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ABSTRACT

Because legal argument shares many of the characteristics of academic debate, it can serve as a paradigm for evaluating debates. Like debate, legal argument is bilateral, the judge is external to the deliberation and excluded from raising his or her own arguments, and reasons have been developed for assigning presumption, determining the wording of a policy, and defining terms. Legal argument has also been dealt with in depth by argumentation experts and addresses many of the issues of debate. Although not perfect, this analogy can be used to develop guidelines for judging academic debate. A judge could apply the following seven implications: (1) resolution could best be viewed as a court views the title of a piece of legislation; (2) presumption could be used as a tie-breaker; (3) once advocacy begins, only one position should be allowed per advocate; (4) the implications of present decisions on future cases should be recognized; (6) judicial attitude should stress openmindedness and impartiality; and (7) ethical rules should play a stronger role. (JL)

A JUDICIAL PARADIGM FOR THE EVALUATION OF DEBATES

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A JUDICIAL PARADIGM FOR THE EVALUATION OF DEBATES

The issue of paradigm evaluation has become one of the most important theoretical issues in debate during the past few years.[1] While many judges feel that the paradigm to be applied in any given round should be decided by the arguments advanced by the teams in any given round,[2] judges are often forced to apply a paradigm to a debate when there is no theoretical dispute or tacit agreement upon a paradigm by the debaters involved. In addition, while several theoretical models of debate have been advanced in the past few years[3] these models are by no means a comprehensive list of the ways that debate can be evaluated. This paper will attempt to address the issues of how paradigms should be evaluated, and then it will suggest that the best model of debate is one that is drawn from legal reasoning. Finally, it will attempt to outline the major features of a paradigm of argument drawn from law.

THE NATURE OF DEBATE PARADIGMS

One of the major points of dispute in the Rowland-Zarefsky dispute over the evaluation of debate paradigms is the relationship between academic debate and argumentation. Rowland argues that the constraints of debate should guide us in the selection of a debate paradigm.[4] Zarefsky concludes that such a strategy is misguided. He suggests that debate is to argumentation as the species is to the genus, and that we should start with general principles of argumentation to establish a paradigm for argument, and then apply those guidelines to the debate situation.[5]

Zarefsky's position assumes that all argumentation situations have certain similarities that enable us to develop

a broad theory of argumentation.[6] If a theory does not fit the model of debate, however, that would indicate that the theory is not a general theory of argumentation, but rather is a special theory of argumentation applicable to some argumentative fields but not to all argument. If one accepts Zarefsky's genus/species analogy, if a paradigm does not adequately describe all of the species of argument, it cannot be a general theory covering the genus. While Zarefsky is correct in arguing that debate is not all of argument, he forgets that debate is a type of argument, and if any paradigm does not apply to all argumentative situations, then the paradigm covers only a special case of argumentation and is not a universal paradigm for argumentation. Thus, if any paradigm is not suited for the debate setting, we must either decide that it is not a universally applicable paradigm (thereby indicating the paradigm will not help us understand the general nature of argumentation) or else that debate is not a form of argumentation (in which case argumentation rules need not apply).

A better way to evaluate paradigms is to cease to search for a universal paradigm to govern all argumentation, and to shift our examination to the nature of fields of argument that combine to form the larger genus of argumentation.[7] Debate offers us an opportunity to examine in depth one field of argument, and the theoretical discussion of that field can assist us in evaluating the way that the forum of argumentation should affect the way argument progresses and the way that argument should be evaluated. We can then compare and contrast the debate setting and the

debate paradigms with other fields to examine the nature of fields. How does limited time affect a decision? What happens to argument when it is repeated in several debates? These and other issues can be discovered by emphasizing debate as a field in itself and by applying these conclusions to other fields.

This does not mean that rules governing debate need not have some relationship to other fields of argument; if debate is a totally isolated field of argument then learning about debate would not train our students about argument in any other field. It does mean that seeking universal rules for argument may be futile. Rather, we should seek to draw rules for debate from fields that are similar in terms of goals, format, etc., and to deviate from those fields only if the unique characteristics of debate justify the deviation.

