THE APPLICATION OF PROXIMATE CAUSE TO CEDA DEBATE

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One of the most common problems in academic debate today is the use of arguments dependent on tenuous causal links. These so-called "generic" or "meatball" arguments deprive students of the educational benefits of studying issues of current public significance in a meaningful way. This problem has led Parson and Bart (1987, p. 138), Hollihan (1983, p. 9) and Walker (1983, p. 17) to call for standards by which the reasonability of debate arguments may be measured. This paper proposes importing the concept of proximate cause from the law of torts to CEDA debate as a means of deriving such standards. Proximate cause analysis in CEDA would help insure that generic arguments are subjected to a rigorous causal standard, provide debate with a real-world context, and aid debaters in developing inherency arguments.

JUSTIFICATION FOR APPLYING LEGAL CONCEPTS TO CEDA

A legal paradigm is particularly appropriate in CEDA. Issues of fact and issues of judgment are central both to CEDA debates and legal argumentation. The resolution of the issues of fact provide the "building blocks" upon which the issues of judgment are resolved. For example, several rounds on the Spring 1990 topic, "Resolved: That the trend toward increasing foreign investment in the United States is detrimental to this nation", focused on the question of fact of whether such trend is necessary to keep interest rates low. This is analogous to the questions of fact that permeate civil and criminal trials.

Issues of "judgment" are also central to both legal and CEDA debate arguments. For example, CEDA debaters argue which competing value is greater. Similarly, cases decided in appellate courts of law often also involve weighing of values. Consider the recent U.S. Supreme Court decision that police sobriety-check roadblocks do not violate the Fourth Amendment's ban on unreasonable police seizures. In his majority opinion, Chief Justice Rehnquist wrote that "the balance of the State's interest in preventing drunken driving . . . and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program." (Michigan State Police v. Sitz, 1990, p. 2488). The balancing Rehnquist speaks of is similar to that called for by CEDA resolutions. For example, the Fall 1990 resolution, "Resolved: that government censorship of public artistic expression in the United States is an undesirable infringement on individual rights", asks for a balancing of rights of artistic expression against the governmental interests (such as morality, or whatever else an affirmative team may reasonably choose to argue) that lead to censorship. The Spring 1990 topic asks for a balancing of the positive and negative attributes of foreign investment in the U.S., and for the judge

to thereupon decide whether that trend is "detrimental".

Because CEDA debate operates at this evaluative pre-policy level, policy implications of CEDA debate arguments need to be examined in terms of their likelihood [1]. For example, if a negative team argues that a value objection to what affirmative proposes is that it would result in nuclear war, affirmative should begin its response in terms of the likelihood of nuclear war occurring as a result of their proposal. Should they conclude that nuclear war is not likely, the value objection becomes moot.

There is much precedent for the application of legal concepts to argumentation. Toulmin (1958, p. 7) and Perelman (1980) suggest jurisprudence as the model for argument theory. With regard to academic debate, Thompson (1962) has presented a judicial model of a counterplan. More recently, Ulrich (1982) argued that "the best model of debate is one that is drawn from legal reasoning" (p. 1). One reason for this is that a judicial paradigm provides a context for debates to occur. Ulrich notes that:

> if debate is a totally isolated field of argument, then learning about debate would not train our students 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 (p. 3).

As Ulrich notes, law is the field that best meets that criterion, as

> legal argument (especially appellate argument) has many similar characteristics of academic debate. Legal argumentation 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 legal arguments before it to one hour. Legal reasoning has also developed standards for assigning presumption, determining the wording of a policy, and defining terms. If there is a genus/species relationship between argumentation and debate, then law is the species closest to debate (p. 4).

Another advantage to adopting a judicial paradigm is that as legal rules develop out of necessity, so do equivalent argument rules outside of law. Ulrich notes that the standards of presumption used in civil and criminal courts

> 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. 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 procedures that require the presuming of a fact to be true. (p. 7).

