Book Review

Burdens of Proof in Modern Discourse
by Richard Gaskins

EUGENE GARVER *St. John's University*

In *Rhetoric* II.24 Aristotle says that the apparent diversity and fecundity of the sophists' art hides the fact that their work is really reducible to the use of a single fallacy, the idea that if something is true overall it is true in a particular case (II.24.1401a23-24). "Just as in eristics an apparent syllogism occurs in confusing what is general and what is not general but some particular ... so also in rhetoric there is an apparent enthymeme in regard to what is not generally probable but probable in a particular case" (1402a2-5), what later is called the fallacy of *secundum quid*. This, he says, is what it means to make the worse appear the better argument.

For a contemporary example, consider the fallacy in the popular argument for equal treatment for "creation science." Partisans argue that since evolution falls short of some unstated standards of certainty, it follows that both evolutionary biology and "creation science" are each only probable, hence equally probable, and hence they deserve equal standing. That argument can stand as a paradigm of an argument which is empty because there is no means of weighing probabilities and signs, and so no way of coming to judgment.

In a similar way, Richard Gaskins, in this wide ranging and thoughtful book, finds a single argumentative technique – not an ar-

gument form – pervasive in modern discourse. Shifting and assigning the burden of proof is not an argument form but a background condition usually ignored in argument studies – since it is a given – but tactically manipulated by practitioners. He expands the idea of the burden of proof to include arguments from ignorance, claims concerning standards of scrutiny, and kinds of presumption – the "entire range of practices by which courts gain control over indeterminate questions" (37) – and shows that the burden of proof is everywhere. He draws material from contemporary rhetorical and argument theory, from modern American legal disputes and from 19th century German philosophy to direct attention to usually overlooked background conditions and boundary assumptions. He shows how most accounts of argumentation oversimplify once the important work of assigning burdens of proof and presumption has already been done. Gaskins begins, consequently, with a criticism of Toulmin's and Perelman's models for being insufficiently attentive to the actual tactics of legal argument. "When the legal way of arguing reaches conclusions, it does so after deliberately inviting polarized interpretations of established rules. An examination of such institutional practices in the judicial system shows important features that shade Toulmin's bucolic portrait of human reasoning."

Gaskins shows that tactics concerning the burden of proof are omnipresent. "Since

no one knows for sure when life begins, we should give the benefit of the doubt to the principle that life begins at conception." "Since no one knows for sure when life begins, we should let people decide for themselves." Practical arguments have to be settled before all the facts are in, partly because of the need for a timely decision and partly because there often is no such thing as "all the facts." Evidence is incomplete, inconsistent, and subject to multiple interpretations. But that account of the practical situation is not enough to show that the burden of proof is always involved. Victory in a practical argument could simply be settled by whoever has the preponderance of evidence, or the more probable case.

One more factor is needed for burdens of proof to be as pervasive as Gaskins claims. Practical argument is *structured* argument about the indeterminate. It is often, but not necessarily, structured by institutional rules. But once practical argument is structured, someone has to have the burden of proof. Someone has to win if no case is made, since a decision has to be reached. Practical argument is not only adversarial, but there is always an analogon to plaintiff and defendant. "Our desire for finality and legitimacy extends beyond the force of available evidence" (15). The desire to make finality and legitimacy coincide make arguments from ignorance pervasive, and makes them generally hidden or implicit. The tensions between finality and legitimacy – and between flexibility and legitimacy – animate Gaskins's inquiry.

Since both Aristotle and Gaskins show that a wide diversity of phenomenon really boil down to a single tactic, it isn't surprising that the example I offered of Aristotle's *secundum quid* should also fit Gaskins's account of how shifting and assigning the burden of proof works. If biology doesn't measure up to some unstated standard of certainty, then why should I let it be imposed on my children? My beliefs about Biblical creation stories are deeply

and sincerely held, and so they have to be definitively refuted before I should have to give them up. Once I assign the burden of proof to science, my own views are undefeated, and so I can continue to act on them and impose them on my children. Gaskins declares "I am right, because you cannot prove that I am wrong" an "increasingly common style of public argument" (2), and sees it as a "natural consequence of modern pluralism."

Once a phenomenon is shown to be pervasive, then there enters the possibility of triviality. If burden of proof maneuvers are always with us, then no particular example is a scandal or surprise. Someone persuaded by Aristotle that the sophistic art boils down to a single argument form – and a fallacious one at that – is less likely to waste money studying with the sophists, and less likely to be worried that unscrupulous sophists have to be stopped before they poison all rhetorical discourse. Aristotle shows that a particular fallacy is common among the sophists, but Gaskins' focus is not on a fallacy but on a tactic used by everyone. Is this like showing that we all speak prose?

