

AN ESSAY ON THE BURDEN OF PROOF

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1. Introduction

People are sometimes said to bear a burden to prove their assertions—to support them with reasons or evidence. But what is a burden of proof? The idea goes back a long way—at least to classical Roman law, *onus probandi*—and it has mainly appeared in legal settings. Most of us are well enough acquainted with the notion as it is used in that setting. Traditionally, it was seen as something assigned to a party by a judge. Some assertions were accepted as true by a court, while others needed evidential support. A judge usually determined whether the relevant party had satisfied the burden, and could decide the consequences for failing satisfy it.

But a trend has emerged in recent years: the notion is increasingly used in non-legal settings—for example, in debates about the truth or rationality of religious belief.¹ Whether this trend is good is difficult to say. James Cargile writes that the “idea of burden of proof has come to be applied outside the context of legal proceedings, with some unclarity as a result.”² Indeed, while we can make some sense of burden of proof in legal matters, important questions arise when the notion is elsewhere used. Antony Flew, for instance, famously argued that there is a presumption in favor of atheism, and therefore that a burden of proof rests upon theists. He claimed that the presumption of atheism, and its corresponding burden of proof, arises in the context of the debate over God’s existence. But what is that context, and what about it makes it reasonable to appeal to presumptions and burdens of proof? Is Flew’s appeal licit? Plausibly, people have

¹ See, for example, Scriven (1966), Hanson (1971), Flew (1972), McInerny (1985), Parsons (1989), Draper (2012), and Pigliucci (2013).

² Cargile (1997), 59.

purely epistemic duties in ordinary life.³ But do people bear burdens of proof in ordinary life? If so, is there really a burden of proof on those who assert or believe that God exists? Is the notion Flew applies the same as that which is used in the legal tradition? What is the notion in *that* tradition? If not the same, then what notion is it?

No sooner do we pose these questions than do others come to the fore. Is a burden of proof a duty and, if so, is it moral, or legal, or epistemic, or prudential, or several at once, or something else besides? When is a burden of proof reasonably assigned? What is its relation to presumption? It seems to matter a great deal whether someone bears a burden to prove that something is so, but there is a general lack of clarity about the notion, and few philosophical works are devoted to understanding it.⁴

Most treatments are concerned with questions about application: to whom, and under what conditions, does the burden of proof apply?⁵ In this essay, I present an account of burden of proof—a set of answers to some of the questions above, plus a few more. I argue that a burden of proof is not a duty or obligation in any strict sense.⁶ Bearing a burden of proof might involve possessing some duty or other, but the burden itself is not a duty. I also give an account of the conditions under which it is reasonable to assign a burden proof. I will therefore have something to say about applying the notion to

³ Nelson (2010) argues that, while we have negative epistemic duties not to believe certain things, we have no positive epistemic duties to believe anything.

⁴ James Cargile (1997) and Larry Laudan (2006) are two of only a few.

⁵ For example, Cargile (1997) mostly considers the issues and difficulties involved in determining how someone comes to acquire the burden. Kaplow (2012) and Cheng (2013) address questions concerning standards of evidence, and the threshold needed to satisfy a designated burden of proof. Rescher (1977), discussed below, considers the notions of presumption and burden of proof in the context of the medieval disputation, which he uses as a model for the epistemological process of rational inquiry and probative reasoning.

⁶ I use the terms ‘duty’ and ‘obligation’ interchangeably. And I take it to be sufficiently clear what it is to provide evidence for some proposition: it is to provide some reason or consideration in favor of the truth of that proposition. If you think of reasons in terms of propositions, then a reason for some proposition P is a proposition that, if true, renders P more likely or plausible than not. This picture is simplistic, no doubt, but good enough for now.

theistic belief. Specifically, I argue that Flew's presumption of atheism is really a presumption of agnosticism, and also that, for all Flew says, there is a no unique burden of proof on theism.

For the purpose of this essay, to illicitly apply or appeal to the burden of proof is to apply or appeal to it when it is unreasonable to do so. I do not have a precise account of reasonableness, but what I mean by the term should be fairly obvious. It is a normative notion, though I take no stand on whether the normativity is of a moral or strictly rational sort; perhaps it is one or the other, depending on context. A reasonable assignment of burden of proof is one that is proper, or fitting, or right; and an unreasonable one is in some sense improper, or unfitting, or wrong. The legal tradition I describe below seems reasonable in this sense. Something would be amiss if we drastically changed how we assign burdens of proof therein.

Three caveats are in order. First, I consider only the *burden* aspect, not the *proof* aspect. Successful proof is a context sensitive matter: in criminal law, proof is whatever meets the reasonable person standard, or the standard of reasonable doubt. In civil law, it amounts, roughly, to providing a preponderance of evidence in favor of the truth of some assertion; what matters is the balance of probabilities, as determined by the judge or jury. But proof in mathematics involves deducing a proposition from premisses that are held with certainty (or near certainty). And of course there is no single standard of proof that must be met in the events of everyday life. For the purpose of this essay, think of proving that a proposition is true as giving *sufficient* reason or evidence to believe as much.⁷ It follows from this sense of proof that we can prove a falsity: I can provide you with

⁷ You might think of sufficient reason or evidence in normative terms, as that which *ought* to persuade a reasonable and unbiased person who considers the evidence under proper conditions—for example, while fully awake and not under the influence of alcohol or drugs.

sufficient grounds to *believe* that some proposition is true—even if, in fact, it is false. Clearly, what counts as sufficient will vary from one context to another, and sometimes it varies with risk or stakes.⁸ Second, while I take the burden of proof as used in the Western, legal setting as a paradigm, my main concern is not with all the intricacies and details of how that notion is used in every part of the law. I discuss only those aspects that are relevant to the task at hand.

Third and finally, I characterize a burden of proof as a conditional demand for sufficient evidence, and I provide an account of the conditions under which it is reasonable to make such a demand. But there is another way to go. You might think, as I do, that there is a fact of the matter whether things *should* begin and proceed the way they do in the legal setting. An unjust society could authorize a presumption of guilt, and go on to assign a burden of proof to the defendant. And we would probably say that the new procedure is not just deeply different, but also deeply wrong. And you might also think that the law can recognize or fail to recognize a certain party as having a burden to prove some proposition, in which case the burden is something prior to actual laws themselves. The state, then, may *falsely* declare that the burden rests upon the defendant. After all, there is something to be said for Martin Luther King Jr.’s rough paraphrase of Thomas Aquinas, which he penned from the Birmingham jail: an unjust law is no law at all. On this view, an unreasonable burden of proof is not a burden of proof. The main task would then be to offer an account of burden of proof—that is, of reasonable, conditional demand

⁸ Some recent philosophical works discuss the degree to which stakes (or risk) determine whether you have knowledge or sufficient evidence in a context, or whether “knowledge” can be truly attributed to you in that context. See, for example, DeRose (2009) and Fantl & McGrath (2009). You might think that, even though you can know some proposition on the basis of some evidence at some time when nothing is at stake, you can’t know the same proposition on the same basis at another time when much is at stake—that is, when it *really* matters whether the proposition is true. In the latter case, you may need more evidence, given only what’s at stake.

for sufficient evidence.

I will take a different line. We should think of a burden of proof as a conditional demand for sufficient evidence. It follows that any such demand is a burden of proof, unreasonable though it may be. On this view, the burden is not something prior to actual laws themselves. But reasonable assignment of the burden is prior to laws. The main task, then, is to say under what conditions it is reasonable to assign a burden of proof—that is, to make the conditional demand for sufficient evidence. I take our historical legal practices as the paradigm of reasonable application of burden of proof.

