Presumptions and Shifting the Burden of Proof
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1.0 Introduction

1.1 Professor Perelman has observed, “All audiences admit presumption.” (1969) To this observation it should be added (i) that at times all (most) speakers undertake burdens of proof, i. e., obligations to substantiate their statements with reason and evidence, (ii) these burdens of proof are typically incurred in relationship to presumptions, and (iii) in the course of argumentation these burdens of proof sometimes shift from one party to another.

1.2 The theoretical and practical importance of the idea that presumptions interact with probative obligations to shift the burden of proof: central to conceptions of persuasive force (Kauffeld, 1994a); key to understanding defeasible argumentation (Epstein, 1973); practical role in strategic maneuvering (Gaskins, 1992; Kauffeld, 1994b, 1995, 1998; 2002; Zarefsky, 1990).

1.3 Our central question: How in ordinary argumentation (outside the courts) do probative obligations shift? Two approaches:

> 1.30 The older approach attempts by strong analogy to extend legal conceptions of presumption and burdens of proof to ordinary argumentation outside the courts.
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> 1.31 A second, more recent, approach attempts to explicate how probative obligations are engaged and realigned in light of a broader understanding of how presumptions and commitments are undertaken in speech acts.
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> 1.32 Will first recount the older approach and then turn to some findings from the more recent. This review shows that <u>not only do presumptions and burdens of proof interact in ordinary argumentation, but also that their interrelations are more complex and interesting that the legal formulation and corresponding strong analogies suggest</u>.

2.0. <u>Judicial conceptions of presumptions and the burden of proof.</u> Legal conceptions and corresponding practices allocation presumptions and burdens of proof are procedural necessities designed to enable equitable and rational decision within a reasonable time frame and often in the absence of certainty (Epstein, 1973; Gaskins, 1992).

2.1 <u>In the law presumptions are inferences mandated by rules</u>. The rules governing presumptions do not mandate inferences regarding the truth of conclusion; rather they regulate how persons are to act. Given an accusation of criminal wrong-doing, the defendant is be regarded as innocent until the prosecution shows otherwise (Ibert, 1910).

2.2 Fundamentally presumptions and burdens of proof are aligned as pairs: a presumption favoring one side in proceeding relieves that side of probative responsibilities and assigns the obligation of mustering evidence and reasoning to other side of contest.

2.3 Generally the courts recognize two distinct kinds of probative obligations: global or macro burdens of proof which fundamentally do not shift during a controversy and local or micro probative burdens with which do shift as corresponding presumptions are modified by the argumentation (Cleary, 1959; Thayer, 1890).

2.4 Finally, jurists have attempted to formulate presumption rules on rational basis. Thus the presumption of innocence both a matter of treating accused parties fairly and a matter of minimizing the possibility of an erroneous determination of guilt . Likewise, local presumptions are established as a matter of fairness, policy, and probability (Cleary, 1959). And the standard for determining whether a party has discharged her burden of proof, i.e., has provided a prima facie case, have rational grounds.

3.0. Strong Analogies to Judicial Conceptions of Presumption and Burdens of Proof
Richard Whately introduced the terms "presumption" and "burden of proof" into the lexicon of argumentation theories as prompt to commonsense recognition of the presumptions bearing on ordinary controversies (1963). He offered only a weak analogy to legal concepts; his account offers no clear parallel to the legal notion that discharging a probative obligation can shift he burden of proof (Hansen, 1995).

3.1 Stronger analogies have been developed (1) in the rationale for debate based pedagogy (Ehninger & Brockriede, 1966; Hill & Leeman, 1997) and (2) in some accounts of dialectical inquiry (Rescher, 1977; Ullmann-Margalit, 1983). Strong analogies attempt to illuminate argumentation conducted out side the courts in day-to-day circumstances. They parallel judicial conceptions by allocating burdens of proof on the basis of presumptions; presumptions are seen as inferences mandated by rules; both macro and micro (or global and local); burdens of proof shift at the local level in response to argument which the discharge of burdens of proof.

