

THESIS

GUILTY UNTIL PROVEN INNOCENT? RICHARD WHATELY AND
PRESUMPTIVE LENSES IN THE KAVANAUGH CONFIRMATION HEARINGS

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ABSTRACT

GUILTY UNTIL PROVEN INNOCENT? RICHARD WHATELY AND PRESUMPTIVE LENSES IN THE KAVANAUGH CONFIRMATION HEARINGS

In this thesis, I argue that nineteenth-century rhetorician Richard Whately was underrated in his time and is underutilized in rhetorical studies today. Drawing from Michael Sproule's scholarship concerning Whately's psychosocial approach to rhetorical theory, I demonstrate the utility of Whately's theories to evaluate a modern, case study: Justice Brett Kavanaugh's Confirmation Hearings to the Supreme Court in the fall of 2018. This thesis examines how Whately's concepts of presumption and burden of proof were pivotal in understanding this notorious rhetorical encounter. In an effort to extend Whately's original theories, I offer the concept of "presumptive lenses" to center the idea of perspective taking and how different argumentative frames can lead to confusion when both sides invoke the same terms but use very different burdens and evidentiary standards. The essence of "presumptive lenses" is to foster a practice in which all parties in a debate try to identify their opponents' understanding of presumption and burden of proof, to discuss it respectfully, and to honestly compare it to their own. The goal for the argumentative process is transparency for the rhetorical opponents, the judge, and the general public.

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Dedication:

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Chapter 1: Rhetorical Theory and Richard Whately

Introduction

On September 27, 2018, twenty million people watched Dr. Christine Blasey Ford and Supreme Court nominee Brett Kavanaugh testify before the Senate Judiciary Committee (Bauder, 2018). Ford and her supporters argued that Kavanaugh should not be confirmed for the United States Supreme Court because of his past misconduct, including an unreported sexual assault against Ford when they were both minors in 1982. This hearing touched off a contentious debate over what constitutes valid proof of innocence, as well as who should be believed—and why. Weeks before the 2018 midterm elections, then-President Donald Trump addressed the allegations against his Supreme Court nominee. In a press conference outside the White House, Trump told reporters: "My whole life I've heard you're innocent until proven guilty, but now you're guilty until proven innocent—that is a very, very difficult standard for the country. . . . What's happening here has much more to do than even the appointment of a Supreme Court justice" (Lucey & Colvin, 2018). Trump's comments capture the bitter conflict at the heart of Brett Kavanaugh's controversial confirmation, which added fuel to disagreements that rage to this day. While "innocent until proven guilty" is the standard in U.S. criminal courts, it is unclear if this standard applies when public figures are judged in the court of public opinion.

In the fall of 2018, argumentation concepts such as "presumption" and "burden of proof" occupied center stage. Presumption is commonly defined as an idea assumed to be true that is often the basis for other ideas. Burden of proof means having an obligation to prove disputed facts for an argument to stand. Debates over how these concepts function (or should function) in legal or public disputes are not new. In 1830, Archbishop Richard Whately was the first to

translate presumption and burden of proof from formal evidentiary law to the informal field of argumentation (Sproule, 1976, p. 121; Ehninger, 1963, p. xix). Today, Whately's historical contribution to rhetorical theory is often seen as merely "historical," in that it is recognized as foundational theory with little relevance for modern rhetorical theory.

As I contend in this thesis, however, the rhetorical concepts Whately popularized in the nineteenth century are germane today. Indeed, I maintain that Whately's theories can help us to better understand the clash of arguments and cultures that occur in divisive public debates such as the Kavanaugh hearings. Specifically, I maintain that Whately's concepts of presumption, burden of proof, and oral argumentation are valuable tools for unmasking the "game-rules" in modern disputes, and this knowledge could potentially foster more effective persuasive strategies.

To support this claim, I analyze the testimony provided by Ford and Kavanaugh to identify the presence of implicit and explicit presumption on the two sides. I assess the centrality of these concepts of presumption to the rhetorical strategies and tactics employed by the adversaries. Next, I evaluate the ways in which sexual assault or harassment allegations pose unique burdens for accusers seeking justice, including distinctive barriers embedded in the procedures and language of judicial argument. Despite the complications of these structural inequalities, I argue that Whately's theories anticipated changing social, political, and cultural values, and invited others to adjust his concepts to account for these circumstances. In particular, I will focus on Whately's notion of "deference," which assumes that different audiences will be governed by an unconscious, habitual type of presumption based on an individual's lived experience or social context. After using Whately's theories to analyze the discourse, I propose how Whately's concepts could be employed as "presumptive lenses" that might lead to more

productive dialogue between opponents who are committed to radically different conceptions of what constitutes “good reasons” (Wallace, 1963).

My method was to examine the rhetoric of presumption and burden of proof used in the “Kavanaugh Sexual Misconduct Special Hearing.” To provide context, I collected media coverage from the vantage points of the three most prominent groups in the hearings (e.g., Democrats, Republicans, and the #MeToo movement). I then categorized the rhetoric according to Whately’s typology on presumption (and corresponding burdens) and charted the arguments presented in testimonies and cross-examination according to Whately’s rules of argumentation (e.g., counter presumption, shifting burdens, and deference). As a result, I demonstrate that a breakdown in communication occurred, stemming from both Democrats’ and Republicans’ failure to 1) acknowledge the presence of multiple forms of presumption, 2) justify why their presumptions were preferable, and 3) to communicate metrics, or clear standards, for the audience to judge the hearing.

Context on Richard Whately

Oxford University anchored Whately’s life, education, and career. Whately experienced Oxford as a student, earning his Bachelor of Arts degree in 1808. Subsequently, he served as a tutor and a fellow. Whately married in 1821, and, in 1822 he relinquished his fellowship so he and his wife could move to Suffolk for parish life (Fitzpatrick, 1864, p. 23; p. 29). Whately didn’t stay away long, however. He came back to Oxford in 1825, when he became the Principal of St. Alban Hall, a position that involved mentoring the young divinity students living there (Fitzpatrick, 1864, p. 8) Whately joined the faculty of Political Economy at Oxford in 1829 (Fitzpatrick, 1864, p. 66). Whately’s first tenured job as the Drummond Professor at Oxford was short-lived when he accepted the role of Archbishop of Dublin in 1831.

Whately's background as Archbishop of Dublin, theologian, logician, and educator molded his distinctive view of rhetoric. According to Ehninger (1963), Whately's love for teaching and "ecclesiastical background" are reflected in *Elements of Rhetoric*, which was written as a textbook for instructing budding orators and "unpractised [*sic*] writers" (p. xxxvii). According to Bizzell and Hertzberg (2001), Whately's central concern was to determine what people find persuasive and "true" (p. 1001). Although Whately viewed this truth to be salvation through God, the principle still applies that there is a method to persuading truth to others. In addition, according to Ehninger, Whately's work is best suited for "a rhetoric of oral argumentation," due to his emphasis on the art of persuasion in "the formal speaker-audience situation or in the give and take of face-to-face dispute" (1963, p. xv).

To some, Whately's blunt, instructive tone suggests rigid requirements to follow in oral argumentation. However, Whately himself provides a better explanation. He envisioned *Elements* "to introduce whatever may appear, to the majority of students, relevant, interesting, and instructive" (Whately, 1963, p. xlv). Accordingly, Whately's theories are his way of making sense of the recurring patterns of persuasion: certain "laws and inevitable principles" to which rhetoric "knowingly or unknowingly conform[s]" (Whately, 1963, p. xi). From this perspective, Whately translated presumption and burden of proof from the formal realm of evidentiary law to everyday argument because these concepts helped explain how arguments functioned implicitly in practical, public situations.

The concept of presumption was not introduced until the third edition of *Elements of Rhetoric* in 1830, according to J. M. Sproule, who traced the evolution of Whately's ideas through seven editions and four revisions (Sproule, 1976, p. 117). Based on this analysis, Sproule concluded that Whately's thinking evolved over time and reflected a nuanced

understanding of presumption in rhetoric, rather than a rigid set of rules. Such a conclusion represents a significant shift in the conversation around Whately. Sproule (1976) shows how presumption evolved through revisions from strict legal concepts to an understanding of audience adaptation through a psychological and polythetic perspective (composed of many layers). Sproule argues that presumption and corresponding burdens can be used as a tool of audience analysis (p. 120). Thus, Whately's nuanced view of presumption allows it to be applied in a variety of contexts with varying degrees of evidentiary rigor. Overall, Whately believed in the importance of presumption and insisted that it should be communicated "clearly to the hearer" to persuade audiences more effectively (1963, p. 112).

Within *Elements of Rhetoric*, Whately defines rhetoric as "the art of inventing and arranging Arguments," which is "the only province that Rhetoric can claim entirely and exclusively" (1963, p. 39). Argumentative form became a central focus for Whately's analysis because arguments could be viewed as the vehicle for persuasive appeals. Put another way, Whately's concept is that not all arguments are persuasive, but all persuasive appeals can be classified as arguments. In Whately's mind, the rich variety of persuasive appeals could be broken down into their shared structure, and he could then categorize, find patterns, and discern what makes for the most successful persuasive appeals.

Whately's approach to helping students reflected his overall view on education and in some ways symbolized the relationship between rhetoric and logic. If logic can be represented as forms and proofs that we use to tackle analytical puzzles, rhetoric is the other side of the coin that captures "the art" of arranging and inventing arguments (Whately, 1866, p. 31-32).

Significantly, Whately instructed students on persuasion (through the structure of arguments) in

the same way that he taught logic to students through the use of proofs (see Whately's *Elements of Logic*, 1836).

Whately believed it was important to retain methods or modes of persuasion, rather than memorizing the specific details of each situation. When Whately asked students questions from the textbook, he required them to give an extemporaneous answer in a methodical format. Whately found this method worked particularly well with students who liked “rote memorization” but needed to expand their thinking beyond remembering facts and figures (p. 31). Students memorized the routines and processes to analyze inconclusive pieces of reasoning or messy logical questions through a repetitive problem-solving structure. In this way, even though questions differ with different information, this approach provided a consistent method to analyze and process logical problems. The main goal was to get students to think through complex problems and to articulate those thoughts. In today's terms, we would call this training students in extemporaneous speaking skills and critical thinking.

