

## ***Genera causarum* and the burden of proof**

### ***Genera causarum* y el peso de la prueba**

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**Abstract:** This paper revisits the theory of the three speech genres that are best known as *genera causarum*. It shows that although the *genera causarum* are one of the most successful elements of classical rhetoric, they are notoriously under defined. There are at least six different ways of distinguishing the genres from each other, each of which leads to different results. This constitutes a problem for the main purposes of the concept as a systematic, pedagogical, evaluative or heuristic tool. It is claimed that this problem can be solved by either giving clear preference to one definition of speech genres only or by adapting the way of referring to each genre. In the former case it is argued, that instead of using any of the six classical attempts to defining *genera causarum*, one might instead turn to modern argumentation theory and use the concept of the burden of proof to distinguish more clearly between three similar speech genres.

**Keywords:** Burden of proof, presumptions, speech genres, *genera causarum*, rhetoric.

**Resumen:** Este trabajo repasa la teoría de los tres géneros discursivos que es mejor conocida como *genera causarum*. Muestra que a pesar de que *genera causarum* es uno de los elementos más exitosos de la retórica clásica, está notoriamente mal definida. Hay al menos seis formas diferentes de distinguir los géneros, cada una de las cuales arroja resultados diferentes. Esto constituye un problema para el propósito de que el concepto se vea como una herramienta sistemática, pedagógica, evaluativa y heurística. Se arguye que este problema puede resolverse dando solo una clara preferencia a la definición de géneros discursivos o adoptando la forma de referirse a cada una de los géneros. En el primer caso se arguye que en vez de usar alguno de los seis intentos clásicos por definir *genera causarum*, uno podría usar la teoría de

la argumentación moderna y el concepto de peso de la prueba para distinguir más claramente entre tres géneros discursivos similares.

**Palabras clave:** Peso de la prueba, presunciones, géneros discursivos, *genera causarum*, retórica.

## 1. Aim

The theory of the three speech genres or *genera causarum*<sup>1</sup> in classical rhetoric is one of the most well-known and influential remains of ancient rhetoric. Eugene Garver refers to the *genera causarum* as “(...) one of the few features of Aristotelian rhetoric that his successors have noticed and developed” (Garver 2009, p. 1). The success of the *genera causarum* as one of the basic dimensions of classical and modern rhetoric (alongside concepts like the modes of persuasion, the *partes orationis* and the *officia oratoris*) can hardly be disputed. The basic division of speech genres is of central importance for systematic, pedagogical, evaluative and even heuristic reasons: the *genera causarum* are one of the most important, if not *the* most important, dimensions of structuring the rhetorical art. Nearly all extant ancient rhetoric textbooks use the *genera* as one of their main dividers. Accordingly, the *genera* are also helpful in teaching the art in an organized manner to new students and allow for a clearer understanding of rhetorical rules for a given task. Understanding speech genres is also a pivotal prerequisite for the analyst in trying to evaluate whether a particular speech fulfills or exceeds the expectations under the given circumstances. And, finally, knowing which *genus* applies to a speech situation may help the practical orator to compose an adequate speech. Given the significance of the *genera causarum* to many aspects of rhetorical theory it is surprising that relatively little attention has been paid so far to the details of their definition and distinction. It is usually readily assumed that in speaking of ‘the’ *genus iudiciale* (forensic genre), ‘the’ *genus deliberativum* (deliberative genre) or ‘the’ *genus demonstrativum* (epideictic genre), we refer

<sup>1</sup> The term “genus causarum” is used for different purposes in various classical texts. In this paper it refers exclusively to the three rhetorical genres (genus deliberativum, genus iudiciale and genus demonstrativum).

