

PRESUMPTION AND BURDEN OF PROOF

by
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The Nature and Importance of Presumption and Burden of Proof in Lincoln-Douglas Debate

Presumption and burden of proof are two terms rarely uttered in the context of a Lincoln Douglas Debate round. Despite the fact that these terms are not part of the language employed by value debaters, these two concepts often lie at the heart of argumentation advanced by such debaters as well as act as key factors in the decisions rendered by their critics. The Lincoln Douglas Debate community would be served greatly by examining the nature of these two concepts.

In order to begin a discussion of burden of proof and presumption it is first necessary to determine what exactly is meant by each of these terms. These two terms refer to the standards one applies to the different sides involved in a debate. They define what is the responsibility of each side. The side with the burden of proof is responsible for proving the validity of their position. In the absence of such proof, one must favor the other side. This side is said to have presumption. The side which enjoys presumption must simply establish why the opposing side has failed to meet its burden and should be favored in a case where there is not a clear distinction as to which position is superior. These standards are extremely important because they dictate how a critic should approach their decision and thus often determine which side will ultimately win. Given the importance of these issues it is vital that as competitors, coaches, and judges we attempt to understand the nature of presumption and burden of proof in L/D, as well as the reasoning that underlies these standards.

There is a misconception that the rules of L/D prohibit the use of standards of presumption or burden of proof. I argue that such a statement is a misinterpretation of the guidelines currently in place. Those guidelines state that there is no *prescribed* presumption or burden of proof. I believe it

would be erroneous however to surmise from this that such concepts are not allowed in value argumentation. Presumption and burden of proof are acceptable standards in a Lincoln Douglas Debate round when established by one of the debaters. The rules concerning such standards simply prevent these ideas from being automatically connected to one side or the other. In other words, the affirmative does not have the burden of proof simply by virtue of being the affirmative and the negative does not have presumption simply by virtue of being the negative. The instructions on the NFL ballot clearly illustrate this:

“The burdens on the affirmative and negative positions are not prescribed as they may be in debates on propositions of policy; therefore decision rules are fair issues to be argued in the round.”

Depending on the nature of the topic being discussed either side could argue that presumption lies with the position they are defending. The fact that presumption is not prescribed simply means that the debaters in the round must establish the appropriate burdens through their own analysis. The two sides should begin the debate with equal burdens. That is the essence of what it means to not have prescribed burdens. This can and should change however, in light of analysis from one side or another showing why their position should enjoy presumption. Very often debaters will attempt to undermine their opponent’s attempt to establish such standards by claiming that it is unfair or possibly arguing that there should be equal burdens of proof. This line of reasoning is flawed because while it doesn’t automatically give one side or the other presumption, it does assume that there

is a prescribed set of burdens. Essentially this line of thinking tells us that we should prescribe burdens in an equal manner. While this would certainly seem more fair than one side automatically receiving presumption it is nevertheless a prescribed burden. It fails to allow the debaters to argue for themselves how the issues in the round ought to be evaluated. If we accept that there are no prescribed burdens in L/D Debate then we cannot accept that burdens should be equal in the face of explanation and analysis to the contrary. If one side in a debate can make persuasive argumentation as to why presumption should lie with their position then it is only fair that such standards be accepted. Let us take a look at several examples from various topics that illustrate this:

Topic: *In the United States a journalist’s right to shield confidential sources ought to be protected by the first amendment.*

On this topic the affirmative often argued that presumption should lie with a free press. In other words, unless the state could provide an overwhelming and compelling reason for forcing the press to reveal its sources they should not be required to do so. The press did not have to justify why they should be allowed to keep their sources confidential. The reasoning behind this was that the necessity of a free press was so great that we must err on the side of caution rather than risk deterring the press from fulfilling its function as a watchdog on the government and society.

On this same topic the negative often advanced an argument that presumption should lie with the literal text or framer’s intent of the constitution. Since the notion of protecting confidential sources was not explicit in the constitution or part of the intent of its framers it did not merit protection. The affirmative had the burden to prove that protecting confidential sources was the in-

tent of the first amendment if it was to uphold its burden. The reasoning behind this analysis was that adding things into the constitution was undemocratic and undermined the legitimacy of the government.

