USING LEGAL MATERIALS IN DEBATE

By Marty Ludlum

Debate must keep the respect and support of the academic community to remain a vital part of the educational process. It can only remain so as long as debaters use evidence in the context it was written. One of the primary abuses of context is when legal materials are used in debate. This article will advocate a ban on the use of most legal materials.

This article is in response to the view of Rogers & Luong (*Rostrum*, January, 1999) which advocates the use of legal materials. While I think their view is well intended, it is not practical for high school debate. I will advocate three positions on legal materials: (1) published opinions should not be used; (2) legal dictionaries should not be used; and (3) legal journals can be used with some important caveats.

Debaters Should Not Use Court Opinions

Rogers & Luong (1999) over-simplify the legal system. An easy analogy is mainstream media reporting on facts uncovered in medical journals. When the *Today* show attempts to convey the information in the latest issue of the *Journal of the American Medical Association* they must often simplify the material so much that the truth is lost. When they report on a study that shows that oatmeal lowered cholesterol in test subjects, does that mean everyone should eat oatmeal? What if you already eat oatmeal, should you eat even more? If you are allergic to oatmeal should you still eat it to make your heart better? By trying to simplify the medical research so that everyone watching the *Today* show can understand, more questions are raised than answered.

In their attempt to boil the legal education process into four pages Rogers & Luong make the same mistake. I will point out one obvious mistake to serve as an example: the use of state court decisions. They have no bearing whatsoever outside of that state. There is a time-honored myth advanced by law professors that out-of-state decisions may be influential. Law students eagerly gobble up this myth, which makes the reading of the state decisions seem to have significance. The law professors and their obedient students are wrong. Any practicing attorney will tell you that cases from outside your jurisdiction mean nothing. A typical judge's comment will consist of: "That is very interesting counselor, but this is Oklahoma, and I do not care how they do it in Tennessee."

Why? Because judges, like attorneys, live in the real world, not the ivory tower of academe. Judges understand that all decisions will be affected by the myriad of state laws, substantive, as well as procedural and evidentiary, and these rules affect how cases are to be interpreted. You can only understand a Texas state court opinion if you are familiar with Texas substantive laws, procedures and evidence. As a result, only cases from that jurisdiction (state or federal district) are really examined for precedent.

In rare instances, I have heard attorneys argue a case from another jurisdiction as precedent, then claiming that "state X" and Oklahoma have similar (if not exactly) worded statutes. They are never ever as influential as a decision from the home jurisdiction. As an Oklahoma attorney, I would much rather have a single Oklahoma court decision to support me than a wheelbarrow full of out-of-state decisions. Out-of-state decisions have little use in the practice of law, and absolutely no relevant application in high school debate.

When you go to a law library and read court cases, you have only a small portion of the cases on that issue. Only appellate decisions are published, and then not all appellate decisions. However, there is no shortage of published opinions. Jacobstein & Mersky stated there were 3,000,000 published opinions in 1980, adding 50,000 new cases per year [1985].

To research a case adequately, the student must be certain of several facts. First, the student must know the case's history [Ulrich 1985]. The case might be overturned on appeal or the precedent of the case may be moot because of the reasoning in other cases. Second, the student must know which statutes applied at the time of the lawsuit and be certain that they apply to the case at hand. Third, the student must be certain that the cases are factually similar. Since no two cases are identical, this becomes a process of discovering which factual changes would not change the ruling of the court [Lloyd 1974]. Courts may treat apparently similar cases differently because the law sees a distinction between the cases which may not be apparent to the lay person. Ulrich [1985] states using court decisions poses serious problems for debate since they are poorly worded and difficult to follow.

In fact, Rogers & Luong (1999) violate their own standards on using state court opinions. They argue that in many issues, state opinions, are best, one of their examples being capital punishment:

> *First, many moral issues are local issues which are governed by states, not the federal government. For example, education, capital punishment, and liquor laws are matters primarily governed primarily by state law. (p. 33)*

Assuming for the moment that two primaries make one secondary, what cases do Rogers & Luong cite for examples? Three U.S. Supreme Court opinions, Furman v. Georgia, Gregg v. Georgia, and McCleskey v. Kemp. Not one state opinion is mentioned, even by those attempting to advocate their use.

To summarize, state court opinions have no application, and doubtfully any relevance to high school debate. Even if any relevance could be found, they are so difficult to understand and apply that even their advocates cannot accomplish the task.

Debaters Should Not Use Legal Dictionaries

The meaning of legal terms is never clear on the surface, hence the need for legal dictionaries [Statsky 1974]. Lawyers consult legal dictionaries for a starting ground on their research [Smith 1986]. Legal dictionaries, such as *Words and Phrases* and *Corpus Juris Secundum* each have over 100 volumes listing hundreds of definitions for each term. The dictionaries list all the different contextual definitions for each term.

Each definition refers to a different case which interprets the term. Each case has a different fact pattern and occurs in a different jurisdiction, subject to different statutes. Hence, each definition in a legal

dictionary has its own specific context. They are not interchangeable. The simple fact that a dictionary has a definition you would like to use does not mean that it is proper. Context determines which definition should be used.

Since legal dictionaries are research tools, they have no authority in court [Cohen 198]. They simply aid attorneys in starting their research, they are never the final product [Smith 1986]. Debaters, however, misuse these legal dictionaries as authorities, not research tools as they are intended. The debate community incorrectly views these materials as a final product.