to a well-defined and distinct concept. It is the purpose of this paper to critically revisit this assumption, address two common misconceptions, and offer an additional suggestion for the use of the concept of the *genera causarum* in modern rhetoric. The first (minor) asserted misconception is the occasionally advocated belief<sup>2</sup> that the three Aristotelian *genera* are an incomplete selection of speech genres that stand next to a potentially unlimited amount of more or less specific occasions. It will be argued here that, on the contrary, the concept of the *genera causarum* should be understood as exhaustive within the larger genre of persuasive speeches and that there is ample evidence in Aristotle's writings for this point of view. The second (larger) asserted misconception addresses the definition of the *genera* themselves. It will be held that, contrary to common belief, the three speech genres are *not* well-defined and that speaking of 'the' *genus iudiciale* (as opposed to 'this version' of the *genus iudiciale*) is significantly misleading. In order to analyze each genre and illustrate problems in their distinction we will introduce a number of real life speech situations and apply the concept of the *genera* to each of them. The purpose is to show how, depending on which of the alternative definitions of the *genera* one uses, the particular speech situation will be considered an instance of a different genre. Finally, the classical definitions of *genera causarum* will be contrasted with a modern alternative based on the concept of the burden of proof of the proponent. It will be argued that dividing speech genres based to their burden of proof might lead to a better defined and more practical division of modern *genera causarum*.

## **I. 2. The *genera causarum* are an exhaustive concept**

At the beginning of Rhetoric I. 3, Aristotle introduces his well-known division of rhetoric into three *genera causarum* according to a number of distinguishing criteria. It seems to be rather evident that this division is meant to be exhaustive. However it has occasionally been claimed that all Aristotle is trying to provide here is a selection of the most important

<sup>2</sup> Garver 2009; comp. also Quint. Inst. Orat. III, 4.

or paradigmatic genres, beyond which an practically unlimited number of further kinds could exist.<sup>3</sup> Since much of the following analysis in this paper depends on the assumption that the *genera causarum* are indeed an exhaustive concept, this (minority) opinion should be addressed here first.<sup>4</sup> Two main arguments point to the understanding of the *genera causarum* as an exhaustive concept: the language Aristotle uses in introducing and describing them and the quality of the divisions themselves. Aristotle opens this section with the statement: “*The species [eide] of rhetoric are three in number; for such is the number [of classes] to which the hearers of the speech belong.*”<sup>5</sup> This division of a main *genus* into its species is one that we find at a number of central places within his rhetoric. Among them are some of the most famous divisions such as the division of the artificial proofs into the three *pisteis entechnoi* (*ethos*, *logos* and *pathos*),<sup>6</sup> the division of *logos* into *enthymeme* and *paradeigma*,<sup>7</sup> the division of the *paradeigma* into its two kinds (historical or fictional)<sup>8</sup> and the division of the *enthymeme* into its two main species (*eikos* and *sêmeion*).<sup>9</sup> There is little or no doubt that all of these divisions are introduced as necessary and exhaustive and in some instances Aristotle even explicitly repeats that fact. It is hard to see then why a similarly central division, explained in similar language, should be treated differently, especially given the fact that Aristotle indicates at no place throughout his entire rhetoric the existence of further *genera*. But even if neither his wording nor his silence about other

<sup>3</sup> Comp. esp. Garver (2009, p. 15): “The three kinds of rhetoric are nobler than the rest of rhetoric because they are more rational and more civic, and deliberative rhetoric stands to judicial rhetoric as all three kinds stand to the rest of rhetoric.”; see also Quint. Inst. Orat. III, 4.

<sup>4</sup> This is of additional importance because the history of rhetoric has indeed in a way sided with Garvers point of view by introducing additional genres (such as homiletics or epistolography) in subsequent centuries. That this is a deeply un-Aristotelian approach and probably not helpful for the consistency of rhetorical theory will be addressed by the arguments below. For Quintilians arguments against this approach comp. Quint. Inst. Orat. III, 4.

<sup>5</sup> Arist. Rhet. 1358a, trans. G. Kennedy.

<sup>6</sup> Arist. Rhet. 1356a.

<sup>7</sup> Arist. Rhet. 1356a/b and 1393a.

<sup>8</sup> Arist. Rhet. 1393a.

<sup>9</sup> Arist. Rhet. 1357a. These are later further subdivided and there are some inconsistencies in Aristotle’s treatment. While this lack of consistency might raise doubts towards a *categorical* reading of this division, it does not indicate a lack of exhaustiveness of the division in Aristotle’s eyes. Also Hoppmann (2008b, pp. 632ff).

