DePaul University

From the SelectedWorks of Donald Hermann

1985

Legal Reasoning as Argumentation

Donald H Hermann, *DePaul University*

Available at: https://works.bepress.com/donald-hermann/48/

HEINONLINE

Citation:
Donald H. J. Hermann, Legal Reasoning as Argumentation,
12 N. Ky. L. Rev. 467 (1985)
Provided by:
Rinn Law Library

Content downloaded/printed from *HeinOnline*

Wed Mar 21 10:17:23 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

Use QR Code reader to send PDF to your smartphone or tablet device

LEGAL REASONING AS ARGUMENTATION

*Donald H. J. Hermann**

I. LEGAL REASONING: CONVENTIONAL ANALYSIS AND CONTEMPORARY CRITIQUE

A. *Traditional View*

The integrity of legal reasoning, which is central to the legitimacy of the rule of law, has been subjected to relentless challenge for half a century.[1] The traditional view of legal reasoning maintains that there is a distinct mode of reasoning and analysis in law which leads to determinate solutions involving correct characterization of facts and proper deduction from established principles.[2] A conventional account of the process maintains that:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.[3]

More recently it has been suggested that even where the case law falls short of providing a basis for analogical reasoning, there exist bases for determination of the proper decision; this requires identification of "a particular conception of community morality as decisive of legal issues; this conception holds that community morality is the political morality presupposed by the law and in-

---

* Professor of Law and Philosophy, DePaul University. A.B. 1965, Stanford University; J.D. 1968, Columbia University; LL.M. 1974, Harvard University; M.A. 1979, Northwestern University; Ph.D. 1981, Northwestern University.

1. The principal challenge to the integrity of legal reasoning was made by the legal realists who viewed the judicial opinion as the formal manifestation of the process of legal reasoning which was viewed as a rationalization of judicial preferences or intuitions rather than as an account of a formal process of reasoning from legal rules to legal decision. *See, e.g.*, Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929) where the author endorses the view that "[T]he judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, and that ratiocination appears only in the opinion."

2. *See* Kairys, *Legal Reasoning* in D. KAIRYS, THE POLICIES OF LAW: A PROGRESSIVE CRITIQUE at 11 (1982) [hereinafter cited as KAIRYS].

3. E. LEVI, AN INTRODUCTION TO LEGAL REASONING at 1 (1948).

stitutions of the community."[4] This view leads to the conclusion that there is a determinate correct decision even in "hard cases" for according to this view:

> It is no longer so clear that either common sense or realism supports the objection that there can be no right answer, but only a range of acceptable answers, in a hard case. . . .The "myth" that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.[5]

B. Contemporary Analysis

The contemporary challenge to the integrity of legal reasoning first maintains that the scheme of legal rules and opinions produces a state of affairs in which decisions are indeterminate. According to this view:

> Our legal norms are broadly and vaguely stated. They do not logically lead to particular results or rationales concerning most important or difficult issues. A wide variety of interpretations, distinctions, and justifications are available; and judges have the authority and power to choose the issues they will address and to ignore constitutional provisions, statutes, precedents, evidence, and the best legal arguments.
>
> Moreover, there are prior decisions similar or related by analogy to both sides of almost any difficult or important issue. This should not be surprising, since issues are difficult or important largely because there are significant policies, rooted in social reality and/or legal doctrine, supporting both sides. Each such policy, or a closely related policy, will have been favored or given high priority in some context and/or during some period. Usually the various relevant precedents will provide some support for both sides rather than lead to a particular rule or result.[6]

The critical view of legal reasoning further entails the premise that there is no identifiable community moral or political consensus which can be invoked to support determinate legal outcomes but instead there is only a possibility to attain power to impose legal decisions. Thus is it maintained that:

> [P]eople struggle for power through law. . . .To understand law is to understand this struggle as an aspect of class struggle *and* as

---

4. R. DWORKIN, TAKING RIGHTS SERIOUSLY at 126 (1978).
5. *Id.* at 290.
6. KAIRYS, *supra* note 2, at 13-14.

> an aspect of the human struggle. . . .The outcomes of struggle are not preordained by any aspect of the social totality, and the outcomes within law have no "inherent logic" that would allow one to predict outcomes "scientifically" or to reject in advance specific attempts by judges and lawyers to work limited transformations of the system.[7]

II. CHAIM PERELMAN'S DEFENSE OF LEGAL REASONING

A. *Legal Reasoning as Argumentation*

Chaim Perelman has correctly identified the falacious nature of the position which would assimilate legal reasoning to formal logic through a process of identification or adoption of basic premises of univocal meaning from which determinate legal conclusions can be deduced.[8] Similarly, Perelman identifies the fallacy of the position that legal decisions are necessarily arbitrary and without a defensible reasoned basis.[9] Rather than the determinate deduction of formal logic or the arbitrary assertion of those who see legal conclusions established only with the assertion of power, Perelman characterizes legal reasoning as a practice of argumentation, within the conventions of the legal profession, supported by the authority vested in legal functionaries, which is dependent upon the legal conclusion and the reasons given in support of it being accepted by the audience or constitutiency to which such argumentation is directed.[10]

---

7. Kennedy, *Legal Education as Training for Hierarchy* in KAIRYS, *supra* note 2, at 40-50.

8. *See* Perelman, *Legal Reasoning* in C. PERELMAN, JUSTICE, LAW AND ARGUMENT (1980) [hereinafter cited as JUSTICE, LAW AND ARGUMENT] (where the author identifies a principal reason why legal reasoning cannot be subsumed within the rubic of formal logic.)

> Does formal logic allow us to resolve judicial controversies? Certainly not. It is quite exceptional that the controversies come about from the fact that one of the antagonists commits an error in formal logic. . . . In fact, the rules of logic, to be applicable, require that certain conditions be observed. The first of these conditions, preliminary to the application of logical formalism, demands that the same sign preserve always the same meaning without which the most self-evident logical laws cease to be valid, i.e., an identity is no longer true and a contradiction no longer necessarily false.

Id. at 126.

9. *See* C. PERELMAN, JUSTICE (1967) at 97 where it is argued:

> [N]either the legislator nor the judge makes purely arbitrary decisions: The statement of motives indicates the reasons for which a law was voted and, in a modern system, each judgment should be accounted for in terms of the law. Positive law has as a correlative the notion of a decision which, even if not rational in the sense of its conformity with formal deduction, should be reasonable, or at least reasoned.

10. *See* Perelman, *Law and Rhetoric* in JUSTICE, LAW AND ARGUMENT *supra* note 8, at 120-21, where the function and operation of rhetoric by legal authorities is described:

B. *Argumentation Distinguished from Demonstration*

Perelman maintains that legal reason is best characterized as rhetoric.[11] This rhetoric entails a practice of "argumentation" which is to be contrasted to a process of "demonstration."[12] A demonstration involves an analysis made in conformity to a set of rules. A demonstration leads to a conclusion which is valid if it can be reached by means of a series of correct operations which begin with a series of premises or axioms.[13] To properly deduce a true or probable conclusion, the premises must be accepted as true, self-evident, necessary or hypothetical; furthermore the process of deduction depends upon a fully coherent system of axioms.[14] Perelman makes clear that "we need good reasons to accept the premises from which we start" which are given by intuition or evidence judged by the natural light of reason or merely accepted by those judging them.[15]

The nature of law and the choice of values legal decisions presuppose preclude the use of demonstration as a method of reasoning or justification.[16] Demonstration is not possible in law because

---

> [T]he role and importance of rhetoric clearly increases with the growth and independence of the judiciary power. This occurs when the judiciary power attempts to motivate its decisions and not forcibly impose them: It is the same with the legislative power. When the latter recognizes that the laws which it enacts are not self-evident—and not wishing to arbitrarily impose them—it furnishes reasons which would give them public acceptance.
>
> * * * * * *
>
> The role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable. Each time he must settle conflict of opinions, interpretations, interests and values, he must seek those solutions which are both in conformity to the law and acceptable.

Id.

11. JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 130 where the author asserts that: "Legal reasoning is thus a specific application of the theory of argumentation, a generalization of the Greco-Roman dialectic and rhetoric."

12. *See* C. PERELMAN, THE NEW RHETORIC AND THE HUMANITIES 9-15 (1979) [hereinafter cited as THE NEW RHETORIC: HUMANITIES]. *See generally* C. PERELMAN, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969) [hereinafter cited as THE NEW RHETORIC: ARGUMENTAION].

13. THE NEW RHETORIC: HUMANITIES, *supra* note 12, at 10.

14. *Id.*

15. *Id.*

16. Perelman, *The Justification of Norms* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 111-12 where it is observed:

> When general principles are applied in a normative context, they play a very different role from mathematical norms. We can develop an arithmetic or geometry indepen-

competing premises can be cited and because every premise is open to interpretation. According to Perelman: "[W]hen the premises are contested or furnish only more or less compelling reasons in support of an argument, or when competing arguments can be reasonably entertained and no single conclusion imposes itself, then the role of authority and conceivably even the legitimate use of force becomes crucial to secure compliance with an existing order."[17] Even those who draw their legal postulates from a system of natural law must depend on authorities with competence to determine the interpretation or applicability of the identified norms; according to Perelman: "These fundamental norms must not be equated with mathematical premises that are self-evident and unequivocal, but rather with 'commonplaces', that is, vague but commonly accepted principles requiring a clarification of their mode of application, which may in some cases conflict with other principles."[18]

The process of argumentation which is characterized as "the new rhetoric" is the mode of reasoning which is characteristic of legal reasoning. According to Perelman: "[W]hen deductive, purely analytical reasoning is insufficient, there is cause to refer to what Aristotle, who in his analyses is greatly inspired by law, has designated as dialectical reasoning and which I personally characterize as a recourse to argumentation."[19] Such argumentation is directed at an audience with the purpose to persuade, convince, gain adherence, move to commitment or action.[20] Such argumentation requires some means of communication, namely a common language which necessarily entails interpretation.[21] This process of argumentation aims not at truth but agreement.[22] This

---

dent of the objects we counted or measured, by putting into operation rules of a correct deduction; in contrast the norms of our behavior contain vague elements that can only be specified in concrete situations.

17. Perelman, *Justice and Reasoning* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 80.

18. *Id.* at 81.

19. Perelman, *Legal Reasoning* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 127.

20. Perelman, *The New Rhetoric: A Theory of Practical Reasoning*, in THE NEW RHETORIC: HUMANITIES, *supra* note 12, at 10-11.

