

## The Anatomy of a Dispute

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When men are brought face to face with their opponents, forced to listen and learn and mend their ideas, they cease to be children and begin to live like civilized men.

—Walter Lippmann

### A Hypothetical Example

It is a hot August afternoon. Mr. N on his way home from the office comes to the bus stop and, finding a single spot of shade just large enough to cover him, steps into it gratefully. Soon Mr. A, a fellow worker, approaches and, seeing the only spot of shade already occupied by Mr. N, resigns himself to waiting in the sun. A certain order of things—a certain pattern of relationships among Mr. N, Mr. A, and the spot of shade—is thus established and persists until the bus arrives.

But now suppose that instead of being a peaceful, timid soul, Mr. A is an aggressive, belligerent individual, and that he attempts to push Mr. N out of the shady spot, by words or manner challenging him to retain it. Under these circumstances, one of two reactions is possible: (a) Mr. N may let the challenge pass, and move as Mr. A desires, so that a new pattern of relationships is established, with Mr. A now in the shade and Mr. N out in the sun. (b) Mr. N may try to repel Mr. A's aggression, with the result that blows are exchanged and a fight develops.

Either way, two facts are to be observed: (a) Mr. N and Mr. A want the same spot of shade, a spot too small for both of them to occupy at once; and (b) when Mr. A attempts to push Mr. N out of the shade he takes a certain risk, a risk on which he has to make good if he is to achieve what he wants, and even, perhaps, avoid physical harm to himself. For Mr. N may respond to A's shove by knocking him down and beating him soundly. Then Mr. A would not only fail to win the place in the shade, but might sustain injuries, as well.

Now let us vary the story in one respect. Assume that the altercation between Mr. N and Mr. A, instead of involving shoves and blows, is confined to words.

In this new situation, Mr. A, on approaching the bus stop, might say: “By rights, N, that spot of shade belongs to me.” Again, Mr. N has two courses of action open to him: (a) He may reply, “Yes, that is so,” and move out of the shady spot, allowing Mr. A to occupy it; or (b) he may answer, “I deny this spot of shade belongs to you. Prove that such is, indeed, true.”

Three observations are to be made about this second version of the story:

1. Although less direct physical danger may be involved in the verbal declaration than in the shove, Mr. A still takes a risk when he asserts that the shade by rights belongs to him, for, unless his claim is to be idle talk, he must be able to prove the necessity, expediency, or justice of the state of affairs he seeks. This, too, is a “risk,” not only because failure to make good his claim means that it will be impossible for A to achieve the goal he seeks, but also because defeat may cause him to lose status in the eyes of N and of the community as a whole, so that in the end he will be less well off than before.
2. The verbal assertion, no less than the physical blow, is an agitating force. It has the effect of stirring up and throwing into turmoil what had previously been a static and ordered situation, a situation which, it may be assumed, would have remained static had the challenge not been issued.
3. The verbal assertion, no less than the physical blow, specifies the particular reordering—the new pattern of relationships—that A believes should replace the old order. It says that instead of N being in the shade and A in the sun, A should be in the shade and N in the sun.

### Presumption, Burden of Proof, and Burden of Going Forward with the Debate

Keeping these points in mind, one must consider two concepts that are of the greatest importance in understanding what happens when contending parties engage in a debate. They are *presumption* and *burden of proof*.

As the two versions of the story about Mr. N and Mr. A showed, the battle of fists and the battle of words arose for the same reason: Mr. N was occupying a particular piece of ground that Mr. A believed N should not be on.

In this respect, the story is completely typical. Every debate that ever has or ever will take place concerns, if not an actual, at least a figurative piece of ground. One of the disputants *preoccupies*—figuratively stands upon—an idea, interpretation, or value that the other thinks he should not be occupying. In-

deed, unless some actual or figurative piece of ground is preoccupied, there can be no debate. There is no established order or pattern of relationships that may be challenged. The situation is chaotic or formless and hence not subject to reordering. There is nothing to argue about, no matter concerning which the parties can disagree. For a debate to occur, the occupancy of a piece of argumentative ground must be contested. Here, as at many other points in a description of debates and verbal disputes, the analogy to a physical order or event is both close and pertinent.

The technical term for the preoccupation of a piece of argumentative ground is *presumption*. The party who at the beginning of the debate stands upon the disputed ground—in our example, Mr. N—is, therefore, said to have the presumption.

Presumption is, however, neither more nor less than such preoccupation. As a concept, it makes no evaluation of the situation it labels. To say that one of the parties to a dispute has the presumption does not mean that the ground which he occupies is occupied legitimately or illegitimately or that he should or should not be standing on it. The term only describes a situation that exists and points out the prevailing order of things by declaring that one of the disputants stands at a particular place within that order.

