The Rationality of Judging and Judges

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Legal philosophers and academics have not been impressed by this piece, which brings a new and enlarged conception of rationality – non-formal reason – to law in the manner in which two recent publications bring non-formal reason to bioethics. The goal of the paper is to vindicate the rationality of judging and judges by showing that the indeterminacy of judicial decision making does not entail the arbitrariness and subjectivity of judicial decision making. I need help in revising this draft, so I would appreciate receiving criticisms and suggestions for improvement, as well as direction to possible venues for publication.
THE RATIONALITY OF JUDGING AND JUDGES

Barry Hoffmaster

I. Introduction

There is more rationality in the law than there is in our philosophy of law. That submission undoubtedly is startling, but the prime example of it might be even more startling: the dogged insistence of legal philosophers and theorists that the indeterminacy of judicial decision making establishes the arbitrariness and subjectivity – the irrationality – of judicial decision making. Sustained criticism from lawyers and academics has expunged the naive belief that judges apply antecedently existing legal rules to cases and forced the resigned acknowledgement that judges make law by deciding cases on the basis of their personal values and political commitments. That disenchanting portrayal of judging now suffuses the public consciousness and dominates debates about appointments to the highest appellate courts. We feel driven to answer H. L. A. Hart’s question, “Do courts really apply rules or merely pretend to do so?” by accepting the pretense and the concomitant demise of the rule of law. But despite the vigorous, sustained criticism, that concession is unwarranted because the dichotomy that forces it – that judging is either objective rule application or subjective informal judgment – is false. Assimilating judging to the spare application of rules is an artifact of a pervasive but unduly narrow conception of rationality – formal reason – that camouflages the complexity of judging and reduces judges to legal technocrats. Judging is more intricate, complicated, and sophisticated than directly applying rules. Yet appreciating the intellectual richness of judging is not a capitulation to arbitrariness and subjectivity. There is a broader conception of rationality – non-formal reason – that undermines the false dichotomy by establishing rational processes for judicial decision making that enable judges, in applying all the law, to exercise judgment rationally. Bringing non-formal reason’s more robust and expansive account of rationality to the ineluctably human enterprise of judging vindicates these heretical claims.

For almost a century, sophisticated realists and uncompromising positivists, lately

1H. L. A. Hart, The Concept of Law, 2nd ed. (Oxford: Oxford University Press, 1994), p. 8. After the first edition was published in 1961, Hart characterized the realization that judges legislate as a “Nightmare”: “Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them....The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment – on an extreme view, always, and on a moderate view, very frequently.” H. L. A. Hart, “American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream,” Georgia Law Review, Vol. 11 (1977), p. 972.

2Jerome Frank distinguishes a lie, which is “an affirmation of a fact contrary to the truth, made with knowledge of its falsity and with the intention of deceiving others”; a fiction, which is
bolstered by postmodernists, have insisted that judging is indeterminate, but what does that claim mean? Hart’s question implies that law is indeterminate when judges do not ‘really’ apply rules, so what does it mean to ‘really’ apply a rule? Judges cannot ‘really’ apply a rule when they cannot derive a correct decision from a rule without using judgment because resorting to judgment introduces uncertainty about the correctness of the decision. Were different judges to make different judgments that lead to different decisions, there would be no determinate uniquely correct answer for a case. Brian Leiter characterizes the law as “rationally indeterminate” if “the class of legal reasons” is “insufficient to justify only one outcome” in a case. Leiter’s definition incorporates the no-correct-answer understanding of indeterminacy, and his explanation of what constitutes “the class of legal reasons” dramatically expands the scope of legal indeterminacy because judges have to exercise judgment about matters such as the legitimacy of various methods of interpretation, the legal significance of facts, and the strength of arguments by analogy.

The identification of rationality with the existence of correct answers has a long, august intellectual history, and legal realism, legal positivism, and postmodernism cannot be uncoupled from that tradition. Implicit in and common to their skepticism is a core theory of rationality, the account of rationality that for centuries has animated Western analytic philosophy and Western thought in general. The bedrock assumption of analytic philosophy is that rationality is formal reason, i.e., the kind of inferential reasoning used in the paradigmatically rational domains of logic and mathematics. This assumption percolates through ordinary understandings of rationality as well and is exemplified by the familiar use of the expression, “That’s not logical,” to mean, “That’s not rational.” Moreover, analytic philosophy’s defining project of theory construction and justification, which in philosophy of law assimilates law to a theory of law, proceeds from this conception of rationality. Propositions, for example, principles and rules, are, along with logical relations, the fundamental elements of logical inferential reasoning. Logical relations within and among propositions plus inferential principles provide the material needed to construct theories, classically by axiomatisation, and to apply them, as well as to justify the

a false affirmation made with knowledge of its falsity but with no intention of deceiving others”; and a myth, which is “a false affirmation made without complete knowledge of its falsity.” “The doctrine of no judge-made law” is, in his view, a myth. Jerome Frank, Law and the Modern Mind (London, Stevens & Sons Ltd.: 1949), p. 37.


The traditional epistemological project of foundationalism has largely been abandoned by analytic philosophers, who now embrace a coherentist approach to theory justification. The notion of coherence or fit remains refractorily vague, however. In moral philosophy, e.g., Richardson, recognizing the indeterminacy of norms, proposes a theory-based account of specification in which the theory is justified by a “coherence standard”. But the kind of coherence “that can justify” is explained in the unilluminating terms of “argumentative support.”
theories themselves and hence the principles and rules they contain.

Yet when rationality is equated with the rule-constituted and rule-governed reasoning of logic, as happens in formal reason, the limitations of logic become the limitations of rationality. Rationality runs out as quickly as logic runs out. The paradoxical upshot of assimilating rationality to formal reason is, therefore, not to establish, but to disestablish, the rationality of a domain. That happens not only in law but in science and morality as well.

In law, as elsewhere, it is the vulnerabilities of formal reason that foster indeterminacy. When law, quite naturally, is taken to be composed of propositions – rules and principles – “applying the law,” quite naturally, becomes the logical maneuver of subsuming the facts of cases under legal rules or principles to deduce decisions. As long as judges do just that (if they ever can do just that), they are not pretending to apply rules. In logic, for example, constructing a truth table to determine whether an argument is valid requires only following the rules, not judgment. In logic and mathematics deduction produces correct answers: conclusions that, given true premises, are necessarily, and therefore universally, true. So the same exercise in law should produce correct legal decisions. But in law, as judges, lawyers, and academics stress, applying legal rules and principles to facts is not straightforward. Because real legal problems are messy, amorphous, complex, and dynamic, much work needs to be done before facts can be subsumed under a rule or principle. The rule-application of formal reason assumes that the facts of legal problems can be adequately characterized and well formed in its terms; that relevant legal rules and principles exist and can be readily identified; that the applicable legal rules and principles are sufficiently robust and determinate to be helpful; and that the inevitable conflicts between legal rules and principles can be resolved straightforwardly. But the law and the legal theories proposed to represent the law lack the powerful principles needed to specify the facts of problems properly and productively and to ascertain the relevance of substantive rules and principles to those problems; the ancillary bridging principles needed to engage the general concepts of its substantive rules and principles with the particular facts of situations; and the higher-order principles needed to settle conflicts between its substantive principles (recall Karl Llewellyn’s famous thrust and counter-thrust of canons of statutory construction5). The resources of law and law-as-a-theory-of-law are missing when and where they are needed most.

Bereft of the panoply of rules and principles needed to justify decisions in the terms prescribed by formal reason, judges have to resort to their own values and pretend to be applying law. Hart conveys the distressing plight of the judge: “…the judge must, when the explicit rules


prove indeterminate, push aside his law books and start to legislate in accordance with his personal morality or conceptions of social good or justice.” That regrettable dichotomy – judges objectively apply the law or judges subjectively make the law – is imposed by the narrowness of formal reason. Logic runs out, and, for formal reason, when logic runs out, rationality perforce runs out.

What ensues is a jurisprudential salvage operation to delimit judicial indeterminacy. Leiter attributes that undertaking to Hart when he argues that the “central strategic move” in the chapter on formalism and rule skepticism in Hart’s classic text, *The Concept of Law*, is “…to concede to the skeptic, right up front, that legal rules are indeterminate, but to argue that this indeterminacy is a marginal phenomenon, one insufficient to underwrite far-reaching skepticism. The skeptic is portrayed, accordingly, as having unrealistically high expectations for the determinacy of rules, as being ‘a disappointed absolutist’.” Legal realists largely adopt the


7Leiter, *supra*, note 3, pp. 73-74. The depiction of the skeptic that Leiter quotes is from Hart, *The Concept of Law*, *supra*, note 1, pp. 138-139. In a note to the “disappointed absolutist” remark, Hart suggests a related article but does not identify the source of the expression. It comes from Dickinson: “The fact that legal rules do not always dictate the decisions of cases does not, however, mean that they may not have influence, and sometimes a controlling one, in the process of decision. Sceptics who minimize the influence of such rules often seem only disappointed absolutists, who expected the traditional theory of legal determinism to work out to the bitter limit of its clock-work logic, and on finding it play them false, react into an opposite extreme of naive unwillingness to recognize the less absolute, but none the less relatively effective, way in which legal rules do their work, holding an impossibly exalted view of certainty, they insist on all or none.” John Dickinson, “Legal Rules: Their Function in the Process in Decision,” *University of Pennsylvania Law Review*, Vol. 79 (1931), pp. 835-836. Dickinson quite rightly identifies the sway of formal reason as the source of skepticism, which results because formal reason suppresses the processes of judicial decision making in which legal rules do not play a domineering logical role.
different strategy of relegating indeterminacy to appellate courts. They emphasize the problems of specifying the general terms in rules and resolving conflicts between rules and pay less attention to the manifold difficulties judges in lower courts encounter in framing problems and assessing the relevance of rules and facts. With characteristic perspicacity, Hart appreciates the indeterminacy of the claim about indeterminacy when he asks whether it is restricted to specific kinds of adjudication, notably constitutional adjudication, or whether adjudication itself is “...essentially a form of lawmaking, never a matter of declaring the existing law....” Formal reason answers Hart’s question: Lawmaking occurs whenever and wherever adjudication is indeterminate. So Hart’s characterization of the skeptic, in the thrall of formal reason, as “a disappointed absolutist” is apt.

