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The Philosophy and Legal Philosophy of Chaim Perelman

Mitchell Franklin
University at Buffalo School of Law

THE PHILOSOPHY AND LEGAL PHILOSOPHY OF CHAÏM PERELMAN

MITCHELL FRANKLIN*

I. THE SIGNIFICANCE OF *Traité de l'argumentation*

PERELMAN'S *Traité de l'argumentation*[1] is an important work because he forces scholarly reconsideration of problems, both of philosophy of law and of philosophy in general. His writing is philosophically significant, because he reintroduces dialectic into philosophical discussion, from which it has been excluded by the distaste for it among bourgeois thinkers who fear the Marxist outcome of the dialectic. However, Perelman's conception of dialectic is anti-Hegelian and anti-Marxist. Indeed, it constitutes a rejection of Hegelian and Marxist conceptions of dialectic because it is in part founded on Kantian and Neo-Kantian ideas. Perhaps it would not be too fanciful to describe his work as a confrontation between Kant's *Critique of Judgment* and Hegel's criticism thereof in Hegel's *Aesthetics*. However, Hegel is rarely mentioned by Perelman, and his reference to Kant is largely to the *Critique of Practical Reason*. The principal sources of his theory of argumentation come from the ancient Greek world.

Perelman's *Traité de l'argumentation* is important because he compels reconsideration of problems of philosophy of law. He discusses philosophy of law as an aspect of his general philosophic theory of dialectic or argumentation. This leads him to suggest that legal argumentation, based on the carefully structured contestation of the rival parties or subjects of law in a competent court, which makes a reasoned determination or decision, should be regarded as the ideal for the solution of problems arising within various social sciences. Thus, he makes a distinction between the formal logic of the physical sciences and the dialectical logic of the social and human sciences. The influence of the Neo-Kantian distinction between *Erklärung* or *explication* and *Verstehen* or *compréhension* as rival theories of knowledge may be here perceived. This explains the importance of two recent works which Perelman has edited. One is a volume of antinomies in law.[2] The other is a work concerned with *lacunae* or gaps in the legal order.[3] The latter is a valuable contribution to the theory of legal or juridical method. Although there have been twenty-six centuries of the history of Roman and civil law, the scholarly history of the legal method of such Roman and Romanist law really begins only in 1840 with Savigny. It is not entirely an accident that revived theory of the role of legal argumentation and of legal method should come from Perelman, who is involved both in

* Professor of Law, State University of New York at Buffalo; Professor of Law Emeritus, Tulane University; A.B., 1922, LL.B., 1925, S.J.D., 1928, Harvard University.

1. C. PERELMAN et OLBRECHTS-TYTECA, LA NOUVELLE RHÉTORIQUE TRAITÉ DE L'ARGUMENTATION, tomes 1 et 2 (1958).

2. C. PERELMAN, LES ANTINOMIES EN DROIT (1965).

3. C. PERELMAN, LE PROBLEMÈ DES LACUNES EN DROIT (1968).

the ancient theory of argumentation and in twenty-six centuries of Roman legal history, because the ancient history of theory of argumentation and the history of Romanist legal method at times have been inter-related.

II. Dialectic and Roman Law

Following some discussion in 1936,[4] Professor Fritz Schulz stated in 1946 the importance of Greek ideas of dialectic in developing Roman law, and condemned philosophers for not acknowledging this.[5]

> The importation of dialectic [from Greek thought] was a matter of extreme significance in the history of Roman jurisprudence and therefore of jurisprudence generally. It introduced Roman jurisprudence into the circle of the Hellenistic professional sciences and turned it into a science in the sense in which that term is used by Plato and Aristotle no less than by Kant. It is only systematic research and organized knowledge that can properly be so called, and these are attainable only by the dialectical method. It is only through dialectic that Roman jurisprudence became fully logical, achieved unity and cognoscibility, reached its full stature, and developed its refinement. Not only does dialectic subsume individual phenomena under their genera; it is also an instrument of discovery, suggesting, when applied to jurisprudence, problems which have not actually occurred in practice . . . Plato's enthusiastic laudation of the dialectical method is seen to be fully justified: for Roman jurisprudence it proved to be verily the fire of Prometheus.[6]

Thus, in Schulz' thought dialectic explains the strength of Roman law. Although I have written that "Schulz' conception of dialectic is extremely restricted,"[7] because it is not Hegelian, what he has said should be carefully studied. In a footnote Schulz says that the role of dialectic in Roman law is "not sufficiently noticed by historians of Roman jurisprudence and entirely ignored by historians of philosophy."[8] Schulz was partially wrong, because Hegel attacked the Stoicism of Roman law.[9] In his majestic *Encyclopedic Dictionary of Roman Law*, Adolf Berger published his bibliography concerning the role of the *rhetor* in Roman law.[10] Even before Schulz, Professor Édouard Cuq, among modern Romanists, had indicated the role of Greek dialectic in making Roman law a science. The second edition of Cuq was published in

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4. F. Schulz, Principles of Roman Law 15, 124, 129 (Wolff tr. 1936).

5. F. Schulz, History of Roman Legal Science 62, 66, 67, 76 (1946). *See* Franklin, *Bracton, Para-Bracton(s) and the Vicarage of the Roman Law*, 42 Tul. L. Rev. 455, 466 (1968).

6. Schulz, *supra* note 5 at 67.

7. Franklin, *supra* note 5.

8. Schulz, *supra* note 5, at 67 n.6.

9. Franklin, *The Significance of Stoicism in the Development and Outcome of Hegel's Theory of Alienation*, 1958 Acta Juridica 246.

10. A. Berger, Encyclopedic Dictionary of Roman Law 685, 804 (Transactions of the American Philosophical Society, New Series, Part 2) (1953).