21. *Id.* at 11.

22. The "new rhetoric" avoids the distinction drawn between classical rhetoric and dialectical reasoning. *See* Perelman, THE NEW RHETORIC: ARGUMENTAION, *supra* note 12, at 11 where Perelman makes this distinction clear:

[I]t is apparent that the new rhetoric cannot tolerate the more or less conventional, and even arbitrary, limitations traditionally imposed upon ancient rhetoric. For

is because argument does not lead to a determined solution, but rather acceptable or agreed upon conclusions.[23]

III. A CASE STUDY OF LEGAL REASONING

In order to examine the functioning of argumentation in the context of legal reasoning, I have chosen to consider a series of opinions of the United States Court of Appeals for the District of Columbia[24] which deal with the question of whether an exhibitionist[25] was properly regarded as a sexual psychopath and subject to indefinite involuntary commitment under the Sexual Psychopath Statute of the District of Columbia.[26] The three majority opinions which are examined were all authored by Judge David Bazelon. A dissenting opinion in the third case, delivered by Judge Warren Burger, will also be examined.

> Aristotle, the similarity between rhetoric and dialectic was all-important. According to him, they differ only in that dialectic provides us with techniques of discussion for a common search for truth, while rhetoric teaches how to conduct a debate in which various points of view are expressed and the decision is left up to the audience. This distinction shows why dialectic has been traditionally considered as a serious matter by philosophers, whereas rhetoric has been regarded with contempt. Truth, it was held, presides over a dialectical discussion, and the interlocutors had to reach agreement about it by themselves, whereas rhetoric taught only how to present a point of view—that is to say, a partial aspect of the question—and the decision of the issue was left up to a third person.

23. *See* Perelman, *Law, Philosophy and Argumentation* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 155 where Perelman identifies the objective of argumentation:

> Argumentation generally, and contrary to demonstration, even if guided by methodological principles, and in particular when guided by the principle of equal treatment for essentially similar situations, does not impose a determined solution. Most often, argumentation allows us to put aside solutions that don't conform to principles and yet does not impose a unique solution. The reason for this is that reasoning about values appeals to *loci communes* not because of their self-evidence but because of their ambiguity.

24. Three sets of opinions provide the basis for this discussion: Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966), Millard v. Harris, 406 F.2d 964 (D. C. Cir. 1968), and Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).

25. Exhibitionism is classified as a type of paraphila, alternatively as a sexual deviation or perversion, which is characterized by specialized sexual fantasies and masturbatory procedures. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (302.40 Exhibitionism). *See generally* H. KAPLAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, at 1065-1077 (4th ed 1983). Exhibitionism involves acts of exposing the genitals to a stranger or an unsuspecting person. This activity produces sexual excitement in anticipation of the exposure, and often orgasm is brought about by masturbation during or after the event of exposure. In exhibitionism, the presence and significance of the phallus is established by the reaction of fright, surprise, awe, and disgust of the confronted victim. *Id.* at 1072.

26. D.C. CODE ANN. §§ 22-3503 to 22-3509 (1967).

A. *The District of Columbia Sexual Psychopath Law*

The District of Columbia Sexual Psychopath Statute, which is the focus of these opinions, defines a "sexual psychopath" as:

> a person not insane, who by a course of repeated misconduct in sexual matters has evidenced such a lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of his desire.[27]

The District of Columbia Code provides authority for the United States Attorney, or the court, to file a statement setting forth facts tending to show that any criminal defendant or other person is a sexual psychopath.[28] The subject of such a petition is provided with a right to counsel and a due process hearing including notice and a right to examine psychiatric reports of two court appointed psychiatrists who are required to make a personal examination of the subject of the petition.[29] Upon receipt of reports of the two psychiatrists concluding that a subject is a sexual psychopath, the court must hold a hearing to make a judicial determination of whether the subject is a sexual psychopath and, if so, to commit the subject to the government's mental health facility.[30]

B. *Application of the Sexual Psychopath Law to the Case of the Exhibitionists*

To apply this statute in the case of an exhibitionist, a court must determine: (a) the applicability of the statute to the particular subject; and (b) the sufficiency and compliance with the statutory procedures. The first issue presents the most serious issues of interpretation. A court must decide whether the subject lacks "power to control his sexual impulses" and whether he is "dangerous." This latter finding demands both interpretation of the concept of "dangerousness" as well as interpretation of the meaning of "injury, loss, pain or other evil" which the statute aims to protect against.

The indeterminancy of the applicability of this statute to exhibitionists stems in part from the differing reasons given for the adoption of sexual psychopath statutes. On the one hand, this

---

27. D.C. CODE ANN. § 22-3503 (1967).
28. D.C. CODE ANN. § 22-3504 (1967).
29. D.C. CODE ANN. § 22-3505 to § 22-3507 (1967).
30. D.C. CODE ANN. § 22-3507 to § 22-3508 (1967).

type of legislation was motivated by progressive concerns about the treatment of the mentally ill and about the restrictive nature of the insanity defense, which at the time of adoption of the Sexual Psychopath Statutes was limited to a narrow cognitive test, and the existent civil commitment law which provided treatment only for persons found insane. As one commentator noted: "[T]he introduction of this legislation was hailed by practically all scientists and many enlightened judges, law enforcement offices, and part of the community as a major step forward."[31] To the extent that such a humanitarian attitude motivated the interpretation of the statute the tendency was to focus on whether behavior such as exhibitionism is a treatable mental disorder and if so then to conclude that an exhibitionist is a sexual psychopath. If treatment is not effective or not available, or available under less restrictive conditions, it is less likely that the exhibitionist would be classified as a sexual psychopath.

There is a second concern, however, which motivated the adoption of the Sexual Psychopath Laws and that was fear of the sexual offender. It has been observed that:

> [A]n even more important factor in the enactment of such legislation was the ever-growing preoccupation of powerful and vociferious parts of the population with sex crimes. The demands of the 'people's voice,' occasionally couched in rational argument but more often expressed with hysterical fervor, for more restrictive measures against sex criminals had to be met somehow by the various legislatures, since important groups seemed to feel that ordinary legislation was not sufficient to protect the community from the perpetration and repetition of heinous crimes by sex fiends.[32]

Fear of sex offenders can motivate an interpretation of the statue which focuses on the potential dangerousness of the exhibitionist and the harm that his conduct is likely to produce. If the exhibitionist is judged not likely to produce physical or psychic harm in his victim or, if so, is not likely to engage in further exhibitionistic acts, then the exhibitionist is not likely to be classified as a sexual psychopath. However, if psychic distress is likely to be caused by the exhibitionist and he is likely to engage in future

---

31. Hacker & Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955).

32. *Id.* at 767.

33. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 19.

acts of exhibitionism, then the exhibitionist is likely to be classified as a sexual psychopath.

Any judicial opinion dealing with the question of whether an exhibitionist should be treated as a sexual psychopath, needs to be addressed to an audience composed of some individuals who primarily see the sexual psychopath statute as a means to provide humanitarian mental health treatment and of some others who view the statute primarily as a means to isolate dangerous sex offenders. Drawing on Perelman's discussion of the new rhetoric in the context of oratory, it is possible to identify the nature of the audience which is central to argumentation and the need to address the various groups which constitute it. An "audience" is defined by Perelman as "*the ensemble of those whom the speaker wishes to influence by his argumentation.*"[33] In order to develop any argumentation, it is crucial that it be directed at an audience and that the audience by properly assessed.[34] For this reason, identification of the various motivations for adoption of the sexual psychopath statutes is crucial for effective argumentation to establish agreement on the meaning and application of the statute in the case of an exhibitionist. As Perelman observes: "It often happens that an orator must persuade a composite audience, embracing people differing in character, loyalties, and functions. To win over the different elements in his audience, the orator will have to use a multiplicity of arguments."[35]

---

34. *Id.* at 18. Perelman makes clear the need to properly assess the character of the perspective audience: "In real argumentation, care must be taken to form a concept of the anticipated audience, as close as possible to reality. An inadequate picture of the audience, resulting from either ignorance or an unforeseen set of circumstances, can have very unfortunate results." *Id.* at 20. Such an unfortunate result can be observed in the abortion decisions of the United States Supreme Court where there was a failure to address the concerns of those who viewed the fetus as a person who deserves the protection of the law. While acknowledging that some hold the view that a fetus is a person with claims to the full protection, the Court did not expressly develop arguments aimed at those who held this position in order to persuade or convince them to the contrary, but merely asserted that there was no case law recognizing the fetus as a person under the fourteenth amendment. *See* Roe v. Wade, 410 U.S. 113 (1973) where the Court observed:

> The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.... All this, together with our observation, *supra*,

C. Millard v. Cameron *Convergence of the Sexual Psychopath Law with the Civil Commitment Law*

The United States Court of Appeals for the District of Columbia began its consideration of whether an exhibitionist could be confined under the sexual psychopath law in *Millard v. Cameron.*[36] The defendant, Millard, was committed as a sexual psychopath after pleading guilty and before sentencing on a charge of indecent exposure. The evidence showed that the defendant had exposed himself to several people, that one woman complained that she had seen the defendant expose himself on several occasions, that the defendant was masturbating; and several other females in the neighborhood reported having seen the defendant expose himself.[37] The defendant sought his release on a *habeas corpus* petition on the grounds that his confinement was procedurally defective since it was made on the basis of written reports of two psychiatrists without a full hearing, that he was not dangerous within the meaning of its sexual psychopath statute and that he was being detained without provision of treatment.[38]

(i) *Procedural Requirement: Records Versus Oral Testimony*

The first issue considered by the court in *Millard v. Cameron* was whether the determination that the defendant was a sexual psychopath was properly made on the basis of the court ordered report of two psychiatrists without any judicial adjudication beyond acceptance of the report.[39] The trial court reasoned that the conclusory report of the psychiatrists was sufficient[40] because the statute explicitly provided that the "court shall appoint two qualified psychiatrists" and that "[e]ach psychiatrist shall file a written report of the examination, which shall include a statement

---

> that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person" as used in the Fourteenth Amendment, does not include the unborn.

Id. at 156-57.

35. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 21-22.

36. 373 F.2d 468 (D.C. Cir. 1966).

37. *Id.* at 469-70.

38. *Id.* at 469.

39. The two psychiatrists reported that they examined Millard and "as a result of the examination . . . arrived at the conclusion that [he] is a sexual psychopath as defined in the Sexual Psychopath Statute. It is recommended that . . . [he] be committed to a mental institution for proper care and treatment for his condition." *Millard*, 373 F.2d at 470.

