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Complex Cases and Legitimation Inferences: Extending the Toulmin Model to Deliberative Argument in Controversy

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ABSTRACT: A warrant may be grounded in personal testimony, technical method, or public consensus. The justified choice of a field, in authorizing the warrant and providing further extension of support constitutes a legitimation inference. Complex cases evolve when there are a surplus of good reasons as potential support for a claim, and a choice must be made either to select a single ground for the claim or to advance independently valid reasons, differentially grounded, as support. Complex cases enter the realm of controversy when not all relevant grounds offer the same degree of support or point in the same direction, and a choice to select some grounds and discard others must be justified. The justification of the selection of grounds constitutes a legitimation warrant—a missing element of the Toulmin model.

KEY WORDS: Controversy, Stephen E. Toulmin, legitimation, field, complex case, deliberation

INTRODUCTION

The Toulmin model (1958, 2003) opened the door to the recovery of practical reason, the development of informal logic, and the advances of critical thinking into the realms of the everyday uses of argument. An alternative to positivistic reasoning, the model provided a basic outline that called attention to the ordinary communicative practices that lend support to claims for a reason. This intuitive idea of argumentation is at the basis of Habermas's own notion of the 'form of argumentation' where: 'We try to support a claim with good grounds or reasons; the quality of the reasons and their relevance can be called into question by the other side; we meet objections and are in some cases forced to modify our original positions' (1981, p. 31). Thus, Habermas follows Toulmin into more complex observations, reaffirming the distinctions between the general schema of reasoning which is more or less field invariant and the much more elaborate 'field-dependent rules of argumentation which are constitutive for the language games or life-orders of law, medicine, science, politics, art criticism, business enterprise, sport, and so on' (pp. 31-32). To appreciate an argument, then, it is necessary to understand the sort of enterprise 'that is supposed to be advanced through argumentation,' and to appreciate the enterprise, one follows the rules of thumb of argument general to all practical engagements and special to the authorized moves and certified standards of a field.

The fields of argument explored by Toulmin, Rieke and Janik include science, law, management, art criticism, and ethics (1979, pp. 203-338). The fields are said to differ along 'varied' constellations of complex procedures. The categories for assessing the requirements of argument for fields include: (1) degrees of formality ranging from informal turn taking to ritual advocacy, (2) degrees of precision ranging from mathematical exactitude to more common ball park estimates, (3) alternative requirements for completion or resolution that range from mutual agreement producing

consensus to impartial judgment effecting a verdict, (4) diverse goals that are linked to ‘*what is at stake* within the forum involved’ (p. 198). In this last respect, the goals of argument will reflect the ‘general purposes’ and ‘practical demands’ placed upon argument by the practices of a field and the objectives of the interlocutors. It is at this juncture that Habermas raises an objection, namely that Toulmin ‘doesn’t draw the proper lines between *accidental institutional differentiations of argumentation*, on the one hand, and the *forms of argumentation* determined by internal structure on the other’ (35). In other words, the categories of formality, precision, resolution mode, and purpose are insufficient descriptors to differentiate between those ‘validity claims’ (assertions of the worthiness of an argument to be trusted) that are grounded in routines of practices and those that are core to sustaining the integrity of an institution or form of life. At this point, Habermas leaves field theory behind and introduces his own well-known theory that differentiates argumentation into theoretical, practical, aesthetic, therapeutic, and explicative discourse and critique (1981, p. 23). The advantage of Habermas’s system is that it properly weights the validity and proof requirements of each form of argumentation.

The purpose of this paper is to extend the original Toulmin model, with its intuitive focus on practice, and its tantalizing promise to find grounds for practical reasoning in the warrant-using and warrant establishing work of reasoning authorized by the forms and practices of reasoning within fields. I will argue, contra Habermas, that argumentation is best served by repairing rather than abandoning Toulmin’s field grounded reasoning. The major repair I offer is the addition of ‘legitimation inferences,’ that is, justifications of the selection of backing to support a given argument. I will endeavor to show how the addition of such a component permits analysis of complex cases where grounds may or may not point unequivocally in a single direction. Finally, the modern predicament between practical and technical reasoning will be explored around the issue of risk in order to illustrate the uses of the repaired Toulmin model in exploring contemporary controversy. In the end, the Toulmin model repaired to take into account legitimation inferences may help answer Habermas’s objection that Toulmin’s field analysis cannot differentiate between essential and accidental features of a field in authorizing a warrant.