Whately was an illustrative and methodical teacher. He would get students to think on their feet, but, more than that, he would have students talk out their reasoning. For example, he would meet with students at breakfast and give them inconclusive logic puzzles just so they could practice thinking on their feet when considering messy problems with no evident solution (Whately, 1866, p. 31). Whately stressed that he did not want his students to simply memorize information then regurgitate those details to pass a test. Rather they should be able to explain which axioms, or universal principles of math or reasoning to justify their arguments as they answered.

McKerrow (1987) and Parrish (1929) show that Whately's emphasis on logic (and the proof-like structure he applied to arguments) enabled his most significant breakthrough and

helped foster a revival of Aristotelian logic in the nineteenth century. Whately believed that rhetoric was “an off-shoot from logic” because logic established truth by reasoning, whereas rhetoric was the process of conveying that truth to an audience in attempts to persuade them (1963, p. xi). By this definition, Whately considers rhetoric to be unique because it is the only field to focus on *the* art of persuasion, rather than one of many arts that can persuade. By defining rhetoric this way, Whately believed that it could be classified as “inevitable laws and principle[s] . . . [to] which all successful persuasion must knowingly or unknowingly conform” (1963, p. 39).

Whately’s Legacy

Scholars consider Whately’s theories of presumption, burden of proof, testimony, and rules of oral argumentation to be his most notable contributions to the fields of rhetoric and argumentation. On the other hand, *Elements of Rhetoric* has also been challenged over the years. Indeed, sceptics have questioned *Elements of Rhetoric* in Whately’s own time, right up to the present (Gronbeck, 1966). Ehniger labels *Elements* as “able rather than brilliant, systematic rather than profound, useful rather than stimulating” (1963, p. xxi). Though Ehniger argued many of the theories in *Elements* were dated, contradictory, and derivative of other logicians, he found Whately’s views on presumption, burden of proof, and testimony to remain useful (1963, p. xxii). Bizzell and Herzberg (2001) refer to *Elements of Rhetoric* as “dry rules for argument,” a sentiment echoed by Einhorn (1986), who states that “Whately’s rhetoric could win debaters points,” but his concepts of presumption would not account for audiences in real life (p. 1003; p. 290).

In some ways, Whately's critics are correct. Presumption and burden of proof have evolved beyond Whately's textbook definitions from his own day. The fact that it has evolved seems to support Whately's own argument about presumption being tied to audience perception. Over time, the field of argumentation has developed and refined presumption and burden of proof as they apply to different communicative situations, spanning from debate, to dialogue, to the realm of jurisprudence (see Walton's 2014 book for a comprehensive survey). Since the publication of the third edition of *Elements of Rhetoric* in 1830 (Sproule, 1976, p. 117), Whately's theories on presumption, burden of proof, testimony, and rules of oral argumentation have been adapted and reshaped to a point where, some would argue, they have progressed beyond their creator (Walton, 2014; Vancil, 1998; Givens, 1994; Ehninger and Brockreide, 1978).

In the twenty-first century, Whately's theories on presumption and the shifting nature of argumentative burdens have evolved into creating algorithms for artificial intelligence to map arguments (Walton, 2014). Scholars have even applied Whately's basic concepts to uncover inherent presumptions for political schools of thought (Whedbee, 1998; Goodnight, 1980). Admittedly, U.S. high school and collegiate debate teams have adapted and employed Whately's theories for competitive success, but, outside of the debate circuit, there are few calls to revisit Whately's original work (Rutledge & Forward, 2004; Burnett, 1992). However, the question of how Whately's theories operate outside of ideal or formal argumentation settings continues to be the standard used to gauge the usefulness of his concepts.

Whatelian analysis is well-suited to reveal how arguments actually function in public controversies such as the Kavanaugh hearings. First, Whately's goal was to explain how to persuade audiences, and, obviously, the goal of the testimonies from both Kavanaugh and Ford was to persuade committee members, the Senate, and the public.. Whately regarded the

consequences of poor argumentation skills as consequential. In Whately's day, he was concerned with the eternal salvation of his congregation, but, in the Kavanaugh Confirmation Hearings, both parties stood to gain (or lose) based on the decisions made by Congress, the Senate Judiciary Committee, and the public's reaction. Kavanaugh and Republicans worried that, if an additional FBI investigation were conducted, the committee would be forced to delay Kavanaugh's confirmation until after the midterm vote, in which case they could lose their majority. For Kavanaugh himself, providing convincing testimony could mean the difference between acceptance and rejection for a seat on the highest court in the American judiciary. For Ford, testifying involved publicly reliving emotional trauma and exposing her to the public's (often negative) judgment.

Second, Whately's rhetorical theory was explicitly designed for oral arguments. He analyzes how two sides, locked in the give-and-take of spoken debate, use facts and appeals to authority to arrive at conclusions. The testimonies in the Kavanaugh hearings created face-to-face platforms for speaking, as Ford and Kavanaugh were cross examined in five-minute increments, alternating between Democratic and Republican speakers. These five-minute segments created an opportunity to respond and argue across the party lines of Senate Judiciary Committee members. For example, after Ford gave her opening statement, she was questioned by all twenty-one senators on the U.S. Senate Committee on the Judiciary. However, in lieu of individual questioning by the 11 male Republican senators, these senators opted to bring in a special appointed counsel, Rachel Mitchell, to complete their questioning of Ford.

The third reason that Whately's theories are a good fit for reviewing the Kavanaugh hearings is his focus on credibility and the establishment of fact, which is at the heart of testimony. Ehninger described *Elements of Rhetoric* as "a valuable handbook for the practicing

disputant, especially when engaged in the difficult task of defending a position for which factual evidence is scanty or lacking” (xiv). In the case of sexual assault allegations, a more fitting guide would be difficult to find. Fourth, and finally, presumption and burden of proof were arguments invoked explicitly by both sides in the Kavanaugh testimony.

Chapter 2: Case Study

Overview of Kavanaugh Hearings

Before rhetorically analyzing the Kavanaugh hearings, I will provide some historical background. A key factor in understanding these hearings was how allegations of sexual misconduct aligned with contemporaneous social and political events. Within the larger cultural context, allegations of sexual misconduct were being discussed in Hollywood and other areas, with the #MeToo Movement’s rise in late 2017 (O’Keefe, 2021). By July to November 2018, amid the broader discourse of the #MeToo movement, Kavanaugh’s lifetime Supreme Court appointment prompted widespread discussion about the implications of sexual allegations for individuals in high-profile governmental roles (O’Keefe, 2021). Together these factors fueled the dramatic and divisive atmosphere of the hearings. The central figures in the Kavanaugh confirmation hearings were the members of the U.S. Senate Committee on the Judiciary (SCJ), political parties, Kavanaugh and Ford, whom I refer to as “witnesses,” since they both gave sworn testimony.

According to Article II, Section 2, Clause 2 of the U.S. Constitution, presidents can appoint ambassadors, public ministers, Supreme Court judges, and other officers under the Senate's advice and consent. The Senate Judiciary Committee, or the Senate Committee of the Judiciary, was established in the 1800s to confirm presidential appointments to federal judicial positions

(Rutkus, 2010; U.S. Senate Committee on the Judiciary, 2024). The SCJ is comprised of 21 senators, and during the time of the Kavanaugh Confirmation hearings, there was a Republican majority with 11 Republicans in the SCJ and ten Democrats (U.S. Senate Committee on the Judiciary, 2018, p. II). Notably, this was an exceptionally experienced group as 16 of the 21 members had been practicing attorneys. Several members had previously chaired the SCJ or had legal experience. For example, Senator Patrick Leahy from Vermont had been involved in 19 Supreme Court confirmations, over the span of 43 years brought significant expertise to the proceedings (*Washington Post*, 2018, p. 16; *Congressional Record*, p. 32).

Chair of the Committee, Senator Charles Grassley, had the responsibility of appointing a representative for the Republican Party to cross-examine Ford and Kavanaugh. He selected Rachel Mitchell, who played a pivotal role in the hearings. Senator Grassley believed Mitchell's background as a career prosecutor, Division Chief of the Special Victims Division, and recognized expert in victim interviewing made her the most equipped to "question the witnesses" effectively (*Congressional Record*, 2018, p. 710). Her experience in the field meant she would be trained in best practices in talking to Ford, or any survivor of sexual assault. This was especially significant, as the ten Republicans, minus committee chairperson Grassley, ceded their time to Ms. Mitchell so she could cross examine Ford during the first half of the hearing on September 27, 2018.

Grassley emphasized in his opening remarks that the testimony involved "very serious allegations of sexual assault," a "complex and sensitive" subject which required an individual trained in best practices. Grassley's goal was to ensure a "fair and productive hearing" and avoid

the “chaos and grandstanding” of Kavanaugh’s initial appearances before the committee (Kavanaugh Hearing Transcripts, 2018, p. 629).

Political Parties

The Supreme Court is generally considered the least political of the branches of government in the United States, since members are not elected by popular vote like in the legislative and executive branches (Rutkus, 2010). Yet, Kavanaugh’s confirmation process appeared markedly political, since there were key figures from both political parties, Democrats and Republicans, as well as then-president Trump commenting on the nomination. Party politics became increasingly evident as Democrats within the SCJ, along with party leaders like Senator Schumer, emphasized specific quotes and lines of inquiry, reflecting their perspective. Conversely, Republican leaders and members highlighted their own positions and responses. Additionally, the split on the 21-member Senate Judiciary Committee, with 11 Republicans and 10 Democrats, mirrored the deeply divided sentiments among the public and within Congress. Ultimately, Kavanaugh’s confirmation vote in the Senate was narrowly won with a 50-48-1 margin.

Witnesses

Ford and Kavanaugh were scheduled to testify one after the other on September 27, 2018, as witnesses for the “Kavanaugh Sexual Misconduct Special Hearing.” Ford shared her background and alleged account of the house party incident where the alleged sexual assault took place, while Kavanaugh provided his own recollection of his schedule in the summers of 1982 to 1984. The cross-examination covered details of the incident, including timing, factors leading up to and after the event, and committee questions.