Thus understood, you have a burden to prove some proposition if and only if there is a conditional demand that you provide sufficient evidence for that proposition. By a demand I mean some sort of requirement or prerequisite, along the following lines. A student is required to do such-and-such to get an ‘A’ in some class; those tasks are in some sense required to warrant that letter grade. But the student is not obligated to do those tasks; nor need there be any duty of practical reason to do them.

To assign a burden of proof to you is to make a conditional demand of you for sufficient evidence. The condition is that you are proposing that the relevant proposition is true and needs to be acted on, where to act on a proposition is to act as if it is true. Put another way, the demand is conditional upon your trying to defeat a presumption, which will be defined later. Throughout this essay, I mean *action* in a broad sense. Taking an attitude toward a proposition is an action; you might think it an involuntary action, but it is an action nonetheless. And making a decision is also an action. A burden of proof, then, is a social phenomenon. It applies only when there is some presumption, and when two or more people are associated in certain ways, and when some action is to be taken.

We can now see that a burden of proof on some proposition means that insofar as some action will be taken on the proposition—and in legal settings there will be *some* ruling or other, either for or against the proposition in question—there is a demand, in the sense specified above, for sufficient evidence for its truth.⁹

I will say much more about presumption later on, but for now it should be noted that its purpose is procedural, in the sense that it furnishes dialectical settings and agents with ground rules for where to begin the process of taking certain actions. Presuming a proposition tells the court, for example, where to begin the probative process and how to proceed therefrom. An assignment of burden of proof is based upon a presumption.

All this should make clear the difference between a burden to prove and a command to prove. I can walk up to you on the street and demand that you prove, say, that you are a U.S. citizen. But that demand should be understood merely as a command—and an illegitimate one at that—unless the claim that you are U.S. citizen needs to be acted on and there is a presumption in favor of it.

Now a conditional demand for sufficient evidence may be reasonable or unreasonable, legitimate or illegitimate. It is reasonable only insofar as the presumption on which it rests is reasonable. And it is reasonable to presume that some proposition is true if a person or group of persons has a conditional right or obligation to act on that proposition. Part of what generates such rights and obligations in a context are the aims, principles, and stakes involved in that context. The aims and principles may be of a legal,

⁹ The demand is not for you to provide the evidence if you propose a proposition. Here's a formal representation of a burden to prove some proposition P: *if you propose P to be acted on, Demand[sufficient evidence for P]*. In other words, if the antecedent condition is met, and if the burden of proof is on P, then P won't be acted as if true unless sufficient evidence is adduced. This is different from *Demand[if you propose P to be acted on, then sufficient evidence for P]*.

epistemic, or moral sort. On this account, the reality of a reasonable burden of proof assumes a more basic realm of normativity. This is all abstract, of course, and soon I will bring it down to earth. But first I give some reason to care for this topic at all.

2. Motivating the subject

Consider two examples, “knowledge” and “science.” Knowledge is power, so the saying goes. It matters who knows and who is perceived to know, and history shows how badly things can go when those with power choose to act on what they are falsely thought to know. The possession of “knowledge (not just true belief),” says Dallas Willard, “confers the right, and often the responsibility, to act, to lead, and to prescribe policy. It confers authority, including the authority to teach.”¹⁰ And even the mere *reputation* of knowledge can secure authority

to act and direct others, individually or through policy. This leads to struggles between individuals and groups to control knowledge: to possess it, keep it away from others, to sell it at a price, to defend its status as knowledge and to attack the assertions of others who advocate alternative sources of knowledge.¹¹

Likewise, what we count as “scientific” is significant, and it is commonly supposed that the terms ‘science’ and ‘knowledge’ are synonymous. But there may be an even greater social force or pressure behind “science.” For better or worse, those who are perceived to be scientific “experts” form a privileged and authoritative class in most of the culture-shaping institutions of the West—among others, the universities. We generally believe what so-called scientists say, “however counter-intuitive and implausible their assertions might appear to be.”¹² And what passes as science is taken as reliable; we base many of our policies and court decisions—not to mention daily choices—on what we perceive are the edicts of “science,” which are mostly brought to us not by argument but by authority.¹³ If you can convince someone that the ‘science’ is

¹⁰ Willard (2007), 32.

¹¹ *Ibid.*, 17.

¹² Laudan (1983), 111.

¹³ I’m speaking loosely here when I talk of science. I don’t think there’s any one thing that is *science*: no single method that all and only sciences have in common (or are reducible to), no set of necessary and

settled, you can in effect shift inquiry away from the topic in question. And nowadays, if you can convince a group of persons that some discipline or practice is somehow not part of “science,” you can get away with—or be lauded for—dismissing that field or practice without even considering the evidence or claims on their behalves. It would seem that “science” is power too, and powerful is the one who can say what is or isn’t science.

Something similar goes for burden of proof. There is a social force or pressure behind *it* as well. Ideas have consequences for people, and bad ideas have bad consequences. If some person or group of persons is seen as having the burden to prove the truth of some assertion, then those who reject it will be neither required nor expected to consider evidence for it; they will not be held to account for believing it or acting as if it is false. A bad idea may endure through time insofar as those who say it is bad are seen as having, but not satisfying, a burden to prove as much.

Moreover, wrongly applying the burden of proof to those who believe some important proposition can have the adverse affect of impeding the process of inquiry. Those who disbelieve the proposition run the risk of being prejudiced in the extent to which they seek the truth of the matter. In other words, they are unlikely to believe the proposition unless certain evidence presents itself; nor will they have much incentive to inquire about the topic in a manner in which they should; they risk conducting their inquiry in the wrong way, or stopping it prematurely or perhaps altogether.¹⁴

Given the increased application of burden of proof to important questions, the vulnerable status given to those who are perceived to bear it, and the privileges and risks

sufficient conditions that demarcate science from non-science. But there are many sciences, each with its own techniques, subject matter, presuppositions, and so forth.

¹⁴ These points about inquiry are adapted from Geivett (2002), who applies them to inquiry into the question of God’s existence.

assumed by those who are not perceived to bear it, we are therefore called upon to consider what the burden is, when it is reasonable to apply it, and the consequences that come along with using it. The hope is that an account of reasonable burden of proof will contribute to a decrease in illicit appeals to the notion.

3. The burden is not a duty

One is tempted to think of a burden of proof as a duty of some sort.¹⁵ Larry Laudan, for instance, in his excellent collection of essays on legal epistemology, seems to assume as much. The burden of proof, he says, is

the obligation of one party to persuade the trier of fact that the evidence presented by that party proves, to the level specified by the [standard of proof], a hypothesis of interest... For simplicity's sake, we can say that the burden of proof involves the duty to prove the two hypotheses: a) Crime x was committed, and b) defendant y committed x .¹⁶

Call this the duty view. I suppose we are led to this view in two ways. For one, there is some similarity between having an epistemic duty with respect to a proposition, and having a burden to prove that proposition. And we may therefore mistake the latter for what really is the former. For on occasion there is a context in which both are present. We also have Carl Sagan's popular dictum, publicized in the writings of Christopher Hitchens, that extraordinary assertions require extraordinary evidence.¹⁷ Something about this seems right to us, at least initially. We would look down upon someone who went about life making crazy and defenseless assertions. And a requirement, after all, is closely tied to duty—in the dictum it is an epistemic duty perhaps, but a duty nonetheless. If you bear a burden to prove that something is so, it seems right to say that it is you who *should* or *ought to* give evidence. Since we already have epistemic duties, and since burden of proof talk has, as it were, a responsibility ring to it, we can easily come to think of the burden as a duty.

