UTILIZING LEGAL RESOURCES IN VALUE ARGUMENTATION AND ADVOCACY

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INTRODUCTION

Contemporary Lincoln-Douglas (L/D) debate necessitates a combination of values oriented analysis with application to present-day social issues. Unlike early abstract topics which limited discussion to the philosophical arenas, nearly all of the Lincoln-Douglas debate topics over the past five years have required the debaters to include analysis which spans from the theoretical to the empirical. Indeed, many who remember epic late elimination rounds of major invitationals and national championship tournaments recall that the best debaters utilized a variety of methodologies; selecting the one which was most appropriate to the nature of the resolution.

The authors observe that despite the fact that social issues nearly always have a significant legal dimension, many Lincoln-Douglas debaters as well as coaches lack a sufficient understanding of our legal system and fewer still are willing to introduce legal-based argumentation even when the nature of the resolution calls for legal research and analysis. This situation is truly regrettable because so many in the activity are intimidated by the complexity of our court systems, unfamiliar with legal terminology, and deterred by the seemingly endless number of court decisions.

The goals of this essay are to introduce the reader to the U.S. court system, suggest methods for getting the most out of legal cases and law review articles, identify easily accessible internet-based legal resources which are low-cost or free of charge, and analyze two prospective resolutions from the 1999 NFL Lincoln-Douglas ballot as examples.

BRIEF OVERVIEW OF THE ORGANIZATION OF THE JUDICIAL SYSTEM

The relationship between the federal government and the states is more complicated than it might at first appear. Although there are some instances in which the states are bound by decisions of a branch of the federal government[1], the states are also considered sovereign entities. Just as state legislatures are independent of the United States Congress, the states also have their own courts.

State

There are multiple kinds of courts that hear different types of cases.[2] The particular structure and names of state courts vary because the states are free to organize their own judiciaries; however, there are some similarities across the state systems. There are three main levels of general state courts.[3] New cases are tried at the first level. The losing party has a right to choose to appeal to the second level.[4] In contrast, appealing that decision to a state's third level court is usually not a right; the highest state courts usually have discretionary jurisdiction, meaning they are free to hear or decline to hear such cases. The highest state courts are often called supreme courts; however, this is not universally true. For example, the Supreme Court of New York is actually its lowest level court. Even if what a state refers to as its supreme court really is its highest appellate court, it is important to avoid confusing it with the United States Supreme Court, most assuredly a different body.

As L/D resolutions raise general issues of great importance, it might be tempting to focus on federal decisions – associating bigger with better – but doing so would be a mistake. Researching state decisions can be extremely helpful. 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.[5] The federal government may legislate in these areas – for example, if they raise constitutional questions or if the government sets conditions on the receipt of federal aid – but much of the debate over these issues occurs at the state level. A second reason to research state court decisions is that the state courts have concurrent jurisdiction over many federal law issues.[6] Therefore even if a resolution involves an area that is governed by federal statutes or the Constitution, state court decisions may directly address it.

After the highest state court has issued a final judgment on an matter of federal law, the decision may be appealed to the United States Supreme Court.[7] Getting a case to the Supreme Court is not as simple as merely qualifying for such review. First, the party desiring it must request Supreme Court review. The request is made by filing a petition for certiorari.[8] Every year thousands of cases apply, but the Court chooses to hear only a tiny proportion of them.[9] Last year the Court accepted fewer than 100 cases. This is significant because although most of the media-hyped cases are those which the Supreme Court has chosen to hear, it is important to remember there are many very important, compelling claims that did not get the benefit of the publicity which comes when the Supreme Court grants certiorari. Once the Supreme Court rules on an issue of federal law the decision becomes "the supreme Law of the Land."[10] When that issue arises in future cases, all other state and federal judges are bound by the Supreme Court's decision.