40. *Id.* at 470.

of his conclusion as to whether the patient is a sexual psychopath."[41] This interpretation of the statute in effect renders the determination of whether a person is a sexual psychopath a medical judgment with the consequences that the required judicial hearing is limited to procedural issues or challenges based on failure of the reports to meet the statutory requirements.[42] The statute clearly provides for a judicial hearing in the case that the reports of the psychiatrists indicate that the subject is a sexual psychopath. The question which was presented to the court of appeals was whether the psychiatrists must personally testify and be subjected to cross examination or whether their reports could stand as evidence without the personal appearance of the psychiatrists.

The statute is silent on the issue of whether there must be psychiatric testimony. The statute merely provides that: "Upon the evidence introduced at a hearing held for that purpose, the court shall determine whether or not the patient is a sexual psychopath."[43] The court of appeals interpreted this provision to mean that the determination of whether a person is a sexual psychopath is a legal determination rather than a medical determination. Consequently, such a legal determination was held to require a hearing in which the reporting psychiatrists testify and are subject to cross-examination.[44]

(a) *Dissassociation*

At this point one can observe two equally plausible interpretations of the statute: one dispensing with actual psychiatric testimony and the other requiring it. Each have plausible justifications. The former based on a view that the determination of whether a person is a sexual psychopath is a medical judgment satisfactorily established by medical reports and the other based on the view that the determination is a legal one requiring oral

41. D.C. CODE ANN. § 22-3506 (1967).

42. *See* D.C. CODE ANN. § 22-3507 (1967) which provides in part: "If, in their reports filed pursuant to section 22-3506, both psychiatrists state that the patient is a sexual psychopath, or if both state that they are unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination, of if one states that the patient is a sexual psychopath and the other states that he is unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination. . . ."

43. D.C. CODE ANN. § 22-3508 (1967).

44. *Millard*, 373 F.2d at 470.

testimony and presenting an opportunity for cross examination. The court of appeals did not discuss the relative merits of the medical and legal models which are implicit in the two interpretations. Instead it emphasized all the legal rights which a person has at a hearing under the Sexual Psychopath Statute including a right to a jury, a right to counsel, and a right to inspect the reports of the examining psychiatrists. One can observe here what Perelman has called the dissociation of ideas and the manner in which this argumentative technique operates.[45] According to Perelman:

> While the original status of what is presented as the starting point of the dissociation is unclear and undertermined, the dissociation into terms I and II will attach value to the aspects that correspond to term II and will lower the value of the aspects that are in opposition to it.[46]

In this case, term I refers to a proceeding based on the reports alone which implies the medical model which is not elaborated. In contrast, term II refers to the requirement of oral testimony premised on the legal moral which is elaborated by reference to procedural rights.

(b) *Value Judgments*

The statute, however, only states: "The counsel for the patient shall have the right to inspect the reports of the examination of the patient."[47] The statute lacks any reference to a right to cross-examine the reporting psychiatrists. Rather, it provides that "[u]pon the evidence introduced" the court shall determine whether the patient is a sexual psychopath.[48] Thus, the designation of the determination of whether a person is a sexual psychopath as a legal one is not determinative of whether the reports are sufficient evidence for a legal judgment. The court was required to invoke the concept of an "informed legal judgment" for which it found the reports, standing alone, to be insufficient. The court of appeals argued that: "A judicial determination based on a psychiatric examina-

---

45. *See generally* C. PERELMAN, THE REALM OF RHETORIC 126-137 (1982) [hereinafter cited as REALM OF RHETORIC].

46. *Id.* at 128.

47. D.C. CODE ANN. § 22-3506(b) (1967).

48. D.C. CODE ANN. § 22-3508 (1967).

tion must be *an informed one*, particularly where as here, the result is indefinite confinement."[49] In support of this assertion the court quoted as authority an earlier opinion to the effect that "[i]t would be necessary for the trial judge to inquire of the examining doctors the basis for their conclusions."[50] Here the court can be seen as employing two important argumentative techniques. The first maintains that the court must make an "informed" judgment which requires oral testimony of the examining psychiatrists. Such is an assertion based on a value judgment. According to Perelman: "[T]he word 'value' applies wherever we deal with 'a break with indifference' or with the equality of things, wherever one thing must be put before or above another, wherever a theory is judged superior and its merit is to be preferred."[51] This is not a reference to a known or presumed reality since it is not shown that a judgment based on a written report is inferior to one based on oral testimony. Rather it expresses "a preference (values or hierarchies) which indicate what is preferable (the *loci* of the preferable)."[52] In fact, what the court has done is express a preference for oral testimony over evidence consisting solely of a written report. The court did this by holding that the receipt of oral testimony is necessary to make an informed legal judgment. This is consistent with the manner in which Perelman suggests that the argumentative technique of value judgment operates. According to Perelman: "Often, positive or negative values indicate a favorable or unfavorable attitude to what is esteemed or disparaged, without comparison to another object. What is described by the terms 'good,' 'just,' 'beautiful,' 'true,' or 'real,' is valued, and what is described as 'bad,' 'unjust,' 'ugly,' 'false,' or 'apparent' is devalued."[53] The court projects a positive value on oral testimony by associating it with an *informed* legal judgment.

(c) *Argument from Authority*

Nevertheless, the court of appeals was not content to limit its argument to an assertion of positive value; instead, it attempted to support its view by citation to authority in the form of the opinion delivered in a previous case. The court relied on the authority

49. *Millard*, 373 F.2d at 470-471 (emphasis added).
50. *Id.* citing Holloway v. United States, 343 F.2d 265, 268 (D.C. Cir. 1965).
51. REALM OF RHETORIC, *supra* note 45, at 26.
52. *Id.*
53. *Id.*

of a precedent which provided that the term "report" had to be construed as requiring a judicial determination involving the examination of the reporting psychiatrists.[54] The persuasiveness of this authority is, however, somewhat reduced when one notes that the cited authority consists of dicta in an opinion of the very same court from the previous year.

Perelman points out that the use and acceptance of the argument from authority reflects the fact that a particular area of inquiry is not susceptible to demonstration of the type used in scientific inquiry but rather must utilize argumentation of the type associated with rhetoric.[55] The argument from authority has been criticized as a pseudo-argument, intended to disguise the irrationality of an assertion and aims merely to win unthinking assent. It has been suggested that the argument from authority is "an instrument for logicalizing nonlogical actions and the sentiments in which they originate."[56] Perelman, on the contrary, suggests the importance of the argument from authority where asserted matters are not susceptible to a true or false determination such as questions in law which cannot be reduced to scientific problems subject to demonstration.[57] Perelman maintains that judges are concerned not only with truth but also with justice and social order. Perelman observes:

> The quest for justice and the maintenance of an equitable order, of social trust, cannot neglect considerations based on the existence of a legal tradition, which appears first as clearly in legal doctrine as in the actual holdings of courts. Recourse to argument is inescapable if the existence of such a tradition is to be attested.[58]

(ii) *Classification*

The second matter considered by the court of appeals in *Millard v. Cameron*[59] was whether the defendant exhibitionist was properly classified as a sexual psychopath who is "a person, not insane, who

---

54. *Millard*, 373 F.2d at 471, citing Holloway v. United States, 343 F.2d 265, 268 (1965).

55. REALM OF RHETORIC, *supra* note 45, at 95 where it is noted that: "The argument from authority is of interest only in the absence of demonstrable proof. It comes to the support of other arguments, and the person who uses it will not fail to accord value to the authority which agrees with his thesis. . . ."

56. PARETO, THE MIND AND SOCIETY, § 583, vol. 1, at 349-50 (1963).

57. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 306.

58. *Id.*

59. *Millard*, 373 F.2d at 471-72.

by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire."[60] In construing the statute, the court was faced with two possible areas of emphasis. The court could emphasize the fact of "repeated misconduct in sexual matters" and the lack of power to control "his sexual impulses". Alternatively, the court could emphasize the danger to other persons requiring that the "injury, loss, pain or other evil" be serious and thereby de-emphasizing the significance of sexual misconduct in and of itself. The court of appeals chose the latter approach.

To support its emphasis of a required showing of serious injury as a requisite to establish the element of dangerousness as specified in the statute, the court referred approvingly to a decision rendered by the Minnesota Supreme Court construing that state's sexual psychopath laws. The construction of the Minnesota court of its sexual psychopath statute was later upheld by the United States Supreme Court; the statute withstood an attack that it was "too vague and indefinite to constitute valid legislation."[61] The Minnesota court construed the statute in the following manner:

> [The Act] is intended to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined.[62]

The Court of Appeals for the District of Columbia concluded that the effect of the sexual misconduct must be serious, reasoning that: "Though the 'likely . . . injury, loss, pain or other evil' may be either physical or psychological, we think it must involve conduct

60. *Id.* at 471 citing D.C. CODE ANN. § 22-3503 (1961).

61. *Millard*, 373 F.2d at 471-72 citing with approval State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274 (1940).

62. *Pearson*, 309 U.S. at 273.

that is not merely repulsive or repugnant, but that has a *serious effect on the viewer*."[63] The court argued that without this requirement the definition of sexual psychopath would be too vague and indefinite to withstand constitutional attack.[64]

(a) *Confused Notions*

The court in construing the notion of dangerousness utilized a type of concept Perelman has characterized as a "confused notion."[65] These "confused notions" are not only inevitable but useful, according to Perelman, when one moves from scientific inquiry which requires terms of unequivocal meaning involving an ideal language "giving rise to" no misunderstanding, no disagreement, [and which] must conform to certain laws for the construction of a formed language."[66] However, "when it is a question of expressions formulated in a natural language, the necessity for unequivocalness can disappear before necessities considered to have priority."[67] Recourse to such confused notions is most appropriate in law where there is no possibility of specifying all possible cases which might come under a rule or be included in a class but which instead require a case by case determination of the applicability of a concept. According to Perelman: "[O]utside a pure formalism, notions remain clear and unequivocal only in relation to a field of application that is known and determined."[68] Perelman suggests that sometimes such confused notions can be clarified by further classification so that "[a] highly ambiguous notion, like that of freedom, has some of its uses clarified in a judicial system where the status of free men is defined as opposed to that of slaves."[69]

(b) *Clarification*

However, such clarification most often has both contextual and particular aspects. The court of appeals in *Millard v. Cameron* clarified the concept of dangerous conduct in a context of indefinite

---

63. *Millard*, 373 F.2d at 471 (emphasis added).

