

THE ENLIGHTENMENT OF DIALECTICS: STRATEGIES INVOLVED IN BURDENS OF PROOF

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In *Burdens of Proof in Modern Discourse*,¹ Richard Gaskins describes a form of argument present, to one degree or another, in a variety of arenas—the “transcendental argument-from-ignorance.” But while Gaskins extensively analyzes this type of argumentative strategy, one might finish his book and still wonder just what Gaskins’s own strategy is. Gaskins argues that the use of transcendental arguments has led to increasingly irresolvable polarization: “Rather than bringing conflicts to a peaceful result, contemporary tribunals appear to sharpen existing divisions, even as jurisprudential authority descends from its transcendental abode and shapes the everyday world according to the demands of litigation.”² Thus it appears that Gaskins is diagnosing a malady in the way debates are conducted. But it is not clear what cure, if any, Gaskins has in mind.

Two questions thus emerge, to be addressed in this Article. First, what is the theoretical or methodological position from which Gaskins approaches the description of the transcendental argument-from-ignorance? Second, what does Gaskins see as the value of his description of the argument-from-ignorance in overcoming the increasing adversarial polarization that accompanies it? In answering these two expository questions this Article will address a third, evaluative one: Does Gaskins achieve his purpose?

This Article will argue that while Gaskins often appears merely to be describing the uses of strategies of argument, this description is coordinated within an appropriation of Hegel’s dialectical logic. This is only made clear in the final chapter of Gaskins’s book, which must have remained obscure for the reader who approached it without a previous knowledge of Hegel. Thus this Article begins with a sympathetic reconstruction of the twelve-

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1. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* (1992).

2. *Id.* at 208.

place chart of Chapter Eight,³ with the aim of expressing these abstract Hegelian concepts as concretely as possible. This Article will then ask how the transcendental argument-from-ignorance, as described by Gaskins, fits into this Hegelian account. In answering this the Article will also indicate where alternative strategies—strategies that Gaskins does not address—appear. These alternative strategies are not of interest as substitutes for arguments-from-ignorance. On the contrary, they appear only in certain domains (theoretical and scientific), and indicate demands inherent in judicial and institutional domains that call forth and maintain the strategy of argument-from-ignorance. This evaluation of the argument-from-ignorance in the context of Gaskins's appeal to Hegel will provide the material necessary to answer the question of just what Gaskins hopes to accomplish in his book and to what extent he succeeds.

I. THE TRANSCENDENTAL ARGUMENT-FROM-IGNORANCE

Aristotle, in discussing whether happiness, "one of the most divine things," is acquired by chance and natural causes, or as a result of learning, training, and good habits, lays out this argument:

[I]f happiness depends on virtue [*arete*], it will be shared by many people; for study and effort will make it accessible to anyone whose capacity for virtue is unimpaired. And if it is better that happiness is acquired in this way rather than by chance, it is reasonable to assume that this is the way in which it is acquired. For, in the realm of nature, things are naturally arranged in the best way possible. . . . To leave the greatest and noblest of things to chance would hardly be right.⁴

Aristotle's argument has the structure of Gaskins's transcendental argument-from-ignorance, which Gaskins describes in Chapter Seven.⁵ This Article will use it to illustrate Gaskins's model of the argument-from-ignorance. The argument can be broken up into its conceptual components in accordance with Gaskins's four-step scheme, with commentary on their function at each stage, as follows:

3. *Id.* at 261.

4. ARISTOTLE, NICOMACHEAN ETHICS 1099b 15-24 (Bobbs Merrill Co.) (Martin Oswald trans. 1962).

5. GASKINS, *supra* note 1, at 217.

1) *A metaphysical postulate*: Happiness depends on virtue. If this postulate can be established, it can serve as the basis for Aristotle's theory of virtue.

2) *A conceptual dichotomy*: Either happiness is the result of chance or it is the consequence of good habits. That is, if happiness is not the result of virtue (good habits), then it can only be the result of chance.

3) (a) *Lack of direct evidence and (b) manipulation of the presumptions*: (a) We can only "assume" that one or the other is true. Any argument on this issue will have to be indirect. (b) But if happiness were the result of chance, then things would hardly be right. Therefore, according the above exclusive disjunction (2), happiness must be a consequence of good habits, that is, virtue.

4) *The assertion that the outcome is better or more reasonable*: Happiness will be shared by many people; it is reasonable to assume that this is the way in which it is acquired. Thus the conclusion is secured as that which is already commonly believed.

Gaskins's purpose in describing the structure of transcendental arguments-from-ignorance is clearly to illuminate *strategies* of argument. At each stage the issue is how the argument can be moved forward to a favorable conclusion. Thus Gaskins's interest can be broadly described as that of the rhetorician. Gaskins devotes Chapter Seven to tracing the lineage of the modern form of this argument.⁶ The authors have some questions about the use of Kant in this genealogy, but before addressing them this Article turns to Chapter Eight and Gaskins's development of a Hegelian map of argumentative strategies. This map informs Gaskins's understanding of the transcendental argument-from-ignorance and indicates what Gaskins sees as being of practical value in its description.

II. THE APPROPRIATION OF HEGEL'S LOGIC

Gaskins's claims in Chapter Eight are Hegelian, but do not entail the whole Hegelian system. In particular, Gaskins extracts Hegel's insights into the dialectical movement of argument from the context of Hegelian ontology. Gaskins's appropriation of Hegel is based on a reading of the first section of the third book, "The Doctrine of the Concept," of Hegel's *Science of Logic*.⁷ The dialectic of the concept, set forth in this section, explores the

6. *Id.* at 205-39.