3.2 Two difficult questions for strong analogies are: (1) on what basis are extra-legal presumptions to be assigned and (2) what constitutes a prima facie case, i.e., a body of argument capable of discharging a probative obligation and shift the burden of proof.? The proponents of strong analogies try to answer these questions on the suppositions (i) that rational grounds can be found for the presumptions bearing on a controversy, and (ii) once the presumptions have recognized, the corresponding burdens of proof can be readily identified.

> 3.21 Thus Rescher recognizes (i) conventional presumptions established by artificial regulation in "contrived settings," e.g. the courts, competitive debates, formal disputations; and (ii) natural presumptions can be recognized in the less contrived situations of rational controversy resting on estimates of plausibility, i.e., on how well a thesis fits within our cognitive scheme in view the reliability of

confirming sources, the strength of confirming evidence, the tendencies of inductive systematization (1977).

3.22 In Rescher's view shifts in presumptions and the burden of proof occur in natural rational controversies roughly as follows: proponents of a novel thesis will initially incur a burden of proof because their proposition will at first seem implausible or less plausible than its negation. At a macro level the burden of proof will shift when the proponents of novelty have provided reason and evidence sufficient to make apparent the plausibility of their proposition; given this prima facie case the burden of proof shifts to their opponents who are now obliged to accept the novel proposition and take up the burden of showing that it is less plausible than an alternative thesis.

3.3 Not everyone influenced by the judicial model has accepted the idea that probative responsibilities align with presumptions. Some debate theorists hold that presumption is just a matter of psychological or social resistance to change which makes it practically necessary to provide reasons which overcome that resistance (Cronkhite, 1966). These views do not provide an account of how advocates come to have probative obligations. Other views reject the idea that recourse to presumptions is necessary to locate probative obligations. One ground for this objection is that presumptions depend upon rules, and rules of the relevant kind are tied to courts and other institutional settings (Sidgwick, 1884).

3.4 In addition to this skepticism, we should add these further worries.

3.41 The legal concept of a presumption does not accord well with our ordinary conception. The legal concept takes the power of the presumptive conclusion to impose probative obligations on those who refuse to accept that conclusion as the mark of presumptive inference. This is neither a necessary or sufficient condition of ordinary presumptions. Rather presumption, in the plain sense of the term, is an inferences based on the supposition that someone will have made such and such a propositions true rather than risk resentment, retribution, etc. for failing to do (Kauffeld, 2003). If we are to build our understanding of ordinary probative obligations on their supposed relationship to ordinary presumptions, then our accounts ought to be brought into line with the plain understanding of and practice of presuming. The fact that it is not obvious just how that would be done on strong parallels to judicial models raises serious question about their adequacy as representations of how probative obligations shift in ordinary argumentation.

3.42 Finally, one might ask how the legal conception fits with our plain sense of obligation. The general conditions under which obligations are incurred have been illuminated for us by G. J. Warnock. According to that eminent English philosopher, one party (*B*) incurs an obligation to do *x*, where (i) another party (*C*) is counting on *B* to *x*, and (ii) *C* will suffer harm if *B* fails to *x*, and (iii) *B* will have spoken or acted falsely, should *B* fail to have *x*ed (1971). Any good account would have to square with this analysis in a natural way.

4.0. Shifts in communicatively incurred probative obligations. The study of speech acts, especially the family of such acts identified by J. L. Austin as illocutionary acts, provides a fertile field for the investigation of the genesis of probative obligations in ordinary day-to-day discourse (1962). Advances in our capacity to analyze and explicate these communicative acts have put us in a position to directly investigate the relationship between presumptions and burdens of proof.