64. *Id.* at 471-472. *See generally* Rose, *A Criticism of the Current Use of the Term "Sexual Psychopath,"* 109 AM. J. OF PSYCHIATRY 177 (1952).

65. *See generally* Perelman, *The Use and Abuse of Confused Notions* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 95-106.

66. *Id.* at 96.

67. *Id.* at 97.

68. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 133.

69. *Id.*

commitment of an individual which requires not only a mental disorder evidenced by lack of control of sexual impulses but also a showing of dangerousness to self or others.[70] Furthermore, the court of appeals maintained that there is a need to assess the particular circumstances of the individual case. According to Perelman: "Ambiguous notions present the person who uses them with difficulties whose solution calls for handling of concepts, for a decision as to how they are to be understood in a given case."[71] In an effort to provide the trial court a means by which it could evaluate the threat of danger by an exhibitionist defendant's sexual misconduct, the court identified specific criteria which it offered for clarification of the concept of danger in the specific case. The court suggested consideration of: "Whether conduct is 'likely' to have a serious effect on potential viewers may depend for example, in their age and condition, the proximity and extent of the patient's exposures, and his accompanying gestures."[72]

(iii) *Confinement Versus Treatment*

The court of appeals in *Millard v. Cameron* considered whether the appellant could challenge his confinement on the ground that he was receiving no treatment.[73] Two possible responses to this challenge were available to the court. The first, the approach taken

---

70. *See e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) construing the Wisconsin Civil Commitment Statute. The court held an implicit requirement of a finding of dangerousness to be constitutionally required for the statute to withstand constitutional scrutiny. The court stated:

> Wisconsin defines "mental illness" as "mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." * * * * [The United States] Supreme Court noted (in dicta) that implicit in this definition is the requirement that a person's "potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." In other words, the statute itself requires a finding of "dangerousness" to self or others in order to deprive an individual of his or her freedom. The Court did not directly address itself to the degree of dangerousness that is constitutionally required before a person may be involuntarily deprived of liberty. However, its approval of a requirement that the potential for doing harm be "*great enough* to justify such a *massive curtailment* of liberty" implies a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if a person is not confined he will do immediate harm to himself or others. (emphasis in original) (citation omitted).

Id. at 1093.

71. THE NEW RHETORIC: ARGUMENTAION, *supra* note 12, at 135.

72. *Millard*, 373 F.2d at 472.

73. *Id.*

by the trial court, was that confinement was justified on a finding that the appellant continued to meet the criteria of sexual psychopath.[74] Implicit in this view is the premise that the statute was aimed at providing social protection by isolating a person who was dangerous to the public. A second possible response was that confinement was justified only upon a showing that the defendant was receiving treatment. This latter position was the view of the court of appeals.[75] The court of appeals justified its view first by an analogy to civil commitment. The court referred to an earlier opinion that it had rendered requiring treatment of a person involuntarily committed following an insanity acquittal.[76] In that case, the court considered that the statutory purpose of commitment was detention for treatment and that absent treatment constitutional issues were presented. Since the mental health statute provided a right to treatment,[77] the court concluded that "[t]he same principles apply to a person involuntarily committed to a public hospital as a sexual psychopath."[78]

(a) *Analogy Versus Assimilation*

Several reasons were given to justify the analogy of sexual psychopath proceedings to civil commitment proceedings. The first relied on the semantics of the statute and the legislative history. The court observed: "Persons against whom proceedings under the statute are instituted are called 'patients' because the title essentially provides treatment rather than punishment."[79] The second reason involved an implicit constitutional argument based on equal protection. The court observed: "The statute requires that the criminal sentence for sexual misconduct be withheld until after the patient's release. Lack of treatment destroys any otherwise valid reason for differential consideration of the sexual psychopath."[80] Finally, the court found that the statute contemplated treatment by its terms since a requirement for a person's commit-

---

74. *Id.* where it was reported that: "The [trial] judge responded that he considered the purpose of the hearing to be only to determine whether appellant was still a sexual psychopath. He made no findings on the fact of the alleged lack of treatment."

75. *Millard*, 373 F.2d at 472-73.

76. *Id.* at 472, citing Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

77. *Millard*, 373 F.2d at 472-73.

78. *Id.*

79. *Millard*, 373 F.2d at 473, citing H.R. REP. No. 1787, 80th Cong., 2d Sess. 5 (1948).

80. *Millard*, 373 F.2d at 473.

ment was a "[l]ack of power to control his sexual impulses" and that the purpose of commitment was "treatment," and that a requirement for release was "recovery."[81]

Perelman's discussion of analogy reveals that while the court appears to be analogizing the sexual psychopath confinement to mental health commitment, in fact it is encompassing the sexual psychopath statute within the law of mental commitment. According to Perelman: "When the two relations encountered belong to the same sphere, and can be subsumed under a common structure, we have no analogy but argument by example or illustration. . . ."[82] Thus the traditional view of legal reasoning as analogical reasoning is undercut. It is apparent by a close reading of the opinion in *Millard v. Cameron* that the court *did not* identify features of civil commitment and features of the sexual psychopath detention, which would otherwise provide grounds for concluding that the dispositional treatment should be similar under the two statutes. This in fact was not possible for the court since mental health commitment in the District of Columbia was based on a finding that the subject was "insane" and the sexual psychopath detention was conditioned on a finding that the defendant "was not insane." Thus the only way that the court could conclude that the same disposition was required was to find that both types of detentions were to be made within a general category of law which provided treatment of the mentally ill. Perelman makes clear the limited role of true analogy in law:

> In the field of law, reasoning by true analogy appears to be restricted to comparison as to particular points of systems of positive law separated by time, place, or context. On the other hand, whenever resemblances between entire systems are sought, the systems are regarded as examples of a universal system of law. Similarly, whenever someone argues in favor of the application of a given rule to new cases, he is thereby affirming that the matter is confined to a single domain.[83]

One may properly conclude that the court of appeals merely assimilated the Sexual Psychopath Statute within the structures of the Mental Health Code providing for civil commitment. This being the case, the question necessarily arises concerning how the

---

81. *Id.* at 473, citing D.C. CODE ANN. § 22-3503 and § 22-3509 (1961).
82. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 373.
83. *Id.* at 374.

two separate statutes can be maintained and whether the Sexual Psychopath Statute continues to have any independent significance. Thus, the fact that the court reasoned not by analogy but by example and assimilated the Sexual Psychopath Statute to the Mental Health Code would seem to render the Sexual Psychopath Statute a nullity. Nevertheless, the court of appeals was apparently reluctant to so rule even though the consequence of the court's reasoning seems to be incoherent to the extent that it would permit similar treatment of persons classified as "insane" and "not insane." This apparent incoherence renders the opinion in *Millard v. Cameron* and its reasoning instable and unconvincing. This evaluation is confirmed by the court of appeal's subsequent opinion in *Millard v. Harris*.[84]

(b) *Argument by Convergence*

Perelman designates the type of argument developed by the court of appeals in which the Sexual Psychopath Statute was assimilated into the Mental Health Code as an argument by convergence.[85] As used by the court of appeals, the argument for convergence is based on the premise that the reasons for confinement of both the sexual psychopath and the mentally ill defined as "the insane," including the need to provide treatment for those with mental disorders and the need to protect society, are the same. The result is a necessary convergence of the two statutory schemes with a further result that the proper disposition in both types of cases and the required treatment for both should be the same. This analysis of what at first appears as two distinct situations leads to the conclusion that there is one overriding principle which governs both situations. However, as Perelman points out: "The convergence between arguments may cease to carry weight if the result arrived at by the reasoning shows up elsewhere some incompatibility which makes it unacceptable."[86] Several difficulties are inherent in maintaining the stability of conclusions based on arguments based on convergence. Distinctions between the two separate areas which are highlighted may seem more significant

84. *See generally* Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968). *See also infra* notes 90-156 and accompanying text.

85. *See generally* THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 471-74.

86. *Id.* at 472.

than the established convergence. Perelman suggests this when he notes that: "The problem of the significance of the convergence will arise every time there is an effort made to relate fields that are regarded as separate from one another, with barriers to be broken down before the convergence can be taken into account."[87] The convergence achieved by the court in *Millard v. Cameron* was achieved by emphasizing the similar objective of mental health treatment in both the case of civil commitments as well as in the case of sexual psychopaths. Any special characteristics of the sexual psychopaths which distinguish them from those who constitute the class of mentally ill persons subject to civil commitment were ignored by the court. Similarly, no comparison was made between the sexually motivated criminal and those offenders who are not sexually motivated. To the extent that differences between sexually motivated offenders and the non-sexually motivated offender, and the special class of mentally ill persons subject to civil commitment are shown to be significant, the convergence argument of the court will be untenable.

(c) *Avoidance of Incompatable Positions*

The effort of the court in *Millard v. Cameron* to subordinate the Sexual Psychopath Statute to the Mental Health Code while at the same time maintaining that the Sexual Psychopath Statute continued to have significance and was not a nullity must ultimately be seen as an instance of incompatible arguments. Perelman suggests that the attainment of resolution of such incompatible positions is a major objective of legal reasoning. According to Perelman:

> [T]he same idea is expressed by the great American jurist Cardozo: "The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the problems of law." This effort to resolve incompatibilities is carried on at every level of legal activity. It is pursued by the legislator, the legal theorist, and the judge. When a judge encounters a juridicial antinomy in a case he is hearing, he cannot entirely neglect one of the two rules at the expense of the other. He must justify his course of action by delimitating the sphere of application of each rule through interpretations that restore coherence to the juridical system. He will introduce distinc-

87. *Id.*

> tions for the purpose of reconciling what without them, would be irreconcilable.[88]

The avoidance of incompatible arguments and the achievement of consistency and coherence are driving forces in legal reasoning. This compulsion toward consistency can be seen in the subsequent opinions of the Court of Appeals for the District of Columbia as it further considered whether an exhibitionist could be properly classified as a sexual psychopath. Perelman, however, points out that the drive to avoid incompatibility and the means to achieve that goal is characteristic of persuasive argumentation generally. Perelman notes:

> As a rule, a speaker who wishes to avoid the harm that comes from the use of incompatible arguments will have to introduce a complimentary line of argument which will underscore the apparent inconsistencies between his various arguments, or between his arguments and the beliefs of the audience, and seek to forestall their harmful effects. He will explain the changes of viewpoint, present hypotheses as alternative, and define the field of application of norms so that they are not mutually exclusive.[89]

D. Millard v. Harris—*Divergence of the Sexual Psychopath Law from the Civil Commitment Law*

The Court of Appeals for the District of Columbia was faced with the incompatible positions to which its argument in *Millard v. Cameron* led, namely that all the requirements of the civil commitment law must be met in the case of the confinement of a sexual psychopath and that, nonetheless, the Sexual Psychopath Law had an independent significance. The court felt compelled in subsequent opinions to recast its interpretation of the purpose and application of the scope of the Sexual Psychopath Law. As will be seen in the following discussion, the court proceeded to argue the distinctions between the two statutes which it had previously ignored and it was ultimately compelled to reject the congruence argument on which it had previously relied.