Federal

Although it is more uniform than the state systems, the federal judiciary is no less complex. Just as state courts sometimes hear issues if federal law, federal courts sometimes decide cases involving state law questions.[11] The first level in the federal system consists of district courts. Sometimes district lines may correspond to state boundaries, but more often there are multiple districts within each state. For example, there is the Eastern District of Pennsylvania, the Southern District of New York. Each district belongs to one of eleven federal circuits or the D.C. Circuit. District court decisions may be appealed to the particular Circuit court encompassing the district. For example, a Southern District of New York decision may be appealed to the Second Circuit Court of Appeals, not to the Fifth Circuit Court of Appeals. The first appeal is generally a matter of right, and it is heard by a panel of three circuit court judges. If the losing party wants to continue appealing she must petition for a rehearing, and then a rehearing en banc.[12] It is very rare for a petition for rehearing en banc to be granted. If the petition is denied or if the party does not prevail at the rehearing en banc, she may petition the United States Supreme Court for certiorari.

GETTING THE MOST OUT OF LEGAL RESOURCES

While commentary and public affairs articles which focus on legal matters are among the most commonly cited sources in Lincoln-Douglas debate rounds, often the analysis is diluted due to the fact that journalists are not legal scholars and use secondary sources in preparing their articles for publication. The authors suggest reading actual case decisions and law review articles in order to gain the fullest appreciation for the issues and reasoning behind each side of the cases. Many researchers, including the authors, have found that keeping a both a legal and collegiate dictionary handy can be of great benefit when reading legal material.[13]

Law Review Articles

Professional journals are an excellent source of current discussions by experts in various fields. In law reviews and law journals, the discussions often focus on various political, social, and philosophical issues that mirror or at least parallel those raised by Lincoln-Douglas resolutions. Entire volumes are sometimes devoted to the discussion of one issue. Such volumes are particularly helpful when they include a series of articles and direct responses to them by other law professors, political scientists, legal professionals. Reading along as they grapple with tough questions can be enlightening. It can also be frustrating, which is why we have included the following suggestions. It is always helpful to have a goal before reading an entire article. Reading strategically and for key issues are critical. Will the article likely provide an overview? Affirmative arguments? Examples? Students in research labs at L/D institutes have been known to complain that they were not given enough library time after spending hours reading patently irrelevant material. Discerning what the focus of a particular article will be before reading it in its entirety saves a lot of time. The fact that the title of an article includes a word which is also in the resolution should be insufficient justification for spending hours translating arcane technical language into English. Though there may be some unfamiliar language which should not automatically scare you off, avoid being too generous when deciding if an article is worth reading. The beginning of many articles will contain an abstract summarizing the article's content. The abstract is the first place to look to determine if the article will be useful. If an article fails to include an abstract, the author will typically "roadmap," or explain in the introduction what the rest of the article does. If the author has failed to clearly communicate something as important as the subject after a page or two, look for a different article.

Clearly written law review articles can be particularly helpful in three ways. First, they can provide an excellent overview of the real-world scenarios where the value conflicts raised by a resolution actually play out. It is undoubtedly true that mistaking a statement of the way the world *is* for an argument about how the world *ought to be* is a logical fallacy.[14] However, that is not license to completely ignore the present state of the world. Values are more than just abstract important things; they are important *to* people. Proving a resolution true or false requires persuading someone that the value implicit in one side of a resolution ought to be important to him. This is a much easier task for debaters who understand judges' assumptions about the state of the world. If a resolution is about the legal system, or if it has implications for which laws ought to govern, law review articles can provide essential real-world perspective. Such perspective allows understanding of the context in which a resolution's abstract values are truly at stake. Judges are typically aware of that context, so understanding it is necessary in order to effectively communicate to them. In addition to allowing for a richer, more informed debate than when debaters are aware only of the dictionary definitions of the values in conflict, legal perspective can help to expose specious claims. For example, on the resolution: "The spirit of the law ought to take precedence over the letter of the law," many negatives argued that laws must be clearly written in a deterministic fashion and followed to a T or the world would come to a quick and violent end. This destruction would ostensibly be due to conflicts arising from the uncertainty about what conduct would be considered legal in a world where some laws were unwritten or imprecise. Law review articles discussing statutory interpretation indicate, however, that many statutes are interpreted in a manner which is inconsistent with the plain meaning of their text. Though this does not establish that the statutes *ought to be* interpreted that way, it provides a sound basis for discrediting the negative's warning that dire consequences are sure to occur on the affirmative. Additionally, explaining that much of our law is judge-made common law rather than legislatively created statutory law would also assist in demonstrating that this negative scare tactic lacks an empirical basis. The approaches to statutory interpretation which are currently employed, and the fact that not all law is statutory are things you might not realize. Unless you read a law journal article or two.

