

Book Reviews

Burdens of Proof in Modern Discourse. By Richard H. Gaskins. New Haven, Conn.: Yale University Press, 1992. Pp. 362. \$37.00 (cloth); \$18.00 (paper).

Well before the recent triumph of country-club Republicanism, one could see "a growing adversarial spirit . . . across political and academic debate" (p. xvi), says Richard Gaskins in his deep and lucid book *Burdens of Proof in Modern Discourse*. Gaskins takes seriously the legal connotations of the word "adversarial." The phrase "burden of proof" in his title is, of course, legal in origin, *onus probandi*, and Gaskins is a student of the law.

We Americans, Gaskins notes, love legal analogy, so much so that we forget we are using it, applying it half-consciously to social policy and university governance and married life. Foreigners like Tocqueville have been regularly astonished at our legalistic and adversarial frame of mind. Tocqueville argued that it comes with democracy in America, and Gaskins agrees: "In a culture that casts profound suspicion on all other forms of authority, judicial power assumes unique importance. It is the institutional expression of our dominant rhetorical ideal" (p. xvi). Gaskins' book explores the philosophical foundations of that American rejoinder, "See you in court, bub!"

The new adversarial spirit may in fact be a reversion to an earlier one. It may be that the consensus from 1942 to 1968, not the nastiness of modern discourse, was the oddity. Adversarial men were not rare in the times of H. L. Mencken or George Bernard Shaw, nor in the times of Daniel Webster or Charles James Fox.

Whether the adversarial spirit is entirely new or not, "we need to find new ways to address more openly the strategic context of modern argument" (p. xix), says Gaskins. Otherwise, the strategies of argument do their work without scrutiny. Consider the strategies in arguments about social services (Gaskins repeatedly touches on them, especially as cases before the Supreme Court). Has the burden of proof for subsidies for housing been shifted to the social service providers? *How* has it shifted? Has the presumption now become that the poor are bad people, a presumption that has, in fact, alternated with its opposite during waves of reform dating back at least to the Elizabethan poor law? *How did* it become so this time?

Gaskins believes in some of his moods that the words of the discourse matter—contrary to the modern notion, as modern as Hobbes, that words

are merely ornamental and that material interests run the show. Hobbes argued (with many a shining metaphor) that "Metaphors, and senseless and ambiguous words, are like *ignes fatui*; and reasoning upon them, is wandering amongst innumerable absurdities; and their end, contention, and sedition, or contempt."

The Hobbesian program has failed, which is to say that we in the late twentieth century have rediscovered the importance of discourse—although 3 centuries after Hobbes, the wordless program still enchants sociologists and political scientists bent on remaking their fields into bush-league economics. If the philosophy and literary criticism and linguistic science of the past quarter century had to be summarized in a couple of sentences, they would read: Hobbes was wrong; there is no nonmetaphorical place from which to move the world; we had better attend to the rhetoric.

As he knows, therefore, Gaskins' "new" ways to address the rhetoric are very old. The strategies of argument about the poor law are no more new in 1996 than are the poor themselves. Gaskins uses old Hegel explicitly, arguing that "the dialectical framework for practical reason occupies an uncharted middle ground between logic and rhetoric" (p. 37). Dialectic concerns "the kinds of speech events in which persuasion takes place, in which communicative norms are negotiated, or in which the boundaries of conventional inference are critically examined" (p. 130)—in brief, the assigning of the burden of proof. Implicitly throughout the book he uses the ancient art of rhetoric in an expanded sense, the ability, as Aristotle defined it, "in each case to see the available means of persuasion." Gaskins' definition of "dialectic" fits easily into this ancient Big Rhetoric, or into the social psychology of Michael Billig (in his brilliant book, *Arguing and Thinking*).¹ It is rhetoric for keeps, for the whole prize. Gaskins' book is a rhetoric of adversarial procedures in social thinking and policy.