The study of any field should start with the identification of two features of that field: the goal of the field, and the forum in which argumentation takes place.[10] While there may be some dispute over the goal of debate,[11] the use of goals to evaluate paradigms does eliminate some potential paradigms. Some goals (training students to be political, training students to manipulate audiences) are unlikely to be articulated or defended in debate rounds. In other cases, differing goals may not be mutually exclusive.

The restrictions of the forum on a debate (or argument) may provide even greater limits to any theory of debate. It could be argued that time limits prevent truth from being an objective of debate. The bilateral nature of debate might place

other constraints on the debaters.[12] The discussion of the restraints that the forum places on a theory of argumentation can not only help us evaluate paradigms, but it can also encourage us to examine how other forums that are not as structured as debate are affected by the lack of these restrictions.

JUSTIFICATIONS FOR A LEGAL MODEL OF DEBATE

There are several reasons for developing a paradigm for evaluating debate from legal argument. First, legal argument (especially appellate argument) has many similar characteristics of academic debate. Legal argument is bilateral. The judge is external to the deliberation. The judge is expected to refrain from deciding a case based upon any issues other than those raised by the litigants. The Supreme Court even limits oral arguments before it to one hour. Legal reasoning has also developed standards for assigning presumption,[13] determining the wording of a policy,[14] and defining terms.[15] If there is a genus/species relationship between argumentation and debate, then law is the species closest to debate. In addition, it is worth noting that the current interest in the development of a Science Court[16] suggests both that the legal forum (and proceedures) may be the best way to evaluate scientific disputes, and that when a field of argument is shifted to another forum, the way the argument is evaluated changes (in this case when the scientific controversy moves to a legal setting, it acquires the legal proceedures for evaluating argument).

A second justification for drawing from legal argument for

a paradigm for evaluating debate is that it would enhance our understanding of argument. Two of the major theorists of argumentation in the twentieth century, Toulmin and Perelman, have drawn extensively from legal reasoning in developing their theories of argument. By attempting to discover the nature of legal reasoning and applying it to a similar forum, we can help test the appropriateness of legal reasoning for other fields of argument. The applicability of legal reasoning to other fields of argument should be relatively easy.[17] Legal reasoning has always been viewed as being very rational and as being one of the most developed systems of argument.[18] Furthermore, legal argument addresses many of the issues that we discuss in debate, including issues of ethics, political philosophy,[19] science (whether nuclear plants are safe), psychology (is a defendant sane?), and sociology (is discrimination harmful?). In short, if there is any way of looking at argument that has been successfully applied to a wide range of arguments, it is legal reasoning. In addition, unlike science (which emphasizes what is), legal reasoning attempts to discover what should be, making it very appropriate for policy decisions.[20]

THE NATURE OF A LEGAL PARADIGM

The close analogy between academic debate and courtroom argument makes it easy to develop guidelines for academic debate drawn from legal material. While some details of this paradigm may be open to dispute, these disputes can be resolved by examining primary legal materials, as opposed to relying on the

judgement of the initial proponent of the debate paradigm. In the legal paradigm, the debate judge acts as an appellate court judge (the best analogy might be that the judge becomes a judge on the Fourth Federal District Court of Appeals hearing, on original jurisdiction, a case involving public policy). The debaters become the litigants in the dispute, with the affirmative team defending its plan and the negative team defending non-resolutional ground. The goal of the argument is to reach a decision, and the forum in which argument takes place is an adversarial forum. As a judge, there are several implications of this view:

1. The role of the resolution. In the legal paradigm, contrary to the speculation of many, the resolution does not specify the jurisdiction of the judge. If this were the case, all non-resolutional counterplans would be outside the jurisdiction of the judge and thus would be irrelevant to the debate. There are two potential ways to examine the function of the resolution in a debate. First, the resolution could be viewed as indicating the options open to the two teams. It would serve a similar function to the assignment of a client to a public defender or the assigning of a case to a moot court participant (this view would obviously rule out topical counterplans); the resolution limits the options available to both teams. The affirmative team can defend any resolutional option, while the negative team is limited to competitive non-resolutional policies.