Ford’s Testimony At the time of the hearing, Christine Blasey Ford was a research psychologist at Stanford University and a professor at Palo Alto University (Anderson, 2018). In

1988 she graduated from the University of North Carolina, Chapel Hill. In 1991 she received her Master's in clinical psychology from Pepperdine University and her PhD from the University of Southern California in 1996. Christine married Russell Ford in 2002 (Anderson, 2018). The couple had two children and resided in California, near the college campuses where Ford taught. Ford gained national attention when she came forward with allegations of sexual assault against Supreme Court nominee Brett Kavanaugh. Ford published her autobiography, *One Way Back*, in May 2024.

Kavanaugh's Testimony Though he gained national attention as a nominee for the United States Supreme Court, Kavanaugh had a strong legal background and history of public service. He received his bachelor's degree from Yale in 1987 and three years later, Kavanaugh would receive his JD at Yale Law. Kavanaugh served 12 years as a judge on the United States Court of Appeals for the DC Circuit, which is the nation's second most prominent court. Kavanaugh also served in the executive branch in Bush's White House from 2001-2006. Kavanaugh's wife, Ashley, sat behind him every day of the hearings. Ashley and Brett Kavanaugh had two daughters, who attended the first day of committee hearings, prior to the sexual assault allegations.

Complications

The way in which the sexual-assault allegations came to light, coupled with Kavanaugh's need to be confirmed before the rapidly approaching midterm elections, added urgency and tension to the proceedings. On July 9, 2018, President Trump nominated Brett Kavanaugh to fill the Supreme Court vacancy left by Justice Anthony Kennedy's retirement (Darrah, 2018). According to Ford's testimony, she took the first step to share her story publicly after Kavanaugh was considered for the shortlist in early July 2018. By July 30, Ford's allegation letter had been

written, sent, and received by California 18th District, House Representative Anna Eshoo (D). The letter was then forwarded to Senator Dianne Feinstein later that same day, who turned it over to the FBI. Feinstein was the ranking Democratic member on the Senate Judiciary Committee.

Kavanaugh had never been accused of sexual assault until Ford wrote the letter of July 30. To complicate matters more, there were two additional allegations of sexual misconduct against Kavanaugh within the span of two weeks. These accusations by Ford, Deborah Ramirez, and Julie Swetnick changed the trajectory of the hearings, as they morphed from procedural confirmation into public testimonies with a larger than anticipated audience. The politically contentious, but routine, bureaucratic motions of the Senate were now a cross-examination into the history and character of the witnesses. Due to Ford's initial insistence on remaining anonymous, a fact that would later become a critical tension in the proceedings, Ford's name and allegations did not become public until September 16, 2018. This delay in information, and extra precautions to maintain Ford's anonymity, created additional tension around the time constraints of the confirmation procedures. As the hearings reviewed the details of Ford's allegations, more questions were unearthed. One of the key points of contention was Ford's decades long delay in speaking publicly about the sexual assault allegations against Kavanaugh.

The earliest documentation of the assault came from 2012 when Ford disclosed the attack during a couple's therapy session. These therapy notes are the first documented medical notes referenced. Ford also confided in her personal therapist in 2013 about an assault when she was a teen. Ford referred to her assailant as a "high ranking" member in society but did not name Kavanaugh in 2012 or 2013 (Dejardins, 2018). Beyond the therapy and telling her husband, Ford

first mentioned the assault to a friend in 2017 when the #MeToo Movement was a big topic (Desjardins, 2018).

Timeline for Kavanaugh's Supreme Court Confirmation Hearings

The Kavanaugh hearings were not the start of contentious battles over Supreme Court nominees. There were many events that led up to the Kavanaugh hearings. The ones I focus on are the political environment following President Trump's 2016 election, the appointment of Justice Neil Gorsuch (and the denial of Merrick Garland) to the Supreme Court, and the increasing hostility of the Supreme Court confirmation processes.

The decision by the Senate Judiciary Committee (SCJ) not to hold confirmation hearings for Merrick Garland created a complex context for future nominations. The situation escalated further when Justice Anthony Kennedy, a critical swing vote on the Court, announced his retirement on June 27, 2018 (Shear, 2018). In the same *New York Times* article that reported Kennedy's retirement, Kavanaugh was listed as a front runner citing his experience as a federal appellate judge for the District of Columbia Circuit and that Kavanaugh clerked for Justice Kennedy from 1993-1994 (Shear, 2018). Trump formally nominated Kavanaugh to fill this crucial vacancy on July 9, 2018, two weeks after Kennedy's retirement announcement (Darrah, 2018).

Initial Confirmation Hearings (September 4-8)

Many prominent members of Congress and those within the legal community spoke in support of Kavanaugh. The American Bar Association (ABA) rated Judge Kavanaugh as "well-qualified" for the position, although this document was subsequently removed from the ABA's website ("Kavanaugh Rating Letter," 2018). However, opposition began to emerge soon after

Kavanaugh's name was mentioned. Congressional Democrats, still reeling from the Republicans' blockade of Barrack Obama's end-of-term Supreme Court nominee Merrick Garland, strongly opposed Kavanaugh's confirmation. Key members in the Democratic Party, such as Senate Minority Leader Chuck Schumer, went on the record that Kavanaugh's confirmation would be opposed with "everything I have" (Darrah, 2018).

Kavanaugh's regularly scheduled confirmation hearings before the Senate Judiciary Committee aired from September 4-7, 2018. These televised hearings were frequently interrupted by protestors. On the first day alone, 70 were arrested for disorderly conduct as they interrupted the speakers (Fram et al., 2018). The confirmation hearings were marked by contentious debates, particularly regarding the acquisition of unredacted documents from Kavanaugh's time in the Bush White House. Passionate testimony was given on both sides, but notably there was no mention of sexual misconduct. Rumors about sexual assault allegations against Kavanaugh, had been floating around Washington, DC. However, nothing was confirmed until the day after Kavanaugh's final confirmation hearings on September 8, 2018 when the letter Ford had written to Eshoo was leaked.

Additional Hearings Following Sexual Assault Allegations (September 12-27)

The situation escalated on September 12, 2018, when CNN posted a partially redacted version of Ford's letter without her consent (Brown, 2018). This letter was the same one Ford had written anonymously to her Congressperson and forwarded to Feinstein's office as well. Once the letter was leaked to the press, events unfolded quickly. By September 12 Kavanaugh's name was specified, while Ford's was not. On September 13, 2018, Feinstein's office released a press release that confirmed the rumors that her office had information against Kavanaugh and that "the incident involved possible sexual misconduct" (Fandos & Edmondson, 2018).

Kavanaugh released a public statement on September 14, 2018, vehemently denying that he ever assaulted anyone (BBC News, 2018). At this time two other women, Deborah Ramirez and Julie Swetnick, also came forward with allegations against the nominee. Ford's story was known, but Ford's identity was still anonymous at this time. Ramirez and Swetnick did not claim to write the leaked letter.

In an interview published on September 16, 2018, Ford told her version of events and publicly revealed her identity to Emma Brown from *The Washington Post*, which reported that *The New York Times* article was a "bare-bones version of [Ford's] story" and was shared "without her name or consent" (Brown, 2018). At that time Ford "feared she would be exposed," since "people were clearly learning her identity," as reporters showed up to her house and place of work" (Brown, 2018). Ford wanted to remain anonymous and only agreed to testify after reporters began harassing her and her family at work and at home. One reporter sat in on one of Ford's graduate seminars where Ford mistook the reporter as a student, until the reporter approached Ford after class and began asking questions.

Within hours of Ford's interview, the ABA rescinded their recommendation of Kavanaugh until a thorough investigation into the allegations was completed by the Federal Bureau of Investigation ("Kavanaugh Rating Letter," ABA, 2018). Ford called for Congress to investigate the claims made against Kavanaugh and offered her personal testimony as evidence of why Kavanaugh was unfit for the Supreme Court. Negotiations followed between Senate Judiciary Committee members, Ford's legal team, and Kavanaugh who wanted the chance to publicly respond to what he viewed as outrageous and unfounded allegations. All parties agreed to a public testimony by September 17, 2018 (Fandos & Stolberg, 2018). This set the stage for a

highly publicized and emotionally charged hearing on September 27, 2018, where both Ford and Kavanaugh testified before the Senate Committee on the Judiciary.

Sexual Misconduct Hearing (September 27-28)

Ford's Testimony The Senate Judiciary Committee agreed to reconvene the confirmation hearings for an extra session to address the allegations in the “Kavanaugh Sexual Assault Hearing.” During her testimony to the Committee on September 27, 2018, Ford alleged that roughly thirty years prior, when she was fifteen, Kavanaugh (seventeen at the time) assaulted her at a house party in Maryland. Ford claimed that she went upstairs to look for a bathroom and was pushed into a room with an intoxicated Brett Kavanaugh and Mark Judge. Ford claimed both Judge and Kavanaugh were inebriated and “stumbling drunk” (Brown, 2018). She claims Kavanaugh pinned her to a bed, while Judge stood to the side laughing. Ford testified under oath that Kavanaugh laid on top of her “grinding” and groping, attempting to remove her one-piece bathing suit. When she screamed for help, Ford alleged music was turned up louder to muffle her screams, and Kavanaugh covered her mouth. At that point, Ford stated she believed Kavanaugh was going to accidentally kill her. According to Ford, Mark Judge jumped on the bed twice. On Judge’s second jump, Ford and Kavanaugh tumbled apart. Ford escaped to a bathroom, locked the door, and waited for Mark Judge and Kavanaugh to leave (*Congressional Record*, p. 634). Later in cross-examination, she testified that she could tell the boys had left the room based on hearing their voices downstairs. This was particularly important because she realized she might have to walk past them to get to the front door to leave the house.