You might think that the burden of proof is a piece of "mere" rhetoric, confined to inherently debatable matters like the innocence of O. J. Simpson or the guilt of recipients of public housing. Gaskins rejects this partitioning of knowledge. In scientific as much as in legal or political debates—remember cold fusion?—"the debate over substance turns into a battle for the tacit authority to dismiss an opponent's entire case. Each side declares, 'I win, because you have not proposed sufficient evidence to prove your point'" (p. 3). "The grand strategy of shifting the burden of proof," as he puts it, is a neglected source of change in science and in policy. The burden of proof has somehow been placed, for example, on advocates for the poor.

Burden shifting is the main rhetorical tool in a court of law. "By allocating in advance certain procedural and evidentiary burdens among relevant interest groups, legislation favors substantive outcomes that defy the bland and balanced rhetoric one finds in many statutes" (p. 22). His theme: "the adversarial parties to constitutional disputes were able to perfect an indirect style of argument: preserving the rhetoric of evidence and rational decision, while manipulating the onus of decision" (p. 119), the burden of proof.

We tend to suppose that the truth will out, that the present scientific orthodoxy is established factually, no rhetoric about it. And yet over 4 decades, American geology assigned the burden of proof for continental drift to the (mainly foreign and therefore suspect) followers of Alfred Wegener. Recent studies of science have shown repeatedly, as in Harry Collins's book, *Changing Order: Replication and Induction in Scientific Practice*, or Trevor Pinch *Confronting Nature*, or Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle and the Experimental Life*, that the burden of proof, this piece of mere rhetoric, runs the scientific show.² Our most dignified intellectual activi-

ties depend on the burden of proof, about which, sad to say, there is no mechanical rule. Science itself "seems to need quasi-judicial institutional structures for bringing closure to issues of public significance" (p. 141).

But there is trouble in the courtroom. "Sudden and dramatic shifts in rhetorical burdens," Gaskins notes, "signal the inevitable cyclical changes that affect most fields of discourse [one could say 'all,' even in mathematics]: the paradigm shift in scientific theory, the alternating styles of ethical argument, the proverbial pendulum swings in public opinion" (p. 4), such as those about private versus public charity.

In the social services and their legal context, the ultimate authority for the burden of proof is the Supreme Court. For example, in *Lochner* (1905), the Court set an impossibly high burden of proof on state legislatures to demonstrate that protective legislation was good for workers in bakeries. As Gaskins points out, the same rhetoric was adopted after 1937 by progressive justices, placing impossibly high burdens of proof on litigants to show that protective legislation was *not* good. *Brown v. the Board of Education* "raised to an unbearable weight the burden on states to prove that their segregated services were, in truth, equal" (p. 55).

In similar terms, Gaskins tells the story of the contested "right" to receive welfare. Civil rights had encapsulated the burden of proof in a doctrine of "strict scrutiny," which is to say, a higher standard imposed on a practice discriminatory on its face, such as "separate but equal" schools. The advocates of welfare rights decided to pursue this line, which proved disastrous when the Court under Burger became more conservative in composition. "By investing their entire adversarial fortune in the doctrine of strict scrutiny, welfare-rights advocates gambled and lost everything in a remarkably short period of time. Given the win-or-lose nature of burden-shifting strategies, once the Court definitively rejected strict scrutiny for welfare litigants, their claims were condemned to stay in the domain governed by the presumption of constitutionality" (p. 61).

The Equal Rights Amendment was similarly hoist by its own petard. If rights are *equal*, said its opponents, I suppose we will have to have unisex bathrooms, accidentally abolishing that urinary segregation so beloved of Americans. "Supporters were effectively handed the burden of proving that certain politically volatile consequences would *not* result from the ERA" (p. 64, italics supplied). Likewise, No Fault divorce: "Placing an insupportable burden of proof on all forms of differential treatment" of the mother and the father in a custody dispute has, as Mary Becker put it, given "a bargaining chip to fathers in negotiations with mothers . . . because mothers seem to want custody much more" (p. 65). The burden of proof, which sounds to the justices and their readers like "mere procedure," that is, mere rhetoric, changes the substantive law. The substantive law of the family was altered in the 1970s by arguments put forward by Anna Freud, Albert Solnit, and Joseph Goldstein. Against the claim of expert psychologists that they could determine whether birth or adoptive parents were best for the child, Goldstein asserted that "so long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family" (p. 98). Gaskins notes that the argument is libertarian and antistatist. Goldstein "reversed the presumption that had favored professional or bureaucratic expertise" (p. 97).