Preserving the legitimacy of judging and the authority of judges requires more than the stopgap containment of indeterminacy. It requires the recognitions that the irrationality of indeterminacy proceeds from the limitations of formal reason and that there is more to rationality than producing correct decisions. This paper describes an alternative account of rationality – non-formal reason – that has been developed by C. A. Hooker to vindicate the rationality of science, which also outstrips the resources of formal reason, and then uses a provocative depiction of a judge putatively making law to show how non-formal reason establishes the inherent rationality of the judge’s deliberation. The result is a radically different understanding of both rationality and law. Rationality is not reduced to logic and equated with reasoning. Non-formal reason is not a kind of informal reasoning; rather, it involves judgment and the processes and procedures from which, as well as the practices and institutional structures within which, rational judgment emanates. Focusing on processes and structures likely will discomfit philosophers, who insist on confining rationality to reasoning and take theory to be rational.

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8According to Leiter, “...the Realists...do not claim that the law is ‘globally’ indeterminate: they do not claim that the class of legal reasons fails to justify a unique outcome in all cases; rather it fails to do so ‘locally,’ i.e. in a particular range of cases (e.g. the cases that reach the stage of appellate review). Supra, note 3, p. 41 (emphasis in original).


11Throughout Law and the Modern Mind Frank invokes science as a model for judging. See Frank, supra, note 2. Doing so is proper because science, like logic and mathematics, is a paradigmatically rational domain, but only if the rationality of science is properly understood. As Hooker shows, formal reason cannot account for the rationality of science but non-formal reason can. See Hooker, ibid. One of the strongest arguments for non-formal reason is that it can vindicate the rationality of science.
reconstruction, but it should not surprise more practically acclimated lawyers. Nor is law reduced to a theory of law; rather, it becomes a human enterprise with respect to which the goal, or ideal, of rationality is, as it is for all intelligent human activities, to improve our capacity to make judgments by transcending the limitations and defects of our inherent finitude and fallibility.

A final, important preliminary. The charge of attacking a straw man, in the guise of what Leiter calls “Vulgar Formalism”, needs to be forestalled. “Vulgar Formalism” is “the idea that judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism,” which, Leiter rightly emphasizes, “is not a view to which anyone today cares to subscribe.” “Sophisticated Formalists” appreciate that “legal reasoning is not mechanical, that it demands the identification of valid sources of law, the interpretation of those sources, the distinguishing of sources that are relevant and irrelevant, and so on, and they offer a theoretical account of how these various bits of reasoning are done ‘rightly’.” One tenet of formalism common to both Vulgar and Sophisticated Formalism, however, is that “the law is ‘rationally’ determinate,” which means that “the class of legitimate legal reasons...justifies one and only one outcome....” Leiter’s obvious suspicion of rationality is understandable because it is hard to see how doing “bits of reasoning...‘rightly’” – and Leiter is, of course, rightly suspicious of what ‘rightly’ means as well – will produce “one and only one outcome”. So Leiter’s Sophisticated Formalists need an account of rationality to support their formalist doctrine that the law is “rationally determinate”. What is it?

The classic film, “12 Angry Men” (1957), is a beautiful illustration of non-formal reason at work in jury deliberation. I thank Arthur Yates for bringing this movie to my attention. The film could just as accurately be titled, “12 Rational Men” or “12 Rational Men and Women”, had any of the jurors been female. The sexism reflects the times because neither rationality per se nor non-formal reason is intrinsically sexist. In this regard, see how non-formal reason accounts for the rational deliberation of women about whether to try to become pregnant after having received genetic counselling in Barry Hoffmaster and Cliff Hooker, “How Experience Confronts Ethics,” Bioethics, Vol. 23 (2009), pp. 214-225. Non-formal reason also captures the rationality of children, whose intelligence and savvy never should be underestimated. See Barry Hoffmaster, “The Rationality and Morality of Dying Children,” Hastings Center Report, Vol. 41 (November-December, 2011), forthcoming.


Ibid., p. 111.

Ibid., p. 112.

Ibid., p. 111.
Setting aside Vulgar Formalism, there are three general positions with respect to the rationality of judging. First, there is no normative theoretical account of judging that renders it rationally determinate. That is the skepticism of legal realism, Critical Legal Studies, and versions of postmodernism. Second, there is a normative theoretical account of judging that renders it rationally determinate. That is Sophisticated Formalism, which adds theory to legal rules, principles, and other resources. Either legal rules, principles, and other resources are systematized into a theory, or an external theory is imported into the law. Leiter cites Ronald Dworkin as the “leading theoretical spokesman” of the former, and economic analysis of the law is the current paradigm of the latter. But such valiant attempts to achieve non-deductive rational determinacy by expanding the array of substantive considerations and figuring out how to reason “rightly”, for example, by moving from rules to principles to theories and by switching from foundationalism to coherentism, are futile because they simply shift the loci of indeterminacy. That is abundantly clear with respect to producing the ‘fit’ required by coherentist theoretical approaches. The most popular of these methods, reflective equilibrium, has been criticized by D. W. Haslett for “the lack of any clear guidelines for making the many adjustment decisions that would have to be made in achieving a ‘fit’ among the various elements that go to make up a person’s equilibrium.” And that failure precludes rationality: “All coherence considerations enable us to decide is that the one or the other [of two adjustments to a theory] must be chosen, they do not enable us to decide, definitively, which one. But then if we cannot decide between ...[the two adjustments] by appeal to coherence, how can we rationally decide between them? In the absence of “a satisfactory answer to this question by proponents of reflective equilibrium methodology, and so far we have not been given a satisfactory answer,” Haslett concludes that we can decide “only arbitrarily, or else irrationally by appeal to prejudices, intuitions, or revelations.” Attempts to incorporate external theories from the social sciences – nowadays economics, of course – into the law are unsuccessful because insofar as they are prescriptive, their prescriptivity pertains only to means, not to ends.

Theoretical brands of Sophisticated Formalism, like judging, inevitably require judgment,

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17Ibid., p. 112.

18Hart clearly recognizes the futility of these substantive shifts. See Hart, “American Jurisprudence Through English Eyes,” supra, note 1, pp. 979-984.


20Ibid. (emphasis in original).

21Ibid.
and with formal reason the necessity of judgment likewise vitiates their claim to rationality.\textsuperscript{22} Sophisticated Formalists have no answers to crucial questions about how matters of theory construction, theory justification, theory application, and theory assessment can be decided rationally, let alone be rationally determinate. So Leiter’s hesitation about the rationality of Sophisticated Formalism is warranted. That brings us to the third position: there is a normative theoretical account of judging that renders it rational, albeit not in the sense of being rationally determinate that is required by formal reason. Only this position has an answer to the question of how judges can decide rationally when there is no single, definitive, justified outcome and when they must exercise judgment. That answer is the account of non-formal reason presented and defended here.

As a quick orientation, section II provides highly compressed descriptions of formal and non-formal reason. Because the best way to understand non-formal reason is through examples,\textsuperscript{23} sections III and IV examine Duncan Kennedy’s provocative, albeit hypothetical, account of how he, with his strong moral and political proclivities for workers, would decide a case about issuing an injunction in a strike.\textsuperscript{24} Careful scrutiny reveals that his approach, contrary to what might be expected, does not patently violate the rule of law but displays the operation of non-formal reason and the fidelity to the judicial office that his rational deliberation evinces. Section V then relates this analysis to judging as the human endeavor it always has been and

\textsuperscript{22}Leiter suggests that rationality could serve as a “normative ideal”. \textit{Supra}, note 13, p. 112. For a brief analysis of this proposal, see \textit{infra}, note 45.

\textsuperscript{23}For the same reason that, as Kronman explains, Llewellyn had to use examples in \textit{The Common Law Tradition} (\textit{supra}, note 5): “...[O]nly examples can tell us what we need to know about the judge’s art. What they offer is a composite picture of the wise judge at work, a portrait of his habits and qualities. Given Llewellyn’s conception of adjudication, no other method of exposition seems appropriate or even possible....To understand the nature of good judgment in political affairs, Aristotle tells us, we must go and look at those who have it and listen to what they say. Llewellyn makes the same point about the craft of judging. Proponents of legal science will find this view circular and unilluminating. But those who, like Aristotle and Llewellyn, believe in the virtue of practical wisdom are likely to think it the best view of all and in any case the only really helpful one....He [the true judicial craftsman] knows that his craft is not a science and cannot be made into one, that it must be learned through experience and requires a form of practical wisdom irreducible to rules.” Anthony T. Kronman, \textit{The Lost Lawyer} (Cambridge, MA: The Belknap Press of Harvard University Press, 1993), p. 224. The good judgment of the wise judge is grounded in the use of non-formal reason combined with experience distilled by non-formal reason.

always will be.