1928.[11] Mention should also be made of Professor Eduardo J. Couture who had lectured on the dialectic of the Romanist judgment some years ago.[12]

In 1967, Professor Peter Stein wrote:

> In recent years . . . scholars of Roman law have come to accept the law of the classical period as something dynamic and have been concentrating their attention on the nature of juristic argument during that period. Two valuable studies, from widely differing viewpoints, are that of Professor Max Kaser, *Zur Methode der römischen Rechtsfindung* [published in 1962], and that of Professor Erwin Seidl, *Prolegomena zu einer Methodenlehre der Römer* [published in 1966].[13]

Stein's own work, *Regulae juris*, disagrees with aspects of Schulz' discussion of dialectic in Roman law.[14] A few years before Stein, Professor H. F. Jolowicz had explored the role of *regulae juris* in Roman law.[15] Jolowicz seems at times to have been unaware that he was confronting the philosophic problem of the dialectical unity-in-opposition of the general and particular which is buried in the texts of legal maxims and legal common places. The theory of the new rhetoric has been carefully discussed by Professor Jacob D. Hyman.[16] Because of his hostility to formulated texts relating to the theory of aggression in international law, it may be significant that Professor Julius Stone has yielded considerably to the influence of Perelman.[17] Professor Karl Larenz[18] does not mention Perelman, but discusses, juridically and philosophically, the small volume, *Topik und Jurisprudenz*,[19] written by Theodor Viehweg. Viehweg acknowledges his relation to Perelman.[20] His prefacé to the third edition states the importance of the work of Professor Luis Recaséns Siches and of Stone.[21] The first edition of Viehweg's work appeared in 1954 and the third edition in 1965. The latter contains an elaborate bibliography.[22] Professor H. L. A. Hart is under the influence of Perelman.[23]

III. Aristotle and Kant

The most distinguished theorist of "common places" is, of course, Aristotle, whose *Topics* is concerned with the dialectic of argumentation or of controversy

11. E. Cuq, Manuel des institutions juridiques des romains 40 (2d ed. 1928).
12. *See* E. Couture, Introduction à l'étude de la procedure civile (1950).
13. Stein, *Justice Cardozo, Marcus Terentius Varro and the Roman Juristic Process*, The Irish Jurist 366, 368 (1967) (Second Series).
14. P. Stein, Regulae Juris From Juristic Rule to Legal Maxims 52 (1966). Professor Stein recognizes the importance of Professor David Daube, of Oxford.
15. H. Jolowicz, *Roman Regulae and English Maxims*, 1 Studi in memoria di Paolo Koschaker *"L'Europa e il Diritto Romano"* 213 (1953).
16. Hyman, *Concerning the Responsibility and the Craftsmanship of the Judge: A Review of Julius Stone's Legal System and Lawyers' Reasoning in the Light of Recent Criticism of the Supreme Court*, 14 Buffalo L. Rev. 347, 354 (1965).
17. J. Stone, Legal System and Lawyers' Reasoning 327 (1964).
18. K. Larenz, Methodologia de la ciencia del derecho 147 (Ordeig tr. 1966).
19. T. Viehweg, Topik und Jurisprudenz (1965).
20. *Id.* at i.
21. *Id.*
22. *Id.* at 2.
23. H. Hart, Introduction to Perelman, The Idea of Justice and the Problem of Argument vii (Petrie tr. 1963).

or of contestation. W. A. de Pater holds that Aristotle's *Topics* is important, not merely as content, but as method. "The *Topics*," de Pater writes, "does not present a heap of places, but a dynamic method, worked out by the style of example, so that it is not necessary to be disconcerted by the weighty number of laws mentioned."[24] Furthermore, de Pater writes, ". . . [T]he place is a principle and a proposition (or premise) common to several arguments . . . ."[25]

De Pater has sharpened the discussion of Aristotle's common places in several important ways. He has removed the common places from the content of law to the methodology of law and thus the work of Aristotle becomes an aspect of the problem of legal method which has been so prominent in the history of legal theory since Savigny's discussion of legal method was published in the first half of the nineteenth century. Hegel held that Aristotle's *Topics* or "places" were methodological. Hegel, influenced by Bruno and perhaps by his own dialectical methodology of the unity-in-opposition of the abstract-concrete, said:

> . . . [I]n [the *Topics*] the points of view from which any thing can be considered are enumerated . . . Aristotle gives a large number of general points of view which can be taken of an object, a proposition or a problem; each problem can be directly reduced to these different points of view that must everywhere appear. Thus these "places" are, so to speak, a system of many aspects under which an object can be regarded in investigating it . . . [T]he knowledge of points of view at once places in our hands the possibility of arriving at the various aspects of a subject, and embracing its whole extent in accordance with these points of view . . . This, according to Aristotle, is the function Dialectic, which he calls an instrument for finding propositions and conclusions out of probabilities . . . .[26]

Contemporary bourgeois interest in Aristotle's *Topics* may be designed to veer Aristotle to subjectivistic Kantianism and ultimately to subjectivistic Neo-Kantianism and its various manifestations. De Pater's discussion suggests that *Topics*, understood as Kantian or Neo-Kantian methodology, is valuable to contemporary bourgeois jurists because such method is ambiguous or existential. That is to say, it may establish the Kantian freedom of the jurist to exploit possibilties or *déplacement*, or placement as displacement, or harmony as disharmony. The vulnerability of the subjects of law to the ambiguity of the common place is suggested by de Pater's idea that the place is a principle, proposition or premise "common to several arguments."[27]

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24. W. DE PATER, LES TOPIQUES D'ARISTOTE ET LA DIALECTIQUE PLATONICIENNE LA METHODOLOGIE DE LA DEFINITION 230 (1965).

25. De Pater, *La fonction du lieu et d'instrument dans les Topiques*, in ARISTOTLE ON DIALECTIC, THE TOPICS, PROCEEDINGS OF THE THIRD SYMPOSIUM ARISTOTELICUM 164, 177 (Owen ed. 1968).

26. 2 G. HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY 217 (Haldane and Simson tr. 1894). *See also* volume 3 at 129.

27. *Supra* note 25.

IV. A Criticism of Perelman's Dialectic

Because he has involved and subordinated Aristotle to Kant, it is necessary to consider Perelman's dialectic of legal argument or contestation as Kantian and Neo-Kantian in that he precipitates a Kantian legal argument between abstract, unhistoric, fettered or limited subjects of law, and resolves the contradiction by the mediation of the self-determination or freedom of the jurist who exploits or subjectively chooses among the possibilities offered by the alienated or fettered subjects of law. In choosing his freedom or in making his choices Perelman expects, but in no way requires, the bourgeois jurist to be bound by "precedent." By precedent Perelman does not merely mean prior Anglo-American judicial determinations, but also the formulated constitutions, the formulated codes of Romanist national states and the formulated texts of international law. Thus, his Kantian dialectic puts the bourgeois legal order at the disposal of the futurist demands of monopoly capitalism without jeopardizing bourgeois social relations.

