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Why Barbara, Celarent, Darii, and Ferio Flunk Out of Law School: Comment on Scott Brewer, on the Possibility of Necessity in Legal Argument, 34 J. Marshall L. Rev. 77 (2000)

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WHY BARBARA, CELARENT, DARII, AND FERIO FLUNK OUT OF LAW SCHOOL: COMMENT ON SCOTT BREWER, *ON THE POSSIBILITY OF NECESSITY IN LEGAL ARGUMENT*

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Scott Brewer has written an extremely insightful and illuminating account of deductive reasoning in law that once again unites his rapier wit with his scalpel-like analysis. But, I think (if you will excuse the pun) he has missed the point.

His analysis proves that to be a great lawyer or jurist, one must have a firm grasp of deductive logical principles, that deduction is a necessary (though not sufficient) part of much legal interpretation, and that deduction forms a necessary (though not sufficient) part of what judges do in *articulating* their decisions. With these conclusions I have little quarrel and I applaud Brewer's attempt to beat back the skeptics. However, he has not yet parried the main thrust of the legal realist criticism of deduction: that it plays little role in how judges *make* their decisions.

Brewer articulates an account of legal interpretation he calls deductive punctuated equilibrium, which treats common law legal reasoning not as a "mushy" process of provisional articulation of rules, but of a process of periodic changes in legal rules. The right way to understand a set of common law cases, he says, is that the judges articulate new rules periodically in the cases, not that the newer cases somehow change or reconfigure old rules.[1] So, when the judge announces the decision, the judge is deducing the result from the new rule she has just articulated, even though that rule is not binding on later courts. Therefore, according to Brewer, judicial reasoning is deductive.[2]

This answer to the legal realists feels like sleight of hand, because what formalism explains in terms of deduction, that is, the link between the case at bar and the prior cases, is exactly

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1. *See generally* Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Dewey*, 34 J. MARSHALL L. REV. 9 (2000).

2. *Id.*

where, according to Brewer, no deductive link exists.[3] The prior cases do not determine the outcome in the case at bar, at least deductively, as Brewer admits and as the realists pointed out.[4] So, the legal realist is still entitled to wonder how the judge is constrained and why judicial lawmaking isn't illegitimately retroactive and unpredictable and ultra vires.

The answer is, of course, that deduction is only part of the story — I would argue, a relatively unimportant part of the story. In fact, to characterize common law reasoning as a series of separate new rules is to break the links between cases created by other modes of reasoning—a sort of Zeno-like reduction of continuity into separate points. The true link between prior cases and future cases is not deduction, but what Brewer calls abduction and analogy,[5] or what Kant called reflective judgment, the discerning of norms and patterns in the prior cases, the fashioning of appropriate rules from those discerned norms and patterns, and the recognition of a new case as fitting within the prior normative pattern. And these sorts of activities start to look more like late-Llewellyn situation-sense[6] than like deduction.

Moreover, I want to resist at least part of the assertion that judges, once they formulate a rule for the case, deduce their result from it. The part that I want to resist is not the idea that judges *can* at least sometimes formulate rules (ie, give reasons), or that the reasons logically dictate the result. The part that I want to resist is that judges *have to or ought to* formulate rules (give only one "controlling reason") for their decision. Many times, judges may be able to rule that this case is "like" or different from another without being able to articulate the precise dimensions of similarity. Indeed, if judges could not do this, then they could not check their rule formulations against other conceivable cases, as Brewer says they do at the reflective stage of analogical reasoning.[7] For example, if I say "No dogs in the restaurant," I am able to "check" the scope of that rule because I recognize that seeing eye dogs ought to be allowed. Hence, I recognize the seeing eye dog case as one requiring a certain result, even before I have formulated a rule about it.