4.1 Sally Jackson and Scott Jacobs introduced argumentation theorists to the idea that by analyzing and explicating communicative acts, we can directly investigate burdens of proof. Jackson and Jacobs hypothesized that the array of commitments undertaken in the performance of an illocutionary act comprise a potential disagreement space within which a speaker's potential probative obligations may be identified (Eemeren, Grootendorst, Jackson, & Jacobs, 1993; Jacobs & Jackson, 1982, 1983, 1989). The central idea here, that commitments speakers incur in the performance of speech act, opens a direct window on the genesis of probative obligations in ordinary day-to-day discourse marks an important step forward in the study of presumption and the burden of proof. It offers an approach to our topic which can make use of, but is not dependent on, legal conceptions.

> 4.11 This initial step forward limited is by two factors: (i) first Jackson and Jacobs rely on John Searle's account of illocutionary acts as rule constituted performances. Illocutionary acts of the kinds of interest here are constituted by pragmatic strategies which make use of the possibilities of openly incurred obligations (Stampe, 1967, 1975; Strawson, 1964; Warnock, 1973). Premature recourse to rules just obscures this picture. (ii) It is not the case that the various commitments undertaken in the performance of illocutionary acts amount to burdens of proof. In giving advice the advisor commits herself to speaking out of regard for her advisee's concerns. This is does not commit her to showing that her remarks are so motivated.

4.2 A broadly Gricean account of illocutionary acts, as developed by Strawson, Stampe and others provides a more productive approach to the study of probative obligations occurred in communicative acts (Kauffeld, 1987, 2001, 2002; Stampe, 1967;, 1975; Strawson, 1964; Warnock, 1973). According to this view in the performance of centrally important illocutionary acts speakers openly incur responsibility for the truthfulness of what they say and strategically incur still further obligations pragmatically important obligations. This view invites the hypothesis that in some such acts the larger obligations incurred include probative burdens. This approach squares with our ordinary sense of presumption and of obligation.

4.3 Investigation of this hypothesis has disclosed three ways in which probative obligations are generated in the performance of illocutionary acts. These patterns relate to distinct possibilities for shifting burdens of proof.

4.31 In ACCUSING the speaker may incur a probative obligation as a direct and foreseeable consequence of what she does in the performance of her illocutionary act. In paradigm cases of this speech act the speaker tries to impose on the accused an obligation to answer for an alleged offense. To secure that obligation the accuser impugns the accused's conduct, purports to be upset by her beliefs that the accused has wronged her, and would have it presumed that she is making effort to treat the accused fairly. By purporting to not know how the accuser could believe that he acted as she alleges, the accused can generate a presumption of his innocence and impose on the accuser an obligation to provide evidence and reason supporting her allegations. Where the accuser is able to discharge this duty, she will have vindicated her presumption of fairness, and the accused will fall under an obligation to answer her charges. Should he persist in a denial of wrong-doing, the burden of proof will shift to his shoulders. Of course, he may at this point offer an excuse or justifications or attempt to make amends. Here something like a shift in the burden of proof corresponding to the judicial model occurs and does so within a pragmatic context, without special rules (Kauffeld, 1994b, 1998).

4.32 In PROPOSING the speaker openly undertakes a probative obligation as an inherent component of her illocutionary performance. Proposals are characteristically made in order to induce presumably self-reliant addressees to, at least, tentatively consider a proposition which initially strikes the addressee as not worth considering. In order to have it presumed that her proposition may prove to be worth considering; the proposer openly commits herself to speaking on its behalf, answering her addressee's doubts and objections. She therein openly undertakes a probative obligation. If she discharges that obligation a realignment of obligations will occur. Mere skeptics will incur an obligation to carefully consider what now appears to be proposition which deserves such consideration; opponents will incur an obligation to substantiate their objections or suffer criticism for wasting valuable time by unwarranted delays. In especially interesting cases this shift in the burden of proof may obligate opponents to address the issues as delineated by the proposer . Thus shifts in the burden of proof relative to proposals may bring into alignment positions which had formerly seemed incommensurable (Kauffeld, 1998, 2002).