potential *genera causarum* would be sufficient for a proof that the *genera causarum* are introduced as an exhaustive concept, the quality of the divisions themselves is. The first division Aristotle introduces is according to audience (and time): “Now it is necessary for the hearer to be either an observer [*theôros*] or a judge [*kritês*], and [in the latter case] a judge of either past or future happenings. A member of a democratic assembly is an example of one judging about future happenings, a juror an example of one judging the past. An observer is concerned with the ability [*dynamis*] [of the speaker]. Thus there would necessarily be three genera of rhetorics: *symbouleutikon* [“deliberative”], *dikanikon* [“judicial”], *epideiktikon* [“demonstrative”].<sup>10</sup> Note that both distinguishing criteria (audience and time) are necessarily exhaustive. An audience member can only either have the power to make a decision or cast a vote on the matter (*kritês*) or not (*theôros*). There is no reasonable third option. Similarly decisions can only be made about past or future events.<sup>11</sup> Note further that Aristotle here (for reasons discussed below) does not *equate* assembly speeches with the deliberative genre or speeches in front of the court with the judicial genre, but rather names them as mere examples. Garver names three clear examples of persuasive speeches which according to his view, do not fall under any of the Aristotelian *genera*: a) a doctor persuading a patient to take the medicine, b) a physicist persuading an audience to spend money on building a missile defense system and c) a preacher attempting to give hope to an audience.<sup>12</sup> While neither of these instances is necessarily an assembly speech, all three are attempts to persuade an audience of *kritês* that can make a decision about the future, i.e. a) “Yes, I will take my medicine,” b) “Yes, we should spend my tax money on the system,” and c) “Yes, I will live my life under the assumption of a potential life after death.” Even those alleged counterexamples to the exhaustiveness of the *genera causarum* thus fail to provide a sufficient argument against treating the Aristotelian concept as exhaustive.

<sup>10</sup> Arist. Rhet. 1358b, trans. G. Kennedy.

<sup>11</sup> While there would be the grammatical option of “present” events, it will be safe to assume that (contrary of their occasional didactical use to mark the third genus in Aristotle and later theorists) all deliberation about such events will be dominantly influenced by considerations about past or future.

<sup>12</sup> Garver (2009, p. 6).

### II. 3. The *genera causarum* are not well-defined

Thus far, the three *genera causarum* appear to be fairly well defined concepts. Speeches are given either in front of an audience that makes no decision about the subject matter<sup>13</sup> (*genus demonstrativum*) or in front of an audience with the power to judge. If the latter is the case, then the audience either decides about future events (*genus deliberativum*) or past happenings (*genus iudiciale*). However, this original Aristotelian approach of distinguishing the three speech genres based on types of audience is not the only, and probably not the most influential, division of the *genera causarum* in rhetorical theory. Aristotle himself already indicates alternative criteria for that taxonomy; in his rhetoric they are still partially marked as secondary and illustrative, thus largely avoiding the theoretical inconsistency. But even he later drops this caution and equates different forms of defining the *genera causarum* as if they lead to the same results. In Aristotle's *Rhetoric* and Quintilian's *Institutio Oratoria* alone we find no fewer than six independent criteria for distinguishing the three *genera causarum* without a single word of caution that, depending on which criterion one uses, the result will be vastly different. Accordingly it would be mistaken—as is usually done in classical and modern rhetorical theory—to speak of 'the' *genus iudiciale* or 'the' *genus deliberativum*. Rather, one should speak of 'this version' of the *genus iudiciale* or *genus iudiciale* 'according to criterion x'. All of the above indicated purposes of the *genera causarum* (systematic, pedagogical, evaluative and heuristic) require a well-defined theory to be a useful tool.

To further illustrate the point and develop a systematic analysis of the different approaches to the *genera causarum*, we will look at a set of exemplary speech situations and show how they can be subsumed under different *genera* depending on the kind of distinguishing criterion one uses.

<sup>13</sup> They might still make decisions about the speaker, but that is a different kind of decision.

### Sample cases:

- A) *First standard case*:<sup>14</sup> O. J. Simpson's defense in his murder trial.
- B) *Second standard case*: The German parliamentary debate on moving the seat of federal government from Bonn to Berlin.
- C) *Third standard case*: Isocrates' praise of Helen.
- 1) *Cicero: Pro Murena 80-85* – Cicero defends Murena in court based on the argument that he will be needed as a consul for the people and that convicting Murena now would thus do significant political harm.
  - 2) *Isocrates: Areopagiticus* – Isocrates gives advice about Greek politics in a speech that was written mainly as a display piece for his students and not intended to be publicly performed in front of a decisive audience.
  - 3) *Plato: Apology* – Plato uses the historical trial of Socrates as a reference point for his own fictional defense of his teacher.
  - 4) *Modern moot court competition speech* – a competitor in a moot court defends a fictional accused in order to win a rhetorical or legal competition.
  - 5) *WUDC debating competition* – a student argues for or against a proposed fictional law or policy in order to win a round against three other debating teams.