A second, and probably superior view of the resolution, suggests that the resolution is analogous to the title of a piece

of legislation. The subject of the resolution would indicate the audience that is being addressed (or what level of government the judge can control), and the predicate would suggest the title of a proposed bill. There are a great deal of court cases detailing the functions of the title of a piece of legislation,[21] and the title serves a similar purpose as a debate topic. The title provides warning to others about the content of the bill[22] and it also limits the content of the bill.[23] This view of the resolution would also eliminate counterwarrants (since all potential forms of the bill are not adopted, only the one voted on), and it would provide a clear standard for topicality arguments.

2. Presumption. There are two potential views of presumption drawn from legal reasoning. In a criminal court, the prosecution must overcome a substantial presumption of innocence in order to win its case. In the civil courts, a more lenient "preponderance of proof" standard is used. These presumptions were developed, not because of any abstract sense of the nature of presumption, but because the goals of the judicial system required such a presumption.[24] The presumption of innocence, for example, is based upon society's view that it is better to let guilty people free than to convict innocent people. Other judicial systems that value liberty less might reverse this presumption, arguing that any risk of guilt is enough to convict a person. The implication is that legal presumptions are based either upon values that should be protected, or due to proceedures that require the presuming of a fact to be true. In debate, these justifications for arbitrarily

assigning presumption are not compelling, while there is a strong desire for the judge to be impartial; i.e., the debate community assumes the judge should not favor one team more than the other. While either team could argue that it should have presumption based upon risk analysis or other considerations, without presenting such an argument in the debate, neither team should be assigned presumption by the judge. Furthermore, even when a side establishes presumption, the presumption "vanishes when positive evidence to the contrary is introduced."[25] Thus presumption largely serves as a tie breaker.

3. The role of the advocates. The legal system is an advocacy system, and many of the guidelines outlined by Strange in his paper on an advocacy model of debate[26] apply to the litigants. Each side is expected to defend its own position as rigorously as possible. In addition, each team is limited to one consistent policy. A defense attorney who simultaneously argued that there was no crime, that his client was elsewhere at the time, that his client acted in self-defense, and that his client was forced to commit the crime, besides risking perjury, would not be very successful. Instead, each side is expected to defend one position. While truth may be a goal of the legal system (and some argue it is not), the means to this end is an adversary system that requires each side to defend a singular position. While all positions can be considered prior to advocacy (and some may be argued for other clients in other trials), once the advocacy begins, only one position is allowed per advocate.

4. Decision rules. Unlike other paradigms, only in a legal setting does the actual construction of a ballot become an important part of the process. It is not enough for a court to render a decision, it must articulate the reasons for its decisions. These decisions help both guide future litigants and they alse act as a check on the court.[27] The decision of the judge is exposed to criticism by the litigants and any other individual that examines the decision, thus requiring the judge to devote a great deal of energy to the decision.

The judge should also recognize that any decision rendered by the court has implications, not only on the immediate case, but on future cases. Any decision may create a precedent for future action.[28] While the argument that a plan may create a dangerous precedent has been argued frequently in debate, it really should have an impact only in a judicial paradigm. A legislative body does not claim to base its decisions on earlier decisions; in fact, a new legislator may very well be elected on a platform to alter the way past legislators have acted. The thesis of incrementalism is that small changes are made and, if they turn out to be harmful, future changes in that direction are not made. A judge, however, realizes that a decision may create a precedent for future action and, at a minimum, the judge realizes that he/she should base a decision on neutral principles that transcend the immediate case. This orientation makes the argument from precedent a very effective position.

5. Fiat power. For a judicial decision maker, fiat is not an external power, but rather is a power of the court itself.

The court fiats into existance a new decision or a new interpritation of the law. It is not an artificial concept, but rather the idea of fiat is an act over which the court exercises control. The fiat power is limited, however, to those actions in the court's jurisdiction. While the court can dictate that an individual or a government perform an action, the action comes about through a court mandate, not through an independent action of the agent involved. Thus a court can prevent an individual from saying something, but the court does this by issuing an edict; the result does not come about by having the individual act without court action.