For another, having a burden to prove a proposition might imply, or at any rate come along with, duties to do other things. In law, for example, bearing the burden may

¹⁵ Throughout this essay, I use the terms 'duty' and 'obligation' interchangeably.

¹⁶ Laudan (2006), 109.

¹⁷ For what it's worth, I think this dictum is either false or trivially true. But that is a topic for another occasion. For a brief discussion of it, see McGrew (2011).

coincide with all sorts of obligations, even an obligation to prove, which you would not possess, were it not for your bearing the burden. We may therefore be tempted to confuse the duties that attach to the burden with the burden itself. Someone who has a burden to prove a proposition may on that account have many obligations, but the question is whether the burden itself is an obligation.

It's a mistake, I will argue, to think of the burden of proof as a duty, even though I think duties are a necessary component of contexts in which the burden applies. First, a duty, an epistemic one in particular, is agent-centered in a way that a burden of proof is not. My having a duty, and my fulfilling or failing to fulfill it, matters primarily for me—and essentially so. But my having a burden to prove, and my fulfilling or failing to fulfill it, may or may not matter for me at all. The point of a burden of proof is to help guide a probative process and to ensure that a presumption is properly defeated, if defeated at all.

Second, consider a version of the *Principle of Correlatives*, which says that rights correlate with obligations:

If Y belongs to the sort of entity that can have rights, then X has an obligation toward Y to do or refrain from doing A if and only if Y has a right against X to X's doing or refraining from doing A.¹⁸

This is a plausible principle. But it's incompatible with the idea that a burden of proof is an obligation to give sufficient evidence. Suppose I bear a burden to prove some proposition. Then, if the burden is an obligation I have, then I have it with respect to someone else, and that person has a correlative right to my giving sufficient evidence.¹⁹

¹⁸ This formulation of the principle comes from Wolterstorff (2009), 34, and he says in the footnote on that page that the principle applies to claim-rights, not permission-rights. Note that he includes the qualification "if Y belongs to the sort of entity that can have rights..." because he thinks that we have obligations to some entities—for example, particular works of art—that don't have rights. But for those that do have rights, the principle holds.

¹⁹ The example applies equally well if my obligation is toward, not to one person, but to a group of persons, each of which has a right against me to giving sufficient evidence.

But this can't be right. In many cases there is no such evidence to produce. And how could anyone have a right to evidence that does not exist?

Third, you have a duty to perform some action only if you are responsible for performing or not performing it; you are therefore culpable if you fail to perform it; you are in some important sense responsible or accountable for the outcome.²⁰ But no one is culpable for failing to satisfy a burden of proof. Fourth, and related to the previous point, you are subject to blame if you fail to do what you are obliged to do—perhaps by failing you thereby wrong someone else. But no one who bears the burden and fails to meet it is subject to blame on that account. Fifth, assuming some version of the ought-implies-can principle, you are obligated to perform an action only if you can (in the relevant sense) perform it. Not so with burden of proof: you may have a burden to prove that something is so, even if, in fact, you cannot (in the relevant sense) prove it. You may have the burden to give sufficient reason, even though you cannot provide sufficient reason.

Now you might think that the burden is not a duty to prove, but a duty to try to prove. This appears to sidestep some of the previous objections. But the burden to prove cannot be an obligation to try to prove. In a court of law, if you make an allegation and thereby come to bear a burden to prove it, but you don't try (in the relevant sense) to prove it, either you lose the case or the case is dropped. You are not legally culpable for failing to *try*, as you would be if the burden were a legal duty. Now you may be culpable in other ways and for other reasons; perhaps you have violated other obligations; perhaps the burden to prove generates some kind of duty to try to prove.

²⁰ I am thinking of what Wolterstorff (1997) calls responsibility-obligation: the sense of obligation that has to do with being normatively accountable for something, with praise- and blameworthiness, and so on. But there's another sense of *ought* or *should*—call it the proper-functioning-ought—that gets applied when we say things like, “How odd: you should be feeling pain right now.” Clearly, the burden of proof does not fall under the latter notion.

Moreover, the duty view in either form is hard to understand, given the practice in the legal tradition of judges or magistrates assigning the burden of proof. Can duties be assigned? Things like commands can generate duties. But it's difficult to understand the idea of assigning obligations. What isn't difficult to understand is how an obligation can be generated by an assignment.

Nor should we think of the burden as a conditional duty of practical reason. We know the standard examples: if I want or need to drink some water, and going to the kitchen is the only way to get the water, then in some sense I ought to go to the kitchen. Similarly, suppose I want the jury to rule that someone is guilty, and that getting the jury to do so requires me to try to give evidence sufficient to persuade the jury. Then I should try to provide sufficient evidence. This, too, is a mistake, since the burden to give sufficient evidence to the jury will be present (or applicable) whether I desire the guilty verdict or not. Therefore, the duty of a practical reason to prove cannot be the same as a burden to prove.

4. Burden of Proof in Legal and Dialectical Settings

Rather than think of the burden of proof as a duty, I suggest we think of it as a conditional demand for evidence. The demand is conditional on someone contending that a proposition is true and should be acted on. This characterization is consistent with the survey of burden of proof in our legal traditions.

Earlier I said that the use of burden of proof in the Western legal tradition is paradigmatic, that it is representative of reasonable assignments of burden of proof. Indeed, the burden of proof itself derives from that tradition. Ancient works like Cicero's *De inventione* contained methods of reasoning that were adapted from legal practices. But Nicholas Rescher notes that it was the logician and Archbishop Richard Whately, in his *Elements of Rhetoric*, who in the 19th century was the first to explicitly borrow the notions of burden of proof and presumption and employ them in extralegal, dialectical settings.²¹ We would therefore do well to understand the legal tradition. Doing so allows us to locate that phenomenon which needs to be explained, and to bring several of its important features to the fore.

4.1 Roman law and medieval disputation. We can do no better than begin with Rescher's illuminating book *Dialectics: A Controversy-Oriented Approach to the Theory of Knowledge*. In it he examines the notions of burden of proof and presumption in the context of formal debates or disputations, which were an educational component of universities in the Middle Ages.

Rescher distinguishes *natural* from *conventional* dialectic. The former is rational controversy or inquiry, the sort of epistemic behavior we engage in, and the reasoning we employ, when we *aim* either to find the truth about something or to secure a rational basis

²¹ Rescher (1977), 2.

for our beliefs. Social, intellectual disciplines—mathematics, for example—are natural dialectics. Conventional dialectic, by contrast, is simply a *model* of rational controversy, which aims, at the very least, to instill the abilities and dispositions that natural dialectic—done properly—requires. Practicing chess drills and puzzles, for example, is a kind of model that aims to develop the skills and dispositions that proper chess play demands.

Rescher limits himself to exploring just one kind of conventional dialectic, the formal disputation, because “it exhibits [the] epistemological process [of rational inquiry] at work in a setting of socially conditioned interactions,” and it uses various helpful tools of probative reasoning, two of which are burden of proof and presumption. In other words, the process of disputation is worthy of careful study because it reveals “the structure and workings of the validating mechanisms which support our claims to knowledge.”²²

The disputation was commonplace in medieval universities, and it was modeled, more or less exactly, on Roman legal practice and reasoning. The disputation served as a method for conducting controversial discussions and it involved a person defending a thesis in the face of counterargument from an adversary. It consisted of a proponent, an opponent, and a determiner. The determiner was to the disputation as a judge (or supervisor or magister) was to a legal proceeding, in that the determiner presided over the discussion.