II. Formal and Non-formal Reason

The hallmark of the Western philosophical tradition from Plato on is a commitment to rationality. At its inception, it took the form of what Stephen Toulmin calls “the Gospel According to Socrates,” which emphasized

...the importance of ‘keeping the talk going’; and keeping it going in terms that did not discriminate, in principle, between the parties to any issue. So, from the beginning, the problem of rationality was equivalent to the problem of keeping man ‘open to reason’. This meant establishing both an impartial forum or court of reason, in which all men would have the same intellectual standing, and also impartial methods and procedures, whose even-handedness they could all alike acknowledge.\textsuperscript{25}

Over the ensuing centuries, however, the philosophical theories propounded in accord with this gospel crystallized rationality into what Toulmin calls “logicality”:

The need for an impartial forum and procedures was understood as calling for a single, unchanging, and uniquely authoritative system of ideas and beliefs. The prime exemplar of such a universal and authoritative system was found in the new, abstract networks of logic and geometry. In this way, ‘objectivity’, in the sense of impartiality, became equated with the ‘objectivity’ of timeless truths; the rational merits of an intellectual position were identified with its logical coherence; and the philosopher’s measure of a man’s rationality became \textit{sic} his ability to recognize, without further argument, the validity of the axioms, formal entailments, and logical necessities on which the claims of the authoritative system depended.\textsuperscript{26}

Philosophers agreed that historically and culturally invariant principles had to ground a rational system because mere empirical universality could not provide the kind of authority needed to avoid relativism. They disagreed not about the nature of rationality or the nature of philosophy but about the \textit{a priori} correctness of their competing principles.

\textsuperscript{25}Stephen Toulmin, \textit{Human Understanding} (Princeton, NJ: Princeton University Press, 1972), p. 43. Not only the dated language in this quotation but the very notion of rationality might be criticized as sexist. For a reply, see supra, note 12.

\textsuperscript{26}Ibid., p. 44.
The problem with this philosophical legacy is not logicality, the rational method it prizes and exalts, but the overweening narrowness of the account of rationality that results when rationality is confined to this method. Deducing theorems from axioms in logic or geometry is, of course, a paradigmatically rational activity, and the parallel exercise of deducing decisions from principles or rules in law, morality, and everywhere else is itself rational. But it is a mistake – in logic, law, morality, and everywhere else – to reduce all rationality to this one kind of rationality. Even within formalist domains such as logic and mathematics, formal reason runs out because, for example, it ignores the skill required to identify important theorems and construct proofs for them, neither of which can be automated (the tasks are largely formally undecidable), let alone the capacity to create relevant formal systems in the first place (cf. the many differing systems of logic now available).

Yet it is hard to shake the identification of objectivity and rationality with the existence of correct answers. Logic and mathematics are taken to be exemplars of rationality and objectivity because they produce answers that are correct for everybody. What is the source of this strong, right-answer objectivity and its correlative universality? As Harold Brown points out in his analysis of formal reason, which he calls “a classical model of rationality,” universality derives from necessity, and necessity derives from the application of rules:

...the rationality of any conclusion is determined by whether it conforms to the appropriate rules. When we proceed from a starting point to a conclusion in accordance with a set of rules, we free ourselves from the arbitrariness that is characteristic of nonrational decisions.

...rules are at the heart of our classical model of rationality: if we have universally applicable rules, then all who begin from the same information must indeed arrive at the same conclusion, and it is these rules that provide the necessary connection between our starting point and our conclusion.

27 Nor, as Susan Haack has demonstrated, can the development of a multitude of new logics beyond the “classical logic” of propositional calculus and quantification theory, such as modal logics, deontic logics, and relevance logics, rescue the identification of rationality with logicality. See Susan Haack, “On Logic in the Law: ‘Something, but not All’,” Ratio Juris, Vol. 20 (2007), pp. 1-31. The title of Haack’s article quite nicely captures the position presented here.


29 Ibid., p. 17.

30 Ibid., p. 19.
The theories that philosophers construct are systems of these putatively “appropriate” and “universally applicable” principles and rules.

Formal reason is pervasive, as an excerpt about legal ethics from a textbook on professional ethics illustrates. The editor distinguishes morality from subjective matters of “mere taste” and “mere opinion” by affirming that “we can argue rationally about moral beliefs” and goes on to explain the nature of this rational arguing:

...[M]oral reasoning is a form of reasoning, that is, there is a structure of reasoning proper to moral decision making that takes the form of a logical argument. Particular moral judgments (e.g., “Beth should lie to protect her client” or “Beth would be wrong to lie to protect her client”) are derived as conclusions of moral arguments which include as their premises general moral principles and certain factual claims.31

Deriving conclusions from moral principles or rules is, like the corresponding exercise in law, simple in theory but rife with practical difficulties.32 In addition to the obvious problems of the indeterminacy of the general terms in norms and conflicts between norms, there is, as in law, the crucial but generally unrecognized problem of ascertaining the relevance of norms to particular situations. How do we determine whether a moral rule or principle is relevant to a situation and what the morally relevant description of a situation is? Resolutions of these essential matters about establishing relevance, removing indeterminacy, and settling conflicts can be rational for formal reason only if they are derived from rules. But appealing to further rules simply introduces a vicious regress because their applicability and mutual consistency must in turn be established by yet another appeal to still further rules. Again, all this essential work occurs before and beyond the dispositive logical maneuver, thereby vitiating the rationality imparted by formal reason. For formal reason everything that precedes and structures the subsumption of facts under norms – everything that goes into establishing the givens of the subsumption – must be non-rational because it is not rule-governed. The triumphal application of norms, whether legal or moral, to


32In 1949 Stuart Hampshire recognized how formal reason constricts the rationality of morality: “...[I]t does not follow from the fact that moral or practical judgments are not in their normal use...deducible that they must be described as ultimate, mysterious, and removed from the sphere of rational discussion. All argument is not deduction, and giving reasons in support of a judgment or statement is not necessarily, or even generally, giving logically conclusive reasons.” S. Hampshire, “Fallacies in Moral Philosophy,” Mind, Vol. 58 (1949), p. 473. Hampshire nevertheless accepts the philosophical assimilation of rationality to reason giving or reasoning. Non-formal reason includes formal and informal reasoning methods but appreciates that the rationality of human beings encompasses more than just reasoning.
facts is the last step in a complex process of analysis, deliberation, critical assessment, and judgment that is not rule governed, and that last step cannot itself be rationally redemptive.

Commonplace depictions of judging and the assimilation of the rule of law to the law of rules render law indeterminate because they manifest the constricted rule-governed rationality of formal reason. Law is composed of rules; judging is the application of those rules. Frederick Schauer’s analysis of argument by analogy reveals just how deeply and irrevocably rules are entrenched in the law. An argument by analogy identifies a number of properties that two (or more) entities possess, and based upon these similarities, infers that the second entity is likely to have an additional property that the first entity has. Unlike the certainty conferred on the conclusions of valid deductive arguments, arguments by analogy establish their conclusions with only probability. How strong an argument by analogy is, i.e., how probable it is that the conclusion follows, depends upon an array of judgments about the relevance and importance of the similarities, as well as the relevance and importance of any posited dissimilarities. But Schauer effaces the need for judgment by invoking a rule that determines the relevance of the properties in the premises of an argument by analogy. Either such a rule exists prior to the argument by analogy and the judge applies it, or the judge creatively chooses the rule that determines relevance. Even argument by analogy is reduced to rule-governed reasoning, a move that backfires because it ultimately bolsters skepticism rather than tempering it. Given the


34Schauer, supra, note 6, pp. 96-100.

35For a short, clear, helpful analysis of arguments by analogy and how they are appraised, see Irving M. Copi and Carl Cohen, Introduction to Logic, 10th ed. (Upper Saddle River, NJ: Prentice Hall, 1998), pp. 469-473 and 477-482. The account of these two logicians is a dramatic contrast to the legal literature on analogical argument, which Haack describes as “…luxuriant, to say the least – a steamy, tangled jungle in which it would be easy to get hopelessly lost.” See Haack, supra, note 27, p. 21. Most importantly, Copi and Cohen recognize that judgment is essential to arguments by analogy.

hegemony of formal reason, that temptation is almost irresistible, but particularly so in the law, as Hart recognizes: “...what conventional legal thought in all countries conceives as the standard judicial function...[is] the impartial application of determinate existing rules of law in the settlement of disputes.”

Depicting judging as the impartial logical application of rules is hard to disclaim because it is the method that produces correct answers that constrain and compel judges. Yet lawyers and academics have established that there are no right answers for at least some cases. Schauer reports “what most legal insiders and commentators now take to be commonplace,” namely, that “[n]owadays it would be hard to find very many dissenters from the view that when judges change the law, they base their decisions on a mix of policy and principle that can hardly be thought of as a deductive or logical exercise.” That recondite “mix of policy and principle” triggers the belief that promotes the “Nightmare view of adjudication”: “...the belief that, if a particular legal rule proves indeterminate in a given case so that the court is unable to justify its decision as the strict deductive conclusion of a syllogism in which it appears as a major premise, then the decision which the court gives can only be the judge’s legally uncontrolled choice.” Legal insiders, legal commentators, and legal philosophers have indeed moved beyond deduction and logic, but they have not moved beyond the conception of rationality embedded in deduction and logic, so they continue to be ensnared in the trap of indeterminacy. Using a tool of logic, a modus ponens argument, and the narrow conception of formal reason, the non-rationality of judging is easily deduced. If judging is indeterminate, then judging is not rational. Judging is indeterminate. Therefore, judging is not rational. Skepticism prevails.

Both Llewellyn and Hart spy the trap. Llewellyn sees how it affects students:

You cannot watch generations of law students assume, two thirds of them, as of course and despite all your effort, that if the outcome of an appeal is not foredoomed in logic it therefore is the product of uncontrolled will which is as good as wayward, without realizing that our machinery for communicating the facts of life about the work of our central and vital symbol of The Law: the appellate courts, has become frighteningly deficient.

Llewellyn’s concern is to show how the “facts of life” about judicial work make that work “reckonable”. Hart’s concern is to make that work rational.

37Hart, “American Jurisprudence Through English Eyes, supra, note 1, p. 971.

38Schauer, supra, note 6, pp. 125-126.


40Llewellyn, supra, note 5, p. 4.
For Hart, the trap springs when decisions fall within the penumbra of a general term:

If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises.  

Hart appreciates that if a non-deductive argument about a penumbral question can be rational or “sound”, it must be rational or sound “without being logically conclusive,”  that is, it cannot possess the necessity and certainty of a deductive argument. And Hart concedes that whatever makes a decision about a penumbral question “sound” is “some concept of what the law ought to be,” but he quickly distinguishes that ‘ought’ judgment from “a moral judgment about what law ought to be” to avert the possibility of a necessary “intersection between law and morals.”