Legal definitions are the most abused materials in college tournament debate [Ulrich 1985]. Most often a debater misuses a legal dictionary to find an unusual definition which he/she cannot find within the context of the topic. However, removing legal definitions from their very specific context would cause distortion [Ulrich 1985, Cantrill 1988]. Both *Words and Phrases* and *Corpus Juris Secundum* caution researchers that the definitions are within the context of specific facts and issues. For example, *Webster's New Collegiate Dictionary* [1981] offers two definitions for bankrupt/bankruptcy. In contrast, *Corpus* offers 440 pages of definitions [v. 8A 1988].

Only possible use of legal materials is the use of legal journals, which have their own problems, but at least are written in a familiar style and can be accessed more readily. While legal journals have problems, such as source credibility, these are problems inherent in all materials, legal or non-legal, so this does not serve as a justification to prohibit their use.

An innocent reader can be easily misled by legal periodicals (journals and law reviews). Legal journals are deceptive since they are the easiest legal materials for the lay person to read. However, contrary to their appearance, legal writings are not settled issues. They are statements of opinion by the individual writers (most of whom are still law students). To determine if the article is credible, you should check to see if the others in the legal community accept the view of the article's author.

Often legal journal articles focus on the unsettled controversies of the time and have little relevance after the Supreme Court has ruled. Similar to television shows predicting who will win the Superbowl next year, legal journals contain articles predicting how courts would rule on a variety of scenarios which have yet to happen. Very often, the courts do not decide the case as the commentators expected.

Also, some articles show complaints about how the court rules in the past. These articles do not prove that the court made an error, they simply explain another point of view. For instance, hundreds of articles have been written on the Rose v. Wade decision. Some are enlightening, some are ludicrous. Only a scholar very familiar with the issue and the academic literature can tell the difference.

There are three reasons why legal materials should not be used in high school debate. It extends beyond the materials mentioned by Rogers & Luong, to include statutes and hornbooks. First, the use of legal materials is not practical. Second, the use of legal materials is not fair. Third, the use of legal materials is bad for debate.

The Use of Legal Materials Is Not Practical

For a skill to be practical in debate, it must be able to perform three tasks. It must be (1) taught, (2) researched, and (3) judged, all fairly and accurately. None of this is true when applied to most legal materials.

Rogers & Luong (1999) downplay the problem. Few, if more than a handful of high school debate coaches have legal training. One cannot realistically expect coaches to train students in areas which they are completely unfamiliar. An expectation that the high school coaches can be taught legal reasoning and research is equally unrealistic. High school coaches have their hands full teaching in their area of certification and learning all they can on the current topics. Adding an expectation of legal training in the coach's "spare time" is an unfair burden.

Reading cases or statutes is not something which a lay person can easily understand without training. They are filled with procedural issues and legal terms. Understanding the cases is a difficult task. Perella (1987), an attorney and debate coach, wrote this process of learning takes about a year in law school.

In fact, Rogers & Luong (1999) acknowledge this. In their article (p.34), Rogers & Luong argue to avoid mainstream media sources on legal issues since "often the analysis is diluted due to the fact that journalists are not legal scholars.." (p. 34). If Rogers & Luong have doubts about legal writers for newspapers (by the way, many of which are attorneys who work as a correspondent on special events), how do they expect high school coaches to understand legal research based on a dozen paragraphs in the *Rostrum*?

The truth is, their hope is not realistic. The problem is severe, and no one, Rogers & Luong included, have any proposal to pass the skills of legal research to high school coaches. Without the training, it is unrealistic to expect them to pass on this information to their students.

The Use of Legal Materials is Not Fair

Allowing, if not encouraging the use of legal materials puts some schools at a huge disadvantage, which is beyond their control. Those schools with a law school nearby will have a huge advantage, which even the best of Internet browsers cannot manage. Internet services which are complete, such as Lexis, cost significant amounts of money, even once subsidized by higher fees paid by attorneys. Many schools cannot afford computers in the classroom. Expecting schools to have computers and Lexis accounts "to be competitive" is both unfair and unrealistic. Interlibrary loan is not a substitute, as it often takes weeks to get the materials, far too long for a two month topic. This form of financial elitism has been devastating in college debate, leading many colleges to abandon their program rather than spend a small fortune on forensics. High school debate should learn from this mistake.

The Use of Legal Materials Is Bad for Debate

High school debate does not lend itself to this type of intensive research, least of all with Lincoln-Douglas topics, which change every two months. Debate research is already intensive enough, as the amount of materials carried by even novice teams requires a moving van and a pack mule to transport it to the classrooms. We should not complicate matters by expecting teams to have stacks of research from expensive materials, which have little real application, even when they are correctly interpreted.

Further, the timed formate of debate does not allow a thorough discussion of these very important issues. Eight minutes is not enough time to fully develop any legal research issue. While at the appellate level, attorneys are time limited in their presentations, appeals focus on just a few issues, each attorney has 30 minutes to present their position and be questioned, and is supplemented by written research, which often takes days to read. Ignoring

context simply to add a new resource for debate research does not serve the students, the teachers, nor the activity.

Conclusion

In summary, the debate community should avoid the use of legal materials. Legal research requires too extensive research to be applicable, which neither coaches nor students have. Legal research is also too costly for most high school programs, for what little application it may contain. Legal materials should be avoided by debaters and coaches alike, and debate judges should scrutinize their context and application. That should limit the use of legal materials in debate, and perhaps raise the consciousness of the debate community to the importance of context of the evidence used.

ENDNOTES

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