These older and more recent writings show the important role of Perelman in seeking to revive the role of dialectic both in law and in the philosophy of the social sciences.

This is said even though Perelman's conception of dialectic may be rejected. This rivalry, at least in the history of Roman law, may sharpen. For some decades, Roman legal scholarship seemed to have arrived, exhausted, at the terminus of interpolationism and thus to lose its presence-in-the-world. However, since movement for the reconsideration of Roman law from the point of view of dialectical (historical) materialism has arisen, Perelman's anti-Hegelian, anti-Marxist dialectic may be intended to confront dialectical (historical) materialism. Hence there may be in the making controversy between different conceptions of dialectic.

V. An Hegelian Criticism of Perelman's Kantianism

A critic of Perelman's conception of dialectic occupies a position similar to that of Schiller to Kant. In his remarkable discussion of Kant's *Critique of Judgment*, which appears in Hegel's *Aesthetics*, Hegel said:

> It constitutes the starting-point for the true conception of the beauty of art. Such a conception could however, only make itself effective as the higher comprehension of the true union of necessity and freedom, particular and universal, sensuous and rational, by its overcoming the defects still latent in the previous standpoint. It must be admitted that the artistic sense of a profound and, at the same time, philosophical spirit anticipated philosophy in the stricter sense by its demand for and expression of the principle of totality and reconciliation in its opposition to that abstract finiteness of thought . . . that understanding faculty devoid of any substantive content, which one and all apprehend nature and reality, sense and feeling, merely as a *limit* . . . It is Schiller who must be credited with the important service of having

> broken through the Kantian subjectivity and abstractness of thought, and of having ventured the attempt to pass beyond the same by comprehending in thought the principles of unity and reconciliation as the truth. . . .[28]

Hegel is thus criticizing Kant who acknowledged contradiction, but who merely surmounted the rivalry by subjectivizing it. As Hegel says, this Kant did by conceiving the contradictory forces as limited, abstract or fettered. The contradictory forces were forces-in-themselves, but not also forces-for-other. Kant then subordinates these motionless or unrelated forces through the motion of a *deus ex machina* or external force, which dominates the limited rival elements and chooses freely or arbitrarily among them.

Where Hegel perceived mediation or negation through the inter-penetrating self-motion of the contradictory elements, Kant perceived the external mediator who with agility selected his possibilities among the fettered or (in social life) alienated or appropriated forces. In the *Critique of Judgment* Kant wrote:

> Hence we see that the removal of the antimony of the aesthetical judgment takes a course similar to that pursued by the critique in the solution of the antinomies of pure theoretical reason. And thus here, as also in the *Critique of Practical Reason*, the antinomies force us against our will to look beyond the sensible and to seek in the supersensible the point of union for all our *a priori* faculties, because no other expedient is left to make our reason harmonious with itself.[29]

Kant himself states that his *Critique of Judgment* was not only an aesthetic theory, but also an attempt to relate aesthetic taste to moral ideas and "the culture of the moral feeling."[30] A weakness of Marcuse is that he blunts or weakens Hegel's condemnation of Kant. Marcuse writes:

> In the *Critique of Judgment* the aesthetic dimension and the corresponding feeling of pleasure emerge not merely as a third dimension and faculty of the mind, but as its *center*, the medium through which nature becomes susceptible to freedom, necessity to autonomy. In this mediation, the aesthetic function is a "symbolic" one . . . In Kant's system, morality is the realm of freedom, in which practical reason realizes itself under self-given laws. Beauty symbolizes this realm in so far as it demonstrates intuitively the reality of freedom.[31]

But Schiller grasped and solved the matter dialectically.

> Beauty, it is said, links together two conditions which are opposed to each other and can never be one. It is from this opposition that we must start; we must comprehend and recognize it in its whole purity and strictness, so that the two conditions are separated in the most definite way; otherwise we are mixing but not uniting them . . . [I]t is said that Beauty *combines* those two opposite conditions, and thus

28. 1 G. HEGEL, THE PHILOSOPHY OF FINE ART 83 (Osmaston tr. 1920).
29. I. KANT, CRITIQUE OF JUDGMENT 186 (Bernard tr. 1951).
30. *Id.* at 202.
31. H. MARCUSE, EROS AND CIVILIZATION A PHILOSOPHICAL INQUIRY INTO FREUD 159 (1955).

> removes the opposition, but since both conditions remain eternally opposed to one another, they can only be combined by cancellation (*aufgehoben*). Our . . . business, then, is to make this combination perfect, to accomplish it so purely and completely that both conditions entirely disappear in a third, and no trace of the division remains behind in the whole; otherwise we are isolating, but not uniting them.[32]

The role of Perelman's jurist in the world of bourgeois property and social conditions is praetorian, cassational or para-legal. Although Perelman asserts the rationalism of legal argumentation or contestation, the rationalism of the method of argumentation justifies the domination of the rationalism of the jurist. Because of the Kantian limits imposed on the forces involved and, hence, their lack of the necessary interpenetration, the jurist or the external mediator seizes, appropriates, alienates or limits the forces involved in the legal argument. There is thus juridical conquest reflecting the alienation in the social infra-structure.