6. The judicial attitude. Traditional discussion of debate paradigms has emphasized the mechanical rules that a judge should apply to a given debate round. While these rules are important, a portion of the judging philosophy involves more abstract qualities that cannot be easily defined. Some of these characteristics include personal characteristics, and others involve the attitude that a judge takes toward a decision. These characteristics are important for a judge to understand. A judge needs to create the impression in both parties that they have an opportunity to win a decision; the judge should be impartial.[29] This requires that the judge be objective in hearing a case; otherwise the judge should decline to hear a case. In addition, the judge should be open to new viewpoints and should be receptive to new ideas rather than dismissing outright views that, at first glance, seem to be unreasonable. All ideas should have their chance to be heard in the court.[30]

7. Ethics. In the post-Watergate environment, the legal profession has become more and more interested in the ethical implications of advocacy. Many of the guidelines developed by the legal professions (prohibitions against lying, for example) can be applied directly to debate, and many of the issues of advocacy (defending a guilty client, for example) have their counterparts in the ethical issues facing debaters. In addition, just as judges in law are bound by ethical codes, so are debate judges bound by codes such as the AFA and NFL ethic codes. While there may be a temptation of some to evade these rules (or, as one coach indicated, to be thankful that the AFA is not enforcing its rules), the nullification of these rules by judges creates a dangerous environment in which people pick and choose those guidelines that they like and ignore all other rules. The ethical rules should play a more important function for the field. The codes outline the rules for the forum. While we can question the wisdom of these regulations, once they are adopted they become binding on members of the community; if we do not like the regulations we can either repeal these rules or we can create alternative forums. These rules no more violate academic freedom or freedom of speech than rules governing football restrict freedom of movement. Coaches and debaters are free to do as they wish on their own time and at their own campus. When they come to compete with other schools, however, there must be a common set of regulations or there can be no basis for competition, and the ethics code creates this framework.

There are other implications of legal reasoning for a theory of debate, but most of these implications can be reached by examining the ways that courts react to arguments, as well as by examining the limitations that the debate forum places on the advocates. Debate can never create a universal theory of argumentation, but it can allow us to study the nature of argumentation in an advocacy situation, as well as the way that a highly developed method of reasoning - legal reasoning - works. This paper has attempted to illustrate how such a paradigm for the evaluation of debate arguments might be structured and developed.

NOTES

[1]See "Special Forum: Debate Paradigms," Journal of the American Forensic Association, 18 (1982), 133-160.

[2]Austin J. Freeley, "Judging Paradigms: The Impact of the Critic on Argument," in Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation, George Ziegelmueller and Jack Rhodes, ed. (Annandale, Virginia: Speech Communication Association, 1981), pp. 437-438.

[3]See David Zarefsky, "Argument as Hypothesis Testing," in Advanced Debate: Readings in Theory and Practice, David A. Thomas, ed. (Skokie, Illinois: National Textbook Company, 1979), pp. 427-437; Allan J. Lichtman and Daniel Rohrer, "The Logic of Policy Dispute," Journal of the American Forensic Association, 16 (1980), 236-247; Bill Balthrop, "Citizen, Legislator, and Bureaucrat as Evaluators of 'Competing Policy Systems'," in Advanced Debate, pp. 402-418; and Kenneth M. Strange, "An Advocacy Paradigm of Debate," paper presented at the Speech Communication Association Convention, November 13, 1981.

[4]Robert C. Rowland, "Standards for Paradigm Evaluation," Journal of the American Forensic Association, 18 (1982), 139-140.

[5]David Zarefsky, "The Perils of Assessing Paradigms," Journal of the American Forensic Association, 18 (1982), 141.

[6]Zarefsky, "Argument as Hypothesis Testing," p. 436.