4.33 In ADVISING speakers do not necessarily or characteristically incur probative obligations. Advisors often do provide reasons supporting the advice they have given, but such assistance goes beyond the commitments inherent in the act of advising. Still, speakers do sometimes use ADVISING as a vehicle to secure consent for argumentation which might otherwise be rejected as meddling. Advice is characteristically designed to guide the advisee in his determination about matters which are his concern, his "business" as we say. As such, advice is an intrusion into a sphere where the advisee would be presumed to give due thought and where it would be presumed that the advisor did not have similar orientation. To overcome the suspicion that her advice will be meddlesome and, so, secure consent to speak about these matters, the advisor openly commits

herself to speaking out of regard for the advisee's concerns. In so doing she generates a presumption that what she has to say will provide useful guidance. In a somewhat more intrusive, and hence more risky, amplification of this speech act, the advisor may commit herself not only to speaking out of regard for her advisee's concerns but, also, to providing supporting arguments which warrant imperative acceptance of their advice. If successful in discharging this burden of proof, the advisor may generate an obligation for the advisee to at least consider a realignment of the priorities he assigns to his concerns. So, advising can serve as a vehicle for the advisor's winning consent to providing argumentation which intrudes into the advisee's affairs; discharge the corresponding probative obligation can produce a realignment of the obligations bearing on the addressee (Kauffeld, 1986).

4.4 Investigation of the genesis and satisfaction of probative responsibilities incurred in and resulting from ordinary communicative acts prompts the following (tentative) conclusions.

4.41 In day-to-day argumentation, probative obligations are incurred and shift in relationship to presumptions. This can occur in the absence of specific rules, a point which should not be surprising given that Professor Warnock has shown that obligations can be, and commonly are, incurred in the absence of rules.

4.42 The structures with which ordinary probative obligation are incurred and realigned by argumentation are considerably more complex than the simplified rule based model drawn from jurisprudence suggests. This is not to say that the legal model is of no interest. On the contrary it should be given invigorated attention. But the order and variety exhibited by day-to-day presumptions and probative obligations merit clear understanding, undistorted by simplistic models. Moeovwe, ordinary practice, unlike judicial argumentation, admits of macro-level shifts in the burden of proof. This possibility is of particular importance in disputes where participants disagree as to what are the basic issues. There is some tendency to hang onto conceptually neat formulations in the face of a more complex reality. That ought tendency not prevail in this important area of argumentation.

4.43 The basic strategy of strong analogies seems flawed. That strategy depends on the supposition that recognition of the pertinent presumption will enable identification of the corresponding probative obligation. This supposition holds narrowly for the special case of ACCUSING in which the accused purports to be innocent, but it would not hold for PROPOSING and for cases, like imperative ADVISING, in which an illocutionary act is the vehicle for securing consent to the presentation argumentation.

4.44 In the range of cases adumbrated above, probative obligations are incurred strategically in response to a complex of standing presumptions which would other impair the utility of the presumption of veracity ordinarily generated by

seriously saying that P. By openly undertaking a probative obligation, or commitments which may foreseeably result in the speaker bearing a probative obligation, a speaker can generate a stronger presumption favorable to her purposes (i.e., to imposing an obligation to answer her accusation, to inducing tentative consideration of her proposal, to consent to intrusive arguments for her advice). Discharging these strategically engaged probative obligations can produce realignments of the presumptions and obligations governing an argumentative exchanges. But how that occurs and what that involves is relative to the initial strategic configuration of presumptions and commitments.

4.45 Investigation of the ordinary genesis of and shifts in probative obligations is its infancy. Much remains to be studied. It may be that as a matter ordinary practice we have a variety of stock means for incurring probative obligations which work systematically across a variety of communicative acts. The proposer's strategy relies of openly committing oneself to answer questions and objections—something we do in a wide variety of communicative acts. Perhaps the option of incurring a probative obligation and focusing it should be regarded as a design possibility available to a rich variety of communicative/epistemic strategies. It may even be that something like Resher's view of plausible argumentation may be a real possibility within the resources of ordinary argumentation and not dependent on special consensus about rules. To essay these and other intriguing possibilities careful analysis and explication of the commitments undertaken wider varieties of communicative acts are needed.

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