These disputations proceeded by way of certain fundamental moves. The proponent launched it with a categorical assertion of the form “P is the case,” or “I maintain that P.” The opponent made use of so-called cautious assertions of the form “Q

²² Rescher (1977), 3.

is the case for all you have shown,” and both parties used so-called provisoed assertions of the form “P is true, other things being equal, when Q is true.”²³ It is important to note that the *ultimate* aim of the disputation was not refutation but rational appraisal. The question that mattered was this: what were the epistemic merits of the proponent’s categorical assertion?²⁴

Rescher describes some probative *asymmetries* involved in the disputations, one of which affected the assignment of burden of proof. The proponent was said to bear a burden of proof throughout the debate, since the proponent’s every move involved a categorical assertion. The opponent’s every move, by contrast, involved only one of two things: either a cautious assertion (or denial) or a challenge—which itself consisted either of a cautious assertion, or a cautious plus a provisoed assertion. The basic idea is that the opponent only needed to call the proponent’s assertions into question, and therefore had no need for making categorical assertions. In this way, a “disparity or imbalance of probative position is built into the proponent’s role as supporter and the opponent’s as skeptical denier.” The relation between a categorical assertion on the one hand, and a cautious assertion on the other, differs from the symmetrical, contradictory relation between a categorical assertion and its negation. If the proponent had categorically maintained P, and the opponent maintained not-P, then each side would be defending one member of a pair of mutually exclusive categorical assertions. This is important, since without this asymmetry the proponent would not be the sole party to bear a burden of proof; the opponent would bear one as well.

²³ Let ‘!P’ signify a categorical assertion; let ‘~P’ signify the negation of P; let ‘tP’ signify a cautious assertion; and let ‘P/Q’ signify the provisoed assertion. As an example, the proponent might begin with !P, and opponent might respond with the conjunction consisting of (~P/Q & tQ).

²⁴ Ibid. 46.

Rescher considers certain *dialectical tools* for disputation, two of which are burden of proof and presumption. These tools were a part of the ground rules, as it were, for probative procedure in Roman law—they helped divide the argumentative labor between the plaintiff and defendant and to “specify tasks regarding the marshaling of evidence.”²⁵ The burden of proof applied in contexts in which something was in dispute between two parties before a neutral adjudicative tribunal; it was needed when one party was endeavoring to establish that something is so. The Latin rule read, *necessitas probandi incumbit ei qui dicit non ei qui negat*: the need for proof lies with the one who affirms, not the one who denies.²⁶ Nothing in Roman law was conceded in legal action as admitted, and the principle that the accused is innocent until proven guilty served to allocate the burden of proof onto the side of the accuser. Many aspects of Anglo-American legal procedure derive from this conception.

But there are two distinct conceptions of burden of proof. Rescher appeals to Sir Courtney Ilbert on the distinction:

In modern law the phrase "burden of proof" may mean one of two things, which are often confused—the burden of establishing the proposition at issue on which the case depends, and the burden of producing evidence on any particular point either at the beginning or at a later stage of the case. The burden in the former sense ordinarily rests on the plaintiff or prosecutor. The burden in the latter sense, that of going forward with evidence on a particular point, may shift from side to side as the case proceeds. The general rule is that he who alleges a fact must prove it, whether the allegation is construed in affirmative or negative terms.²⁷

There is, then, a difference between the burden of defending a proposition on which some dialectic depends, and the burden of producing evidence. The former is the *probative burden of an initiating assertion*, which Rescher calls the I-burden, and it is

²⁵ Ibid., 25.

²⁶ Ilbert (1911), .

²⁷ Ibid., 15.

static in that it rests on one party, the plaintiff, throughout a trial. The general idea was that “whichever side initiates the assertion of a thesis within the dialectical situation has the burden of supporting it with argument.”²⁸ The latter is the *evidential burden of further reply in the face of contrary considerations*, which Rescher calls the E-burden, and it may shift from side to side, from plaintiff to defendant and back again.

Rescher makes clear that the burden of proof is not a logical notion, as logic “has no dealings with probative obligations.” Logic concerns truth “wholly in hypothetical mode:” if such-and-such is so, then this or that is so. The burden of proof is a methodological notion: “it is a procedural or regulative principle of rationality in the conduct of argumentation, a ground rule, as it were, of the process of rational controversy—a fundamental condition of the whole enterprise.”²⁹

4.2 Presumption. In the legal tradition, the correlative to burden of proof is a defeasible presumption: whenever there is a burden of proof for establishing that a proposition P is so, the correlative defeasible presumption that not-P stands until the burden has been definitively discharged.³⁰ A presumption is defeasible in the sense that it may be “overthrown by sufficiently weighty countervailing considerations.”³¹ Some presumptions are perhaps indefeasible—for instance, that children under the age of five cannot commit crimes. But most, like the presumption of innocence, are defeasible.

A presumption is also seen as an inference from known or admitted facts to something unknown. For example, given only certain admitted facts, we should presume

²⁸ Rescher (1977), 27.

²⁹ Ibid., 29-30.

³⁰ Epstein (1973), 558-59, writes: “Accordingly, the subject of presumption is intimately connected with the subject of burden of proof, and the same legal rule may be expressed in different forms, either as throwing the advantage of a presumption on one side, or as throwing the burden of proof on the other.”

³¹ Rescher (1977), 31.

that the charged person is innocent; the innocence, in some sense, is inferred from a class of accepted facts. Whether we understand the presumption as an inference or not, it is clear that presumptions serve to “impute significance to certain facts, thus throwing upon the party against whom it works the duty of bringing evidence to meet it.”³² In law, a presumption is a proposition that should stand until duly set aside. In debate contexts, there may be a presumption in favor of propositions that are generally accepted or are taken to be common knowledge—for instance, the testimony of experts, the reliability of memory or inductive reasoning, and so forth. And in either setting, presumptions may be either internally agreed upon by parties or externally mandated by a determiner.

Some insightful remarks on presumption come from Whately:

Thus it is a well-known principle of the Law, that every man (including a prisoner brought up for trial) is to be *presumed* innocent till his guilt is established. This does not, of course, mean that we are to *take for granted* he is innocent; for if that were the case, he would be entitled to immediate liberation: nor does it mean that it is antecedently *more likely than not* that he is innocent; or, that the majority of these brought to trial are so. It evidently means only that the 'burden of proof' lies with the accusers; - that he is not to be called on to prove his innocence, or to be dealt with as a criminal till he has done so; but that they are to bring their charges against him, which if he can repel, he stands acquitted.³³

This is important. In law, a presumption falls far short of outright belief or commitment, and a presumption in favor of some proposition is not evidence in favor of that proposition. Whately and Rescher are both careful to note that the probative situation with presuming some proposition P is strictly provisional: it is not that P is unquestionable, or probable, or plausible, or the bearer of some other positive epistemic status. The presumption of innocence, for instance, is procedural, not substantive. It provides a starting point for the court by telling it where it should begin its process of

³² Epstein (1973), 558-59.