*Natural and Artificial Presumption.* As a description of an existing system of relationships, presumption may be either *natural* or *artificial*.

Natural presumption reflects things as they are viewed in the world about us. If an argument involves a belief concerning existing institutions, practices, customs, mores, values, or interpretations, the presumption is automatically in favor of that belief simply because the institutions, etc., are thought to exist.

Artificial presumption, on the other hand, is the result of ground arbitrarily assigned, a preoccupation by agreement rather than by the present order of things. That a man brought to trial is to be presumed innocent until proved guilty is an example of presumption of this second sort.

The point to bear in mind, however, is that neither natural nor artificial presumption evaluates. The former does not say that a belief about existing institutions, practices, customs, mores, values, or interpretations is intrinsically good or even better than anything that might be substituted for it. Presumption merely recognizes that the belief now stands on the ground that any alternative belief would have to occupy. Nor does the artificial presumption of innocence mean that an accused man is more apt to be innocent than guilty, or that the judge thinks him innocent, or that most men brought to trial are not guilty.<sup>1</sup> Here the presumption is only a man-made convention, invoked so that an order may be established and debate proceed. The accused must be placed on some piece of ground to begin with; and American legal tradition assumes that the interests of justice and expediency will best be served if he is

assigned the ground of “innocence.” In short, presumption is always descriptive, never evaluative.

### Burden of Proof

Whereas presumption is the preoccupation of argumentative ground, burden of proof is the obligation devolving upon the party who advances a statement—or, as it is called when formally worded, a *proposition*<sup>2</sup>—that challenges that occupancy. In most debates outside the courtroom, the burden of proof is twofold. It entails (a) showing that the person, idea, institution, or practice now occupying the disputed ground should not be there; and (b) specifying what person, idea, institution, or practice should be there. Hence, burden of proof both criticizes the present order and recommends a new one, the specific content and scope of the “burden” being determined by the wording of the proposition that is advanced. (In the hypothetical case outlined above, for example, Mr. A would have to prove (a) that Mr. N should not be in the spot of shade, and (b) that he, Mr. A, should be.)

Unlike presumption, which merely describes, burden of proof evaluates and recommends. Instead of reporting what is, it declares what should be. And because it does evaluate, assuming the burden of proof involves taking the risk described [above].<sup>3</sup>

There is no risk in description. Descriptions are merely reports, and as such accurate or inaccurate, complete or incomplete, clear or unclear. But when the debater criticizes and recommends, he takes the risk that he will not be able to prove his criticism justified or his recommendation sound. The burden of proof may, therefore, most accurately and usefully be defined as *the risk involved in advancing the proposition*.

### The Burden of Going Forward with the Debate

Having defined presumption as the preoccupation of a piece of argumentative ground and burden of proof as the risk involved in advancing the proposition, we return to Mr. A and Mr. N.

All was calm and at rest—in technical language, the “universe” of the bus stop was quiescent—until Mr. A declared, “By rights, N, that spot of shade belongs to me.” By advancing this proposition A disturbed the situation initially. Moreover, his proposition specified the exact burden of proof that A, as the party standing outside the disputed ground, must now be prepared to assume.

But the proposition alone did not start the dispute. Had Mr. N, without replying, surrendered the shady spot to A, no interchange would have taken place, even though a proposition had been advanced. Instead, a new order

would have been established quickly and peacefully. The debate began only when N answered A's challenge by saying, "I deny this spot of shade belongs to you. Prove that such is, indeed, true."

This reply, operating in conjunction with A's challenge, produced the controversy, by forcing A to do more than mouth assertions. Now he was required to produce proof to support the proposition he had advanced.

If, for instance, at this point A were to say, "I have no proof. Let's just forget the whole matter," he obviously would fail to make good on the risk he took in initiating the dispute. Under these circumstances, not only would any impartial judge be forced to declare against him, but, as a practical matter, he would lose all hope of gaining the desired place in the shade. Therefore, if he is to attain the end for which he began the debate in the first place, A must now make good his claim. He must do as N asks and present proof designed to show its expediency and justice. In other words, he must go *forward with the debate*. Unless he does so, obviously his case will fail.

This obligation of going forward with the debate is a new and additional one, quite distinct from the risk A took in advancing his original proposition. Of course, if he had not challenged N, he would not now be called on to carry the debate forward. But it was not merely the advancing of the proposition that gave rise to the new burden. What directly motivated this second obligation was not A's challenge, but N's response. Had N not answered, the obligation would not have risen. Had N answered differently from the way he did, the obligation would have assumed a different form. But since N did deny the challenge in the fashion stated, A is now called on to make good his claim by proving that the shady spot is "by rights" his.