Gaskins's book is not light summer reading but is finely written (except for the modern disease of anticipation—"In the following chapters I shall explore the fate of this project"—required for deans and promotion committees who are not paying attention and forgivable in such a complicated, weighty book). The weight of learning is astonishing. The 86 pages of notes, whose bulk is

characteristic of the legal academy, contain reference to technical philosophy and 20 other fields of learning, although, unlike some law professors of one's acquaintance, Gaskins appears to have actually read and understood what he cites.

Well, almost everything. Gaskins the Sophist (in the ancient and honorable sense) understands that we have learned recently to elevate "argumentation over argument, speech acts over statements, discourse over speech, pragmatics over semantics, dialogue over utterance, practical reasoning over formal deduction, and rhetoric over logic" (p. 129). He is sophisticated in every sense about the conclusions of modern thought. He is several standard deviations above the mean for such discussions of words in action. He is even able to remain reasonable in the face of that stamper of the herd of independent minds, deconstruction, something not achieved by columnists and letter writers in the *New York Times* or the *Wall Street Journal*.

But there's also a Gaskins the Platonic Old Radical, who betrays a nostalgia for the ways of certitude. Gaskins is vexed by the relativistic appeal to legal analogy in such philosophers as Stephen Toulmin, who have not, Gaskins complains, troubled to learn much about legal argument in detail. Gaskins's vexation comes across as a trifle churlish, an anxiety of influence such as a later poet has for an earlier one. Toulmin, after all, has done more than any modern philosopher to free us from the notion that proof is something beyond merely human persuasion (see, e.g., Toulmin's recent book with Albert Jonsen, *The Abuse of Casuistry*).³ Without Toulmin, no Gaskins.

One suspects that Gaskins is reacting to Toulmin's old-liberal politics. Gaskins, in fact, makes no secret of his distaste for Toulmin's "optimism" about persuasion, an optimism he finds also in Jürgen Habermas's "ideal speech situation" or Chaim Perelman's "universal audience." Gaskins the professor of law is, in fact, pessimistic about courts of law. He knows well that they are nothing like an ideal speech situation but, in fact, a dirty field of Hobbesian politics. He has the self-refuting tendency of rhetors to sneer at rhetoric, a surprising slip of his sophistication. Thus, "by embracing the justice ideal as a model of truth, we have fostered an endless succession of skeptical, relativistic, and nihilistic alternatives" (p. 9). One wonders how. "My theory in this book has suggested [that] this perceived loss of communal self-confidence [in a public forum in which good policies can be decided] has hastened the skeptical turn in public discourse" (p. 145). Oh, yes?

His pessimism is that of the left and of the right, both of whom find nasty interests of a Hobbesian sort everywhere they look, for example in supreme courts of law. Both ends exhibit a hermeneutics of suspicion, which is to say, a way of reading that supposes that since discourse is not transparent and nonrhetorical, free of "metaphors, and senseless and ambiguous words," it must be dirty. In other words, Gaskins has not quite freed himself from the antirhetorical program of Hobbes; he is not quite sophisticated.

In particular Gaskins regards the legal analogy as corrupting, as did Plato, that antidemocrat:

Socrates: Then would you have us assume two forms of persuasion—one providing belief without knowledge [without the thing seen], and the other sure knowledge [*episteme*]?

Gorgias: Certainly.

Socrates: Now which kind of persuasion [*peithô*] is it that rhetoric creates in law courts or any public meeting on matters of right or wrong? . . .

Gorgias: Obviously, I presume, Socrates, that from which we get belief [*pisteuein*].

Socrates: Thus rhetoric, it seems, is a producer of persuasion for belief [*peithous . . . pisteutikês*], not for instruction in the matter of right and wrong.

Gorgias: Yes.