In *Millard v. Harris*,[90] the Court of Appeals for the District of Columbia considered an appeal from the denial of *habeas corpus*

---

88. *Id.* at 414-15.
89. *Id.* at 486.
90. *Harris*, 406 F.2d 964 (D.C. Cir. 1968).

resulting from the hearing on remand which followed its decision in *Millard v. Cameron*. The court began its analysis by noting two facts which obviated much of the reasoning of its previous opinion. First, contrary to his prior testimony, the appellant testified at the remand hearing, that the two psychiatrists had testified at his original commitment hearing.[91] Consequently, there was no basis for the procedural attack on the statute. Secondly, the appellant admitted that he was receiving treatment.[92] Nevertheless, the appellant maintained that: (1) the statute was inappropriately applied to him and that he was improperly classified as a sexual psychopath; and (2) that the District of Columbia Hospitalization Act[93] superseded the Sexual Psychopath Statute and that the latter was constitutionally invalid.[94]

The court began its analysis by noting that the Sexual Psychopath Statute was enacted as "a humane and practical approach to the problem of persons unable to control their sexual emotions."[95] The purpose of the statute, according to the court's reading of the legislative history, was "to provide for the commitment and treatment of sexual psychopaths in a manner similar to the treatment afforded insane persons."[96] On the other hand, the terms of the statute made it clear that Congress intended to exclude insane persons from the operation of the statute.[97] The significance of this legislative history, according to the court, turned on the meaning of the word "insane" at the time the statute was enacted. In a criminal case, if a defendant was "insane," the insanity defense which was available to a defendant in the District of Columbia would have provided an excuse and preclude conviction.[98] If a person was found to be "insane," he was subject to civil commitment and the commitment statute itself used the term "insane" to designate those who were in need of treatment and subject to

---

91. *Id.* at 966.

92. *Id.*

93. D.C. CODE ANN. §§ 501-591 (1967).

94. *Harris*, 406 F.2d at 966.

95. *Id.* citing SENATE COMM. ON THE DISTRICT OF COLUMBIA, PROVIDING FOR THE TREATMENT OF SEXUAL PSYCHOPATH IN THE DISTRICT OF COLUMBIA, S. REP. NO. 1377, 80th Cong., 2d Sess. 5 (1948).

96. *Harris*, 406 F.2d at 967.

97. *See* D.C. CODE ANN. § 3503 (1) (1967) providing in part: "The term 'sexual psychopath' means a person not insane. . . ."

98. Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953).

involuntary hospitalization.[99] Moreover, at the time of adoption of the Sexual Psychopath Statute the term "insane" was equated with a psychotic condition which entailed a clear break with reality.[100] Thus it was reasonable to utilize the medical model and to provide treatment to persons suffering from mental disorders but who were not insane; and this was the apparent purpose of the Sexual Psychopath Law.[101]

(i) *The Current Law and the Significance of the Concept of "Mental Disorder"*

The court of appeals went on to observe that significant change both in use of language and in the operation of both the criminal law and mental health law had taken place since adoption of the Sexual Psychopath Statute. The insanity test had been reformulated so that in place of the McNaughten Rule, the law of the District of Columbia provided that "an accused is not criminally responsible if his act was the product of mental disease or defect."[102] Subsequently, the court had defined "mental disease or defect" to include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[103] As a result, a defendant "need not be a hallucinating psychotic to pass through the eye of the insanity defense."[104] Significantly, the civil commitment law was changed to reflect a broader conception of mental disorder. The 1939 statute entitled "An Act to Provide for Insanity Proceedings in the District of Columbia"[105] was replaced by the 1964 Act entitled "The Hospitalization of the Mentally Ill Act."[106] The court of appeals pointed out that the term "insane" was replaced by the term "mental illness" in the new statute.[107] The statute, moreover, adopted a definition of mental illness which extended beyond psychosis to include any

---

99. Act of Aug. 9, 1939, ch. 326, 53 Stat. 1299 (formerly 21 D.C. CODE § 308-325; *repealed* 1964).

100. *Harris*, 406 F.2d at 967.

101. *Id.*

102. Durham v. United States, 214 F.2d 862, 874-75, *rev'd* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (adopting the American Law Institute Test).

103. McDonald v. United States, 312 F.2d 847, 51 (D.C. Cir. 1962).

104. *Harris*, 406 F.2d at 968.

105. 53 Stat. 1299 (1939) (formerly 21 D.C. CODE §§ 308-325; *repealed* 1964).

106. 78 Stat. 944 (1964), 21 D.C. CODE §§ 501-591 (1967).

107. *Harris*, 406 F.2d at 968.

"other disease substantially which impairs the mental health of a person."[108]

(ii) *The Convergence Alternative*

The next step in the court's analysis was to determine the consequence of these changes in language and legal practice for the Sexual Psychopath Statute. One possibility considered by the court was to maintain its earlier convergence analysis and to avoid the incompatability problem either by maintaining that the Sexual Psychopath Statute was a nullity or to require full compliance with the procedures of the Mental Health Code in any action brought under the Sexual Psychopath Statute. The court observed: "[O]ne might well conclude that the more flexible standards now applied in the areas of the insanity defense and civil commitments leaves scant need for the separate statutory scheme for sexual offenders."[109] Procedurally, the court could have held that the Sexual Psychopath Statute was repealed by implication. However, the court found that Congress had expressly held that the new mental health law extended to those previously "declared insane or of unsound mind pursuant to a court order."[110] A strict reading of the statutory language rendered it impossible to construe a statute which was to be applied to those "declared insane" as applicable to sexual psychopaths who were defined as "not insane." Moreover, there was no evidence in the legislative history to suggest an implied repeal.[111]

(iii) *The Divergence Alternative*

The second possibility was to reject the convergence argument and to identify a separate function for the Sexual Psychopath Statute and the Mental Health Code. Previously the "insane" were eligible for civil commitment and those "not insane" were subject to the Sexual Psychopath Statute. With the new statute, those found to be "mentally ill" and dangerous were subject to commitment and those "not insane" and dangerous because of inability to control their sexual impulses were subject to the Sexual

108. *Id.* citing 21 D.C. Code § 501 (1967).
109. *Harris*, 406 F.2d at 969.
110. *Id.* citing 21 D.C. CODE § 589(a) (1967).
111. *Harris*, 406 F.2d at 969.

Psychopath Statute.[112] However, according to the court the term mentally ill includes some persons "not insane" under the earlier mental health code. Moreover, some persons who are unable to control their sexual impulse are in that condition because they are mentally ill. Since there are greater procedural protections under the Mental Health Code than under the Sexual Psychopath Statute, there would be serious constitutional problems of an equal protection type, if all those persons who were mentally ill were not afforded the same legal protection. The court reasoned:

> It would indeed be strange logic to argue that the fact that a person is "mentally ill" but not so mentally ill as to be "insane" as that word was understood in 1948 justifies withholding from him the protections of the civil commitment law. Nor can we conceive of any rational reason for shading the procedural rights incident to commitment and release simply because the person's dangerous proclivities manifest themselves in the form of sexual misconduct.[113]

(iv) *Plasticity of Notions and the Avoidance of Incompatability*

Reasoning that as a court it was without authority to rewrite the Sexual Psychopath Statute to include all the procedural requirements of the civil commitment law, the court concluded that it could avoid the identified constitutional problems only by construing the words "not insane" in the Sexual Psychopath Statute to mean "not mentally ill."[114] Thus the court avoided the incompatibility problem implicit in its earlier decision only by explicitly rejecting the convergence argument it had previously adopted. To achieve this result the court was compelled to maintain that the meaning of the words "not insane" had changed over time as a result of semantic developments and as a result of legal practice. A driving force of the court's reasoning was an argument for coherence avoiding both inconsistency or the need to declare an enacted law to be a nullity.

The argumentative usage which the court developed in *Millard v. Harris* employs the device which Perelman calls the "plasticity of notions."[115] The notion of "insane" was shown to be rich and

---

112. *Id.* at 970.
113. *Id.*
114. *Id.* at 971.
115. *See generally* THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 138-41.

flexible and subject to evolution as it was said to shift in meaning from "psychotic" to "mentally ill." By asserting the flexibility of the notion of "insane" at the onset of its argument, the court was able to avoid the incompatibility problem of its earlier opinion which led to constitutional difficulties identified in the instant case. This argumentative device permits the court to claim that it is not acting beyond its competence as it would if it had merely held the Sexual Psychopath Statute was repealed by implication, or if it characterized itself as redrafting the statute by substituting the term "mentally ill" for the term "insane." Perelman's reasoning suggests that the court's argumentation involves a standard rhetorical device: "The flexibility of the notion, postulated at the outset and claimed as inherent in it, makes it possible to minimize, and the same time underline, the changes that the new experience would impose, that objections would demand this basic adaptability to new circumstances will enable the speaker to maintain that he is keeping the same notion alive."[116] It is important to observe that the court itself made the notion of "insane" flexible and provided the characterization of the notion as flexible. As Perelman describes the process, the technique operates at two levels: "On the one hand, we actually make the notions flexible, thus enabling them to be used in circumstances far removed from their original usage: on the other hand, we qualify the notions as flexible."[117] The entire argument of the court depends both on the ability to postulate meaning and to maintain that there is semantic evolution. According to Perelman: "[I]f the meaning is viewed dynamically, in terms of the uses of the notion in argumentation, it will be seen that the field of application of the notion varies according to these uses and that the plasticity of notions is related to them."[118] One can appreciate the significance of the court's argument when one considers an alternative reading. The Sexual Psychopath Statute could be read as merely providing for special treatment of a group of criminal offenders. The insanity defense would be available for those who meet the standard for insanity. Then among those who were convicted, those who met the definition of sexual psychopath would be dealt with as a special class for purposes of detention or possible alteration of their behavior.