The first three standard cases (A, B, C) are chosen to illustrate the kind of speech events that Aristotle and his followers must have envisioned when writing about the *genera causarum*. They can be firmly linked to one *genus*, independently of the distinguishing criterion one uses. They do however constitute a small (if paradigmatic) minority of real life speech events. All of the remaining cases listed can be subsumed under different *genera* depending on the criterion employed.

<sup>14</sup> For easier reference in the text below, standard cases are referred to with letters and non-standard cases with numerals.

There are six entrenched criteria for distinguishing between the three *genera causarum* in the main works of classical rhetoric.<sup>15</sup> These are based on: a) audience, b) time, c) place, d) rhetorical *telos*, e) oratorical activity and f) certainty of the case.

a) Audience: The first criterion for distinguishing between the three genres has already been mentioned above and can be found in Aristotle, Cicero and Quintilian.<sup>16</sup> Speeches are delivered in front of an audience that either makes a substantive decision or not (*genus demonstrativum*). If the former, then it makes decisions about past events (*genus iudiciale*) or future happenings (*genus deliberativum*).

b) Time: This criterion is mainly used by Aristotle but appears as a secondary criterion also in Cicero and Quintilian. Aristotle writes: “Each of these [species] has its own “time”; for the deliberative speaker, the future (for whether exhorting or dissuading he advises about future events); for the speaker in the court, the past (for he always prosecutes or defends concerning what has been done); in epideictic the present is the most important; for all speakers praise and blame in regard to existing qualities [...]”.<sup>17</sup> The advantage of this criterion is its great simplicity, but this advantage comes at the price of a rather doubtful identification of the *genus demonstrativum* with the present as focal time. Based on this advantage this version of the *genera causarum* has been rather successful in modern textbooks.

c) Place: Like the distinction based on types of audience, this criterion requires two steps, in this case location and time. While others do frequently refer to paradigmatic locations (court, senate, forum), only Quintilian uses the location as an independent criterion. He states: “Thinking it all through, another principle also occurs to me, namely

<sup>15</sup> I.e. those that are concerned with the divisions of rhetoric in classical times, esp. Aristotle: *Rhetoric*, the *Rhetorica ad Alexandrum*, the *Rhetorica ad Herennium*, Cicero: *De Inventione*, Cicero: *Partitiones Oratoria* and Quintilian: *Institutio Oratoria*.

<sup>16</sup> Arist. *Rhet.* 1358b2–9; Cic. *Part. XX* (69); Quint. *Inst. Orat.* III, 4, 6.

<sup>17</sup> Arist. *Rhet.* 1358b2ff., trans. G. Kennedy.

*that the whole task of oratory must be either in court or not in court. The 'kind' of the questions which arise in court is obvious; those which do not come before a judge must relate either to the past or to the future. We praise and denounce the past, we deliberate about the future.*<sup>18</sup> In other words, *genus iudiciale* is defined as speeches in court, *genus deliberativum* as speeches outside of court and about the future and *genus demonstrativum* as speeches outside the court and about the past.

d) *Telos*: This Aristotelian criterion for distinguishing between the *genera* is openly criticized by Quintilian<sup>19</sup> who considers it imprecise. Aristotle explains: “*The 'end' of each of these is different, and there are three ends for three [species]: for the deliberative speaker [the end] is the advantageous [sympheron] and the harmful (for someone urging something advises it as the better course and one dissuading dissuades on the ground that it is worse), and he includes other factors as incidental: whether it is just or unjust, or honorable or disgraceful; for those speaking in the law courts [the end] is the just [dikaion] and the unjust, and they make other considerations incidental to these; for those praising and blaming [the end] is the honorable [kalon] and shameful, and these speakers bring up other considerations in reference to these qualities.*”<sup>20</sup> The *telos* for the *genus deliberativum* is the advantageous (and its opposite), the *telos* for the *genus iudiciale* is the just, and the *telos* for the *genus demonstrativum* is the honorable.

e) *Activity*: Somewhat related to the criterion of *telos* is the criterion of activity the orator engages in. This is probably the most widely used criterion. It can be found already in the *Rhetorica ad Alexandrum* as well as in Aristotle, the Auctor ad Herennium, Cicero and Quintilian.<sup>21</sup> Aristotle describes it as follows: “*Deliberative advise is either protreptic [‘exhortation’] or apotreptic [‘dissuasion’]; for both those advising in private and those speaking in public always do one or the other of these. In the*

<sup>18</sup> Quint. Inst. Orat. III, 4, 6-8, trans. D. Russell.

