.” But in criminal law the legal burden of proof must be proven “beyond a reasonable doubt.”

I believe that the difference in standards here merits a little of our attention. If the reader will recall, Flew compares his presumption of atheism to the presumption of innocence found in criminal cases under the Common Law. On the basis of his comparison I am led to assume that the theist must meet a rather high standard of proof that is comparable to that found in criminal law.24

24 I assume this for a couple of reasons. First, Flew draws a close comparison between his presumption of atheism and the presumption of innocence as it is found in criminal cases under the Common Law. This invites us to assume that the standard of proof would be comparable between these domains unless some qualifications were made, which I have not found in Flew's article. Second, his exhortations to believe on "sufficient" grounds in matters of importance implies that he is not referring to something like a mere or marginal preponderance of evidence.
Consequently, it might be helpful to take a closer look at this particular aspect of legal argumentation and turn our attention to the notion of the standard of proof.

4. **The Standard of Proof in Criminal and Civil Law.**

Once one is made aware of the existence of more than one burden of proof, it raises the question of whether there is a difference between the burden of proof as it operates in criminal and civil law cases. As we noted, it would seem that the answer is no. Legal proof burdens and evidentiary proof burdens appear to be comparable to one another. But criminal trials do not, in fact, proceed like their civil counterpart. As we noted earlier, in criminal trials the accused enjoys what is known as the presumption of innocence. This serves to decisively allocate the burden of proof to the prosecution. There is also a difference in the standard of proof between criminal and civil cases when it comes to discharging legal burdens of proof. Why is there this difference and what does it tell us about the burden of proof?

First, as we mentioned earlier, the standard for discharging the burden of proof is informed by a particular orientation in moral-political values that has emphasised a marked preference for avoiding unjust prosecutions. As a result, criminal law has settled on the expression “beyond a reasonable doubt” to express the attitude a juror should have with respect to their decision in reaching a guilty verdict. In civil cases involving matters of less gravity, comparably speaking, it was deemed to be sufficient to prove a case on the basis of a “preponderance of evidence” (Sopinka, Lederman and Bryant 154).

Second, I think it is important to understand the difference in the standards of proof and why they are in place in order to assess the acceptability of those proposals that suggest ordinary argumentation ought to adopt the procedures of argumentation found in criminal cases under the
Common Law. Ordinary argumentation can be significantly affected by introducing this high standard for discharging the burden of proof outside its suitable context. As we noted in our examination of Whateley's remarks, the person with the presumptive advantage in ordinary argumentation occupied what we referred to as the default stance.

We noted earlier that there was a definite advantage to championing this default position and not having to bear the burden of proof. By looking at the standard of proof in legal argumentation we can see that a speaker who is successful in allocating the burden of proof and setting the standard for discharging the burden of proof can significantly influence the material outcome of an exchange. The most obvious possibility of such a thing's occurring seems to arise in those circumstances where a speaker has somehow managed to persuade another person to prove something to his satisfaction. Of course once a dispute is cast along these particular lines, then the trap is set.25

For those of us interested in the burden of proof issue, this kind of problem always lurks in the background in cases of ordinary argumentation. When someone proposes that ordinary argumentation ought to follow the special procedures that are laid out in criminal cases under the Common Law, we need to pay careful attention.26 Proving something to a standard akin to "beyond a reasonable doubt" in ordinary argumentation imposes a very difficult requirement upon a speaker and agreeing to meet it, even implicitly, puts one at a serious disadvantage.

25 In fact, Donald Evans uses this exact phrase to describe the disadvantage the theist is likely to find himself up against once he naively accepts Flew's procedural proposal (Evans 48).

26 I want to point out here that for practical purposes I have deliberately limited my discussion to the standards of proof found in criminal and civil law. This is not to imply that no other standards are to be found within the legal domain. For example, within Administrative Law, which deals with the powers and privileges of the executive branch of government and controls various administrative tribunals, the standard of "clear and convincing evidence" is sometimes referred to. I think the key point to bear in mind, no matter what part of the legal domain one is surveying, is that the standard of proof involved usually develops out of a general sense of what is apposite for a particular mode of legal argument and the stakes involved.
Remember that in legal argumentation involving criminal cases this standard is considered to be acceptable because a set of special circumstances exists. A shared axiological orientation that reflects a recognition of the gravity of a criminal prosecution, as well as the presence of third party adjudication serve to make this especially high standard of proof unproblematic in criminal law. In cases of ordinary argumentation where one or more of these special circumstances might not be present, it is somewhat unrealistic to expect that an ordinary burden of proof be discharged to the same exacting standard. At the very least, it seems that a sound case needs to be made in support of the contention that the circumstances surrounding a given case of ordinary argumentation are similar enough to those surrounding legal argumentation involving criminal cases to merit proposing similar standards of proof. This was what I found lacking in Flew’s argument in Chapter One.

But before bearing down on Flew’s argument I want to take a look at an exchange of sorts between author Richard Gaskins and legal theorist Ronald J. Allan. Their exchange illustrates that even legal scholars can have differing perspectives on how comparable legal and ordinary argumentation are.

C. On The Burden of Proof as an Element of Legal Strategy.

It is a bit of strange comfort to find out that even legal scholars can differ over how legal argumentation ought to be construed. In his work Burdens of Proof in Modern Discourse, Richard Gaskins depicts the burden of proof, in American constitutional cases, as something that is subject to a significant amount of tactical manoeuvring. Constitutional Law gets changed and reformed because insightful individuals are adept at creatively seizing “the presumption” or manipulating what the court sees as “the presumptive basis” that forms the groundwork for how various cases are decided. In an almost realpolitik fashion, Gaskins suggests that constitutional reforms are accomplished by shrewd
individuals who are able to "frame" a given case of legal argumentation in accordance with their own agenda by casting this agenda in presumptive terms. This paints a very dramatic picture of the burden of proof in legal argumentation where it appears to be dominated by the tactical aspect of argumentation.

On the other side of this debate is legal scholar Ronald J. Allan. Allan argues that Gaskins has presented an overly dramatic picture of the burden of proof in legal argumentation and that legal presumptions and the allocation of the burden of proof are carefully regulated by legal procedure and precedent. I think a couple of highlighted points from each theorist on the subject should suffice to show that this issue is not beyond contention, even within a discipline that prides itself on its institutionalised canons for argumentation procedure. Let us begin with Gaskins' thesis.

1. Richard Gaskins' Burdens of Proof in Modern Discourse.

In the introduction to his sizeable work on the subject, Gaskins lays out his vision of the burden of proof. Gaskins' arguments cannot possibly be presented in their entirety, but in the introduction to his work he is good enough to lay out his general outlook for his readers and discusses what he sees as a transformation of sorts in the character of legal argumentation. Gaskins starts his introduction by noting that "arguments-from-ignorance" rely on areas of "systematic ignorance" and that such arguments are ubiquitous in modern discourse (Gaskins 2).

As Gaskins notes:

The chapters below will suggest that we have to acknowledge this argument pattern as an inescapable feature of contemporary discourse. Its widespread use is a

\[27\] See Chapter 2, 58-60.
natural consequence of modern pluralism — cultural, political and epistemological. It is also a rhetorical index to some of the deepest inhibitions in current public debate: our increasing insecurity in restating arguments on fundamental principles, on disciplinary foundations, on some political notion of the common good. There may, however, be ways to reduce the polarizing tendencies of public debate, which arise as each side seeks to impose the entire burden of ignorance on its opponent. (Gaskins 3)

In this respect, I think Gaskins’ assessment of the zeitgeist of ordinary argumentation is not entirely off the mark. This is an outlook that arises largely as a response to what I have described earlier as a shift toward a post-modern perspective. As Gaskins goes on to elaborate:

Exactly, who ought to pay the price of deep-seated uncertainty? In the current rhetorical climate, shifting the burden of proof to our opponents becomes an irresistible argument strategy. It tends to harden and exaggerate the differences between speakers on opposite sides of an issue. The debate over substance turns into a battle for the tacit authority to dismiss an opponent’s entire case. Each side declares, “I win, because you have not produced sufficient evidence to prove your point.” Reduced to its simplest form, this argument can scarcely disguise its paradoxical claim to authority. The speaker is not simply expressing a personal opinion, but also assumes the roles of judge and jury. (Gaskins 3)

With some qualification, I think Gaskins’ diagnosis of this particular pathology holds. I find Gaskins’ description of the ordinary burden of proof interesting because he goes on to suggest that this free play of “onus allocation,” that takes place in the post-modern milieu of ordinary argumentation, has also influenced legal procedure. In Gaskins’ own words he suggests:
The burden of proof is a ubiquitous device whose wider influence on litigation has been curiously ignored by legal commentators. It generally blends into the background of legal procedure, like the default settings in computer programs with which it has some striking parallels. As part of the tacit framework within which the drama of adjudication unfolds, the burden of proof is often viewed by lawyers as little more than basic stage directions: it determines which party to a legal dispute has the obligation to speak first, or which one must step forward with special forms of evidence.

In recent decades, a more elusive dimension of the burden of proof has begun to play a larger role in the legal drama. The risk of non-persuasion is the lawyer's technical term for the chance that arguments presented before judge and jury will fail to support any relevant inference; whether guilt or innocence in criminal cases, or the presence or absence of liability in civil cases .... The burden of proof compensates for the many uncertainties of litigation, allowing the judicial system to reach determinate outcomes in the absence of relevant information. It is, in short, the law's response to ignorance, a decision rule for drawing inferences from lack of knowledge. (Gaskins 3-4)

This belittling description of the burden of proof, where it is viewed by lawyers as "little more than basic stage directions," gives the careful reader a clue as to what is to come. From a perspective that sees the tide of influence as flowing from ordinary argumentation to the legal domain, Gaskins makes his case for the view that the legal burden of proof is assuming a much more tactical role in legal argumentation. But as our quick analysis of the legal field noted, legal proof burdens are, as a rule, tightly constrained by procedural strictures that limit the element of uncertainty and ambiguity in their application. Tactical proof burdens can "shift" relatively quickly
in the give and take of exchange, but the legal burden of proof and the basic orientation of legal argumentation itself is carefully regulated. So what inspires Gaskins to think that the legal burden of proof is subject to what he calls "judicial activism" within the legal field? Why does he assume that there is room for this kind of tactical manoeuvring?

The answer is because Gaskins himself makes room for this particular assumption by inserting a wedge of doubt into the legal notion of a presumption. Again, Gaskins is quite capable of explaining his own case here when he notes:

The language of proof could misleadingly suggest that factual evidence alone marks the difference between ignorance and knowledge in public discussion. In legal proceedings, as in wider rhetorical contexts, however, the basic norms or rules for weighing evidence often contribute more fundamentally to the condition of ignorance. These rules are the reigning presumptions used by the legal system to interpret and to draw conclusions from factual evidence. When uncertainty arises about the meaning or legitimacy of these presumptions, a more profound level of ignorance casts its shadow over the course of argument. This source of ignorance is not merely informational, but largely consensual or cultural in origin.

Many legal standards are notoriously vague but must nonetheless be applied to complex cases. Civil rights laws, for example, condemn the practice of discrimination, but they do not tell us exactly what it is. Is there employment discrimination, for example, when a company's hiring and promotion policies — although neutral on their face — have a disparate impact on people of different races or genders? Or does discrimination require some conscious intention by employers to single out particular groups for lesser treatment? The legal standards themselves do not tell us which it is, and under these conditions it makes a crucial difference
where the burden of proof rests. Must you bear the burden of showing that I am not violating the amorphous terms of such laws, or must I prove that I am not violating them. (Gaskins 4-5)

Now we noted earlier that an uncontroversial allocation of the burden of proof is predicated upon an unambiguous grasp of what the working presumptions are in a given case of argumentation. The comment that Gaskins makes in the above citation turns this insight on its head. The rest of Gaskins' work plays upon this central theme by outlining the development of the notion of the burden of proof in certain legal cases along the lines of ordinary argumentation.

Gaskins contends that in past Supreme Court cases, especially on the subject of human rights and constitutional challenges, various proponents in legal argumentation have pushed through a specific agenda by adopting techniques that are less formal and more tactical in orientation.

Gaskins argues that certain legally instituted changes in the socio-political domain were made possible by reinterpreting key legal presumptions or by carefully substituting other presumptions in such a way as to orient the process in favour of what Gaskins has called an agenda marked by "judicial activism" (Gaskins 4). Leaving the specific merits of Gaskins' case aside for the present, I think it is interesting that we have a legal theorist looking outside the legal domain and drawing a comparison between ordinary argumentation and what he sees as the increasing tactical or strategic element within legal argumentation. Just how much weight we ought to give to Gaskins' commentary on this issue needs to be considered in light of some comments from the other side of this issue that is represented by Ronald J. Allan in his article "Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse."
2. Ronald J. Allan's "Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse."

Allan's take on Gaskins' argument concerning the "sea change" that he sees as occurring in legal argumentation is that it is a view entirely uninformed by scholarship on this issue (Allan 627). With a pendulous list of citations in tow, Allan argues that the element of free play in legal argumentation that Gaskins describes in his work is exaggerated. Drawing the lines of dispute sharply, Allan states that:

Although Professor Gaskins may be unaware of the fact, which suggests others must be as well, American evidence scholars over the course of this century have developed deeply and in detail the various aspects of the concept of the burden of proof, as well as the implications of the concept's first cousin, presumptions. (Allan 627)

In immediate support of this contention (apart from his copious references to recent examples of scholarship on this subject in his notes) Allan adds:

If there has been a relative lull over the last decade in this century's torrent of legal scholarship on burdens of proof and presumptions, it is because the evidence community is largely satisfied that the relevant analytical implications have been worked out, leaving only political arguments unresolved. Indeed, the agenda of evidence scholarship has moved from these well-known and resolved problems to new problems that use the analysis of burdens of proof and presumptions as their base. I refer here in particular to the present focus of the field on the process of proof, how it is and how it should be that a rational actor draws inferences about historical facts and applicable standards. (Allan 628)
Clearly there is a sharp divergence in interpretation over how much leeway exists in the legal process of interpreting presumptions. Gaskins argues that the idea of “interpretation” with respect to legal presumptions is more rhetorical than the casual observer might realise, thus permitting the burden of proof to be shifted by skilled advocates as a means of securing an advantage. Speaking for the more conservative side, Allan argues that:

Burdens of proof rarely shift at trial, and when they do — as for instance when a presumption is appropriately invoked — it is because of rules of law that virtually always pre-exist the trial. The only room for tactical manoeuvring is to demonstrate that, as a factual matter, the case fits into one of the pre-existing legal categories whose parameters are fairly well determined by statutes and precedents. (Allan 629)

In any case, it is clear that when it comes to the legal burden of proof, Allan sees little if any significant strategic leeway that is not carefully circumscribed by jurisprudential scholarship and legal precedent. In terms of the relative merits of the arguments presented by Gaskins and Allan, I am inclined to side with Allan because I think his argument has the superior weight of evidential scholarship in its favour, but with some qualifications. It needs to be mentioned that Gaskins’ work (at least his arguments involving the legal burden of proof) appears to concentrate on disputes of a constitutional nature and on issues raised in the context of family law.

I might be wrong, but if Gaskins were given a chance to respond specifically to Allan’s critique, he might want to qualify his remarks by limiting their scope to these specific categories and suggest that this is the apposite backdrop for his commentary on this subject. On the other hand, as impressed as I am with Allan’s presentation, I wish I could be a little less sceptical about Allan’s contention that the process of interpreting legal presumptions is so rigorously covered by evidential scholarship that any talk of leeway is automatically suspect.
As a non-initiate, I find myself suspicious of the absolute tone of such an empirical claim. As a result, my preference for Allan’s outlook on legal argumentation is mitigated by some scepticism. But no matter which side one comes down on in this “in house” quarrel, the dispute itself is still enlightening. Let me end this chapter by summing up exactly what I find interesting about this dispute and the discussion that preceded it.

D. Legal and Ordinary Argumentation: Just How Permeable Are These Categories?

Here we have opposing perspectives on the permeability of legal and ordinary argumentation. My overarching point in critiquing Flew’s argument earlier on was to suggest that Flew has advanced an analogical argument in favour of his presumption of atheism that does not stand up to scrutiny. I believe that there are enough critical points of disanalogy to seriously lessen the persuasiveness of Flew’s case. His argument in favour of adopting his presumption of atheism relied on a comparison between it and the presumption of innocence found in criminal cases within the Common Law.28 His admonition concerning the imperative need for grounded belief also implies that he has more in mind than proof on a preponderance of evidence. I do not think it would be untoward to suggest that if Flew does not have the criminal standard of “proof beyond a

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28 The objection could be made to my critique that what Flew is presenting in his article is merely an “illustrative” analogy. That is to say, it is only advanced in order to help his readers acquaint themselves with his presumption (the presumption of atheism) by likening it to a presumption that is, in all likelihood, already familiar to his readers (the presumption of innocence in criminal law). The idea is that this particular comparison is not designed, strictly speaking, to provide reasons or grounds for adopting Flew’s proposal. While I think that it certainly can, and most likely does, perform an illustrative function in this instance, I would disagree with the suggestion that this is all this analogy does. At one point Flew argues that the theist no more betrays his position by agreeing to accept the presumption of atheism than a prosecutor would betray the state by acknowledging the legal presumption of innocence (Flew Presumption 34). The implicit argument here is that if we find one approach procedurally benign, then we should have no objection to adopting a similar procedure. Insofar as Flew attempts to meet anticipated objections to his proposal by comparing it to a more familiar and benign procedure, his analogy serves an argumentative function. This makes his argument from analogy fair game for those like myself who see enough salient disanalogies between these procedures to call Flew’s comparison into question.
reasonable doubt” in mind, what he does consider the apposite standard is something very much like it.

In our discussion of the legal burden of proof we uncovered three special background conditions that served to account for what might otherwise be regarded as too stringent a standard of proof in criminal cases. First, in legal argumentation involving criminal cases the participants all share the same axiological orientation and embrace the same socio-political values that underwrite the presumption of innocence and the standard of proof. Second, the disproportionate levels of power that exist between the state and an individual seems to call for a special effort to check the possible abuse of power by the state by making it difficult for the state to err in the exercise of its powers. Third, the presence of third party adjudication appears to provide an element of impartiality that seems to prevent this particular process of legal argumentation from yielding to the adversary system completely.

Clearly, one is hard pressed to find a robust comparison between the shared axiological orientation in values that serves as the backdrop for criminal cases of legal argumentation and the actual epistemological values that individuals bring to ordinary argumentation, even as Flew construes it. Comparing the gravity of the physical consequences of unjustly convicting someone with the gravity of imprudently exercising religious belief might, with some imagination, hold up to a little more scrutiny. But I believe that more than a few critical voices exist that would question the legitimacy of comparing the gravity of physical peril with the gravity of spiritual peril. Others might question the sincerity of Flew’s appeal to the “spiritual” gravity of a situation in support of his argument given the tenor of his own personal commitments. The case could also be made that Flew’s comments on the seriousness of grounding the exercise of belief in religious matters is simply a thinly veiled effort at plumping for his own epistemic value orientation. Finally, Flew does appear to give lip service to the notion of third party adjudication but is quick to advance his views on how
the exchange should be conducted as soon as the debate turns in what he believes is in an unproductive direction (Flew Reply 52).

In any event, I think that having surveyed the burdens of proof in legal argumentation we are safe in drawing the modest but general conclusion that comparisons between legal and ordinary argumentation need to be made carefully. Moreover, we need to view these comparisons with a healthy sense of scepticism whenever they are presented for our consideration. Consequently, I think Flew’s proposal should stand as a cautionary example for any thinker who would attempt to come to terms with the burden of proof in ordinary argumentation by comparing it to the burden of proof in legal argumentation. I should hasten to affirm that this insight applies both ways. The more rigorous the analogy, the more informative the insight into the notion of the burden of proof is likely to be.

The Gaskins-Allan dispute also serves as a reminder that this caution might apply equally to attempts to draw comparisons on this issue in the other direction. Gaskins’ attempt to liken current legal disputation to its ordinary counterpart is cut off abruptly by Allan who makes a credible case for the non-analogous nature of the two forms of argumentation. Legal argumentation, Allan contends, is strongly informed by evidential scholarship and does not lend itself _habeas corpus_ to any interpretation of its procedures that would make it a merely tactical exercise. Whether the divide between legal and ordinary argumentation is as permeable as Gaskins would have us believe it is, or whether it is as rigid and hermetic as Allan’s comments would convey, one clear message does emerge out of the attempt made by both of these thinkers to deal with this issue. Any insight about the burden of proof that is predicated on an analogous relation between legal and ordinary argumentation needs to be examined carefully.

As a final note, I want to suggest that _a priori_ there is no good reason why the burden of proof cannot be allocated in an uncomplicated fashion outside the forensic sphere of strictly rule-
governed argumentation. But this point needs to be assessed in context. In Rescher's formal model of disputation the burden of proof was allocated as a matter of firm role assignment. This assignment was, more or less, the upshot of constructing a form of disputation on a purely *a priori* basis in order to achieve a specific effect. In the legal domain the burden of proof can also be decisively allocated by statute to a particular party because it enjoys the benefit of being rooted in firmly entrenched procedures and presumptions. In the case of criminal law, this was made unproblematic by the presence of an overarching value system that served to underwrite this process. But as Gaskins might be quick to note, outside of the legal domain a comparable overarching basis is almost impossible to find.