Due to the length of time between the alleged assault and coming forward, it was difficult for Ford to remember specific details of the event. Ford asked for an additional FBI investigation because she admitted she did not remember the exact day or year the event occurred. It is

estimated that it happened at a house party in 1982. After the event, she told a friend and a therapist. The marriage therapy notes would later be reviewed by Ford and Mitchell in cross-examination. This was a point of contention because the motives of why Ford would choose to make a public allegation more than 30 years after the alleged incident. As Ford herself says, she was not raped, and there was no documented complaint with police and no rape kit. Ford remarked, “I am here today not because I want to be. I am here because I believe it is my civic duty to tell you what happened to me with Brett” (“Kavanaugh Hearing Transcript,” *The Washington Post*, 2018; *Congressional Record*, 2018, p. 634).

Kavanaugh’s Testimony In Kavanaugh’s opening statements on September 27, he testified that he respected women and was committed to upholding principles of justice and fairness. Kavanaugh denied ever sexually assaulting anyone, including Ford, Ramirez, or Swetnick. Kavanaugh’s overarching rebuttal to Ford’s claims were: 1) he was not around during the time the alleged incident occurred (he brought calendars and yearbooks to support his claims; and 2) he believes Ford has experienced PTSD from sexual assault but not from any interaction with him. Reporters and news outlets noted that his outraged demeanor stood in stark contrast to Christine Blasey Ford’s quiet manner (Kaur, 2022). Kavanaugh backs up his claim he has never met Ford based on the sworn testimony of three of the four alleged witnesses from the party: Ford’s friend Leland Keyser, Mark Judge, himself, and Kavanaugh’s friend Patrick Junior “Squee” Smith all reported to Grassley’s office’s investigation as an extension of the Senate Judiciary Committee.

To prove his innocence, Kavanaugh listed the times he had cleared an FBI background investigation. Kavanaugh underwent his first FBI background check in 1993, before he clerked for Justice Kennedy (Desjardins, 2018). Kavanaugh would have additional background checks

every five years as a federal employee. No record of sexual assault or misconduct came up during the initial FBI background checks, nor in the subsequent checks (Desjardins, 2018). In 2001 Kavanaugh began working for the Bush White House as an Assistant and Staff Secretary to President Bush (Desjardins, 2018). For this position, there would have been a more intensive background check. Kavanaugh worked in the Bush White House until 2006, so it would appear that once again no suspicious or illegal behavior was found during the background check. This is not surprising since the incident in 1982 with Ford had not been reported to or investigated by law enforcement. This lack of a charge, conviction, and evidence collected by law enforcement will become a key part of the Republicans' argument of why Kavanaugh should be presumed innocent given that a court of law never adjudicated the matter between Ford and Kavanaugh.

Throughout his testimony, Kavanaugh remained firm in his denial of any wrongdoing, stating “unequivocally and categorically” that he had never assaulted Ford or any other woman. In addition, Kavanaugh questioned the motives and tactics of Democratic Senators, accusing them of politically motivated strikes on his reputation reminiscent of the attempts to discredit Supreme Court nominee Robert Bork:

The behavior of several of the Democratic Members of this Committee in my hearing a few weeks ago was an embarrassment. But at least it was just a good, old-fashioned attempt at Borking. Those efforts didn't work. When I did at least okay enough at the hearings that it looked like I might actually get confirmed, a new tactic was needed. Some of you were lying in wait and had it ready. (p. 682)

Kavanaugh drew upon his extensive record of public service and legal experience to illustrate dedication to upholding the law and serving his country. He adamantly rejected the notion that he had engaged in misconduct during his youth, portraying himself as a devoted family person and a dedicated public servant. He pointed to the lack of corroborating evidence and

inconsistencies in Ford's testimony, questioning the credibility of her allegations and asserting his right to a fair and impartial confirmation process.

Public Reaction and Vote to Confirm

After an 11-10 vote in favor of Kavanaugh in the Senate Judiciary Committee the day after the sexual assault hearing, and a 50-48-1 vote (in favor) in the Senate on October 6, Justice Brett Kavanaugh was sworn in at a private ceremony as the 114th Justice to sit on the Supreme Court (Fram et al., 2018). Though Kavanaugh's confirmation had come to an end, it appeared the only national consensus was dissatisfaction with Kavanaugh's confirmation proceedings by Republicans, Democrats, #MeToo supporters, and the American public. Polls indicated the nation remained just as divided as Congress in what some political commentators termed "the Kavanaugh effect" (Cutter et al., 2018). Three of the Democrats sitting on the Senate Judiciary committee lost their bid for reelection. The nation was left divided on whether Kavanaugh was guilty, qualified, and what the hearings as a process should be about.

The Public

The story captured America's attention after the letter and Ford's allegations went public in *The Washington Post*. More than 20 million viewers watched the Kavanaugh hearings. Ford's and Kavanaugh's appearances were arguably the most widely viewed testimonies within the last decade (Reuters, 2019). Outside of viewership, the hearings also expanded national dialogue surrounding sexual assault. Before the hearings, the #MeToo movement had already begun raising awareness of sexual assault, as a result of recent victories with sexual harassment and discrimination lawsuits in America's entertainment industry. Many #MeToo supporters closely followed the Kavanaugh hearings and filled social media platforms with hashtags such as:

#BelieveSurvivors, #BelieveWomen, #WhyIDidntReport, and #CancelKavanaugh. Supporters also protested in the streets with signs reading “I believe her,” and “I still believe Anita Hill” (Walters, 2018).

Effect of the Hearings

The audience of the “Kavanaugh Sexual Assault Hearings” represented a diverse spectrum of political affiliations, including Democrats, Republicans, and undecided individuals. In order to show this, Gallup Polls (Jones, 2018) collected information on Kavanaugh’s confirmation as the Supreme Court confirmation process unfolded. This graph is most useful because we can see when Kavanaugh was first mentioned, his approval ratings by Democrats and Republicans and how he was perceived when the news story broke on September 13, 2018, in *The Washington Post* and after both Ford and Kavanaugh’s testimonies on September 27.

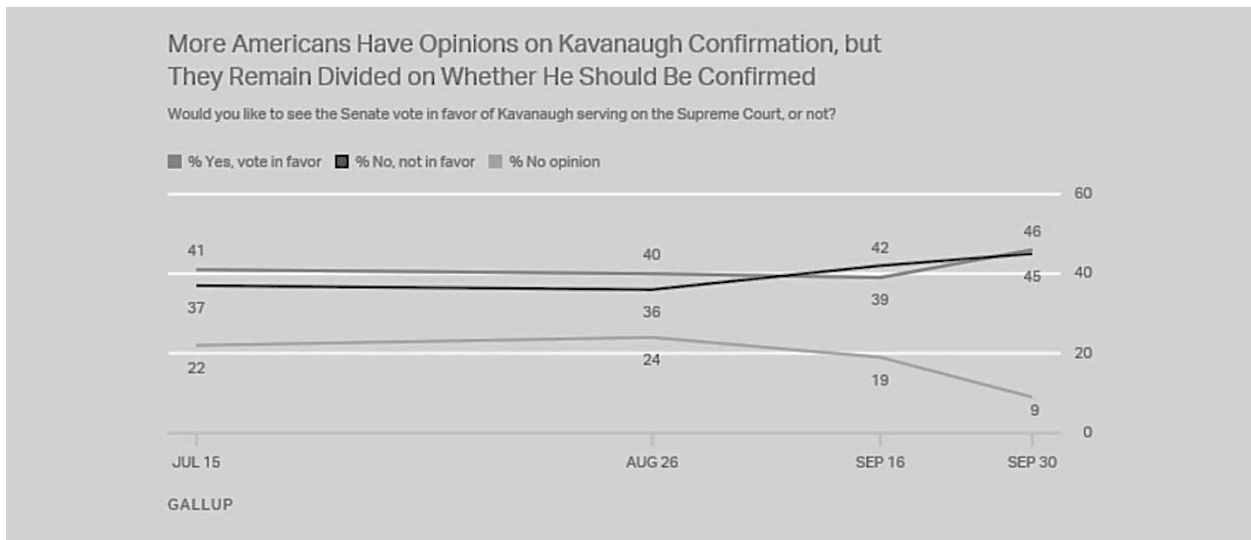


Figure 1 Note. This graph was produced for an article in 2024. From “Americans still closely divided on Kavanaugh’s Confirmation,” by Jones, J.M., 2024, Gallup Polls. Retrieved from <https://news.gallup.com/poll/243377/americans-closely-divided-kavanaugh-confirmat>

According to the graph above, it is understandable how Kavanaugh's hearings were described as tumultuous and polarizing. Gallup Polls preceding Kavanaugh's confirmation showed 46% in favor and 45% against. Subsequent polls indicated a cementing of opinion, with initial support increasing from 41% to 45% and opposition rising from 38% to 46% (Jones, 2018). Arguably, the rhetoric used in the confirmation hearings was persuasive, since conviction rose "by roughly equal increases in support and opposition" after the televised hearing dates on September 27, 2018. Even apathy (or "not having an opinion on the matter") dipped from an initial 20% when the process began, to single digits, or 9%, as of September 30, three days after the testimonies.

Illuminating Whately's Theories through the Kavanaugh Hearings

Lois Einhorn, Whately's most outspoken academic critic, dismisses *Elements of Rhetoric* by arguing that presumption and burden of proof are rigid "game rules" that do not adequately consider the irrationality and subjectivity of audiences. Einhorn explains that arguments do not follow Whately's structures because multiple issues can exist during any single dispute, and opposing parties refuse to agree on presumption and burden of proof:

Presumption and burden of proof are social-cultural concepts; they are not fixed rules unaffected by people's social and cultural differences. If there are game rules in argumentation, these rules exist in people, not in argumentative forms. Especially in the pluralistic society in which we live, arguments involve many interacting issues, and it becomes difficult to locate where presumptions and burdens of proof lie. Audiences are

not neutral judges of victory and defeat; they make their judgments based on their own beliefs and values (Einhorn, 1986, p. 295).