Perelman, himself, relates his Kantianism not to the *Critique of Judgment*, but in large measure to the *Critique of Practical Reason*. Perelman writes:

> The conclusion recalls Kant's categorical imperative. Let us examine Kant's ideas more closely. This will give a more exact idea of how my theses are similar to his, and how they differ from them . . . We may translate Kant's categorical imperative into judicial language as follows: "You must conduct yourself as if you were a judge whose *ratio decidendi* was to furnish a principle valid for all men." Apart from my emphasis on precedents, to which the *ratio decidendi* must be related, my formulation seems at first glance to differ very little from Kant's categorical imperative. Yet its actual meaning is different because of the clear distinction that Kant establishes between the subjective and the objective. In opposing maxims to laws, Kant tells us that the maxim is subjective because the subject considers the condition that determines his will to be valid only for his will. The law, in contrast, is objective if the condition is recognized to be valid for the will of every reasonable man. This dichotomy, with its opposition between the individual and the universal, seems to me to be contradictory to the facts and altogether chimerical. As soon as we formulate principles of action, whatever they may be, those principles eliminate something of the arbitrary from our conduct. Our behavior, being regulated, is no longer entirely dependent on our subjective whims . . . What we actually do find is a progressive universalization of our moral principles, which allows us gradually to elaborate reasonable principles of action for all mankind. The essential function of the philosopher is, perhaps, to formulate such practical principles . . . .[33]

Because of his insensitivity to history—even to the brutal history of his own century—Perelman does not acknowledge that the bourgeois subject of law may be historically fettered or limited. Instead Perelman seems to conceive

32. J. SCHILLER, ON THE AESTHETIC EDUCATION OF MAN 88 (Snell tr. 1954).
33. C. PERELMAN, JUSTICE 76 (1967).

that the subject of law is a carrier of objective spirit or objective idealism. Perhaps, in this regard, he is following Schelling or Savigny. For the latter, law was the *Volksgeist* or national spirit revealed through custom or exteriorized by practical activity. But Savigny's theory of the *Volksgeist* was merely a form of appropriative alienation, in which Savigny veered the subject of law into the object of the *Volksgeist,* and then veered the new subject, the *Volksgeist,* into the object of the new subject, the agile or ironic jurist, to whom both subjects of law and *Volksgeist* were objects. Thus, it appears that Perelman's departure from Kant signifies that the former has eliminated the class struggle idea which was hidden in Kant's presentation by replacing it with a theory of the essential unity or indifference or harmony of the subjects of law. At the same time he preserves Kant's categorical imperative by which the jurist rules the subjects of law as objects, through his agility, freedom or acrobatism.

But in truth the agility of Perelman's categorical imperative or of Perelman's jurist is a superfluity unless there is an historic contradiction among alienated or limited subjects of law. By means of the categorical imperative, Kant undertook, within the limits of the weakness of the German bourgeoisie of the late eighteenth century, to negate or to alienate feudal alienation and to bring eighteenth century Germany abreast of the French revolution. The importance of his *Critique of Judgment* is that he clearly introduces the genius or artist, who when metamorphosed into the jurist (as was done in effect by Savigny), enjoys the role of sovereign mediator who dominates the rivalry between feudal and bourgeois forces. This external mediator enjoys the role of the unhistoric prince in the French thought of the mechanistic eighteenth century, who was designed through his enlightened laws to replace feudal social relations with bourgeois social relations. Because he conceived that the rivalry of social forces should not be resolved by the self-motion of the historic rivals themselves, who are thus limited or alienated, Kant's mediator-jurist is also imposed from without. As Claude Bruaire could add, Kant's mediator-artist-jurist also enjoys the role once played by the mediator-artist-priest-jurist over the contradictory, unstable consciousness of European feudalism, which was torn between heaven and earth, and which therefore was seized or alienated by the medieval mediator.[34] Kant's *Critique of Judgment* immediately leads to the élitist, agile, ambiguous secular mediator. The categorical imperative of Kant's *Critique of Practical Reason,* to which Perelman commits himself, leads to the hegemony of the holy moral legislator. However, as the holy moral legislator, who in time issues from the thought of the *Critique of Practical Reason* is merely postulated by Kant, he is succeeded as mediator by the artist-genius in the *Critique of Judgment,* where Kant attempts to necessitate his hegemony. It may be hinted that Kant may have yearned for a judge even in the *Critique of Pure Reason.*[35]

34. C. BRUAIRE, LOGIQUE ET RELIGION CHRÉTIENNE DANS LA PHILOSOPHIE DE HEGEL, 152, 156 (1964).

35. *See* I. KANT, CRITIQUE OF PURE REASON 480, 486 (Müller tr. 1966).

VI. Perelman's Theory of Contestation

Perelman's theory of the judicial contestation of the subjects of law, which justifies the role of the common places or *centrum* in his thought, must be examined closely. A weakness is that his theory of contestation does not explain the role of the *ex parte* or default judgment, where there is, of course, no contestation. These judgments are increasingly prominent in American law, especially in the area of Conflict of Laws. Moreover, where there seems to be contestation, which is ordinarily true, Perelman does not seem to grapple with the fact that the contest or common place is coerced or forced by the state. But in kin-organized society the contestation was founded on a self-determined submission to the artist-genius-jurist by the subjects of law. In Roman law this was the principle of *litis contestatio,* which perhaps found an echo in the political and legal theory of the social contract. Before the period of Aristotle, Socrates had been condemned because of his conduct in respect to an aspect of this matter. Hegel's discussion of the trial of Socrates from this point of view is too detailed to be considered here.[36] However, with the emergence of the state, based on private property, self-determined submission was in effect overcome and replaced by coerced submission to judicial process. Aristotle's considerations relative to contentious common places should be studied in connection with the ideas of self-determined submission, such as or similar to *litis contestatio.* The problem is whether Aristotle justified mediation founded on the self-determination of free subjects of law or founded on the free mediator who imposed his own freedom as mediator on unfree, coerced or alienated subjects of law. Professor Wenger raised the question whether the formulary procedure of Roman law was influenced by the *Topics.*[37]

In relating the condemnation of Moosbrugger for murder in *The Man Without Qualities,* Musil, who says that the convicted man ". . . [H]imself . . . was a world,"[38] shows through him that the historic role of *litis contestatio* has been reversed by bourgeois reality. Musil writes of Moosbrugger:

> When the president of the court read the finding that declared him responsible for his actions, Moosbrugger rose and addressed the courts: 'I am satisfied I have attained my object.' Scornful incredulity in the eyes round about answered him, and he added angrily: 'As a result of having forced the court to try me, I am satisfied with the conduct of the case!' The president of the court, who had now become all severity and condemnation, rebuked him, remarking that the court was not concerned whether he was satisfied or not. Then he read the death sentence to him, exactly as though the nonsense that Moosbrugger had been talking all through the trial, to the delight of all present had now for once received a serious answer.[39]

36. *See* 1 Hegel *supra* note 26 at 440.
37. *See* H. Wenger, The Institutes of the Roman Law of Civil Procedure 140, n.18(a) (Fisk tr., rev. ed. 1940).
38. *Quoted in* The Existential Imagination 161 (Karl and Hamalian, eds. 1963).
39. *Id.* at 162.