<sup>19</sup> Quint. Inst. Orat. III, 4, 16.

<sup>20</sup> Arist. Rhet. 1358b21ff., trans. G. Kennedy.

<sup>21</sup> Rhet. ad Alex. 1421b7-17; Arist. Rhet. 1358b9-14; RaH I, 2; Cic. De Inv. I, 7; Quint. Inst. Orat. III, 4, 15.

*law courts there is either accusation [kategoria] or defense [apologia]; for it is necessary for the disputations to offer one or the other of these. In epideictic, there is either praise [epainos] or blame [psogos].*<sup>22</sup>

- f) Certainty: The final criterion to be discussed here is, like the one based on place, particular to Quintilian. Also like that criterion it needs two steps to arrive at a *genus*. Quintilian writes: “Again, everything on which we have to speak must be either certain or uncertain. We praise or blame what is certain, according to our individual inclinations; as to the uncertain, it is either a matter of our own free choice, and this is a subject for deliberation, or else it is something left to others to decide, and then it forms the subject of litigation.”<sup>23</sup> In other words, *genus demonstrativum* pertains to speeches on topics that are certain, *genus deliberativum* to those that are uncertain and for one self to decide, and *genus iudiciale* to those that are uncertain and for others to decide. This criterion is probably the most problematic of all given the vague nature of what Quintilian refers to as certainty<sup>24</sup> and the assumption that anybody speaking in front of a deliberative body must be a dominant member of said body. There are probably good reasons that the last criterion in our list is hardly known and has enjoyed no significant influence on or in the history of rhetorical theory.

Having as many as six alternative definitions of the *genera causarum* is not *per se* a bad thing, and certainly not sufficient to show that the concept as such is not well defined. If all six (or even the most important three or four) led to the same result, then one could choose whatever criterion seems the best in the given context and still always reach dependable and theoretically satisfying results. This is not the case, however. The only cases in which it makes no difference how one defines the speech genres are the comparatively rarely occurring standard cases for which A), B) and C) above are examples. In the vast majority of real life cases, using different criteria will lead to different results. The table below indicates the changing

<sup>22</sup> Arist. Rhet. 1358b9ff, trans. G. Kennedy.

<sup>23</sup> Quint. Inst. Orat. III, 4, 8, trans. D. Russell.

<sup>24</sup> Under a benevolent interpretation of his criterion. If one was to take “certain” in a narrow sense then this criterion would immediately lead to nonsensical results.

relationships between our sample cases and the *genera causarum* in their different variants.

Table 1. Defining criteria for the *genera causarum*.

Defining criteria	<i>genus iudiciale</i>	<i>genus deliberativum</i>	<i>genus demonstrativum</i>
<b>Audience</b>	→ judges → about the past <b>cases: A, 1</b>	→ judges → about the future <b>case: B</b>	→ observers <b>cases: C, 2, 3, 4, 5</b>
<b>Time</b>	→ past <b>cases: A, 3, 4</b>	→ future <b>cases: B, 1, 2, 5</b>	→ present <b>case: C</b>
<b>Place</b>	→ in court <b>cases: A, 1</b>	→ outside of court → future <b>cases: B, 2, 5</b>	→ outside of court → past <b>cases: C, 3, 4</b>
<b>Telos</b>	→ just & unjust <b>cases: A, 3, 4</b>	→ advantageous & harmful <b>cases: B, 1, 2, 5</b>	→ honorable & shameful <b>case: C</b>
<b>Activity</b>	→ accusation & defense <b>cases: A, 1, 3, 4</b>	→ exhortation & dissuasion <b>cases: B, 2, 5</b>	→ praise & blame <b>case: C</b>
<b>Certainty</b>	→ uncertain → for others to decide <b>cases: A, 1, 3, 4, 5</b>	→ uncertain → our free choice <b>cases: B, 2</b>	→ certain <b>case: C</b>