Second, law review articles can introduce and elaborate upon arguments for both sides of a resolution. Many cases are decided on very specific, technical grounds. Judges consider it their job to apply the law, not to create it out of thin air. Consequently, it is often the case that whereas cases merely discuss the way it is, law review articles following recent cases will criticize the law, encouraging normative change. These articles tend to be extremely helpful sources in L/D argument generation. Many articles objecting to particular laws do so on the grounds that the law contravenes an important principle. Even if the law is only a subset of a more general resolution, analyzing a particular application of the general value might help generate reasons why that value is important. It might also provide a persuasive real-world example to substantiate an argument about the general resolution. A third way law review articles can be very helpful is by providing quotations. These never substitute for arguments, but they can foster credibility when read in support of a well-developed argument. The best quotations are succinct and eloquent. They are best used to express agreement for the controversial premises in a case. For example, everyone agrees that people matter. Consequently, it is unnecessary to quote an expert to reinforce the validity of that claim. In contrast, the claim that people are entitled to rely on the law as it is written, and ought not be punished for actions which are technically consistent with it is much more controversial. That claim surely needs to be supported by premises, but it would also be extremely helpful to quote an expert who agrees. The particular quotations used should be based on reasoning rather than pure emotional appeal. Because lawyers are often accused of having little to no capacity for emotion, law review articles should be an excellent source for such quotations.

Cases

While reviewing dozens of cases in preparation for this essay, the authors were surprised at the wonderful rhetoric employed by many judges and justices to express the clear, sophisticated arguments

contained in their opinions. Quoting them, particularly quoting a supreme court justice, can help build your credibility. However, there are several things you should keep in mind before doing so. First, opinions can be of several different types. Cases are often decided by a panel of judges or justices. On the Supreme Court, there are nine. Unlike the decisions issued by panels in L/D debates, these judges are allowed to confer with their colleagues. However, the decisions need not be unanimous. If a majority of the panel agrees on the proper outcome and the rationale upon which it is based, one judge or justice typically writes the official opinion of the court, and the others join it. However, sometimes there is no official court opinion even if a majority of the court agrees about the proper disposition of a case. This happens when a majority agrees on the outcome but disagrees about the reason why it is correct.

Judges are free to concur in the result reached by other court members but to disagree with all or part of their rationale. Especially in complex cases with lengthy, multifaceted opinions, determining where a judge stands in relation to the other opinions is sometimes difficult. Read majority, plurality, concurring and dissenting opinions carefully to determine whether a judge agreed with the majority or dissented on that particular issue.[15]

Once you have found persuasive arguments and quotations, use them but do not abuse them. Very few L/D resolutions are specifically about the Constitution. Even those that are raising a constitutional question, as opposed to a general moral question, are asking whether the Constitution *ought* to require or prohibit something, not whether it does so now. Consequently, court decisions are not dispositive. L/D judges are not bound by prior precedent, but encouraged to evaluate the strength and quality of the value argumentation in the round. Consequently, "I'm right because the Supreme Court says so" is an especially weak argument.[16] Quoting judges who agree with you can strengthen your arguments, but at the end of the round it is those arguments which will be evaluated on their merit. For this reason, it is very important to read and employ dissenting opinions. They often contain powerful and persuasive objections to the argumentation used by a court majority to justify its legal decision.[17] Furthermore, arguments originating in dissenting opinions are not necessarily destined to remain there; courts revisit issues and sometimes overrule past decisions.[18]