While Ulrich concludes against adopting the judicial model of presumption because the reasons for its existence in law are not present in debate (p. 8), the reasons for the existence of the judicial model of causation are present in debate. The key element of the judicial model of causation is proximate cause, which Black's Law Dictionary (1979, p. 1103) defines as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause [i.e., with no alternate causation], produces injury, and without which the result would not have occurred." [2]

The concept of proximate cause developed out of need. Society would not likely tolerate a judicial system that allowed advocates to make outrageous claims on behalf of their clients. Imagine a jury's reaction if an attorney argued that if the jury did not allow his client to recover money from a corporate defendant, the corporation's shareholders would have more money, would spend that money on beef, and run a greater risk of heart disease. As Sheckels (1984, p. 189) notes, the public reaction to such an argument by a legislator would be equally unfavorable.

Also, allowing an actor to be held liable for remote causes of his actions violates our society's sense of fairness, as would a presumption of guilt in criminal trials. As Courtade, et al (1989) note, holding someone liable for losses that remotely flow from his acts "would be both impracticable and unjust" (p. 420). This is because

> consequences may usually be traced to the proximate cause with some degree of assurance, but beyond that is the field of conjecture, where uncertainty renders the attempt at exact conditions futile. Causes of injury which are mere incidents of the operating cause, although in a sense factors, are so insignificant that the law cannot fasten responsibility on the one who may have set them in motion. (Courtade, et al, 1989, p. 420).

Fairness with regard to imputing liability is also a concern in debate. As Dudczak (1980) notes, the assumptions of fact in an argument "are subject to challenges of verification before any consideration of effects can be made" (p. 232) and "as the complexity of the causal model increases, it becomes more susceptible to indictment as each element of the model must be sustained to make the claim" (Dudczak, 1988, p. 18).

THE NATURE OF PROXIMATE CAUSE

In the law of torts, an actor is not liable for harm to another unless the actor's conduct was both the cause-in-fact (i.e., the "cause" as that word is typically used) and the proximate cause of the harm (Restatement of the Law -- Torts (Second) Sec. 430 (1965))[3]. The issue of whether the conduct was the proximate cause of the harm is not reached until after it is determined that the conduct was the cause-in-fact of the harm.

The term proximate cause originally did mean nearest cause (Prosser, 1971, p. 244). Speiser, Krause and Gans (1986)

attribute the phrase to Lord Bacon's maxim: "In law not the remote cause, but the nearest is looked to" (p. 383). Under modern law, however, proximate cause is not necessarily the nearest in the chain of events. As a result, some courts suggest that the synonymous phrases efficient cause (Riddle v. Exxon Transportation, 1977, p. 1116) or legal cause (Derdiarian v. Felix Contracting, 1980, p. 670) would be preferable . Although legal cause has been adopted by the American Law Institute (Restatement, Ch. 16) and is probably the most descriptive phrase, courts and commentators continue to commonly use proximate cause. It shall therefore be used in this paper [4].

Numerous formulations of the test for proximate cause have been developed. This paper shall focus on one, the substantial factor test. First formulated by Smith (1911-12), the substantial factor test has been adopted by the American Law Institute (Restatement, Ch. 16) and by the courts of New York (Derdiarian, 1980, p. 670) and many other states. Restatement Sec. 431 provides that:

> The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence resulted in the harm.

Comment e to Sec. 431 notes that although the rule is stated in terms of negligent conduct, it is equally applicable where the conduct is intended to cause harm.

Restatement Sec. 432(1) provides that the actor's conduct is not a "substantial factor" (and therefore not a proximate cause) if the harm would have been sustained absent the actor's conduct. In debate jargon, the harm must be "unique." The only exception to this rule is when either of two independent causes are each sufficient to bring about the harm. Then, either cause may be found to be a substantial factor (i.e., sufficient cause) in bringing it about (Restatement Sec. 432(2)). For example, if two fires are set by different actors, either or both of the actions may be found to be substantial factors in bringing about the resulting harm (Restatement Sec. 432, illustration 4).