---

116. *Id.* at 138.
117. *Id.* at 139.
118. *Id.* at 140.

(v) *Avoidance and the Technique of Restraint*

Having read the word "insane" to mean "mentally ill," the court was confronted with whether such a reading rendered the Sexual Psychopath Statute meaningless or self-contradictory. According to the court: "[T]he problem is whether a person who by a pattern of repeated sexual misconduct has demonstrated himself sufficiently dangerous to meet that part of the statutory definition is not, as a definitional matter, mentally ill and therefore outside the statutory definition."[119] To reach the conclusion that the statute was a nullity or meaningless, the court properly reasoned that "we would need to find that the intersection of the class of dangerous sexual recidivists and the class of not mentally ill persons is the null set—i.e., that there is no person who is a dangerous sexual recidivist but who is not mentally ill."[120] The court noted that both medical and legal literature reveals that a large number of sex offenders are mentally ill in the sense that their behavior is affected by their personality problems and that they are in need of psychiatric treatment.[121] Nevertheless, the court reasoned that a determination of mental illness cannot be done by a broad classification such as "sexual offenders" but requires a case-by-case examination of personality and behavior.[122] The court concluded that to establish a sweeping rule that all dangerous sexual exhibitionists are *ipso facto* mentally ill would stand in direct contradiction to the principle of case-by-case analysis.[123] Moreover, the court expressed sensitivity to the legal implications of declaring as a matter of law that all individuals guilty of repeated sexual misconduct are mentally ill.[124] While the court refused to rule that all sexual offenders were mentally ill, it also avoided the need to rule that they were not. Indeed, the court avoided the need to determine whether Millard himself was mentally ill. Instead it concluded that the statute required that it be established that the sexual offender be dangerous as a requisite of his commitment. Thus the

---

119. *Harris*, 406 F.2d at 972.

120. *Id.*

121. *Id.* citing C. ALLEN, A HANDBOOK OF PSYCHOSEXUAL DISORDERS (1962); B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES, ETIOLOGY, PATHOLOGY, PSYCHODYNAMICS AND TREATMENT (3d ed. 1957); F. LINDMAN & D. MCINTYRE, JR., THE MENTALLY DISABLED AND THE LAW 298-313 (1961).

122. *Harris*, 406 F.2d at 972.

123. *Id.*

124. *Id.*

court reasoned: "Regardless of whether Millard is mentally ill or not, the statute is not applicable to him unless his past sexual conduct enables us to conclude that his likely dangerousness places him within the statutory definition."[125]

One should recall that the issue before the court in *Millard v. Harris* was whether the particular exhibitionist before it was properly confined as a sexual psychopath. The litigants before the court framed the issue in terms of whether the defendant was to be viewed as mentally ill and properly subject to civil commitment to the exclusion of the proceedings under the Sexual Psychopath Statute. "[The appellant] attacks the constitutional validity of the Sexual Psychopath Act and argues that the 1964 Hospitalization of the Mentally Ill Act partially or wholly supersedes the statute."[126] The appellee maintained that the Sexual Psychopath Statute applied to persons not mentally ill so that the statute had a significance independent of the Mental Health Code. "[That the] words 'not insane' in the Sexual Psychopath Statute [should be construed] to mean 'not mentally ill,' as indeed the government conceded we should."[127]

(vi) *Reformulation of the Issue and the Technique of Restraint*

The court first used an argument of restraint in its consideration of whether the statute had any possible application. The court refused to rule whether there were or were not any "not mentally ill" sex offenders. The court portrayed itself as careful and restrained in its analysis implicitly suggesting modesty in its judgment. Perelman maintains that such "[t]echniques of restraint give a favorable impression of sincerity and judgment and help to dispel the idea that argumentation is a device, a trick."[128] Secondly, the court recast the questions before it. Rather than having the case turn on whether the appellant is mentally ill or whether the Sexual Psychopath Statute is directed at a person in the appellant's position based on whether he is mentally ill, the court cast the question as being whether the appellant is dangerous or not. In a sense, the court ultimately avoids a conclusion based on the formulation of the parties to the litigation, pursuing a separate line of inquiry

125. *Id.*
126. *Id.* at 966.
127. *Id.* at 971.
128. THE NEW RHETORIC: ARGUMENTATION, *supra* note 12, at 466.

to justify its conclusion that the statute does not provide a basis for the institutionalization of Millard. Perelman suggests that this interaction of arguments and reformulation of the issue are common techniques used in legal reasoning:

> It may happen that the thesis under discussion is not conceived in the same way by the opposing sides: what for one side is the end of the debate for the other merely a step toward a later conclusion. Since the reality the argument is dealing with is split up differently, an opinion or decision in one direction is not the exact counterpart of the opinion or decision in the opposite direction. Accordingly, one of the basic considerations in a legal controversy is the determination of the point to be discussed. This involves an attempt to isolate the issue and to insert it into a framework set up by law or convention.[129]

By focusing the analysis on the issue of dangerousness rather than on the issue of mental illness, the court shifts the argument to one of values rather than empirical proof. Rather than being confined by the lack of factual basis for resolving the question of whether there are any "not mentally ill" sexual offenders and by casting the issue as a question of the dangerousness, the court is able to present the critical issue as one of the likelihood of significant psychological harm posed by the exhibitionist before the court. This type of argument which recasts and restricts the discussion is one which Perelman regards as powerful: "[A] technique, which is very effective, is to restrict the scope of the debate and to advance a conclusion that falls short of what might be anticipated from the writer or speaker."[130]

(vii) *Recasting the Issue as a Matter of Classification Rather than Treatment*

The court recasts the question to be decided in these terms: "In scrutinizing the question, we begin with the premise that when "not insane" is read to mean "not mentally ill" the sole justification for commitment under the sexual psychopath statute is his dangerousness to others."[131] To decide the question posed, the court was required to identify the basis for a prediction of dangerousness which it identified a "the type of conduct in which the individual

129. *Id.* at 461.
130. *Id.* at 466.
131. *Harris*, 406 F.2d at 973.

may engage; the likelihood or probability that he will in fact indulge in that conduct; and the effect of such conduct if engaged in will have on others."[132] The court also suggested that the dangerousness of certain forms of behavior can vary with the frequency with which it is likely to occur. Further; the effect on others might depend on the identity of the victim thus requiring an estimate of the type of person likely to become a victim.[133]

a. *Likelihood of Future Misconduct*

The court applied these criteria to the evidence presented at the *habeas corpus* hearing. The expert psychiatric testimony showed that the appellant was not psychotic, but suffered from a personality disorder diagnosed as "passive-aggressive personality, passive-dependent type, exhibitionism."[134] The exhibitionist conduct was caused by the fact that he was unable to enter into a mature relationship with women and experienced marital difficulties.[135] The record included a report by Millard's wife that he had walked around naked in his home exposing himself to his small children.[136] The hospital records revealed no reports of acts of exhibitionism at the hospital.[137] There was testimony from psychiatrists that since Millard continued to suffer from his personality disorder, it was likely that he would exhibit himself in public when under stress if he were released.[138] However, there were no allegations in the record that Millard had ever committed a violent sexual offense.[139] In fact, the psychiatrists who testified agreed that as a result of " 'the lack of aggressiveness, inferiority, timidity and heterosexual immaturity of the [typical] exhibitionist,' such individuals are markedly less likely to commit violent sexual crimes than other types of sexual offenders."[140] Nevertheless, the hospital records did contain reports of violent conduct on the part of Millard which was not sex related.[141]

---

132. *Id.*
133. *Id.*
134. *Id.* at 974.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 975.

b. *An Argumentation Appraisal of Determining Criteria: The Likelihood of Future Harm*

The court then considered the likely effect of the appellant's exhibitionism on potential victims. The psychiatric testimony suggested that the effect would vary among particular viewers: some would find the act repulsive and suffer brief distress; some women might find it amusing; highly sensitive women would be shocked; and very seclusive, withdrawn, shy women would be quite upset for a few days.[142] One psychiatrist testified that Millard's son, who was six at the time of Millard's exhibitionist act at his home, had suffered serious psychological harm.[143] The court of appeals in evaluating this evidence concluded that there was not sufficient evidence of likely serious harm to establish that Millard's potential future conduct presented a threat of danger. The court reasoned that the mere fact that some women viewers would be psychologically affected as would small children, and that such women and children would be among the "potential viewers" of Millard's exhibitionism if released, was not enough to justify a conclusion of "likely" dangerousness.[144] According to the court, the requirement of commitment for dangerousness is not the mere possibility of serious harm, but its likelihood.[145] The court concluded the appellant was unlikely to engage in sexual misconduct other than exhibitionism.[146] On the basis of the expert psychiatric testimony the court found that "the appellant's self control and insight into his personality shortcomings have improved sufficiently to permit the conclusion that such misconduct is likely to occur infrequently and only at times of stress."[147]

---

142. *Id.* at 976.

143. *Id.* at 976. The court dismissed this testimony on the ground that there was a general breakdown of the parent-child relationship beyond the father's sexual misconduct:

> The [Sexual Psychopath] legislation provides for the institutionalization of individuals who are dangerous to others because of their sexual misconduct, nor for the hospitalization of fathers who traumatize their children by a general pattern of rejection and abuse. If the effect of alleged sexual misconduct cannot be separated out, the solution in applying the statute is not to heap together all the unhappy effects of an unhealthy parent-child relationship as evidence of harm produced by "sexual misconduct."

Id.

144. *Id.* at 977.