How do we escape the trap? By removing the trap. That much of what actually goes on in judging, as well as in science and morality and, indeed, throughout our lives, must be arbitrary or subjective follows only if rationality is reduced to and equated with formal reason. For that reason, constraining rationality to the application of rules is a mistake. Jerome Frank, perhaps surprisingly, provides encouragement to search for a more expansive conception of human rationality: “There can be no greater hindrance to the growth of rationality than the illusion that one is rational when one is the dupe of illusions. Man can invent no better way to balk any of his ideals than the delusion that they have already been achieved.” Rationality is one of our ideals, but we are under the illusion that rationality is formal reason, so, in fidelity to the Socratic Gospel, we have to raise

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42 Ibid., p. 608.
43 Ibid.
44 Frank, supra, note 2, p. xxvii. In addition, this quotation beautifully illustrates the reflexivity of non-formal reason. Non-formal reason is not just about improving the rationality of our judgment but also improving the rationality of our rationality.
a new ideal. Where, though, might we find a conception of rationality that, following Hart’s guidance, is both normative and fallible and lies “in something other than a logical relation to premises”?

Writing about “the irrationalist fallacy” in judging, Richard Wasserstrom points the way:

It is recognized quite correctly that the canons of formal logic have a decidedly limited applicability [in judging]. It is inferred quite incorrectly from this that all the questions which cannot be settled by appealing to formal logic cannot be settled in any manner which could be called “reasonable” or “logical.” An appeal to formal logic is equated with an appeal to criteria of rationality or reasonableness, and it is concluded that because the courts cannot have used formal logic to select or formulate legal premises, the courts cannot have appealed to any rational or objective criteria when engaged in these undertakings....It may not make much sense to describe the judicial decision process as a completely deductive one. But it makes even less sense to insist that for this reason courts could not (and should not) employ a procedure or a set of procedures that permits of some kind of reasoned justification for the judicial decisions reached by

45Hart remarks of Roscoe Pound, that “...it must be said that he probably conceived of the idea that a whole system with its principles and received values would provide a determinate, unique answer when particularly legal rules ran out, not as a literal truth about legal systems but rather as a regulatory ideal for judges to pursue....” Hart, “American Jurisprudence Through English Eyes,” supra, note 1, p. 981. The notion of reason as a regulatory ideal for judging is right, but the rule-application model of formal reason cannot serve that function because it is a degenerate idealization. In science an idealization is a model that is helpful because it simplifies part of the real world by ignoring inessential information. Removing the effect of friction from the model of an inclined plane in physics, e.g., is a useful, simple, non-degenerate idealization for measuring acceleration down a plane. Doing so does not affect the fundamental underlying physical structure, so if necessary, the independent factor of friction can be restored to the model. With a degenerate idealization removing a factor changes the underlying fundamental structure, so that factor cannot be reinserted. Given its extensive simplification, formal reason is a degenerate idealization of rationality, and the rule-application of formal reason is, in turn, a degenerate idealization of judging. It can be pragmatically useful to treat a degenerate idealization as a simple idealization, but the history of theoretical accounts of judicial decision making manifestly demonstrates that that is not the case for the model of deriving uniquely correct decisions from rules. For discussions of ideals and idealizations in science, see Hooker, *Reason, Regulation, and Realism*, supra, note 10, pp. 52-53, 58-59, 307-308, 313-314, 318-326, and 350, n. 13.
those courts.46

Formal reason propagates the irrationalist fallacy, the dichotomy that judges either apply the law or make law. Dismantling the irrationalist fallacy requires an account of the rationality of undertakings that do not involve the application of rules. Providing that account is the challenge that non-formal reason addresses.47 As a corrective to the failings of formal reason, Wasserstrom insightfully proposes a procedural basis for rationality.48 Developing a procedurally oriented alternative to formal reason is the ambition of non-formal reason.

Richard A. Wasserstrom, *The Judicial Decision* (Stanford, CA: Stanford University Press, 1960), pp. 23-24. Others have recognized this fallacy. Haack, agreeing with the conclusion of Oliver Wendell Holmes, appreciates that the fallacy incorporates a sharp distinction between the normative and the descriptive: “...the usefulness of formal-logical tools in legal theory is limited; but that...doesn’t mean that nothing rational, reasonable, or sensible can be going on, or that an explanation exclusively in terms of the operation of social and economic causes is all that could be hoped for. Here as so often, we must beware of This-or-Nothingism.” Haack, supra, note 27, p. 25. See also Hampshire, supra, note 32.

Larmore recognizes the centrality of judgment to morality, the rationality of judgment, and the inability of standard philosophical theory, understood as the rational reconstruction of rules, to illuminate the “puzzling” nature of judgment: “Intentional forms of activity that are not thoroughly constituted by reconstructible rules are ones that, given our idea of theoretical understanding, we may be tempted to label to that extent as arbitrary. But if moral judgment is not thoroughly rule-governed, it is not arbitrary either. Judgment certainly involves risk. Yet it does not resemble the flipping of a coin or a decisionistic leap of faith. Judgment we do not exercise blindly, but rather by responding with reasons to the particularity of a given situation. The fact that we are struggling to comprehend is that our perception of these reasons as indeed reasons and the response that they motivate go beyond what the general rules given in advance (as well as characteristic sentiments and training) could alone make of the situation.” Charles E. Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987), p. 20. Larmore appreciates that judgment can be rational and that the prevailing philosophical “idea of theoretical understanding” is impotent with respect to accounting for the rationality of judgment. Because that idea of theoretical understanding is grounded in formal reason, it must deem judgment arbitrary. Non-formal reason utilizes a different kind of theoretical understanding to vindicate the rationality of judgment. As an alternative, Larmore proposes that “the great works of imaginative literature” can help us understand the nature of moral judgment: “...[O]ur capacity for moral judgment thrives on the examples of its exercise that we find presented by the literary imagination.” Ibid., p. 21. In the same vein, examples provide the best way of understanding non-formal reason. See supra, notes 12 and 23.

Wasserstrom’s suggestion is not surprising given how central and essential procedure and process are to the law in all its legislative, judicial, and regulatory manifestations. This orientation of non-formal reason in large part accounts for the rationality of the law.
Non-formal reason is a theory of rationality, not a method of informal reasoning. That is a cardinal difference between formal reason and non-formal reason because formal reason does reduce rationality to a kind of reasoning, namely, logical reasoning. Another cardinal difference is that non-formal reason recognizes and responds to the finitude and fallibility of human beings. One implication of human finitude pertains to our ability to use formal reason: our limited cognitive abilities enormously curtail our capacity for logical reasoning and therefore force us to rely strongly on non-formal judgement. Judging requires judgment in myriad ways in myriad places before and beyond the application of rules. Judges use non-formal judgment, for example, in ascertaining the relevance of facts and legal rules and principles, in determining whether a particular entity or situation falls within the ambit of a general term, and in resolving conflicts between legal rules and principles. Moreover, the ways in which and the extent to which the logical standard of reason is idealized in philosophical theories, for example, by requiring global consistency, renders it inaccessible to real agents. These considerations suggest that formal reason should not be regarded as an exhaustive account of reason but instead as one tool of reason among others, and that reason should be thought of as a process for the improvement of judgment. In addition, there is a persuasive analogy between reason and other practical skills that typically are not understood in rule-following terms and are allied to a general developmental model of reason as the improvement of judgment. This similarity suggests a model of reason as a skilled process, one that may itself be improved.

Developing these suggestions, reason can be understood as that capacity in virtue of which, within our finite resources, we transcend our imperfections through a process that improves our judgments. This transcendence includes, reflexively, the capacity of reason to improve itself as our understanding of, and our practical control of, our world develops. Reason is a capacity, operating at both individual and collective levels, for initiating processes that replace ignorance with trustworthy information, reactivity and carelessness with systematic judgement, and prejudice and partiality with broad and insightful critical appraisal, and for applying these to rational evaluation processes themselves. Formal tools such as logic have a useful role to play in these processes but only as one resource among several.

Non-formal reason employs four fallible, improvable, learnable tools in the pursuit of improved judgment: observation, constrained but creative construction, systematic critical appraisal, and the use of both formal and informal reasoning procedures. In science, the domain for which non-formal reason was developed, observation is concerned with obtaining reliable

49The account of non-formal reason presented here is adopted from Hooker, supra, note 10.


51 On the former, see Brown, supra, note 28; on the latter, see the exposition of Piaget in Hooker, Reason, Regulation, and Realism, supra, note 10, pp. 252-285.
information about empirical features of the world relevant for scientific decision making, thereby extending the range of evidence considered. Creative construction involves the creation of new theories, new instruments and experimental procedures, new theoretical methods, and new institutional roles, for example, new peer review processes. These constructions have to be creative if something genuinely new is to emerge, but if the overall process is to be cognitively efficacious for finite, imperfect creatures, and ultimately simply feasible, they must also be constrained by judgements concerning relevance/salience, risk, and the satisfaction of appropriate epistemic values. Systematic critical appraisal includes carrying out tests, proposing alternative explanations, checking performance and assumptions in wider ranges of conditions, improving the power of instruments or test methods, for example, by adopting double-blind controlled experimental designs wherever appropriate, and by participating in peer review. Formal and informal reasoning tools include various logics and decision theories, along with argument by analogy, metaphor, and other informal techniques. These four tools are used by both individuals and communal groupings of various kinds, for example, laboratories, learned societies, collaborative and discussion groups, and universities. The depiction of judging in section III illustrates legal analogues to the utilization of the four tools of non-formal reason in science.