This last point should serve as a warning for those who would seek to justify a decisive allocation of the burden of proof in ordinary argumentation. Unless a convincing case can be presented in support of the pivotal supposition that grounds or conditions exist in an ordinary argumentation setting that are at parity with those conditions that serve to underwrite the allocation of the burden of proof in forensic argumentation, any argument in favour of a decisive allocation of the burden of proof in ordinary argumentation will be tenuous at best.

On the other hand, there may exist other grounds that could merely inform the process of allocating the burden of proof in ordinary argumentation. In the legal domain, the element of presumption appears to play a significant role in the allocation of proof burdens. Various thinkers interested in ordinary argumentation have suggested that even if the presence of ordinary presumptions does not affect ordinary argumentation in a manner that is *strictly* analogous to the influence that legal presumptions effect, this is not to say that there is no element of influence whatsoever. This idea of ordinary presumptions effecting a different kind of influence on ordinary argumentation is something, they argue, that a prudent arguer ought to keep in mind. In the next
chapter we will see what this advice amounts to, and what it has to say to us as we continue to try and come to a better understanding of the burden of proof issue in ordinary argumentation.
Chapter 4

On the Burden of Proof in Ordinary Argumentation

In the previous chapter we looked at the burden of proof in the forensic domain where it was set against a backdrop of formal rules and procedures. The advantage that came out of this analysis of forensic argumentation was that it gave us an opportunity to see the burden of proof in a carefully controlled setting. In both formal disputation and legal argumentation we only needed to examine the rules of procedure in order to see where the burden of proof should be allocated. The drawback to this analysis was that the insights into the burden of proof that it provided apply awkwardly to cases of ordinary argumentation.

By definition, as it were, “ordinary” argumentation denotes a practice that stands outside of these strictly regulated forms of discourse. As a result, it would not be unreasonable to expect that ordinary argumentation may stand in need of a different approach if we are to get a grasp of how the burden of proof works in this informal domain. What is needed, I would submit, is a willingness to engage in a little empirical inquiry into some of the de facto conditions under which ordinary argumentation is conducted. Traditionally thinkers within rhetoric and, more recently, “communication theory” have conducted this kind of inquiry. Bearing this in mind, I want to survey contributions from three different sources working within this tradition in order to get a better sense of how the burden of proof appears to work in non-forensic or ordinary argumentation.

First in line is Richard Whateley. His work Elements of Rhetoric contains a section on the burden of proof that is considered by many to be a watershed on the notion of the burden of proof. Here he outlines, perhaps for the first time ever, an approach to the burden of proof as it arises in
the context of ordinary argumentation. The second thinker of note is Alfred Sidgwick. His effort to adopt a pragmatic approach to the burden of proof provides a nice, and somewhat modern, complement to Whateley's exposition of this subject. As a result, I want to suggest that if there is anything that could be called an ordinary sense of the burden of proof, insofar as it attaches to ordinary argumentation, it owes as much to Sidgwick's contribution to this issue as it does to Whateley's.

The third contribution is from Chaim Perelman and Lucie Olbrechts-Tyteca who are the authors of The New Rhetoric: A Treatise on Argumentation. I find Perelman and Olbrechts-Tyteca's comments on this subject interesting because theirs is a modern work that attempts to champion an outlook on ordinary argumentation that, depending on your perspective, may or may not be dated. Perelman and Olbrechts-Tyteca's central thesis is that ordinary argumentation is primarily an "audience oriented" phenomenon. Now even if one dissent from this general theme, which also appears to be embraced by Sidgwick, it is difficult to deny, that audience disposition does appear to play some type of role in cases of ordinary argumentation. I should also add that I believe that these audience dispositions, as I argue below, have a role to play when it comes to understanding the burden of proof issue. Consequently, I am led to propose that any attempt to come to terms with the notion of the burden of proof in ordinary argumentation should at least consider what these thinkers have to say on this subject.

\footnote{Unless otherwise indicated, the term "pragmatic" is intended in the mundane sense of referring to the practical aspect of something. This is in contrast to the philosophical position known as "pragmatism" made famous by Charles Sanders Pierce and William James.}
A. Richard Whately’s *Elements of Rhetoric.*

In his work *Elements of Rhetoric*, Whately addresses what he sees as the relationship between what he calls “a presumption” and the burden of proof (Whately 112-132). Whately sets the tone for his discussion of the burden of proof and what he considers to be its counterpart, “a presumption,” when he states the following:

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. (Whately 112)

Clearly, Whately is speaking in metaphorical terms here. A supposition “preoccupies” ground in the sense that it is already entrenched in the minds of some individuals. The suggestion is that this supposition enjoys some kind of default advantage. Individuals do not seriously question this kind of supposition. To put it another way, they accept it as a kind of “given” within their reasoning. It may even be a piece of information that they use in evaluating new suppositions. In fact, Whately’s exposition of a presumption appears to presume all of the above and puts a specific label on a supposition that enjoys this kind of “favoured status” by describing it as having “the presumption.”

It is interesting that Whately draws a sharp distinction between his notion of presumption and a supposition’s probability *per se.* This allows him to be somewhat agnostic about the probable truth of the supposition itself. Taken in this sense, Whately’s exposition of this notion appears to
be a step away from a strictly logical treatment of the subject. This seems to be confirmed by his effort to describe his idea of “the presumption” along the lines of audience disposition.

What is also interesting is that this kind of entrenched supposition is said to enjoy an advantage of sorts from the very fact that it is an entrenched supposition. Another way to express this is to say that such suppositions are part of the doxastic status quo. As we mentioned above, these suppositions tend to play a pivotal role in people’s thinking. In order to perform this function efficiently, however, they need to play a stable role in individual’s thinking. In fact, the more central the role they play in an individual’s reasoning, the less tolerable the prospect of their modification becomes. As a result, there exists a tendency to resist those pressures that might serve to modify such a class of suppositions.²

This preference for cognitive stability that is served by holding to the doxastic status quo places a “burden” on anyone who would stand as an advocate of change. Proposals for doxastic change need to be grounded and justified in order to merit serious consideration. Good judgement would seem to dictate that the more critical the doxastic alteration being proposed, the more justification should be required. It is this need for sufficient reason or grounds in favour of altering the doxastic status quo that appears to constitute the substance of Whateley’s notion of the burden of proof.

Consequently, “the burden of proof” in this particular context appears to denote an obligation on the part of a speaker to be mindful of the fact that the audience he addresses will have certain deeply entrenched doxastic proclivities. We can outline Whateley’s distinctions as follows:

² W.V.O. Quine in his work *The Web of Belief* talks about this when he discusses conservatism as a “sound strategy” in determining whether to accept a given hypothesis. I find it interesting to note that he refers to conservatism having “inertia” in its favour. But apart from this he seems to see conservatism as a virtue due to its ability to put the individual in a position of “limited liability” with regard to falling into error. Like Clifford, his argument for conservatism also appears to appeal to prudential considerations (*Quine Web 66-68*).
1. A speaker has "the presumption" when:
   The supposition he advances for an audience's consideration is in accord with the audience's doxastic stance.

2. A speaker is obligated to bear the "burden of proof" when:
   The supposition he has advanced for an audience's consideration is not in accord with the audience's doxastic stance.

   It is unclear what the status of Whateley's burden of proof would be in a case where the supposition was neither in accord nor in discord with the prevailing doxastic status quo. Perhaps it would be a matter of indifference, doxastically speaking — a "take it or leave it" kind of thing. Perhaps some kind of quick ad hoc assessment of the plausibility of a totally novel supposition would be in order so that it could be placed in the space of reasons and handled accordingly. Novel cases aside, what makes Whateley's analysis especially interesting is that in addition to this exposition of the burden of proof in terms of doxastic policy, he also presents an exposition of the burden of proof along strategic lines. As Whateley candidly notes:

   A moderate portion of common-sense will enable any one to perceive, and to show, on which side the Presumption lies, when once his attention is called to this question; though, for want of attention, it is often overlooked: and on the determination of this question the whole character of a discussion will often very much depend. A body of troops may be perfectly adequate to the defense of a fortress against any attack that may be made on it; and yet, if, ignorant of the advantage they possess, they sally forth into the open field to encounter the enemy, they may suffer a repulse. At any rate, even if strong enough to act on the offensive, they ought still to keep possession of their fortress. In like manner, if you have the
“Presumption” on your side, and can but refute all the arguments brought against you, you have, for the present at least, gained a victory; but if you abandon this position, by suffering this Presumption to be forgotten, which is in fact leaving out one of, perhaps, your strongest arguments, you may appear to be making a feeble attack, instead of a triumphant defense. (Whateley 113)

In other words, a speaker can gain an advantage in argument by aligning their position with “the presumption” on an issue. Based on Whateley’s remarks, there appear to be three reasons that make this move advantageous for a speaker.

First, any supposition that enjoys “the presumption” tends to be entrenched; that is to say, it plays an established role in someone’s doxastic framework, hence there appears to be no practical case for providing support or grounds on its behalf. Practically speaking, any call for justification on behalf of a supposition entrenched within the doxastic status quo is simply unnecessary. Its continuing presence and the function it performs appears to provide all the justification that could be expected for its inclusion in the doxastic status quo.³

³ Some comments on this point might be in order since this adherence of a speaker’s audience to certain entrenched beliefs is pivotal to Perelman and Olbrechts-Tyteca’s notion of “inertia” later on and to the idea of presumption in ordinary argumentation. It could be argued that the continuing presence of certain beliefs only explains why people do in fact continue to maintain these beliefs, not why they ought to hold such beliefs. For example, comments by Quine (Quine Web 66-68) and others suggest that we may maintain entrenched beliefs and resist change for prudential reasons. But the argument could be made that prudential reasons do not, strictly speaking, provide an epistemological justification for these beliefs. I am suspicious that anything more robust than prudential reasons can be uncovered that would support or justify an audience’s disposition to favor entrenched beliefs but I have run across one article that maintains that something like an epistemic justification could be provided for this conservative policy toward beliefs in Danny Goldstick’s article entitled “Methodological Conservatism.” Near the end of his article here presents what appears to be a schema argument based on the impossibility of expecting every belief to be grounded in a “reasoned justification,” which he argues would lead straight to infinite regress. As a result, there must be at least some beliefs that we are justified in holding by the mere fact that we do hold them. I leave it to the reader to decide if this is a better explanation for a conservative policy regarding belief or if a prudential explanation does a better job of explaining why audiences incline conservatively in favour of entrenched beliefs that, for the most part, serve as the basis for what they take to be presumptive on an issue.
Second, the supposition that enjoys “the presumption” in Whateley’s sense normally reflects the default posture of an audience. That is to say, it will be the position that an audience will revert to if the outcome of a debate or dispute is inconclusive. This gives the speaker who champions a presumptive supposition an advantage in that his effort can prevail in several ways. For example, the side enjoying the presumptive stance can either succeed by undercutting the challenger’s case completely or by providing enough of a rebuttal to achieve an inconclusive outcome that will tell in their favour. In both cases the presumptive position will be seen as coming out ahead.

Third, in light of the two advantages noted above, the champion of the supposition enjoying the presumption has the liberty (if he so chooses) of concentrating on the single effort of providing a defense of his position. The bearer of the burden of proof, on the other hand, must engage in a dual effort of providing a positive case to his audience in favour of accepting his innovative supposition and at the same time defending himself against possible criticisms of his supposition.

With the above three points in mind, it is no wonder that Whateley cautions speakers against abandoning the presumptive stance when he notes:

... if you have the “Presumption” on your side, and can but refute all the arguments brought against you, you have, for the present at least, gained a victory: but if you abandon this position, by suffering this Presumption to be forgotten, which is in fact leaving out one of, perhaps, your strongest arguments, you may appear to be making a feeble attack instead of a triumphant defense. (Whateley 113-114)

In other words, Whateley’s advice to prospective speakers is to work toward aligning their stance with the presumption on the matter in order to capitalise on this “presumptive advantage.” With this in mind, we can now outline what Whateley means when he refers to the notion of “shifting” the burden of proof. Since, according to Whateley, bearing the burden of proof can be an
onerous task, let us follow his advice and suggest that a speaker should seek at the outset of an argument:

1. To suggest to his audience that his supposition (presented for their consideration) is in accord with the tenor of suppositions that they already presumptively favour, or

2. To draw the audience's attention to a presumption that is more preferred by an audience and suggest that the speaker's own supposition (presented for their consideration) is in accord with the same.

It is interesting to note that with this emphasis on a speaker calibrating his argument in accordance with the audience's doxastic disposition, we appear to be presented with something like a psychological outlook on the notion of presumption and the tactic of shifting the burden of proof. Whateley then goes on to give several examples of things that enjoy a presumptive status.

Established institutions (Whateley 114), legal presumptions of innocence and a general tendency not to accept paradoxical suppositions are some of the examples Whateley cites (Whateley 115).

In addition, Whateley goes on to assert that in their nascent stages Christianity and the Reformation movement did not enjoy presumptive status, but that at the time of his writing they had come to do so (Whateley 116). Pronouncements that are endorsed by authority and tradition also fall under the category of the presumptive (Whateley 117-120). As a result, any critics of these entrenched institutions would bear the burden of proof as a matter of course.

It should be added that up to this point Whateley's explication of presumption and the burden of proof takes an unabashedly empirical route. Determining what is to be regarded as presumptive appears to be a simple matter of surveying an audience, or an institution, or a
movement to see which doxastic orientation (and its entrenched suppositions) is the operative one.¹ Once this is done, the speaker's most prudent course, according to Whateley, is to avoid bearing the burden of proof by bringing his supposition into accord with the audience's disposition concerning what they take to be presumptive on a matter.

My decision to survey Whateley's exposition on this subject is based on two considerations. First, others have pointed to this work as a pivotal point in the history of ideas. It depicts, they suggest, the crossover of a notion from Law into Rhetoric (Parrish 76; Pence 31-32). As a result, this work can be described as a watershed within Rhetoric where a non-institutional or ordinary sense of "presumption" and "burden of proof" emerge in their own right. Looked at in light of the history of ideas alone, this point deserves more than a passing nod from anyone interested in this subject.

Second, it also appears that we are encountering the beginning of a sub-theme that has permeated subsequent discussions about the burden of proof. Clearly, Whateley viewed the connected notions of presumption and the burden of proof as strategic elements within ordinary argumentation. Speaking historically, this appears to be the genesis of a train of thought that is intimately connected with the topic and should not be passed over in a careful treatment of the subject.

That being said, I now want to return to Whateley's commentary on this subject and outline what I believe is Whateley's most significant contribution to the subject of the burden of proof. As

¹ According to communication theorist J. Michael Sproule this was not always so. Sproule argues that Whateley started out with a "monolithic" sense of presumption in the early editions of his work that viewed presumption as something that was aligned with one side of a dispute and that this orientation could be treated as an objective fact, thus allowing Whateley to suggest that his readers could determine rather straightforwardly where "the" presumption lay on a matter, as if there were no other reasonable position available. Sproule argues that Whateley eventually moved away from this legal model of presumption toward a more "psychological" outlook on the issue where audience predisposition came to play a more pivotal role in judgements about what the presumption on an issue ought to be taken to be (Sproule 115).
we noted above, Whateley's explication of the idea of presumption and the burden of proof is accompanied by a piece of advice concerning argument strategy. In short, Whateley recommends seizing upon the presumption in a dispute in order to avoid having to bear the burden of proof. What I do not think Whateley could have foreseen was just how dominant a role this piece of advice would come to play within a modern understanding of ordinary argumentation.

We cited a list of examples earlier that Whateley recommended to his readers as clear examples of things that he believed enjoyed the presumption. Shrewd speakers could either identify their position with one of these or cast about for a better established or entrenched source of wisdom to give their position more presumptive weight. The underlying assumption here is that locating and communicating what is presumptive on an issue to an audience is a relatively straightforward matter, at least it seemed to be so for Whateley.

To his contemporaries, Whateley could speak without reservation about discerning where "the" proper presumption on a particular subject was to be located. But as Rorty and other post-moderns would be quick to point out, this sense of what is "given" to human inquiry is becoming more and more circumscribed. In his time, Whateley could say that the pronouncements of the institution of the Christian church enjoyed a presumption in their favour. Flew's approach involves arguing that an opposite presumption ought to be adopted and that this ought to inform contemporary theistic debate. We are, historically and culturally speaking, a long way from Whateley's time and circumstance. Another way to put this is to suggest that contemporary argumentation practice is becoming more and more untethered from the given and the straightforwardly presumptive. Consequently, what started out as a modest piece of advice on Whateley's part is becoming a pursuit unto itself.

Locating what is given and presumptive to argumentation is becoming more and more
difficult in contemporary philosophical disputes. Naïve efforts to participate in ordinary argumentation and provide a positive case in favour of a position in order to rationally persuade another appear to be losing ground to a new kind of meta-strategy. These arguments succeed by advancing a prima facie case in favour of adopting a default position on an issue and undercutting the position of their detractors, thus making their case by default as it were. Rorty's earlier exposition of the development of linguistic philosophy provided a clear example of such a meta-strategy.

Clearly, something is suspect in this type of argument. Let us retrace our steps a bit. Whateley's exposition of the burden of proof suggested that it be allocated in opposition to the presumption on an issue. But this assumes that we are, like Whateley, in possession of an unequivocal sense of how to determine what the proper presumption on an issue is. Unfortunately, post-modern philosophy suggests that we are moving away from those modes of thinking where uncomplicated presumptions on an issue are likely to be embraced in an uncritical fashion. What we need is an approach to presumption and the burden of proof that can accommodate this move beyond the stage of naïve confidence in our ability to determine what ought to be regarded as presumptive in cases of ordinary argumentation. I believe Sidgwick's thinking can take us some way in this direction.

B. Alfred Sidgwick's *Fallacies: A View of Logic From The Practical Side.*

Interestingly, Sidgwick's treatment of this subject appears to pick up where Whateley's ends. As a logician with an intense interest in the practical aspects of thought, Sidgwick appears to have followed up on some of the issues raised by Whateley's rhetorical exposition on the burden of proof and the notion of presumption. Perhaps the best place to begin is with Sidgwick's rejection of
Whateley's outlook on the notion of presumptive advantage.

... it follows that even he who asserts the most widely accepted doctrine cannot escape the 'burden' of supporting it by reasons. The burden of proof rests, for example, on those who maintain the theory of gravitation or of the roundness of the earth, just as truly as on anyone who should set up for his thesis the denial of either. The difference is that in asserting such truths as these the burden is apt to pass unnoticed, from the fact that the evidence is strong enough to shift it easily, while in denying them the burden might be felt as a serious weight. (Sidgwick 154)

Sidgwick's position seems to be that Whateley's comments on "presumptive advantage" should not be taken as reflecting a deep epistemic judgement on an issue. Instead, Sidgwick suggests that it be treated as a pragmatic feature of argumentation. For Sidgwick, the idea of "presumptive advantage" seems to be indicative of the following: that as a practical matter, a prospective audience will not expect a speaker to provide grounds or justification for suppositions that an audience already agrees with. As a result, Sidgwick's commentary on the subject appears to take an even more rhetorical position than Whateley's by placing its emphasis on the practical exigencies of the argumentation process.

One consequence of this change in emphasis is that this practical insight should not cause anyone to jump to the conclusion that a speaker who enjoys this particular practical advantage is completely exempted from having to bear the burden of proof in ordinary argumentation. This special exemption, if we will recall, was available only to those working within Whateley's particular interpretation of the notion of presumption. But if the verdict that Whateley's interpretation of this notion is a dated one holds up, then any talk about someone being completely exempted from the bearing the burden of proof on an issue is moot. Continuing this emphasis on the practical
dimension of ordinary argumentation, Sidgwick’s approach takes up the suggestion that speakers need to take the empirical condition of an audience’s disposition into serious consideration when he notes:

... while admitting that without some ‘self-evident’ truths, no proof of any assertion would be possible, it can hardly be denied that what seems self-evident to one person may seem to another to stand much in need of external support. And since the whole meaning of the Need of Proof is need felt by the audience, and not as the assertor happens to think the audience ought to feel it, they and not he must be the arbiters. If the assertion is not to them self-evident, they are under actual disability to believe it until external evidence is produced. I am speaking, of course, of genuine belief, intelligent and rational, and not of mere voluntary acceptance of a formula, as an act of obedience or otherwise. (Sidgwick 149)

With this outlook on audience disposition, Sidgwick has cast his commentary strongly along empirical lines. As a result, it is not surprising that he should see the locus of presumption as being properly located in an audience’s doxastic expectations and in a speaker’s willingness to meet these perceived expectations. In commenting on Whateley’s maxim “he who asserts must prove” Sidgwick confirms this change in orientation when he points out that “the ‘must’ of the rule is only sanctioned by the assertor’s eagerness to convince his audience” (Sidgwick 163).

It is also important to note that adopting a thoroughgoing empirical approach to this subject appears to bring with it a bit of a sea change in terms of how to view the burden of proof issue from a normative perspective. The burden of proof issue now appears to turn on the matter of what an audience does believe or disbelieve, as opposed to what they ought to believe or disbelieve based on some type of a priori approach to the matter. Sidgwick appears to reject Whateley’s naïve approach
that appears to be predicated on an ability to determine what is presumptive on an issue in an *a priori* manner in favour of an empirical approach to ordinary argumentation where speakers are responsive to the perceived doxastic dispositions of their audience. In contradistinction to Whateley’s naïve view that uncritically embraces various sources of traditional wisdom about what is to be regarded as presumptive, Sidgwick’s approach takes its cue from a more empirical approach that surveys the *de facto* dispositions of a given audience. The obligation, then, is a conditional means/end one.