We do not mean to suggest that there is one rigidly formal method for quoting from a court case in L/D debate, but there is some information that should be included. The first time you cite a decision include the name of the judge or justice, the court on which she sits, the name of the case, the year, and whether the opinion is the opinion of the court or a concurring or dissenting opinion. For example, instead of "Posner agrees," say "writing for the Seventh Circuit in the 1998 case GLASS v. KEMPER CORP., Richard Posner argued." If the constructive subsequently quotes from the same opinion, some form of shorthand is appropriate. For example, "in Glass, Posner continued." Without this information the quotation fails to achieve its primary purpose: foster credibility. This information is necessary in order to verify the source. Even if no one ever looks up the opinion to verify that it actually contains the quotation, failing to cite the case properly may rightly cause judges to accord the quotation no more weight than a quotation by you or a common person on the street. This is not to say that the reasoning provided will be ignored. But unless you or that person on the street is a judge or justice, your opinions probably will not command as much weight as a properly cited Posner opinion.

Finding Legal Resources Online

Cases—especially recent Supreme Court and Circuit opinions—are easy to find online. There are multiple websites that have organized legal search engines. Three of the most helpful, user-friendly ones include:

FedLaw, which can be found at **http://www.legal.gsa.gov**

Forensics 2000 which can be found at **http://www.forensics2000.com** (once there, click on the L/D section).

USSCplus, both a web-based search and CD-ROM product updated semiannually, includes complete Supreme Court coverage from 1938 through 1998. Together with selected older leading cases from 1793, the USSC database has a total of more than 8,500 decisions at: **http://www.usscplus.com**

All three websites contain links to other resources, so be prepared to spend some time exploring and evaluating each site. It is slightly more difficult to do a comprehensive search for law review articles online. The FedLaw website listed above contains a section on which publications are listed. However, in order to obtain an article you want, it may be necessary to use Lexis-Nexis, Westlaw, or to go to a law library. If there is no law library near you, or if one near you will not permit access, remember to ask your local library if they can obtain materials through an interlibrary loan system. Often the staff at the law library can photocopy the article you need and send it to your local library, or directly to your home. This process takes some time, so prior planning is essential, but a successful search can yield rich dividends.

DISCUSSION OF CASES PERTINENT TO SOME OF THIS YEAR'S TOPICS

In addition to being extremely important issues in their own right, the relevant case law on capital punishment and First Amendment protection of source confidentiality makes them excellent examples of how legal resources can enhance the substance of L/D debate. Law review articles on both subjects abound, so the following discussion focuses on relevant cases which might be more difficult to come across.

Capital Punishment Is Justified

When it comes to introducing persuasive arguments which are pertinent to the resolution, the most recent cases are not necessarily the best. Instead of simply reading the most recent case, it is better to consider the entire line of cases. In 1972, the Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) struck down all death penalty statutes in the country as they were then written, but the Court did not say the death penalty itself was unconstitutional. The decision was 5-4. Three of the justices in the majority argued that capital punishment could be instituted in a constitutional manner, but that the statutes at that time allowed for too much arbitrary implementation and consequently amounted to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The remaining two justices in the majority, Brennan and Marshall, argued that capital punishment is per se unconstitutional.[19] Their concurring opinions are good sources of ideas for negative arguments. Chief Justice Burger wrote a dissenting opinion in which Justices Powell, Blackmun and Rehnquest joined, and Justice Powell wrote a dissenting opinion in which the Chief Justice and Justices Blackmun and Rehnquest joined. They provide arguments that capital punishment is Constitutional. However, the fact that something is constitutional or unconstitutional does not render it neces-

sarily justified or unjustified; for you must make that link. With something like the prohibition on cruel and unusual punishment, that should not be too difficult to do. But do not forget to do it.

A later case, Gregg v. Georgia, 428 U.S. 153 (1976), held that capital punishment is constitutionally acceptable provided it is imposed as the product of a bifurcated trial: one determines the person's guilt, another determines the appropriate punishment. Justices Brennan and Marshall dissented in this case, again arguing that capital punishment is per se unconstitutional. Here, the opinions of the justices who affirmed Georgia's imposition of the death penalty might be useful in arguing that capital punishment is justified, and the dissenting opinions would be helpful to the negative.