[*Gorgias* 454E–455A]⁴

Truth in Plato's eyes is happily coercive, the residue that is left after the skeptical refutation of all mere opinion: "for the truth is never refuted" (*Gorgias* 473B); "you attempt to refute me in rhetorical fashion, as they understand refuting in the law courts. . . . But this sort of refutation is quite worthless for getting at the truth" (471E); and, most aristocratically, "the many I do not bother to argue with" (474A). In the *Phaedrus* and in most of his other dialogues, Plato takes up the theme: in the courts "a speaker must always aim at likelihood, paying no attention to truth" (*Phaedrus* 272E). Of this divine truth, asks Socrates, "if we ourselves could find it out, would we care any longer for human opinions?" (274C).⁵

Gaskins, in his nostalgia for Platonism, exhibits in other words one of the two possible reactions to the rediscovery of rhetoric: either old-liberal pleasure at the possibilities of human argument (thus Toulmin, Perelman, Booth, Habermas, Rorty, Fish, Lanham, and, pardon me, McCloskey) or, as in Gaskins's case, leftist or rightist anger that the powerful are getting away with rhetorical murder. In Gaskins's case, he feels he must kill the liberal Toulmin in order to provide room for a rhetoric based on the allegedly more radical premises of dialectic.

Gaskins points out repeatedly that the Court must make up its own authority to be the authority, the determiner of the burden of proof. As Stanley Fish has argued, there are no definitive rules for applying rules, merely a set of rhetorical practices. Fish and other postmoderns and pragmatists do not find this troubling. Gaskins does, chiefly because he is appalled by "the sudden pendulum swings that accompany important shifts in the burden of proof" (p. 166 and *passim*). For instance, in the 1980s "conservative judges quickly mastered the art of burden-shifting" (p. 49), the art being able to claim that one's own preference in the burden of proof is merely constitutional neutrality (and thus earlier, Justice Holmes dissenting to *Lochner*). Gaskins does not like pendulum swings. Why? Because they are swings. And because they result in "fragmented tribunals," such as the 100-year-old tribunal of fact versus the tribunal of value. Gaskins's monism is palpable.

Again and again Gaskins views with alarm the messy rhetoric of modern life. The reduction of all discourse to the legal model is disastrous, he says, because the burden of proof is so easily shifted: "Legal systems are susceptible to abrupt pendulum shifts in basic presumptions and thus become fragile guardians for protecting any particular moral vision" (p. 146). "In the heat of controversy over public regulation, the *structure of presumption* is subject to volatile changes" (p. 150, his italics). He quotes with approval Charles Willard's belief that "the public sphere is a disaster area, not an accomplished epistemic community" (p. 138).

I would suggest on the contrary that the disaster lies in such an attitude toward argument. No one is called a fool for being excessively pessimistic, which may explain why pessimism about rhetoric is so popular. Intellectuals, those professional rhetoricians, rail against advertising and presidential campaigns and all forms of mere rhetoric. But rhetoric, mere or not, is all we've got in a democracy. The antidemocrat—the word covers a lot of ground occupied by people who think of themselves as liberal, from scorners of advertising to sneerers at politics—tend to think that detecting rhetoric is enough to condemn it. "I'm shocked, simply shocked, to find *rhetoric* going on in here!" The Platonic myth is that there is a realm without rhetoric.

I prefer Gaskins the sophist to Gaskins the platonist. The sophist solves Kant with Hegel. Kant tried to found reason without God. Like the Supreme Court of the United States of America, he failed: "The transcendental reasoner gestures wildly to divert attention from the pivotal issue of where the burden of ignorance ought to fall" (p. 221). Gaskins proposes to give up the dream of a unitary grounding, a substitute for a monotheistic God, in favor of dialectic. Kant suggested that we could appeal to "just the facts, ma'am." Gaskins knows, as we all should nowadays, that we can't (or we Kant, for Kant himself said so).