Again, Hegel must be mentioned, because his theory is that punishment even by the state is a self-determination of the criminal.[40] But this requires bourgeois coercion or bourgeois appropriative alienation of the consciousness of the criminal.

Part of Perelman's thinking is devoted to creating the structure within which the coerced or compelled legal argumentation or legal contestation is initiated and develops. This contentious structure is the truth of the research into the facts of the contest which includes and justifies the hegemony of the jurist or judge of the conflict.

Through this structure Perelman creates the form which Kantianism and Neo-Kantianism require, a form which fetters the subject of law and unfetters the jurist or judge. A Neo-Kantian precursor of Perelman is Stammler, who intended a natural law with a variable content. But Professor Rommen, the scholastic jurist, writes of Stammler: "Stammler distinguishes, in a Kantian sense, it is true, and not in an Aristotelian, the form and the content of law. 'Form' signifies for him condition (*a priori*): the problem, then, consists in finding in what conditions the positive law is just law. Therefore it is not the question of a juridical content, but, as in the ethic of Kant, of a pure form in which several contents can take place."[41] The Kantian jurist, or, more exactly, the methodology of the Kantian jurist gains the power to choose and to impose the content of law. It is not yet possible to say that Perelman's jurist is existential. The rationalism of argumentation seems to preclude this. However, the criterion of existentialism is not abstract rationalism, but existential theory of possibility. "The conceptual instrument, i.e., the category that existentialism employs in all of its forms," Professor Abbagnano writes, "is that of *possibility*. In fact, it carries out the analysis of human existence in the world as the analysis of the possibilities open to man in his confrontation with men and things."[42] Professor George Schrader, inspired by Kant's *Critique of Judgment*, moves from Kant to existentialism:

> No man, in Kant's view, is born with a moral character. He is endowed at birth with neither the actuality nor the potentiality of one. If he is to have a character at all, he must create it. It is a possibility which confronts him, but again not as anything determinate. He has no model to guide him, but must construct it. The model is the form in which he represents himself to himself under the idea of freedom. If he takes the model too seriously, he negates the freedom which it was intended to serve and instruct. To use Kant's terminology, the model is a schema and functions symbolically. It gives expression to the ideal in concrete form and thus provides a rule for action; but at the same time it refers beyond itself as does the work of art.[43]

40. G. HEGEL, PHILOSOPHY OF RIGHT 70 (Knox tr. 1942).
41. H. ROMMEN, LE DROIT NATUREL 166 (Marmy tr. 1945). *See* LARENZ, *supra* note 18 at 148.
42. N. ABBAGNANO, CRITICAL EXISTENTIALISM 226 (Langiulli tr. 1969).
43. G. Schrader, *The Philosophy of Existence*, in THE PHILOSOPHY OF KANT AND OUR MODERN WORLD 25, 42 (Hendel ed. 1957). *See* M. HEIDEGGER, BEING AND TIME 217

Thus, reversing the apparent order, the positive civil code becomes the *projet* or *Entwurf* of existentialism. It is only a schema.

VII. PERELMAN'S JUSTIFICATION OF KANT'S CATEGORICAL IMPERATIVE

Perelman's jurist determines himself by the categorical imperative of Kant's *Critique of Practical Reason,* though Kant himself may be said to show that the *Critique of Pure Reason* and the *Critique of Judgment* also introduce or make possible the mediator,[44] who through his ambiguity or agility rules contradictory forces which are fettered, limited, finite or alienated. In law this means that the subjects of law are veered into objects of law. A large part of Hegel's entire thinking is devoted to condemning the agility or arbitrariness of the mediator. It is not necessary to review here these extensive and ample materials,[45] save in regard to Kant's conception of the categorical imperative. Here Hegel holds in effect that because the imperative is a bourgeois "ought," which remains to be realized in history through the overthrow of feudalism by the bourgeoisie, the holy moral legislator must be postulated. As the Kantian "ought" is a postponement of the Kantian "is," the holy moral legislator, the mediator, may seek out his possibilities or his freedom. Perelman states his own Kantian thought as follows:

> Experience of the relations between rules and the will shows us there is rarely a purely subjective rule and that we can never be sure of dealing with an objectively objective and universally valid rule. What we actually do find is a progressive universalization of our moral principles, which allows us gradually to elaborate reasonable principles of action for all mankind. . . . But to *propose* does not mean to *impose.* The distinction must be maintained at all cost.[46]

Despite bourgeois theory of the rule of law,[47] Kant's "ought" legitimates the agility, equivocation, *Verstellung* or displacement of the place by the mediator or holy moral legislator. The meaning of *Verstellung,* Hegel says, is that consciousness is confronted by a "perfect nest" of Kantian "contradictions."[48] Consciousness proceeds

> by fixing definitely one moment, passing thence immediately over to another, and doing away with the first. But, as soon as it has set up

(Macquarrie and Robinson tr. 1962); R. Grabau, *Karl Jaspers Communication through Transcendence in* EXISTENTIAL PHILOSOPHERS: KIERKEGAARD TO MERLEAU-PONTY 109, 128 (Schrader ed. 1967); S. BEAUVOIR, THE ETHICS OF AMBIGUITY 129 (Frechtman tr. 1945); J. WILD and J. EDIE, INTRODUCTION, MERLEAU-PONTY, IN PRAISE OF PHILOSOPHY xix (Wild and Edie tr. 1963); H. BARNES, THE LITERATURE OF POSSIBILITY 365 (1959); Franklin, *The Kantian Foundations of the Historical School of Law of Savigny,* 22 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 64, 86 (1952/1953). *See generally* 2 G. HEGEL, SCIENCE OF LOGIC 181 (Johnston and Struthers tr. 1929).