Note how all of the non-standard (i.e., ordinary) cases will change their *genus* depending on which criterion one uses for distinguishing the *genera*. In extreme cases such as sample case 5, the same speech event will even be subsumed under different versions of all three *genera*. The very same academic debating competition will thus be an instance of *genus iudiciale* (because the case is uncertain and for others to decide), of *genus deliberativum* (because it deals with the future, is held outside the courts, deals with the advantageous and harmful and engages in exhortation or dissuasion) and of *genus demonstrativum* (because the adjudicators do not make substantive decisions on the topic but merely evaluate the performance of

the speakers). It will of course be readily conceded that there will always be cases that can be attributed to different genres in different sections,<sup>25</sup> or cases that have different primary and secondary functions. However, if the same aspect of the same case randomly falls under two or three different genres based solely on issues in their definition, then it renders the concept of *genera* in total meaningless. In order to save the *genera causarum* for rhetorical theory under the given problems, one should thus either refer more precisely to a specific variant of the genre in each circumstance (e.g., “Plato’s Apology is an instance of the *genus demonstrativum*<sub>audience</sub>” or “Plato’s Apology is an instance of the *genus iudiciale*<sub>telos</sub>”) or else make a decision about which of the above criteria is superior and should be decisive.<sup>26</sup>

### III. 4. Burden of proof as alternative for the definition of speech genres

From a theoretical point of view, naming the specific variant of a genre whenever one uses the *genera* is probably the better option. Yet, unfortunately, unless one specializes in the details of rhetorical genres or the history of the *genera causarum*, it will often be necessary to accept certain time and space restraints. In other words, theoretical economy will often mandate making a decision in favor of just one dominant criterion for the version of *genera causarum* one wishes to employ. In that case, most of the six criteria have some quality to commend them. While the audience-based criterion, for example, is very clear and complete but rather complex to explain (due to its two-step approach; see above), the time-based criterion is particularly simple but leads to a very vague understanding of the relationship between the demonstrative genre and the present tense. Ultimately, picking *any* criterion for the purpose of dividing rhetoric into three (or more) genres is an arbitrary choice. Different criteria will lead to different results and most of those results will be of *some* help, given theoretical

<sup>25</sup> Take, e.g., Pericles’ so-called Funeral Oration in Thucydides, which starts off as a regular eulogy but in later parts clearly shifts into the deliberative genre.

<sup>26</sup> While Aristotle and Quintilian present their criteria in a certain order, neither of them seems to see the need to prioritize one over the other in cases of conflict of categorization.

purposes. In order to function optimally, however, a criterion should lead to simple, unambiguous, and exhaustive results. It will be argued in the remainder of this paper that instead of employing *any* of the classical variants, one might be better advised to turn to modern argumentation theory for a contemporary approach to the *genera causarum*.

To fully appreciate the virtues of any approach to dividing rhetorical situations into genres it will be helpful to briefly reconsider the main reasons for this division: the systematical, pedagogical, evaluative and heuristic purpose of the *genera causarum*. For systematic and pedagogical purposes the choice is rather arbitrary. As long as the result is systematically exhaustive, simple enough to be taught to a student of rhetoric and leads to a limited amount of clearly distinguishable *genera*, any criterion works. That said, for systematic as well as pedagogical purposes it would be helpful if the resulting division would coincide with some of the major rhetorical theories and models in order to allow for an easier structuring of the material.

For heuristic purposes, once again, most criteria will be similarly useful because the actual heuristic tools will most often deal with more specific pragmatic circumstances and are thus positioned at a lower level of theory. All the heuristic aim thus demands is a clear and reasonable division between a limited amount of *genera*.

The evaluative purpose, however, provides some valuable pointers to the kind of criterion that could be employed most productively in a division of *genera causarum*. If one of the aims of creating speech genres is to understand under which circumstances a speaker fulfills his or her oratorical and probative duties, then using a criterion that directly relates to this duties would be a significant advantage. The burden of proof of the protagonist in an argumentative disagreement is just such a criterion.