7. See GEORG WILHELM FRIEDRICH HEGEL, *SCIENCE OF LOGIC* 599-704 (A.V. Miller trans., 1989) (1813).

conditions of scientific exposition, rational discourse, and argumentation in general. Here Hegel develops the triad of universality-particularity-individuality,⁸ as well as his views on the judgment⁹ and the syllogism.¹⁰ Concept, judgment, and syllogism, although not devoid of ontological implications, have for Hegel an instrumental value, in that they are means by which to analyze, from a holistic standpoint, the self-coherence or self-contradiction, the openness or closure, and the determinacy or indeterminacy of any piece of rational argumentation.¹¹ It is this grammatical and meta-logical aspect that Gaskins appropriates, and, consequently, his interpretation of *The Science of Logic* revolves around this particular section.¹²

What follows is an attempt to rebuild the twelve-place table using everyday legal arguments, which will then allow one to place the particular sort of transcendental argument-from-ignorance outlined above in its context. The reconstruction should not be read as a claim that there is a single grid that forms a complete table of argumentation. This Article's working hypothesis is that the various axes of the grid represent *directions of argumentative movement*, and these directions can be played out in any number of stages (for example, the four stages of transcendental argument-from-ignorance outlined by Gaskins¹³). More importantly, as the bulk of the case-by-case analysis of Gaskins's book indicates, these dialectical positions can unfold in a variety of different ways, with a variety of different twists in the argument. Sticking to the triad is the authors' own rhetorical tool, allowing for a degree of systematicity that, though one would not expect it in the real world, clarifies the issues at hand.

The starting point will be the first vertical column. This column consists of a three-step pattern. Call each of these steps a "moment" in the progression, following Hegel's use of the term.¹⁴ The first two moments correspond to two adversarial pos-

8. See *id.* at 600-22.

9. See *id.* at 623-63.

10. See *id.* at 664-704.

11. See *id.* at 577-95.

12. Cf. HANS-GEORG GADAMER, *HEGEL'S DIALECTIC: FIVE HERMENEUTICAL STUDIES* (P. Christopher Smith trans., 1976) and DIETER HENRICH, *HEGEL IM KONTEXT* (1971) are, by way of contrast, examples of interpretations and critiques focused in the doctrine of being and the doctrine of essence. They are accordingly more interested in the ontological implications of Hegel's logic.

13. See GASKINS, *supra* note 1, 217-223.

14. See *e.g.* HEGEL, *supra* note 7, at 163.

tures. For the sake of illustration, let the first moment stand for a person's claim to be the owner of a piece of land, and the second moment stand for the adversarial standpoint that questions the ownership. Although the first moment is used in this table to represent an assertive or affirmative claim, and the second stands for its negation, problematization, or at least qualification, the order is irrelevant and can be switched. For from the strategic standpoint, the victory of the second position would entail its assertion and the negation of the first. Moreover, both moments are at the same logical level; that is, each employs the same strategies of argumentation—the assertion of a claim or a counter-claim. In this sense neither is in a condition to claim a priority of right over the other. Moment 3 always involves a relative closure of the conflict (relative to moments 1 and 2), in the form of a decision; although, of course, it is always a possibility that conflicts are not settled and cases are left undecided.

Thus the moments of column I of the chart can be labeled as follows:

- I.1 Assertion
- I.2 Problematization
- I.3 Decision (or lack thereof)

Moment I.2, which offers the other side of the coin in its attack on moment I.1, specifies what was not said in moment I.1. Moment I.3, insofar as it is supposed to arrive at a just decision between the two preceding moments, should in some way incorporate both of them. This explains why Gaskins labels this movement from 2 to 3 "enrichment."¹⁵ The first thing that should impress the reader is the poverty of this lineal development of categories. To be sure, this triad does not illuminate anything about the way in which ordinary or legal decisions are made. Moment I.3 is the point at which a decision is made, and if this decision lacks any higher legitimation, it can be seen as arbitrary finality, or pure "decisionism." In a variety of contexts, however, we do not ask for more justifications for a decision than the mere fact that it was decided. To put it metaphorically, we do not always need to move to a higher court of appeal.

Let us suppose that in arguing about property rights to land, the decision taken in moment 3 is questioned as arbitrary, or lacking legitimacy. One of the common procedures to defend

15. *See id.* at 253.

any one of the positions in this controversy is to comment on it from a higher level—higher insofar as this new commentary *reflects on and comprehends* the previous level in its arguments. This leap to a level of commentary introduces a different dimension of discourse, which Gaskins represents by means of a horizontal axis. Where the vertical axis represents dialectical movement within a given level, the horizontal axis can be taken to represent an increasing tendency toward self-awareness, which is achieved as the arguments of columns II and III comment on the preceding ones.

In the example of land-rights, the arguments of the first column have as their goal the reaching of a final decision; the proximate goal of every player in the dialectic is no more than a decision that is favorable to that player's interests. Column II has the function of critiquing column I's specific positions; arguments in this column are more concerned with matters of legitimacy. To follow the previous example, at this point the participants in the conflict engage in a discussion of matters of *principle*. The parties may ground their positions on the principles of inheritance, possession, or contracts of sale. They will probably also conflict in the interpretation of such rights, and in the recognition of the jurisdictions and codes of law that should solve the dispute. They will therefore attack not only the rights of their adversaries but the foundations of those rights. Column III represents reflection on the arguments of columns I and II in the terms of rhetoric, emphasizing the strategies and interests that underlie the various assertions and arguments from principle.

We therefore label the three steps in the horizontal direction as follows:

I. Assertion	II. Appeal to Principles	III. Dialectics
I.1 Assertion		
I.2 Problemization		
I.3 Decision		

Again, moments I and II of the horizontal axis could be switched. That is, increasing understanding of argumentative strategies might lead from appeals to principles to bare assertion. (This movement is imaginable in constitutional questions. For instance someone might argue: "Whether or not the Supreme Court finds the death penalty 'cruel and unusual,' the Court has a moral responsibility to rule against it."). Clearly, Gaskins does not share the popular version of dialectics as a lineal sequence of thesis,

antithesis, and synthesis (terms that Hegel almost never uses). On the contrary, for Gaskins “the smallest unit of reasoning” within which the relevant correlations emerge is the triad of triads, inside of which this first sequence of three moments is itself a first moment.¹⁶ The triad of triads, with two dimensions, horizontal and vertical—which stand for two different possible directions in the dynamics of discourse—lends itself to much richer possibilities of analogies and formal relationships among its elements.