More recently, in the 1987 case McCleskey v. Kemp, 481 U.S. 279, the Supreme Court upheld the death penalty despite statistical evidence that it is implemented in a discriminatory fashion. The defendant introduced evidence from the Baldus study, which included empirical support for the statistic that defendants who kill white victims are 4.3 times more likely to be sentenced to death than defendants convicted of the murder of non-white victims. The Court did not question the validity of the Baldus study. The Court held that even assuming the study's truth, the statistics alone were insufficient; evidence of racial discrimination in the particular case was necessary to render imposition of a death sentence unconstitutional. Justice Powell wrote the opinion for the Court. His opinion was joined by Rehnquest, White, O'Connor and Scalia. If you quote from his opinion, be aware that his subsequent comments about the decision reportedly expressed regret. That fact does not change the law any more than it changes the result of the 5-4 decision, but it may decrease the rhetorical force of quoting from Justice Powell's opinion. The decision also contains forceful dissents written by Brennan, Blackmun, and Stevens, (Justice Marshall dissented too, and joined parts of Brennan and Blackmun's dissenting opinions).

In The United States, A Journalist's Right To Shield Confidential Sources Ought To Be Protected By The First Amendment

Unlike the capital punishment resolution, this resolution poses a question about what the Constitution ought to protect, not merely a general question about whether the right to shield sources is justified. There are two very important things to note about this resolution. First, a lot more is at stake than a journalist's right to simply publish facts and attribute them to anonymous sources. There is a Supreme Court decision dealing directly with the question posed by this resolution. In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court held that the First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, and therefore the Amendment does not afford him a constitutional testimonial privilege for an agreement he makes to conceal facts relevant to a grand jury's investigation of a crime or to conceal the criminal conduct of his source or evidence of such conduct. In Branzburg, Justices Douglas, Stewart, Brennan and Marshall dissented. Stewart, Brennan and Marshall dissented on the grounds that journalists have a constitutional right to protect the confidentiality of their sources. That opinion promises to be as helpful in generating affirmative arguments as the majority opinion will be to the negative. This decision is exactly that: a good place to start. The fact that five justices agreed with the negative does not mean there should be no debate. Arguably, the majority misinterpreted the First Amendment; the four dissenting justices thought so.

Second, notice that the Branzburg Court did not say that shielding the identity of a source is unconstitutional. Rather, Branzburg stands for the proposition that the *First Amendment* does not afford journalists a right to do so. Consequently, congress or the states could pass laws granting the right to shield sources. Currently, there is no federal shield law, but about half the states have passed shield laws.[20]

CONCLUSIONS

While legal research and argumentation might at first seem unapproachable and intimidating, the authors suggest an approach which combines primary source case readings and legal analysis found in secondary sources such as law review articles. A complete reading of the decision and review is essential, to ensure both comprehension and context of quoted material. Through internet-based resources, legal research has never been more accessible or affordable.

The benefits derived from reading, analyzing, and incorporating legal argumentation in Lincoln-Douglas debates will not only enrich the educational experience of the debaters and judges, but strengthen the activity as a whole and make it an even better pedagogical vehicle for developing active citizens and leaders of the future.[21]

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[1]For example, when Congress passes a law - assuming the law is constitutional - it becomes the supreme Law of the land, as per Article VI [5] of the Constitution. The states are not free to pass their own laws which would directly conflict, making it impossible to abide by that federal law. In Gibbons v. Ogden 22 U.S. 1 (1824), the Supreme Court ruled that a New York law granting a

monopoly to Robert Livingston and Robert Fulton to operate steamboats in New York waters was invalid because the federal government had issued a license to Gibbons allowing him to operate ferries there.

However, the federal government is authorized to arbitrarily issue any order to the state governments. If the constitution doesn't give the federal government power in a certain area then the 10th Amendment reserves that power to the states. In Gibbons, the federal government had the authority to issue the license under the commerce clause, Article 1 &8 [3].

[2]For example, a state may have separate tax, housing, probate, and or family courts.