Contrary to Einhorn's critique of Whately, I contend that public controversies can be understood better (not obfuscated) through "game rules." To be precise, Whately does not claim presumption, burden of proof, authority, and deference should be treated as rigid standards to follow. Ideally, these standards function in disputes to explain the "rules" of the "game," rather than to dictate winning strategies. Moreover, Whately acknowledges that these rules can change to represent different situations. Sproule's socio-psychological interpretation of Whately's theory demonstrates that Whately understood and accounted for the subjectivity of audiences' judgment (1976). By analyzing the audience and understanding their presumptions, advocates can strengthen their arguments. Or, at the very least, advocates can alter their arguments to engage with the public or the other side's position. Indeed, Whately specifically addressed this issue by introducing the concepts of "counter-presumptions" and "shifting burdens" in order to explain how arguments volley between parties (1963, p. 124).

According to Whately, when arguments begin to stagnate, or repeat, then it is reasonable to investigate whether the burdens were successfully shifted. Whately explains that presumption "must stand good till some sufficient reason is adduced against it" (1963, p. 112). The standard of a "sufficient" response is highly subjective and dependent on the nature of the claimed presumption, e.g., beyond reasonable doubt, preponderance of evidence, etc. Typically, arguments move forward when burdens are successfully refuted and shifted to the other side, or when a disputant offers a counter-presumption by proving that their framework should be

preferred over the presumptive framework of the opposition. This may be justified by timing, urgency, precedence, or magnitude of an issue.

Without explicitly comparing the different argumentative frames, the audience is left on its own to decide who is right. Whately explains, “It is a point of great importance to decide in each case, at the outset, in your own mind, and clearly to the point of the hearer, as occasion may serve, on which side the Presumption lies, and to which belongs the [*onus probandi*] Burden of Proof” (1963, p. 112). Whately stresses the equal importance of establishing presumption and burden of proof in the mind of the speaker and “clearly to the point of the hearer.” Sproule (1976) uses this quotation as one piece of evidence to show Whately’s psychological perspective was ahead of its time because the audience is the one that will ultimately decide what is persuasive. Sproule goes on to say that using Whately’s theory means advocates should “analyze their audience and actively claim presumptions as a means of reinforcing their arguments (1976, p 116). Even those who read Whately with a more traditional view (and may not agree with Sproule’s psychological take) recognize the importance of Whately’s focus on communicating clearly to the audience. Einhorn (1986) concurs with this point: “Whately believed that speakers needed to understand the notions of presumption and burden of proof so that they would be aware of their responsibilities and rights in an argument and so that they could inform the audience of these responsibilities and rights” (p. 129).

To determine the relevancy of Whately’s theories in the twenty-first century, a rhetorical scholar should see which of Whately’s “rules” of the “game” are still true and valuable, as well as how the “game of persuasion” has changed over time. In other words, today’s rhetorical scholar should attempt to determine if new “rules” have emerged in modern day argumentation. Contrary to Einhorn, I argue that, due to the socio-cultural nature of presumption and burden of

proof, Whately's theories are needed to discover the new "rules" of sexual assault allegations being judged by the public.

It is important to clarify that allegations of sexual assault are not a "game," nor should they be treated lightly. Rather, the main point of the #MeToo movement is to treat allegations as serious matters. Likewise, Whately's focus was on uncovering biblically based truth, and he viewed salvation as being just as significant as allegations of sexual assault are regarded today. In both situations, the goal is to uncover truth. The key point is that in dealing with such important matters and conveying truth in complex and emotional situations, it is essential to find the most efficient way to reach audiences. As stated previously, I maintain that Whately's theories can operate as a tool to understand the pluralistic views of society and discover the implicit patterns that seem to *de facto* rule the court of public opinion. Though Whately's work presumes the truth of religion and is hostile against science, his overarching theory shows the need for a method to uncover the rules of rhetoric, whatever the circumstances, and it may be more applicable now than ever before.

Chapter 3: Rhetorical Analysis of the Kavanaugh Hearings

The summary of the committee's actions highlights the disjointed nature of the debates within the Senate Judiciary Committee, where members from each party seemed to talk past one another. Their arguments often failed to clash directly because they were, in fact, engaged in two different debates. This can be illustrated through analysis of disagreements over the committee's proper role, the efficacy of a new FBI investigation, and Democratic assertions that, no matter if Kavanaugh committed the sexual assault as charged, testimony has revealed the candidate has an inappropriate temperament to serve on the Supreme Court.

The rancor and chaos of the hearings can be explained in part by procedural matters. The chair of the committee, Senator Charles Grassley, granted both Ford and Kavanaugh unlimited time to give their statements, but, since this was the fifth hearing, and senators had already taken a week to ask their questions, Grassley limited cross-examination to five-minute increments. This forced witnesses, as well as Senate Judiciary Special Counsel Ms. Mitchell and senators, to navigate between two distinct conversations.

During Ford's testimony, Republicans employed a strategy of bringing in a female prosecutor, while Democrats pursued their own approach by trying to get Kavanaugh to verbally commit to additional investigation during testimonies. Similarly, during Judge Kavanaugh's testimony, both parties employed distinct strategies. Republicans emphasized the presumption of innocence until proven guilty and required a burden of proof equivalent to criminal court standards. On the other hand, Democrats focused on the integrity of institutions and adopted a burden of proof needed to convince a hiring board that one is worthy of a prestigious job. It was the same when Judge Kavanaugh testified. Republicans focused on innocent until proven guilty, like in criminal court, while Democrats talked about integrity and giving victims the benefit of the doubt, more like in civil court.

Revisiting Presumption and Burden of Proof

Presumption and burden of proof are intertwined concepts that name and frame the rules in a legal dispute. Presumption is defined as “a pre-occupation of the [argumentative] ground,” meaning that when one side has presumption, there is deference, or favor, given to it on that issue. To be clear, presumption does not equate to automatically winning a dispute (Whately, 1963, p. 129). The “pre-occupation of ground” concept refers to how a judge initially perceives arguments and what the orator should prioritize for success. Once presumption is determined,

then the burden of proof is placed on the opposition. Typically, burden of proof “lies on the side of him who would dispute it,” while presumption assumes certain positions before the debate begins (Whately, 1963, p. 112). Whately explains, however, that presumption is often overlooked. This oversight is essential, since the entire character of a discussion can often “depend” greatly on this question of presumption (1963, p. 113).

When presumption and burden of proof are invoked in a courtroom or debate setting, both sides recognize (and usually agree upon) the definitions and conditions of the terms. This is done for two main functions: 1) to operate as rules to guide the proceedings, since they dictate the expectations and obligations of each side, and 2) to provide a metric for a judge to adjudicate points of contention. In evidentiary settings, both sides recognize these rules and subsequently “invent” and “arrange” their arguments in a way that will give them tactical advantage. Teams in competitive debate can strategically reject presumption (Kauffeld, 1998), or they can situate their arguments on presumption, if they believe they can maintain that ground. Moreover, Vancil (1998) and Ehninger and Brockreide (1968) authored books that clarify the role of burdens in modern contest debate settings. In their assessment, burdens can be procedures that teams must follow (or obstacles they must overcome) in order to win the debate.

In formal situations, different types of proceedings have different definitions of presumption and burden of proof. For example, in criminal courts, the concept of “innocent until proven guilty” is presumed or set as a standard. As a result of this presumption, the burden of proof is for the prosecution (the accuser) to demonstrate beyond reasonable doubt that the accused is guilty. However, civil courts operate under a different set of game rules. Civil courts typically resolve conflicts between people or businesses, and in these cases the presumption of “innocent until proven guilty” shifts. For the accuser to be successful they must meet the

standard of “preponderance of evidence,” instead of attempting to prove “beyond reasonable doubt.” In short, civil courts have a burden in which the plaintiff must prove that something is “more likely than not,” whereas criminal court requires the plaintiff (prosecutor) to prove the harm to a high degree of certainty. In the public sphere, arguments do not necessarily prioritize one presumption. As shown in these examples, each presumption will have different corresponding burdens (and evidentiary standards) unique to the presumption type.

When the rules of presumption are not agreed upon at the start, then “the character of a discussion” (Whately, 1963, p. 113), the nature and rules of the dispute, can be interpreted differently by each side and the judge. Adversaries will most likely disagree with each other on which presumption is most important, as the respective sides will favor whatever they believe to be their strongest arguments, or what they presume the dispute is about. Similarly, the burden of proof is not adopted solely based on the presumption one chooses to acknowledge. Rather, the burden of proof is placed on one by the opposition according to the presumption in which they choose to operate. In this way, Whately links presumption with burdens of proof. He argues that a claim remains valid unless a compelling counterargument is provided. The responsibility to prove a claim rests with the party challenging it. However, this burden can be reversed by introducing what Whately calls a “counter-presumption,” or rebutting burdens of proof in order to shift the burden to the other party (1963, p. 124). This dynamic aspect is what Tindale (2015) refers to as the dialectical component of presumption because, as the arguments develop in oral arguments, the burden shifts back to the respondent.

Implications of Whately’s Theories for the Kavanaugh Hearings

During the Kavanaugh hearings, Republicans, Democrats, and the #MeToo movement all invoked a type of presumption for their side. Each group became increasingly frustrated when

other parties failed to engage the other side's arguments and respond to the rhetorical burdens placed upon them. Whately did not state that presumption (and corresponding burdens) would dictate how people should make up their minds. Instead, presumption is used to describe the reality that judges favor certain arguments. Whately explains, "In any one question the presumption will often be found to lie on different sides, in respect of different parties" (1963, p. 118). This comment refers not only to the opposing parties, but it also applies to the subjectivity of the judge and what they deem to be most important.

Presumption functions as a frame, or a lens, to situate arguments. What is critically important here is that ultimately it doesn't matter if opposing sides agree on the presumption. In fact, it is likely they will not. Instead, they must persuade the judge that their frame (presumption) should be preferred over competing claims. Because this was not established in the Kavanaugh hearings, both sides claimed they had presumption and insisted their opponents had the burden of proof. Consequently, both sides talked past one another, while simultaneously believing that their party would be victorious. In 1846, Whately commented on this exact situation: "It may be shown that each of two contending parties has some reason to hope for success; and this, by irrefragable arguments on both sides; leading to conclusions which are not (strictly speaking) contradictory to each other; for though only one party can obtain the victory, it may be true that each has some reason to expect it (1963, p. 156)." There were two opposing frameworks being employed in the Kavanaugh Confirmation Hearings, and these frameworks refer to what Whately calls "counter presumption" (Whately, p. 124-125). In this case, the Democratic senators employed a "integrity of institutions" framework, and the Republican senators employed the "innocent until proven guilty" framework. Because of these opposing frameworks each group saw their arguments as "winning" under the presumptive framework

they employed. The fatal mistake occurs when both sides claim victory through competing presumptions., but they need to explain to the audience why their framework should be preferred.