Now, Brewer may be making a stronger claim than the claim that judges deduce results from the rules they articulate in the case itself. He argues (and I agree) that rules should not be considered defeasible just because judges have the *power* to

3. *Id.*
4. *Id.*
5. *Id.*
6. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).
7. *See* Brewer, *supra* note 1.

change them, because that would be confusing provenance with meaning. But he also argues that we should ordinarily understand judges to be articulating necessary and sufficient conditions that would dictate results beyond the case at bar.[8]

I would resist this stronger claim. Judges may in fact articulate rules that would deductively imply results in other cases. Any statement of reasons is general, and would not be confined to the case. But typically, judges, working in a common law mode, do not intend to articulate rules covering *any* conceivable fact situation that might fall within the semantic, or "plain" meaning, of the rule.[9] Semantic meaning is meaning that by definition is abstracted from context. Yet common law judging is judgment tied to context. A judge would be presumptuous to make law in a case that was intended to apply to all other cases in which the rules' terms could be semantically applicable. At the very least, the rules articulated by common law judges depart from semantic meaning in that they are meant to apply *ceteris paribus*(other things being equal). Likewise, their application may exceed their semantic meaning because they will apply *ejusdem generis* (to other things of the same sort). In other words, judges recognize that a later judge would be *wrong* to apply their rule semantically.[10] When a case comes along in which other things are not equal, the judge must acknowledge that the situation is not covered by the prior rule, even if the prior rule's semantic compass would reach that case. Unless Professor Brewer is prepared to adopt a plain meaning approach to legal interpretation tout court, and his other remarks suggest he is not, then perhaps he does not mean to make this stronger claim.

So much for disagreement. Now for a matter of emphasis—is deduction to be rethroned as the king of legal reasoning? I would oppose such a coronation. As Professor Brewer recognizes, it does not follow from his position (deductive reasoning is necessary for the lawyer or jurist) that a firm grasp of deductive principles (alone) will make one a great lawyer or jurist (or I would be guilty of affirming the consequent).[11] Nor does it follow that a good lawyer or jurist employs deductive reasoning in every case (or I would be guilty of taking "some" for "all"). Nor does it follow that deductive reasoning is never pernicious. Of course, these things

8. *Id.*

9. I realize that semantic meaning is not always the same as plain meaning, but it is close enough for present purposes. (I.e., I do not intend my sentence to be interpreted only for its semantic meaning.)

10. Here, the proliferation and mindless application of multi-part "tests" has created distortions and misapplications of cases. *See* Linda Ross Meyer, *Is Practical Reason Mindless?* 86 GEO. L. J. 647, 664-65 (1998) (examining the Colorado River abstention doctrine).

11. *See* Brewer, *supra* note 1.

might be true, even if they do not follow from the general principles stated above. But I hope to show that they are not true.

As an enthymematic substitute for a careful deductive argument on these points, I ask you to imagine what it would be like to have students in class who could employ only deductive reasoning. The cast of characters in this dialogue-cum-thought-experiment is as follows: Professor Urteil, her "deductivist" students Barbara, Celarent, Darii, and Ferio,[12] and the student Mensch, who has a practical knowledge of abduction, analogy, induction, as well as deduction, or, what I would like to call "common sense," and a smattering of philosophical knowledge.[13]

Professor Urteil: We will begin today's class with a consideration of Adams v. New Jersey Steamboat, 151 N.Y. 163 (1896). What are the relevant facts, please?

Barbara: On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left his money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached in through the window of the room.

Professor Urteil: Allow me to interrupt, Ms. Barbara. You are simply quoting the first paragraph of the case. Please tell me in your own words only the *relevant* facts, please.

Barbara: How do I know which ones are the relevant ones? Is there a rule stated for determining which facts are relevant?

Professor Urteil: No. You must determine which facts are important to the holding, the reason for the outcome of the

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12. Medieval logicians gave the names Barbara, Celarent, Darii, and Ferio to various forms of the syllogism. *See* BENSON MATES, ELEMENTARY LOGIC 208-09 (1972).

13. I call these abilities "common sense" because although they may, of course, become the object of conscious study and analysis, the ability to employ them comes very early. Here I advert to what we call the "candy litigation" with my now-4 year old. As soon as she learned to talk (ie, employ categorical terms) she could deduce, and quickly figured out how to deploy the recognized exceptions to the "no candy before lunch" rule by getting me to agree with the minor premise before she brought forward the "necessary" conclusion: "Mom, am I a good girl?" "Mom, the babysitter told me today is the Chinese New Year—that's a special day, right?" Thinking my daughter a logic prodigy, I told the story of the candy litigation to other parents of two-year-olds, hoping to amaze and astound them. They, of course, were non-plussed — this is what their kids do, too.

decision.

Barbara: What is the holding? You mean that the Court ruled in favor of the plaintiff?

Professor: Yes, but what was the basis for the Court's ruling and which facts are important to that reason? Mr. Ferio?