Under this empirical approach, it is an audience’s disposition on a matter that provides the appropriate touchstone for determining where the presumption on an issue ought to be said to lie. This is what a speaker needs to be mindful of in his deliberations about the presumption on a matter and where the burden of proof ought to be allocated in ordinary argumentation. Sidgwick takes this line of thought even further when he comments on how we should interpret an instance of failure to provide proof in a case of argumentation:

> The practical difficulty is that of saying where our rooted distrust shall begin. The failure of argument, however, long continued, never indeed amounts to conclusive disproof; since either the real difficulty in producing the sufficient grounds, or the assertor’s want of skill, may be to blame. But it can be hardly denied that the presumption does in certain cases become very strong indeed — quite sufficiently so for many rough practical purposes. Since, however, there does not appear to be any means of generalising the cases satisfactorily, it seems best only to notice this as a standing difficulty in the complete practical theory of Proof, at present beyond the reach of anything more definite than what may be called a kind of logical tact.
>
> (Sidgwick 167)

The general theme seems to be clear. This presumed absence of anything amounting to a
“conclusive disproof” in ordinary argumentation goes a long way towards opening the way for the “particularising” of argument practice. That is to say, failures and successes in discharging the burden of proof are all particular occurrences with practical significance, but at the end of the day we need to be cautioned against endowing them with any kind of universal significance.

Historically speaking, it may be that Sidgwick’s outlook on the burden of proof issue has endured because of its move away from a naïve outlook toward an emphasis on the empirical conditions and the practical features of ordinary argumentation that strike a common chord with several contemporary themes. Now as tempting as it is to address the standard philosophical concerns that attend to an empirical approach to a philosophical topic, I want to beg off on this task a little longer until I have a chance to canvass Chaim Perelman and Lucie Olbrechts-Tyteca’s take on argumentative practice.

I understand that at this point in my analysis there may be some concern arising from the suggestion that the burden of proof ought to be recognised as an obligation to “speak to” an audience’s “doxastic condition” — to purloin an old Quaker saying. The obvious worry is that the idea of an “obligation” here will become degraded. The burden of proof issue, the philosophical concern goes, will merely become a moniker for the need to “pander to” an audience.

Now while it is not my intention to defend the rhetorical tradition (it is quite capable of defending itself without my help) it is not unreasonable to admit that this philosophical criticism has some merit. But it also needs to be placed in its rightful context. One of the advantages of surveying Perelman’s treatise on argumentation is that it stakes out its ground by calling into question certain preconceptions about reason and argumentation that are usually taken for granted within the philosophical tradition.

Once room has been made by their initial critique for a reconsideration of those facets of
argumentation that have traditionally been marginalised, a commentary on the nature of presumption emerges that is germane to our inquiry. That being said, I believe we need to survey what Perelman and Olbrechts-Tyteca have to say in favour of a rhetorical approach to ordinary argumentation before jumping to a precipitous judgement about the lack of virtue in an empirical approach to the subject of the burden of proof.


Perelman and Olbrechts-Tyteca’s work *The New Rhetoric: A Treatise on Argumentation* claims to orient its approach to argumentation in direct contradistinction to a tradition that can be traced back to Descartes (Perelman and Olbrechts-Tyteca 1). They argue that Descartes, in his desire to put philosophy on a firmer and more scientific footing, eschewed the categories of plausibility and probability with respect to knowledge in favour of certainty (Perelman and Olbrechts-Tyteca 2). Knowledge that was not certain needed to be, metaphorically speaking, “grounded upon” knowledge that was certain, or else it did not qualify as a *bona fide* example of knowledge.

In short, Perelman and Olbrechts-Tyteca take immediate issue with a philosophical position known as foundationalism. It is their contention that the notion of rational argumentation underwent a significant change as a result of this shift toward foundationalism. By way of historical contrast they note that Aristotle could freely distinguish between what he referred to as “dialectical and analytical proofs” depending on whether knowledge about the subject matter fell into the domain of what was probable or, in contrast, into the domain of what was “necessarily” known.
But by the time we get to the Post-Cartesian concept of reason, the model of pure demonstration (in a mathematical sense) is the preferred paradigm to the exclusion of other forms of reasoning (Perelman and Olbrechts-Tyteca 3). Perelman and Olbrechts-Tyteca then go on to argue that this approach did not produce a theory of argumentation. What it did produce, rather, was a restricted study of entailment relations, where argumentation practice, technique, and methodology have languished on the philosophical sidelines (Perelman and Olbrechts-Tyteca 10).

What is needed, Perelman and Olbrechts-Tyteca maintain, is a critical look at this Cartesian bias toward the self-evident and certain as the unrivalled touchstone of what is rational, and a return to a study of the practice of argument. This appears to be what they have in mind when they insist that a robust theory of argumentation needs to begin with the thesis that argumentation is fundamentally an "audience oriented" activity. In other words, all argumentation is meant for some type of audience (Perelman and Olbrechts-Tyteca 14). This emphasis on evaluating cases of argumentation on the basis of their acceptability to an audience, rather than on the basis of their conformity to an abstract criterion of entailment, marks their commitment to a rhetorical theory of argument that revives "an ancient and glorious tradition" in their estimation (Perelman and Olbrechts-Tyteca 5).

It is also the reason that this chapter ends with a survey of Perelman and Olbrechts-Tyteca's approach to argumentation. Whateley's and Sidgwick's comments served to introduce an empirical outlook on the subject of the burden of proof in ordinary argumentation by taking audience dispositions seriously. The line of thinking that is initiated in these historical works becomes a robust feature in Perelman and Olbrechts-Tyteca's work on argumentation.

My own working assumption here is that as long as Perelman and Olbrechts-Tyteca's difference
with the particular philosophical tradition of reason initiated by Plato and Descartes remains a live issue, a rhetorical and empirically oriented approach to the burden of proof issue in ordinary argumentation cannot be ruled out of consideration tout court. If this much can be granted, then we possess enough liberty here to at least be open-minded to Perelman and Olbrechts-Tyteca’s approach. It is, I believe, an approach that has some interesting things to say to us about the burden of proof and the role it plays in ordinary argumentation.

With that being said, we can turn our attention to the following question: just what does this description of argumentation as being “audience oriented” reveal to us about the burden of proof? To answer this question, let us look back for a second. With Whateley and Sidgwick we were introduced to a sense of presumption that was identified with an audience’s disposition on a particular issue. We noted that taking an audience’s disposition seriously places different expectations on a speaker, namely, to be more perceptive and responsive to an audience in cases of ordinary argumentation. Here lies, I think, the advantage in looking at the burden of proof from Perelman and Olbrechts-Tyteca’s perspective. I believe that understanding the role that the burden of proof plays in ordinary argumentation will require a different approach than that needed to grasp how the burden of proof issue gets worked out in forensic argumentation.

As a means to getting at this different approach, I want to start with a look at what Perelman and Olbrechts-Tyteca have to say about the topic of presumption. I think this is important. We noted earlier that although the element of presumption was not a key factor in some forms of forensic debate (Rescher), it did play a pivotal role in those forms of forensic debate that it was a part of. Presumptions in legal argumentation were, for the most part, a tightly prescribed feature of legal discourse that rarely underwent non-institutional change or revision. This served to stabilise judgements about where the burden of proof “ought” be allocated in any specific case of legal argumentation.
Within Perelman and Olbrechts-Tyteca’s perspective, the term “presumption” reflects, in a fashion similar to legal discourse, an audience’s expectation of what is to be taken as “normal and likely” (Perelman and Olbrechts-Tyteca 71). Put another way, a “presumption” under this view reflects what an audience would consider a “normal” starting point in any case of ordinary argumentation. This sense of what is “normal” is what Perelman and Olbrechts-Tyteca point to as the basis of presumption, or as they themselves state:

A more general presumption than all those that we have mentioned is the existence, for each category of facts, and particularly for each category of behaviour, of an aspect regarded as normal and capable of serving as a basis of reasoning. The existence of this connection between presumptions and what is normal is itself a general presumption accepted by all audiences. Until there is proof to the contrary, it is presumed that the normal will occur, or has occurred, or rather that the normal can safely be taken as a foundation in reasoning. (Perelman and Olbrechts-Tyteca 71)

And what underwrites this more “general presumption,” on the part of audiences, that what is standard or normal ought to be taken as the default position in reasoning? Perelman and Olbrechts-Tyteca supply the answer when they state that:

In most cases, however, a speaker has no firmer support for his presumptions than psychical and social inertia which are the equivalents in consciousness and society of the inertia of physics. It can be presumed, failing proof to the contrary, that the attitude previously adopted — the opinion expressed, the behaviour preferred — will continue in the future, either from a desire for coherency or from force of habit. (Perelman and Olbrechts-Tyteca 105-106)

Desire for coherency and force of habit is what appears to supply the continuing force behind
Perelman and Olbrechts-Tyteca's sense of presumption. A more nuanced explanation might suggest that inertia of belief and force of habit in this regard can be traced back to what we could call the "economics of inquiry." That is to say, human beings are creatures of finite capacity and limited resources. We need to expend our limited resources (physical and intellectual) judiciously. We cannot afford to expend needless effort in activities akin to "reinventing the wheel" when it comes to pursuing and acquiring knowledge about the world. In order to avoid unnecessary expenditures in effort we come to rely on accumulated knowledge. We learn from experience and use this knowledge as the basis for dealing with new experiences. Force of habit is quite helpful in that it helps us do this almost automatically or unconsciously making our efforts even more economical.

But where does the desire for coherency come into the picture? Perhaps it arises out of the fact that human beings need to live, work and communicate together against a general background of shared beliefs. Individuals are like this too; everyone is in possession of a network of beliefs. An implicit reliance on these beliefs allows a person to get by in ordinary life. But in order for this doxastic network to work it must be relatively stable. Too much change or disruption threatens the stability of this kind of network. In addition to this, since beliefs are not monadic entities, alterations in one part of a person's belief structure can serve to cause significant changes in the doxastic network at other points.5

But absorbing new information is not always an easy process and, as we said, it can serve to disrupt our belief systems and, as a result, our lives. In turn, because this can disrupt our lives, we find it worth our while, as rational creatures, to make an effort toward maintaining a coherent belief structure. Again, bearing in mind the economics of inquiry, this tends to run along conservative lines.

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5 Quine goes as far as to note that we access new candidates for belief in light of the totality of our existing beliefs. As he puts it: "It is in light of the full body of our beliefs that candidates gain acceptance or rejection; any independent merits of a candidate tend to be less decisive" (Quine Web 16).
We scrutinise propositions and weigh their potential for disruption against our collected beliefs. Beliefs that seem too disruptive have a higher standard for justification applied to them in order to avoid the tension in beliefs that comes with introducing a belief that does not accord well with the rest of the other beliefs in a person's doxastic structure. So in addition to the two outlooks on epistemic duties we uncovered in Chapters One and Two, we can now see that we may have doxastic duties to ourselves with respect to maintaining our doxastic structures.

Just how much revision should a person allow for in their doxastic system? What about the person who refuses to entertain alternative beliefs too closely for fear that the stability of his doxastic structure will not be able to be maintained? Just how much can we expect from others in this regard? I am not sure I can answer these questions adequately here, but these observations seem to go a long way toward showing us that what came across as mere audience bias earlier on, can now be seen as the product of a natural doxastic policy with definite epistemic aspects involved. I think this move away from treating audience disposition as "mere" bias puts the rhetorical approach to audience disposition or presumption in a much better light.

In short, the moral of this story is that intellectual progress has been possible because knowledge acquisition is a conservative process. Even dissenters from this outlook acknowledge that it is a powerful theme within epistemology. With this particular form of practical economics in mind, it

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6 It might be more accurate to say that that particular form of conservatism has shown itself to have survival value. But in the spirit of fairness it should be pointed out that this is not the only contender for consideration. Popperian critical rationalism touts the value of ruthlessly setting out to falsify that which we believe we know, and critically and provisionally asserting to whatever survives this process. See Karl Popper’s Objective Knowledge: An Evolutionary Approach and Conjectures and Refutations: The Growth of Scientific Knowledge. In a more radical approach to this subject, Stephen Stich argues that the rational underpinnings we attempt to provide to account for our doxastic policies can all be deconstructed. In short, no one strategy will suit every circumstance. As a result, Stich embraces what he calls a "floridly pluralistic" policy of cognitive virtue (Stich 14). For our purposes I think it is enough to modestly note that, for the most part, what we have called doxastic conservatism is a firmly entrenched doxastic policy with more than a little merit in its favour.
is hardly surprising to note that several philosophical thinkers have made it a point to stress that human reasoning does not take place in a vacuum. Even Descartes in his Meditations, which is considered the locus classicus on the subject of attempting to reason about knowledge and the world from a tabula rasa mindset, left clues in his exposition that indicate that he had not completely cleared his thinking of every preconception passed on to him from his scholastic education. Jürgen Habermas also makes a similar point in his work The Theory of Communicative Action: Reason and the Rationalization of Society when he notes that:

Every process of reaching understanding takes place against the background of a culturally ingrained preunderstanding. This background knowledge remains unproblematic as a whole; only that part of the stock of knowledge that participants make use of and thematize is put to the test. (Habermas Theory 100)

Habermas refers to this body of traditional knowledge as a person’s “lifeworld.” In the introduction to this same work Thomas McCarthy supplies Habermas’ readers with a concise but helpful explanation of this concept when he notes:

In the form of “language” and “culture” this reservoir of implicit knowledge supplies actors with unproblematic background convictions upon which they draw in the negotiation of their common definitions of situations. Individuals cannot “step out” of their lifeworlds; nor can they objectify them in a supreme act of reflection. Particular segments of the lifeworld relevant to given action situations can of course be problematized; but this always takes place against an indeterminate and inexhaustible background of other unquestioned presuppositions, a shared global

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7 See Alasdair MacIntyre’s “Epistemological Crises, Dramatic Narrative and the Philosophy of Science” reprinted in Anti-Theory in Ethics and Moral Conservatism. By Stanley G. Clarke and Evan Simpson.
preunderstanding that is prior to any problems or disagreements. (Habermas *Theory xxvi*)

Once we are made aware of the existence of this background knowledge and have had our attention drawn to the integral role that it plays in our thinking and our communicative processes, it becomes easier to see Perelman and Olbrechts-Tyteca’s comments on presumption as a natural extension of the point made by Habermas and McCarthy above. It is tempting to dismiss Perelman and Olbrechts-Tyteca’s explication of presumption as being rooted in “mere” audience bias. But once we see that reasoning from the basis of what we deem to be normal or usual is a universal feature of the human condition, room opens up for a more tolerant outlook on this particular feature of reasoning. Consequently, it should be neither surprising nor very objectionable to note that Perelman and Olbrechts-Tyteca acknowledge this same conservative strain in reasoning in argumentation.

So what does this tell us about the burden of proof? Well this is something that Perelman and Olbrechts-Tyteca address, but only indirectly, by highlighting a point of similarity and a point of difference between legal presumptions and ordinary presumptions. We noted earlier that presumptions in law help legal practitioners to reason under less than ideal circumstances and “fill in” certain lacunas in knowledge that might otherwise frustrate attempts to get the process of legal argumentation off the ground, so to speak.⁸

Perelman and Olbrechts-Tyteca flesh out this suggestion by adding that presumption allows legal practitioners to approach argumentation with a sense of what will be regarded as “normal,” even if these conditions have to be institutionally ratified (Perelman and Olbrechts-Tyteca 107). In the course

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⁸ Chapter 3, Page 75.
of inspecting Perelman and Olbrechts-Tyteca's comparison between these two domains (legal and ordinary argumentation) we learn something about the burden of proof.

Legal presumptions, Perelman and Olbrechts-Tyteca contend, insofar as they reflect our tendency to favour a conservative heuristic in our reasoning, are much like the presumptions we assent to in everyday life. That is to say, the law often lays down for the purposes of argument what it intends to regard as normal. As Perelman and Olbrechts-Tyteca note:

The usual characteristic of legal presumptions is the difficulty there is in overcoming them: they are often irrefragable or can be rebutted only by following very precise rules. Sometimes they concern only the burden of proof. Before any audience, this is almost always a function of the accepted presumptions, but the choice of these presumptions is not prescribed, as it is in certain legal situations. (Perelman and Olbrechts-Tyteca 103) [Emphasis Mine]

This, I think, does a fine job of getting to the heart of the difference between presumptions in legal argumentation and presumptions in ordinary argumentation. In both forms of argumentation, presumptions perform the heuristic function of helping individuals reason against a general background of beliefs concerning what they regard as regular or normal. This is the point of comparison between these domains. The point of difference comes into sharp relief when we reflect on Perelman and Olbrechts-Tyteca's point that in ordinary argumentation an audience's choice of presumptions is not prescribed by fiat. It is something that develops and emerges as a natural consequence of their habitation of a lifeworld. This fact is something that thinkers who wrestle with the burden of proof issue in ordinary argumentation need to come to terms with.

Perelman and Olbrechts-Tyteca's analysis provides some balance in that it helps us to see that presumptions are not completely reducible to an arbitrary exercise of audience dispositions, even from a
rhetorical perspective. In almost all forms of argumentation (with the exception of Rescher's model) we learned that the burden of proof has a close relationship to the notion of presumption. Starting with legal argumentation and ending with Perelman and Olbrechts-Tyteca's analysis of ordinary argumentation, we now learn that the general preference in favour of the presumptive is part of a general heuristic of knowledge acquisition. And it is on the basis of this heuristic that Perelman and Olbrechts-Tyteca explicate their outlook on presumption and, indirectly, the burden of proof.

Returning to the metaphor of inertia, Perelman and Olbrechts-Tyteca note:

Inertia makes it possible to rely on the normal, the habitual, the real, and the actual and to attach a value to them, whether it is a matter of an existing situation, an accepted opinion, or a state of regular or continuous development. Change, on the other hand, has to be justified; once a decision has been taken, it cannot be changed except for sufficient reason. (Perelman and Olbrechts-Tyteca 106)

This explains, in practical terms, why the side of a debate whose position is identified with what is presumptive bears no burden of proof in ordinary argumentation. Any move to give grounds to what is presumptive would simply be an improvident expenditure of effort. But if this general heuristic underlies ordinary argumentation, why are there such deep disputes over the allocation of the burden of proof like those we discussed in Chapter One? Again, I will let Perelman and Olbrechts-Tyteca put it more succinctly than I could when they note that “Before any audience, [the burden of proof] is almost always a function of the accepted presumptions, but the choice of these presumptions is not prescribed, as it is in certain legal situations (Perelman and Olbrechts-Tyteca 103).

To put it another way, once we recognise the fact that speakers in ordinary argumentation have a great deal of freedom over the choice of presumptions they wish to espouse, maintain, and argue for, you have enough free play in ordinary argumentation to frustrate any serious effort to
dictate in advance how this process “ought” to be conducted. Add to this the fact that choices of presumptions will be subject to a myriad of background considerations, and you have enough contingency in the process to render any effort at an a priori handling of the matter a virtual impossibility.

I should hasten to add that a recognition of the element of contingency in the process of belief formation should not used to conclude that, to use a bad old slogan, “everything is relative” and that no regions of stability can be located. As we noted earlier, the very notion of presumption presented by Perelman and Olbrechts-Tyteca suggests that something like a stable ongoing basis from which to reason needs to exist already, or be adopted quickly. I also think that this acceptance of the element of contingency in the process of belief formation does not preclude the possibility of a mutual effort between speakers to seek out and even develop places of commonality that could serve as regions of stability from which to constructively engage in ordinary argumentation.

This outlook also serves to cast the burden of proof issue in ordinary argumentation in a more realistic light. If Sidgwick, and Perelman and Olbrechts-Tyteca are correct in their contention that ordinary argumentation is a practice that turns on audience dispositions and that any particular constitution of the beliefs that lie behind these dispositions is a contingent feature of this process, then it should come as no surprise that the burden of proof issue needs to be looked at in light of these de facto conditions. In ordinary argumentation the burden of proof does attach, as a matter of practical exigency, to a speaker who challenges the intellectual status quo. Audiences are, literally speaking, alleviated of this burden because of the same general sense of practical exigency. The weightier point here is that speakers, audiences, and circumstances are constantly changing and so no single description of a situation of ordinary argumentation can serve as a basis for proof allocation very far beyond its immediate context.
We are also in a position to see why some thinkers have been prone to assume that the burden of proof is merely the “logical opposite” of presumption (Ziegelmueller and Dause 20). In ordinary argumentation, which constitutes the bulk of our dialectical efforts, these two notions are closely linked. There is no denying that some type of relationship exists between these two notions. But I think that blithely describing one as the logical opposite of the other does not exhibit the clearest thinking on this subject. It fails to account for those forms of exchange, like Rescher’s formal dialectic, where the burden of proof does not appear to be functioning merely in correspondence to presumption, or an audience’s disposition on an issue. This suggestion leads me to my final point.

