REASON AND LAW

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JUSTICE, LAW, AND ARGUMENT: ESSAYS IN MORAL AND LEGAL REASONING. By *Chaim Perelman* with an introduction by *Harold J. Berman*. Dordrecht, Holland: D. Reidel Publishing Co. 1980. Pp. xiii, 181. Cloth $28.50; paper $10.50.

Justice, Law, and Argument is a collection of seventeen of Chaim Perelman's essays on "moral and legal reasoning" that span a period of over thirty-five years. When Professor Perelman of the Université Libre de Bruxelles began his illustrious career almost forty years ago, he shared the common view of many legal and moral philosophers that the most a scholar interested in the question of justice could do was to isolate the ultimate value judgments underlying our basic conceptions of law and morality.[1] While one could criticize the application of any particular notion of justice to concrete circumstances as being more or less consistent with that notion — in short, one could criticize the application of the rules of justice as arbitrary[2] — the choice of any specific concept of justice over another could not be subjected to criticism. An individual's choice of ultimate values was beyond philosophical analysis (p. 55). According to the conventional wisdom, philosophers could identify moral issues, but could not resolve them.

In the course, however, of examining the nature of informal argumentation — which resulted in the publication, in coliaboration with Mme. Olbrechts-Tyteca, of the now classic, *The New Rhetoric: A Treatise on Argumentation*[3] — Perelman concluded that this was not

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1. He thus early on identified at least six rather widely held concepts of justice: (1) to each the same thing; (2) to each according to his merits; (3) to each according to his works; (4) to each according to his needs; (5) to each according to his rank; and (6) to each according to his legal entitlement. P. 2. In the course of his studies, he concluded that these six divergent ideas of justice shared one common structural property, which was that people placed (according to whatever criterion that might be chosen) in essentially the same category should be treated as equals. Pp. 20-22, 84.

2. It is because the idea of justice is structurally associated with the notion of consistency that, as Perelman notes, "justice . . . is the characteristic virtue of the reasonable man." P. 34. Moreover, Perelman notes, justice may not be the only ultimate value to which we subscribe. To the extent that the "just" solution may conflict with other values that we accept, the just solution may itself be criticized as "arbitrary." *See* pp. 92-94.

3. C. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC (J. Wilkinson & P. Weaver trans. 1969). This work was originally published in French as TRAITÉ DE L'ARGUMENTATION in 1958. Among Perelman's other works published in English are THE

all that could be said on the subject (pp. 57-61).[4] Despite what many philosophers, especially since Descartes and Spinoza, had contended, there was a tradition in Western thought that refused to confine philosophical reasoning to conclusions that had been arrived at by some sort of deductive process. At least since the time of Aristotle, philosophers have studied how people have sought to persuade others of the reasonableness of their arguments and conclusions, and of the reasonableness of the courses of action that they have espoused.

One of the particularly important insights developed by Perelman in *The New Rhetoric* was his concept of the "universal audience."[5] While most argument, particularly in an advanced and technologically complex society, is addressed increasingly to a specialized audience sharing not only particular values but highly specialized knowledge, everyone at some time or other speaks to an audience that is limitless and unchanging. A moral or legal philosopher does so, for example, when he explores society's basic notions of justice and the good. Whether there is in fact any such identifiable entity as a universal audience is, of course, a moot question.[6] Nevertheless, by acting as if such an audience did exist we reaffirm our belief that there are such things as "truth" and "reason." One might add that, without something like a belief in a universal audience, how could we preserve our own sanity and break out of the constraints of a sterile solipsism? In the present collection of essays, Perelman makes the following statement about the need of the philosopher to address the universal audience:

> The activity of the philosopher, master of wisdom and guide for actions, consists in taking a stand correlative to his vision of the world; it is based on selection, on choice. The danger of choice is partiality — neglecting opposing points of view and closing one's mind to the ideas of others. The difficulty of the philosopher's task is that, like a judge, he must arrive at decisions while remaining impartial. That is why the philosopher's rationality will be founded on a rule common to all tribunals worthy of that name: *Audiatur et altera pars*. In philosophy, opposing points of view must be heard, whatever their nature or their source. This is a fundamental principle for all philosophers who do

IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (J. Petrie trans. 1963); a collection of essays published as JUSTICE (1967); THE NEW RHETORIC AND THE HUMANITIES (1980); and THE REALM OF RHETORIC (W. Kluback trans.) (forthcoming).

4. Perelman declares that it was his reluctance to accept the conclusion that the choice of ultimate values was purely arbitrary, particularly in the light of the Nazi experience, that led him to embark with Mme. Olbrechts-Tyteca on this inquiry. P. 149.

5. *See* C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 3, at §§ 7, 16-18, 28.