Without quite using these terms, Gaskins wishes to solve philosophy with rhetoric. He calls it, to repeat, "dialectic." I would call it, with the literary critic and theorist for cyberspace, Richard Lanham, rhetoric. In showing why a rhetorical sensibility is right for a democracy, Lanham uses the notion of a "toggle," that is, a switch in a canned program that allows one to move from, say, looking at a stripped-down version of a text on a screen to looking at a fully formatted version. The age of speaking before 1620 and the age of keyboarding after 1980, Lanham argues, both elevate toggling to the master art. In an earlier book, he had spoken of Castiglione's glorification in *The Book of the Courtier* (*Il Cortegiano* 1528) of *sprezzatura*, the art of the gentleman, "the art of concealing art, of unaffected affectation."⁶ He quotes the American pragmatist George Herbert Mead on the multiple roles played by graceful living in the world: "It is the social process itself that is responsible for the appearance of the self; it is not there as a self apart from this type of experience. A multiple personality is in a certain sense normal."⁷ In being a self, being a gentleman, being a citizen, argues Lanham, "the same technique is required—holding opposite worlds in the mind at once,"⁸ an attitude that "oscillates from realism to idealism and back again."⁹ You must know that the president's inaugural address or the latest attempt by a Supreme Court Justice to manipulate the burden of proof is *merely* a speech, and note its figures, at the same time that you grasp its values, for what they are worth. To be unable to toggle between the two knowings is to be either a cynic or a fool.

In his recent work, Lanham contrasts the rhetorical looking *at* the words with the philosophical looking *through*. The *sprezzaturatore*, the person skilled at speaking, can toggle between the two, and that is what a rhetorical education offers: "The rhetorical *paideia* did not resolve the struggle [between form and substance], or simply teach the rhetorical side of it, but built the debate into Western education as its central operating principle. . . . Rhetorical man was a dramatic game-player but he was always claiming that the ground he presently stood upon was more than a stage. Rhetoric's central decorum enshrined just this bistable oscillation [i.e., toggling]. . . . It thus represents not a nihilistic repudiation of the Western intellectual tradition but a self-conscious return to it."¹⁰

In a comment on my work, Lanham explains how the strong defense arises out of all of this:

[McCloskey's] stated defense is the weak one: "Rhetoric is merely a tool, no bad thing in itself." . . . But what he succeeds in doing, with his . . . close readings of the rhetoric of economics in action, is to suggest the Strong Defense we began to see emerging with [the Chicago Aristotelian Richard] McKeon. To read economics as McCloskey suggests is always to be toggling between looking at the prose and through it, reading it "rhetorically" and reading it "philosophically," and this toggling attitude toward utterance is what the rhetorical *paideia* was after all along. Train someone in it and, according to Quintilian's way of thinking, you have trained that person to be virtuous.¹¹

Lanham argues persuasively that someone educated without the toggle, so to speak, is not only not automatically a good person (though skilled at speaking) but is likely to be bad. Being educated in rhetoric, acquiring the skill in speaking, is usually to acquire the toggle. The traditional case for traveling abroad or meeting many sorts of people or learning a second language fluently is that it throws light on life at home. You can see two sides. You are tolerant, without by any means abandoning the responsibility to choose. It is necessary for wisdom. It is *sprezzatura*. Pick one view, know what you're doing, and from time to time, for the hell of it, toggle, or ride on the dreaded "pendulum swing."

Lanham's strong defense of rhetoric is then, to borrow some terms from political philosophy, that rhetoric provides procedural rather than end-state justice. Rhetoric, as against epistemology, does not provide conclusions; it provides methods or, better, stagings, lights, makeup, gestures to be used in a drama, in the courtroom or the classroom or the assembly. The best defense we have is the ability to see the staging of the Nuremberg Rally or the vagaries of due process arguments. Rhetorical self-consciousness—the ability to toggle between looking at and looking through a text, as Lanham puts it—is the best defense we have yet devised for what we value. It is a shabby thing by the standard of the Platonic forms or natural right, I admit, with their lovely, if blinding, uniformity of light. But it's all we've got. Like democracy, which it defends, rhetoric is the worst form of wisdom, except those others that have been tried from time to time.

In other words, if we break argument into rhetoric and logic, the logic takes immediately a falsely superior position. The toggle is always off. The move is assured by the long and lunatic fascination with certitude since the Pythagoreans showed by force of reason that not all numbers are rational. The actual human argument of law courts is downgraded to mere persuasion or politics or advertising or teaching or something else without the dignity of truth saying. The actual human argument of scientific laboratories and blackboards is elevated to scientific method, beyond rhetorical scrutiny. Philosophers and scientists, believing themselves in possession of certitude, never requiring a toggle, are encouraged to sneer; planners and politicians, believing themselves in sight of utopia, are encouraged to ordain. It is not an encouragement they need.