Topic: *On balance, violent revolution is a just response to oppression.*

On this topic there is a very strong presumption argument that can be advanced by the negative. The sanctity of human life provides a strong basis on which to establish a presumption against the use of violence. In other words, if one chooses to employ violence as a means to achieve some ends, he or she must justify why such actions are appropriate. Many theories tell us that violence is only justified as a last resort, or that violence must be necessary in order to be justified. In addition one could argue that violence must be effective in achieving its desired ends or else it cannot claim to outweigh the loss of human life that accompanies it. Once the negative has established this it can proceed to argue that violent revolution is neither necessary (since there are other means to respond to oppression) nor effective (since empirically it has not lead to positive social change). In the end only when the affirmative can meet both these standards can it uphold its burden.

Topic: *The public's right to know ought to be valued above the right to privacy of candidates for public office.*

The nature of this topic allows the negative to make a presumption argument concerning the importance of the right to privacy. In all likelihood the affirmative position is not going to deny the existence of the right to privacy. The affirmative position would most likely focus on the special status of candidates for public office and how this uniquely impacts their rights. The fact that the affirmative recognizes the legitimacy of privacy in general allows the negative an opportunity to establish presumption. By only advocating a limit on the privacy of candidates the affirmative implicitly acknowledges that privacy should only be limited when there is a clear and compelling interest which it conflicts with. In the absence of such an interest we must respect privacy rights. This establishes a burden on the affirmative to show that knowledge of the private lives of candidates is a clear and compelling reason to justify limiting the individual's privacy. In essence all the negative must establish is that knowledge of a

candidate's private life is not of overwhelming importance and therefore cannot justify infringing on the right to privacy. The negative need not prove a reason to protect privacy, but rather then no reason can be established to limit it.

While the aforementioned examples illustrate that there can be presumption and burden of proof in L/D even when not prescribed; this does not necessarily mean that it would not be advantageous to have such standards formally established. Some would argue that presumption and burden of proof should be prescribed, as is the case in policy debate. Those who advocate this position believe that topics should be framed in such a way that the affirmative has the burden of proof and that the negative should be given presumption. The major problem with such a proposition is that it would seem to violate the fundamental principle used to justify the existence of presumption and burden of proof; the idea of fairness. In order to illustrate this idea we can look to two examples of cases were prescribed burdens are seen as completely acceptable. First is the case of a criminal trial. In such a proceeding there is a presumption of innocence towards the person accused of the crime. The prosecution on the other hand is considered to have the burden of proof. In fact they must not simply prove their case, but must do so beyond a reasonable doubt. The reasoning beyond such standards is the idea that they ensure the fairest outcome. In other words, we recognize that the greatest possible injustice would be for an innocent person to be punished for a crime they did not commit. The result is that burdens in a criminal proceeding are prescribed in the fashion explained above to ensure the fairest result possible.

In an academic policy debate, the affirmative is given the burden of proof and the negative presumption. The primary reasoning for such standards is that since the affirmative is advocating a change from the status quo they have the burden to prove why such changes should be undertaken. The risk inherent in change is considered to be greater then the risk in maintaining the current system unless it is proven otherwise. The framers of any policy resolution are aware of this reasoning and therefore always frame the resolution such that the affirmative is advocating change. The reason why this is appropriate brings us back to the notion of fairness that I have claimed is at the heart of any justification of standards of proof in a debate or contest.

Since the affirmative is given the discretion of picking the policy to advocate in support of the resolution; essentially allowing them to define the ground of the debate; it seems only fair that they be given the burden of proving their position. The fact that the overwhelming number of teams in flip for sides rounds select the affirmative should be proof that this is seen as the inherently more advantageous side. The fact that this side also is given the burden of proof therefore would seem to aid in ensuring a fairer contest.

Turning to Lincoln Douglas debate as it is currently practiced, such reasoning would seem to lead us to the conclusion that prescribed burdens of proof are not appropriate. Unlike policy debate the affirmative in L/D does not possess an automatic advantage. In fact the opposite is more likely to be true. The affirmative in L/D often is seen as being at a distinct disadvantage due to the time constraints. While the same could be said of policy debate; the advantage mentioned above of being allowed a broad amount of discretion in defining the particular focus of the round seems to counter the disadvantage in speech times. In L/D, while the affirmative has some deal of discretion in deciding how to approach their position, it is no where near the ability of an affirmative team in policy to shape the entire nature of the debate through the selection of a specific policy to advocate. Lincoln Douglas resolutions are most often framed to capture a very specific value conflict whereas policy topics are framed in a manner to allow for a wide variety of options to be considered in support of the topic. In fact it is often the perception that a negative in L/D is at a distinct advantage. Unless the specific nature of a topic makes the affirmative more desirable the tendency is for the negative to be seen as the more advantageous side. If the affirmative in L/D were to be given the additional burden of having to overcome presumption it would seem to create an imbalance that would provide the negative with an unfair advantage. Since the purpose of burdens of proof is to ensure fairness it is difficult to view this as legitimate.