1. LEGITIMATION INFERENCES

The Toulmin model is missing a critical component: a legitimation warrant. Unnoticed by any of its many interpreters, readers and critics, Toulmin is able to convincingly make the case that the selection of grounds for establishing a warrant or support is a natural connection between argument and context (1958, 103). Indeed, in Toulmin, Janik and Rieke, the choice of the grounds for an argument is circularly defined because an argument and its purpose are the same thing: legal reasoning contextualizes legal argument, the purpose of ethical argument is an ethical decision, and so forth (1979). The problem with this notion is that it begs the question as to why any specific argued-claim is legitimately appropriate, judicable, proper, or even relevant to a given field. Further, since practitioners can borrow standards analogically from another field, or supplement the reasoning of one field with the arguments of another (presumption moves from the law to science in setting proof standards), the establishment of a claim within the ambit of

a field does not always establish what standards of argumentation offer proper certification. The justification of a decision to ground a particular argument in a field I have called elsewhere a 'legitimation inference' (1991).

The choice of backing to certify the authority of a warrant requires a special kind of inference. Like any other part of the model, the choice of grounding is criticizable; yet, the selection of backing is not another item of support, a warrant in itself, a reservation, qualifier, or claim. When called upon to justify the crucial choice to develop an argument out of a certain interpretation of the authority, relevance, and acceptability of a field, an interlocutor is required to show sufficient and necessary reasons for the selection of that field—that is to legitimate the assumed or explicit connection. In a warrant-using argument, legitimation inferences impart sufficient reasons for the selection of a field to ground and develop support, warrants, qualifiers and reservations. In a warrant-establishing argument, legitimation is a complicated process that balances competing choices among fields in the interests of rendering an overall judgment that the connections among grounding and backing, while somewhat novel, are none the less reasonable.

Typically, the legitimation inferences are left in the background. There are different reasons for this, depending upon whether a 'field' is constellated as informal practices of communicative reasoning, professional decision-making, or political advocacy. In everyday argumentation, we disagree with one another without having recourse to either an etiquette coach or a rule book, because it is appropriate to ground our discussion in the informal conventions of conversation and common opinion. In a court of law, the formidable symbolism, rituals, trained advocates and justices of the forum itself all collaborate to put on a trial where reasons tend toward questions of justice. Likewise in other forums, from science to religion, the rules of reasoning appear as immanent within a situated discourse, and the situation a product of the practices, procedures, and issues of the interlocutors. Finally, in politics, the nature of a deliberation grounds discussion in questions of power and expediency by virtue of the time toward which decisions are tending to come to a vote or a head. In other words, the social rules, institutional fora, and eventfulness of argument offer cues to the field from which reasons should be developed and from which standards should be borrowed to inform tests of reasoning or the outcomes of judgment. The personal, technical, and public fields within which the same (or similar) claims may be grounded suggest that the deliberative exigencies of situated argument are typically enmeshed in complex case making. The following section distinguishes complex cases that evolve from warrant-using argumentation, and those that typically evolve warrant-establishing reasons.

2. THE COMPLEX CASE

A complex case is a situated argument where the settlement of a disagreement depends upon the resolution of multiple points of disagreement. This section divides complex cases into two types. In Type I complex cases the process of reasoning is well established and shaped into coherent case-making. Such cases equate the procedure of arguing with the essential nature of the enterprise and reflect warrant-using strategies. Type II complex cases are those that cobble together justifications for assembling a complex set of

reasons, drawn from diverse fields, to support deliberative reasoning. These cases do not rest on any inherent equation of form and purpose, and often give rise to novelty.

2.1 *Type 1 Complex Cases*

Classical rhetoric defines the complex case in terms of stasis theory. Questions of fact are deployed around a contested conjectural stasis. Questions of definition are procedurally argued through a definitional stasis. Questions of the justice or expediency of the act are argued through a qualitative stasis. And questions of jurisdiction fall under a translative stasis (*Stasis*, 2005). In the classical paradigm, the levels of disputation distribute the burden of proof, so that to affirm the guilt of an accused a prosecution needs to establish the preponderance of evidence at all levels, while the defense needs only to successfully wage dispute on one. As is well known, should the facts, definition, quality, or place not be successfully established, a case cannot be made; on the other hand, should all of these claims be put in order, then the force of reason places a demand for a ruling by a judge and a call to render a verdict by the jury. Indeed, in discussion prior to trial, a judge may inquire of potential jurors as to whether they are capable of making decisions upon weighted evidence and of following basic rules of rational conduct presupposed by the jurisprudential model of argument. Such a model offers a complex case insofar as multiple issues are potentially in play any time the prospect of a legal dispute arises; participants in the trial are trained to see in the particular case a field of potential arguments weighted and categorized along the lines of potential issues for an overall contest between positions; and a mode of coming to terms with the diverse issues is invested in a procedure that makes sense on its face.