As in the first column, let us reduce schematically the different possibilities of argumentation in the second column to the form of a triad. The various strategies that Gaskins calls “transcendental arguments-from-ignorance” fall in this column. Here more than elsewhere, one is aware of the real multiplicity of argumentative possibilities, but a reduction to three will help point out some formal analogies. After completing the chart, this Article will discuss exactly which movements (described in the chart) the various maneuvers of the transcendental argument-from-ignorance display.

Three basic ways of legitimizing or undermining the positions of column I are argument-from-principles, argument-from-ignorance, and skepticism. An ‘argument-from-principles’ is the transition from the initial claim (“I have the right to this land”) to an argument that is aware of and includes its principle (“Given the principle of adverse possession, I have the right to this land”). One must include as arguments-from-principles all the attempts to legitimize legal claims by subsuming them under higher juridical or moral principles, the attempts to legitimize epistemic claims by making them follow from a system of scientifically proved propositions, the attempts to legitimize philosophical claims by subsuming them under metaphysical principles, and so on. By ‘arguments-from-ignorance,’ as explained above, one must mean arguments that exploit the inability of the adversary to disprove one’s principles, relying on a previously posited ignorance. This sort of argument arises as a unification of (a) reflection on the negative claim of I.2 (“You can’t prove that you have a right to this land”) and (b) appeal to a principle of the form given in II.1. In the above example, an argument-from-ignorance might read: “Given that my adversary cannot conclusively prove a

16. *See id.* at 252.

right to this land, we must apply a presumption in favor of that person who can better use it, that is, me." Finally, given Gaskins's emphasis on the polarization resulting from the use of arguments-from-ignorance,¹⁷ the third moment—skepticism—would stand for the acceptance that no solution can be reached at all which would be both final and legitimate.

Thus, one may expand the chart:

I. Assertion	II. Appeal to Principles	III. Dialectics
I.1 Assertion	II.1 Argument-from principles	
I.2 Problematization	II.2 Argument-from-ignorance	
I.3 Decision	II.3 Skepticism	

The moments of column II find parallels in epistemological positions taken from the history of philosophy. Moment II.1 corresponds to the foundationalism of traditional metaphysics; moment II.2 corresponds to those controversial tendencies of transcendental philosophies addressed by Gaskins; and moment II.3 characterizes the mechanics of the deconstructivist stances that consider irresolvable those antinomies that are the natural result of the arguments in II.2. The transcendental argument-from-ignorance of II.2 is negative in the sense that it problematizes the argument-from-principles as issued from the standpoint of II.1; but it is positive in relation to the skeptical conclusions of II.3. In this way the transcendental philosopher, in Gaskins's model, says: "It is necessary that you accept my conclusions; otherwise you will end up with relativism." Column III is a commentary on the conflicts that take place in the first two columns, and as described by Gaskins it seems to be *therapeutic* in its aim.¹⁸ By drawing together the strategic and conceptual aspects that occupy the stage in columns I and II, it purports to re-describe them. It also presents itself as a means of overcoming the transcendental maneuvers by explaining that they might be fruitful for winning the present case, but that in the long run they necessarily end up in polarization and the reification of false dichotomies.

It is obviously in these sorts of reflection on rhetorical strategies that one will find Gaskins's understanding of his own project, and the answer to the question about Gaskins's methodology. The categories of rhetorical reflection also capture

17. See *id.* at 194-95.

18. See *id.* at 257 (arguing that the horizontal shift from II to III is a "reconstructive" one that avoids relativism).

the above descriptions of columns I and II. When articulated they, too, fall into three internal moments:

I. Assertion	II. Appeal to Principles	III. Dialectics
I.1 Assertion	II.1 Argument-from principles	III.1 Ordinary language rhetorics
I.2 Problematization	II.2 Argument-from-ignorance	III.2 Evaluative rhetorics
I.3 Decision	II.3 Skepticism	III.3 Presumption of closure

Presumption of closure Column III re-translates the first two columns into the jargon of legal strategies. All “moments 1” (assertion, argumentation from principles) are here re-described as the moment of positively bearing the burden of proof and trying to meet the standards set by this burden. The rhetorical analyses of Toulmin¹⁹ and Perelman,²⁰ which describe such strategies, would fall into this category of “ordinary language rhetorics.”²¹ All “moments 2” (problematization, argument-from-ignorance) refer to the negative stance by which we question our adversary, try to evade the burdens placed on us, shift the burden of proof, polarize the debate, and posit transcendental postulates supporting the desired outcome. These strategies are obviously the main subject of Gaskins’s analysis. Their analysis in column III is labeled “evaluative rhetorics” because of the obviously critical or therapeutic aim of Gaskins’s book (to be further explored below). All “moments 3” refer to the description of conflicts in an integrated way, be it that the conflict is resolved or that a final decision remains pending. The name, “presumption of closure,” is to indicate the possibility of a re-constructive effort that would stand for the drawing of this very chart, and other analogous philosophical and political projects designed to allow genuine controversy both to reach closure and to keep going (which is thought to be a pre-condition for the realization of the legal concept of justice, at least in the long term). Arguments-from-ignorance are, in the table, actually issued at moment II.2, but from the perspective of II.2 are understood as transcendental proofs, and only at III.2 are re-described in strategic terms as arguments-from-ignorance. Moments 2 are crucial in all the triads; they are the points at which the unilateral assertions of moments 1 are questioned. Although sometimes they appear as “merely negative” in content, they are always positive when characterized in

19. STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* (1958).

20. CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (John Wilkinson & Purcell Weaver trans., 1969).

21. See GASKINS, *supra* note 1, at 15-21, 30-37.

strategic terms. In a similar way, Hegel understood the “negativity” of the concept as a tendency of rational discourse to determine and particularize or “specify” itself (in Gaskins’s terms) as not merely negative.²²

This perhaps explains why Gaskins uses Hegel’s tags of “universality,” “particularity,” and “individuality” to indicate the function of each member of the triad.²³ In this context, universality, particularity, and individuality refer to specific standpoints within the development of an argument. Universality corresponds to moment 1, whereas the shift of discourse towards particularity (moment 2) corresponds to the dialectical moment of specification. Individuality (moment 3) retrieves and integrates the duality or plurality of discourses, which pull in different directions, as unfolded in the transition from moment 1 to moment 2. None of these moments is in a situation of argumentative equilibrium, that is, none can successfully resist an argumentative attack, except by referring to its context in the triad and in the triad of triads; besides, a position of absolute stability can never be absolutely achieved. The very criterion by which the chart is drawn could be questioned and thus the legitimation of this chart would involve a higher order chart, within which this one would constitute an internal moment.