There is, I think, one last piece of the puzzle that needs to be fitted into place in order to get a firm grasp of the burden of proof issue. In Chapter Three, Rescher raised the idea that the burden of proof was connected with a basic obligation that a person has to substantiate or ground their assertions. In order to get a better understanding of this basic obligation, I will be focusing on the constitutive conditions for issuing assertions and engaging in fact-stating discourse. At an earlier point in this thesis I asked the reader to defer discussing in detail the relationship between the burden of proof and the act of issuing an assertion. The time has now come to enter into a discussion of this particular issue.

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9 The reader might also want to note that a similar misunderstanding concerning the burden of proof occurs when assumptions are made about the legal burden of proof based on a casual examination of legal argumentation. As our examination of legal argumentation in Chapter Two revealed, once the facts about legal argumentation are in hand we can see that legal argumentation contains more than a single burden of proof. We could also see that these burdens of proof are carefully prescribed obligations that must be discharged according to a very firm standard. There is a “tactical” burden of proof that can be said to shift, but this is a different kind of exigency for a speaker that is not a legal burden of proof in any strict sense. Consequently, we were bound to conclude that comparisons between legal and ordinary argumentation cannot be made carefully enough.
Chapter 5

Looking at the Burden of Proof Issue from the Perspective of

Speech Act Theory

In this chapter, I want to explore the possibility of applying some insights from Speech Act theory to the subject of the burden of proof. I have expressed my dissatisfaction with those attempts to understand the burden of proof that explain it in terms of a commitment, on the part of a speaker (and perhaps hearers also), to a narrowly conceived goal of discourse. I believe that the insights that are gained through this approach have a limited application at best. For example, attempts to explain the burden of proof with reference to audience presumption have a limited application in those cases where a speaker’s need to provide supporting grounds for his assertion does not appear to arise as a necessary (or even simply exigent) response to the specific presumptions of a particular audience.

There is also a recurring theme in this inquiry that has yet to be explored in detail: the idea that there is a general obligation on a speaker to provide grounds for his assertions. For example, in our survey of Cargile’s comments on the burden of proof he talks about the idea of a “dialectical duty” that a speaker has to defend a claim or affirmation that he has made (Cargile 61, 62). Similarly, in Rescher’s formal model of disputation the burden of proof is identified with a speaker’s commitment to defending the assertions that he has made (Rescher 20). In addition, Robert Alexy also discusses the importance of this kind of general obligation for practical discourse, but refers to it as a “general rule of justification” that applies to the “speech act of asserting something” (Alexy 166; cf. Alexy fn.58, 187). In Van Eemeren and Grootendorst’s discussion of the burden of proof,
they too suggest that this general idea has a basis in speech act theory (cf. van Eemeren and Grootendorst *Argumentation 9; Speech 3*).¹

I think this line of thinking is worth pursuing in more detail. As we noted earlier, rhetorical approaches to the subject of the burden of proof generally look to context specific features of discourse for inspiration when it comes to understanding the subject of the burden of proof. Looking to speech act theory for inspiration on this subject, however, takes us in a different direction, methodologically speaking. It moves us in the direction of philosophical analysis by looking to uncover a basic set of conditions that can underlie the burden of proof. Cargile, Rescher, Alexy, and Govier (as well as others) all link the notion of the burden of proof with the general idea of making an assertion and incurring some kind of obligation as a result. I think once we take a closer look at the act of asserting, we will be in a better position to see how the burden of proof is related to this activity.

Toward this end, I want to look at what three key figures in speech act theory (Austin, Grice and Searle) have to say on this subject to see what their insights might have to contribute to my own inquiry. I believe that their insights can furnish a theoretical outlook to the subject of the burden of proof, of sorts, and that this theoretical outlook is important for developing a systematic approach to the subject in general. While it is not my intention to argue that these insights constitute a comprehensive explication of the subject of the burden of proof, I believe they do play an indispensable role in developing a systematic approach to this subject.

¹ Van Eemeren and Grootendorst's interest in speech act theory concentrates on applying its insights to the study of argumentation as a complex dialogical process. They see arguments as complex speech acts that are directed toward achieving the perlocutionary effect of persuading or convincing a hearer. My own modest interest in exploring the prospects for applying speech act theory to the subject of the burden of proof is content to limit its attention to

We can start with one of the first works to introduce the notion of a speech act. In his watershed work *How to Do Things With Words*, John L. Austin draws a distinction between merely saying something and using this act to accomplish something. To explain how a speaker's mere act of saying something can serve a speaker's purposes, Austin breaks down the act of saying something (or in his terminology a "speech act") into three subordinate acts. Austin's basic thesis is that once we understand the role and function of these subordinate acts and how they "work in concert," we will have a better understanding of how speech acts work as a whole. To this end, Austin draws a distinction between what he calls locutionary acts, illocutionary acts, and perlocutionary acts. Austin describes each of these in the following passage from his work:

We first distinguished a group of things we do in saying something, which together we summed up by saying we perform a *locutionary act*, which is roughly equivalent to uttering a certain sentence with a sense and reference, which again is roughly equivalent to 'meaning' in the traditional sense. Second, we said that we also perform *illocutionary acts* such as informing, ordering, warning, undertaking, &c., i.e. utterances which have a certain (conventional) force. Thirdly, we may also perform *perlocutionary acts*; what we bring about or achieve by saying something, such as convincing, persuading, deterring, and even say, surprising or misleading. (Austin 109)

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exploring the relation between the burden of proof, or incurring a burden of proof, and the simple speech act of assertion (cf. van Eemeren and Grootendorst *Speech* ch.2; van Eemeren and Grootendorst *Argumentation* 28-30).
I think this passage provides us with a basic workable vocabulary that we can use to describe in more detail what takes place when a speaker makes an assertion. Looking at the speech act of assertion from Austin’s perspective, we can break down this act into three different parts. That is to say, when a speaker performs the speech act of asserting that \( p \) he:

1. Performs the locutionary act of uttering words meaning that \( p \).
2. Performs the illocutionary act of asserting that \( p \).
3. Performs the perlocutionary act of asserting that \( p \) in order to bring about a specific (perlocutionary) effect on a hearer.

Now each of these subordinate acts is comprised by certain conditions that need to be satisfied if the speaker is to perform that type of act. Sometimes, however, things can, and sometimes do, go wrong in such a way that it impairs a speaker’s ability to perform a speech act. Austin described these kinds of failed speech acts cases as infelicities (Austin 14). For example, a speaker who asserts that “Next Tuesday is green” cannot perform a speech act by doing so because this speech act fails to meet the semantic conditions that are necessary for the performance of a locutionary act. This particular utterance fails because it has neither an intelligible sense, nor a reference. Consequently, any effort to assert that “Next Tuesday is green” results in an infelicitous (as Austin put it) or defective speech act.

On the other hand, when a speech act is felicitous, or non-defective, it appears to be capable of helping a speaker bring about a specific effect on a hearer. In the case of assertions, a speaker generally seeks to persuade, convince, or simply inform a hearer that \( p \) is in fact the case. What makes Austin’s analysis of this particular form of activity interesting is his insistence on pressing the point that merely employing a particular utterance cannot cause this perlocutionary effect. Now in all fairness there is another type of explanation, that we should at least acknowledge, that has been
advanced to bridge the gap between a speaker's semantically well formed utterance and the ability to achieve a specific effect in a hearer, namely, the causal theory of meaning.

Let us use an example. When the curator of a botanical museum stands next to an exhibit and says to the patrons, in the simple indicative, “That plant is poisonous” he is, in all likelihood, simply informing the patrons about the nature of the plant they are inspecting. Now to say that a particular plant is poisonous is to describe it in such a way that native speakers of a language will be able to draw certain standard inferences on the basis of certain conventions about standard language use. In turn, this will have a distinct causal effect on a hearer.

But the causal theory of language meaning suffers from a weakness insofar as it has trouble accounting for how speakers manage to convey an intended meaning to a hearer that appears to stand in contrast to the conventionally based sense and reference of the expression they are using. The field guide who quickly says to a young man who is about to reach out and touch a particular sample of plant “That plant is poisonous” seems to be conveying something more to the young man than a fact about the toxicological qualities of the plant. Sarcasm, irony, and various non-literal forms of language use make the effort to hold to a strict causal theory of language problematic. Something else seems to be needed to explain how a speaker can produce certain perlocutionary effects in a hearer in a manner that does not rely solely on the conventional meaning of an utterance.

This a specific problem, as we shall see, that speech act theorist Paul Grice sought to address.

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2 This is the view Paul Grice takes issue with in his article entitled “Meaning” that was originally presented in *Philosophical Review* Vol.66, 1957 and reprinted in *The Philosophy of Language* (cf. Martinich ch.5).
B. Paul Grice on Conventional and Conversational Implicature.

In his book *Studies in the Way of Words*, Grice raises the issue of how to account for cases of meaning that do not rest on the conventional force of an utterance alone. It is by no means unusual for a speaker to convey to a hearer, by using certain utterances, an intended meaning that cannot be explained with reference to the conventional meaning of the utterance itself. Competent speakers can hint at, imply, or otherwise convey indirect and oblique meanings to their hearers.

What is needed, Grice suggests, is an explanation of meaning that accounts for how a speaker can indirectly convey more than a plain semantic rendering of his utterance would convey. Fortunately, Grice goes on to sketch out just such an approach that, I believe, contains a number of insights that are germane to our own inquiry into the subject of the burden of proof. Consequently, I believe it is worth our while to survey Grice’s treatment of this matter.

To explain how language can convey certain straightforward meanings and be employed to imply or convey other oblique messages, Grice suggests that there are two processes whereby a speaker can convey his intended meaning to a hearer. The general term Grice uses to describe these processes is “implicature” (Grice 24). There are, Grice suggests, two kinds of implicature: conventional implicature and conversational implicature. In the case of conventional implicature all that is required is knowledge of a particular language. Grice’s examples of meaning that can be attributed to conventional implicature are:

1. He is in the grip of a vice.
2. (Said smugly) He is an Englishman; he is, therefore, brave. (Grice 25)

In the case of the first utterance (as Grice himself explains), a listener with an adequate grasp of the English language would be in a good position to assume that someone is either unable to rid himself of a particular undesirable trait or has some part of his person caught in a mechanical device. Only further knowledge of the context in which the utterance was made could help someone decide which of these interpretations is the correct one. In the case of the second utterance, the
implicature is conveyed by the conventional force of the terms used and the logical bridge is made by supplementing this enthymeme with the needed but unexpressed premise "All Englishmen are brave." Although the speaker never advances this specific premise he has, according to Grice, implied as much.

By contrast, we have conversational implicatures that do not rely solely on conventionally based meaning. They are distinguished from their conventional counterpart in that the ability of a speaker to convey an intended meaning, in certain cases, rests on his ability to exploit these conventions in a carefully calculated fashion. To appreciate this particular form of exploitation, however, we need to discuss the idea of Grice’s co-operative principle and the maxims contained within it.

Grice’s co-operative principle amounts to the working supposition that communication between speakers and hearers would not be possible if it were not for the fact that, as communicators, we can make certain basic assumptions about the intentions and abilities of other communicators. The most basic assumption is that language use (and communication in general) presupposes a base level of co-operation between interlocutors. Unless we could rely on such an assumption, the argument goes, communication would never rise above being an exchange of utterances at cross-purposes leading nowhere. Grice’s co-operative principle is an attempt to articulate this general condition that is presupposed by competent language users when they engage in communication with others. Grice expresses this principle 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 it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.

(Grice 26)
Under Grice’s view, competent speakers need to follow this principle in order to make their conversational contributions appropriate to the circumstances in which they occur. In order to convey the sense of appropriateness described above, Grice presents for consideration four subcategories of implicit rules or “maxims” that competent speakers generally follow. These subcategories are Quantity, Quality, Relation, and Manner (Grice 26), and Grice explicates these 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. (Grice 26-27)

If straightforward cases of conventionally based language meaning are to be possible, according to Grice, these maxims (or something like them) need to be followed as a general rule. In cases where a speaker wishes to convey an oblique meaning to his hearer, however, these maxims are deliberately violated in order to prompt the perceptive hearer into inferring the speaker’s
intended, but not directly stated, meaning (Grice 30). My own interest in Grice’s co-operative principle, not surprisingly, centres chiefly on his maxim of quality. By saying that a speaker needs to avoid saying something for which he lacks adequate evidence, the maxim of quality certainly appears to say something interesting about the subject of the burden of proof; but what exactly?

At this point, it is tempting to assume that Grice’s maxim of quality refers to the burden of proof insofar as it implies that a speaker should make good on the conditions stated in this maxim. But we need to proceed carefully here. Specifically, Grice’s maxim of quality refers only to what a speaker must be able to do (produce adequate evidence) in order to communicate competently. This particular requirement, in turn, seems to invite the supposition that speakers incur proof burdens in virtue of the fact that they are competent language users who, in the course of the speech act of asserting, are complying with Grice’s maxim of quality. The problem with this supposition is, it simply is not true.

It is simply not the case that every speaker who makes an assertion actually ends up having to provide supporting grounds ipso facto. The fact of the matter is some speakers end up having to provide supporting grounds to their hearers, while others do not. An explanation of the burden of proof that rests on Grice’s maxim of quality alone cannot make a connection between the following points: that every competent speaker must be able to provide grounds in support of an assertion that they make, but that only some speakers (but not others) end up actually having to provide those grounds to a hearer. Consequently, a complete description of those conditions that would cast some light on this connection is still not in view.

This is where I think a look at John Searle’s discussion of speech acts can help. In his work *Speech Acts*, Searle provides a rather detailed outlook on what he sees as the necessary and sufficient conditions for the competent production of speech acts. I think an examination of
Searle’s account can give us an overview of the relation that connects the two points mentioned above. It explains in detail, I believe, what it is that speakers do that makes it possible for their hearers to impose an actual obligation upon them to discharge the burden of proof.

C. On Constitutive Conditions and Constitutive Rules.

As an introduction to Searle’s thinking on speech act theory, I think it would be helpful to introduce a couple of technical terms. I think this is important because an understanding of these terms will help us to avoid some confusion about what Searle is arguing for later on. Searle argues that we need to distinguish between a regulative rule and a constitutive rule. Since Searle’s discussion of these rules in his article “How to Derive ‘Ought’ from ‘Is’” contains a straightforward definition of these terms, I will rely on his account directly. As he states:

Regulative rules regulate activities whose existence is independent of the rules;

constitutive rules constitute (and also regulate) forms of activity whose existence is logically dependent on the rules. (Pahel 166)

For example, in polite society, using cutlery is usually a regulative rule for eating a meal. But it is possible to eat without using cutlery and still be recognised as someone who is engaged in the act of eating, albeit rudely. On the other hand, moving a bishop in a diagonal fashion is a constitutive rule for chess. Players who start moving their bishops vertically or horizontally, in the middle of a chess game, are not just being non-conformist, like our rude diner above, they are no

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3 This work, which originally appeared in the Philosophical Review, Vol.73 (1964) has been reprinted in Pahel and Schiller’s work Readings in Contemporary Ethical Theory – the work I am citing this article from.

4 Searle also discusses this distinction in his work Speech Acts (ch. 2., sec. 5.)
longer playing chess. The constitutive rules for an activity, as the very word “constitutive” suggests, articulate those forms of action that set the standard for what counts as performing that activity.

At this point I should say something about the connection between constitutive rules and constitutive conditions. Simply put, statements about the constitutive conditions for an activity do not presume the presence of a particular agent to perform that particular activity. Consider the following example:

In the game of chess, bishops must be moved diagonally and remain on their own colour.

What we have here is the stipulation of a constitutive condition for playing chess. This formulation does not presume that anyone is playing, or even has any intention to play chess. However, once we amend this situation to include the presence of an agent who sets out to play chess, then the constitutive condition becomes a constitutive rule that this agent must follow. That is to say, in order for his actions to count as playing chess, he is constrained by the following imperative:

If an agent is to play chess, then he must *inter alia* move his bishops diagonally and keep them on their own colour.

If the imperative is cast in this form, then the agent is confronted with a constitutive rule. I think this distinction is important because it is easy to assume that constitutive conditions cannot give rise to obligations — they are, after all, only stipulated conditions. This is, I think, a misleading half-truth. Naturally, the mere stipulation of a set of constitutive conditions alone cannot serve to create even a single rule of conduct that an agent must follow. But as soon as an agent’s intention to perform a particular action comes into play, then we have a convergence in conditions that results in
a directive that serves to constrain that agent's conduct with respect to that particular form of activity.

This discussion of the relationship between constitutive conditions and constitutive rules not only gives us a clue as to how certain obligations can arise for an agent, but also gives us a clue as to the scope of these obligations. Constitutively based obligations are conditional in nature. They are conditional in the sense that they presuppose the presence of an agent who intends to perform a particular type of activity. This particular insight into constitutive rules, and the obligations they can impose on an agent, can, I believe, be applied to the activity of performing speech acts.

If Searle is correct in his suggestion that agents, specifically speakers, need to satisfy certain constitutive rules in order to perform the speech act of asserting, and if we can show how satisfying these constitutive rules places a speaker in a position where he is obligated to provide supporting grounds for that assertion, and if we can make a case for viewing hearers as being in a position (under these circumstances) to justifiably impose a request for supporting grounds on a speaker on the basis of a speaker's obligation to provide such grounds, then we are in a better position to describe in detail the relationship between the speech act of asserting and incurring a burden of proof.

With this particular goal in mind, let us see what Searle has to say on the subject of the speech act of asserting and the constitutive conditions that become binding rules for any speaker who engages in this kind of speech act.


In Chapter Three of *Speech Acts*, Searle provides his readers with an outline of what he
believes are the necessary and sufficient conditions that serve to constitute the illocutionary force behind the speech act of promising (Searle Speech 54-71; cf. Austin 109). That is to say, Searle is seeking to uncover the necessary and sufficient conditions that serve to define what makes a speech act a particular kind of speech act. In this part of his discussion he examines the conditions that define what makes a promise, a promise. In our case, we are looking to Searle’s account for a description of what the necessary and sufficient conditions are for an utterance in the form of an assertion, to be an assertion.

As the first paragraph from the third chapter of Speech Acts explains, Searle starts with the illocutionary act of promising because he believes it can provide a straightforward case that is amenable to analysis (Searle Speech 54). Searle also believes that he can generalise the insights uncovered through an analysis of the speech act of promising to cover and account for the force of illocutionary acts per se (cf. Searle Speech 54). Since we are interested in the conditions that account for the illocutionary force of assertions, I want to focus on Searle’s remarks where they pertain to this particular form of illocutionary act. There are, Searle argues, three different constitutive conditions that serve to give the speech act of assertion its illocutionary force. Following Searle’s own outline, they can be sketched out as follows:

For any assertion involving \( p \), there exists:

1. A preparatory condition — a speaker must have evidence (reasons etc.) for the truth of \( p \), and it is not obvious to both the speaker and the hearer that the hearer knows that \( p \).
2. A sincerity condition — a speaker believes \( p \).
3. An essential condition — \( p \) is presented as representing an actual state of affairs.

(cf. Searle 66; Searle 64)
As we noted earlier, once a speaker performs the speech act of asserting, then these conditions, and their satisfaction, become rules that a speaker must be ready, willing, and able to satisfy in order to perform the speech act of asserting competently. This allows a hearer to make certain reasonable inferences about a speaker who performs the speech act of asserting. He also goes on further to state that:

Where the sincerity condition tells us what the speaker expresses in the performance of the act, the preparatory condition tells us (at least part of) what he implies in the performance of the act. To put it generally, in the performance of any illocutionary act, the speaker implies that the preparatory conditions of the act are satisfied. Thus, for example, when I make a statement I imply that I can back it up, [Emphasis Mine] when I make a promise, I imply that the thing promised is in the hearer's interest. When I thank someone, I imply that the thing I am thanking him for has benefited me (or at least was intended to benefit me), etc. (Searle Speech 65)

The central idea here seems to be that in having to satisfy the preparatory rule, the speaker puts himself in a position where he implies to his hearer that he can provide grounds in support of his assertion. This is not unlike what we uncovered in our look at Grice's maxim of quality. In short, in order for a speaker to competently perform the speech act of asserting he must represent himself as someone who believes that p, and as someone who can provide grounds or evidence on behalf of p. Moreover, Searle argues that a speaker must also assume responsibility for representing himself in such a fashion as part of satisfying the sincerity condition (cf. Searle 65). If these conditions can be applied to a speaker, then I think it is safe to suggest that they serve to put a speaker in a position whereby a hearer can impose upon him (the speaker) a request for supporting
grounds. Of course a speaker is free to refuse such a request, but in so doing the speaker runs the risk of rendering his speech act defective.

For now, let us call this particular responsibility that a speaker incurs as a consequence of competently performing the speech act of asserting a \textit{probative liability}. As I hope to show, I think the notion of a speaker's probative liability can go a long way toward explicating the notion of the burden of proof. Under this view, the source of the hearer's power to impose a burden of proof is rooted in the speaker's commitment to the performance of a non-defective speech act. That is to say, by committing himself to the performance of a non-defective speech act, a speaker puts himself in a position where he cannot (without good reasons) refuse this kind of call for supporting grounds on the part of a hearer.