To demonstrate how proximate cause would apply in a debate setting, consider the following example of a "generic" argument, as reported by Belkin (1985): a negative team argued that an affirmative proposal that would create several thousand jobs

> would lead to economic growth, which would lead to a rise in population, which would in turn increase carbon dioxide in the atmosphere, melt the polar ice caps and lead to nuclear war.

The team arguing this negative disadvantage would have to demonstrate that sufficient growth to cause the problems complained of would not happen absent adoption of the affirmative proposal. Otherwise, adoption of the affirmative proposal cannot be considered a proximate cause of the harms.

Three examples may help illustrate the concept of proximate

cause and the rules that have emanated from it which are most applicable to debate. The first example illustrates that an event need not literally be the nearest cause of harm to be the proximate cause. The second illustrates the application of rules regarding the failure of third persons to prevent harm. The third example demonstrates the application of proximate cause to so-called "linear" arguments.

Example 1: An event need not be the nearest cause to be the proximate cause:

In this example, a policeman shot his wife with the gun the police department issued him (Bonsignore v. City of New York, 1982). The wife sued the city, arguing that the city's failure to identify officers who are unfit to carry guns was a substantial factor in her injury (p. 637). In legal jargon, the policeman's action here was an intervening force (Restatement Sec. 441(1)). That is, after the city failed to screen out the officer (the negligent act), he shot his wife (the intervening force). The fact that there was an intervening force does not by itself relieve the negligent actor of liability.

Although it is not clear from the published opinion, it appears that the city argued that the officer's actions were a superseding cause of his wife's injuries. A superseding cause is an intervening force that does relieve the negligent actor of liability (Restatement Sec. 440).

The appellate court in this case held that a jury could reasonably find the city liable for the injury even though the acts of the officer were the immediate cause of the injury (Bonsignore, 1982, pp. 637-38). That is because of the rule that "[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent" (Derdiarian, 1980, p. 671; Restatement Sec. 442B). In this case, the very risk the city took by not identifying officers who are unfit to carry guns was that an unfit officer might injure someone with the gun he is issued.

This example illustrates that an event need not literally be the nearest cause to be the proximate cause of harm. Thus if the affirmative proposal to create jobs would necessarily result in increased carbon dioxide emissions, the negative could properly charge the affirmative with whatever harm results from the emissions caused by the creation of those jobs only, which is not likely to include the melting of the polar ice caps.

Example 2: An actor isn't liable for someone else's failure to prevent harm if that someone else has full responsibility for preventing the harm

In this example, which comes from Illustration 10 of Restatement Sec. 452, an automobile manufacturer becomes aware of a defect in a model of car and supplies all of its dealers with

parts to remedy the defect. A dealer calls a purchaser of one of the cars, offers him the part and warns him of the danger. The purchaser refuses to accept the part. One year later this purchaser sells the car to someone else, who is subsequently injured as a result of the lack of the part. The manufacturer is not liable to the subsequent purchaser.

This result is because of the operation of Restatement Sec. 452(2), which provides that a third person's failure to prevent harm relieves a negligent actor of liability, if the duty is found to have passed from the negligent actor to the third person. (Restatement Sec. 452(2)). One instance where this duty is found to have passed is when "the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person" (Restatement Sec. 452, Comment f)[5]. In the illustration, such responsibility passed to the original purchaser of the car when he was notified of the defect and the availability of the remedying part. [6].

Generic debate argumentation usually presents analogous situations. For example, the Environmental Protection Agency is charged with the "full responsibility for ... prevention of" carbon monoxide levels so high that they threaten the polar ice caps [7]. Indeed, it is the government, and not private industry, that is charged with preventing nuclear war. The very reason that a lay audience would not respond favorably to a generic argument in a legislative setting is that a rational, sophisticated government would not consciously take actions likely to result in catastrophic public harms, and, as a result, government agencies have been created to prevent those harms.