The Case from the Democratic Party

In general, Democrats wanted to uphold the integrity of an institution by appointing the best fit for the Supreme Court and making sure the process to confirming a future justice would not be tarnished by rushing through hearings when there were questions of a nominee's character. This strategy aligned with Whately's view that "there is presumption against every change" (1963, p. 124). The framing of the hearing as a job interview presumed that the institution and processes of the Supreme Court should be prioritized. The burden placed on Kavanaugh was double-edged: either he had to prove he was worthy of the institution by meeting the standard of an FBI investigation, or he needed to prove that he merited an exception to this process. Senate Democratic Whip Dick Durbin reflects this sentiment when he addressed Ford directly:

The FBI should have investigated your charges as they did in the Anita Hill hearing, but they did not. Mark Judge should be subpoenaed . . . and required to testify under oath, but he has not. Judge Kavanaugh, if he truly believes there is no evidence, no witnesses that can prove your case, should be joining us in demanding a thorough FBI investigation, but he is not. ("Kavanaugh Hearing Transcript," *The Washington Post*, 2018)

Concerning institutions, Whately wrote that "burden of proof" lies with the party that proposes an alteration. In other words, since change is not necessarily a good in itself, those who demand change should show cause for it (Whately, 1963, p. 114). In this example Durbin cites precedent

concerning how the Senate Judiciary Committee proceeded on Clarence Thomas's confirmation hearing, since he was the last Supreme Court nominee to face allegations of sexual misconduct.

According to this perspective, the burden on Kavanaugh was to show why the precedent of FBI investigations (established with Anita Hill's sexual harassment allegations against then nominee Justice Clarence Thomas) should be altered for the nominee. In this way the burden of proof still falls on the "accuser," but it is the individual who proposes a change to the current system. Two days after Professor Anita Hill accused Justice Clarence Thomas of sexual harassment, an FBI investigation was launched. The burden put on Republicans by Democrats (like Durbin) was to show that Kavanaugh uniquely merited a deviation from precedent or that Kavanaugh was uniquely qualified to serve on the highest court.

Senator Diane Feinstein's opening remarks also draw from this line of reasoning concerning the integrity of institutions. Feinstein frames the "burden of proof" as analogous to hiring Kavanaugh for "a job interview." Feinstein's argument is that, in order to uphold the integrity of two institutions, the nominee, Kavanaugh, must prove he is "worthy" to be "elevated" to the "most prestigious court in our country." For this reason, the burden of proof is for Kavanaugh's supporters to show he is "the best we can do." This, of course, is a completely different standard than the Republican's presumption that Kavanaugh is innocent until his accuser can supply enough evidence to prove him guilty of wrong-doing.

An editorial in *The Atlantic* expresses the reasoning of the Democrats:

The question before us, after all, is not whether to punish Kavanaugh or whether to assign liability to him. It's whether to bestow on him an immense honor that comes with great power. Kavanaugh is applying for a much-coveted job. And the burden of convincing in such situations always lies with the applicant. The standard for elevation to the nation's

highest court is not that the nominee established a “reasonable doubt” that the serious allegations against him were true. (Wittes, 2018)

This emphasis on institutional integrity also influenced Democrats' approach to addressing allegations of sexual assault. By embracing a presumption of deference towards accusers, Democrats acknowledged the importance of giving credibility to victims of sexual assault, without presuming guilt on the part of the accused. This stance allowed for the consideration of evidence and the progression of arguments, even if initial validation was lacking. Democrats moved beyond a binary view of guilt or innocence and instead placed the burden of proof on the credibility of the accuser and the necessity of further investigation.

The Case from the Republican Party

In contrast, Republicans framed their arguments around principles of due process and fair trials: the presumption of “innocent until proven guilty,” which maintains that the “The Burden of proof, in each case, lies fairly on the accuser” (Whately, 1963, p. 115). The standard used to adjudicate this claim is that Kavanaugh had not been convicted in a court of law and that Ford did not show he was guilty beyond reasonable doubt.

Take for example this quotation from Republican Senator John Cornyn III of Texas, which shows that the senator understands the opposite framing that Democrats are employing, but he advocates for a burden of proof that that is favorable to his position. This quote by Cornyn illustrates how burdens and evidentiary standards are corollary to the form of presumption he saw as most important. Here, Cornyn showed how the “presumption of innocence” framework looked when applied to allegations of sexual assault.

CORNYN: Some of my colleagues across the aisle say, “Well, the burden is not on the accuser because this is a job interview,” the burden is on you. . . . We insist that those charges be proven by competent evidence. And I know we’re not in a court. I’ve told my colleagues, if we were in court, half of them would be in contempt of court . . . , [but] if

somebody's going to make that accusation against you, then they need to come forward with some corroboration, not just allegations. But the burden is not on you to disprove the allegations made. The burden under our system, when you accuse somebody of criminal conduct, is on the person making the accusation. ("The Kavanaugh Transcripts," 2018, p. 706).

According to Senator Cornyn, the burden of "our system" is on the party raising allegations. Additionally, that person ought to be able to provide corroborating evidence, not just allegations. In addition, Republicans also held deference for the institution of the Supreme Court, but they believed the best way to show that deference was by highlighting institutions of the American legal system (constitutional right to due process, separation of powers into three branches of government).

In sum, by insisting on traditional notions of due process, Republicans showed respect to these American foundational institutions. Senator Grassley, Chair of the Senate Judiciary Committee, demonstrated this when he opened Kavanaugh's confirmation vote by arguing "Judge Kavanaugh was publicly accused of a crime and his reputation and livelihood were at stake. So, it was only fair that his accuser has the burden of proof, the consensus is that the burden was not met" (Grassley, 2018).

This huge gap between the two sides concerning burden of proof and presumption accounts for the phenomenon of both sides "talking past each other," and it also helps explain the high level of frustration among all of the parties. As the previous discussion illustrates, pro- and anti-Kavanaugh advocates were hindered by ideology and political expediency. They asserted vehemently why they were winning according to their "game rules," but they failed to explain to the Senate Judiciary Committee or public why their rules should be preferred over the other side. Without such rules to settle controversies or weigh arguments, the public was left to form its own opinions. With competing views of presumption and the purpose of the hearing any individual

could determine what they felt was important in order to reach the conclusion of supporting Kavanaugh or not, and this was not conducive to building a consensus.

Whately's writings provide insight into the rhetorical struggle that occurred in the Kavanaugh hearings. Whately likens presumption (and its "preoccupation with ground") to occupying space on the battlefield (1963, 112). It is impossible to cover all the ground in a war; therefore, generals determine which location to occupy. That selected location will almost always offer their troops a strategic advantage. When debaters pick their presumption, they decide which area to defend, and they place the burden to attack that location on their opposition. Focusing all of one's attention on addressing the offensive argument from your opposition opens up the possibility of losing the presumptive ground you first held. Determining what ground you preoccupy, and what ground needs to be secured for victory, offers a strategic advantage for the orator that can maintain and claim coveted ground. However, occupying presumptive ground alone does not equate to a victory since there are multiple forms. Covering the most ground does not guarantee success either as arguments can claim the ground of issues that are not relevant or pressing. Absent mutually agreed upon terms, the decision of what ground is coveted and necessary for success ultimately falls upon the judge to decide.

The standards to determine if Kavanaugh was fit for the Supreme Court would not be determined in the hearings, as both sides acknowledged there was no way to ascertain in the Senate Judiciary Committee if Kavanaugh was guilty or innocent of sexual assault charges. In sum, Republicans maintained that Kavanaugh was qualified for the Supreme Court, that he had not been convicted of any offenses, and he had an impressive record prior to the "unfounded" and "uncorroborated" allegations. Democrats and #MeToo supporters on the other hand felt that the true test would be an FBI investigation under the logic that if Kavanaugh truly was innocent

he should have nothing to hide. The overarching purpose of the hearings (to confirm Kavanaugh or not) created an intersection of competing standards, burdens, and hierarchies of presumption.

Interestingly, Whately's theories anticipated the standards Democrats would use to address Republicans' claims that another investigation was unfair to Kavanaugh and his Republican defenders. Whately explains, the argument proposing an alteration to an institution (or institutional process) "ought in fairness to prove, not merely an actual inconvenience, but the possibility of change for the better" (Whately, 1963, p. 114). Each time Republicans maintained that another FBI investigation would take more time, which would further inconvenience Kavanaugh and Ford, Democrats asked Kavanaugh to explain why "a one week pause to investigate" was more important than a lifetime appointment for a Supreme Court judge ("The Kavanaugh Hearing Transcripts," 2018).

As the hearings progressed, both sides became increasingly frustrated with one another. Whately predicted these frustrations as well, noting that deference (habitual presumption) may not be recognized by the opposition (1963, p. 119). Failure to recognize deference or presumption makes it difficult for rhetors to know what ground they need to defend, what arguments to let go of, and how to identify the "unconscious" biases and feelings of their audience (p. 119-120). Whately gives an anecdote that eerily mirrors the Kavanaugh hearings:

Let anyone imagine a perfectly unsupported accusation of some offence to be brought upon himself . . . taking on himself the burden of proving his own innocence, by collecting all the circumstances indicative of it that he can muster: and the result would be . . . that this evidence would fall far short of establishing a certainty, and might even have the effect of raising a suspicion against him . . . (1963, p. 114)

Kavanaugh's attempt to prove his innocence on his own accord resulted in showing the court handwritten calendars, yearbook comments, and testimony about Kavanaugh's love of beer—what Whately would call "collecting all the circumstances." The nature of the evidence

Kavanaugh offered in his own defense may have raised suspicions to the audience about his innocence.