E. The Bridge Between Conditional and Actual Obligations to Discharge the Burden of Proof.

To summarise the main idea raised in the last section, by competently performing the speech act of asserting or, at the very least, by presenting himself as someone who is competently performing the speech act of asserting, a speaker places himself in a position of probative liability. That is to say, by competently performing an assertive speech act a speaker incurs a conditional obligation to provide supporting grounds to a hearer if that hearer should place a demand on that speaker to provide such grounds.

Another way to put this is to suggest that by competently performing the speech act of assertion a speaker is representing himself to his hearer as someone who is ready, willing and able to satisfy the constitutive rules for that act. By engaging a hearer with his speech act performance a
speaker puts himself in a position where a hearer can exercise a power over him to satisfy these rules by requesting that the speaker actually provide him (the hearer) with supporting grounds. The very idea of one person's liability providing another person with a corresponding power is not new and can be found in Wesley Newcomb Hohfeld's discussion of eight fundamental juridical relations (cf. Kent ch. 10).

Perhaps a simpler example might make this clear. Suppose that I borrow $100.00 from my best friend Brian and give him a demand note for the loan. This act gives my friend a power over me to demand payment of the loan. I successfully incur and carry this liability provided I am ready, willing and able to give him $100.00, if he should demand it. So long as he makes no demands, I am not obliged to give him any money. In this respect, I am only conditionally obligated to pay him the money I have borrowed. But the moment Brian asks for repayment, then my obligation is no longer conditional. His request for repayment converts my conditional obligation into an actual obligation to make good on the loan, or default and suffer the appropriate sanction. Naturally, I fulfill or discharge this actual obligation by paying him back the money I owe him.

However, even if my friend calls in his loan and requests repayment, I may still avoid discharging this actual obligation. The obligation to pay back the loan, if it should be demanded, is a *prima facie* obligation or, alternately expressed, an obligation *ateris paribus* (an obligation, "only other things being equal"). This obligation, that has been made actual by my friend's request for repayment, given my liability, can be overridden by special circumstances. Suppose, for instance, that I declare a bankruptcy that is accepted by the courts; given this, my debts are thereby abrogated. Thus, we can say that my liability is, in general and in brief, a conditional obligation. But within the

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5 I am indebted to my supervisor, Prof. Jack Stevenson, for bringing this particular illustrative analogy to my attention.
conditions involved, we can distinguish between a central condition — the calling of the demand note — and, although nonetheless important, peripheral conditions — the defeating conditions for *prima facie* obligations.

This example casts light on a distinction that I believe can bring some clarity to the burden of proof issue. By making a careful distinction between a probative liability to be ready, willing and able to provide supporting grounds for an assertive speech act and the actual obligation to provide supporting grounds that a hearer can impose on a speaker who has placed himself in a position of probative liability we can do two things at once.

First, we can use this as basis for sketching out what a theoretical framework to the subject of the burden of proof looks like if we are willing to take speech act theory (and Hohfeld's thinking on liability) as a starting point. Identifying the burden of proof as a probative liability that attaches to the competent production of assertive speech acts puts us in a better position to explain why the burden of proof, and burden of proof centred issues, can be found in various forms of discourse since assertive speech acts are the predominant mode of expression for language-using creatures such as ourselves.

If I may return to an issue raised earlier on in this work, we are now in a better position to see why discussions about the burden of proof that rest on notions of "positive" as opposed to "negative" assertions should be re-examined. A theory of the burden of proof that is speech act oriented may be oriented toward constatives, but it is indifferent as to the status of those constatives. The fact that it may be more difficult to provide supporting grounds for one constative rather than another does not, in and of itself, provide a basis for removing the burden of proof.

From a speech act perspective, the question of who ought to bear the burden of proof in theistic debate depends on the assertive speech acts each side is making. If the theist is asserting
that God exists, then he has a probative liability to be ready, willing, and able to provide supporting grounds; if he is called upon to do so, then he has an actual obligation to provide supporting grounds. If the atheist is asserting that God does not exist, then a corresponding liability attends to this constative as well. As our examination of Flew’s position revealed, there are ways of skirting around this sense of liability, and only careful attention to what is being said can help arguers decide if this is in fact the case, and whether they find it acceptable.

Agnostics and other sceptics, for example, do not commit to a belief in God’s existence one way or another. It is, I think, an open question whether someone who is completely agnostic on the subject of theism could get enough of a “toehold” on the subject of theism or be engaged with the subject to a sufficient degree that they could engage in constructive debate. I only raise this issue because it does seem to me that for those interested in evading the burden of proof in dialectical exchanges, the sceptical posture is attractive. I think that this route provides only limited cover since at some point, in order to remain engaged in the dialogue, even a sceptic needs to assert and assume probative liability for something (cf. Hamblin Theory chs. 1 and 2).

Second, viewing the burden of proof as a probative liability helps us put some of the insights that we encountered earlier into perspective. If we view the burden of proof as a probative liability, then we are in a better position to see why many of the thinkers that we cited early in this chapter draw a strong link between the act of making an assertion and having an obligation or a burden of proof to provide grounds. If we may recall, it was originally Sidgwick’s suggestion that we should not confuse a speaker’s obligation provide a proof with the difficulty that a speaker may have in discharging this obligation. It was also Sidgwick who noted that a speaker who enjoys a presumptive advantage still incurs a burden of proof, even if it is unlikely that he will ever be called upon to actually give supporting grounds.
In addition to these insights, this outlook on the burden of proof can also help us get a sense of what is not (and cannot) be accounted for by a speech act oriented theory of the burden of proof. By treating the burden of proof as a conditional probative obligation that a hearer has the power to convert into an actual obligation, this theory about the burden of proof leaves open (and fairly so) the question of what would motivate a hearer to make this kind of request. We can broadly suggest that a hearer might be motivated to ask for supporting grounds for those assertive speech acts that he finds improbable, implausible or otherwise incredible, but it would be a mug's game to blindly speculate about what in fact will motivate a given hearer before examining the relevant particulars of a given exchange. In this sense the argumentation theorists and the rhetoricians have it right — only an examination of the actual conditions of a particular exchange can supply a suitable answer to these kinds of questions.

This limitation also applies to at least two other aspects of the subject of the burden of proof. First, as we will soon see, the obligation to bear a burden of proof can be overridden in certain circumstances by other more pressing or weighty obligations. Determining when this particular description actually applies to a given case of argument is something that the interlocutors will have to work through jointly on a case by case basis.

Second, there is also the question of discharging the burden of proof in a satisfactory manner. We noted that determining when an assertive act is too implausible for a speaker to accept was something that was chiefly within the purview of the hearer. The same point applies, with some qualifications, to question about when a speaker has satisfactorily discharged the burden of proof. Only the hearer himself can say when a speaker's evidence, reasoning or grounds are sufficient to satisfy his particular request for grounds. Of course the inclusion of something like a rational standard or norm needs to be consciously included in this part of our theory in order to avoid falling
into the trap of fashioning a burden of proof theory geared exclusively toward the satisfaction of a speaker's expectations, no matter how idiosyncratic, unrealistic, or unreasonable they may be (cf. Johnson 106-109).

I think if a general expectation of rationality or reasonableness is factored into the process, speakers and hearers should be able to jointly work through, on a case by case basis, what they will regard as an acceptable standard for discharging the burden of proof in particular cases of dialogical exchange. Again, argumentation theorists and rhetoricians are on the mark when they suggest these particular kinds of questions are best answered by a careful examination of the particular circumstances of each exchange.

By this point I think it is clear that my position is that an optimal approach to sorting through questions about the burden of proof, especially as these questions arise in actual cases of dialogical exchange, involves adopting a mixed methodological approach to the subject. Speech act theory can provide the basis for a philosophical theory of the burden of proof capable of articulating how the burden of proof can arise as an obligation upon a speaker who engages in a certain form of speech act. It can also elucidate the connection between this type of conditional obligation and the actual obligation to discharge a burden of proof that can be imposed on a speaker by a hearer by requesting that he provide supporting grounds.

But questions about whether a particular speaker in a given instance of dialogical exchange has actually incurred a burden of proof, or whether a speaker has actually discharged a burden of proof in a satisfactory manner, or if there are conditions that actually exist in a particular circumstance that serve to override a speaker's proof burden cannot be answered by a philosophical theory of the burden of proof — at least as it is conceived here. These particular questions can only be answered after examining a variety of possible factors that, in all likelihood, will not remain
constant from circumstance to circumstance. These kinds of evaluations, as logician and argumentation theorist Trudy Govier has put it, require individuals to exercise their capacity for judgement (cf. Govier *Philosophy* 127-130).

When taken together, these methodological approaches show some promise of combining into a comprehensive and systematic approach to the subject of the burden of proof. I think it is important that we respect the division of labour in this proposal for a comprehensive approach because if we do not, we end up expecting too much from one side or another and unfairly impugning it for not answering questions that fall outside its legitimate scope. To use an example: an economic theory can explain how a company’s stock value can increase or decrease. But if the question a person is faced with is to explain how a particular company’s stock managed to fall at a particular point in time, the resources of economic theory alone will not suffice unless these are combined with a variety of information about the particular circumstances that surrounded and contributed to this particular effect.

This example also serves to highlight the limitation on the other side of the methodological fence. A wealth of raw data about a particular company is not likely to be self-interpreting. It is also not likely that the insights to be gained from a particular case study will apply smoothly to other companies, especially those that differ considerably from the original case study. The obvious lesson here is, of course, that the components of data and theory tend to complement each other when it comes to developing a sound and comprehensive approach to most issues. In this case, speech act theory and rhetorical theory have complementary roles to play in the search to uncover a systematic and comprehensive approach to the subject of the burden of proof.

Having now described what I think is the optimal approach to this subject let me quickly take a step back to the constitutive rules that (if accepted and followed by a speaker) can serve to
place him in a position of probative liability and make a brief case for why I think these rules (and
the corresponding probative liability) are binding upon a speaker and why they are not optional
requirements for language users. The reason, as I noted earlier, that a probative liability is binding
for a speaker is that the consequence of not taking on this kind of responsibility is that a speaker
ends up delivering a failed or defective speech act performance.

That is to say, a speaker could, perhaps, explicitly abdicate his responsibility for satisfying the
constitutive rules that underlie a particular speech act, but the result is a speech act that is no longer
capable of conveying a speaker's straightforward literal meaning; it becomes, to put it pointedly,
defective. Perhaps a few illustrative examples of these kinds of breaches of the constitutive rules for
assertive speech acts will serve to illustrate what I mean.

F. Breaches of the Constitutive Rules for the Competent Production of Speech Acts
(with Some Illustrative Examples).

Directly put, speakers have a probative liability with respect to their assertive speech acts
insofar as it cannot be the case that a speaker can fail to satisfy the constitutive rules for a particular
speech act and at the same time perform that speech act competently. A good way of highlighting
this point might be to examine a few cases where a speaker deliberately and knowingly breaches the
constitutive rules for the speech act of asserting to see if he (or she) manages to succeed in
performing a speech act that conveys a straightforward meaning to a hearer or if what he (or she)
says becomes problematic, unless a hearer adopts a different interpretative strategy.
1. Breaching the Sincerity Rule.

Blatant breaches of the sincerity rule tend to come across as such oddities that natural examples are hard to come by. Take for example Moore's paradox: It is raining, but I do not believe it. Philosophers have recognised for some time that such expressions are self-stultifying even though they are formally consistent. That is to say, the first and second conjuncts in Moore's paradox are not logically contradictory. One indication of this is that we can imbed this expression in a larger sentence without getting a paradoxical or contradictory result. For example, there is nothing paradoxical about saying "Suppose it is raining, but I do not believe it is."

We can imagine situations in which sentences that expressed Moorean paradoxes would be true; but it is difficult to imagine a situation where someone could assert them. So why is Moore's example paradoxical? One answer is that it violates Grice's maxim of quality against saying anything you do not believe. A similar answer comes from Searle. He notes that this expression breaches the sincerity rule for the speech act of assertion. In fact, Searle actually presents his sincerity rule as an explanation as to why Moore's paradox strikes us as odd (cf. Searle 65). The second conjunct in Moore's paradox contradicts what is implied about the speaker's state of mind when he utters the first conjunct. The conflict is between what the second conjunct explicitly states and what the speaker implies about his own beliefs by using the expression delivered in the first conjunct. This has led most philosophers to resolve Moore's paradox by suggesting that it involves a pragmatic contradiction where what is implied by the use of language contradicts what a speaker explicitly states.

Consequently, earnest expressions of this kind tend to be rare. The temptation when such expressions are encountered is to interpret them as expressing something less direct. If a speaker
Thomson says "I see it, but I do not believe it" as the usual response it to take this as a colourful way for a speaker to express his incredulity about something he has encountered. Were he to insist that this was not his intention but that his expression was a literal deliverance, it seems that he would need to explain to us why we should not be troubled by what we have described as the presence of a pragmatic paradox.

2. Breaching the Essential Rule.

In plain language, deliberate breaches of the essential rule (stating to a hearer that \( p \) must count as a case of representing to a hearer that \( p \) is an actual state of affairs), amount to a speaker stating something that they believe does not represent an actual state of affairs — a lie. Clearly, a lie represents a defective speech act that is incapable of conveying a speaker’s literal meaning and intention.

3. Breaching the Preparatory Rule of Stating What is Obvious to a Speaker and a Hearer.

This kind of breach appears to result in meaningless or senseless utterances that speakers, more often than not, handle by automatically assuming that a non-literal meaning or a non-standard use is the real intention of a speaker. Let us look at a couple of literary examples where this preparatory rule is deliberately breached to give us a sense of what the results are.

In Jean Paul Sartre’s short story “The Room,” Eve Darbedet, the central character, is married to a man, referred to only as Pierre, who is afflicted with a degenerative condition of an
unspecified nature that affects his mental faculties. The assumption is that Eve has married this man out of pity in order to look after him and, perhaps, in order to get away from her parents. From the general clues in the story, it becomes clear that Eve has confided to her mother that her relationship with Pierre is still an intimate one despite his degenerative condition. In turn, Madame Darbedet decides that she needs to convey this fact to her husband but finds the matter too indelicate to tell him forthrightly. Consequently, the following conversation takes place:

M. Darbedet sat in the armchair and put his hands on his knees; a slight chill ran up Mme. Darbedet’s spine: the time had come, she had to speak.

“You know,” she said with an embarrassed cough, “I saw Eve on Tuesday.”

“Yes.”

“We talked about a lot of things, she was very nice, she hasn’t been so confiding for a long time. Then I questioned her a little, I got her to talk about Pierre. Well, I found out,” she added, again embarrassed, “that she is very attached to him.”

“I know that too damned well,” said M. Darbedet.

He always irritated Mme. Darbedet a little: she always had to explain things in such detail. Mme. Darbedet dreamed of living in the company of fine and sensitive people who would understand her slightest word.

“But I mean,” she went on, “that she is attached to him differently than we imagined.”

M. Darbedet rolled furious, anxious eyes, as he always did when he never completely grasped the sense of an allusion or something new.

“What does all of this mean?”
“Charles,” said Mme. Darbedet, “don’t tire me. You should understand a mother has difficulty in telling certain things.”

“I don’t understand a damned word of anything you say,” M. Darbedet said with irritation. “You can’t mean ....”

“Yes,” she said.

“They’re still ... now, still ...?”

“Yes! Yes! Yes!” she said, in three annoyed and dry little jolts.

M. Darbedet spread his arms, lowered his head and was silent.

“Charles,” his wife said, worriedly, “I shouldn’t have told you. But I couldn’t keep it to myself."

“Our child,” he said slowly. “With this madman! He doesn’t even recognize her any more. He calls her Agatha. She must have lost all sense of her own dignity.” He raised his head and looked at his wife severely. “You’re sure you aren’t mistaken?”

“No possible doubt. Like you,” she added quickly, “I couldn’t believe her and I still can’t. The mere idea of being touched by that wretch .... So ....,” she sighed, “I suppose that’s how he holds on to her.” (Sartre 21-22)

M. Darbedet fails to grasp the meaning of his wife’s utterance at first because he thinks she is informing him of something that is obvious so he does not see the point. I think it is also an interesting side note to point out that no sooner does M. Darbedet grasp what his wife is implying, than he questions her about how sure she is about this oblique but intended message — a clear request for grounds. In response, Mme. Darbedet is quick to recognise this request and show that she accepts a burden of proof here by affirming to her husband that her grounds for accepting this
particular fact about her daughter's relationship (a direct communication from their daughter that Mme. Darbedet has informed her husband of earlier in the discussion) leave no room for doubt.

Another case where a speaker violates the preparatory rule against stating the obvious can be found in Dorothy Parker's story "Here We Are" where two newlyweds are sharing an awkward moment alone after the wedding and are, most likely, just a little embarrassed about their new situation. The exchange between the new bride and groom goes as follows:

'Well!' the young man said.

'Well!' she said.

'Well, here we are,' he said.

'Here we are,' she said, 'Aren't we?'

'I should say we were,' he said. 'Eeyop. Here we are.'

'Well!' she said.

'Well!' he said. 'Well. How does it feel to be an old married lady?' (Leech and Short 303)

The breach in the preparatory rule in the above exchange is obvious. It is obvious to both persons that they are where they are; nevertheless, it is by no means unusual for individuals to make idle or even empty assertions about the obvious as a means of initiating small talk. Linguists Leech and Short, in their work *Style in Fiction*, use this example to illustrate the common phenomenon known as phatic language use (Leech and Short 304; cf. Austin 92). Phatic expressions are empty assertions that convey no substantive meaning of any kind. Their function is to move a conversation along, socially speaking. Interestingly, as Leech and Short point out, phatic language stands as an exception to Grice's maxim of quantity because violating the maxim of quantity in cases
like these conveys nothing of a speaker’s intended meaning, either literal or oblique. (Leech and Short 304). This brings us to a different kind of breach of the preparatory rule for speech acts.

4. Breaches in the Preparatory Rule of Being Able to Provide Grounds or Reasons in Support of an Assertion.

When we consider examples of assertive speech acts that appear to involve violations of the preparatory rule whereby a speaker appears to be unable or unwilling to provide supporting grounds for an assertion, we seem to be presented with a situation where a speaker’s ability to perform the speech act of asserting is considerably impaired. Consider the following passage from E.M. Forster’s novel A Passage to India where a conversation centres on the question of whether Dr. Aziz has assaulted a woman, Miss Quested, while they were exploring some caves together. The Collector appears to be taking Miss Quested’s defence, while Mr. Fielding appears to be concerned with the issue of Dr. Aziz’s innocence. Mr. Turton has the unpleasant task of informing the Collector about who has charged whom with what offence. The ensuing exchange runs as follows:

‘Who lodges this infamous charge?’ he [the Collector] asked pulling himself together.

‘Miss Derek and — the victim herself ... ’ He [Turton] nearly broke down, unable to repeat the girl’s name.

‘Miss Quested herself definitely accuses him of _’ He [Turton] nodded and turned his face away.

‘Then she is mad.’ [Fielding]
'I cannot pass that last remark,' said the Collector, waking up to the knowledge that they differed, and trembling with fury. 'You will withdraw it instantly. It is the type of remark you have permitted yourself to make ever since you came to Chandrapore.'

'T'm excessively sorry, sir; I certainly withdraw it unconditionally.' For the man was half mad himself.

'Pray Mr. Fielding, what induced you to speak to me in such a tone?'

'The news gave me a great shock, so I must ask you to forgive me. I cannot believe that Mr. Aziz is guilty.'

He [the Collector] slammed his hand on the table. 'That — that is a repetition of your insult in an aggravated form.'

'If I may venture to say so, no,' said Fielding, also going white but sticking to his point. 'I make no reflection on the good faith of the two ladies, but the charge they are bringing against Aziz rests on some mistake, and five minutes will clear it up. The man's manner is perfectly natural; besides, I believe him incapable of infamy.' (Forster 160-161)

Fielding, realising that he had no grounds upon which to make his assertion about Miss Quested, withdraws his groundless (and from a speech act perspective, defective) assertion when the Collector insists he do so. But he is more insistent in his second assertion. He does not withdraw this assertion, but instead gives his reasons in support of his holding to it. It appears that the difference is that Fielding can satisfy the preparatory rule of being able to provide supporting grounds for the second statement on the basis of his personal acquaintance with Aziz that informs his assessment about Aziz's character. Presumably, he does not know Ms. Quested well enough to
make any kind of unqualified statement about her character. As a result, he is in a position where he cannot provide grounds in support of his first assertion.

A failure to provide grounds can also impair a speaker’s ability to have a hearer take their utterance seriously. In P.D. James’ novel *The Skull Beneath the Skin* Clarissa Lisle, a stage actress, has received death threats and her husband, Sir George Ralston, has decided to hire the novel’s main character, Cordelia Grey, to investigate the case. In the process of hiring Cordelia, Sir George relates something to Cordelia that his wife has told him. His description of his wife’s outlook runs as follows:

'I had hoped to be there myself but that won’t be possible. I have a meeting in the West Country which I can’t miss. I propose to motor down to Speymouth with my wife early Friday morning and take leave of her at the launch. But she needs someone with her. This performance is important to her. There’s a revival of the play at Chichester in the spring and if she can regain her confidence she might feel that she can do it. But there’s more to it than that. She thinks that the threats may come to a head this weekend, that someone will try to kill her on Courcy Island.'