The complex case constituted by forensic stasis is an exception to, rather than a paradigm of, everyday argumentation, where decisions of choice and expediency, means and ends, risks and outcomes prevail. In every situation where probable argument is in play, there is no assurance that (1) there will be a finite number of levels at which arguments may stiate, (2) that all engaged in a dispute will agree upon criteria of relevance to discern what issues need to be resolved, or even discussed, to properly resolve an issue, and (3) that, even should there be an agreement as to relevance, the claims involved will bind together in such a neat way as to distribute the burdens of proof, determine sides of an argument, and provide a coherent route to adjudication. Nor is it even the case that a normative model of deliberation that prescribes levels of stases for rendering sound, practical judgments will get the advocates closer to a resolution.

In practical argumentation, models have focused on evolving various schemes that appear as a fitting counterpart to forensic stasis. One common model is the ill-solution paradigm. In making a choice about medical care, one needs to know: if there is an illness, how serious it is, what the cause of the illness is (to discover if there are any incidental changes that would eliminate the problem), the effectiveness of a cure, and whether side-effects would do more harm than the solution good. This complex case is like forensic stasis insofar as it offers a coherent, reasonable model of argument that aims at a decision by distributing the burden of proof. Just as in forensics, if there is any one of the levels of the claims cannot be established, there is no reason to go forward with a positive judgment.

The difference that is lurking here is that, whereas the question of justice is constitutive of reaching a legal decision, the complex case underwriting public deliberation is analogical. In Habermas's terms with which we began, the illness-cure model is an accident or variation on deliberative reasoning, whereas forensic stases are constitutive of justice. Indeed, the medical model is not necessarily appropriate to political activity, and itself rests on the unexamined bias at the bottom of Western medicine as a field: 'do no harm.' One can imagine a prudential model of complex case-making that would see government as an initiator of action, with a duty to search out and mitigate social problems, where outcomes were in the interests of compensation for past wrongs, present inequities, or future legitimacy—rather than merely move to eliminate a particular problem when it makes us uncomfortable enough to be seen as an 'ill.' In other words, the model of deliberation—the narrative within which case-construction is articulated—is not a necessary part of deliberative argument, but only a preference to frame a context in a particular way in the service of an overall view of how deliberation best proceeds for citizens.

2.2 *Type II complex cases*

In a pluralistic society, deliberation is complicated because the contexts within which arguments are made are not obvious, authoritative, or relevant to all who have a right to a say in a deliberation. Type II complex cases typically engage what Toulmin calls 'warrant-establishing' arguments. In such cases, it is not enough to determine the likely truth or falsity of a well-established series of claims that regulate the production of proof and inference bearing upon a claim. The act of placing a claim within a given field requires assembling a case where more than one ground that must be addressed. The relative weighting of different grounds in an overall decision makes for quite complex deliberative argument, indeed. If complexity offers less security in linking argument to grounds, it also offers the potential benefit of forming a more robust consensus--more on this later.

At this point, I would like to enter a simple example to illustrate the use of legitimation inferences in an instance of complex case-making.

Suppose that you are at the pharmacy and are evaluating the reasons that go into a decision to take a product *Nexium*, to fight 'acid reflux disease.' At a personal level, you have what seems like an upset stomach, hoping that the pain signals digestion issues with 'something you ate,' (+1) but aware that there are worse maladies that afflict others in your family (-1). At another level, you are aware of the chemistry of traditional remedies for gas (+1), but also interested in the ability of research to provide more effective 'relief' (-1). At a third level, you have heard a congressional investigation condemn 'direct to market advertising' (-1) as preying upon the gullible but you are also aware that the FDA regulates efficacy (+1). Do you buy '*Nexium*' or not? How do the arguments 'add up' in deliberating a reasonable decision?

A complex case could be rendered by simply adding and subtracting positive and negative reasons, and a reasonable purchase could be defined by the preponderance of affirmative or negative evidence. Probability theory would render calculations somewhat more complex should the degree of confidence be measured in the strength of an affirmative or negative judgment, but the principle of determining the outcome would be

relatively the same. Indeed, should all the reasons for or against a claim be vectored in the same direction, then a decision is rendered transparent: it would not make sense to ignore the conclusion. If all the reasons favored *Nexium* or all the reasons were opposed to the decision, then further deliberation is not necessary.