It is now useful to describe the general outlines of the table in such concrete terms as is possible. In general those philosophical positions that argue by reference to paradigms, traditions, ways of life, positive evidence, “the ways things are,” and so on, should be accommodated in column I; those which refer to the higher or transcendental venues of authority, the source of norms, values, foundations, “the way things ought to be,” and so on, should be accommodated in column II; and those attempts to re-describe the conflict in strategic terms or by reference to a common ground, to the procedures by which goods are distributed and justice is done, should be identified with column III. This is only an indication, however, and in fact Gaskins’s point is that many authors, who seem to be arguing with the categories described as typical of columns I and III, reveal themselves—after we analyze

22. *See id.* at 253.

23. *See id.* at 261-62.

their method of arguing—to be using arguments-from-ignorance.²⁴

III. LOCATING THE ARGUMENT-FROM-IGNORANCE

Having elaborated a reading of Gaskins's Hegelian charting of argumentative moves, this Article now asks how the chart might illuminate the claims about the transcendental argument-from-ignorance that precede it. This strategy of argument has been located at II.2, but how its various steps relate to the rhetorical dimensions of the chart has not yet been explored. Here this Article will address these relations, and also examine Gaskins's appeal to Kant in his description of the transcendental argument-from-ignorance. The analysis of Gaskins's use of Kant will allow the location of his model further as particularly descriptive of institutional decision-making. In institutions the requirements of *legitimacy and finality* are both in effect. These requirements together provide the impetus for the move to an argument-from-ignorance.

The first two steps of the transcendental argument-from-ignorance, as outlined by Gaskins, need to be understood together. The first is the introduction of a transcendental principle or postulate.²⁵ As the chart is set up above, this would first seem to correspond to II.1, the initial move to an appeal to principles. But the appeal here is to *transcendental* principles, which "are meant to be different from scientific hypotheses, intuitive first principles, and customary beliefs."²⁶ In fact this first step in the transcendental argument-from-ignorance is a move *away from* the mere positing of principles represented in the chart by II.1. For the appeal to transcendental principles defines its own status negatively in relation to the principles of II.1.

This negative status is confirmed and explained in the second move in Gaskins's model, the definition of a conceptual dichotomy.²⁷ This strategic move also has analogs at other places in the chart. As stated, the initial conflict of column I might not be resolved. This deadlock might then be posited as a dichotomy that can only be solved by appeal to a higher principle, under which

24. See *id.* at 75-102 (in the context of Supreme Court procedural due process jurisprudence), 169-204 (in the context of the development of modern rights-based ethical argumentation).

25. See *id.* at 218-219.

26. *Id.* at 219.

27. *Id.* at 219-220.

the arguments of both I.1 and I.2 would be subsumed. Gaskins's stage 2, then, *looks like* the move that takes us from I.3, the temporary and relatively arbitrary resolution of a conflict, to II.1, the initial appeal to principles. But as Gaskins describes the dichotomy, it is not the positing of a principle (as at II.1) but rather the *negative* legitimation of a *transcendental* principle.²⁸ This negative legitimation is accomplished by distinguishing the transcendental principle from other sorts of principles and their standards of proof. Thus this step belongs at II.2. The dichotomy is used to "limit knowledge to make room for faith," and therefore to make room for the argument-from-ignorance.²⁹ Gaskins points to the distinction between facts and values, a distinction made strongly by Kant,³⁰ as paradigmatic of the dichotomization represented by step 2. The dichotomy between facts and values can function, according to Gaskins, to clear a space for the operation of transcendental principles that are not empirically verifiable. (An obvious example of this is Rawls's original position.³¹) "Rather than establishing their claims by appeals to empirical evidence (the method favored by natural science), guardians of the moral sphere are left with indirect arguments, for which the bedrock premise is the alleged inability of science to *disprove* moral claims."³² With this move we see the real difference between the positing of *transcendental* principles and the appeal to principles as characterized in II.1: the appeal to transcendental principles happens only within the context of this strategic dichotomization, which will allow for a shifting of the burden of proof. The transcendental principle is thus an appeal to a "higher world, to which we must demand some form of access."³³

28. See *id.* at 220.

29. See *id.*, quoting IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* 29(Bxxx) (Norman Kemp Smith trans., 1987) (1788).

30. Although this distinction is made by Kant, it is not the distinction behind his most famous appeal to transcendental principles—the transcendental deduction of the categories in the *Critique of Pure Reason* (KANT, *supra* note 29, at 129-75). But Kant does posit a conceptual dichotomy in the transcendental deduction; he argues that we must distinguish between empirical evidence and the transcendental condition of the possibility of that evidence. The later, according to Kant, is not open to empirical proof *or disproof* (*id.* at 120-25). This is the distinction that allows Kant to maintain that he is both an empirical realist and a transcendental idealist, and is well described by second stage of Gaskins' argument-from-ignorance.

31. See JOHN RAWLS, *A THEORY OF JUSTICE* 17-22, 118-194 (1971) (describes the original position).

32. GASKINS, *supra* note 1, at 6.

33. *Id.* at 170.