³³ Whately (1828), 112-13.

investigation and how it ought to proceed. But the presumption of innocence can be defeated: one who is presumed to be innocent may be proven guilty in the end. Moreover, since it is procedural, the presumption of innocence is neutral with respect to whether the charged person is in fact innocent: to *presume* that someone is guilty is not to *assume* as much. And defeating a presumption does not say anything of whether we should have used that presumption in the first place.³⁴

But both Whately and Rescher think that presumptions can appear in non-legal settings. In such cases, a presumption may favor the most plausible or reasonable of rival alternatives. In natural dialectic or inquiry, standards of natural presumption must be appealed to: plausibility, intrinsic or prior probability, common knowledge, and so forth. The *plausibility* of assertions may be based upon a source (like testimony) or a principle. But it will not be a measure of “its [prior] probability—of how likely we deem it, or how surprised we would be to find it falsified. Rather, it reflects the prospects of its being fitted into our cognitive scheme of things in view of the standing of the sources or principles that vouch for its inclusion therein.”³⁵ Whately says that, in natural dialectic, there is (or should be) a presumption in favor of “every *existing* institution... till some argument is adduced against it,” and there is also a presumption against anything paradoxical or “contrary to the prevailing opinion.”³⁶

4.3 Burden of proof—two concepts? In American legal theory, there is a well-known distinction that is very similar if not identical to that between Rescher’s I-burden

³⁴ Flew (1972) makes very similar points to these. And Epstein (1973), 558, concludes: “The presumption lends structure to the argument, but it does not foreclose its further development.”

³⁵ Rescher (1977), 38.

³⁶ Whately (1828), 114-15.

and E-burden.³⁷ James Fleming, Jr., traces the origin of the distinction to the writings of James Bradley Thayer, and describes the burdens in terms of the risks attaching to each. On the one hand is the *risk of non-persuasion*—or, for short, the persuasion burden; on the other hand is the *risk of non-production*—or, for short, the production burden. Before describing this difference in more detail, I wish to consider an important element of legal practice that is relevant to the use of burdens of proof therein. Fleming writes,

Wherever in human affairs a question of the existence or non-existence of a fact is to be decided by somebody, there is the possibility that the decider, or trier of the fact, may at the end of his deliberations be in doubt on the question submitted to him. On all the evidence before him, he may, for example, regard the existence or non-existence of the fact as equally likely—a matter of equipoise. If... the trier is operating under a system which requires him to decide the question one way or the other, then to avoid caprice the system should furnish him with a rule for deciding.³⁸

Our legal system is one in which so-called triers—judges and juries—are not charged with the task of investigating and presenting arguments. They are only called upon to decide, on the basis of the arguments and investigations of others, whether purported facts are facts, and they need a rule for deciding in the event that the evidence presented is even or their mind is in balance. Presumption and burden of proof provide such a rule. The burden to persuade the jury usually rests on the plaintiff. In the event that the evidence is even, the triers decide against the plaintiff. The plaintiff, then, bears a persuasion burden: it will lose if the trier's mind is not made up after considering the evidence, so it assumes the *risk* of losing the verdict in the event that it fails to persuade the trier.³⁹ The bearer of the persuasion burden is entitled to a particular verdict only if the greater weight of evidence—as determined by the trier—is in favor of its assertion.

³⁷ It seems clear that Rescher's I-burden is identical to Fleming's persuasion burden. It is less than clear whether the E-burden is the same as the production burden.

³⁸ Fleming (1961), 51-2.

³⁹ *Ibid.*, 52-3.

In short, the persuasion burden usually applies to the party that not only instigates some dispute with an assertion but also stands to gain from the truth of that assertion. And an important point to remember from Fleming is this: the persuasion burden is inseparable from any system in which issues of fact are decided on any rational basis by human beings.

There is also the production burden—or risk of non-production. It is the burden to provide evidence sufficient enough to make a *prima facie* case for, or defense of, some assertion. Usually a plaintiff bears both burdens, but the production burden, unlike the persuasion burden, can shift: if the plaintiff meets the production burden, then it shifts to the defendant.⁴⁰ A trial judge, not a jury, decides whether this burden is met. If it goes unmet, then the case is dropped, which is why the party that bears the production burden is said to assume a risk of non-production. If both parties meet the production burden, then the dispute goes to a jury and that burden drops out completely. From that point onward, the jury is solely concerned with whether the relevant party meets the persuasion burden; the persuasion burden comes into play *only if* each party has met the burden of production.⁴¹ And there is no applicable principle that determines, in all cases, which party bears either burden.⁴²

Now, Rescher distinguished the I- from the E-burden, and we just considered the difference between the production and the persuasion burden. But I suggest we think of these as differences, not in kind of burden, but in propositions that burdens are attached

⁴⁰ Actually, McCahey (2008) says that this burden is static in that it remains on the same party throughout a trial; it doesn't shift. But Fleming thinks it's unclear whether the burden of persuasion can shift. This dispute, interesting though it is, is irrelevant to my project, and deciding which is right must be left for another occasion.

⁴¹ Fleming (1961), 57.

⁴² See McCahey (2008) for a nice summary of these issues.

to. And the difference in proposition accounts for the difference in risks. The I-burden is the demand for sufficient evidence for the initiating assertion of the dialectic, while the E-burden is a demand for sufficient evidence for any other assertion within the dialectic. The E-burden only comes into focus if some I-burden is present. The same goes for Fleming's distinction. Let P denote the proposition *that X is murdered Y*. The persuasion burden attaches to P itself. But the production burden attaches to some Q, which denotes a proposition like *that P is well supported enough to go to trial*.

4.4 Actions, Aims, and Stakes. These features of the legal tradition reveal the key features of burden of proof and presumption. The foremost is this: the notion paradigmatically applies in social, dialectical contexts in which someone is endeavoring to establish the truth of some assertion, and some important decision needs to be made, or some course of action pursued, or some attitude taken toward the assertion. Those contexts have certain aims. In the legal setting, we aim to do justice—or at least to protect the vulnerable from injustice. In natural dialectic, we aim to inquire after the truth, and to secure rational grounds on which to base our beliefs and policies. In conventional dialectic, we aim to appraise the rational or epistemological credentials of some proposition, and also to instill certain skills and dispositions.

Moreover, in the settings in which the burden of proof reasonably applies, something is at stake: it really matters—morally, financially, or otherwise—which decision is made, which course of action is pursued, which attitude is taken up. The legal setting is where liabilities are assigned and actions demanded; the consequences are fines, prison terms, death penalties, and other things besides. In natural dialectics, we risk missing out on the truth, and we therefore risk basing policies, important decisions,

claims to knowledge, and so forth, on that which is false. All this brings us to the heart of the matter: part of the reasonableness of burden of proof is tied to idea that some person or group of persons must decide a question or take an action in a circumstance in which something important is on the line.

5. What needs accounting?

When is it reasonable to assign a burden of proof, to conditionally demand sufficient evidence? A successful account should abide by at least one constraint, and should consistently explain at least three items, which I describe below. I assume that these items are facts, and therefore I do not argue for them. My account, then, is relevant only insofar as at least one of the three is taken as a datum in need of explanation. The constraint is that the account should explain the notion that is used in the legal and historical settings considered above.

First, some assignments of burden or proof are reasonable. Why is this the case? Adequately explaining this fact will allow us to know why the burden of proof is reasonably assigned in one context and not in another, what unifies the contexts in which it is reasonably assigned, and why there can be an objective fact of the matter whether it ought to be assigned on some occasion.