Deliberation is never in principle a closed matter, however, and the search for disconfirming or countervailing reasons may continue. In the above example, one might introduce questions of price and availability of resources at the end of an evening; so a lack of available cash might settle the argument. A consensus emerges, however, when all claims at the different levels of argumentation *independently* support a central claim. Purchasing *Nexium* is a good idea because of personal experience, technical information, systemic trust, and financial availability. What happens, however, when the field of argument relevant to a reasoned decision fails to become transparent?

A genuinely complex case arises where reasons point in multiple, relevant, different directions in supporting and contesting a claim that must be resolved before a reasonable decision can be rendered. This complexity forces a reasoner into a second-order set of questions about the comparative relationship among the grounds that are positioned in support of or opposition to the claim. Questions arise as to the relative weight of reasons that point independently in opposite directions. Even the assumed independence of relationships among independently grounded reasons, relating to the case, may come into question.

The comparison of relative weight among alternative grounds arises most often when a single ground does not provide a self-evident context and a reasoner is forced to think over what groundings are fitting for the specific choice in question. Such reflection is provoked when multiple support is available, conflicting and relatively equal in attributed rational force. Thus, whether to rely on personal experience, technical reasoning or public trust opens a question in a particular case, where advice conflicts, as to what constitutes a legitimate decision.

Formally, two kinds of arguments apply: first, why a particular ground should be discounted as non-determinative in the decision; second, why a particular ground (or combination of grounds) should trump countervailing argumentation. The preference for and discounting of alternative grounds for argumentation ideally should be isomorphic, but may not be the same. When the preferences for one kind of ground over another becomes a rule that is generally applied, then a complex case may be said to have evolved through a 'warrant-establishing' argument; namely, reasons have been discovered for settling a claim in a conflicted context. These warrant-establishing warrants may or may not form authoritative precedents for selecting one sort of grounds over another in situations of a particular type.

Complex case-making of this sort (Type II) occupies a substantial portion of everyday argumentation in pluralistic societies, I believe, because modern living is suffused with a surplus of reasons for decision, and deliberation requires sorting through the multiple sources that aspire to guide, if not determine, the grounds upon which rational conduct is deliberated. The routine requirements of complex case-making are well illustrated in contrasting the personal field of risk assessment, prudential reasoning, as compared to its technical counterpart in science. The question of how to square practical and scientific justifications when they evolve as opposing grounds for a decision

is a core question of deliberation within the practice of everyday life as well as a site for the continuing evolution of controversy.

3. RISK AND LEGITIMATION CONTROVERSY

A traditional view of practical decision-making involves the element of chance or fortune in all decisions. Chance is that element of a decision that speaks to a gap between our grounded expectations and the actual outcome of an endeavor. The practice of deliberative argument assumes that humans are fallible, that they make errors and can learn from mistakes by sifting causes and consequences relating choice to activity. The element of chance recognizes that in spite of the best reasons, outcomes of actions can exceed or disappoint expectations. The intervention of chance into human affairs creates a deliberative space where risks can be appraised and evaluated, their consequences anticipated and hedged. Type I cases emerge when a deliberation draws upon a single field to make a case for taking a chance; Type II cases emerge when multiple fields are in play, offering something less than commensurable reasons.

3.1 Traditional views of practical reason acknowledge that chance intervenes into human affairs. There are three elements that always accompany portrayals of the goddess Tyche (luck for the Greeks) and Fortuna (fortune for the Romans). The goddess is displayed holding a cornucopia, representing abundance, standing on a stream or a ball, indicating impermanence, and near a rudder, indicating steering or intent. The symbolic field is rather unambiguous insofar as the elements of luck enter into human actions in the pursuit of fruitful enterprises. Occasionally, fortune is blind, representing that she is indifferent to whether the person pursuing an end is deserving or not; at other times, fortune is shown by a wheel, cautioning or encouraging reasoners that chance has its up and down cycles. The goddess of fortune has been figured as present at great events such as battles or at smaller ones, featuring natality. In any event, the relation between risk and reason appears to be a staple acknowledgement in the Western tradition. Douglas and Wildavsky (1983) argue that all notions of risk are culturally bound. So the limits of practical reasoning occasioned by fortune have underwritten the limits of prudential reasoning and conduct for millennia.