Having distinguished the appeal to a transcendental principle from the appeal to principles in II.1, it is important to recognize that the move from the one to the other is in no way predetermined. In fact, it only takes place when there is a challenge to the *legitimacy of the argument-from-principle*. Consideration of Kant's attempt to ground science transcendently (which is also paradigmatic for Gaskins³⁴) suggests just this. Kant's appeal to the transcendental realm in the *Critique of Pure Reason* (the "first critique")³⁵ must be read as a response to Hume's skeptical challenge to the empirical verifiability, the *legitimacy*, of the principles of science (especially the idea of causation).³⁶ It was only in response to such a critique that Kant's move to posit a transcendental realm as distinct from the empirical was necessary. Similarly, the modern distinction between scientific and ethical spheres fits Gaskins's model as a move to the transcendental only because science has been viewed as a threat to the legitimacy of ethical discourse. It is only the authority of science in our technologically-oriented culture, and its perceived challenge to the legitimacy of ethical discourse, that requires the creation of a space for a transcendental grounding of the valuative that is protected against scientific disproof.

Such challenges to legitimacy are intrinsic to the adversarial structure of and competing interests in democratic institutions. Arguments-from-principle may hold indefinitely without challenge. But where institutions embody competing interests, the legitimacy of these principles is bound to be challenged, moving the argument to a new stage in the chart outlined above.

As indicated in the above analysis of Aristotle's argument, one must view Gaskins's characterization of the next move in the model (step 3) as comprising two parts: (a) the claim that there is a lack of direct evidence, and (b) the manipulation of presumptions. These moves are the fulfillment of the dichotimization of step 2, and they fully establish the argument-from-ignorance. They take over the negative stance from I.2 ("the

34. *Id.* at 214-17. An irony of Kant's transcendental deduction as paradigmatic is that here Kant cannot rely on his distinction between facts and value, which Gaskins emphasizes as having been so historically important. Moreover, as we will argue below, precisely where Kant does employ this distinction in his ethical writings, he does not always use arguments-from-ignorance. This discrepancy by no means disproves Gaskins' claims, but stands here as a first indication of where his analysis does not capture Kant.

35. KANT, *supra* note 29.

36. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 66-179 (Clarendon Press ed., 1888) (1739).

claim that . . . is false") in a new key, that of arguments-from-principle (II.1). But once again these moves are motivated only by the particular exigencies of judicial and institutional decision-making. This Article has discussed the force of the demand for *legitimacy* in judicial decisionmaking. The demand for *finality*, that is, the requirement to find solutions to actual moral and legal problems that will not be overturned or open to revision, plays a similar role in this stage of the argument-from-ignorance.

Kant's transcendental argument in the first critique more or less conforms to Gaskins's model of an argument-from-ignorance. But Kant's transcendental argument in the *Groundwork of the Metaphysic of Morals*³⁷ is an example of a transcendental argument that does *not* fit Gaskins's characterization. In particular, Kant does not rely here on a strategy such as that described by Gaskins's step 3, a manipulation of presumptions based on ignorance. It does not because here Kant is not faced with the requirement of finality. A brief explication of Kant's alternative strategy and a look at another strategy not captured by this step of Gaskins's model—one used by Charles S. Peirce—will indicate the significance of the finality requirement for Gaskins's model.

In the *Groundwork*, Kant argues that the transcendental condition to which all moral judgments must conform is that "I ought never to act except in such a way *that I can also will that my maxim should become a universal law.*"³⁸ While in the first critique Kant had attempted to limit knowledge to make room for faith, he does not argue for the categorical imperative merely on the basis of a shift in the burden of proof. Rather, in the first chapter of the *Groundwork* he provides an analysis of the concept of morality, from which he concludes that moral actions are done from duty, that the worth of these actions is not derived from their results but from the duty itself, and that duty is one's actions taken because of reverence for the law.³⁹ From these three propositions Kant *infers* the categorical imperative.⁴⁰ This deduction of the categorical imperative makes it analytic, that is, the categorical imperative is merely an elaboration of the concept of morality in general. But fulfillment of the categorical imperative remains a *transcendental* condition for the possibility of morality:

37. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., 1964) (1785).

38. *Id.* at 70.

39. *Id.* at 64-69.

40. *Id.* at 69-71.

“Any one therefore who takes morality to be something, and not merely a chimerical Idea without truth, must at the same time admit the principle we have put forward.”⁴¹ A move away from the argument-from-principles (II.1) has taken place, for in his appeal to the categorical imperative Kant takes it to be supra-empirical (step 2). Thus it meets Gaskins’s definition of the ‘transcendental’: “a philosophical strategy of projecting a realm of objects or concepts beyond the reach of human experience, which is allegedly necessary for justifying certain conclusions about our immediate experience.”⁴² But Kant does not rely on shifting of the burden of proof (step 3); his argument here is not an argument-from-ignorance.

Kant’s analysis in the *Groundwork* is important not as a counter-example to Gaskins’s transcendental argument-from-ignorance, but because Kant’s argument indicates the direction that a transcendental argument can go in the absence of a requirement of finality. Kant’s introduction of the categorical imperative is often criticized on the grounds that it cannot serve as a guide to our actions in concrete cases. Critics argue that no substantive decisions can be made on the basis of the categorical imperative alone.⁴³ Whether or not one agrees that this is a valid criticism of Kant (who can be defended as trying to present not a moral theory, but only the *groundwork* for one), it indicates a certain freedom in which Kant is operating here. In the *Groundwork* Kant frees himself from the requirement of providing a substantive moral theory, from the requirement of producing final decisions in real moral cases.⁴⁴ With the categorical imperative he attempts to answer what in a law court might be characterized as a purely

41. *Id.* at 112.

42. GASKINS, *supra* note 1, at 323.

43. For example: “[Kant] fails, almost grotesquely, to show that there would be any contradiction . . . in the adoption by all rational beings of the most outrageously immoral rules of conduct” (JOHN STUART MILL, *UTILITARIANISM* 6 (Oskar Piest ed., 1957) (1861); Kant’s failure to make the “transition to the conception of ethics” results in “empty formalism . . . [I]f the definition of duty is taken to be the absence of contradiction . . . then no transition is possible to the specification of particular duties nor . . . is there any criterion in that principle [i.e., the categorical imperative] for deciding whether it is or is not a duty” (GEORG W.F. HEGEL, *PHILOSOPHY OF RIGHT* 90 (T.M. Knox trans., 1967) (1896)) (It is ironic that Hegel criticizes Kant for his empty formalisms, while Gaskins—who is clearly working in a Hegelian framework—appears to be more critical of substantive assumptions hidden in transcendental principles.) These examples are taken from an unpublished paper by Elie G. Noujain entitled “Kant on Rules and Moral Action” (manuscript on file with authors). Our account of Kant’s categorical imperative draws heavily from the analysis in Noujain’s manuscript.