Overall, each group “pre-occupied” ground that was most important to their arguments. However, with the competing claims, it was clear that groups were not looking to take the ground claimed by another. Instead, they continued to defend their own uncontested space. With no one attempting to counter the others’ presumption or shift the burden of proof in the public’s eye by explaining why their ground was superior, the groups argued past one another. Democrats and Republicans relied reflexively on their own presumptions to the extent that they never questioned how other presumptions compared or what the world might look like through the opposition’s viewpoint.

Structural Barriers to Fairness in Sexual Assault Allegations

In the present day, there are structural barriers concerning sexual assault allegations in the United States that prevent victims from reporting crimes or later participating in criminal trials. Such barriers establish a pernicious precedent for accusers who seek justice. . For many, filing a police report and subjecting themselves to rape kits can be invasive and put victims in vulnerable positions. As many as 65%-85% of sexual assault cases go unreported, and even less are tried in court (U.S. Bureau of Justice Statistics, Planty, & Langton, 2013). These cases are not adjudicated for a variety of reasons, ranging from lacking adequate proof of their claims, difficulty accruing evidence when (as in Ford’s case) sexual assaults happen behind closed doors between two private parties, or when victims do not report incidents immediately. In courtrooms, sexual assault cases are complicated by questions of hearsay and problems corroborating stories. In the United States rape and sexual assault are tried in criminal courts rather than civil courts. This means that the standard for cases of sexual assault must meet the evidentiary standard of

“beyond reasonable doubt,” not to mention the burdens of additional financial and emotional barriers victims must carry.

Presumption and Sexual Assault Allegations

The #MeToo movement used the rhetoric of #BelieveWomen to vehemently oppose Kavanaugh’s confirmation. For many in the #MeToo movement, their goal was for sexual assault survivors like Ford to be heard and her claims investigated. As Anita Hill reflected on her firsthand experience of going through the “process weaponized against the accuser” (2018), she helps to explain Ford’s situation in a *New York Times* op-ed: “Given the seriousness of these allegations, the government needs to find a fair and neutral way for complaints to be investigated. . . . If Congress decides to rush forward, to not investigate, it will be saying once again that boys are not subject to the rules of decency and humanity that ought to be expected of everyone” (2018). The frustration of #MeToo supporters was further exacerbated when three other women also came forward with sexual assault allegations against Kavanaugh, but they were shut down, along with an FBI investigation into the allegations, as well as requests to subpoena Mark Judge (the man who Ford claims was in the room laughing when Kavanaugh assaulted her) (Walters, 2018).

Those who opposed Kavanaugh’s confirmation took issue with Republicans’ explanation of why another FBI investigation was unneeded. Specifically, Democrats drew on the precedence of Clarence Thomas’ confirmation hearings and the FBI investigations conducted after Professor Anita Hill’s sexual harassment allegations. When Republicans opposed calls for a new investigation, they claimed that the FBI had already investigated Kavanaugh at least six times by June (before Ford came forward) and had not found anything about Ford’s claims. After

Democrats pushed multiple times for an impartial FBI investigation focused specifically on allegations of sexual assault levied against Kavanaugh, Republican Senator Mike Lee from Utah responded, “So, I ask my Democratic colleagues if you have questions for Judge Kavanaugh, ask him. He’s right here. If that’s really what you want is the truth, ask him questions right now” (“Kavanaugh Transcript,” 2018). Democrats replied that FBI investigations conducted before Ford’s claims and the committee’s ability to investigate were insufficient answers to the burdens placed on Republicans to prove why Kavanaugh should be confirmed.

Deference and Sexual Assault Allegations

In 1974 Sproule conducted a survey of 26 twentieth-century argumentation textbooks, and he found that nearly all of these works referred only to Whately’s early writings about presumption. This is unfortunate because Whately expanded his discussion of presumption in his subsequent writings. As it happens, Whately’s later thoughts about presumption and the psychology of audiences are particularly relevant to understanding some possible rhetorical remedies to the barriers that women face when reporting sexual assaults and seeking justice.

Legal ideology and language play a significant role in shaping a speaker's ethos, adding authority and fostering deference among audiences unfamiliar with judicial arguments. As Sproule (1976) demonstrates through his analysis of Whately, one of the biggest miscommunications that can occur around burdens and presumption is to oversimplify the term presumption and assume that there is only one. Sproule highlights the pitfalls of this monolithic view and proposes a reinterpretation to address such issues. When presumption is mistaken as an objective singular truth (for example, the erroneous assertion that all courts go by innocent until

proven guilty), it can be manipulated as a rhetorical tool for powerful leaders to make it seem like disputes have only one answer.

Whately taught the concept of presumption to illustrate how arguments can function and interact in both formal and informal settings. He believed such knowledge could help his students be more persuasive in their own careers. In order to capture the nuances of presumption, however, Whately added the concepts of “deference” (defined as “habitual presumption”), “credibility” (a source’s level of trustworthiness or believability), and “authority” (giving more credibility to certain figures, facts, and books) (1836, p. 115). When the rhetoric of “presumption” is fossilized to argue for a *singular*, universalized deference, the accusers and defenders are attempting to settle a dispute before it can be properly considered by courts or the public. More simply, the advocate who claims there is a universal form of presumption, detached from present circumstances, is dictating the terms of an argument in a way that favors their side. In reality, as previously discussed, presumption is subjective, multi-faceted, dependent on the ideas, attitudes, values and beliefs of audiences, and it should be questioned. Not questioning presumption grants authority to one side and discredits those who would oppose it.

Given this framing, can an unreported sexual assault ever be considered credible? Was there any evidence Ford could have produced to meet the standard Cornyn set? If the answer is no, then this raises a broader question: what is the purpose of bringing forth sexual assault allegations against public figures? Is there value in speaking out if the legal system cannot provide a conviction? Beyond legal standards, does the absence of explicit procedural rules create opportunities for persuasion to play a larger role? This shift in focus moves the discussion from strict legal burdens to rhetorical influence, opening the conversation to broader considerations of credibility and justice.

Whately's concept of deference explains how habitual presumptions—whether legal or cultural—shape arguments and limit debate. However, Whately's theories also explain that definitions of presumption and burden of proof are changeable and ultimately must respond to the ideas, values, attitudes and beliefs of the public. As social movements like #MeToo influence public attitudes about how victims of sexual assault can bring charges against their assaulters and seek justice, public opinion will need to be considered in future sexual assault allegations along with and concepts of presumption and burden of proof.

Presumptive Lenses

Whately described theories of presumption, each with its own respective burdens. Of those, Republicans and Democrats matched two of the centuries-old game rules, in terms of how the arguments were defined and operated under presumption and burdens of proof. Although Whately described these rules, he did not explain in detail how orators could succeed in disputes with multiple forms of presumption belonging to each side. In this thesis, as a means of extending Whately's concepts, I offer the notion of multiple "presumptive lenses." As demonstrated in my analysis of the Kavanaugh hearings, on issues of sexual assault and political power, antagonists adopted whatever version of presumption supported their ideological goals. Indeed, particular definitions of presumption strongly colored how Democrats, Republicans, and the #MeToo movement interpreted the nature of the dispute, the character of their opponents, and the fairness of the proceedings. Hence, these insulated, silo-like versions of presumption functioned as a kind of ideological filter.

In the Kavanaugh hearings, the two major sides were frustrated with each other because they believed their standard for judging guilt was self-evident and widely accepted. For example,

the #MeToo advocates assumed that their presumption (believe her) was beyond dispute. Democratic senators, mostly aligned with the #MeToo movement, similarly believed that a person accused of sexual assault could not possibly be qualified to be a Supreme Court Justice. With equal fervor, the defenders of Kavanaugh were certain about the traditional standard of innocent until proven guilty. To put it in the terms that Whately used, the two sides believed they had gained ground on the rhetorical battleground of the confirmation hearing, but, because there was no agreement on coveted land or battles won, the arguments lay wasted on the hearing room floor.

As a result of this lack of engagement, it is understandable how Democrats, Republicans, and the supporters of the #MeToo movement thought their arguments were “winning.” They believed presumption was on their side. In some ways they were correct. They did have a piece of presumption on their side. However, they did not account for Whately’s observation that multiple presumptions can exist at once, even in the minds of a single audience member. As Whately predicted, deference, or habitual presumption, is “apt to depend on feelings; often, on whimsical and unaccountable feelings” (1963, p. 120). These multiple forms of presumption are difficult to identify because the person might not consciously recognize one form, let alone multiple forms (Whately, 1963, p. 121). This becomes even more complicated when we remember that Whately recognizes that logic sometimes fails to win the hearts and minds of audiences. Often thoughts, feelings, and emotions prevail over logic.

In the Kavanaugh hearings, there was some effort to compare why presumptive frames ought to be preferred. For example, some Republicans engaged with the Democratic framework of a job interview determining if Kavanaugh was the “most qualified” Supreme Court nominee. However, there was no explicit comparison to ground the arguments on the same plane.

Therefore, in the absence of clear criteria for evaluation, , the public was left to choose which form of presumption was most important to them. Using the same legalese as “burdens,” “precedent,” and “standards” can confuse audiences and elicit genuine frustration from groups that reach two different conclusions, while viewing the same dispute. In the case of the Kavanaugh hearings, the respective sides, those for confirming Kavanaugh and those against, may have felt the other was purposefully ignoring the argumentative burdens placed on them by the other side. The lack of precise definitions of terms or jury-instruction-style explanations of the proceedings, laws, and game rules meant that each participant was playing by their own rules.

The concept of “presumptive lenses” acknowledges the breakdown in communication that occurs when opposing parties talk past one another. It regards presumption as a useful tool for identifying and evaluating the argumentative clash between antagonistic parties. However, rather than just serving as a tool for winning a debate, I propose that a broader view of presumption could be used as a tool for reducing misunderstanding, promoting more productive argumentative engagement, and providing an accessible tool to improve the critical thinking skills of public audiences. Indeed, to echo Kenneth Burke, “presumptive lenses” could be a valuable part of “equipment for living” (Burke, 1973). Moreover, I contend that viewing the world through “presumptive lenses” could lead to rhetorical awareness that might improve the quality of civic discourse. In addition to being a proven tool for swaying juries and winning verdicts in judicial settings, presumptive lenses could also be used to foster greater understanding of what motivates argumentative opponents. A more sophisticated and ethical appreciation for the importance of presumption could possibly encourage rhetorical antagonists to explain their positions more clearly to each other, to juries, judges, and to public audiences. Finally, viewing

the world through presumptive lenses might help ensure that each side's definition of presumption is reasonable and resonates with their constituents, as well as the general public.