Example 3: In the court of law a linear harm can only be held liable if it's more likely than not that it would cause the ultimate harm

Our final example comes from a medical malpractice case (Mortensen v. Memorial Hospital, 1984). A plaintiff suffered from a disease that caused the muscles in his left leg to atrophy. The leg eventually had to be amputated. He sued his doctor, claiming that but for the doctor's negligence, the leg would not need to have been amputated. The plaintiff also argued that he should recover if he could prove that the doctor's negligence "deprived him of the possibility, no matter how slight, of saving the leg" (p. 270). The court disagreed, holding that in order for the doctor's negligence to be a substantial factor in producing the injury, the plaintiff would have to prove that, given the condition which existed in his leg, "it is more probable than not that the loss of the limb was caused by the doctor's negligence" (p. 270).

The court noted that the substantial factor test does not require that the substantial factor be the only cause which produces the injury (p. 270; Restatement Sec. 433B, comment b). If another possible cause concurs with the defendant's negligent

act, the plaintiff is still liable if the plaintiff "shows facts and conditions from which the negligence of the defendant and the causation of the [injury] by that negligence may be reasonably inferred" (p. 270, citing Ingersoll, 1938, p. 830). In other words, the negligent actor remains liable if the plaintiff shows that the negligence was one of multiple independent causes, each of which would be sufficient to cause the harm by itself.

But where an injury is one which naturally might occur from causes other than a defendant's negligence, the inference of his negligence is not fair and reasonable. (Foltis, Inc. v. City of New York, 1941, p. 460). If conflicting inferences may be drawn, choice of inference must be made by the jury (Foltis, 1941, p. 461; Restatement Sec. 434.)

Therefore, a plaintiff cannot prove proximate cause by merely showing that the actor's conduct contributed in some small way to causing the harm alleged. Debaters who run generic arguments often argue that the harms they complain of are "linear", and therefore any actors who contribute in any small way to causing those harms should be held liable for the entire harm. Such arguments are not allowed under the judicial paradigm of causation, unless it can be shown that it is more probable than not that the damage was caused by the actor. Consider the example provided by Belkin. The debaters she cites link a modest increase in employment to an increase in carbon dioxide emissions, which in turn are linked to the melting of the polar ice caps. These debaters would likely argue that since any carbon dioxide emissions contribute to the total problem, it is not unreasonable to link the tiny increase in emissions caused by the new jobs affirmative calls for to the ultimate negative harm, the melting of the polar ice caps. However, proximate cause analysis would require these debaters to prove that it is more probable than not that the carbon dioxide emissions caused by the new jobs affirmative calls for are sufficient to melt the polar ice caps.

Although it would be impossible to present a comprehensive treatment of proximate cause in this limited space, the above is adequate to demonstrate the concept and its application to academic debate.

ADVANTAGES AND IMPLICATIONS

Subjecting debate argumentation to a rigorous causal standard would be advantageous for a variety of reasons, one of which is that it would compel debaters to argue the resolution in a meaningful way. CEDA debaters who debated in high school no doubt found generic arguments to be common, virtually prerequisites to success. Belkin (1985) reports that a debater from Bronx High School of Science told her that "[i]n this game, if you can't prove that something will lead to nuclear war, you can't win." It is without question that high school debaters import these arguments to CEDA when they enter college. This author judged a round on the Spring 1986 CEDA topic, "Resolved:

That membership in the United Nations is no longer beneficial to the United States", in which the first affirmative speaker read one card alleging that a certain action of the United Nations causes economic growth and spent the remainder of his time reading evidence of the harms of economic growth, weaving a chain of causal links virtually identical to the one reported above. The first negative responded not with causation or topicality arguments, but rather with eight minutes of "growth is good." These debaters were able to complete their research on the topic upon the discovery of one card tenuously linking the topic to economic growth. They managed to defeat the aim of academic debate to give students an opportunity to research and discuss important issues in a meaningful way (Sheckels, 1984, p. 188). Ehninger and Brockriede (1963, p. 18) claim that "the debater does not seek conviction regardless of the terms. He is more concerned that decision be reflective and that his method be correct than that any particular result be obtained by his appeals." But the debater who claims that he or she should earn a judge's ballot because of an argument with minimal causal relationship to the topic is clearly more concerned with the particular result than a correct, reflective decision [8]. Similarly, Dudczak (1988, p. 20) notes that the lack of a rigorous standard of causation teaches debaters that "reason-governed choice is not relevant to argumentative discourse".