44. *Supra* note 29.

45. *See* Franklin, *Sketch of an Historical Foundation For A Tribunitial Theory of Conflict of Laws,* 41 TUL. L. REV. 579, 619 (1967).

46. Perelman, *supra* note 33 at 78.

47. G. HEGEL, THE PHENOMENOLOGY OF MIND 670 (Baillie Jr. 1931).

48. *Id.* at 629.

> this second moment, it also "shifts" (*verstellt*) this again, and really makes the opposite the essential element. At the same time, it is conscious of its contradiction and of its shuffling, for it passes from one moment, immediately in its relation to this very moment, right over to the opposite. Because a moment has for it no reality at all, it *affirms* that very moment as real: or, what comes to the same thing, in order to assert one moment as *per se* existent, it asserts the opposite as the *per se* existent. It thereby confesses that, as a matter of fact, it is in earnest about neither of them. The various moments of this vertiginous fraudulent process we must look at more closely.[49]

As he develops his condemnation of Kant, Hegel says:

> The concrete moral consciousness . . . is an active one; that is precisely what constitutes the actuality of its morality. In the very process of acting, however, that 'place' or semblance is immediately 'displaced,' is dissembled; for action is nothing else than the actualization of the inner moral purpose, nothing but the production of an actuality constituted and determined by the purpose; in other words, the production of the harmony of moral purpose and reality itself.[50]

In the theory of Kantian *Verstellung* the legal subject, as mediator, as agile jurist, dominates or rules the legal object, the so-called subject of law, the apparent "parties" in ordinary Anglo-American legal language. In *L'heritage kantien,* Professor Jules Vuillemin has laid a foundation for understanding and mastering Hegel's criticism of Kant.[51] Professor Lewis W. Beck's discussion of Kant is important, too, but it is marred because it is insufficiently linked to Hegel.

> Just as a schema was the 'third thing' that could mediate between pure concept and pure intuition, the type must be a third thing that can mediate between the concept of nature, all that is, and the concept of what ought to be. The third thing in the practical judgment is the concept of law itself as definitive of a realm or kingdom. Nature is phenomena under law, and natural law provides a type or model by which we can think the practical law *in concreto.*[52]

In the *Philosophy of Law,* Hegel considers German romantic legal irony as legal *Verstellung.*

> To impose on this way on others is hypocrisy; while to impose on oneself is a stage beyond hypocrisy, a stage at which subjectivity claims to be absolute. This final, most abstruse form of evil, whereby evil is perverted into good and good into evil, and consciousness, in being aware of its power to effect this perversion, is also made aware of itself as absolute, is the high-water mark of subjectivity at the level

49. *Id.* at 629. *See contra,* without mentioning Hegel, Ebbinghaus, *Interpretation and Misinterpretation of the Categorical Imperative,* in KANT: A COLLECTION OF CRITICAL ESSAYS 211, 216 (Wolff ed. 1967).

50. *Supra* note 47 at 630.

51. J. VUILLEMIN, L'HÉRITAGE KANTIEN ET LA RÉVOLUTION COPERNICIENNE 1 (1954).

52. L. BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON 158 (1960).

> of morality; it is the form into which evil has blossomed in our present epoch. . . .[53]

This states the problem which confronts theory of the possibilities of the existential mediator. This is perceived by Julius Stone, who mentions that when there is resort to rhetorical arguments "the legal system is 'open,' in the sense that it does not offer mechanical keys to determinate solutions. This, as we have sufficiently stressed, does not mean that choice is at large, or that decisions may not command a degree of conviction, springing from their anchorage in the *tópoi*, the truths taken as common grounds for the time being."[54] But Abbagnano penetrates to the philosophical crux of the matter, when, according to Nino Langiulli, he holds ". . . that the possible is the category of comprehension. To *understand*, says Abbagnano, signifies taking account of that which makes something possible, i.e., grasping a possible in its constitutive possibility."[55] Professor Larenz emphasizes that Viehweg says the solution of juridical problems moves within a "comprehensive relation."[56] This should be taken to mean, as was stated at the beginning of this essay, that Perelman's treatment of Aristotle's theory of argumentation, has been drawn within the anti-causal, individuating Neo-Kantian conception of *Verstehen*, the chief weapon of Neo-Kantianism against law-governed ideas of the social and human sciences of Hegel and of Marx.

This may explain why Perelman has committed himself, not to Kant's *Critique of Judgment*, but to the categorical imperative of Kant's *Critique of Practical Judgment*. It may be that Perelman turned to the *Critique of Practical Reason*, hoping to overcome the weakness of *Verstehen* theory, flowing from the utter subjectivity of such thinking. It has been shown that Hegel believed that *Verstellung* or equivocation or ambiguity was present in the three critiques and also that Kant mentioned the essential unity of the three works.[57] However, it may be believed that existentialism, or certain types of existentialism, may rescue Kant's categorical imperative from the subjectivity of *Verstehen* theory. It may be believed that the weakness of *Verstehen* theory may be overcome or minimized if *Verstehen* theory is buttressed by objective idealism, including undialectical Neo-Hegelianism. Perelman seems to have introduced objective idealism in presenting his subjects of law. This, too, affects the situation of the mediator. Because of the arbitrariness of original *Verstehen* theory, the need of strengthening the authority of the mediator by introducing objective idealism within this area also exists. This, for example, seems to be the outcome of the "place" (*Ort*) in the social theory of Emil Brunner. Nevertheless, it is difficult to justify the role of objective idealism if the starting point is Neo-Kantian,

53. HEGEL, *supra* note 40 at 94. *Cf.* HYPPOLITE, GENÈSE ET STRUCTURE DE LA PHENOMÉNOLOGIE DE HEGEL 467 (1946).
54. STONE, *supra* note 17 at 332.
55. ABBAGNANO, *supra* note 49 at xxx.
56. LARENZ, *supra* note 18 at 147.
57. *Supra* note 29.

because the problem of "double" or divided idealism emerges.[58] This is a problem which Savigny could not solve during the nineteenth century when he supported both the *Volksgeist* and the jurist-mediator.[59]