Ferio: Oh, I know. I read a little about this case in a law review article by Professor Brewer.[14] Brewer praised the case for stating its holding as a clear rule instead of as a mushy set of "gestalt" observations, and Professor Brewer said that the plaintiff won because he was like a hotel guest, with a locking room, instead of like a train passenger, with only an open sleeping berth. Locking rooms generate an expectation of privacy and security (AWR), so the passenger expects his effects will be safe. So, the holding is that defendants who rent locking rooms are strictly liable for losses of personal property (AWR). It follows that the relevant facts are that the plaintiff rented a locking room from the defendant.

Professor: So any landlord who rents a room to a tenant is strictly liable for the tenant's losses if the door has a lock on it?

Ferio: Yes, that would follow.

Mensch (breaks in): Wait a second. This decision was about steamships and hotels, not about landlord-tenant relations. We don't usually make landlords strictly liable for losses to their tenants — my landlord would flip if he had to insure my computer! The court says the strict liability rule was applied to innkeepers because "an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties."[15] If you think about an innkeeper — well, an innkeeper is a stranger that you have to trust to give you wholesome food and a safe bed — you can't really protect yourself and, as you are just passing through, you have no friends to protect you or to warn you about dangerous persons. The innkeeper, especially in the bad old days, had to be trustworthy. So, it makes sense to make the innkeeper strictly liable. Same is true of the steamship company.

But I still don't understand about the trains — yes, you assume that you are safe when you are behind a locked door, so I guess that makes a difference, but the court seems to rule more broadly than that. I mean, if the steamship can avoid strict liability just by taking the locks off its doors, well, that makes no sense. And anyway, in both a ship and a train, there are porters who are supposed to be protecting the passengers.

The court doesn't just say the rule is "locking rooms generate

14. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy* 109 HARV. L. REV. 923, 925 (1996).

15. Adams v. New Jersey Steamboat Co., 45 N.E. 369, 369 (N.Y. 1896)

strict liability." The court also talks a lot about how one rents a sleeping berth from a different company than the railroad, a company that is not a "common carrier." What is that all about? Does it matter that the passenger could ride the train without buying a berth on the sleeper (that is, breaking the connection between traveling and providing service)? The court seems to suggest *many* factors to distinguish the steamboat from the train, but I can't figure out why they are important. It seems to me there is more going on here behind the "locked doors" idea. I would need to read more cases about steamships and railroads in 1896 to understand what is really going on here.

Ferio: We don't need to know history — just the rule of the case. After all, the court is not supposed to look at facts not in evidence. It is just supposed to look at the rules in the precedent cases and apply them to the facts before it. All we need to do is modify Barbara's statement of the rule to avoid the landlord/tenant problem.

Mensch: But there isn't just one stated rule in the case. The court gives lots of reasons. I can't pick out one as "the" rule of the case, especially when I don't really know the background. So we *do* need to know more about the history here. The judge would have been familiar with the customs and practices of sleeping cars in that era, but we aren't. So it is hard for us to have any intuition of whether strict liability would be fair.

Darii (grumbling sotto voce): There you go again with "intuition" and "fairness." You are really thinking about things using rules, you just won't acknowledge and articulate what they are.

Professor Urteil: As a matter of fact, it was a bit more complex than just whether or not the company provided a private room. In fact, early hotels often did not provide private rooms, but even required guests to share beds, a fact that did not affect the innkeeper's liability. However, the strict liability required of innkeepers was generated by the very concerns Ms. Mensch voiced. There is also a quid pro quo involved: the King gave the innkeeper the right to be in business, and the right to retain a guest's belongings to pay her bill, if the innkeeper agreed to take all comers and to insure his guests against loss.

The sleeper cars on a train were different in several respects from the paradigm case of the innkeeper. The Pullman Company, the largest sleeper-service provider, provided the sleeping cars and employed conductors and porters for them. The cars were attached to railroad trains run by other companies. The railroad company and the sleeper company cooperated in selling tickets, but the train company had the right to remove the sleeper company's passengers and to have its own employees come into the sleeper cars to check tickets. The companies shared liability for

damage to the cars, and the railroad company could be liable for torts to its passengers committed by sleeper company employees (as when a railroad passenger was forcibly ejected from the sleeper car). Passengers could leave and return to the sleeper car, though they were required to have a sleeper ticket to stay in the car.