Pfau (1987, p. 63) cites Unger (1981) as having proposed a set of four standards to be used in evaluating generic arguments in policy debates: internal context (are all sources defining and implicating terms the same way?), external context (do the sources cited in the generic argument support the link between that argument and the opposing team's specific proposal?), subject matter context (is there one expert who agrees with the generic argument in its entirety?), and historical context (why hasn't the impact of the generic argument happened yet?)

While Unger's standards are doubtlessly valid, proximate cause analysis is also a legitimate means of analyzing generic arguments and is uniquely useful in CEDA rounds because, as noted above, legal and CEDA debates both focus on propositions of judgment. Additionally, Unger's standards are essentially evidence-dependent, while the underlying problem with bad generic arguments is related to causation, not evidence. For example, a team could meet Unger's standards by relying on evidence from a dubious source who claims horrendous harms unless a given event happens. This is not unlikely, as it has been said that some debaters "quote World Marxist Review as freely as Foreign Affairs" (McGough, 1988, p. 19). Conversely, it is possible for a generic argument to be legitimate without anything specific enough to meet Unger's criteria having been published on it. This is an important consideration, as the goals of CEDA include striking "a balance among analysis, delivery and evidence" (Constitution of the Cross Examination Debate Association, 1988, Art. II, Sec. 1) and "seek[ing] to be a full, free testing of

ideas" (CEDA Ethics Committee, 1989, p. 6). So testing of arguments in CEDA may then be considered as appropriate at the idea/analysis level as at the evidence level.

Some authors [Brownlee (1987, p. 441), Dudczak (1987; 1988), Freely (1986, p. 173)] propose that inherency arguments be part of CEDA debaters arsenals. Those who heed this advice shall find that proximate cause analysis is an excellent means of locating inherency arguments, as "inherency is essentially causal in nature" (Cherwitz and Hikins, 1977, p. 83).

Some may argue that a judicial paradigm is not appropriate in academic debate because while tort liability results in extreme, immediate harms (i.e., being compelled to pay a potentially large judgment), academic debate is "just a game." However, if as Colbert and Biggers (1987) contend, we should justify our expenditures on debate in terms of educational value, then we should not condone argumentation that has no validity in legal or legislative debate. Although Colbert and Biggers (1987) found that, generally, "[t]he data suggesting that debate is valuable to the pre-law student is overwhelming" (p. 4), Fadely (1982) reports that, "upon their arrival at law school [undergraduate debate alumni] often find that the debating done there ... bears little resemblance ... to the debating which they did at the undergraduate level" (p. 13).

The adoption of a judicial paradigm, particularly with regard to causation, would make undergraduate debate more beneficial to future lawyers. [9]

CONCLUSION

Proximate cause analysis is used in the courtroom to determine the legitimacy and fairness of causal arguments. This paper contends that it would fulfil the same purpose if used in CEDA debate. It would also provide students with a better understanding of the constraints placed on debate in a real life context, and of the policy reasons for those constraints.

This is beneficial for all students, not merely those who aspire to be lawyers. As Rowland (1984, p. 76) notes, a principal justification for the study of argumentation is to teach students "to distinguish between strong arguments, which more often than not lead to accurate conclusions, and weak arguments, which do not".

NOTES

[1] The author wishes to thank Craig Dudczak of Syracuse University for suggesting this concept, and for his many other valuable suggestions upon reviewing the various drafts of this paper.

[2] Newspaper accounts suggest that this concept was the basis of the judge's decision in the recent Nevada case involving the "heavy metal" band Judas Priest. The Associated Press reports that the judge ruled that alleged subliminal messages on one of the band's albums did not cause the suicides of two people who listened to the album. ("Rock Group Not Liable for Deaths", 1990).