The concept of presumptive lenses recognizes that others may see the world in very different ways. Introspectively focusing on how arguments are framed and grounded has the potential to promote more productive engagement. Identifying and publicly voicing presumptive lenses may offer an alternative to the popular tactic of demonizing the other side. In theory, presumptive lenses give all parties in a conflict the benefit of the doubt. For example, a group may genuinely have not recognized a burden placed on them (Whately refers to this situation as when "deference is not recognized by either party" (1963, p.119)). Whether a presumptive lens is used defensively to avoid other groups reframing one's argument (as seen with the #BelieveWomen and "guilty until proven innocent" claims), or proactively as a means of comparing different groups perspectives and their corollary forms of burdens, presumption, and standards, to appeal directly to a judge to adopt one's standards and framework, these tools can teach a participant how the rules of the game operate, so they can decide their strategy.

Chapter 4: Conclusion

Whately believed the purpose of rhetoric was to persuade. Typical of his day, Whately's lessons were best suited for oral arguments and formal speaker-audience formats, with the give-and-take of live debate. Despite a 188-year gap in time, Whately's theories are still useful for understanding contemporary rhetorical conflicts. Whately directly addresses the importance of credibility, testimony, and facts when evidence is lacking, as was the case in the Kavanaugh hearings. Moreover, as I have discussed, Democrats, Republicans, and the #MeToo movement

invoked (however unconsciously) Whately's central concepts of presumption and burden of proof.

One of Whately's less-famous ideas deserves more attention: the concept of "deference." Whately defined deference as "a habitual presumption or appeal to authority which grants credibility to books, figures, concepts for rational or irrational reasons." (Walton & Kosowy, 2018 p, 192; citing Whately, *Elements of Logic*, 1846, p. 118). However, a careful reading of Whately recognizes that notions of deference are not invariable, prescribed game rules, but, rather, responsive to changing circumstances. In accordance with Richard Whately's view on the psychological foundations of rhetoric, rhetors should recognize that each individual has their own values, beliefs, and attitudes. These perceptions inevitably influence what a person gives deference to, and how a person interprets the nature and winner of a dispute. Sproule (1976) supports the contention that Whately's theories were/are not fossilized but designed to be flexible and to consider changing circumstances.

As I have argued, it would be a mistake to dismiss Whately's rhetorical concepts as outdated or irrelevant. Whately's theories are valuable for three main reasons: (1) as a critical tool for understanding what happened (and why) in complex rhetorical exchanges such as the Kavanaugh hearings; (2) as a handbook for providing strategies for winning such debates; (3) as a lens for reducing misunderstanding in bitter persuasive conflicts. It is important to note, however, that these three reasons are not mutually exclusive. Seeking to understand how and why a debate unfolded in a certain way, a kind of rhetorical postmortem, contributes to our inventory of effective rhetorical techniques and provides possible avenues for more civil, productive communication. For the same reason, awareness of how to reduce misunderstanding could help to comprise winning strategies in public controversies. Overall, I conclude that

analyzing Whately's theories and the Kavanaugh hearings together creates a kind of critical synergy, resulting in a greater understanding of both topics. In other words, Whately's theories and the Kavanaugh hearings illuminate each other and yield insight into the roots of rhetorical conflict.

Rhetorical Postmortem

Whately is relevant and useful as a tool for conducting a rhetorical postmortem of a complex debate or complicated oral argument. As my analysis of the Kavanaugh hearings demonstrates, different beliefs about presumption and burden of proof contributed to a hostile, divisive exchange that left both sides frustrated and the public angry and confused. There was very little acknowledgement of multiple understandings of presumption or burden of proof. At the same time, there was no clear understanding of a reasonable metric or standard for undecided people to judge the winner. In addition, Whately's concepts call attention to the existence of multiple audiences in contentious judicial settings. Two of the audiences were the Democratic and Republican senators on the Senate Judiciary Committee. A third audience was the wider public, including proponents of the #MeToo movement, which were watching the hearings as they were broadcast.

As previously discussed, Republican senators focused on the traditional, legal concept of presumption of innocence, which appealed to the legal expertise of the other voting senators on the committee. Democrats, on the other hand, framed their arguments around institutional integrity, aiming to resonate with voters and the broader public. They asserted that Kavanaugh's confirmation should be treated like a job interview for a position to which he wanted to be promoted. These rhetorical strategies employed by opposing sides highlight the radically different perspectives through which the hearings were interpreted.

Whately as a Handbook for Winning

Whately's theories are still relevant in their usefulness as a rhetorical handbook for teaching winning techniques and strategies. As a teacher, Whately emphasized preparing his students to be successful advocates in the public, rhetorical arena. In short, he taught them how to adapt their discourse to different circumstances in order to win arguments. Much of what he taught in the nineteenth century is still applicable today, as illustrated by the Kavanaugh hearing.

Most importantly, Whately consistently advises rhetoricians to adapt arguments to the ideas, values, beliefs, and attitudes of the judge (in the courtroom setting) and, just as importantly, the various public audiences. In this Aristotelian approach, the most effective arguments will be based on criteria (standards) that already exist in the minds of the audience and/or judge. In a muddled argumentative conflict, Whately believed, the orator should cater to the audience's beliefs about presumption and make these concepts clear. The public's notions about who has the burden of proof supersedes a rigid, unchanging rule in a textbook. If necessary, openly and specifically explain to the judge and/or public why your side has presumption, and why your opponents have the burden of proof to win the verdict they are advancing. Using Whately's advice, the rhetor should focus on getting the audience or judge to agree with the general framework first, instead of getting stuck in the details of a line-by-line refutation of the facts of the case. Given this advice, all of the rhetorical combatants in the Kavanaugh hearing would have failed Whately's class on rhetoric.

For this reason, audiences should not be treated as passive recipients of information or given false dichotomies to choose between (e.g., innocent guilty/guilty innocent). This precise situation occurred often in the Kavanaugh hearings. Rhetors should recall that everyone has their own values, beliefs, and attitudes. These individual views inevitably frame how a person

interprets the nature of a dispute (e.g., the Kavanaugh hearings as a job interview, a trial, or to assess whether more investigation was needed) and subsequently the winner of a dispute. As shown in the Kavanaugh hearings, on an issue of sexual assault, much of the American public did not abide by party lines or respect traditional notions of presumption. Recognizing and acknowledging what perspective one's target audience has is important because it facilitates aligning their (invisible or hidden) presumption with one's arguments.

Based on my analysis of Whately and the Kavanaugh hearings, I have extrapolated some additional rules that operated in the Kavanaugh hearings and that may serve as useful advice for future hearings: Do not spend too much time pressing a point you are already winning (Whately, 1963, p. 114). Allow a proposition regarding presumption to temporarily stand (on the condition that the evidence will be held up to scrutiny later) because it might be the other party attempting to answer their burden of proof, if you limit responses and lack comparative frames for your audience, your discussion may stagnate or lack clash. In the case of the Kavanaugh hearings, Mark Judge should have been subpoenaed as the other person in the room. Arguments move (are more productive), when two sides engage each other clearly and directly. In debate circles, this is called "clash." Specifically, when rhetorical antagonists clash honestly on the issue of who has the burden of proof, arguments move forward towards resolution. If arguments are stale or repetitive, that is a bad sign. It is a symptom of a debate where the participants are "talking past each other." This makes rendering a verdict more difficult, and, at the same time, it leaves the public confused about the outcome.

Presumptive Lenses

Whately's theoretical framework, if used properly, has the potential to reduce misunderstanding and improve the quality of civic discourse. The essence of "presumptive

lenses” is to foster a practice in which all parties in a debate try to identify their opponents’ understanding of presumption and burden of proof, to discuss it respectfully, and to honestly compare it to their own. The goal for the argumentative process is transparency for the rhetorical opponents, the judge, and the general public. Such a practice follows in the general direction of I.A. Richards, who, in 1936, framed rhetoric as “a study of misunderstanding and its remedies.”

In my analysis of the Kavanaugh hearings, I explained how the rhetorical antagonists relied on emotional appeals and often failed to articulate their presumption and burden of proof standards clearly. Democrats, Republicans, and the #MeToo movement made opposing claims with apparent certainty and lack of regard for the reasoning of their opponents. The result was confusion and misunderstanding. Whately's theories offer a potential remedy by advocating for greater transparency regarding these rhetorical standards, which could lead to more civil debate and a deeper understanding of the key issues at stake. In addition, if Whately’s concepts were broadly known and accepted, they may have helped the undecided members of the audience understand why the various parties were not listening to each other or speaking directly to the various audiences. As public discourse becomes increasingly polarized, the need for clarity, empathy, and civility becomes ever greater.

Whately’s Lasting Legacy

Whately based his lessons on rhetoric from observing the discourse of his day. While those details have changed over time, his method is sound. Whately believed that all arguments have shared structures, and watching these shared structures over time can show patterns. As Whately taught his students, it is not enough to simply state the facts of the case. These facts needed to be organized into structures that will convince judges and various involved audiences. The notions of presumption and burden of proof provide the foundation for compelling

arguments concerning the responsibilities of attackers and defenders, as well as what constitutes good reasons. In the case of Whately, good rhetoric is an explanation of reasoning through a presumptive framework so that audiences, juries, and judges can decide for themselves.

Whately's nineteenth-century writings predicted some of the things that occurred during the Kavanaugh hearings. For example, he understood that debates likely would result in bitter reactions when orators failed to recognize or respect presumption and burden of proof. Overall, my thesis suggests that transparency in these rhetorical strategies may well have altered the trajectory of the Kavanaugh hearings by reducing confusion and sharpening the focus of public discourse.

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