Given the finitude and fallibility of human beings and the dynamic complexity of the world, the outcomes of the processes that human beings use to make judgments will be fallible and contextual. Contextuality entails relativity, of course, but relativity to context yields only sensitive variety; it does not entail relativism, i.e., arbitrariness and subjectivism. Judgment does not possess the patent correctness or certainty of a deductively derived conclusion. Unlike with formal reason, however, the failure of judgment to be certain, uniquely correct, or determinate does not entail that it is not rational. With non-formal reason the rationality of judgment is a function of its four tools and the processes from and the structures within which judgment emanates, so judgment can be rational even if it is not certain or demonstrably correct. Non-formal reason is systemic rationality. It is not the result of an isolated, circumscribed, independent exercise such as deduction. Rather, it is a feature of the institutional design and operation of not just the complex, dynamic system of adjudication but of the legal system within which adjudication occurs.52

52In Chapter 12 of Thinking Like a Lawyer, supra, note 6, Schauer recognizes some of the procedural, structural, and institutional dimensions of adjudication that, with non-formal reason, contribute to establishing the rationality of judicial decision making, along with the institutional values that are relevant to judicial decision making. Of the burden of proof and the concepts of deference and presumption, Schauer says, e.g., that they “...tell us just how sure the legal system needs to be in order to reach a particular conclusion, and indirectly tell the system what is to happen in the event that it is not sufficiently sure. And by specifying how confident the law must be in order to produce a particular legal outcome, the burden of proof, especially, reflects deeper substantive and not just procedural values that vary depending on the consequences of that outcome” (p. 220). Moreover, he explicitly recognizes the importance of institutional design: “At the heart of much of law’s use of its characteristic reasoning devices is its acceptance of the fact that the best decision is not always the best legal decision. In operating in this fashion, law does not intend to be perverse. It does, however, intend to take institutional values especially
This sketch of non-formal reason is, of course, unsatisfyingly brief and vague.\(^5^3\) The best way to understand non-formal reason, though, is through examples,\(^5^4\) for our purpose, the example of judging presented in Sections III and IV.

III. Judging

How does careful thinking, analysis, and scrutiny proceed in the law? In the same way it proceeds outside the law. Within the law John Dewey provides a perspicuous description of how a lawyer thinks:

As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation. The

\[^{53}\text{A detailed account and defense of non-formal reason in moral life is provided in C. A. Hooker and C. B. Hoffmaster, Re-Reasoning Ethics (unpublished manuscript). For the philosophical basis of the account of rationality utilized there, see Cliff Hooker, “Rationality as Effective Organisation of Interaction and Its Naturalist Framework,” supra, note 10.}\]

\[^{54}\text{For two non-legal examples, see Hoffmaster and Hooker, “How Experience Confronts Ethics” and Hoffmaster, “The Rationality and Morality of Dying Children,” supra, note 12.}\]
problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to find statements, of general principle and of particular fact, which are worthy to serve as premises. As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions. No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to form a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts. And as his acquaintance with rules of law judged applicable widens, he probably alters perspective and emphasis in selection of the facts which are to form his evidential data. And as he learns more of the facts of the case he may modify his selection of rules of law upon which he bases his case.55

Dewey recognizes that real problems, whether legal, moral, or otherwise, are complex and messy. The principal challenge is to frame a problem in a way that is meaningful, defensible, and productive. The search for mutually supportive statements of principles and facts involves analysis, interpretation, creativity, and critical assessment in a process that is dynamic and fallible. The process also is reflexive because how it is being conducted, how productive it seems, and how it might be improved are themselves subjects of on-going scrutiny and critical assessment. Choices about what material to examine, which methods to use, whether an approach is working, and when to stop, for example, are not governed by rules but are matters of judgment. And, of course, the process has to start somewhere, with an initial impression, inkling, or hunch about, or perhaps a preference for, an outcome.

55John Dewey, “Logical Method and Law,” Cornell Law Quarterly, Vol. 10 (1924), p. 23. Frank holds the same view: “The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around – with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. If he cannot, to his satisfaction, find proper arguments fo link up his conclusion with premises which he finds acceptable, he will, unless he is arbitrary or mad, reject the conclusion and seek another.” Frank, supra, note 2, p. 100. Note Frank’s qualification: “...[U]nless he is arbitrary or mad,” i.e., unless he is not rational.
Dewey’s characterization does not represent just how a lawyer thinks about and reasons through a case; it also represents how a judge thinks about and reasons through a case. In “Toward a Critical Phenomenology of Judging,” Duncan Kennedy provides an imaginative depiction of how a judge might work through a case, a depiction that tellingly conveys the pertinence of and the rationality and objectivity inherent in Dewey’s analysis. What Kennedy, hypothesizing that he is a U.S. District Court judge, has to decide is whether to issue an injunction that would stop striking bus drivers from lying down in the street in front of a bus station to prevent replacement drivers from taking the buses on their routes. Given his strong moral and political convictions, Kennedy is sympathetic to the striking workers and to workers in general. But his initial sense of the case is that “the law” does not allow the workers to prevent the use of the buses during their strike, so the employer will get the injunction. He disagrees with that specific outcome and would like to change “the law” to favor employees more generally. So there is a seeming conflict between what “the law” requires and what Kennedy would like, which he calls his “how-I-want-to-come-out” (HIWTCO).

This apparent conflict between Kennedy’s cursory impression of the law and his moral and political principles needs to be understood carefully, however. In his book, How Judges Think, Richard Posner dismisses Kennedy’s phenomenological foray into the mind of a judge with the “damaging criticism” that “judges no more identify with Kennedy’s imagined judge than they do with Dworkin’s fictional ‘Judge Hercules’.” Were that comparison apt, Posner’s criticism would indeed be damning. But unlike Dworkin, Kennedy does not make the judicial task superhuman. Kennedy’s depiction of judicial deliberation is thoroughly and refreshingly realistic and practical. More potentially damning is Posner’s portrayal of Kennedy as a judge “torn between” the law and his personal sense of “social justice,” a conflict that “impels him to search for ways in which he 

56Kennedy, supra, note 24.

57Kennedy is supposing that he is a judge in a trial court, not an appellate court. An attractive response to legal realism is to mitigate the damage by relegating indeterminacy, if not exclusively at least predominantly, to appellate courts. See, e.g., Leiter’s discussion of legal realism, supra, note 3, pp. 77 and Schauer’s discussion of Llewellyn, supra, note 6, pp. 137-138. That attempt restricts indeterminacy to rule bewitchment, in particular, to conflicts between and among rules. Such a narrow conception ignores the fact skepticism of legal realism: the rampant indeterminacy of ascertaining the relevance of facts as well as rules. Appreciating fact skepticism would, it seems, suggest that there is more, not less, indeterminacy in trial courts because trial judges have to wrestle with both facts and rules. That is a mistake, however, because the relevance of facts and rules is not established singly, but collectively. Determining the relevance of facts or rules is a complex symbiotic process in which facts and rules interact dynamically, reciprocally, and reflexively. Kennedy nicely represents that process.

can deny the injunction,” to which Posner objects that “[j]udges do not think the way he imagines them to....” Posner is right that Kennedy’s moral and political commitments provide the motivation for his legal investigation, but, as we will see, there is nothing untoward about that. Posner is wrong, however, in depicting Kennedy’s problem as a conflict between the law and his morality, the upshot of which is that his desired moral outcome defines and directs his legal work. Kennedy is engaged in a scrupulous critical examination of whether there is stronger legal support for issuing an injunction or not issuing an injunction. He would like the legal support for not issuing an injunction to be stronger in the end, but he is not steadfastly, blindly embarked on a dedicated moral mission. In fact, just the opposite. And in that telling respect, it is unfortunate if judges do not think in the way Kennedy imagines them to think because they should think in the rational way Kennedy imagines himself to think.

Kennedy begins by recognizing the complexity and uncertainty of the matter. He is not a labor law expert, and he has not read any cases or articles about what the employer may or may not do with the means of production (m.o.p.) during a strike. He recalls having read John Steinbeck’s *In Dubious Battle* when he was 16. He suspects that if there is a rule that supports the employer, there probably will be relief in federal court, but he vaguely recalls that federal courts are not supposed to issue injunctions in labor disputes. And he strongly feels that if relief is available, the employer will be able to demonstrate whatever is required to justify an injunction. He is sure that the employer may use the m.o.p. as he or she pleases during a strike, and he is “quite quite sure” (emphasis in original) that the drivers have violated this rule. He is sure that the rule means that the employer has a privilege to act and a right to protection against interference and that what the employees did was interference. But he is not sure that a U.S. District Court has jurisdiction to intervene when the municipality is enforcing local law about obstructing public ways or whether, if there is a basis for federal intervention, an injunction would be an appropriate remedy. (143-144)

Kennedy then has to go to work. He has to see whether the position he suspects will prevail – that the law gives the employer the right to use the m.o.p. during a strike; that the employees interfered with that right; that an injunction is an appropriate remedy for that interference; and that he has jurisdiction to issue an injunction – can really withstand critical scrutiny. That slant to the task aligns with his moral and political commitments and his political activism, which provide strong motivation for an aggressive, sustained investigation. He posits two ambitious goals: “I want these specific workers to get away with obstructing the buses, and I want to change the law as much as possible in the direction of allowing workers a measure of legally legitimated control over the disposition of the m.o.p. during a strike.” (145) And he surveys various strategies. He could delay, hoping that the drivers win the strike before he has to rule. He could try to formulate a version of the facts that would not warrant an injunction. He could search for a “technicality” to avoid having to decide about the injunction. Or he could

59Ibid., p. 213.