6. Perelman points out that even in argument addressed to particular audiences, "the audience . . . is always a more or less systematized construction." *Id.* at § 4, at 19. The only essential point is that the speaker's "construction of the audience should be adequate to the occasion." *Id.*

> not believe that they can found their conceptions on necessity and self-evidence; for it is only by this principle that they can justify their claim to universality.
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> Just as a judge, after he has heard the parties, must choose between them, so a philosopher cannot grant the same validity to all opinions. Many of the theses and values submitted to his scrutiny represent interests and aspirations of limited scope and conflict with views of universal import. To the extent that the philosopher bases his decisions on rules that ought to be valid for all mankind, he cannot subscribe to principles and values that cannot be universalized, and which could therefore not be accepted by the universal audience to which he addresses himself. [P. 71.]

The philosopher, in short, can make value judgments that have some degree of universality, but to do so, he must believe that he can persuade the "universal audience" to accept his premises.

The search for accepted principles and values upon which to base informal argumentation is, of course, difficult, particularly as the composition of the audience is expanded over time and distance. There are, however, certain techniques, certain structural presumptions that can be called upon for assistance. It is a recurring feature of all human reasoning, but particularly of legal reasoning, for instance, that it is change that needs justification (pp. 28, 134). This is why the doctrine of stare decisis is so compelling. Even in a world where everything is accepted as relative, nevertheless, as a practical matter, all human communication needs some starting points that are accepted as at least provisionally valid by the participants in any discussion. This is particularly true when people have to decide what to do.[7] For want of anything better, whatever actually exists, particularly if its existence is of long standing,[8] seems to be a natural starting point.

In pursuing this line of thought, Perelman several times stresses how valuable the paradigm of legal reasoning is for the moral philosopher. To accept the paradigm of mathematics, as so many moral

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7. Perelman comments:

> Since Hume many have pointed out that one cannot logically deduce a right from a fact, nor what ought to be from what is. But no logical deduction is made when one is dealing with behavior that is customary, or with a situation that is traditional. It is only when someone maintains that what ought to be is different from what is that proof has to be supplied. Proof is incumbent upon the man who asserts that the customary action is unjust, not upon him who acts in accordance with custom. It is presumed that what is, is what ought to be: Only in upsetting a presumption must proof be given. The principle of inertia thus plays an indispensable stabilizing role in social life. This does not mean that what is must remain forever, but rather that there should be no change without reason. *Change only must be justified.*

P. 28 (emphasis in original).

8. Compare this to Hume's observation concerning the legitimacy of governments in which he stated that the firmest foundation of "the right of magistry" is "*long possession*." D. HUME, A TREATISE OF HUMAN NATURE, Bk. III, Pt. II, § X, at 556. (L. Selby-Bigge ed. 1888) (emphasis in original).

philosophers since Descartes and Spinoza have done, is to reduce moral philosophy to the trivial and prevent it from examining the most basic moral questions by making these questions essentially undecidable.[9] But in contrast to the apparent clarity of mathematics — whose clarity is in large part owing to the fact that it is a product of conceptual abstraction — law and philosophy are characterized by what Perelman calls "confused notions."[10] We could not hope to begin to make sense out of the complexity of the world, Perelman claims, without the use of these vague, flexible concepts. General notions of justice and equity, which often are at variance with the literal text of particular laws, are typical illustrations. Much of informal argumentation, whether in law or in philosophy, is concerned with the attempt to apply and to use these notions in the resolution of the concrete controversies presented for decision.

As a method of informal argumentation, however, legal reasoning has at least two features not shared by philosophy: Its premises are more generally accepted and (perhaps most important) it has an authoritative decision-making procedure. The moral philosopher, by contrast, can never close off a discussion (p. 71). He must continue to deal indefinitely with any reasonable objection to his conclusions.

Perelman stresses, however — and I think this is important — that despite the presence of an authoritative decision-maker, rules of law cannot be considered to function analogously to the rules of a game. Games are played in artificial and narrowly circumscribed environments. Law and morality confront a much more complex reality:

> In fact, however precise a law may be, it cannot enumerate all situations in which, for unforeseen reasons, it cannot be applied. At best, it will contain clauses such as "case of superior force," "the invincible force of events," "extraordinary situation," which limit its application. In the end, therefore, it is the judge or the police who must interpret it in each concrete situation.
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> To see a legal text only as a means in terms of an end and not a statement which is applicable in any circumstances voids any assimilation of a legal rule to a game rule. The game rule evades all conflict and is, by definition as long as it is uninterrupted artificially, isolated from reality. If we see in law only a normative structure and are unaware of the functions of law in society, then the pure theory of law, for methodological reasons, risks the separation of the legal system from

9. *See* pp. 163-67. For a recent discussion examining and decrying the movement in the nineteenth century away from an Aristotelian to a formal model of legal reasoning, see Siegel, *The Aristotelian Basis of English Law 1450-1850*, 56 N.Y.U. L. REV. 18 (1981).