[7]See Stephen Toulmin, Uses of Argument (Cambridge: Cambridge University Press, 1958), Stephen Toulmin, Human Understanding (Princeton: Princeton University Press, 1972), and Stephen Toulmin, Richard Rieke and Allan Janik, An Introduction to Reasoning (New York: Macmillan Publishing Co., Inc., 1979)

[8]Walter Ulrich, "A Model of Argument," unpublished paper, University of Alabama, 1981.

[9]See Robert Rowland, "Argument Fields," in Dimensions of Argument, pp. 56-79.

[10]Toulmin, Rieke and Janik, pp. 7-9; 14-16.

[11]Zarefsky, "Perils of Assessing Paradigms," p. 142.

[12]Strange, pp. 4-7.

[13]Charles T. McCormick, Frank W. Elliot, and John F. Sutton, Jr., eds., Evidence: Cases and Materials, fourth edition (St. Paul, Minnesota: West Publishing Co., 1971). See also Wayne Thompson, Modern Argumentation and Debate (New York: Harper & Row, Publishers, 1971), pp. 90-91.

[14]See Horace E. Read, John W. MacDonald, Jefferson B. Fordham, and William J. Pierce, Materials on Legislation, 3rd. ed. (Mineola, New York: Foundation Press, Inc., 1973).

[15]Many debaters draw from legal sources such as Black's Law Dictionary and Words and Phrases to define terms.

[16]See Arthur Kantrowitz, "Controlling Technology Decocratically," American Scientist, 63 (1975), 505-509; Task Force of the Presidential Group on Anticipated Advances in Science and Technology, "The Science Court: An Interim Report," Science 193 (1976), 653-656; Arthur Kantrowitz, "Proposal for an Institution for Scientific Judgement," Science, 156 (1967), 763-764; "'Science Court' Idea: Toward a Test," Science News, 115 (1976), 198-199; Albert R. Matheny snd Bruce A. Williams, "Scientific Disputes and Adversary Proceedures in Policy Making: An Evaluation of the Science Court," Law and Policy Quarterly, 3 (1981), 341-364; and Arthur Kantrowitz, "A Response to Matheny and Williams," Law and Policy Quarterly, 3 (1981), 365-368.

[17]See Walter A. Ulrich, "The Implications of Legal Reasoning for a System of Argumentation," unpublished Ph.D. dissertation, University of Kansas, 1980, pp. 9-14.

[18]George C. Christie, Jurisprudence: Text and Readings on the Philosophy of Law (St. Paul, Minnesota: West Publishing Co., 1973), p. 833.

[19]R.M. Dworkin, ed., The Philosophy of Law (Oxford: Oxford University Press, 1977), p. 1.

[20]There are other reasons from drawing from law for a paradigm to evaluate debates. Since many debaters plan to attend law school, for example, it makes sense to orient them to some of the issues in legal reasoning.

[21]82 C.J.S. 219, pp. 364-380.

[22]Ibid., pp. 365-370.

[23]Ibid., p. 373.

[24]E.M. Morgan, "Presumptions," Washington Law Review, 12 (1937), 255-258.

[25]McCormick, Elliot and Sutton, p. 269.

[26]Strange, pp. 1-12.

[27]Robert A. Leflar, "Some Observations Concerning Judicial Opinions," Columbia Law Review, 61 (1961), 810; Herbert Wechsler,

"Toward Neutral Principles of Constitutional Law," Harvard Law Review, 73 (1959), 15-22; and G. Edward White, "The Evolution of Reasoned Ellaboration: Jurisprudential Criticism and Social Change," Virginia Law Review, 59 (1973), 290.

[28]Wechsler, pp. 1-32. See also Richard Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (Palo Alto, California: Stanford University Press, 1961).

[29]George C. Christie, "Objectivity in the Law," Yale Law Journal, 78 (1969), 1329-1330; American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (New York: Institute of Judicial Administration, 1971), p. 4; Wechsler, pp. 1-32; and Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949), pp. 5-6.

[30]Levi, pp. 5-6.