145. *Id.*

146. *Id.*

147. *Id.* at 977-78. The court noted that Millard had not exposed himself to others who

To further establish its conclusion that the appellant did not pose a threat of likely serious harm, the court considered the likely consequence of future misconduct on the part of Millard. The court reasoned that although the expert testimony showed that serious psychological harm would result from Millard exhibiting himself to unusually sensitive adult women and small children, any future sexual misconduct of Millard was not sufficiently "likely" to cause the sort of harm required to justify continued commitment.[148] The court found the evidence showed Millard was "unlikely" to commit acts of exhibitionism with any great frequency. Although admitting some people who would have a significant psychological reaction to an exhibitionist act *might observe* Millard in a future act of exhibitionism, the harm would be produced in only a small proportion of the population and the susceptible viewers were merely "potential" viewers not "likely" viewers.[149]

c. *Anticipating Counterargument*

The court anticipated criticism that it was not giving sufficient consideration to the interests of supersensitive women and small children. First, the court postulated that very seclusive, withdrawn, shy, sensitive women are a minority.[150] Second, although it acknowledged a need to provide this class legal protection, the court reasoned that there are limits to which the law can go to eliminate all possible sources of occasional distress to this class of persons.[151] Acknowledging a need to provide greater protection for children, the court referred to expert testimony that the typical child would not be injured by an isolated act of exhibitionism.[152] Thus the court was able to conclude that the likelihood of serious harm being suffered by a child as a result of any act of exhibitionism by Millard was too remote to justify commitment.[153] As a result of this analysis, the court concluded that Millard did not qualify as a sexual

---

were hospitalized with him. In response to the counterargument that Millard's restraint was a result of the fact that hospitalization had precluded the type of tension which led Millard to expose himself, the court observed "it was by the government's choice, and not his, that he has had no greater opportunity to prove his self-control." *Id.* at 978.

148. *Id.* at 978.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

psychopath because he was not shown likely to be dangerous to other persons.

d. *Evaluation of* Millard v. Harris *as a Case of Legal Argumentation*

The opinion of the court of appeals in *Millard v. Harris* provides a paradigmatic example of the use of argumentation in the context of legal reasoning. It is clear that the opinion does not utilize syllogistic reasoning or formal logic. Rather, the opinion consists of an argument in which adduced reasons are elaborated to persuade and to justify a conclusion. Nor did the court consider it sufficient merely to declare without reasons that an exhibitionist is or is not a sexual psychopath subject to commitment. The process of argumentation which is evident in *Millard v. Harris* is central to the reasoned judgment which is characteristic of law. Perelman correctly identifies this critical feature of legal reasoning:

> What is specific in the way matters are resolved in law is that decision is obtained by recourse to a judge . . . [who] cannot be satisfied only with a decision which settles the conflict, but most in addition justify it and show that it is in conformity to the law that is in force. The pronounced judgment is not given as a collection of premises from which a conclusion is deduced, but as a decision justified by adduced reasons. In a formal deduction the conclusions flow in a constrained and impersonal way from the premises. But when the judge makes a decision, his responsibility and his integrity are at stake, the reasons he gives to justify his decision and to refute the real or eventual objections which could be made against him furnish a sample of practical reasoning, showing that his decision is just and conforms to the law, i.e., that the decision takes account of all the directives which the legal system has given, and that he is responsible to apply—a system from which he draws his authority and competence. . . .[154]

Legal reasoning then is an instance of practical reasoning which employs argumentation rather than justification. Argumentation employs reasons rather than logical proof. This is clear in the *Millard v. Harris* opinion in which the court assesses the nature of injury likely to be inflicted by conduct, determines the likelihood of the conduct occurring, and the psychological condition of the individual who is the subject of the proceeding. Perelman identifies

154. Perelman, *Legal Reasoning* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 128-29.

the range of reasons, which are exemplified in *Millard v. Harris*, and which are generally employed in argumentation: "The reasons given in practical argumentation, the 'good' reasons, can be moral, political, social, economic or religious according to the field from which the decision is drawn. For the judge, they will be essentially legal, for his reasoning must show the conformity of the decision to the law which he is responsible for applying."[155] In *Millard v. Harris* the reasons given employ practical judgment drawing on the insights of psychiatry, criminology and common experience, as well as law. It is clear from a close reading that there is no determinate solution available in a case like *Millard v. Harris*. The court could have ruled otherwise by making different evaluations of the data which it considered. As Perelman observes:

> What characterizes an argumentation is its non-constraining character. If we admit certain propositions and methodological rules, we can show the inadequate character of certain solutions, but, even there, the accepted solution rarely can impose itself in all its details. It is rare when the judge does not have to exercise a power of appraisal, which his authority will have to impose on the issues before him as the expression of the law, although his practical reasoning is so closely rule bound.[156]

It should be clear that Judge Bazelon exercised a continuing power of appraisal on the various data that he offered as a basis for his decision as well as a continuing judgment on the identified harms that were posed by Millard. Also considered was the significance of the restraint posed by continued commitment. Legal reasoning employs argumentation to justify a conclusion, rather than operating by deduction as in formal logic or using demonstration to establish the existence of fact. Argumentation aims to convince, not to establish truth. Thus any argument is subject to counter argument. Reasons given in any argument are open to challenge. Moreover a counter argument may be based on reasons ignored or denied in the argument that presents the opposing view. These features of argumentation that are characteristic of legal reasoning are evident in the majority and dissenting opinions rendered in *Cross v. Harris*.[157] The majority opinion, authored by Judge Bazelon, defended the argument developed in *Millard v. Harris*

155. *Id.* at 129.
156. *Id.*
157. Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).

while the dissenting opinion provided a challenge to the reasons and conclusions of the majority.

E. Cross v. Harris: *A Clash of Arguments in the Application of Classification Criteria*

Cross v. Harris involved an appeal from a denial of *habeas corpus* relief to the appellant who had been hospitalized for fifteen years on account of his tendency to engage in acts of public indecent exposure. The appellant had been released but within several months was hospitalized again following an arrest for indecent exposure and a determination that he was a sexual psychopath.[158] At the commitment hearing, the examining psychiatrists recommended outpatient care rather than hospitalization. The court, however, concluded that the Sexual Psychopath Act precluded provision of less drastic alternatives in place of indefinite commitment.[159] The appellant argued that proceedings under the Sexual Psychopath Act were equivalent to civil commitments so that the statutory mandate of least restrictive disposition under the Mental Health Code should be read into the Sexual Psychopath Act.[160] The majority remanded the case for a determination of whether the appellant was a sexual psychopath under the statute as construed in *Millard v. Harris*.[161] The majority's opinion reiterates its argumentation in *Millard v. Harris* and extensively responds to the argument developed by the dissenting opinion. An examination of the majority opinion will be taken up following a discussion of the dissenting opinion.

(i) *Exhibitionists as a Dangerous Class*

Judge Warren Burger concurred in the decision to remand the case but dissented from the reasoning of the majority in *Millard v. Harris* as well as in *Cross v. Harris*.[162] Judge Burger objected to the argumentation developed by the majority which he maintained exceeded the proper bounds of judicial action and he argued that remand of the case precluded any need to state views about

---

158. *Id.* at 1096.
159. *Id.*
160. *Id.* at 1097.
161. *Id.*
162. *Cross*, 418 F.2d 1095, 1107 (Burger, J., dissenting).

the constitutionality of the Sexual Psychopath Statute.[163] The principal focus of Judge Burger's opinion, however, is a dissent from the portion of the majority opinion relating to the issue of "dangerousness."[164] Judge Burger asserted that the analysis developed of "dangerousness" in *Millard* was dicta without legal force.[165]

Judge Burger began his analysis of the scope of the Sexual Psychopath Statute with the premise that the same concern should be given to the "victim whose traumatic injury may be very grave" as is given to the sexual offender.[166] On that basis he objected to the discounting in the *Millard* opinion of the effect of exhibitionism which "'most women would find . . . repulsive' even though depending upon their sensitivity, they might be 'quite upset' but for *only* 'two or three days.'"[167] He further objected to the discounting of "the possibility of serious psychological harm which might result to small children from witnessing Millard's 'expected exhibitionism.'"[168]

According to Judge Burger, the majority in *Millard*, as in the instant case, over-emphasized Millard's lack of a physically assaultive or violent nature and denegrated the psychic trauma and injury which could be associated, according to the dissent, with Millard's acts of exhibitionism.[169] The error of the majority was "to equate 'dangerousness' with conduct involving only physical impact."[170] According to Judge Burger the legislature intended to protect people from *psychological* as well as purely *physical* harm. While admitting that there are problems in determining

---

163. *Id.* at 1107. Judge Burger set out a firm statement of his view on judicial restraint:

> Since the case is to be rewarded, however, I think its wholly unnecessary—if indeed not inappropriate—for this court to intimate by way of obiter dicta general views as to apparent Constitutional issues which may never arise in this case. The majority takes issue with my challenge to their excursion into what is essentially no more than legal literature expressing personal views of two judges. I risk their displeasure because of my strong view that judges should generally confine themselves to the case at hand.

Id.

164. *Cross*, 418 F.2d 1095, 1108 (Burger, J., dissenting).

165. *Id.* at 1108.

166. *Id.*

167. *Id.* at 1108 citing Millard v. Harris, 406 F.2d 964, 976 (D.C. Cir. 1968).

168. *Id.* at 1108.

169. *Id.* at 1108-09.

170. *Id.* at 1109.

psychological trauma to victims and balancing the gravity of the harm with the necessity of involuntary commitment of the sexual offender, this was said to be a legislative policy matter and not primarily a judicial matter.[171] Judge Burger maintained that Congress provided a non-penal rehabilatative approach to the problem of the sexual offender in the Sexual Psychopath Act.[172] Consequently, he argued that the court should defer to this legislative judgment.