It is sometimes reasonable to assign a burden of proof, and the reasonableness in some context depends on certain features of that context. The account, then, should explain what those features are. Part of this should also make clear the unique connection between burden of proof on the one hand, and actions, aims, and stakes on the other. Consider normative facts, for example, which are facts about how things ought to be or should be, whether they are that way or not. Intuitively, the world contains such facts. And we have at least some sense of how reality must be—what features must be in place—in order for normative facts to exist. Some think, quite plausibly, that there must be beings that are designed to function in certain ways—from this we get teleological facts, and perhaps even facts about rationality. Some think, quite plausibly as well, that

there must be beings that have a certain level of intrinsic worth—from this we get moral facts and perhaps a foundation for rights and obligations.⁴³ Turn back now to burden of proof: what must the world, or some part of the world, be like—what must *we* be like—to make it *reasonable* to assign a burden of proof? If stakes and impending actions and decisions all play a role in making a burden of proof reasonable, then how do they all fit together?

Second, burdens of proof correlate with presumptions, and the latter are prior to the former in the order of explanation. A successful account of burden of proof should therefore explain the notion of presumption, since the former is intimately tied to the latter. The legal tradition suggests that you have a burden to prove that some proposition only if there is a presumption against that proposition—or, put another way, a presumption in favor of that proposition's negation. How do these two notions relate?

Third, we have good reason to think that the notions of burden of proof and presumption are sometimes reasonably assigned outside of legal settings. By virtue of what are they reasonably assigned in non-legal settings that appear far removed from even conventional dialectics?

⁴³ Wolterstorff (2009), for example, argues that inherent natural rights supervene on intrinsic worth, and that something like Christian theism is the best way to secure an adequate foundation for such worth.

6. A normative account of reasonable burden of proof

My account is *normative* in the sense that normative features play an essential role explaining when it is reasonable to assign a burden of proof. To best state it, recall the duty view. Although it fails, it gets something right. As we saw above, the burden of proof most clearly applies in contexts in which something important is at stake—when, say, some decision that matters needs to be made. The idea that the burden is an obligation fits well with this picture. Things tend to matter when obligations are involved. And the burden of proof seems connected, in some way, with obligations. Furthermore, rights and obligations are the locus of normative domain, and so any account that essentially involves them is to that extent normative.

6.1 The normative account in legal setting. Rather than think of the burden itself as a duty, we would do better to think of duties as constituents of the sphere in which the burden can be reasonably assigned. Begin by considering the fact that some assertions *need* evidential support; it is reasonable, even obligatory, to call for evidence in response to them. Take the legal setting, the paradigm case in which the burden clearly applies. In that setting and in others like it, there is some *legitimate* need, or demand, or requirement, or expectation for evidence in response to certain assertions. This is so at least in part because the assertion, if true, requires some action to be taken in the proposition in question. And those actions have consequences for people.

On the normative account, there is a reasonable demand for evidence for some proposition precisely because there is a presumption in favor of the negation of that proposition. The account tracks with the legal tradition in holding that burdens of proof correlate with presumptions—in the sense specified in section 3.1—but it goes slightly

further in suggesting that the latter are *prior to* the former in the order of explanation. And it is the presence of a reasonable presumption that makes it reasonable to make a conditional demand for evidence.

But what is a presumption? We have already seen, in section 4, the purpose a presumption serves. Given that purpose, the normative account takes a presumption of some proposition to be a conditional *acceptance* of that proposition, where to accept a proposition is to act as if P is true. Accepting a proposition, in this sense, is therefore consistent with taking a variety of attitudes toward it: belief or disbelief, agnosticism, doubt, trust, hope, and so forth. To presume that P is to conditionally accept that P is true, but the condition may change from one context to another. In the legal scenario, when the presumption is defeasible, it should be understood along the following lines: accept that P unless sufficient evidence for the negation of P is presented. The presumption of innocence is paradigmatic here. The basic notion behind presumption since Roman law is “what is now called default reasoning: [a] presumption is what is to be taken as true, unless and until there are reasons to the contrary.”⁴⁴ And taking P as true is accepting it as true; and acceptance is essentially tied to action, which is why it is relevant to legal settings. To accept is not to believe; nor is it to see the accepted as more likely true than not.

Now it is reasonable to presume that P when a person or group of persons has a *conditional* right or obligation to act as if P is true; in that case, there would be a burden to prove the negation of P. Not just any person or group, of course, but the ones who need to decide the relevant thing about P, or take the relevant action or attitude with respect to P. Think of a jury or judge. Each has an obligation to refrain from deciding guilt, unless

⁴⁴ Franklin (2015), 9.

and until sufficient evidence is given. Something would be terribly wrong if, on obviously poor grounds, the triers of fact decided that some accused person was guilty.

Presumptions have, in the course of history, been intimately tied with moral principles, and rights and obligations. Concerning an example in Roman law, James Franklin writes that the

Carbonian Edict declared that if there was a doubt as to whether a child was in fact the issue of someone who had left money in a will, the presumption was in favor of the child. That is, the question was settled for moral reasons, without considering how probable the outcome was.⁴⁵

This case of presuming in favor of the child fits well with the normative account. The child, we might say, has conditional right to the money left in the will, and those who decide what to do with the money have a corresponding conditional obligation to give the money to the child. This makes sense of the fact that juries and judges, by deciding on clearly insufficient evidence, can morally wrong someone.⁴⁶

If presumptions are reasonable when a person or group has a right or obligation to act on some proposition, then how, in the legal setting, do rights and obligations arise? This is a complicated matter. But I venture to say that they arise on account of the interplay of three things: aims, stakes, and normative principles. The legal system exists to provide rules for the operation of legal proceedings. And we hold that sort of proceeding when something or other needs to be *done*, and the aim therein is to *enact* justice—to consider allegations and weigh evidence, to render verdicts, to *assign* liabilities, and to *decide* whether to rectify, redistribute, or punish.⁴⁷ We aim to do right by each other.

⁴⁵ Ibid., 9.

⁴⁶ The acquittal of the men who murdered Emmett Till in the 1950s supports this fact.

⁴⁷ I should remind the reader that I mean *action* in a broad sense. Taking an attitude toward a proposition is an action; making a decision is also an action.

In addition to the aim of enacting justice, there are normative principles that we uphold, which are central to the rules that govern judicial practices. One is that justice is intrinsically good, something we should take great pains to pursue. We have an authoritative and dialectical system, with its own grounds rules as it were, in which we decide particular questions of justice. Another is that in general it is morally better to free the guilty than to punish the innocent. This is a simplified picture, no doubt; there are other normative principles than these, and it's not the point of this section to consider them all. The point is simply that the legal dialectical setting has normative aims and commitments.

Now add to these aims and principles the fact that the stakes in a legal setting tend to be high. It is typical that parties to a trial have something lose, one more so than the other. Something of import hangs on the verdict. The party is at risk of facing penalties that come along with losing a case, and we know well enough what those are. Legal judgments matter for people, and the process of deciding them should not be handled lightly.