60Page references in the text are to the later version of Kennedy’s article in *The Rule of Law*, supra, note 24.
research issues of federal jurisdiction and the appropriateness of an injunction. The first three would protect these particular strikers but would not address the general issue of an employer’s right to use the m.o.p. during a strike. The second two might benefit other workers as well but again would not address the general issue. Kennedy consequently opts for a “frontal assault” on the putative rule about the use of the m.o.p. during a strike because if that strategy succeeds, “the result will be both to get the workers off in this case and to accomplish my law reform objective.” (145; emphasis in original)

This depiction of the case leads, as Kennedy points out, to a very different understanding of judicial reasoning, one that assimilates the thinking of a judge and the thinking of a lawyer:

...we are not dealing with a “case governed by a rule”, but rather with a perception that a rule probably governs, and that applying the rule will very likely produce a particular (pro-company) result. The judge is neither free nor bound. I don’t see it that way from inside the situation. From inside the situation, the question is where am I going to deploy the resources I have available for this case. The issue is how should I direct my work to bring about an outcome that accords with my sense of justice. My situation as a judge (initial perceived conflict between “the law” and how-I-want-to-come-out) is thus quite like that of a lawyer who is brought a case by a client and is afraid on first run-through that the client will lose. The question is, is this first impression one that will hold up as we set to work to develop the best possible case on the other side? (145-146; emphasis in original)

Realizing that his account of judging seems profoundly illegitimate, Kennedy explains that this criticism

...misunderstands the rules of the game of legality. All members of the community know that one’s initial impression, that a particular rule governs, and that when applied to the facts it yields X result, is often wrong. That’s what makes law such a trip...So it is an important part of the judges’ and the lawyers’ role that they are to test whatever conclusions they have reached about “the correct legal outcome” by trying to develop the best possible argument on the other side. In my role as an activist judge I am just doing what I’m supposed to do when I test my first impression against the best pro-union argument I can develop. What would betray legality would be to adopt the wrong attitude at the end of the reasoning process, when I’ve reached a conclusion about “what the law requires” and find it still in conflict with how-I-want-to-come-out. (146; emphasis in original)
The point of Kennedy’s explanation is that, for the purposes of legitimacy and rationality, it does not matter whether he is being an “activist judge”. He is doing what judges and lawyers alike are supposed to do. Whether a conclusion a judge or lawyer reaches is rational depends on the processes that have led to it, and central to that rationality are the processes of evaluating it in terms of the best arguments for the opposite conclusion and subjecting it to criticisms that emanate from the opposite conclusion.61

Apprehensive that a rule affirming the employer’s right to use the m.o.p. during a strike might be intractable, Kennedy pushes on. His inability to come up with ideas for dislodging the rule makes him feel disgraceful and foolish: “it shows I lack legal reasoning ability.” (147) He considers researching the contract between the union and the bus company and ruminates about the confusion surrounding injunctions issued by federal courts before entertaining “really third-rate solutions” such as hoping the facts turn out to be different or the company’s lawyers make a “stupid technical mistake.” (147) Then, spurred by analogies, an idea emerges. What may these striking bus drivers do? Like other strikers, they may picket, and they may use various publicity measures to dissuade people from riding the buses, both of which interfere with the company’s use of the m.o.p. But picketing does not physically interfere with the company’s use of the m.o.p. and is justified by the First Amendment’s protection of free speech. Appreciating those differences, Kennedy strives to preserve the analogy:

The workers did lie down in the street to block the buses, but they did not intend to and did not in fact use force to prevent them from rolling. After all, the submitted peacefully to arrest. And the press was everywhere. Obviously the worker on the ground could not have physically prevented the bus from rolling, because it could have rolled right over him. (148; emphasis in original)

Yet lying down in the street did delay the buses and disrupt the company’s service, and that success derived from an important disanalogy: “The workers did physically obstruct the owner’s use of the means of production and were delighted to do so. It wasn’t just a side effect.” (148)

Kennedy persists. Although the actions of the striking bus drivers went beyond conventional picketing, they nevertheless were a symbolic protest directed at the company, the public, and the replacement drivers. With respect to the company, it was an attempt to “exert moral suasion...by impressing it with the extreme feeling of the workers and their willingness to take risks, their sense that the company is theirs as much as management’s.” (148; emphasis in original) With respect to the public, it was an attempt to attract publicity and garner support. And

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61 In praising the “Socratic dialectics,” Mill emphasizes the importance of what he calls “negative logic”: “...no one’s opinions deserve the name of knowledge, except so far as he has either had forced upon him by others or gone through of himself the same mental process which would have been required of him in carrying on an active controversy with opponents.” John Stuart Mill, On Liberty (New York: Bobbs-Merrill Company, Inc., 1956 [1859]), p. 55.
with respect to the replacement drivers, who, after all, are the ones who actually stop the buses, it was an appeal, a declaration, and a warning: “It would be ok to try to persuade the non-union replacements with flyers, to picket them, to threaten them with anger and non-association and guilt trip them and swear at them. This is just a small extension of those tactics. It is a physical statement to them.” (149) Kennedy portrays the conduct of the strikers as non-violent civil disobedience and an exercise of their First Amendment rights. The legal consequence of his interpretation is that “injunction of a non-violent civil disobedience protest would be an unconstitutional restriction of expression....” (148; emphasis in original) Kennedy reflects: “By this time, I’m getting high....My heart lifts because it seems that the work of legal reasoning within my pro-worker project is paying off.” (148; emphasis in original)

What did Kennedy do? He transformed a labor law and tort law case that the strikers most likely would lose into a constitutional law case that the strikers might win. How did he do that? Kennedy explains:

I relied on the idea that there had to be some limit to the employer’s freedom from interference, came up with picketing by trying to imagine what the workers certainly could do to him, and then looked for an extension of the picketing idea to embrace the particular facts of this case. (148-149)

Another way to put it is that I stopped imagining the rule of “no interference” as the only thing out there – as dominating an empty field and therefore grabbing up and incorporating any new fact situation that had anything at all “sort of like interference” in it. I tried to find the (affirmative other) rules that set the limits of this one, so I could tuck my case under their wing. Once I identified those other affirmative rules (protecting picketing and other first-amendment-based attacks on the employer’s use of the m.o.p.), I restated the facts of the lie-in to emphasize those aspects that fit (non-violence, submission to arrest, one prone body can’t stop a Sceni-cruiser unless the Sceni-cruiser wants to be stopped). (149)

Kennedy’s “brainstorming” has reframed the case, and his brainstorming is not arbitrary, capricious, or haphazard. To the contrary, it has uncovered a richness to the rights situation that might otherwise have remained suppressed and affirmed a balance of rights that is crucial to a mature democracy with a complex economy working in everyone’s interests as well as can be had. Kennedy’s “brainstorming”, insofar as it contributes to a thorough examination of each side to this case, is rational, but its rationality cannot be explained in the rule-governed terms of formal reason. For that explanation, non-formal reason is required.

IV. Rationality and Objectivity
Rationality, for non-formal reason, inheres in the processes from which judgments emerge. Those processes are conducted by human beings, not, as Dewey put it, “done by a piece of inanimate machinery,” because what they require, repeatedly and unavoidably, are judgments about all sorts of value-riven substantive and procedural matters, for example, not just what considerations are relevant and how important they are, but what strategies and methods to adopt, how far to pursue them, and, eventually, when the inquiry should be terminated. The function of rationality is to improve the capacity of human beings to make good judgments in these and like matters by enabling us to transcend defects arising from our inherent finitude and fallibility, for example, our ignorance, our prejudices and biases, our impulsivity, and our self-interest. Towards that end, non-formal reason provides four tools to utilise in the processes of judgement formation: observation; creative construction; comprehensive critical assessment; and formal and informal reasoning methods.

Objectivity, like judging, is richer and more complex than formal reason recognizes and allows. The objectivity of non-formal reason is not the correct-answer objectivity of formal reason that results from the rule-governed reasoning constitutive of formal reason, although non-formal reason of course incorporates that kind of objectivity in its use of formal reasoning methods. Nor is non-formal reason just another kind of informal or non-formal reasoning; it is a theory of rationality. Informal reasoning methods, such as argument by analogy, narratives, and metaphors, along with the formal reasoning methods of logic and mathematics, are one of the tools of non-formal reason. Kennedy’s deliberation evinces the objectivity of non-formal reason.

Kennedy thinks in the way Dewey describes. He analyzes the total situation, making judgments about what strategies to adopt and the merits of what those strategies produce. It is not an exercise in subsuming factual premises under legal premises but a search for statements that are, in Dewey’s words, “worthy to serve as premises.” That is a dynamic, reciprocal inquiry, as factual premises and legal premises are tested against each other to see how mutually supportive they are. As an understanding of the facts develops, rules can be modified, or new rules can become relevant. And vice-versa, as happened with Kennedy. As his understanding of potentially relevant rules expanded, new facts that supported the new rules became relevant. Kennedy had to “choose intelligently” as he searched for “rules which will substantiate a certain way of looking at and interpreting the facts,” and in doing that, he discovered facts that could substantiate the rules his analogies produced, e.g., the strikers were not violent and submitted peacefully to arrest, and the strike was widely covered in the media.

The four tools of non-formal reason operate throughout Kennedy’s thinking. His “brainstorming” is a dedicated, persistent exercise in creative construction, motivated by the need to subject his impression that “the law” does not allow workers to interfere with the owner’s use of the m.o.p. during a strike to comprehensive critical assessment. Kennedy entertains a variety of options and strategies and does not give up when they fail. His search for an alternative way to frame the problem is risky and uncertain. He might not succeed. Formal reasoning structures his overall challenge because he ultimately will have to deduce a conclusion about issuing an injunction, but it is argument by analogy, an informal reasoning method, that provides his
breakthrough. Personal empirical observation may not be prominent, but what is at issue here is
the amassing of relevant, reliable empirical information ultimately gleaned from observation
somewhere. Information about matters such as the general character of strikes, the behavior of the
parties involved, and the psychological, emotional, and social impacts of this behavior is of this
kind and can be utilized as long as good empirical evidence from the judge’s own experience
would support the summation. Vicarious visualization is evident in Kennedy’s restatement of the
facts when he employs an image, not of a dirty, smoke-spewing city bus swathed in advertisements
but a shiny Sceni-cruiser. Kennedy’s analogical thinking was, and probably needed to be, visual as
well as verbal, picturing strikers marching with picket signs, blocking entrances to company
parking lots, and pounding their fists on the vehicles of replacement workers. And had Kennedy
been thinking about this case after rather than before Tiananmen Square, his route to the First
Amendment likely would have been more direct.