10. *See* ch. 10 ("The Use and Abuse of Confused Notions"). There is an obvious parallel here to Gallie's "essentially contested concepts." *See* Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOCY. (n.s.) 167 (1956). *See generally* Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885 (1964).

> its social and political context and background. In fact, in an abnormal situation, unforeseen by the legislature, we stand before a legal gap, which the responsible powers, the executive and then the judiciary, must, for better or worse, fill. [P. 154.]

For Perelman, the central characteristic of legal reasoning is that its premises, "whatever they may be, whether it is a question of constitutional principles, of laws, of judiciary precedents in the *common law* system, or even of general principles of law, have never been considered as self-evident" (p. 168), that is, "as imposing themselves in an unambiguous fashion on all rational beings" (p. 168). "But, on the other hand," he continues, "neither have they ever been considered as arbitrary. Situated in a social, political, and historical context, they find, in this context, reasons which explain and justify their acceptance" (p. 168). The consistent application of the rules of a game can be fairly well worked out in advance, but this cannot be done for legal rules, which must respond to conflicting demands for "social justice" (pp. 50-51).

The very indefiniteness of legal sources will necessarily produce contested cases, instances where informal argumentation cannot definitively resolve all the issues. The role of authority then becomes critical. For me, the most intriguing theme touched on in these essays is this relationship between law and authority. It is obvious, as Perelman notes (pp. 80, 121), that when a legal decision proceeds from generally accepted premises, that is, when these decisions are in accord with the customs and values of a community, the need to rely on authority or force is diminished. The real difficulties arise when the issues are difficult, and the answers appear uncertain. It is characteristic of societies in which the Western notion of the rule of law prevails that judges and other public officials are empowered in these circumstances to decide upon the reasonable solution. In the long run, of course, the decisions of authority must, on the whole, be accepted as reasonable by society. Otherwise the legitimacy of authoritative decision-makers, one might even say their ability to function as authorities, will be questioned. Although this ultimate fragility of authority has been accentuated in the modern social order, it still appears to be true that it is a central feature, indeed a requirement, of the rule of law that society allow authority to decide what is reasonable in contested cases.[11]

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11. After mentioning, first, agreement as a form of express consensus and then custom as a form of implicit consensus, Perelman continues:

> [T]he final form of *consensus* is indirect: the question of agreement upon a rule or precedent considered as just does not enter into it, rather it is a matter of trust placed in an authority which is accepted by the members of a community, whose decisions are binding and to which it will accordingly be just to conform. This will be a matter of religious authority such as God or his spokesmen for a religious community, or of a political authority such as a monarch, parliament or judge, whose powers will be admitted within the framework of an accepted ideology in the political community.

Pp. 91-92 (emphasis in original).

These almost self-evident observations suggest that, when the issue cannot be resolved by reference to "facts" or to a shared consensus, all informal argumentation ultimately requires resort to authority if it is to reach any sort of conclusions. Without the acceptance of any such authoritative means of decision, informal argumentation can never resolve a contested issue. Whatever the abstract fascination of anarchism might be, it remains intellectually bankrupt. Without some deference to authority social organization would be impossible; mankind could never escape from the morass of solipsism. Human discourse requires both the existence of commonly accepted starting points — the *topoi* or common-place seats of argument discussed by Aristotle and by Perelman in *The New Rhetoric* — and the acceptance of some persons as authorities with the power to apply these accepted premises to concrete situations. Even philosophical argument, which in a sense is never closed, requires authoritative and accepted means of at least temporarily resolving some aspects of a dispute if any progress is to be made. In any discussion, we always accept some other person's say-so about some aspects of a disputed point. Sometimes this acceptance is based on the demonstrated or even purported superior knowledge of that other person, but this is not always the case. A speaker's tone of voice, his eloquence, and his personal magnetism can all contribute to the establishment of his authority[12] — and this only scratches the surface of the subject. The role of authority in informal reasoning is thus for me one of the principal matters that any theory of argument must confront.[13] How is this need for authority met? This is a question whose resolution requires an exploration of the bases of Western culture. It is no criticism of the present collection of essays that they merely raise this complex but fundamental question.

The publication of Perelman's essays in English is a welcome development. I hope that their publication will stimulate an English-speaking audience to probe deeper into the work of Perelman and Aristotle on informal argumentation and to contribute to the further development of this difficult but fascinating essential subject.

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12. *See* ARISTOTLE, RHETORIC Bk. II, cc. 1-17 (9 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH (1924)), where Aristotle discusses the means by which a speaker builds up his own credibility and persuasiveness and destroys that of his opponents. *See also* C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 3, at 305-21 (§§ 70-73).

13. For a discussion of the notion of authority in the context of a legal system, see G. CHRISTIE, LAW, NORMS AND AUTHORITY (1982) (forthcoming).