But how does the normative account fare with the three items that need to be explained? Regarding the first item, the normative account explains what the burden is and the conditions under which it is reasonable to assign it. A burden of proof is a conditional demand for sufficient evidence for some proposition, and it depends upon a presumption in favor of the proposition. The burden is reasonable insofar as its correlative presumption is reasonable. And the presumption is reasonable insofar as some person or group of persons have a conditional right or obligation on the proposition being presumed. The rights and obligations arise from the interplay of aims, stakes, and

normative principles. The account also explains what unifies the contexts in which the notion of burden of proof is reasonably assigned. The contexts in which it is reasonably assigned with respect to a proposition are those wherein it is reasonable to presume in favor of that proposition's negation. Furthermore, it explains the reasonableness of burden of proof: at bottom are genuine rights and obligations, which are objective and may be rational or epistemic or moral. All this helps to explain why the notion of burden of proof applies in one context in which something is asserted or maintained, but not in another such context. The reason is that, in the contexts in which it applies, there is a reasonable presumption; when it doesn't apply, there isn't.

Lastly, we saw that the normative account allows us to understand the notion of presumption, along with the way in which it is intimately tied to burden of proof. But does the account explain the third item? We turn now to address that question.

6.2 The normative account in non-legal setting. We saw in the previous section that the normative account can explain two of the three items that it set out to explain. What about the third? We took the legal setting as the paradigm in which the burden of proof reasonably applies. But people use burden of proof talk in non-legal settings. Does the notion reasonably apply outside the court? Is the same notion being applied at all? If the ensuing remarks are correct, then at least on some occasions the burden of proof is reasonably assigned outside of the legal setting.

The normative account says that the notion applies whenever there is a presumption in favor of some proposition, and that reasonable presumptions arise whenever a person or group has a right or obligation to act on the relevant proposition. Nothing about a non-legal setting by itself precludes a person from having a right or

obligation to act as if a proposition is true; *a fortiori* there is nothing about a non-legal setting that precludes the presence of presumption and therefore burden of proof. Still, we would do well to try and extend the model to those settings and consider examples.

Here is how the burden might apply in a non-legal setting. In the legal setting, the aim is to do justice, to behave rightly, respect the intrinsic worth of other persons, render unto each what is due him, and all that. In natural dialectical settings, or in certain cases of everyday life, we have important aims as well. We aim to pursue and believe the truth, to avoid asserting falsehoods, to gain knowledge and avoid error. Such aims are plausibly based upon normative principles: it is *best* to pursue the truth and avoid falsehood; we *should* reject beliefs that are inconsistent, we *ought* to try to base our beliefs upon sufficient evidence, and so on. And we can have high stakes in these contexts as well.

To take one example of natural dialectic, suppose that some mathematician claims to have proved a theorem, which if true will bring significant changes to current theories in mathematics, which will result in changes to theories in various sciences, which will result in changes in government policy on important matters of human concern. It matters, then, whether the proof is sound; it's not a trivial matter, since important things hang on whether the theorem is true. In this case, the aim of pursuing truth, the epistemic norm of believing what is true, and the high stakes, can together generate at *least* a conditional permission right of relevant persons to not act as if the theorem is true. If the proof is evaluated and confirmed to be sound, then it will likely count as sufficient evidence for the theorem. But unless that happens, relevant parties have at least a permission right not to act on the theorem. And this right generates a reasonable

presumption in favor of the negation of the theorem, and therefore it is reasonable to make a conditional demand for sufficient evidence for it.

Or consider the following sort of case:

Fidelity. Bill is the CEO of a large and successful corporation. He is also a philanthropist who volunteers to serve the homeless, and he is well liked in his hometown. He is married to Jill, and the two are parents to eight children. One day, Jill overhears a conversation at the grocer, in which one man tells another that Bob has been cheating on his wife. Jill steps into the conversation and asks the man to restate the allegation that she thought she overheard. The man restates it exactly as before: he sincerely asserts to Jill that Bill has been unfaithful to her.

The aims here are similar as before, and the principles are too. Jill ought to pursue and believe the truth, and so forth. Now it also matters a great deal whether the man's assertion is true. The stakes are high, and acting on that assertion will likely ruin Bill's reputation, hurt his business, lead to a divorce, and bring emotional damage on the children. It seems reasonable to say that the man has a burden to prove the assertion. On the normative account, Jill has at least a conditional permission right—if not an outright obligation—not to act as if it is true, which generates a reasonable presumption in favor of Bill's innocence of the charge.

And what about conventional dialectic? There are two ways to go at this point, and the normative account is consistent with both. You might think that we speak loosely when we say that someone in a conventional dialectic setting bears a burden to prove. After all, conventional dialectic is a *model* of rational inquiry. When we say that one bears a burden of proof in that sort of dialectic, perhaps we mean only that, were one to be in a dialectic of which the convention is only a model, one would bear a burden of proof.

Or perhaps it is reasonable to think of a burden of proof applying in conventional

dialectical contexts. How would the normative account make sense of it? The question is whether there can be a reasonable presumption in those contexts. And certain rights and obligations not to act on a proposition can generate a reasonable presumption in favor of that proposition's negation. There are plausibly rights and obligations in that context. Recall that, in debates and other conventional dialectical settings, the aim—or at least the main aim—is rational appraisal of some proposition. Epistemic principles are also at play. At least some of the time, we *ought* to try and base our propositional attitudes of P on the rational credentials of P. Finally, it matters whether we get the rational credentials of a proposition right. There can be stakes, for instance; we run the risk of improperly appraising the proposition, and therefore of taking the wrong attitude toward the proposition. In the end, we may have an epistemic right to disbelieve, or to be agnostic, that P is the case, and therefore we may reasonably presume that P is not the case. And then we would be reasonable to assign a burden of proof on P, insofar as someone contends that P is true and should be acted on; in this case the action would be to take a different attitude with respect to P. This would apply to any conventional dialectic in which P is a categorical assertion.

It is a virtue of the normative account that it makes sense of applying the burden of proof in non-legal settings. The aims, stakes, and principles in any context can affect whether some proposition *matters*. If it matters in the relevant sense, then a conditional right or obligation not to act on the proposition can be generated, which can make it reasonable to presume the proposition's negation, which can make it reasonable to assign a corresponding burden of proof. The aims, stakes, and principles may generate epistemic, legal, or moral rights and obligations, in which case the burden of proof may

be epistemic, legal, or moral. More should be said concerning the relevant ways in which propositions can matter, but we have at least a basic grasp. The rough idea is this: when it doesn't matter at all whether a proposition is true, there won't be a burden of proof with respect to it.

But you may have the following worry. We seem to apply the burden of proof in conventional dialectical settings, even when the propositions don't matter at all. How is this compatible with the normative account? In conventional dialectic, when the aims, normative principles, and stakes are not sufficient to for the relevant propositions to matter, then strictly speaking there is no reasonable burden of proof or presumption involved. There is no fact of the matter whether a presumption and corresponding burden are reasonable. Whatever notion we think we are applying, it can't be that which is applied in legal settings.

7. Case study: application of normative account to philosophy of religion

In light of the conditions under which it is reasonable to apply the burden of proof, how should we assess Flew's application thereof to religious belief? There are at least three possible outcomes. The burden of proof is not reasonably assigned in that context; it can be reasonably assigned, but not on the theist; lastly, we may find Flew is right after all.⁴⁸ But first we ought to get clear on what he says.

He argues that the "debate over God's existence should properly begin from a presumption of [negative] atheism, and that the onus of proof must lie on the theist."⁴⁹ His presumption is analogous to the presumption of innocence in English common law. He says that both presumptions serve to instruct the relevant parties where inquiry should begin and how it should proceed. Countervailing evidence can defeat them. They are procedural and therefore neutral: the presumption of innocence does not imply guilt, and the presumption of atheism does not imply that theism is false. Neither one is trivial: defeating a particular presumption does not provide any reason to think that the presumption should not have been in place. Flew's presumption "lays it down that thorough and systematic inquiry must start from a position of negative atheism, and that the burden of proof lies on the theist proposition."