'She must have some reason for thinking that.' [Cordelia]

'Nothing that she can explain. Nothing that would impress the police. Not rational, perhaps. But that’s what she feels.' (James *Skull* 16-17)

I find it interesting that instead of taking this character’s expression of impending disaster at face value, James’s character of Sir George chooses to categorise his wife’s expression as either an irrational utterance or merely an expression of her own personal intuition. I think this particular literary example illustrates two very natural alternative interpretative strategies that are frequently applied in cases where a groundless assertion is presented for a hearer’s consideration.
Continuing on this line of thought, I think it is important to note that in all of these cases a common point can be detected: speech acts that are defective because a particular constitutive rule is not being satisfied do not pass for straightforward cases of literal meaning. In such cases, hearers fall back on a variety of alternative strategies for interpretation: they can charitably interpret these defective cases as empty, irrational, or pointless locutions, they can interpret them as a sign that an oblique meaning is being implied (Grice's argument), they can assume that a merely expressive or emotive use of language is being employed, they can insist that the speaker withdraw or retract the assertion, or they can request that a speaker provide supporting grounds on behalf of an assertion.

In addition to breaches in the constitutive rules, other factors can serve to disrupt the chain of relations between the constitutive rules for a speech act performance and incurring an actual obligation to discharge the burden of proof. Apart from considerations about satisfying the constitutive rules for speech act competence, there is also something to be said for also taking into account the status of an asserted proposition itself. There is, perhaps, something about the very expression 'that p' itself that raises questions about the burden of proof. We have already noted that p cannot have the quality of being obvious to a speaker and his hearer. But what about the probability of p being true? Does this affect a systematic approach to the subject of the burden of proof? Let us look at these kinds of questions in the next section.

G. Presumption-Oriented Talk, the Ceteris Paribus Condition, and Other Context Dependent Aspects of the Subject of the Burden of Proof.

I think that an examination of the conditions that underlie the performance of the speech act of assertion revealed significant insights into the subject of the burden of proof. But the questions
raised at the end of the last section highlight what I have referred to as an inherent limitation in approaching the subject of the burden of proof from a speech act perspective. A speech act perspective can tell us how a speaker can put himself in a position of probative liability whereby a hearer can exercise a power over him and ask for (and expect to be provided with) supporting grounds, but it cannot directly address the question of what might actually motivate a hearer to exercise this particular power.

I think this is where (what I called earlier) a rhetorical emphasis on certain context specific conditions, as well as the exercise of judgement, finds its place in a systematic approach to the subject of the burden of proof. Because the possibilities are limitless when it comes to speculating about such conditions, only an empirical examination of those context dependent aspects of discourse that actually serve to influence a hearer's assessment of the probability or plausibility of \( p \) can give us the information needed to make an intelligent assessment of a speaker's attitude toward the truth status of \( p \).

Consider the next two examples where the burden of proof appears to arise because a speaker has asserted that \( p \) and the hearer finds \( p \) implausible, at least at first blush. Both of these examples come from interviews of prominent philosophers conducted by British personality Brian Magee for the BBC. These interviews can be found in Magee's work *Men of Ideas*. Occasionally one of his interviewees would say something that prompted Magee to call for that speaker's reasons or grounds in support of what they have asserted. The first example comes from Magee's interview with A.J. Ayer. The subject is Logical Positivism, and if we bear in mind the fact that Ayer's book *Language, Truth and Logic* is a (if not the) *laos dassias* in this area, the call for grounds by Magee in the excerpt that follows is quite understandable.
Magee: It's enough in itself to explain the huge and passionate hostilities aroused by Logical Positivism. Authoritarian governments, like those of the Communists and Nazis, banned it altogether. Even liberals were disconcerted by it.

Ayer: They thought it was too iconoclastic.

Magee: But it must have had real defects. What do you now, in retrospect, think the main ones were?

Ayer: Well, I suppose the most important of the defects was that nearly all of it was false.

Magee: I think you need to say a little more about that.

Ayer: Well, perhaps I'm being too harsh on it. I still want to say it was true in spirit — the attitude was right. But if one looks at it in detail ... First of all, the verification principle never got itself properly formulated, I tried several times, but always let in either too little or too much. To this day it hasn't received a logically precise formulation. Then the reductionism doesn't work. You can't reduce even ordinary statements about cigarette cases and glasses and ashtrays to statements about sense data — let alone the more abstract statements of science. So the really exciting reductionism of Schlick and the early Russell, as I say, doesn't work. Third, it seems to me very doubtful now whether statements in logic and mathematics are analytic in any interesting sense. In fact, the whole analytic-synthetic distinction has been put in question by the work of recent philosophers like Quine. I still want to maintain it in some form, but I have to admit that the distinction is not so clear-cut as I once thought it was. In some sense, obviously, statements in mathematics are different from statements about the empirical world. But I'm not at all sure that
saying, as I did say, that they’re true ‘by convention’ is right — anyhow it needs a lot of defending. Again, the whole reduction of statements about the past to statements about the present and future evidence for them is wrong. Our doctrine about other minds was wrong. I think my theory of ethics was along the right lines, though much too summary. So if you go into detail, very little survives. What survives is the general rightness of the approach. (Magee Men 107)

To anyone who has read A.J. Ayer’s work, this assertion by Ayer to the effect that Logical Positivism was nearly all false certainly comes across as highly implausible upon first sight. Understandably, Magee tells Ayer that he “needs to say more about that,” presumably, because Magee himself (or perhaps only as a good interviewer) recognises that Ayer’s assertion is, as it stands, somewhat incredible. At this point Ayer seems to be in a position where he must either provide grounds in support of his assertion, or run the risk of having Magee (and perhaps the audience) not take what he says seriously, or perhaps even dismiss it entirely. In this instance, Ayer was good enough to provide his grounds for saying what he did.

In the next example from one of Magee’s interviews, Magee is interviewing W.V.O. Quine. At one point in the interview Quine shares his views with Magee on the subject of abstract entities, which Magee finds puzzling. Magee expresses this puzzlement and in doing so appears to call one of Quine’s assertions into question. The exchange runs as follows:

Quine: ... My position is not that there are only physical objects — there are also abstract objects.

Magee: But these abstract objects are not mental — it’s important to make that distinction, is it not?

Quine: That they’re not mental? That’s it.
Magee: In other words, you don’t believe in the existence of minds as separate from physical things, but you do believe in the existence of certain abstract non-physical entities.

Quine: Yes, numbers notably.

Magee: I think you need to explain that a bit. If you are a physicalist, how can you justify belief in the existence of abstract entities at all.

Quine: The justification lies in the indirect contribution that they make to science.

(Magee Men 148)

Magee finds Quine’s asserted belief in abstract entities somewhat incredible because he sees a conflict between this and Quine’s materialist stance that leads him to reject any belief in mental entities. This leads Magee to call Quine’s position as a physicalist into question by pointing to what he sees as a conflict between a belief in abstract entities and Quine’s own physicalist stance. It is interesting that Magee uses the word “justify” in this particular instance implying, perhaps, that without some kind of grounds being provided by Quine in support of his belief, it stands unjustified and perhaps unworthy of Magee’s assent or the audience’s assent. Quine accepts Magee’s request for grounds and discharges his burden of proof by giving Magee his reasons in support of his belief in abstract entities.

But not every exchange involving the burden of proof pivots around philosophical issues. Burden of proof questions can also arise in ordinary exchanges. As our literary example from E.M. Forster was designed to illustrate, assertions do not need to be puzzling or apparently contradictory to give rise to a reasonable request for grounds by a hearer. To illustrate this I want to return to another literary example from P.D. James.
In her novel *A Certain Justice*, one of the central characters of the novel, a lawyer named Venetia Aldridge, has been murdered in her law office. Another character, Harry Naughton, has discovered the body and after leaving the room of the murder scene, as well as closing and locking the door and reporting the murder by phone to the authorities, he encounters a junior law clerk named Terry Gledhill. Gledhill asks Naughton what is wrong by inquiring:

“What’s up? You all right, Mr Naughton? You look as white as that door.”

“It’s Miss Aldridge. She’s dead in her room. I found her when I arrived.”

“Dead? Are you sure?”

Terry made a move towards the stairs but Harry moved instinctively to block his path.

“Oh course, I’m sure. She’s cold. No point in going up ... it wasn’t natural, Terry.”

“Christ! You mean she was murdered? What happened? How do you know?”

“There’s blood. A lot of blood. And, Terry, she’s cold. Ice cold. But the blood is tacky.”

“You’re sure that she’s dead?”

“Of course I’m sure. I told you, she’s cold.” (James *Certain* 121)

Terry, of course, has trouble accepting Harry’s claim that Ms. Aldridge is dead. He asks Harry if he is sure, questioning his assertion. Harry provides his grounds by saying repeatedly to Terry that she was cold, implying that her body temperature was far below normal, which is the usual condition of anyone who has been dead for sometime. Harry’s initial assertion is incredible, but not for any deep philosophical reason. It was not initially credible because it brought shocking and unexpected news that Terry has trouble believing.
Let me conclude this particular point by stating the last three examples are provided as a means of showing that a hearer can have any number of reasons for regarding \( p \) as less than credible. Similarly, the question of what kind of evidence, or supporting grounds, or even reasons for asserting \( p \) a speaker would need to provide to a sceptical hearer in order to discharge the burden of proof with respect to \( p \) will be closely linked to the truth conditions that attend to each constative that a speaker may utter. Claiming to have a headache, or that your car's starter is ruined, or that God exists are all assertive speech acts that involve constatives. These constatives each have their own truth conditions that when satisfied serve to justify a speaker's confidence in what he has said.

Again, there is simply no telling in advance what kinds of truth claims will come into play until the actual details of a particular dialogical exchange are known. From a systematic standpoint that rests on speech act theory, we can only state in the broadest sense that determining whether a speaker has a proof burden and determining what the conditions will be for discharging a particular burden will, in certain cases, require that speakers and hearers turn their attention to the question of what kind of truth conditions are involved in a particular expression that \( p \). Some expressions of \( p \) will involve truth conditions that are relatively straightforward, other cases will prove to be more complicated. Again, only a detailed analysis of a particular constative and the specific truth conditions involved with that particular constative can help speakers and hearers work through these kinds of questions.

Another context dependent consideration that this approach needs to take into account is covered, oddly enough, by what Searle calls "normal conditions." As he notes:

I use the terms "input" and "output" to cover the large and indefinite range of conditions under which any kind of serious and literal linguistic communication is possible. "Output" covers the conditions for intelligible speaking and "input" covers
the conditions of understanding. Together they include such things as that the speaker and hearer both know how to speak the language; both are conscious of what they are doing; they have no physical impediments to communication, such as deafness, aphasia, or laryngitis; and they are not acting in a play or telling jokes etc. It should be noted that this condition excludes both impediments to communication such as deafness and also parasitic forms of communication such as telling jokes or acting in a play (Searle 57).

This allows Searle to exclude several kinds of non-literal and defective speech acts from his account and narrow down the scope of his analysis to cover only straightforward cases of literal meaning. But this description also contains the implicit concession that in order for it to apply to real cases, an empirically based judgement about whether these normal conditions do in fact hold is needed. This not to say that non-literal and defective forms of speech acts are completely outside of the reach of Searle’s approach, but only that they do not play a pivotal role in his account.

Another context dependent factor that it is necessary to acknowledge involves the possibility that a speaker’s duty to bear and discharge the burden of proof might come into conflict with other duties that a speaker might have. If we will recall, on the basis of what was said earlier, speakers who perform the speech act of assertion incur a probative liability to provide supporting grounds to a hearer. But even in those cases where a hearer imposes an actual duty on a speaker to discharge the burden of proof on the basis of his probative liability, a speaker may still not be in a position where he must discharge the burden of proof. There may be other duties that compete with the duty to bear a burden of proof. In such cases, a conflict of duties may be inevitable.

To accommodate this type of conflict between duties that can arise, the term prima facie has sometimes been employed to describe a speaker’s duty to bear and discharge the burden of proof.
The term *prima facie* duty comes from William D. Ross and was proposed in order to help sort out a common difficulty within ethical theory that has its roots in Kant's suggestion that there are exceptionless rules that morality dictates must be followed (cf. Hospers 297). Individuals, Ross argues, can find themselves in situations where they are faced with conflicting duties or with duties that (under those conditions) seem weightier than a particular "exceptionless" rule of morality. For example, if the biblical injunction that "thou shall not kill" were to be taken as an exceptionless rule of conduct, then we have the counter-intuitive result that all cases of self-defence are unjustified.

On the other hand, if everyone regarded ethical duties as being only weakly binding or as injunctions that are entirely context sensitive, then a robust system of moral relations could hardly be developed, much less relied upon. In between these two alternatives is the notion of a *prima facie* duty that (Ross argues) should be regarded as an absolute duty for an individual, provided no other *prima facie* duty conflicts with it. Naturally, questions about how to deal with actual conflicts that arise between *prima facie* duties will require careful, and context sensitive, exercises in judgement.

Bringing this insight to bear on this speech act based account of the burden of proof might begin with the suggestion that a speaker has a *prima facie* duty to discharge a burden of proof, if a speaker has placed himself in a position of probative liability, and if a hearer has imposed an actual request on that speaker for supporting grounds for that speech act. What exactly does this mean? Simply that speakers should satisfy a hearer's request that he discharge his proof burden unless that duty conflicts with a weightier *prima facie* duty that a speaker might be under. Naturally, speakers and hearers will have to exercise their best judgement in order to work out in a joint fashion when such a conflict has occurred and how it ought to be resolved.

If I may use a fictitious example to illustrate this point, suppose that a doctor unexpectedly discovers something that is seriously wrong with his patient in the course of a routine examination.
The problem, let us speculate for the sake of our example, requires immediate surgery in order to save the patient’s life. The doctor then decides to send the patient up to the Operating Room and goes out to the Waiting Room to tell his wife. The doctor is in a hurry because immediate action can make the difference between life and death for the patient. With these circumstances as a backdrop, consider the following possible scenario:

Doctor: “Mrs. Jones, I’m afraid we have had to rush your husband to the emergency room. I’ve discovered a blood clot in his leg and he needs immediate surgery or he could die.”

Mrs. Jones: “Doctor, this has all happened very quickly. Are you sure that he has this condition? Does he really need surgery?

The doctor is under two conflicting *prima facie* duties in this case. First, because the situation is serious, Mrs. Jones is owed some kind of explanation as to why they are taking her husband into surgery unexpectedly and on such short notice. If the situation were a bit more relaxed we might say that the doctor has a *prima facie* duty to provide his reasons for asserting that Mr. Jones has a blood clot in his leg and why, exactly, he needs surgery immediately. But the doctor also has a *prima facie* duty to save the patient’s life. The longer the doctor stays to talk to Mrs. Jones, the less likely it is that Mr. Jones will survive. Under normal circumstances these duties are binding for a doctor, but in this case they are in conflict; both cannot be satisfied, and one must be followed at the expense of the other.

Since the doctor is likely to be bound by certain professional responsibilities to provide the best possible care to a patient, it is likely that he will have to defer discharging his proof burden until later in favour of acting immediately in order to save Mr. Jones’ life. Now the circumstances are not always this dramatic when it comes to conflicts in *prima facie* duties, but this basic dynamic is not
uncommon. In fact some formulations of the burden of proof duty include a rider to the effect that a speaker needs to satisfy the request to discharge a burden of proof unless that speaker can provide sufficient grounds in support of not discharging this particular obligation (cf. Alexy 166).

This raises the question of just what kind of grounds a speaker could point to as a basis for a claim to be excused from bearing a burden of proof in a particular instance. In turn, a consideration of these grounds in their own right falls under what has been described a ateris paribus condition. Interestingly enough, Searle introduces the notion of a ateris paribus condition into his account of what makes a promise binding upon a speaker. Since his description can be helpful in coming to understand this condition, we can follow his account for a while, as long as we keep in mind that there is a significant difference between promising and asserting. I think as long as we are mindful of this difference we can follow his line of thinking here, at least for a while.

Any speaker, Searle argues, who makes a promise puts himself in a position where he must satisfy the constitutive rules for performing that kind of speech act. As a matter of common sense, and as we have just noted, we can also recognise that making good on a promise is one kind of duty out of many that a speaker may be faced with. To settle this kind of conflict Searle has proposed, in a different context, that his approach to speech act theory should include what he calls a "ateris paribus rider" (Pahel 158). This kind of rider states that constitutive conditions ought to hold "all other things being equal," which means:

Unless we have some reason (that is, unless we are actually prepared to give some reason) for supposing that the obligation is void ... or the agent is prepared to give some reason for supposing that the obligation is void ... or the agent ought not to keep the promise ... then the obligation holds, and he ought to keep the promise. It is not part of the force of the phrase "other things being equal" that in order to
satisfy it we need to establish a universal negative proposition to the effect that no reason could ever be given by anyone for supposing the agent is not under an obligation or ought not to keep the promise. That would be impossible and render the phrase useless. It is sufficient to satisfy the condition that no reason to the contrary can in fact be given. (Pahel 160)

What is especially notable here is Searle’s description of how it is that we come to determine when the *aetatis paribus* condition has not been satisfied. As he states:

If a reason is given for supposing the obligation is void or that the promiser ought not to keep a promise, then characteristically a situation calling for an evaluation arises. Suppose for example, we consider a promised act wrong, but we grant that the promiser did undertake an obligation. Ought he too [to?] keep the promise? There is no established procedure for objectively deciding such cases in advance, and an evaluation (if that is the right word) is in order. But unless we have some reason to the contrary the *aetatis paribus* condition is satisfied, no evaluation is necessary, and the question whether he ought to do it is settled by saying “he promised.” It is always an open possibility that we may have to make an evaluation in order to derive “he ought” from “he promised,” for we may have to evaluate a counter-argument. But an evaluation is not logically necessary in every case, for there may as a matter of fact be no counter-arguments. I am therefore inclined to think that there is nothing necessarily evaluative about the *aetatis paribus* condition, even though deciding whether it is satisfied will frequently involve evaluations. (Pahel 160)

Now at this point I think it is important to point out that asserting, unlike promising, does not *ipso facto* serve to place a speaker under an actual obligation to discharge a burden of proof. We
can only infer that a competent speaker may have to discharge the burden of proof, not that he actually must. On the other hand, once a request for grounds has been legitimately imposed by a hearer on a speaker who is in a position of probative liability, then a speaker has an actual duty to discharge the burden of proof aeternis paribus.

What this comes down to is the expectation that a speaker will treat the actual obligation to discharge the burden of proof as an absolute duty once he has performed the speech act of asserting and has had a legitimate claim for evidence, grounds, or simply reasons in support of his assertion imposed on him by a hearer. In turn, this duty is regarded as completely binding upon a speaker aeternis paribus or “all things being equal.” But as soon as a speaker can actually present a legitimate reason for not discharging the burden of proof in a particular instance, the speaker has introduced a consideration that serves to override the obligation to discharge the burden of proof.

This insight also serves, once again, to underscore the rhetorician’s point. Even Searle acknowledges that in order to reach a conclusion about whether this kind of overriding consideration has affected a speaker’s actual obligation to discharge the burden of proof, it is not enough that there merely be some reason that might serve to override this obligation, a reason must actually be provided that suffices to override this obligation. I would add that this request for actual and sufficient reasons returns us, once again, to a point where we can recognise the importance of incorporating context specific knowledge in order to round out, so to speak, our speech act approach to the subject of the burden of proof.

This leaves me with the firm conviction that although a speech act oriented perspective on the subject of the burden of proof yields some crucial insights into this subject, only a mixed methodological approach that incorporates salient contributions from both speech act theory and from rhetoric and modern argumentation theory, can yield a systematic and comprehensive
approach to the subject of the burden of proof in general. In the next chapter, I want to outline what I think this kind of mixed systematic approach to the subject of the burden of proof might look like in practice by attempting to anticipate some questions that could be posed to it in order to test the adequacy of this mixed model for approaching the subject of the burden of proof.
Chapter 6

On Developing a Systematic and Comprehensive Approach to the Subject of the Burden of Proof and Some Critical Questions


In the last chapter I proposed that an optimal approach to handling the subject of the burden of proof would include two different methodologies. I argued that approaching the subject of the burden of proof from a speech act perspective provides a systematic approach to this particular subject. Specifically, this approach provides a framework for answering several general questions about the burden of proof. What accounts for the family resemblance in proof burdens that can be found within various dialectical exchanges? How do some speakers, but not others, incur an actual obligation to discharge the burden of proof? What makes the burden of proof obligatory for a speaker? Let me explain why I think these kinds of questions are important.

In dialectical exchanges, opinions and viewpoints are advanced and exchanged for another person's consideration. These exchanges can take on different forms and be directed toward a variety of goals. In any given case it is not unusual to encounter instances where a hearer requests reasons or grounds in support of something that a speaker has said. In some of these cases the result of such a request is that a speaker has a burden of proof that he needs to discharge, in other cases no burden of proof arises.

Some have speculated that what compels speakers to discharge the burden of proof can be explained with reference to a specific goal that a particular exchange happens to be directed toward.
I think it is important to recognise that the problem with this kind of explanation is that dialogical exchanges can be directed toward many different goals. Explaining the burden of proof by linking it to a particular conversational goal becomes problematic, I think, once we recognise that the burden of proof is a ubiquitous feature of dialogical discourse and that these discourses (at least in principle) can involve a variety of conversational goals. Even within the confines of a single exchange it is possible to find speakers and hearers who are committed to two different conversational goals.