The concept of the burden of proof of the protagonist and the corresponding presumption on the opposing side has first been brought to prominence by Richard Whately,<sup>27</sup> and since been studied and further developed by modern scholars of argumentation theory.<sup>28</sup> It acknowledges that opponents in a disagreement do not always – or even rarely – carry

<sup>27</sup> Whately (1963) I, iii, §2.

<sup>28</sup> Compare, e. g., Kauffeld (1998) and Kauffeld (2002).

the same argumentative burden for their position. A probative effort that might be sufficient by reasonable standards for one side will not be sufficient for the other. This discrepancy between the burden of proof of protagonist and antagonist or between protagonists in different situations is due to the allocation of varying presumptions in a disagreement. Simply put, the stronger the presumption in favor of one side, the higher the burden of proof on the other.<sup>29</sup> This effect is most evident in the case of one of the most famous presumptions in our society, the presumption of innocence. In a reasonable society, any person has the right to be presumed innocent until the accusations against him or her are proven.<sup>30</sup> This means that in a disagreement between accuser P and defendant A about the guilt of A, P has a significantly higher burden of proof (affirming A's guilt) than A (denying A's guilt or affirming A's innocence). Providing, as it were, the same amount of proof might be sufficient for A, but not for P.

Using this concept for the definition of rhetorical genres allows one to clearly distinguish three genres that roughly correspond to the three classical *genera causarum*. In addition, it also allows for a finer subdivision of genres, which is not possible in any of the classical *genera*. The result of this division will not only be precise and exhaustive (thus fulfilling the demands of the systematic and pedagogical purposes) and closely linked to the evaluative purpose by informing about the orator's argumentative tasks, but it also allows for a clear allocation of some of the central rhetorical models, such as stasis theory and the stock issues model.

The functional equivalent of the speech genres based on the burden of proof (*genus<sub>bop</sub>*) to the classical *genus deliberativum* are cases in which the protagonist carries a *simple* burden of proof. In the paradigmatic case, there are no significant presumptions for either side of the disagreement, and the protagonist only has to show that his or her case is more persuasive than that of the opponent. Beyond this paradigmatic case the *genus deliberativum<sub>bop</sub>* also contains cases in which the protagonist is up against

<sup>29</sup> This paper only considers the burden of proof on the macro level. There are also burden of proofs on the micro level that can be shifted from turn to turn within a discussion. These are not significant for the question at hand.

<sup>30</sup> Giving a full justification for each of the presumptions goes beyond the scope of this paper. For a summary of the main reasons for the presumption of innocence compare Hoppmann (2008a, pp. 20ff).

presumptions that are lighter than the presumption of innocence. Such cases would, for example, include speaking against the presumption for an existing law. Of our sample cases above, B, 1, 2 and 5 clearly fall under this *genus*. It is very easy to see that standard case B (moving the seat of federal government) and case 2 (advising the Greeks to change their political stance) both contain a light presumption in favor of the *status quo* on the side of the antagonist. The situation is slightly more complex in case 1 (defending Murena based on political needs). What Cicero presents here is a conditional argument for his client: *Even if* Murena would otherwise be found guilty, then the jury should *still* refrain from punishing him, because of the republic's overriding political interests. With this argument, Cicero must therefore assume his guilt but ask that the punishment that is usually presumed to be the right consequence of a guilty verdict be declined. Accordingly, this presumption in favor of punishing a guilty man elevates Cicero's burden of proof in his defense of Murena.<sup>31</sup> Case 5 (WUDC debating competition) would also be an instance of this genre, because either side simply has to show that their arguments are superior to their opponents' points.<sup>32</sup> Once again the affirmative side in this disagreement carries a slightly elevated burden of proof that can be reconstructed with the help of the modern stock issues models, which work only in this subgenre of rhetoric.

The functional equivalent to the classical *genus iudiciale* are cases in which the protagonist carries a *qualified* burden of proof because of the presence of a presumption of innocence. Within this *genus iudiciale*,<sup>bop</sup> there are once again various distinctions. The paradigmatic case is the accusation in a court of law that, depending on the gravity of the crime and the severity of the potential punishment, imposes different degrees of a qualified burden of proof on the protagonist. The best known of these qualified burdens of proof is the "beyond reasonable doubt" standard in

<sup>31</sup> Since the technical distinction between guilt and punishment is hardly communicable to the Roman jury, Cicero does in fact use this argument to plead for Murena's acquittal, but this simplification on his behalf should not obscure our understanding of the underlying argumentative burdens.