*Prima Facie Case.* The first thing A must do in discharging his obligation of going forward with the debate is to make out what is technically called a *prima facie case*<sup>4</sup>—that is, *a case that any reasonable judge would consider strong enough to stand, unless or until refutation is offered against it*. If A cannot make good his claim at least to this extent, he can hardly expect a further hearing. To have any validity at all, his case must at the minimum be able to stand by itself.

But making out a *prima facie* case is only the first step involved in carrying the debate forward. In a second, and equally important, phase of this process, N as well as A participates. For when A has successfully made out a *prima facie* case, his obligation is for the moment discharged. Now N must bestir himself. If he wants to maintain his place in the shade, he must counter A's *prima facie* case strongly enough so that it can no longer stand without additional support, or without A's showing the invalidity or irrelevance of N's attacks upon it.<sup>5</sup>

Assuming that N does attack successfully, the burden of going forward then shifts back to A. It is once more his duty to offer proof or refutation so that his *prima facie* case may be reconstituted and his cause strengthened. But A's ac-

tion only calls for a new response from N, to which A must again reply. And so the debate proceeds, with each party alternately bestirring the other into action, until the evidence and proofs have been exhausted or a predetermined time limit has expired. Then he who by this process of alternating action and counteraction has achieved a preponderance of proof, thus establishing his “right” beyond the point where it can reasonably be disputed, may be awarded the decision.

The importance to each party of this alternating obligation to carry the debate forward may be seen by supposing the arrival of the bus at various stages during the course of the controversy between N and A. If, for example, the bus arrives after A has issued his challenge but before he has an opportunity to develop a *prima facie* case, any reasonable judge, being called on to decide the dispute at this point, would have to declare in favor of N. If, however, it arrives after the *prima facie* case is completed and before N has an opportunity to reply, the award would have to be for A; if after a successful attack upon that case, for N; etc. Not until both sides have had a fair and equal chance to present all of their proofs, or an agreed time limit is exhausted, is a final or summary decision possible.

*The Burden of Proof Does Not Shift.* A discussion of the difference between the burden of proof and the burden of going forward with the debate requires attention to a frequently misunderstood matter.

While the burden of going forward with the debate constantly shifts back and forth between the contesting parties, the burden of proof does not. From beginning to end it always rests with him who challenges the existing order. Unlike the burden of going forward, it is not a subsequent or contingent obligation. Rather, the burden of proof represents the risk involved in originating the action by advancing the proposition in the first place. Since the challenger puts forward the proposition, he must accept as his permanent and unshiftable obligation the task of making good on whatever risk it entails.

Moreover, this obligation requires that the challenging party maintain his proof throughout the debate at a level above equilibrium. Unlike the defendant, he cannot be satisfied with a balance or standoff. Although a draw in proof may subject the existing order to severe tests and put it on its mettle to defend itself, in the end it leaves that order unaltered, with the original occupant still in control of the contested ground. To make good his claim the challenger must do more than threaten or annoy; he must effect a rearrangement.

Consider, again, the dispute at the bus stop. N may maintain the existing order of himself in the shade and A in the sun simply by parrying or countering the attempts of A to alter it. He need not show cause why the situation should not be altered. A, on the contrary, must offer affirmative proof why it should. In conducting his defense of the present order N must, of course, from time

to time go forward with the debate by advancing proof or refutation. This requirement, however, represents only a temporary shift in the center of gravity of the controversy, not a shift in the fundamental obligations of the parties. These obligations remain constant. A must strike and maintain throughout a level of proof sufficiently above equilibrium to effect the rearrangement he desires. This margin of proof above equilibrium represents the unshiftable obligation he assumed in initiating the action. Hence, another way to define the burden of proof is to say it consists of such a margin.

### Notes

Reprinted from Douglas Ehninger and Wayne Brockriede, *Decision by Debate* (New York: Dodd, Mead, 1973), 81–87. Notes in square brackets added by HVH. The orthography of the original has been preserved.—Eds.

1. Richard Whately, *Elements of Rhetoric* (London: 1828), 1.3.2 (this volume, p. 45).
2. See Chapter 14. [Chapter 14 has the title “Analyzing the Proposition.”]
3. [Described earlier in the first section of this essay.]
4. See the definition of “case” on p. 233 of Chapter 15. [“A debate case may be defined, therefore, *as a structure of proofs a debater selects to substantiate his claims on the issue of a controversy for the purpose of influencing the beliefs of a particular audience.*”]
5. See James M. O’Neill, Craven Laycock, and Robert L. Scales, *Argumentation and Debate* (New York: The Macmillan Company, 1917), 33–38.