My argument is that there is a common denominator to be found that underlies the burden of proof and that it can be located in the notion of an assertive speech act that a speaker is committed to performing competently. In most cases of dialogical exchange we can locate speakers who are performing the speech act of asserting in order to accomplish an illocutionary effect. From a speech act perspective, all competent speakers who perform the speech act of asserting need to be ready, willing, and able to satisfy a specific set of constitutive rules.

Performing this particular type of speech act also involves presenting oneself as someone who takes responsibility for having performed this kind of speech act. As a result, a speaker incurs an informal liability, of sorts. That is to say, unless a speaker is ready, willing, and able to satisfy the constitutive rules, his attempt at bringing about an illocutionary effect by performing this particular speech act will be defective.

Under this view, we can explain why some speakers must actually provide supporting grounds while others do not. Depending on the circumstances and the predisposition of a particular hearer, some speakers will only have to be ready, willing, and able to satisfy the constitutive rules for a particular speech act, while other speakers will find themselves in a position where it will be necessary to actually discharge this obligation. This brings me to comment on the rhetorical contribution to this subject.
At the beginning of this thesis I proposed that a rhetorical approach to the subject of the burden of proof could benefit from a philosophical approach to this subject. I still maintain this view. As I outline above, I think a case can be made for identifying the speech act of asserting as the most basic unit of linguistic exchange that contains the conditions that account for the pervasive presence of the burden of proof in human discourse. This is why I think speech act theory makes a salient contribution to this subject. In short, it supplies a serviceable general outlook on the subject of the burden of proof as it arises within discourse in general. But the benefits to be bestowed by adopting a different outlook on the subject of the burden of proof are not provided entirely by speech act theory.

What a speech act perspective cannot do (and should not be expected to do) is to provide answers to those questions that are rooted in the context specific details of a dialectical exchange. In almost every dialectical exchange there are certain context specific features that inform that particular exchange. As we noted earlier, from a speech act perspective a request for supporting grounds can be imposed (by a hearer) on a speaker who performs a speech act of asserting that p. On the one hand, if a hearer has no objection to the proposition p itself, then that hearer is not likely to ask a speaker to provide grounds on behalf of p. On the other hand, it is also possible that a hearer may possess some doubt as to the status of p. A hearer might find p incredible, or implausible, or improbable, or have any possible number of objections that may need to be addressed before allowing an assertion of p to go unquestioned.

From a speech act perspective, there is no way of knowing in advance which of these two avenues a particular dialectical exchange will follow. One alternative results in an unbroken conversational exchange, and the other alternative provides the conditions under which a request to discharge the burden of proof can be imposed upon a speaker. It seems to me that this is where the rhetorical emphasis on an approach that emphasises attention to the context specific conditions of
an exchange makes a major contribution. Context specific knowledge about the participants in a particular exchange and an awareness of the relevant particulars of a particular exchange can go a long way toward helping a third party observer, or even a speaker himself, gauge what a particular hearer's response will be to a speech act where $p$ is asserted by a speaker.

It is because of this inescapable element of particularity, or specificity if you will, that this thesis cannot venture to provide answers to those questions that are best handled through an exercise of informed, experienced, and mature judgement. This thesis is in a position to recognise and acknowledge (from a distance perhaps) the importance of this kind of context specific knowledge for any attempt to devise a comprehensive approach to the subject of the burden of proof. This particular form of knowledge is also indispensable when it comes to dealing with specific questions about the reasonableness of a hearer's request for grounds in a given instance or the acceptability of a speaker's refusal to meet a particular request for grounds.

This leads me to believe that I am on relatively safe ground when I say that many philosophical attempts to decisively allocate the burden of proof to one side of a dispute a priori, more often than not, do not take this rhetorical dimension of dialectical exchanges seriously enough. Since I began this thesis by commenting on what I felt was lacking about an approach to the burden of proof that was exclusively rhetorical, I will let those comments stand as a correlative insight to what I have just described above as the limitations of relying exclusively on speech act theory in order to understand the notion of the burden of proof.

The main point I am pressing for here is that an optimal approach to the subject of the burden of proof will include both of these outlooks in order to capitalise on their respective strengths. I believe the best philosophical approach to the subject of the burden of proof can be structured around a speech act perspective that, as a matter of practical necessity, seeks out as much context specific knowledge as is required in order to provide answers to a category of questions
about the notion of the burden of proof that a speech act perspective alone is not designed to handle.

At the beginning of this thesis I presented three central questions that I asked the reader to keep in mind as this inquiry proceeded. It is still my intention to answer these questions, but first some other questions need to be addressed. I think that any philosophical approach to the subject of the burden of proof (and my proposal is no exception) needs to demonstrate that it can anticipate and respond to a certain degree of critique.

In the remainder of this chapter I want to present what I think are some of the more pressing questions that could be aimed at my proposal to adopt a mixed methodological approach to the subject of the burden of proof. Now no philosophical approach (mixed or otherwise) can anticipate every possible objection, nor is it likely that every possible objection can be given a definitive answer. But any serious proposal in favour of adopting a certain methodological approach to a philosophical topic should, at the very least, demonstrate an awareness of those concerns that might tell against it and provide candid answers in response to constructive points of criticism. In order to make the reading of the next section a little easier, I want to adopt the temporary literary device of putting these questions and concerns in the mouth of a fictional critic who can then address them directly to me in the second person. This, I think, allows for a more direct and natural presentation of the ideas to be discussed in the next section.
B. Some Critical Questions.

1. Objection 1.

Your systematic approach to the burden of proof relies on Searle's approach to speech act theory where it is argued that a particular set of constitutive conditions serves to define a speech act, but the fact that these are stipulated conditions leads me to suspect that I am free to either accept Searle's particular definition of what a speech act is or, perhaps, reject it in favour of another definition. For example, you use the example of playing chess where an agent must follow the constitutive rules for chess in order for his actions to count as an example of playing chess. But if there is no general interest in the activity of playing chess, any systematic approach to game playing that appeals to these particular rules will be unconvincing. What if defective speech acts and abnormal discourse suit me better than submitting to Searle's arbitrary definition of a speech act? If I were to adopt this view, where would this leave your systematic approach? Would your speech act oriented approach to the burden of proof even be binding for me in this case?

I would agree that Searle's constitutive conditions for speech acts are stipulative and definitional in nature. This is something that Searle does not deny (cf. Searle 34). I would, however, hesitate before describing them as arbitrary since there is a case to be made for not seeing them as a completely arbitrary set of rules. Searle's argument in his work *Speech Acts* is that these rules represent the necessary and sufficient conditions for performing a speech act in order to convey literal straightforward meaning (Searle 54). His argument in this instance is a transcendental argument (cf. Govier *Socrates* 170-171). It contends that non-defective speech acts (that convey a speaker's literal meaning) are an essential form of linguistic activity, and one that is necessarily presupposed by a particular set of rules.
To suggest that an alternative set of rules "could" possibly be proposed does not upset Searle's argument. For example, if you come up with a different set of rules for chess, you are free to follow them — but you will not be playing chess. That is fine, you might say, you would rather make up your own game anyway. This is where, I think, using chess playing as an analogy breaks down. By this I mean that it is conceivable, not by some perhaps, that someone could lead a complete and integrated social existence and never learn how to play the game of chess. The same cannot be said, I believe, for anyone who has never acquired the ability to competently perform speech acts.

My point is that these are not "Searle's rules" for speech acts, they simply are the rules for speech acts, period. The test of this view is not whether someone could violate these rules. I am willing to concede that if a speaker is willing to endure any kind of consequence, no rule (constitutive or otherwise) will serve to constrain his behaviour. But this does not undermine Searle's argument. The test of Searle's rules on their own terms is to devise a counterexample where these rules are not followed and yet a speaker manages to achieve the straightforward literal communication of his intention.

This is why I presented several examples of speakers who breached the constitutive rules for asserting in the last chapter. The result of these kinds of breaches was not an alternative mode of communicating direct and literal meaning. The result was a montage of defective speech acts and non-standard uses of language. If an alternative mode of discourse is available that is comparable to Searle's description of normal discourse, and if this alternative mode does not rest on Searle's constitutive rules, then any transcendental argument that establishes Searle's constitutive rules cannot hold up. Now one contrary argument that has been mounted against this approach is directed against Searle's claim that defective speech acts necessarily result in defective or non-standard discourse. Lies and false promises, it is argued, have no difficulty passing for literal speech.
acts. Therefore, Searle is wrong in his suggestion that his constitutive conditions must be followed in order to engage in literal straightforward discourse. (cf. Pavel 168-179)

But these forms of discourse can only succeed as long as the person being lied to is left with a false belief that they are participating in normal discourse. Moreover, a liar and a deceiver can only succeed in this form of activity so long as he represents himself as someone who is engaged in normal discourse. Once the speaker’s deviation from the constitutive conditions for promising or asserting is exposed, then the speaker’s speech act performance can no longer succeed in conveying a literal meaning to a hearer. The fact that such a manoeuvre can only succeed by passing itself off as a normal or standard speech act performance shows that this kind of discourse cannot stand on its own but, rather, is parasitic on competent speech act performance.

Any speaker who believes that they can evade the burden of proof, or undermine a speech act perspective on the subject, by rejecting Searle’s constitutive rules for speech act competency needs to ask himself what a cogent alternative mode of communicating would look like. Searle’s rules can always be rejected, but the result is that a speaker ends up abdicating his role as a competent and literal speaker. Eventually, if a speaker were adamant about refusing to submit to Searle’s rules, his ability to participate in a way of life would be seriously impaired. It is always possible, perhaps, that someone could live a life outside the boundaries of a language community à la Robinson Crusoe or live a life based entirely on lies, but the extreme nature of these alternatives testifies to the truth of Searle’s contention that there is a set of constitutive rules that are necessarily presupposed by those who participate in normal discourse. Any attempt to evade or subvert these rules by challenging Searle’s account needs to do more than insinuate that alternative avenues of communication are possible; it needs to present a serious case in favour of adopting them.
2. Objection 2.

The notion of shifting the burden of proof appears to be an important topic that is raised in the course of your thesis, and yet you do not address this specifically in your proposal. Can you account for this notion and what, if anything, does your proposal say about this?

Although my own account sets out to explain how proof burdens arise for a speaker and in what sense they are obligatory for that speaker, it does not directly address the topic of proof shifting. Nevertheless, I believe my account does make an important contribution to the issue of proof shifting. In a way, it clears up a common misconception that is shared by thinkers about the burden of proof. The phrase “proof shifting” or “shifting the burden of proof” is one of those benign expressions like “the sun rises” that, for the most part, describes a particular aspect of our experience in a way that should not be taken too literally.

If we may recall, in Chapter Three we examined the burden of proof in a legal context. As Sopinka, Lederman, and Bryant take pains to note, the idea that the legal (or even evidential) burden of proof somehow shifts or can be offloaded onto another interlocutor is incorrect (Sopinka, Lederman and Bryant 71). Advocates can recognise that, as a matter of practical necessity, a fact has been introduced by the other side of a legal argument that (if left unchallenged) may be detrimental to their case. This fact can prompt an advocate to introduce a consideration that will have a mitigating effect. But this necessity, sometimes called a tactical burden, is not the result of having an obligation shifted away from one side and onto another.

Strictly speaking, the allocation of, and the standard for discharging, legal proof burdens are matters of law, and these do not shift or change in the course of legal argumentation. They can be allocated to one party or another, but only in accordance with the legal rules of procedure. Tactical
strategy may require that an advocate take up a particular legal or evidential burden, but this is
different from the common misconception that in doing so they have had someone else’s proof
burden offloaded onto them.

By adopting a speech act perspective, we can bring the same kind of clarity to the subject of
proof shifting in ordinary argumentation. Each speaker who is committed to a position and
expresses this commitment by employing a constative in the form of an assertive speech act incurs a
burden of proof. Naturally there will be situations that, from a tactical standpoint, can serve to
make the need to actually discharge this burden more pressing upon an individual. If I have adopted
a standpoint that stands in contradiction to one that my interlocutor has taken up, then any success
he has in presenting a case in favour of his position will leave my position at a disadvantage.

But this is not a matter of proof shifting, it is (to put it more accurately) a practical or a
tactical matter of whose position has more going in its favour. From a speech act perspective I still
have a burden of proof in terms of having a probative liability no matter what the prospects are for
my position or my opponent’s position. His improved prospects do not serve to offload any kind of
a proof burden onto me, but they can make it more exigent for me to discharge the proof burden
that I have already incurred by participating in the argument, expressing my position by means of an
assertive speech act, and in so doing incurring a probative liability.

In short, we should not let our philosophical thinking about the notion of the burden of
proof be misinformed by this aspect of dialogical discourse. Tactical advantages can shift, speakers
can suffer a reversal of fortune with respect to the strength of their relative positions, and a host of
various contingencies can intervene that can alter the allocation of proof burdens in certain
circumstances. But underlying all of this is the simple fact that speakers who perform assertive
speech acts incur a probative liability or a burden of proof in doing so. It is a conditional obligation
that can remain conditional or be made actual by a hearer’s request. In the latter case it can either be
discharged in a satisfactory manner, or not. But in no case does this responsibility ever get “passed” on to another. As Voltaire’s Candide might have put it, everyone must tend to his own proof burdens.

3. Objection 3.

It seems convenient, too convenient perhaps, that some of the most intriguing questions about the burden of proof are passed over by your account. For example, you claim that a speech act perspective can only say so much on this subject before having to give way to a rhetorically oriented approach in this regard. Is it the case, then, that your inclusion of a rhetorical aspect to your systematic approach only underscores the insufficiency of your speech act account? What is your response to this?

This question implies that a handling of the subject of the burden of proof from the perspective of speech act theory should not need to be supplemented by a rhetorical contribution that emphasises exercising judgement and taking into account context specific knowledge when it comes to answering certain questions about the notion of the burden of proof. I think that this suggestion misunderstands what it means to adopt a theoretical outlook on an issue or to approach a particular subject by means of philosophical analysis. I have argued that problems and difficulties have developed in previous efforts to understand the burden of proof because previous thinkers have adopted one of two extreme methodological approaches.

Without a constructive theory to guide an inquiry into the subject of the burden of proof, the result is a collection of disconnected insights where narrowly focused outlooks on discourse limit the application of any philosophical insight we might uncover on the subject of the burden of proof. The problem here is not that these insights are false, but that they do not converge into a
gestalt or a broad overview on the subject as a whole. It passes over the question of why proof burdens can be found in all kinds of dialogical exchanges and provides only partial answers to questions concerning why a speaker has a duty (but only in certain cases) to discharge the burden of proof.

On the other hand, as I have candidly admitted, speech act theory cannot give an account of those aspects of the burden of proof issue that rest on certain context specific features of discourse. There are certain situations and certain types of questions that are best handled by individuals who are willing to exercise their own sound judgement after taking all the relevant particulars of a situation into account. No theory, no rule, no single heuristic technique, and no general guideline that anyone can fashion can be applied straightforwardly in every possible circumstance, unless you have a very narrow and short-sighted view of what possible circumstances can arise.

This also gives me a chance to state in plain terms what I think my original contribution is to a philosophical study of the subject of the burden of proof. My contribution, that I do not see emphasised in any other discussions on this subject, is that there are two distinct aspects to the subject of the burden of proof. Coming to understand the notion of the burden of proof and how it functions in dialogical exchanges requires that both of these aspects of the subject be kept distinct. My argument is that each of these aspects needs to be handled on its own merits and that each of these aspects is best handled by using a method that is apposite to its subject matter.

In short, I have made a distinction that is frequently passed over by many different treatments of this subject. A saying that has been attributed to Abraham Maslow is that if the only tool someone possesses is a hammer, then every problem that person encounters will start to look like a nail. Intra-disciplinary approaches to the subject of the burden of proof tend to see the burden of proof as something that is best approached from their own standpoint. Philosophical approaches tend to apply simple heuristics in order to explain how the burden of proof works in
dialogical exchanges, or they express their suspicion that it may not be a genuine philosophical topic at all. Rhetorical approaches tend to emphasise a variety of conditions that can inform the burden of proof in discourse, but the result is a collage of advice that is difficult to develop into a general overview on the subject.

I went through two different phases while researching this topic. I became convinced at one point that handling the burden of proof was a matter that could only be handled by resorting to context specific considerations. Any philosophical insight that could be uncovered would be a relative insight at best. Later on I became convinced that if I were to bear down on speech act theory hard enough, I could supply the kind of comprehensive and general theory for understanding the notion of the burden of proof that would make seeking out context specific knowledge unnecessary.

As the reader can see, I have returned to Aristotle's golden mean on this issue by arguing for a mixed approach that can do justice to each aspect of the burden of proof issue. I have come to sincerely believe that, given the nature of the subject matter, a better handling of this subject is not likely to be forthcoming.

If I seem to be shirking questions about how to answer certain questions about the burden of proof issue it not because I think they are not important. It is because they cannot be handled adequately in this work and it would be unfair to pretend that anything else is the case. In certain circumstances there are no shortcuts that bypass the exercise of individual reason and judgement. If I have placed too much emphasis on the speech act approach to this subject it is because of my own commitment to providing a philosophical approach to this subject that, in turn, grew out of my own conviction that this was the most salient and original contribution I could make to this subject.

For the reader who might not be persuaded by this position I offer the following consideration that was touched on earlier in our discussion of logic's contribution to the subject of
the burden of proof. Systematic approaches to fallacy theory like that proposed by van Eemeren and Grootendorst have gained recent popularity in argumentation theory circles because they appear to touch upon a genuine pedagogical problem. Traditionally the pedagogical method for teaching students about informal fallacies was to present them with enumerated examples of these fallacies in order to prepare students to recognise and analyse fallacies when they are found in other cases of argumentation that they may encounter.

The problem, as C.L. Hamblin pointed out, is that enumerated lists are a poor means of equipping persons to handle novel cases of informal fallacies that are presented for their consideration. As our discussion of Walton’s work on fallacies illustrated, what may constitute an informal fallacy in one context may be a *bona fide* move in another context. Instruction by means of enumerated examples is a limited pedagogical tool at best. This same insight applies to efforts to answer certain questions about the burden of proof by providing enumerated examples. Any list that I could give a reader in order to explain how the reader ought to handle a speech act with a specific kind of truth condition will always fall short, I believe, of the expectation that asking for such a list anticipates.

It would also be inconsistent for me to tell the reader that certain questions can only be answered on the basis of context specific knowledge and the exercise of his own judgement in such matters, and then provide my own examples to bolster this point. Now it could be pointed out, for example, that van Eemeren and Grootendorst emphasise that their approach to developing a theory of fallacy applies to actual arguments and that their work strives to present various naturalised examples of fallacious manoeuvres to the reader for consideration. Perhaps, the argument would run, this work should do the same.

In response to this consideration I will say this. Van Eemeren and Grootendorst’s efforts satisfy this self-imposed mandate to present a comprehensive theory of fallacies complete with a
catalogue of naturalised examples consists of an impressive and prolific body of collected work on this subject. It would be unrealistic of me to make this kind of move given the limitations of this particular work. Some of the work suggested by this thesis must be deferred to a future work. As I have suggested at several points in this thesis, mine is a modest effort to propose what a systematic and comprehensive approach to the subject of the burden of proof might look like and what distinctions such an approach needs to keep in view if it is to have a clear vision of the subject matter. On the other hand, given the tenor of previous discussions on the subject of the burden of proof, perhaps this result is not as modest as it might seem.


I am confused. You say that the burden of proof is the conditional obligation to provide supporting grounds to a hearer that arises as a consequence of performing the speech act of assertion and incurring what you call a proative liability. But you also talk about an actual obligation to discharge the burden of proof that a speaker may have to satisfy. This is also described as a burden of proof. Are both of these obligations a burden of proof? Are there actually two proof burdens? Help me sort this out.

I think the best short answer to this question is to say that there is a single obligation to bear the burden of proof but that the nature of this obligation is different depending on which part of the process you are concentrating on. This is why I introduced the example of the $100.00 loan. If I borrow a $100.00 from my friend Brian (as I noted earlier) and give him a demand note then I have a fiduciary responsibility to pay my friend back the money when he asks for it. In this sense I have incurred, as well as subsequently carry, a conditional obligation to pay him what I owe him. It is a
conditional obligation because I am not under any actual obligation to pay him unless and until he requests that I pay back the loan.

At this point I am under an actual obligation to pay him what I owe him. This is not a different obligation but the same obligation viewed from a different point in the process. There is a slight temptation to view this aspect of the entire loan process, as J.L. Austin would have put it, as "wearing the trousers" (so to speak) because this part of the process tends to receive more attention and is perceived (especially by anyone who has had to actually pay back a loan) as the most pressing part of this process.

I think this is particularly the case when it comes to proof burdens because conditional proof burdens are such an integral feature of our discourse that they fall beneath our conscious notice. So much so that it becomes tempting to assume that only actual obligations to discharge the burden of proof ought to be treated as proof burdens. This is why I am not entirely comfortable with the suggestion that a speaker who enjoys a presumption does not have a burden of proof. This is, as we can see from a speech act perspective, a misleading half truth. If we were to be precise in such cases we should only affirm that, in such cases, these speakers are not likely to find themselves under an "actual" obligation to discharge a burden of proof.