Flew's basis for assigning the burden of proof to theists is his presumption of atheism. But what is his basis for that presumption? He says that policies, like presumptions, must be justified on the basis of their aims. The aim of a presumption of innocence is to protect the innocent. The context in which we ought to adopt the presumption of atheism is the context of inquiry into God's existence. What is that

⁴⁸ Some important criticisms of Flew that go beyond what I will say are found in Shalkowski (1989) and Geivett (2002).

⁴⁹ Flew (1972), 19.

context? I take the context of inquiry into God's existence to be some sort of natural dialectic, in Rescher's sense. Flew cannot mean an actual debate in which two parties defend contradictory propositions, for although the aim would be rational appraisal, the probative asymmetry would not allow for the burden of proof to fall on only one side. Nor can it be a conventional dialectic, like the medieval disputation, for the built-in probative asymmetry plays the major role in determining the assignment of burden of proof; the explicit aim is to appraise the credentials of *only* one proposition, the categorical assertion.

The point of the inquiry into God's existence, according to Flew, is to discover whether it is possible to establish that some concept of God is coherent and, if so, that it has application. And to establish is either to come to know or to show that you know. Knowledge involves true belief plus some sort of epistemic grounds for belief. So the aim is to come to establish that God exists, and knowledge requires grounds, and one should not claim to know on inadequate grounds (or on none at all). "The inescapable demand for grounds," says Flew, "justifies the presumption of atheism." If one is to establish that P, or if one claims to know as much, then one must have good grounds for believing that P.

So the aim (knowledge) and the normative principle—do not claim to know what you do not have grounds to know—combine to generate a presumption of atheism and therefore a burden of proof on theism. This fits well with the normative account I described earlier. In a moment I will show how Flew's presumption is not in favor of atheism. But one objection here is that, in the context of inquiry into the question of God's existence, there is a burden of proof on theism only if there is also one on atheism

(in Flew's positive sense). For both views are either true or false, and therefore, on Flew's view, establishing or claiming to know either one would require adequate grounds. To assign a burden of proof only to theism is arbitrary.

Now notice the talk of positive and negative atheism. On a traditional understanding of the possible views to have on the question of God's existence, there are atheists, theists, and agnostics. According to Flew, though, the common meaning of "atheist" is "one who asserts there is no such being as God."⁵⁰ But he wants the Greek prefix 'a' in 'atheism' to be understood in a similar way to the prefixes in 'amoral,' 'atypical,' and 'asymmetrical.' So atheism, for him, is *negative* atheism, where to be a negative atheist is not to be an atheist with a rude and pessimistic temperament; there are plenty of those. It is simply not to be a theist—or to be a non-theist. And a positive atheist is one who positively holds that God does not exist.

The forthcoming question is this: how is negative atheism in any way distinct from agnosticism? Why is this not the presumption of agnosticism? Flew says that an agnostic is one who lacks knowledge, presumably because one lacks belief, about whether God exists, and that agnosticism involves conceding that there is a coherent conception of God—which could apply, whether it does or not—and we need a category for people who have not even made this concession. So the negative atheist is one who lacks belief even in a coherent conception of God—lacks belief in the possibility of theism. The theist bears a burden, first, to introduce and defend a conception of God, and, second, to provide sufficient reason to think the concept has application in reality.

⁵⁰ A minor quibble: this common definition seems a bit too strong. For someone can be an atheist without ever having asserted anything about the existence of God. We would perhaps do better to say, 'one who believes, or who would sincerely assert if prompted, that there is no such being as God.'

It is unclear why agnosticism should require the concession Flew says it does. For one may be agnostic with respect to the truth of any proposition. But let that pass for now. The main problem lies with Flew's aligning atheism *per se* with asymmetry.⁵¹ Flew seems to assume that the only way in which something is non-symmetrical is if it is asymmetrical. But there are two ways for something to be non-symmetrical: merely non-symmetrical and asymmetrical. A symmetrical relation R is such that, if a stands in R to b , it follows that b stands in R to a . The sibling-of relation is symmetrical. But there are two ways for a relation not to be symmetrical—that is, to be non-symmetrical. R may be either *merely* non-symmetrical or asymmetrical. If the latter, then it follows from “ a stands in R to b ” that “ b does not stand in R to a ,” the older-than relation is therefore asymmetrical. If the former, then neither “ b stands in R to a ” nor “ b does not stand in R to a ” follows from “ a stands in R to b ,” the brother-of relation is therefore merely non-symmetrical; it is neither symmetrical nor asymmetrical.

Likewise, there are several ways to be a non-theist—to lack belief in God. You may be an atheist—that is, you believe or assert that God does not exist—or you may be a mere non-theist. And among the latter are agnostics, who neither believe nor disbelieve in God's existence, and inanimate objects like my laptop, since it has no beliefs at all, and therefore lacks theistic belief. It is odd, then, for Flew to treat negative atheism as non-theism. Contra Flew, negative atheism turns out to be a kind of agnosticism. If you are agnostic with respect to whether some concept is coherent or possibly instantiated, then you are *a fortiori* agnostic about whether it is instantiated.

Flew's presumption of negative atheism is therefore no different than a presumption of agnosticism with respect to whether there is a coherent concept of God.

⁵¹ The same applies to amoral and atypical.

But does it make any sense to speak of presumption here? To presume a proposition is, on my view, to conditionally accept that proposition. But if negative atheism is a kind of agnosticism, a mere lack of belief in a particular proposition, then it is not a proposition—it is neither true nor false—but rather a doxastic state. How does one *accept*, in the technical sense defined above, agnosticism? Perhaps we can formulate an agnostic thesis. There is, on the one hand, soft agnosticism, which maintains, with respect to some proposition P, that I believe neither P nor its negation, but it is possible to know whether P is true. Hard agnosticism, on the other hand, maintains that I believe neither P nor its negation and it is not possible for anyone to know whether P. Does it make sense to speak of a presumption of, say, soft agnosticism? It would mean to accept soft agnosticism, to conditionally act as if it is true. The condition here is that sufficient reasons or evidence are not adduced; insofar as the evidence is not forthcoming, I act as if soft agnosticism is true.

But presuming either version of the agnostic thesis is compatible with believing that P is true (or false). Indeed, you may not have any direct control over whether you believe P. And it seems that there would be no reasonable burden of proof on the theistic position—or on atheism, for that matter. It would be reasonable only to assign the burden to the negation of soft agnosticism.

The conclusion, then: insofar as the notions of presumption and burden of proof do apply in this setting, there is no reasonable assignment only on theism. For atheism would be in just as much need of grounds as theism, and therefore neither should be presumed. (On Flew's criteria, that is—perhaps a Pascalian wager argument could be

wielded for the conclusion that we should presume theism.) But presuming agnosticism would generate a burden of proof on neither atheism nor theism.

The lesson here is that we ought to be careful how we apply burdens of proof. It seems to me that Flew was conflating a burden to prove that P with some epistemic duty not to believe that P in the absence of certain evidence. We certainly do have those sorts of epistemic duties. But they are not the same as having a burden to prove; the latter is procedural, while epistemic duties are part of the normative domain. In some dialectical context, I have a burden to prove some proposition that I am in my epistemic rights to believe and act upon.

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