[3] The Restatement, authored by the American Law Institute, is cited throughout this paper. While the Restatement is not the official code of any jurisdiction, courts have held that Restatements "may be regarded as both the product of expert opinion and as the expression of the law by the legal profession." (Poretta v. Superior Dowel Co., 1957, p. 373).

[4] Additionally, in debate "efficient cause" would be confused with the use given it by Cherwitz and Hikins (1977).

[5] Restatement Sec. 452(2) is an exception to the general rule in the law of torts that the failure of a third person to prevent harm to one threatened by a negligent actor's conduct does not relieve the negligent actor of liability (Restatement Sec. 452). For the reasons stated in the text, though, I contend that the exception stated in Sec. 452(2) is the rule that represents the situation more analogous to generic debate argumentation.

[6] A complete list of the rules that determine whether an intervening act is a superseding cause is found at Restatement Secs. 442-453.

[7] "The air activities of the [Environmental Protection] Agency include . . . emission standards for hazardous pollutants" (U.S. Government Manual 1989/90, p. 555).

[8] While in the judicial model, advocates are expected to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" (Comment, Rule 1.3, American Bar Association Model Rules of Professional Conduct), those measures are limited to the "lawful and ethical" to help insure correct, reflective decisions.

[9] This is particularly true in light of the recent tendency for courts to enact rules calling for sanctions to be imposed on lawyers who file frivolous lawsuits. See, for example, Rule 11, Federal Rules of Civil Procedure; N.Y. Civil Practice Law and Rules Sec. 8303-a; and 22 N.Y. Code of Rules and Regulations Sec. 130-1.1.

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A PROCESS PERSPECTIVE OF DEFINITIONAL ARGUMENTS

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Frequently, debaters argue only on the level of "sound bytes," short isolated verbal tags, such as "freedom" versus "totalitarianism" or "environment" versus "economic growth." Debaters proclaim, "cross apply" without explaining the interrelationship of the specific arguments. "Cross apply" becomes the explanation. Non-policy debaters may state that the "resolution is a fact" although these same debaters advocate the resolution is a value by stipulating a value criterion and arguing value issues.

Unfortunately, some argumentation scholars also ignore how debate constructs are interrelated. Scholars, such as Tolbert & Hunt, 1985; McGee, 1988; Leeman & Hamlett, 1989, never discuss the relationship between definitions and counter-warrants. Herbeck and Wong (1986) stipulate that measurement is the primary problem of debating value issues; nevertheless, their essay sidesteps any value measurement procedure by shifting their discussion to policy measurement.

As an argumentation laboratory, debaters and theorists must understand how constructs and issues are interrelated because a non-process perspective artificially inhibits our teaching and learning of argumentation theory. If we accept that all arguments are subsidiary of the resolution (Patterson & Zarefsky, 1983), then issues must maintain a consistent relationship with respect to a definitional interpretation of the resolution. Drawing upon this contention, this essay will concentrate on how definitional arguments interrelate with other constructs as a process. Specific focus will address the relationship between definitional arguments, criteria, and counterwarrants.

Process

From a process perspective, a debater evaluates all arguments as if they are interrelated. Furthermore, the resolution is interrelated to all arguments and their corresponding issues. Patterson and Zarefsky claim "unless this relationship is kept in mind, attacks and defenses may do little or nothing to enhance the larger goal of proving the resolution probably true or false" (p.71). For example, definitions may offer one interpretation of the resolution while contentions support a totally different interpretation of the same resolution. Because arguments are constructed in isolation of each other, both the affirmative and negative teams may even agree that the resolution is a factual proposition in arguing definitions but argue value issues which cannot justify the existence of facts. Thus, teams may agree that the resolution, "Lee Harvey Oswald killed John F. Kennedy," is a factual resolution and argue a criterion of life even though a value criterion of "life" will not support or reject whether Oswald assassinated Kennedy.