Taking this outlook on the burden of proof (emphasising the actual over the conditional obligation) makes it difficult to explain how a burden of proof arises for a speaker and why only some speakers, but not others, may actually have to discharge a burden of proof. This is like trying to figure out from scratch (or from what Quine would have called a field linguist's perspective) why some people, but not others, hand over money to other individuals on request without having a systematic grasp of the notion of incurring a debt. It amounts to picking up the wrong end of the stick in order to get a grip on this issue.
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Approaching the burden of proof as a probative liability or a conditional obligation, on the other hand, helps us account for how some speakers, but not others, incur actual obligations to discharge the burden of proof. It also helps us sort out the separate questions of what gives rise to a conditional obligation to bear a burden of proof (commitment to a competent speech act performance) and what gives rise to an actual obligation to discharge the burden of proof (a hearer's actual request for supporting grounds).

So is the burden of proof one obligation or two? I say it is one obligation, but that this obligation can be viewed from different vantage points within the dialogical process and that it is important to get these different aspects straight. In practical terms this is an important distinction since this is the kind of knowledge that goes into determining how the burden of proof ought to be allocated. Speakers and hearers who are cognisant of the difference between a speaker being under a conditional obligation and being under an actual obligation and who make themselves aware of the possible conditions that can affect these obligations have a better perspective on what I have referred to as the burden of proof issue — even when it arises in cases of contentious argumentation.

5. Objection 5

The fact that discharging the burden of proof for a proposition can be affected or influenced by the nature of the proposition itself is handled rather lightly in your account. You argue that there are different truth conditions that may apply to different propositions and you also talk about the standard of proof, but the connection between these two is not entirely clear to me. It seems to me that these conditions might be related. Can you say anything more about this?
Sure. Perhaps instead of discussing the subject in terms of truth conditions that need to be met, it might be more helpful to talk about the kinds of evidence that a speaker could adduce in favour of \( p \). As we noted earlier, discharging the burden of proof requires that a speaker provide supporting grounds for an assertive speech act involving a constative. Naturally, the question of what kind of evidence a speaker needs to provide will depend on the nature of the constative being issued by a speaker.

The kind of evidence required to prove that \( 2+2=4 \) is different from that required to prove "The earth revolves around the sun," and different from that required to prove "I have a headache." As we might expect, in some cases, with respect to certain constatives, speakers and hearers will have little difficulty agreeing on what kind of evidence can serve as proof while other cases will be more difficult.

Your suggestion that this is related to the standard of proof is, I believe, correct. I think that some kind of agreement as to what will count as supporting evidence for a proposition needs to be in view before speakers and hearers can address the issue of what standard or degree of proof they will regard as satisfactory for discharging the burden of proof. In other words, as soon as interlocutors have decided what kinds of evidence are relevant and necessary for discharging the burden of proof, then they can address the question of how much or what weight of evidence is required.

I think this is important since some constatives may require that more than one kind of evidence be adduced in support of a particular claim. If someone makes the claim "Buckley's syrup tastes bad but cures coughs," more than one kind of evidence may be needed to discharge the burden of proof to a hearer who is not convinced that this is the case. Personal testimonials or a taste test survey might supply a sceptical hearer with enough evidence to be convinced of Buckley's bitter taste. It might actually require that a sceptical hearer actually try the mixture for themselves.
As I have mentioned earlier, only the hearer himself is in a position to decide which of these two alternatives he will find satisfying in terms of appealing to a suitable kind of evidence.

Convincing a sceptical hearer about Buckley's cough curing abilities may take another kind of survey, perhaps a medically based double-blind survey. Once the results are in, then the separate question of how much or how weighty the evidence needs to be in order to discharge the burden of proof can come into play. It may be that a hearer will only be convinced once a certain threshold of probability is exceeded. Perhaps they will not be persuaded unless the survey exceeds 75%, or maybe only 51% is needed in order to eliminate their doubt.

In any case, I think it is important to have these issues in view. It is easy to see how a misunderstanding over these matters can muddle issues involving the burden of proof. If a hearer believes that one kind of evidence should serve as proof for a particular constative and a hearer has another kind of evidence in mind, then it would come as no surprise that a speaker in such a case might have difficulty discharging the burden of proof to that hearer. A lack of unanimity over the standard of proof can also make the exercise of discharging the burden of proof a difficult affair.

Naturally my position is that speakers and hearers will have to decide for themselves what kinds of evidence they are going to accept and what constitutes a suitable standard of proof before they can proceed to make judgements about whether a burden of proof has been discharged or not. As I implied before, what is shared between interlocutors or what they assume to be the case tends to pass unquestioned. Naturally, once a difficulty arises with respect to discharging the burden of proof, then these issues need to be made explicit and discussed.

Moreover, no one is likely to be in a better position than a speaker and a hearer to decide what they will regard as suitable evidence and how much of this suitable evidence is needed to discharge a burden of proof. Again, this is an aspect of the subject of the burden of proof that involves a plurality of conditions that cannot be outlined adequately in advance. Speakers and
hearers will have to jointly determine on a case by case basis what kinds of constatives are being employed and by whom, what kinds of evidence are needed to prove these kinds of constatives, and how much evidence is needed in order to secure a hearer's assent.

A speech act oriented approach to the burden of proof leaves room for these kinds of questions, but only a rhetorically inspired pursuit of the particulars involved in each case can supply suitable answers to questions involving kinds of evidence and the standard of proof with respect to particular speakers and hearers in specific circumstances.


You restrict your account to explaining how the burden of proof arises out of the speech act of asserting and you limit the scope of your analysis specifically to constatives. What about other forms of language use? If they can have propositional content and have to be issued by a speaker in accordance with certain constitutive rules, then is it the case that they have a burden of proof also?

This is a good question. I think it is best answered by giving a biographical response, of sorts. I focused on constatives for two reasons. First, concentrating on constatives gave a much-needed concentration of focus to this work. Second, it seemed to me that the most natural language form that would give rise to a request for grounds and, in turn, give rise to a burden of proof would be fact-stating language. As my survey of logic texts indicated (and as Alexy points out in his article) statements, and more specifically assertions, are generally at the heart of arguments and other dialectical exchanges, and so this is where it seemed natural to concentrate my own focus (Alexy 165).
But that being said, there have been some moves made to connect the burden of proof with other kinds of speech acts. Prof. Fred Kauffeld, for example, has argued on more than one occasion that there are proof burdens that attach to acts like proposing and accusing (cf. Kauffeld). In his writings on communication theory, Jürgen Habermas talks about “validity claims” that can attach to assertions that look and function like the notion of probative liability in my own account. He also suggests that something like a validity claim also attaches to commands and avowals, but in his approach each of these kinds of activities has its own distinct kind of validity claim (cf. Habermas Theory 305-319). In the case of commands, a hearer is invited to infer that a speaker is in a position of suitable authority to issue the command. In the case of avowals, a hearer is invited to infer that a speaker is being sincere in their expression. If a hearer is in doubt about either of these inferences, a speaker appears to be, under Habermas’ account, in a position where he must assume a duty (of sorts) to make good on what is being implied to his hearer when he performs these particular acts.

I can provide the best service to the reader who is interested in this particular aspect of the subject of burden of proof by recommending both of these writer’s works for perusal (Kauffeld; Habermas Communication; Habermas Justification; Habermas Pragmatics; Habermas Theory).

C. Some Closing Comments.

I have attempted to convey to my reader three different things by posing and responding to anticipated questions in this chapter. First, I have tried to be as fair and direct as possible about what I believe are the limitations for adopting a purely rhetorical perspective or a pure speech act perspective on the subject of the burden of proof. I have proposed what I think a more suitable approach to this subject might look like if both perspectives on this issue were given fair consideration. Each outlook on this issue has strengths that appear to correspond to what appears
to be a weakness on the other side; taken together I believe they complement each other. I think this is important because, as I have argued, neither is equipped to do the other's job.

Second, I have tried to imagine what some of the most serious objections to this approach might look like. While it is true that not every possible exception or difficulty will have been anticipated and dealt with in this chapter, I think enough groundwork has been provided here, and throughout this thesis, to provide a basis for working through questions about the burden of proof. I have tried to show that the substance of my proposal can be applied to bring some clarity to the issue, even if many of the answers to the tough questions about the burden of proof in particular circumstances are best worked out on a case by case basis.

Third, by presenting these objections (many of which have been presented and posed to me during the process of writing this thesis) and attempting to answer them, I hope that I have indirectly conveyed the idea that this kind of issue, and even my own proposal of how to approach it, is something that needs to be worked through. There is a school of thought that tends to distrust solutions or methods that appear to be too neat, too tidy, and too perfected. Theories may be neat and well designed, but philosophical problems (as William James pointed out) do not always come out neat and tidy even after our best efforts to deal with them (cf. James 22).

This leads me to reflect on one final possible objection to this approach. It could be said that my proposal is not credible on the grounds that I have not presented a clear criterion for falsification. I have not stated what would count as firm evidence that would serve to undercut my approach if it were uncovered. I can only say that it is hard for me to imagine what a realistic problem of this nature might look like. If it could be shown, perhaps, that speech act theory is deeply problematic, as is logical positivism's verification criterion, then my approach would be hard pressed to hold itself out as a viable proposal.
Perhaps if it could be shown that a rhetorical outlook and a speech act outlook on the subject of the burden of proof are entirely incompatible with each other, then my proposal for a systematic and comprehensive approach might not be viable. Again, my intuition is that this kind of case can be made only if the most radical interpretation of either methodological approach is used as a basis for encroaching on the domain of the other. As long as a case can be made for incorporating less extreme versions of each approach and maintaining a division of labour on the subject of the burden of proof, then the case for incompatibility is significantly diminished.

Every other kind of difficulty, it seems to me, can be resolved with careful exercises in judgement on a case by case basis. As I have already argued, I cannot realistically anticipate every possible difficulty that could arise in the application of this approach, but I do think that a clear and traversable path has been cut through the subject matter. Consequently, I leave the general task of working through context specific questions for other thinkers to work through for themselves, as I have maintained they should.

In the conclusion to this work I want to take up the task of returning to answer the three pivotal questions posed at the beginning of this work that, I submitted, comprised the burden of proof issue, especially in contentious cases of argumentation. I also want to end this work by briefly speculating on what I think the future prospects are for this kind of approach to the burden of proof issue and what adopting such an approach might bring to philosophy in general.
Conclusion

So what does my proposal to adopt a mixed approach to handling the subject of the burden of proof bring to discussions on this issue? In short, I think it serves to provide any reader who is interested in the burden of proof with a systematic and comprehensive overview of this particular subject. It also seeks to provide a clear view of this issue from both a theoretical and a rhetorical standpoint. I believe it articulates in clear terms what common feature of dialectical exchanges serves to underlie the burden of proof. It points to the speech act of assertion as the common element in dialectical exchanges that provides the conditions that account for the presence of proof burdens within dialogical exchanges in general.

On the other hand, my proposal also makes it quite clear that this speech act perspective needs to be balanced by an inclusion of a rhetorical outlook dedicated to taking context specific knowledge into account when it comes to dealing with particular cases involving burden of proof issues. Unlike speech act theory alone, the rhetorical perspective is particularistic and sensitive to the contingencies and vicissitudes of dialogical exchange in a way that speech act theory alone is not designed to be. Consequently, my proposal favours a blended approach where the strengths of each outlook are incorporated into one philosophical overview of the subject of the burden of proof.

As I mentioned in the previous section, I want to return to answer three questions that I presented in the introduction to this work. It was there that I argued that these three questions comprised what could be termed the burden of proof issue. That is to say, in those dialectical exchanges where the burden of proof becomes an issue in itself, providing clear and cogent answers to these three questions can go a long way toward making a positive contribution to the exchange — even if certain questions cannot be resolved to everyone’s satisfaction.

That being said, let us review what these three questions were:
1. Exactly what is the burden of proof?

2. How can we decide who ought to bear the burden of proof in a given instance of ordinary argumentation?

3. How can we make cases of contentious argumentation more tractable?

On the basis of my proposal these three questions would be answered as follows. First, the burden of proof is a conditional obligation to provide supporting grounds that a speaker incurs as a consequence of competently performing an assertive speech act, usually involving a constative. This same obligation can then be converted into an actual obligation by a hearer who has the power to impose a request for grounds upon a speaker because that speaker (by competently performing an assertive speech act) has placed himself in a position of probative liability.

Second, from a speech act perspective, deciding who ought to bear the burden of proof in a particular instance is as simple as determining who has performed the speech act of asserting that, in turn, has prompted a hearer to request that this same speaker provide supporting grounds — at least initially. If we may recall, this determination can be affected by other factors. The burden of proof can be disrupted by a break in the chain of relations that a speaker must maintain in order to competently perform the speech act of asserting, or considerations can be introduced that serve to override a speaker's actual obligation to discharge the burden of proof.

Determining whether a speaker ought to bear a burden of proof is a matter of determining if he has competently performed the speech act of assertion and a matter of determining whether or not any possible conditions exist that would serve to excuse a speaker from actually having to make good on his obligation to discharge the burden of proof, if a hearer has made a good faith call for supporting grounds. As I have maintained, any determination of this kind is best made on a case by
case basis through an exercise in judgement that is informed by context specific knowledge about the particular circumstances that surround a particular exchange.

Third, cases of contentious argumentation, where it is unclear who ought to bear the burden of proof, can be especially difficult (as we noted earlier on) because several issues can be up for grabs simultaneously. A speaker may be attempting to evade a reasonable request for grounds by attempting to back away from a probative liability that may attach to an assertive speech act that he has performed by looking for some consideration that could serve to breach the chain of relation between the constitutive rules that he must be ready, willing and able to satisfy and an actual obligation to discharge the burden of proof. It should also be said that a speaker might also have good reasons for rejecting a burden of proof.

As we have already noted, a speaker may believe that his hearer ought to have sufficient independent reasons to either accept his assertion that \( p \) or to recognise that a set of conditions exists that overrides the actual obligation to discharge the burden of proof. If a hearer disagrees with a speaker that such reasons exist, then a speech act perspective leaves off and a rhetorical approach needs to take over. Only an investigation into the specific circumstances of the exchange and the disposition of the participants can help anyone determine whether an impasse of this kind can be worked through. In cases like this Habermas has proposed that the participants “suspend” their regular discourse in favour of adopting what he calls theoretical discourse (Habermas Theory 19). In theoretical discourse the participants “thematise” or concentrate on those specific issues that serve as points of contention and work co-operatively toward seeking out common ground upon which to resolve their differences of opinion with respect to these particular issues.

In those instances where theoretical discourse does not succeed it appears entirely reasonable, on the basis of my proposal, for the participants to revert to bearing their respective
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burdens of proof for their assertive speech acts, even if this must take place concurrently. From a speech act perspective, this obligation takes priority if a speaker has a burden of proof and no specific conditions apply that would suffice to overturn this obligation. Expecting speakers to jointly fulfil their actual obligations to discharge the burden of proof seems to be the most equitable alternative to adopt in order to avoid giving one side or another an unfair advantage in such exchanges.

A final option might be to simply break off or “table” a particular discussion until another time when a change in circumstances or in conditions might make the discussion a more manageable affair. It should be noted that only the participants in a particular exchange are in a position to best decide which of these alternatives is the best choice to make. But a systematic approach to the subject of the burden of proof should do more than merely provide a serviceable means of getting through difficult spots in human discourse. This leads me to think that there are more questions out there on this subject waiting to be handled in another work.

Let me end my own inquiry with some suggestions about what I think are some of the interesting issues that my inquiry raises that I think would be worth exploring in future projects. First, there is an ambitious project in terms of constructing a catalogue of naturalised and illustrative examples of the burden of proof as it is found in specific contexts and under differing circumstances. This has the potential to be a very interesting project and one that merits a sincere and dedicated effort by anyone who is taken with the rhetorical aspect of this subject.

Second, there is a historical aspect to this subject that has only recently come into view. For some time now, historians of science have seen the value in providing an account of their discipline that refrains from imposing a heavy handed sense of unity on the narrative (Butterfield, Kuhn). Their respective works have helped scientists and non-specialised thinkers to get a sense of what an
unvarnished look at the development of a discipline looks like. Compressed and carefully selective narratives are making way for chronicles that reveal a rich tapestry of contingencies and fortuitous conditions that have contributed to what we recognise as the history of modern science.

With a systematic but rhetorically informed outlook on the burden of proof issue, we could be similarly poised to re-examine the history of philosophy from a more naturalised standpoint. Rorty's view on the linguistic turn represents only one slice of a much larger perspective. That being said, we do not have to follow Rorty in his complete recoil from traditional philosophy in order to see the value of re-examining the history of philosophy with the burden of proof issue in mind. I think that by looking back at different epochs in thought within the history of philosophy and asking ourselves how much the burden of proof issue has played a role in the transition from one set of ideas to another, we can learn something new and deepen our understanding of the discipline and the history of philosophy.

Third, another benefit of adopting a mixed approach to the subject of the burden of proof is that it lends itself quite directly to practical application. A systematic overview helps us get the subject of the burden of proof in clear view while a rhetorical outlook reveals which aspects of this subject need to be handled by means of a little field study. That being said, I think it is safe to suggest that philosophical argumentation is not the only kind of argumentation that can benefit from this approach. In fact, almost any form of argumentation, regardless of the subject matter, could be susceptible to the same kind of impasses that arise in philosophical argumentation. It would stand to reason that if a systematic approach could help out in the philosophical domain, it might have something constructive to offer outside this area also.

And finally, we can also begin to appreciate what a systematic approach to the burden of proof issue might mean for philosophy as a whole. To begin with, there is an entire set of
immediate questions that the burden of proof issue brings to mind about how philosophical argumentation is conducted and how it ought to be conducted.

In a domain where no simple algorithm exists for telling us how to handle particular instances of ordinary argumentation and where no *a priori* formula exists that is capable of telling us what to do with respect to the same, a different sense of how we ought to handle an issue raised in ordinary argumentation needs to be taken up. I have suggested that there is no purely theoretical method capable of guiding us through the impasses that are the upshot of contentious cases of argumentation. I have made it clear that my own modest theory or, as I have called it, systematic approach cannot work without the presence of a cultivated sense of judgement and a willingness to work through these issues with others in order to keep the process of dialogue going.

At the same time, I am aware that some thinkers will experience a sense of vertigo at the idea of engaging in ordinary argumentation without the security of a purely theoretical "bulwark" to support us if we fail in our efforts to rationally persuade others. Perhaps if something existed in non-forensic argumentation that could serve in a similar stabilising capacity as institutionally entrenched procedural rules appear do for forensic argumentation, then we would have a solid case for approaching ordinary argumentation from the standpoint of pure theory. In response to this concern I will simply submit that this difficulty is rather overblown and that there is nothing to fear and no need to pine for such guarantees. In an odd fashion, what seems to be emerging in philosophical practice is a similar consciousness that now characterizes thinkers who have reflected on the historical development of evolutionary theory in biology. Post-Darwinian thinking has recently been coming to terms with the idea that the evolutionary process has been informed by contingencies and fortuitous occurrences, as it has been by the process of natural selection. What makes the development of life an intriguing and awesome process in a post-Darwinian era involves
an outlook that is quite different from the outlook that preceded this mode of thinking on this subject.

In a similar fashion, there seems to be a different sense of what makes an argument a rationally persuasive affair for post-modern thinking and the rest of modernity. The more we, as philosophers, reflect on our practices the more we become aware that our thinking has been influenced by reasons and considerations that are by no means timeless or transrational in nature. This is not to say that our thinking is deeply flawed because of this. On the contrary, looking back on our actual situated reasoning practices frequently serves to remind us that we have come quite some way. Of course, it is still far too early to tell if the contemporary push toward a more naturalised outlook on philosophical argumentation will continue or turn out to be an episodic development. But I think it is safe to say that which ever direction the study of philosophical argumentation turns toward, the burden of proof issue and all its complexities will always be ready at hand.

This does not surprise me in the least. Having worked on the idea of the burden of proof for some time now, I find that I can heartily agree with Randy Barnett when he notes in the initial sentence of his article “The Power of Presumptions” that: “Once you start to notice it, you begin to see it everywhere. Burden shifting is pervasive” (Barnett 613). My own experiences with this issue certainly bear out this sentiment. I think anyone who makes the effort to approach the burden of proof issue in a systematic fashion will also find him or herself looking at ordinary argumentation from a new perspective.

Considered under this perspective, it is difficult not to view cases of ordinary argumentation as being oriented along the lines that are laid out by a systematic approach to the burden of proof issue. It becomes more natural to adopt a speech act oriented outlook and at the same time to ask
the kinds of questions that call for context specific answers in an effort to determine in many cases where the burden of proof "ought" to lie.

Naturally the general attitude that anyone has towards meta-philosophy in general will bear on their exercise in judgement about the legitimacy and overall merit of this process as a whole. For some, this unadorned look into the practice of philosophical argumentation will lead to a sense of disenchantment and disillusionment. For others, this unfiltered look into the practice of philosophical argumentation will reveal new issues that they will want to explore. I think that as long as these issues are being explored and questions are being raised, we are entitled to a vision of ourselves that sees us as moving forward. As complex and as difficult as it might be to muddle through such issues, it will always be preferable to the alternative of simply allowing human discourse to come to an end and taking up some other means of settling our human differences. Fortunately, no such end appears to be in sight.
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