44. See KANT, *supra* note 37, at 114.

procedural question: What formal rules must be followed to make morality (justice in a law court) possible, regardless of what substantive principles are used to make final decisions in real cases? Free from the requirement of finality, Kant does not need to appeal to an argument-from-ignorance.

Why is this? One answer is just that for a principle so general (some would say so vacuous) as the categorical imperative, there are no competing claims against which it must defend itself. More to the point, because Kant does not attempt to found substantive claims with his categorical imperative but only to describe their form, the manipulation of presumptions is of little use to him. Kant does not need to presuppose anything in order to deduce this formal principle. This is confirmed by Kant's later attempts to provide more substantive ethical claims.⁴⁵ For here he is forced to manipulate presumptions in accordance with Gaskins's model. For example, later in the *Groundwork* Kant uses an argument-from-ignorance to support the claim of human freedom: "[W]e have been quite unable to demonstrate freedom as something actual in ourselves and in human nature: we saw merely that we must presuppose it . . ." ⁴⁶ Kant uses similar "as-if" arguments in the *Critique of Practical Reason*, where he adds the existence of God and man's immortality as two further postulates that cannot be proven but must be assumed.⁴⁷ In these cases Kant cannot analytically deduce his transcendental principle, and he must recognize the possibility of competing claims. It is the requirement of *finality*, the requirement to make substantive decisions, that motivates the shift in Kant's arguments from the merely transcendental to the form of the transcendental argument-from-ignorance.

It is also instructive to look at Charles Peirce's reformulation of the Kantian practical strategy as a theory of science.⁴⁸ What is of interest here is Peirce's *fallibilism*. Peirce advocates what might be termed a categorical imperative for science: Scientific truth is that which will or would ultimately be agreed upon by the com-

45. See *id.* at 114-31 and IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbott trans., 1909) (1788).

46. KANT, *supra* note 37, at 116.

47. See KANT, *supra* note 45, at 218-19.

48. See 3 CHARLES S. PEIRCE, *WRITINGS OF CHARLES S. PEIRCE* (Max Fisch et al. ed., 1982) [hereinafter PEIRCE, *WRITINGS*] and CHARLES S. PEIRCE, *CHARLES S. PEIRCE: SELECTED WRITINGS* (Philip P. Wiener ed., 1966) [hereinafter PEIRCE, *SELECTED WRITINGS*].

munity of scientists *in the long run*.⁴⁹ This means that any statement that is considered true today is, in theory, revisible given a change in agreement among the scientific community. Given the fallibilism that follows from this principle of scientific truth, "every [supposedly indubitable] postulate is cut off, either by the provisionality or by the experientiality of our inference."⁵⁰ Peirce is able to argue for this fallibilistic principle of science without taking it as a postulate precisely because he is exempted (by this very principle) from the requirement of finality; that is, this transcendental principle is itself open to revision. Thus Peirce can deduce his principle from the structure and aims of scientific inquiry. He deduces it as the falsifiable hypothesis which makes that enquiry possible.⁵¹ Such an argument would not suffice to ground a transcendental principle absolutely, or "for all time," but it does suffice for Peirce's fallibilistic requirement. And, while the principle is deduced from the structure of actual scientific practice, it remains transcendental in relation to any particular scientific truth; it is the hypothesis that makes such truths possible and to which they must conform.⁵² Here one finds another example of a transcendental argument, without appeal to an argument-from-ignorance (that is, without instantiating step 3 of Gaskins's model), precisely where finality is not at issue.

This strength of fallibilism, its ability to found its principles without appeal to arguments-from-ignorance, is apparent in science as a whole. Gaskins argues that "Under pressure to respond definitively to public problems, the community of inquirers envisioned by Peirce and the early pragmatists tends to break into jurisdictional fragments."⁵³ But Gaskins does not emphasize that

49. "The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object of represented in this opinion is the real." PEIRCE, WRITINGS, *supra* note 48, at 273. See also Charles S. Peirce, *What Pragmatism Is*, in PEIRCE, SELECTED WRITINGS, *supra* note 48, at 180-202.

50. Charles S. Peirce, *The Doctrine of Necessity*, in PEIRCE, SELECTED WRITINGS, *supra* note 48, at 167.

51. See, e.g., Charles S. Peirce, *What Pragmatism Is*, in PEIRCE, SELECTED WRITINGS, *supra* note 48, at 188-191.

52. Thus Peirce writes:

[T]here exists a division among facts, such that in one class are all those which are absolutely essential as guiding principles, while in the other are all those which have any other interest as objects of research. This division is between those which are necessarily taken for granted in asking whether a certain conclusion follows from certain premises, and those which are not implied in that question.

Charles S. Peirce, *The Fixation of Belief*, in PEIRCE, SELECTED WRITINGS, *supra* note 48, at 97.

53. GASKINS, *supra* note 1, at 167.

it is *only* under such pressure of finality that these systems break down. Thus, the failure to realize a Court of Science did not so much hasten "the diffusion of scientific authority across multiple procedures,"⁵⁴ as indicate that if science has a true seat of authority, it is only given a fallibilistic approach that exempts scientific truths from any requirement of finality.