<sup>32</sup> For systematical or pedagogical purposes one could clearly make a distinction between the "real" cases and mock cases in each genre, thus introducing an additional dimension to the model. For our purposes either way makes no difference to the division between the genera on the primary dimension, however.

the U.S. American court system. This genre also includes non-legal cases such as moral accusation (“You lied to me!”; “You cheated on me!”<sup>33</sup>). It excludes, however, cases that might be tried in court, but do not impose a qualified burden of proof on either side and are thus, from an argumentative point of view, more similar to deliberative disagreements.<sup>34</sup>

Of the sample cases above standard case A and case 3 and 4 fall under this genre. All three have a very clear presumption of innocence for the accused, either because they are real criminal court case as A (O. J. Simpson’s defense), a past and reproduced case as 3 (Plato’s defense of Socrates) or a mock version of a defense trial (case 4). All of the cases in this *genus* are also subject to one of the most important classical rhetorical theories: stasis theory, the theory of legal and moral defense issues exclusively works in the *genus iudiciale*<sub>bop</sub>.<sup>35</sup>

The functional equivalent of the final *genus*, the *genus demonstrativum*<sub>bop</sub> is distinct from the two other genres in that here the protagonist does not carry any (simple or qualified) absolute burden of proof at all. The orator’s argumentative burden in this genre is instead measured on a *relative* scale. The speaker at a wedding, funeral, commencement or other occasion for praise or blame cannot be measured against a potential opponent or a fixed level of argumentation or persuasion but is only responsible for supporting his or her case. Accordingly, the speaker’s duty here is solely to improve the argumentative level that he or she has found before the speech. Of the above cases only standard case C (Isocrates: Helen) is of such a nature, but it is easy to find many famous special occasions speeches to illustrate this genre.

The result of the burden of proof approach to defining the *genera causarum* can be summarized in the following table:

<sup>33</sup> Assuming that in most modern Western societies, including most U.S. states, adultery is not a criminal offense anymore.

<sup>34</sup> Many civil law cases fall under this category.

<sup>35</sup> Contrary to what Cicero and Quintilian thought. While they postulated that stasis theory should be applicable to cases in all three genera, both of them gloriously failed in providing any backing or even meaningful examples for this claim. For a more detailed discussion of this question, compare Hoppmann (2007, pp. 1327ff).

Table 2. Genera *causarum* defined according to three kinds of burden of proof.

Defining criterion	<i>genus iudiciale</i>	<i>genus deliberativum</i>	<i>genus demonstrativum</i>
<b>Burden of Proof</b> (of the protagonist)	<b>Qualified</b> Burden of Proof  <b>cases: A, 3, 4</b>	<b>Simple</b> Burden of Proof  <b>cases: B, 1, 2, 5</b>	<b>Relative</b> Burden of Proof  <b>case: C</b>

#### IV. 5. Summary

While the concept of the three *genera causarum* is one of the success stories in classical rhetoric and still useful in modern rhetorical theory, its execution in the classical texts leaves important questions open. The most important of these issues is the desire for a clear and consistent definition of each genre. It has been shown that no less than six rivaling definitions can be found in Aristotle and Quintilian alone, each of them leading to slightly different results. Considering the main purposes of having a theory of speech genres at all—a) systematizing rhetorical knowledge, b) organizing it for pedagogical purposes, c) producing heuristic tools for each speech occasion and d) evaluating an orator’s work—this situation is unsatisfying, because each of these purposes requires at least a clear, unambiguous and exhaustive model. One way to reach this goal would be to include the defining criterion used whenever the *genera* are applied for any of the four purposes. Since one has to choose which criterion to use it has been further argued that, rather than sticking with any of the classical six criteria, the best alternative might instead be to turn to modern argumentation theory for a seventh—and in many respects superior—criterion. Defining the *genera causarum* based on the burden of proof that a protagonist in a difference of opinion has to carry produces a model that is at least as complete and unambiguous as any of the classical six criteria. Further, it offers three additional benefits: it allows for more precise subgenera, it links the definition of the genre to one of the most relevant aspects of oratorical evaluation, and it provides a system in which some of the central rhetorical models can be allocated more precisely.

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