The major argument advanced in favor of prescribing burdens in Lincoln Douglas Debate is that it is necessary to provide the judge an adequate framework with which to make a decision. The first problem with this claim is that it ignores that fact that such standards can be established

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Frankly, Fillmore shouldn't have a speech team because the students wouldn't know how to behave. How can a student who's streetwise sit still in a humor round? How can a student whose chief experience with drama has been watching videotapes get used to acting out in the piece? How can a student whose learned behaviors include treating all adults with contempt ever be accepted among those whose social skills are far more polished? How can a student who regularly "blows off" courses ever expect to compete in an over-achieving academic environment such as a Speech tournament?

But Fillmore has a speech team. It's eclectic. It's brilliant. It exists, despite the evidence for its non-existence.

Shannon's parents still get stoned every night. Eric's mom still asks Jesus to send her another son. Kristie's dad does methamphetamines. Courtney's mom believes that the music Courtney listens to is a gateway to hell. Cindy's mom hasn't left 1978 and still wears polyester. Peggy's mom is schizophrenic and needs regular medication.

I imagine this scenario is the same for a lot of urban high schools. The students hurt. In spite of their intelligence, their abilities, their drive, the "system" of both family and school is stacked against them. Not only is school complacent and culpable with its self-esteem programs, but it lies to them. Their abilities are cushioned by the soft cotton of lowered expectations and even lower performance. Family does not perform any better. If the expectation by family is to graduate high school, period, then the student is at a disadvantage because the education is devalued. It's merely something to get around before the main business of living. Forget about college altogether.

This is why Speech is so important to the urban high school. The student doesn't need a great body or even a great mind to be part of it—he just needs to want to be part of it because it will tell him the truth about his performance, attitude, behavior, and his prospects for the future. It's not tied to a single city or league; Speech is the entire State—usually the best of it.

And the urban speech team, especially Millard Fillmore High School, and schools like Millard Fillmore, needs to compete with the best—to show what it's made of—to prove that urban kids can do as well as suburban kids, without mollycoddling or

self-esteem programs or school-to-work programs or false expectations. And it can.

(Each month the Rostrum will feature a Chapter from William C. Thomas' book, "The Urban Speech Team.")

CONTINUATIONS

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last minute in rebuttal drills.

Changing Demands

As Lincoln-Douglas Debate evolves the demands on competitors are changing. 2AR strategies must change to meet these new challenges. The divided 2AR is one way to address the tenuous twin burdens of the flow and the big picture. It is a strategy that debaters should carry in their arsenals. They should, at the same time, be willing and able to execute a number of other strategies as the situation demands. It is time that we, as a community, stop thinking of debate speeches as templates that we plug new material into every two months. Such frameworks are valuable instructional tools, but advanced debaters must conceive of their thirteen minutes as a blank canvas on which to paint whatever message will persuade that audience at that time.

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even if not prescribed. Leaving this task to the debaters would actually allow judges the ability to reward those debaters who handle the issues of presumption and burden of proof successfully. In a round where these issues are not adequately addressed and examined the judge should consider that in his assessment of the debaters. Requiring the debaters to examine and analyze such issues would actually seem to further the educational value for the debaters as they are forced to work on developing weighing mechanisms to support their argumentation. Debaters actually gain a better understanding of the concepts of burden of proof and presumption when they are forced to think about them critically and develop such standards on their own. Finally, such standards may be beneficial to judges in making decisions, but they are by no means necessary to the achievement of that end. This is best illustrated by the fact that prescribed burdens disappear from a policy debate when the negative advocates a counterplan. Judges are still able to make decisions in such cases proving that while presumption and burden of proof aid in the decision making process they are by no means absolute.

In conclusion, I would call upon students and coaches of Lincoln-Douglas debate to give serious consideration to the issues of presumption and burden of proof in analyzing topics and developing positions to debate. This would greatly aid in ensuring more meaningful debate for the competitors as well as aid critics in bettering performing their task. Lincoln Douglas debaters will obtain a far better understanding of both the nature of effective argumentation as well as a deeper appreciation of the issues inherent in any given topic when they take the time to examine the underlying beliefs and ideas that provide the foundation for standards of proof. In addition this can hopefully provide an avenue through which true consensus can be reached concerning the nature of these issues in L/D. This would ensure that such issues contribute to the meaningful discussion of a given topic rather than distract from this purpose by shifting our focus to theoretical disagreements.

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