3.2 Prudential argumentation counsels that fortune visits those who are prepared, who do not take incautious risks, who learn from experience, and who draw from general wisdom to guide principles of conduct. In everyday argumentation, risks are evaluated from the standpoint of personal experience—not from an objective calculus. Experience with risks, the intensity of revulsion to a bad outcome, bad publicity and personal preference all combine to make up a cautionary field where rules are evolved to guide whether an action should be undertaken or a choice made. While preferences may vary, some risks can be avoided, others can be framed as not worth taking, and a few may constitute appropriate gambits, if losses are not important or could be recouped. A common sense approach to risk-taking depends upon practical reasoning to draw from the field of experience a connection between cause and effect of an action, thus advising whether or not a risk should be taken. Further, our understanding of risk provides a mode of reception for

unplanned events that are either windfalls or downfalls, depending on the circumstances. When fortune intervenes, little can be done.

3.3 Modernity has changed the reasoning through which risk is appraised. Multiple scientific models now underwrite the scientific assessment of risk (Renn, 1992). Science makes the appraisal of risk in relation to deliberation quite difficult by introducing relatively unique, even counterintuitive, measures of understanding. Several of these will be mentioned.

3.3.1 Latency is the idea that a risk may be encountered at some point and its harms only evolve years later. Latency removes the idea that risks are knowable at the time they are encountered and that precautions can be taken in a timely fashion.

3.3.2 Multiple causality is the idea that no one factor may engender a risk, but that a combination of unique circumstances may accumulate so as to bring about an undesirable set of affairs. Thus, to eliminate one potential cause of a problem (smoking) may do nothing for another (genetic predisposition). In many cases, to solve one cause of a problem may cause other undesirable risks.

3.3.3 Threshold reasoning argues that low-level risks may remain without consequence for years, only to suddenly accumulate at an unknown point to cross the line into a harmful condition. A car may travel for many miles with proper maintenance before a crucial part suddenly gives way. In some cases, the direction of activity that approaches a harmful threshold is not known.

3.3.4 Uncertainty is a measure of probability of success or failure of a chosen outcome. A general domain of uncertainty, however, says nothing about the individual case. When making a decision, say, to have a medical procedure, the range of estimates must somehow be translated into individual judgments. Further, uncertainty itself rests on the unknown; that is, any scientific probability is only valid in the limited sense that it has yet to be disproved by other factors yet to be taken into account and potentially relevant.

3.4 Complex cases evolve where practical reasoning and scientific reasoning are both relevant to a decision, but neither is determinative. In many, if not most, cases a particular claim may find internally contradictory evidence within the field of personal risk-taking and within the field of science too. In such a complex case, the choice of which arguments within field X to compare with contrary arguments in the field Y+Z creates the potential for thorough-going controversy. At a minimum, if practical and scientific reasoning conflict, the choice to ground a risk decision in one field or the other has to be accounted for in the specific case. In a case of maximum controversy, the configurations of practical, scientific, and political reasons from alternative fields create a complex case that balances the argumentative force of fields (and subfields) against one another. The legitimation inferences that evolve to subordinate one field to another, discounting opposing reasons, create new warrants for argumentation or involve interlocutors in the painful process of finding no reasonable guidance to crucial questions. Legitimation inferences that set precedents reconfigure the relationships among fields, or the contestation within and among fields, by answering the question of justified choice among the grounds of reason.

CONCLUSION

In the beginning of the essay, I promised to redeem Toulmin from the criticism of Habermas by showing how the Toulmin model could be adapted to seek out those argumentative situations where standards for reasoning essential to a field evolve. This can be done, but only if the model is made sensitive to the crucial area of justification that constitutes a legitimation inference. The justification of a choice of grounds forces reflection upon why a specific backing should count in this case, for this choice, in a specific deliberative context. Subjecting the constellating body of authority to scrutiny generates a justification for that particular field, as an essential guideline to authorizing a warrant as credible, trustworthy, reliable, or believable. Thus, the choice of field grounding permits discrimination between relevant grounding and accidental features of an enterprise. Tables were turned on Habermas's own view of argumentation that rests reasoning in distinct categories by virtue of independent sources of validity claims. It is true, that cases that are rendered complex by multiple reasons may be simplified by constitutive stases, as in questions of justice. On the other hand, in deliberation, complex cases evolve because personal, technical and political fields may all be relevant but point in alternative directions. The arena of risk was explored to illustrate the challenge of evolving coherent justifications for combinatory grounds in making important choices in modern life. In the end, argumentation theorists are called to study controversies where the unsettled relationships among fields and good decisions give rise to arguments over the appropriate choice or revision of backing. Such disputes engage us critically in the study of legitimation controversies.

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