The history that Gaskins so brilliantly illumines illustrates the point. "The due process episode" (p. 7), which too often was a death of common sense, is now apparently coming to an end. The reason it is coming to an end is precisely the "pendulum swings" that so alarm Gaskins. The swings have bankrupted the notion that there is *one* burden of proof, *one* scientific method, *one* way of looking at the poor. But there is nothing wrong with that. It is the maturation of democracy and the sophistication of our rhetoric.

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Notes

1. Michael Billig, *Arguing and Thinking: A Rhetorical Approach to Social Psychology* (Cambridge: Cambridge University Press, 1987).

2. Harry M. Collins, *Changing Order: Replication and Induction in Scientific Practice* (London and Beverly Hills, Calif.: Sage, 1985); Trevor J. Pinch, *Confronting Nature* (Dordrecht: Reidel, 1986); Steven Shapin and Simon Schaffer, *Leviathan and the Air-*

Pump: Hobbes, Boyle and the Experimental Life (Princeton, N.J.: Princeton University Press, 1985).

3. Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry* (Berkeley and Los Angeles: University of California Press, 1988).

4. Plato, *Gorgias*, trans. W. R. M. Lamb (Cambridge, Mass.: Harvard University Press, 1914).

5. Plato, *Phaedrus*, trans. H. N. Fowler (Cambridge, Mass.: Harvard University Press, 1914).

6. Richard A. Lanham, *The Motives of Eloquence: Literary Rhetoric in the Renaissance* (New Haven, Conn.: Yale University Press, 1976), p. 150.

7. *Ibid.*, p. 152.

8. *Ibid.*, p. 154.

9. Richard A. Lanham, *Style: An Anti-textbook* (New Haven, Conn.: Yale University Press, 1974), p. 34.

10. Richard A. Lanham, "The Extraordinary Convergence: Democracy, Technology, Theory, and the University Curriculum," in *The Politics of Liberal Education*, ed. Darryl J. Gless and Barbara Hernstein Smith (Durham, N.C.: Duke University Press, 1992), pp. 33–56, quote on p. 47.

11. Richard A. Lanham, *The Electronic Word: Democracy, Technology, and the Arts* (Chicago: University of Chicago Press, 1993), quote on pp. 169–70.

Divergent Realities: The Emotional Lives of Mothers, Fathers and Adolescents. By Reed Larson and Maryse H. Richards. New York: Basic Books, 1994. Pp. 333. \$26.00 (cloth).

Fifty-five white middle-class families in the Chicago area provided the raw material at the heart of this intriguing report by Reed Larson and Maryse Richards. Over the course of a week, mothers, fathers, and adolescents were interrupted by beepers eight times a day and asked to describe their activities, social context, and emotional reactions at that moment using a series of rating scales and questions, both open-ended and structured. The responses are distilled and presented with remarkable clarity in this engaging attempt to describe everyday lives and emotions of the individuals.

Several features coalesce to make this book valuable. Larson and Richards combine the precision of systematic statistical analyses and the richness of qualitative analyses to provide colorful portraits of their respondents' lives. Quotations from the informants' logs are frequently and judiciously used to illustrate and elaborate on trends and patterns evident in the quantitative data. The availability of qualitative information, coupled with the nontechnical and accessible prose, make for unusually informative insights into the lives and perceptions of these families. Researchers may find the frequent need to refer to endnotes and appendices for basic information quite disruptive and frustrating, but for most readers the price of accessibility will be acceptable.

Despite considerable evidence that mothers', fathers', and children's reports are often quite divergent, social scientists typically collect information from only one informant. Larson and Richards not only obtained information from multiple informants but did so using both open- and closed-ended questionnaire items. This strategy greatly enriches our understanding of each party's perspective, even though the different informants often focused on different feelings and different aspects of their situations. Larson and Richard's approach contrasts with the more common technique of asking different people to describe the same phenomenon using the same instruments and has resulting benefits as well as disadvantages. For the most part, the data reported bring the different perspectives to life better than the alternative strategy