The first payoff to Gaskins's exhibition comes when he turns from judicial argument to philosophy of science. Starting with Kuhn, published while the Warren Court was putting state authority on trial, the "judicialization of scientific argument reflects the fragmentation of authority presupposed by public appeals to scientific proof" (159). Kuhnian paradigms are judges in their own cause; incommensurability is a sign that there is no neutral, or final, authority. "Definitive tests [for choosing one paradigm over another] exist but they are internal to the warring paradigms; what ensues is a jurisdictional battle for the privilege of imposing finality on otherwise intractable issues. From the internal standpoint, of course, each paradigm will experience the struggle as a battle between truth and error, not as a conflict to determine who will have the final authority to declare truth" (159). Gaskins argues that placing

scientific revolutions in the context of arguments from ignorance is an advance: "Rather than borrowing Kuhn's language of religious conversion, gestalt psychology, lightning flashes, or somnambulism, the study of proof burdens offers a conceptual fulcrum for supporting the sudden shifts that afflict not just scientific theory but also academic inquiry and public policy debate" (161). In the following chapter, he shows how Dworkin and Nozick establish the truth of their theories by the inability of opponents to "prove that certain rights do not exist [and] ... Rawls created a sensation by turning the argument-from-ignorance into one of his own themes" (171), that of judgments made under the veil of ignorance.

Burden of proof maneuvers are especially problematic today, in Gaskin's view, because they first reflect and then reinforce divided authority, divided especially between citizens and government and between science and politics. "In a culture that casts profound suspicion on all other forms of authority, judicial power assumes unique importance. It is the institutionalized expression of our dominant rhetorical ideal: the authority to determine who shall bear the burden of ignorance in a society where traditional and scientific forms of argument have long been stretched beyond capacity.... The widening gap between legitimacy and evidence yields an endless cycle of intellectual crises" (xv). "Proceduralized fairness – based on the ideals of the due process model – has become an independent social principle outside the formal legal system, contributing to an increasingly adversarial climate in the life of modern institutions" (90). We will be better off if we recognize that both sides can always assign burdens of proof to each other, creating Kantian antinomies, and should therefore abandon such tactics for more harmonious and peaceful Hegelian overcoming of oppositions. "Wherever adversarial controversies exist, Hegel's logic pushes both parties to move one or

two steps farther than their immediate strategic interests would otherwise carry them. If the dialectic reminds us that the work of argument is never done, it also requires us to become more systematic in whatever arguments we may pursue" (254).

Despite the impressive scholarship Gaskins brings to bear to make that case, I think there is an alternative account available. Standards of strict scrutiny or complete verification – unless you can show that evolution is certain by showing me the videotapes, I'm sticking with the Bible – declarations of irrebutable presumptions, and the assignment of a burden of proof that cannot be met, are the procedural equivalents of the conversion of desires and interests into rights. Gaskins's diagnosis that modern public discourse is plagued by irrebutable presumptions is parallel to the complaint that discourse is poisoned by "rights talk." Burden of proof arguments make it too easy to convert any desire or demand into a claim about rights. The determination of the burden of proof is procedural rather than substantive, as the determination of rights is. It is an open and to my mind interesting question of which is the more practical diagnosis of contemporary impasses and polemics.

On the one hand, assignment of burden of proof, because procedural rather than substantive, can be seen as more surreptitious: instead of arguing that I have a right to welfare, I simply argue that the burden of proof is on the government to show, in a prior hearing, that my welfare benefits should be taken away. "Such techniques are at their strongest when no one draws attention to them" (59). Or, because it is procedural rather than substantive, these tactics can be seen as more negotiable and less driven by absolute allegiance than rights talk. "Shifting the burden of proof can thus achieve the same result as a new substantive rule, but it stays with the more neutral language of evidence and purports simply to facilitate the jury's duty to draw inferences" (27).

There is a fascinating and important issue here. Often, argumentative tactics lose their persuasiveness when made explicit. Gaskins concludes that the effect of such appeals depends on their being disguised. I'm not so sure. Consider, for example, Kenneth Burke's remark: "Philosophical tracts, if they are of worth, seek to persuade; but the difference between them and Ciceronian exhortation...is that they try at the same time to expose their methods of persuasion." (*The Philosophy of Literary Form: Studies in Symbolic Action* (Berkeley: University of California Press, 1973, p. 391)). It is at least an open possibility that arguments from ignorance can withstand scrutiny, and that their procedural cast makes them more open to negotiation than rights talk. Focusing on argumentative tactics might allow for more constructive debate than focusing on the substance. Bringing such a possibility to attention is, it seems, an unanticipated benefit of this worthwhile book.

EUGENE GARVER
DEPARTMENT OF PHILOSOPHY
ST. JOHN'S UNIVERSITY
COLLEGEVILLE, MN 56321   ❏

∩N∩LOGí∩
Revista de Filosofía.