In invoking Kant's categorical imperative today Perelman perhaps may be seeking to offer a Neo-Kantian "doubled" or divided idealism in which there is both the subjective idealism of the agile jurist and the objective idealism of some "humanist" or culture or even religious theory.[60] Perhaps Heidegger also attempted this eclecticism in *Kant and the Problem of Metaphysics*. Heidegger here in part considers Kant's *Critique of Practical Reason*. He seizes on Kant's original theory of productive imagination (*Einbildungskraft*) and relates it to the phenomenological concept of intentionality, which could be understood to justify veering between subjective and objective idealism.[61]

VIII. An Hegelian View of Perelman as a Theorist of Alienation

In discussing the struggle between the sophists and their enemies in the history of Greek philosophy Hegel shows what is at stake in considering argumentation and the role of the jurist. "Thus the Sophists were more especially the teachers of oratory," Hegel writes, "and that is the aspect in which the individual could make himself esteemed amongst the people as well as carry out what was best for the people; this certainly characterizes a democratic constitution, in which the citizens have the ultimate decision."[62] Against this outlook, Hegel writes, ". . . Socrates expresses dissent and surprise at Protagoras' assertion as to imparting instruction in political aptitude. 'I thought that the political virtues could not be learned,' for it is Socrates' main tenet that virtue cannot be taught."[63] Hegel, in effect, reopens this discussion in his defense of

58. *See generally* H. Mougin, La sainte famille existentialiste 118, 166 (1947).

59. Franklin, *supra* note 45 at 637.

60. "Now what makes the specific quality of our western civilization is the way in which to the stream formed by the rationalist Graeco-Roman tradition is added the Judeo-Christian religious tradition, which draws its spirituality from the primacy accorded to the just God, the model of perfect conduct, and to the just man inspired by that divine model both in his thought and in his action. In contrast to the juridical view of the Romans and the philosophical view of the Greeks, the Judeo-Christian view of justice is essentially prophetic, for it is through the prophets as intermediaries that God reveals himself to men." C. Perelman, The Idea of Justice and the Problem of Argument 72 (Petrie tr. 1963).

"Once we recognize history as a real process, the problems of causality, values, and objective knowledge in history can be answered, Troeltsch believes . . . The cultural values are no longer subjective, but possess objective value . . . The aim of historical study . . . is not restricted to the understanding of the unique and particular; it also involves the study of common characteristics . . . According to Troeltsch, history is not governed by laws of nature in the sense of the natural sciences or by a rigid Hegelian dialectics. Nevertheless, it shows a certain coherence and unified development from common points of origin to common goals." G. Iggers, The German Conception of History: The National Tradition of Historical Thought from Herder to the Present 181 (1968). For Troeltsch "what makes intuitive understanding possible is the unity of all spiritual reality through the mediation of God." *Id.* at 193.

61. *See* M. Heidegger, Kant and the Problem of Metaphysics 162 (Churchill tr. 1962).

62. 1 Hegel, *supra* note 26 at 358.

63. *Id.* at 361.

the French Enlightenment, which justified codification or the content of law instead of legal method.

> What the philosophers brought forward and maintained . . . was, speaking generally, the men should no longer be in the position of laymen, either with regard to religion or to law; so that in religious matters there should not be a hierarchy, a limited and selected number of priests, and in the same way there should not be in legal matters an exclusive caste and society (not even a class of professional lawyers), in whom should reside, and to whom should be restricted, the knowledge of what is eternal, divine, true, and right, and by whom other men should be commanded and directed; but that human reason should have the right of giving its assent and its opinion.[64]

Unlike Hegel, however, Perelman asks:

> Is it to the rhetor or the philosopher . . . that we must entrust the task of completing the upbringing of the man and citizen, of the one who is to govern the city and watch over its destiny?[65]

In the *Phenomenology of Spirit*, Hegel, in his own way, says that it is private property which precipitates the coerced legal contestation or legal argument and which alienates or appropriates or limits the subject of law, because private property itself is based on alienation or *occupatio*. "Wealth has within it from the first the aspect of self-existence (*Fürsichsein*)," he writes. "It is not the self-less universal of state-power, or the unconstrained simplicity of the natural life of spirit; it is state-power as holding its own by effort of will in opposition to a will that wants to get the mastery over it and get enjoyment off of it."[66]

What should be perceived here is that because "wealth" is based on alienation or seizure, it requires or creates the existence of the state,[67] which itself, however, Hegel feels, alienates or limits the alienator. This is not by depriving the property-owner of his property, but by abstracting him from historically-created humanity by veering him into an abstraction, into a non-being who is not a human being but a limited legal person.[68]

> From every particular aspect self-consciousness can abstract and for that reason, even when under an obligation to one of these aspects retains the recognition and inherent validity of self-consciousness as an independent reality. Here, however, it finds that, as regards its own ego, its own proper and peculiar actuality, it is outside itself and belongs to another, finds its personality as such dependent on the chance personality of an other, on the accident of a moment, of an

64. *Id.* volume 3 at 390.
65. Perelman, *Rhetoric and Philosophy*, 1 PHILOSOPHY AND RHETORIC 15 (Johnstone tr. 1968).
66. HEGEL, *supra* note 47 at 536.
67. Franklin, *supra* note 5 at 518.
68. "As capitalist, he is only capital personified. His soul is the soul of capital. But capital has one single life impulse, the tendency to create value and surplus-value . . . ." K. MARX, CAPITAL 257 (Moore and Aveling tr. 1906).

> arbitrary caprice, or some other utterly irrelevant circumstance . . . In the sphere of legal right . . . the self sees its self-certainty as such to be the most unreal of all, finds its pure personality to be absolutely without the character of personality.[69]

In reality this means that because of his ownership, the so-called subject of law is veered by alienation or limitation into an object of law, and that the unfettered jurist, or, more accurately, the unfettered legal method of the jurist becomes the subject of law.

Hegel condemned Roman law because of its Stoicism or abstract universality. Stoicism seemed to be a flight from or abstraction from the property relations of Roman slavery. " 'Stoical self consciousness,' " he writes, ". . . was the outcome of 'Lordship and Bondage' . . . ."[70] The abstractness of the content of such Stoic Roman law concealed the alienating or appropriating power of the jurist over the limited subject of law.