But what exactly has Kennedy accomplished? Using non-formal reason, he has constructed
a respectable legal argument for not issuing an injunction. With that accomplishment, he has
transcended his bias in favor of the striking workers and advanced from a mere “How-I-want-to-
come-out” to a provisional “How-I-might-be-able-to-come-out.” That is a start, but only a start,
as Kennedy appreciates. He is acutely aware of the uncertainty and tentativeness of his possible
defense of the strikers: “Will this fly? I have no idea....It is part of the work of producing lots of
alternative ways at the problem, hoping that one of them will break through. I am already
wondering whether it’s even worth the time to pursue this one further.” (149) Despite all the work
he has done so far, much work remains. To decide the case, he has to make the even more difficult
move from “How-I-might-be-able-to-come-out” to “How-I-should-come-out.” To do that, each
side of the case needs to be fully developed and critically assessed. So Kennedy has to make a
judgment about whether his First Amendment argument is sufficiently promising to devote more of
his judicial resources to developing and assessing it. If he embarks on that task, he then will have
to develop the strongest argument he can for the rule that workers may not interfere with the
owner’s use of the m.o.p. during a strike. And ultimately he will have to make a judgment about
which position is more legally and rationally compelling. The process leading to that culminating
judgment should be a continuation and elaboration of the creative construction and critical
assessment that has brought Kennedy to where he is now. But to be rational, the entire array of
judgments that now looms for him has to survive further sustained utilization of the four tools of
non-formal reason.

Kennedy does not yet know how he would decide this case because much depends on the
state of “the law”, which he understands metaphorically as a physical medium:

...[W]e experience law as a medium in which one pursues a project,
rather than as something that tells us what we have to do. Law
constrains as a physical medium constrains – you can’t do absolutely

62Kennedy does not use either the term, ‘How-I-might-be-able-to-come-out’, or its
successor, ‘How-I-should-come-out’.
anything you want with a pile of bricks, and what you can do depends on how many you have, as well as on your other circumstances. In this sense, that you are building something out of a given set of bricks constrains you, controls you, deprives you of freedom.

...I am free to work in the legal medium to justify the workers’ actions against the company. How my argument will look in the end will depend in a fundamental way on the legal materials – rules, cases, policies, social stereotypes, historical images – but this dependence is a far cry from the determination of the outcome by a process of legal argument that could only be done correctly in one way. (150)

The constraints of “the law” likewise are subject to the operation of non-formal reason. The “rules, cases, policies” that Kennedy mentions need to be discovered, in large part by using the standard techniques and resources of legal research, but then explored, creatively unfolded, and critically assessed with the tools of non-formal reason. Extant precedents are historical analogies that need to be investigated and evaluated in any rational proceeding. Kennedy recognizes both the potential for creativity and the normative power of precedents:

Precedents come to me as little stories called fact situations that judges resolved in particular ways. What they did interests me in the way an earlier painter’s work might interest a later painter. But interest is too weak a word. Especially when they are put together in patterns, precedents reveal possibilities that it would have taken me a long time to come up with, or that I might never have come up with at all....Just studying these patterns may change my view because the study will set my mind going in directions that otherwise wouldn’t have happened. But there is also the elemental normative power of any outcome reached by people I identify with. Because I think they were up to the same thing I am up to, whatever they came up with has in its favor an initial sense that it’s probably what I would have come up with too. (158-159; emphasis in original)

Moreover, if an analogy or pattern of precedents were to inspire a suggestive argument that did not fit “the law”, a case for creatively revamping the precedents to accommodate it could be made and assessed. The relevance and import of the “social stereotypes” and “historical images” that Kennedy mentions likewise need to be scrutinized using the tools of non-formal reason. Again, the rationality of judging is the rationality of non-formal reason.

Similarly, the objectivity of judging is the objectivity of non-formal reason. The tools of observation, creative construction, comprehensive critical assessment, and formal and informal
reasoning methods render the judgements they deliver objective by incorporating their constraints into the judge’s deliberative processes and the institutional judicial processes in which they are employed. The outcomes of formal reason are objective if the input premises are objective because deduction adds nothing to the premises and necessarily preserves initially present truth. The objectivity of input premises usually reduces to some presumed guarantee of their truth, whether of logical necessity, e.g., for normative and logical claims, or nomic necessity, e.g., for observational claims. For non-formal reason, in contrast, the objectivity of its outcome judgements results from the constraints it imposes on and within the deliberative and institutional processes used in reaching them, not by any supposed guarantee, initial or final, of their truth. And, of course, an assessment of the objectivity of an outcome is itself a judgment, the rationality of which is a function of non-formal reason.

With non-formal reason the crux of objective judgement is the kind of impartiality that results from having taken all of the relevant empirical information into account, effectively explored all of the alternative understandings, constructed all of the pertinent arguments, and critically assessed all of these. Doing that is, of course, an ideal, but an ideal that provides guidance for practical investigations, analyses, and assessments. It is the kind of impartiality that is not willfully ignorant of, or willfully in error about, or has a willful partiality or bias toward, particular data, or particular interpretations and interests, or particular arguments. It is the kind of impartiality that can be acknowledged by all who are willing to put themselves through the same process, e.g., all judges. And, we can now appreciate, it is realistically achieved by following processes representative of non-formal reason.

The objectivity of non-formal reason is process-oriented, not right-answer oriented. Objectivity proceeds from the tools of non-formal reason that check the formative processes of judgment in all the senses of ‘check’: control, limit, restrain, examine, test, and verify. Because judging is a human enterprise conducted within a legal system located within a state and a society, additional checks can come from other sources. But for those checks to be rational, i.e., more than social or conventional, their restrictions must be tested by and coalesce with the restrictions of non-formal reason.

V. Judges

When law is taken to be essentially expressed as a theory, and judicial decision making is taken to be the application of that theory to cases, as happens with formal reason, the judge either disappears from judicial decision making or becomes a distressing source of irrationality. The same result occurs in morality. When morality is assimilated to a theory, and moral decision making is the application of that theory, persons either disappear or contaminate moral decision making with their subjectivity. When grounded in formal reason, morality becomes what Edmund

Pincoffs calls “quandary ethics”, where the task is to determine the right answer for a moral problem, an answer that is right for any person who has a relevantly similar moral problem. As an analogy, Pincoffs uses the legal example of determining the right-of-way at an intersection with four stop-signs. (This resemblance to law is, of course, the basis of the charge of ‘legalism’ or ‘formalism’ in morality.) Who the drivers of the cars are makes no difference whatsoever: “What is relevant must have nothing to do with me, but only with the situation: a situation in which anyone could find himself. What is right for me must be right for anyone.” Not surprisingly, in this philosophical conception of morality, virtue ethics is either entirely peripheral, if not superfluous, or simply derivative, i.e., being a virtuous person is just performing the actions that moral theory deems right.

In contrast, when judging is recognized as a human enterprise, as happens with non-formal reason, the person and the personality of the judge cannot be ignored. The challenge for non-formal reason, therefore, is to explain how the humanness of judges relates to the rationality of judging. One aspect of that – impartiality – already has been addressed. With non-formal reason there is an important sense in which objective judgments “must have nothing to do with me,” viz., they must be impartial in the manner discussed in section IV. But this end-of-process impartiality is decidedly not the extreme disappearance-of-the-judge logical independence of formal reason. There are two other differences between non-formal reason and formal reason that matter. One is the role of motivation, which non-formal reason recognizes as related to the personal and professional constraints of judges. The other is differential skill, which non-formal reason recognizes as affecting the capacity of judges to make good judgments. These two features of real judicial decision making will be discussed in turn.

**Motivation:** Judges need motivation not just to undertake the arduous tasks of canvassing vast domains of the law, identifying what is relevant, pursuing suggestive leads and connections, developing promising approaches and analyzing their prospects and implications, and comparing and critically assessing the strengths and weaknesses of all sides of a case, but to pursue these tasks rigorously and thoroughly to a conclusion. Kennedy’s personal moral and political convictions, goals, and aspirations provide ample motivation for him to persist in searching for a respectable legal basis for his HIWTCO. A legally compelling defense of the strikers could favorably influence future cases involving workers and public opinion about unions and labor, as well as promote his “life-project of being a liberal-activist judge.” (152) And because Kennedy regards legal argument as a form of moral argument, he would like to know for his own ethical edification and purposes “how my position looks translated into this particular ethical medium.” (152)

But Kennedy also has professional motivation, emanating from his judicial role and his position in the legal system, to “legalize” his position. He knows he needs an argument that


issuing an injunction would “violate the law.” He has made a promise or pledge, however diffuse its content and audience, that, as a judge, he will not do anything for which he does not have a sound legal reason. Were he to violate that commitment, he would be sanctioned by members of the legal community and society, for example, newspaper editorialists and opinion writers. His reputation would suffer, and he would lose moral capital as a judge. In addition, if his position were not legally defensible, it could be reversed on appeal, and, as Kennedy concedes, “I want my position to stick.” (151)

Kennedy’s confessed moral and political leanings and his judicial activism could be roundly denounced, but that criticism, as Kennedy notes, is misguided. In this case his moral and political orientation fortuitously drives his diligent pursuit of an elusive legal argument that would support the striking bus drivers. The personal “biases” of a judge should not be decried insofar as they prompt careful examination of a legal position that seems weak, if not non-existent. But what if Kennedy’s initial suspicion had been that “the law” did not allow him to issue an injunction? Would he have been equally zealous and creative in seeking to develop a legal argument on behalf of the bus company? No guarantee, of course, but that is where the professional motivation of judges – the ethos of legality – enters to insure that all sides of a case are fully developed and critically assessed, and the effective completion of that task requires the four tools of non-formal reason. Being professional is, in this important respect, being rational. That is the gist of Kennedy’s rejoinder that it is not his motivation that betrays legality, rather “[w]hat would betray legality would be to adopt the wrong attitude at the end of the reasoning process....” (146; emphasis in original)