In support of his position, Judge Burger developed an analogy to the obscenity cases. Judge Burger noted that the United States Supreme Court had upheld a state statute forbidding the sale of obscene literature to minors under seventenn years of age.[173] The Supreme Court stated that it was "required only" to find that it was not irrational for the legislature to find exposure to material condemned by statute harmful to minors.[174] The Supreme Court maintained that it was precluded from concluding that the statute had "no rational relation to the objective of safeguarding . . . minors from harm from the mere fact that a 'causal link has not been disproved' even through the Court found that it was 'very doubtful' that the legislative findings "expresse[d] an accepted scientific fact."[175] According to Judge Burger there was no determination by the majority that it was irrational for Congress to conclude that exposure to acts of exhibitionism may cause harm.[176] Similarly, he argued that the Congressional finding that harm results from acts of exhibitionism, whether this represents an "accepted scientific fact" or not, should be binding on a court since a "causal link" has not been disproved. Thus the Court should be precluded from concluding the statute has "no rational relation to the objective of safeguarding" the public.[177]

Judge Burger also noted that the obscenity cases reflected the fact that the state may legitimately shelter specific groups from exposure to obscene materials. He noted the Supreme Court had held that the state may properly guard against he "danger that obscene material might fall into the hands of children . . . or that

171. *Id.*
172. *Id.*
173. *Id.* at 1109-1110 citing Ginsberg v. New York, 390 U.S. 629 (1968).
174. *Cross*, 418 F.2d 1095, 1110 (Burger, J., dissenting) citing Ginsberg, 390 U.S. at 641.
175. *Id.*
176. *Id.*
177. *Id.*

it might intrude upon the sensibilities or privacy of the general public."[178] Accordingly, Judge Burger argued that the majority in *Millard* erroneously relied on the conclusion that "only a small proportion of the population" would be injured from acts of exhibitionism,[179] and asserting that the overt public misconduct of exhibitionism has an even more devastating impact destructive of the "privacy and sensibilities of the general public" than the intrusive potential of obscene material.[180]

(a) *Particularized Assessment of the Dangerousness of Individual Exhibitionists*

The majority opinion in *Cross v. Harris*, authored by Judge David Bazelon, attempts to counter the arguments developed by Judge Burger. First, the majority addressed the argument that its discussion of constitutional issues raised by the Sexual Psychopath Statute are improper. Judge Bazelon provides a broad view of the significance of legal opinions:

> Opinions are written for explication and instruction. Neither function would be served if, having concluded that the statute must be construed to avoid constitutional doubts, we then made no mention of the doubts we sought to avoid. . . .[C]rucial factors affecting decisions are not to be kept as secrets known only to the court. Bench, bar, and litigants alike would be ill-served if we were to conceal the bases for judgment.[181]

The majority opinion characterizes the dissenting opinion as misreading the holding and rationale of *Millard v. Harris*.[182] The majority makes six assertions which it maintains reveal erroneous premises or a mischaracterization adopted by Judge Burger in his dissent:

> (1) that Congress has never indicated any intention to detain all exhibitionists indefinitely as "dangerous"; (2) that we did not question congressional power to punish acts of exhibitionism; (3) that we did not in any way restrict the kinds of ends and interests that Congress may be appropriate means seek to promote; (4) that we did not say that harm to only a small segment of the population

178. *Id.* at 1110 citing Stanley v. Georgia, 394 U.S. 557, 567 (1969).
179. *Cross*, 418 F.2d 1095, 1110 (Burger, J., dissenting).
180. *Id.*
181. *Id.* at 1106.
182. *Id.* at 1104.

> could not be sufficient to support a commitment to the Sexual Psychopath Act, so long as that harm was, in the language of the Act, *likely* to occur; (5) that we did not exclude any lasting harm of any sort to children, women, or anyone else from the category of 'substantial injury' which may justify commitment under that Act, provided there is evidence that such harm is *likely* to occur; and (6) that far from relying on any psychiatric theories of our own, we simply accepted in *Millard* the testimony of the psychiatrists concerning the likely consequences of Mr. Millard's exhibitionism, as in this case we must rely on the expert testimony concerning Mr. Cross.[183]

The majority asserts that the dissent adopts a faulty premise in that the Sexual Psychopath Statute should be construed to read into it an unascertainable congressional intent to confine all exhibitionists as "dangerous."[184] The majority asserts that the statute is not fairly susceptible to such as construction.

According to the majority, the dissent adopted the unfounded premise that exhibitionism is necessarily dangerous. The majority maintained that its decision in *Millard* was based on a record that showed no harm was likely to flow from the subject's future conduct.[185] The dissent, on the other hand, is said to adopt the view that possible acts of exhibitionism will result in "traumatic injury" and "psychic trauma" to bystanders without any analysis of the likelihood that such trauma will in fact occur.[186] Conceding that it may be true that in particular circumstances frequent exhibitionism is necessarily "dangerous" within the meaning of the Sexual Psychopath Act, the majority maintained that there was no evidence in the record in *Millard* to support such a conclusion.[187] The majority concluded that Judge Burger's dissent is either "(1) relying upon unmentioned extra-record psychiatric theories in order to conclude that exhibitionism is dangerous *per se*, or else (2) giving no effect to the word 'likely' in the statute."[188]

Similarly, the majority rejected the assertion that it failed to give sufficient weight to "the *possibility* of serious psychological harm which result to small children."[189] The majority again noted

---

183. *Id.* at 1104 n.61.
184. *Id.* at 1105.
185. *Id.* at 1105 n.65.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1106.

that the statute provides for commitment only if the subject is "*likely* to . . . inflict injury" on other persons. According to the majority the dissent ignored significant semantic distinctions since "[w]hatever may be the requisite standard of likelihood, there is surely no warrant for reading 'likely' as synonymous with 'might possibly'".[190]

The central error of the dissent then, according to the majority, was the adoption of the core premise that Congress concluded "that exhibitionism is necessarily dangerous, no matter what the circumstances."[191] The majority noted that the dissent provided no citation to any authority establishing that Congress decided that exhibitionism is dangerous.[192] According to the majority, the House Report on the bill, the Senate Report and the Congressional Record are void of any mention or consideration of whether exhibitionism is dangerous.[193] Thus, the majority concluded that the trial court must determine the character and size of the likely viewing audience and the harm it may suffer in order to determine whether any particular exhibitionist's potential misconduct can be deemed a sufficiently grave danger to warrant an indeterminate commitment.[194]

IV. LEGAL REASONING AS AUTHORITATIVE ARGUMENTATION

The opinions rendered in *Cross v. Harris* demonstrate that legal reasoning entails a practice of argumentation. The reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some established true state of affairs. The fact that there are opposing views developed does not mean that one or both of the judges rendering their opinion have not been reasonable or honest or that one is right and the other is wrong. As Perelman notes:

> In fact, we admit that two reasonable and honest men can disagree on a determined question and thus judge differently. The situation is even considered so normal, both in legislative assemblies and in tribunals that have several judges, that decisions made unanimously

190. *Id.* at 1106 citing 22 D.C. CODE § 3505 (1) (1967).

191. *Cross*, 418 F.2d at 1106.

192. *Id.*

193. *Id.* at 1106-07 citing H.R. REP. NO. 1787, 80th Cong., 2d Sess. (1948); S. REP NO. 1377, 80th Cong., 2d Sess. (1948), and 94 CONG. REC. 3884, 4802, 4885-4887, 4927, 6297, 6310, 6593, 6747, 6851, 7114, 7981 (1948).

194. *Cross*, 418 F.2d at 1107.

> are esteemed exceptional; and it is normal, moreover, to provide procedures permitting the reaching of a decision even when opposing opinions persist.[195]

It is in this sense that the majority's opinion provides the correct reading of the statute because it is the majority opinion that it is the correct judgment.

One may respond that to the extent there is a lack of a determinate answer to any question subject to legal reasoning it is not rational. It is exactly this position which Perelman was committed to rejecting. It stems from a mistaken belief that only formal logic or demonstrative proof provide valid conclusions or results. Perelman asks rhetorically:

> Must one condemn the law and the jurists in the name of a conception of reason and justice inspired by mathematical or natural sciences, or should one not begin with the fact that the most eminent jurists are as reasonable and as honest as men of science, and accept once and for all that the divergences of all sorts stem from its own nature, from its specificity in comparison to the sciences? If the important decisions of the Supreme Court of the United States are rarely made unanmiously must one accuse at least certain of these respected judges of being unreasonable or dishonest, or must one not conclude that in law discord is explained by specific reasons?[196]

Perelman's answer is clear: "Two opposing interpretations can be equally respectable, and it is not necessary to condemn as unreasonable at least one of the interpreters."[197]

The critic can assess the persuasiveness of opposing opinions of the type rendered in *Cross v. Harris*. But as an institutional and social matter, in law there must be a determined or authoritative decision. There is a need to know which is the correct reading of the statute being interpreted. The provision of a means for making such a determination renders legal reasoning authoritative in a way that, for instance, argument in philosophy cannot be. In a litigated case it is the judge who determines which counsel has made the persuasive argument. In a multi-judge court it is the majority which determines the correct rule or interpretation. It is not that the truth is determined but that the authority

---

195. Perelman, *What the Philosopher May Learn From the Study of Law*, in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 165.

196. *Id.*

197. *Id.*

of a position is determined. Perelman correctly describes the means by which an authoritative conclusion is established:

> We need a judge when these rules are *equivocal*, when reasoning does . . . not end in a conclusion, but justifies a decision. We can reach contrary decisions according to the importance we accord to this or that type of argument, and it is for this reason that we turn to a judge who will have the power to decide. When the judges do not agree, we need a criterium, e.g., the majority who will hand down the decision and which in the last instance *pro veritae habetur*, will be presumed in conformity with truth. There is no truth in fact, but only recourse to a power that makes the decision binding. From the perspective we understand the importance of this power and also the fact that this power is recognized and its authority admitted.[198]

It is because legal reasoning is a form of argumentation which resists providing determinate conclusion and because legal decisions are not imposed as self-evident, that "recourse to power and recognized authority must supplement the absence of unanimity."[199] Nevertheless, the decision which is rendered authoritative necessarily entails argumentation which is to be evaluated by the persuasiveness of the reasons given for the decision.

While legal reasoning cannot be assimilated to formal logic nor utilize scientific demonstration, neither can it be dismissed as mere subjectivism and exercise of unrestrained power. The argumentation which is the ultimate method of legal reasoning necessarily employs reasons which are ultimately tested by their effect in persuading. It is well to recall Perelman's view that: "The aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to thesis that are present for their consent."[200] The vitality of a legal opinion as precedent ultimately depends on the effectiveness of the argumentation which it employs.

CONCLUSION

Legal reasoning has been viewed as a corrupted form of formal logic by some. Others have viewed what passes as legal reasoning as mere rationalizations for exercises of unrestrained judicial power.

---

198. Perelman, *Law, Logic and Epistemology* in JUSTICE, LAW AND ARGUMENT, *supra* note 8, at 144.

199. *Id.*

200. REALM OF RHETORIC, *supra* note 45, at 9.

Chaim Perelman has provided a convincing account of legal reasoning which avoids these two extremes. For Perelman, legal reasoning is a form of rhetoric which utilized argumentation. The objective of argumentation is to persuade rather than to establish truth. The effectiveness of argumentation turns upon the persuasiveness of the reasons given for a decision. The argumentation itself employs a number of techniques and devices and forms of argument to establish its effectiveness. Through close study of a series of opinions of the Court of Appeals for the District of Columbia dealing with the question of whether an exhibitionist is properly classified as a sexual psychopath, one can identify the forms of argumentation which constitute the rhetoric of legal reasoning. One can observe in these opinions not only the operation of argument, but can also identify special features of law which make possible authoritative legal decisions.