These excursions into Kant and Peirce are made with a twofold intention. First, to retrieve forms of transcendental argument that do not fall into Gaskins's model of the transcendental argument-from-ignorance. Neither Kant's categorical imperative⁵⁵ nor Peirce's fallibilistic principle of science⁵⁶ qualifies as a mere argument-from-principle. Each is predicated on the search for the conditions of the possibility of some practice (ethics and science respectively). Therefore both principles are transcendental according to Gaskins's definition that the transcendental is "a realm of objects or concepts beyond the reach of human experience, which is allegedly necessary for justifying certain conclusions about our immediate experience."⁵⁷ But neither Kant nor Peirce appeals to the sort of shifting of the burden of proof typified by step 3 of Gaskins's model as the *sole* means of support for their transcendental principles. Thus there are possible argumentative moves toward the transcendental that are not captured by Gaskins's chart or by his model of the transcendental argument-from-ignorance.

Just what sort of moves these are indicates something about the nature of Gaskins's project. This is the second reason for the above analyses of Kant and Peirce, for both indicate paths of argument that are open precisely *where a requirement of finality is not in force*. Thus the move to the transcendental argument-from-ignorance is motivated by the requirement of finality in addition to the requirement of legitimacy that, as indicated above, first questions arguments-from-principle. When either of these two requirements—legitimacy and finality—are absent, there is no need to manipulate the burdens of proof in the way that characterizes the transcendental argument-from-ignorance.

The fourth and final step of Gaskins's model of the transcendental argument-from-ignorance shows both of these require-

54. *Id.*

55. See KANT, *supra* note 37, at 70.

56. See PEIRCE, *SELECTED WRITINGS*, *supra* note 48, at 273.

57. GASKINS, *supra* note 1, at 323.

ments in action. This step is the coordination of the transcendental principle with everyday judgments. It represents the *attempt* to move from II.2 to II.3 on the chart, where II.3 would represent not deconstruction but a final resolution of the conflict. Stage 4 is characterized as an *attempt* to move to II.3 because of Gaskins's repeated claim that the transcendental argument-from-ignorance is not a strategy that lends itself to the final resolution of a conflict: "Whatever the quality of dialogue set in motion by the transcendental turn in moral philosophy, there are few signs it is leading any closer to social consensus."⁵⁸ In this attempt, though, one may find legitimacy and finality as the motive forces behind the strategic movement that Gaskins charts.

Gaskins himself thematizes these demands of legitimacy and finality.⁵⁹ They are revealing for the project of locating Gaskins's method, insofar as they are fundamentally *judicial and institutional* requirements. What court or government organization could accept, even in theory, Peirce's fallibilism applied to its decisions? It first appears strange that, after setting forth his appropriation of Hegelian logic, Gaskins, in the second part of Chapter Eight, comes back to the discussion of empirical matters.⁶⁰ Why does Gaskins's book close with a discussion of institutions and organizations? In the authors' opinion, this is related to issues already addressed (through analysis of alternatives to the argument-from-ignorance in theoretical and scientific arenas): the ultimate rootedness of Gaskins's analysis in the institutional demands of legitimacy and finality. It is organizations and institutions as they function in society that exhibit, *in their very structure*, the demands for finality and legitimacy in the highest degree. The mechanism represented by adjudication is designed such that it "simultaneously bestows legitimacy (through fidelity to rules) and finality (through recognition of a judicial hierarchy) on disputes that reach its jurisdiction."⁶¹ It is in the daily operation of this institutional normative environment that the different juridical-rhetorical categories (presumptions, burdens of proof, default rules, decisions based on arguments-from-ignorance) are embodied. Requirements of legitimacy and finality call for the argument-from-ignorance because they demand abso-

58. *Id.* at 194.

59. *See id.* at 123, 128, 134-38.

60. *See id.* at 262-72.

61. *Id.* at 133.

lute standards here and now. The argument-from-ignorance is not only particularly prevalent in bureaucracies and organizations bound to reach authoritative decisions; it is a product of the requirements made by these organizations.

In fact, one might trace the historical origins of these rhetorical strategies to legal institutions. In spite of this Article's defense of Kant as not *always* using an argument-from-ignorance form of transcendental argument, one must recognize Dieter Henrich's⁶² striking claim that the format of the transcendental deduction of Kant's first critique was taken from a legal document, called the *deductio*. The *deductio* was used to publicize learned arguments aimed at justifying controversial legal claims between the rulers of the many independent kingdoms and states, especially in controversies about sovereignty over a specific territory, and it was very common in Germany up to Kant's time.⁶³ Of course this claim about the origins of Kant's argument is consonant with Gaskins's interpretation of Kant as having used the legal strategies of the argument-from-ignorance in his transcendental deduction.⁶⁴ In addition, the birthplace of rhetoric was in the law courts. The first handbooks on this discipline were published in Greece in the second quarter of the fifth century B.C.⁶⁵ In general they included an argument-from-probability, an ancient ancestor of the argument-from-ignorance, which was used to persuade the judges in the absence of sufficient evidence. Aristotle, who considered rhetorics as the counterpart for the uneducated public of dialectics, is the author of the first systematic treatise on this technique.⁶⁶ Since the birth of the practice of rationally defending one's case in front of juries, we find a sisterhood between the disciplines of rhetorics, dialectical logic, and juridical argumentation.

The categories of finality and legitimacy, which are essential to Gaskins's rhetorical analysis, are of course his own; he thematizes their role throughout his analyses.⁶⁷ But this Article arrived at their importance by showing the *limited jurisdiction* of Gaskins's

62. See Dieter Henrich, *Kant's notion of a deduction and the methodological background of the first critique*, in *KANT'S TRANSCENDENTAL DEDUCTIONS* (Eckart Förster ed., 1989).

63. *Id.*

64. See GASKINS, *supra* note 1, at 209-17.

65. See generally ROBERT JOHNSON BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* (1927) and J.D.G. EVANS, *ARISTOTLE'S CONCEPT OF DIALECTIC* (1977).