Skill: The importance of the judge-as-person is strikingly evident when Kennedy discusses testing his How-I-might-be-able-to-come-out to see whether he can overcome what he calls the “obviousness gap”. The obviousness gap is the disparity between how the judge imagines others “think the case ‘obviously’ ought to come out if we ‘just applied existing law’” and a How-I-might-be-able-to-come-out (a How-I-want-to-come-out with recognizable legal support). (153) Whether a judge is able to overcome the obviousness gap – to remove or at least satisfactorily reduce it – and thus move to How-I-should-come-out, depends on two factors. One is what Kennedy calls the “configuration” of the field of law in which the judge is working:

Some fields might be described as impacted, meaning that they initially present themselves as highly organized. Boundaries are long straight lines picked out with many cases each referring in its holding to the other cases and indicating how the remaining gaps should be filled; policies are articulated and “easy” cases well within the boundaries have been decided as such. The impacted field is the

66In this regard, law is comparable to science, where part of the cross-person/lab/chambers critical appraisal process is essential to objectivity, not an addition to it, and also provides incentives for scientists to do their best, thereby behaving rationally. I thank C. A. Hooker for this point.
image of legal necessity, and if I want to decide my case in a way that seems to disorder it, I will have to work hard to overcome the obviousness gap. (153)

Aspects of tax law probably are good examples of impacted fields. At the other extreme is the case of first impression, which means that “the field virtually announces a gap, conflict or ambiguity.” (153) In between are an “unrationalized field”, one “begging for a ‘strong’ opinion bringing order out of chaos,” and a “contradictory field”, one in which “the scatter of cases makes it possible to claim that any fact pattern raises basic policy issues,” for example, promissory estoppel or unfair competition. Reliance on the notion of a reasonable person in tort law falls in the in-between category but does not seem to fit either the unrationalized or contradictory category. Because “the law” is vastly heterogeneous, cases will be diverse and idiosyncratic, and the difficulty of overcoming the obviousness gap will vary from field to field and from case to case.

The other factor is the skill of the judge-as-person:

The skill of legal argument is to close a big obviousness gap with minimal disturbance of the elements of the field. It is the skill of combining the different moves – restating facts and holdings and rules and policies and stereotypes – in such a way as to achieve multiple goals at minimal cost. There is no way to be sure you will be able to do this the next time you try. How much you can change the field through argument is a property of yours, that is, is determined by your skill, as well as a property of the field, but the property of yours is unknowable in advance. There is such a thing as a good day and such a thing as a bad day. Internal psychic factors like adrenalin, panic, fatigue, but also internal factors that seem random, or psycho-analytically knowable only after the fact, all impinge. Hey, life is a gamble, here as everywhere else. (155; emphasis in original)

Skill requires discernment, analytic and critical acumen, astute reasoning, and creativity (cf. the four tools of non-formal reason), capacities that vary in their development and optimal utilization and are affected by circumstances. Consequently, outcomes, as Kennedy reports, are uncertain:

I have had many times the initial apprehension of the objective coverage of a case by a rule. I have many times started out thinking, “no way”. And I have many times had the experience of the apparent objectivity dissolving under the pressure of the work of legal argument. I have no theory that tells me in advance when that will happen and when it won’t. I just have to try and see. When it doesn’t work, sometimes someone else can do it. And sometimes I come back to the problem later and succeed where before I seemed
to fail through no fault of my own. From the inside, what happens to my initial experience of the rule as objective is just radically contingent. (157; emphasis in original)

There are four possible outcomes of Kennedy’s rational engagement with the field and attempt to “equilibrate” the law and his HIWTCO. First, the conversion of his HIWTCO to correspond to the field: “...I will find that I no longer want to come out against an injunction, but rather that my intuition of social justice is now that an injunction ought to issue, just as I initially thought the law required.” (161) Second, a restatement of the law that corresponds to his HIWTCO. Third, a compromise: “I move the law and the law moves me.” (161) Kennedy’s HIWTCO gets substantially modified to accord with a reconfigured field. Whether the striking bus drivers are enjoined from continuing their lie-in depends on the nature of the compromise. Fourth, confusion or ambivalence. The “normative pull” of the field might make Kennedy unsure of his HIWTCO or might give him a “vague sense” that his HIWTCO has been clarified. (161)

Like all judgment, legal judgment is risky and uncertain. The conflict between “the law” and Kennedy’s HIWTCO might be resolved in one of the first three ways, but then it might not be resolved. Kennedy concludes: “As always, from inside the practice of legal argument the outcome is radically indeterminate.” (161) We now can realize that that extreme conclusion reflects the limitations of formal reason and bespeaks the despair of formal reason. Indeterminacy does not entail non-formal irrationality or subjectivity.

Because judging is a human enterprise, the human dimensions of that enterprise cannot be ignored. There are real and recognizable differences in the capacities and skill of judges and lawyers. Llewellyn dedicates The Common Law Tradition to “the undying succession of the Great Commercial Judges whose work across the centuries has given living body, toughness and inspiration to the Grand Tradition of the Common Law.”67 He depicts the chronological order of those ten great judges, beginning with Holt (1689-1710) and ending, as of 1960, with Learned Hand (1910- ). Non-formal reason can explain why and how skill is essential to a sound legal institution and why and how the varying skill of judges and lawyers affects the development of that institution. And, of course, regardless of how skilled one is, one always can become more skilled. The goal of non-formal reason is to improve our capacity to pursue our multitudinous enterprises by enhancing our skilled judgment.68


VI. Conclusion

This analysis of judging and judges is at odds with Kennedy’s culminating assessment of his project because he, too, falls, with a tip of his hat to postmodernism, for the irrationalist fallacy:

...[S]ince Wittgenstein we know that no rule can determine the scope of its own application. It follows more or less directly (unless you insist on a detour through semiotics, structuralism and deconstruction) that the mere statement, “the workers can’t interfere with the owner’s use of the m.o.p. during a strike,” tells us nothing about whether or not they can lie-in to block substitute workers from driving the buses out of the garage onto the great American highway. There is a whole work of interpretation, inherently subjective and indeed perhaps even inherently arbitrary (from the standpoint of my humble artificer’s idea of reason), that we have to go through to get from the rule to “the facts”. And “of course” the facts aren’t any more “just there” than the rule. (164; emphasis in original)

Kennedy’s “humble artificer’s idea of reason” is formal reason, and he is under its theoretical spell. Yet his imaginative deliberation ironically provides the material needed to remove this spell.

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69The hegemony of formal reason also is clear in Kennedy’s statement of the “fancy argument” of a professor of jurisprudence: “...I can’t show an ‘objective basis’ or a rationale or an explanation of rule application that will prove that any particular application was ‘correct’. Indeed, the notion of correctness, at least as we usually use the word, say in math or science or logic, just isn’t applicable.” See Kennedy, The Rule of Law, supra, note 24, p. 165. Formal reason likewise generates Kennedy’s skeptical reaction to the contradictions between fundamental values he identifies elsewhere, and which have been multiplied by succeeding proponents of critical legal studies, in the service of reducing law to politics. Kronman succinctly captures the operation of formal reason, without the label, of course, with respect to Kennedy’s “…emphasis on the irreconcilability of the conflict between individualism and altruism, and his suggestion that we must rely on intuition to help us decide which value to prefer in particular cases”: “Kennedy insists that this conflict lacks an intellectual solution. ‘There is no metasystem that would, if only we could find it, key us into one mode or the other as circumstances ‘required.’” Nor is it possible for us to ‘balance’ the values in question except, Kennedy says, ‘in the tautological sense that we can, as a matter of fact, decide if we have to.’ The philosophy that best ‘conveys’ the process by which we make and abandon our commitments to these competing values is thus that of existentialism, for only it fully acknowledges the irrationality of our choices and the ‘terror’ they involve. These turn ultimately not upon reason but upon a ‘change in attitude’ that is extremely ‘elusive of analysis.’” Kronman, supra, note 23, p. 247.
Formal reason casts indeterminacy as an inevitable and irremediable failure of judging because the only alternative – making law – is a judicial misdeed. Non-formal reason removes the false dichotomy that creates this dismal portrayal of judging by providing its own theoretical understanding of the rationality of judgment. Judgment is pervasive and ineliminable in judicial deliberation, as it is everywhere in life, but judgment need not be capricious, subjective, or arbitrary. Non-formal reason explains how rational judgments can emanate from rational processes and procedures along with the rationally designed practices and institutions within which these processes and procedures operate. That is why, in a legal system constituted by well designed structures and procedures and committed to comprehensive critical scrutiny and rational inquiry, confidence in the rule of law can be warranted, and those who decide cases may rightfully and respectfully be called judges.

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70In a critical review of Neil Duxbury’s account of legal realism, Leiter accepts that the Realists were discredited because they gave “comfort to totalitarianism by undermining faith in the ‘rule of law’” but regards Duxbury’s claim that “‘faith in reason lies at the heart of the American culture’ as ‘the effort to preserve the image of adjudication as an apolitical activity’” as an overstatement, citing the “skepticism about reason” of the “realistic perspective” of American jurisprudence as exemplified by Legal Realism and Critical Legal Studies. Leiter construes Duxbury’s description of “faith in reason” as “the faith that we may understand judicial decisions as determined within the space of legal reasons.” Leiter, supra, note 3, p. 94. The rule of law is understood as “faith in reason”, which is understood as formal reason. With non-formal reason “faith in reason” is not understood within “the space of legal reasons”, i.e., within legal rules and principles or theories composed of legal rules and principles, but within the space of the workings of a complex legal system, i.e., within its elaborate, extensive processes and procedures located in its developed, multi-faceted, reciprocal institutional practices and structures.