> The actual content, the proper value of what is "mine"—whether it be an external possession or again inner riches or poverty of mind and character—is not contained in this empty form and does not concern it. The content belongs, therefore, to a peculiar specific power, which is something different from the formal universal, is chance and caprice. Consciousness of right, therefore, even in the very process of making its claim good, experiences the loss of its own reality, discovers its complete lack of inherent substantiality; and to describe an individual as a "person" to use an expression of contempt. The free and unchecked power possessed by the content takes determinate shape in this way. The absolute plurality of dispersed atomic personalities is, by the nature of this characteristic feature, gathered at the same time into a single centre, alien to them and just as devoid of the life of spirit (*geistlos*). That central point . . . has the significance of the entire content, and hence is taken to be the essential element. . . .[71]

This central point or place of alienation is Perelman's common place, the place also of displacement. While Hegel here is condemning the alienating power of the Roman prince, this is a development from the power of the Stoic jurist, the centre of Roman law. "Stoicism is nothing else," Hegel writes in this discussion, "than the mood of consciousness which reduces to its abstract form the principle of legal status, the principle of the sphere of right [law] . . ."[72] As has been said, Perelman links his thought to the abstract universal of Kant's *Critique of Practical Reason*, which Hegel condemned because of its similarity to Stoicism.[73] With Kant, Hegel says, ". . . we at once come back to the lack of content."[74] But this lack of content is a way of rule by the jurist, a way of

69. HEGEL, *supra* note 47 at 537.
70. *Id.* at 502.
71. HEGEL, *supra* note 47 at 504.
72. *Id.* at 502.
73. HEGEL, *supra* note 26, volume 3 at 424, 460.
74. *Id.* at 460.

domination, a way of alienation through legal argumentation or legal contestation.

In the *Rechtsphilosophie* Hegel who accepts the state, civil rights and liberties, the jury, and codification, makes a Kafka-like criticism of the methodology of the jurist who alienates the legal argument through his role as the mediator:

> Owing to the character of the entire body of the laws, knowledge both of what is right and also of the course of legal proceedings may become, together with the capacity to prosecute an action at law, the property of a class which makes itself an exclusive caste by the use of a terminology like a foreign tongue to those whose rights are at issue. If this happens, the members of civil society, who depend for their livelihood on their industry, on their own knowledge and will, are kept strangers to the law, not only to those parts of it affecting their most personal and intimate affairs, but also to its substantive and rational basis, the right itself, and the result is that they become the wards, or even in a sense the bondsmen, of the legal profession. They may indeed have the right to appear in court in person and to "stand" here (*in judicio stare*), but their bodily presence is a trifle if their minds are not to be there also, if they are not to follow the proceedings with their own knowledge, and if the justice they receive remains in their eyes a doom pronounced *ab extra*.[75]

Hegel's presentation is not only Kafka-like, but anticipates Vásquez, who writes of the "monodimensionality" of the "existence" of Kafka's subject of law.[76] Vásquez perhaps also had in mind Marcuse's one-dimensional man.

IX. Conclusions

Three conclusions may be drawn from the considerations presented. First, insofar as justice is justice dominated by the legal method of the jurist it should be governed by the tribunitial principle which emerged in republican Roman law. This means that those social forces which have proved their reality by struggle for recognition must concur in judicial determinations.[77] This requires that jurists representing the social forces acknowledging each other have the power of *intercessio* or of interposition. The principle of unanimity of the permanent members of the Security Council of the United Nations is an example.

Second, Perelman in part justifies and requires legal argumentation because of Montesquieuan ideas of the separation of powers. But Hegel pointed out that each of the powers of the state involved the same moments as the others,[78] including the moment of judgment. Immediately after the American revolution the abbé de Mably advised the Americans to invest the continental congress itself with the highest judicial power. This is sufficient to suggest that if possible

75. Hegel, *supra* note 40 at 145.
76. A. Vásquez, La ideas esteticas de Marx 141 (1965).
77. Franklin, *supra* note 45 at 580.
78. Hegel, *supra* note 40 at 175.

the American masses should support that sector of the state which for the time being represents or approximately represents mass interest.[79] In the period of President Roosevelt the masses recognized the virtue of the presidency as against the Supreme Court. Following his victory over the Supreme Court, the masses for several decades correctly have acknowledged the virtue of the Supreme Court. This veering is justified both by the ambiguous structure of the First or original constitution of Philadelphia and by the first and fifth amendments introduced through the Bill of Rights. Third, under actual conditions the jurist concerned with the interest of the masses should actively condemn alienating theory of legal method, for otherwise he risks strengthening such alienation through his triumph in a particular argument or contestation.

In his *Refutation of Helvétius* Diderot quotes the following: *"There is no better form of government, said the King of Prussia, in a speech made to the Academy of Berlin, than the arbitrary rule of a just, humane, and virtuous prince."* To this Diderot replies:

> And it is you, Helvétius who quote this tyrant's maxim with approbation! The arbitrary rule of a just and enlightened prince is always bad. His virtues are the most dangerous and the surest form of seduction: they lull a people imperceptibly into the habit of loving, respecting, and serving his successor, whoever that successor may be, no matter how wicked or stupid . . . One of the greatest misfortunes that could befall a nation would be two or three successive periods of rule by a just, gentle, enlightened, but arbitrary power . . . If the English had been ruled by three Elizabeths in succession, they would now be the basest slaves in all Europe.[80]

As Perelman has said in a different context in a most recent work, ". . . in philosophy there is no thing adjudged,"[81] no res judicata.

79. Franklin, *Influence of the Abbé de Mably and of Le Mercier de la Rivière on American Constitutional Ideas Concerning the Republic and Judicial Review*, in PERSPECTIVES OF LAW:ESSAYS FOR AUSTIN WAKEMAN SCOTT 96, 125 (Pound, Griswold, Sutherland ed. 1964).

80. L. CROCKER, DIDEROT'S SELECTED WRITINGS 297 (Colman tr. 1966).

81. C. PERELMAN, DROIT, MORALE ET PHILOSOPHIE 56 (1968).