66. See ARISTOTLE, *ON RHETORIC: A THEORY OF CIVIC DISCOURSE* (George A. Kennedy trans., 1991).

67. See GASKINS, *supra* note 1, at 123, 128, 134-38.

analysis. While Gaskins's comments on Kantianism are often pointed at neo-Kantian strategies more than those of Kant, he nevertheless takes Kant as a sort of archetype of the argument-from-ignorance, which is not always accurate. Moreover, the claims about the argument-from-ignorance should not *necessarily* be transferred to every transcendental argument made in theoretical and scientific arenas. Gaskins's diagnoses of the strategic structures of arguments do not apply to the argumentative structures themselves, as such arguments are used in all contexts, but to their employment under specific institutional demands. (This is not to say that philosophers and scientists never employ arguments-from-ignorance. Rather, it is to say that often the use of an argument-from-ignorance in these contexts should be understood as a result of the demands of academic discourse, the demands of legitimacy and finality.)

IV. DESCRIPTION, CRITIQUE, AND POLITICAL AGENDA

It is now clear what methodology lies behind Gaskins's descriptions and classifications of various arguments from ignorance. Gaskins has taken over a rhetorical schematization from Hegel in which he can redescribe arguments in terms of their multiple strategic dimensions—dimensions that include both affirmation, specification, and enrichment within a given “level of discourse” (the vertical axis), and affirmation, specification, and enrichment functioning as “higher order commentary” on other sorts of arguments (the horizontal axis).⁶⁸ The strategy that Gaskins is most interested in—the transcendental argument-from-ignorance—is given its structure by this schematization. The fact that this strategy is further localized as particularly suited to meet the demands of judicial and bureaucratic decisionmaking (legitimacy and finality) indicates the origins and limits of Gaskins's brand of Hegelian rhetoric.

This leaves the question of what aim is expressed by this methodology. It seems as though Gaskins is doing different things in different parts of his book. At times, Gaskins appears merely to be scanning, describing, and analyzing modes of argumentation, that lend themselves to juridical analogies, much in the tradition that rhetoricians such as Chaim Perelman⁶⁹ and Stephen Toul-

68. *Id.* at 252.

69. See PERELMAN, *supra* note 20.

min⁷⁰ developed in our century. Perelman's *New Rhetoric* and Toulmin's *Uses of Argument* find a counterpart in Gaskins's description of the new uses of ignorance. But in other places Gaskins's descriptions seem to adopt a sociological standpoint, with the aim of unmasking hidden rhetorical dimensions of modern argumentation—a sort of analysis not found in Perelman or Toulmin. Finally, in Chapter Eight, Gaskins goes beyond the empirical description of the strategic dimension of argumentation.⁷¹ Here one finds a search for possible formalizations of such strategies in a discontinuous logic of foundations. By “dialectics,” Gaskins seems to understand precisely this drawing together of conceptual and strategic elements, as illustrated by the “twelve-place-chart.”

With all of these different projects, one is left with the question of why the book was written. Gaskins says that his book offers “neither philosophical manifestoes nor blueprints for cultural reforms.”⁷² But then what is the point of the analysis?

One might argue that Gaskins's analysis has grave consequences—not at all therapeutic. This is perhaps the most natural way to read the unmasking of arguments that constitutes the bulk of the book. Gaskins seems to be not only criticizing particular arguments, but also mercilessly attacking the legal system, as well as other epistemic and ethical disputants, for their tendency to reify their transcendental authority. Where the very abode of transcendental truth seemed to be, there remains after Gaskins's redescription nothing but mundane strategies played on the grounds of ignorance.

But while one might read Gaskins's “unmasking” this way, clearly his own goal is not merely critical or “deconstructive.” In fact, although he says that the story of the argument-from-ignorance is a story without villains,⁷³ the tactics of deconstruction seem to be his main adversary. Gaskins does not take the decisive step of demolishing the strategies he is concerned with by uncovering their use as mere pretense. To view all arguments as mere pretense is to view disputes as ultimately irresolvable, for there can be no common ground when there are no foundations. And Gaskins wants to challenge “the common practice of interpreting

70. See TOULMIN, *supra* note 19.

71. See GASKINS, *supra* note 1, at 240-72.

72. *Id.* at xvii.

73. *Id.* at xiii.

conceptual dualisms as irresolvable, just as legal adversaries interpret their interests as mutually exclusive."⁷⁴

Given that most of the book is descriptive-diagnostic, then, the underlying premise of the book would be that there is *therapeutic* benefit to shedding light on rhetorical strategies:

Paradoxically, the transcendental turn . . . can be rescued from this fate of dismemberment by situating it historically, culturally, and strategically in late-twentieth century skepticism about the exclusive authority of scientific and professional expertise.⁷⁵

Behind the layers of Gaskins's narrative, both the re-description and its critical consequences are instruments for the singling out of the causes and symptoms of fragmentation in modern discourse. Gaskins's own strategy would then be to subordinate the moments of description and critique to his main project, which is to favor a presumption for the possibility of reconstruction of a unified public sphere. The ultimate intention of the book would then be therapeutic, in the sense of transforming the reader as a potential participant in future debates.

This is to say that the presumption of Gaskins's book is that the re-description and critical evaluation that occurs at III.2 in the chart is a means to reaching III.3, the presumption of a closure that will allow adversaries to reach at least provisional decisions.

Gaskins himself, in the above quote, recognizes an element of "paradox" in this program. Whether the program is paradoxical or not, it is certainly optimistic. And this optimism is in the best of Hegelian traditions. One might guess that Gaskins would be sympathetic to a diagnosis of current argumentative strategy "as the night in which, as the saying goes, all cows are black."⁷⁶ The question to ask, of course, is whether the assumption that reconciliation is possible through shedding light on argumentative strategies is not just that—an assumption, another attempt to shift the burden of proof. If what this Article has called the "presumption of unity" is merely a postulate, then it is open to the same sorts of rhetorical shifts that Gaskins diagnoses in the argument-from-ignorance. What would not be open to such shifts would be evidence that this sort of analysis can and does lead to

74. *Id.* at xvii.

75. *Id.* at 203.

76. GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF THE SPIRIT* 9 (A.V. Miller trans., 1977) (1807).

the resolution of conflicts. While the authors are sympathetic to Gaskins's attempt to avoid programmatic statements, there is an absence of case histories where the application of his therapies actually resolves apparent deadlock. This is not to shift the burden of proof back onto Gaskins, but merely to indicate where to look for the benefits of his original analysis.