[3]The general courts tend to hear criminal and civil cases other than those covered by the specialized courts listed in the previous note, and appeals from those specialized courts. In criminal cases the government is one party and the defendant or defendants can be private citizens or entities such as corporations. This is not the case in civil trials, in which both parties are private citizens or entities. Constitutional issues can arise in both criminal and civil trials; a defamation suite may raise First Amendment issues, for example. Due process concerns are universally present although due process may require different things in criminal and civil cases. For example, the Seventh Amendment guarantees the right to a jury in federal civil trials, but it was not incorporated against the states through the Fourteenth Amendment's due process clause. Consequently, state civil trials are not constitutionally required to be jury trials, although the states can create a right to a jury trial in civil cases through state statutes or constitutions.

[4]The Supreme Court has never held that the states are required to grant appeals as a matter of right, but every state has chosen to do so for the initial appeal.

[5]Just ask your coach. Although the federal government has no general power to govern schools, the receipt of state aid is often conditional. That might explain why you didn't get that last snow day.

[6]Concurrent jurisdiction authorizes states to rule on issues despite the fact that they are matters governed by federal law. State courts even have concurrent jurisdiction over Constitutional matters, (however they are bound by prior relevant Supreme Court decisions; see not seven). Be warned that concurrent jurisdiction is not universal though. For example, the federal courts have exclusive jurisdiction over civil actions arising under federal patent and copyright law as per 28 U.S.C. & 1338.

[7]In Martin v. Hunter's Lessee 14 U.S. 304 (1816), the Supreme Court upheld the constitutionality of a statute granting them the power to review state court judgments that rest on interpretations of federal law. That power was granted by Congress in the Judiciary Act of 1789; the modern counterpart is 28 U.S.C. & 1257.

[8]A petition for certiorari is an appeal to a higher court to review the decision and proceedings of a lower court and determine whether there were any irregularities. When such an order is made, it is said that the court has granted certiorari.

[9]Like other appellate courts, the Supreme Court has *discretionary review.* It is not required to hear all the cases that petition for certiorari.

[10]Article VI [2] of the Constitution.

[11]The rules governing when federal courts may hear state law issues are very complicated. They are the bane of many law students, most of whom acknowledge struggling to understand intricacies which in the end remain shrouded in mystery. The others are probably lying. Needless to say, the heuristic for when federal courts may hear state law claims in a gross oversimplification. Usually in order for federal courts to have jurisdiction over state law claims, the suit must be civil, and the people suing each other must be citizens of different states. Sometimes federal courts can also hear state law claims that are supplemental to federal law claims.

[12]A rehearing en banc is a request for a rehearing in which all the judges sitting on the Circuit render a decision instead of just a panel. In that sense it is similar to the final round of the Barkley Forum as compared to the previous elimination rounds.

[13]Even words we use in everyday conversation carry different meaning in legal writing.

[14]This error in reasoning is referred to as the naturalistic fallacy. An example is: racism exists, so discrimination is justified. Equally erroneous is the claim: The law says *x* there *x* is what the law ought to say.

[15]This tip may save lots of time: subsequent opinions usually identify the parts of the first opinion - which is eight the opinion of the majority or of the plurality - that they join or dissent from. If the case covers many issues, only one of which is relevant, skimming the first opinion to identify that the issue is discussed in Part three, for example, makes it easier to skip to the relevant portions of the concurring and dissenting opinions.

[16]If this line of reasoning was correct, then the mistakes that were made in the past by the court would never be corrected. Consider the social, moral, and legal ramifications if cases like the Dredd Scott decision were never overturned.

[17]In fact, because dissenting judges know they will be disagreeing with the majority's declaration of the law, they often argue more passionately for their position.

[18]If you don't believe us, perhaps Justice Rehnquest's dissent in Garcia v. San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985) will persuade you that even Supreme Court justices believe the Court will alter its position. He states: "I do not think it incumbent on those of us in dissent to spell out further the fine points of principle that will, I am confident, in time again commend the support of the majority of this Court."

[19]Furman is a good example of a case in which the court arrived at a decision but issued no official opinion because the majority disagreed about the rationale for striking down the capital punishment statutes.

[20]The existence of states that protect journalists' rights to shield the identity of their sources should be useful in responding to negative claims that protecting such a right would yield extreme consequences. This is an example of how empirical knowledge be a vital element of Lincoln-Douglas debates.

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