A porter and conductor who alternated their watch over the car at night, and kept intruders out of the car, sometimes by force, patrolled the sleeper cars. In cases in which a passenger's belongings disappeared while the passenger slept, courts often allowed the sleeper company's negligence to be inferred through the res ipsa doctrine, as long as the passenger could show he or she was not at fault. Use of res ipsa would result in liability in the sort of circumstances in *Adams* — where money in a pocket was found missing in the morning.

With this history in mind, consider what would happen if the *Adams* court confronted a case in which a train passenger had a stateroom?

Celarent: But what is the rule of the case? I thought the outcome turned on whether the door locked or not. But now it looks a lot mushier. What factors are important here and how are they related to each other? We can't tell what to do in the stateroom case unless we know what the rule of *Adams* really is.

Mensch: Well, it does seem mushier, but the other comments the court makes about the train passenger having a separate contract with the sleeper company and stuff now make a lot more sense. I don't think the stateroom would make any difference. The sleeper car company is still not able to control where the car ends up—like if the car were stopped in a bad neighborhood and thieves broke in the windows it wouldn't seem fair to hold the sleeper car company responsible for that. And, the sleeper car company has to let folks on and off the car, at least some of whom are neither its employees nor its customers. So, part of the problem seems to be control. On the other hand, the door locks, so the passenger expects privacy and security and can't really protect himself either. Still, over all, I would say the sleeper company should not be held strictly liable.

Professor Urteil: Well, Ms. Mensch, you still haven't stated a reason for your "overall" judgment. Why does the balance come out in favor of the sleeper car company?

Mensch: I'm afraid to state any more rules, because I'll articulate them the wrong way and then I'll have to change what I say to avoid injustice in some other case you will invent — I don't think I can ever state a rule meant to do right in all cases. I can only say a few things about the case you give me.

Professor: Well, if you don't have reason, you have at least one case on your side. The Supreme Court of Georgia faced a case in which a stateroom passenger's suitcase was stolen through the

train car window and it held the sleeper company was not strictly liable.[16] In that case, however, the theft occurred during the day, if you think that is relevant.

Ferio: But Ms. Mensch still hasn't stated a rule. And how does she know that it wouldn't be fair to hold the sleeper company responsible in her bad neighborhood example? She did say something about the fact that the sleeper company had little control over the dangers. Why not use that rule—control over dangers?

Mensch: I'm not sure that would always work. I mean the train company might not be able to control whether a train breaks down in a bad neighborhood either. But it would be liable anyway, mostly because we expect common carriers to take on that burden. The sleeper company just doesn't fit neatly into any category.

Professor: Let's take the other case, the case in which the steamship company takes the locks off its stateroom doors. What would the *Adams* court do then?

Darii: Well, even if the rule for trains is all mushy, the rule for steamboats still stands. No lock, no liability.

Mensch: I disagree, again, sorry. Especially if the steamboat company took the locks off in order to avoid strict liability, I think the court would still hold them to it. The company still takes on all responsibility for the passenger's needs, and it controls who gets on and off the boat, and it controls where the boat goes, even if it provides no lock on the door. The passenger still can't help herself very much.

Ferio: Why should it matter if the steamboat company took the locks off on purpose? I don't see that *that* is relevant to the issues of control you identified earlier.

Mensch: No, it doesn't go to control. But it's just basic, well, a norm I guess, that consciously avoiding a rule is suspect, especially if you are doing it to avoid liability to someone you are supposed to protect. It just seems, well, unseemly.

Barbara: What does unseemly mean? Sounds like "the reasonable person" again — I thought we were past all that untidy unreasoned reasonableness.

Professor: Let's try another example, a little exercise. Let's say I have a rule allowing no late papers. The penalty for a late paper is no credit. What result in a case in which a student's house burns down, and her computer and back-up files are destroyed?

Ferio: Well, the answer is clear. The premise is no late papers. There is no dispute that the student's paper is late. Therefore, the conclusion follows — the late paper receives no credit.

16. Pullman's Palace-Car Co. v. Hall, 32 S.E. 923, 926 (Ga. 1899).

Mensch: Wait a second. That just wouldn't be right. You should make an exception.

Professor: Why should I make an exception?

Mensch: Well, she couldn't help her house burning down. It's the sort of thing we would usually make an exception for. Otherwise, well, she could flunk out because of a fire and that just wouldn't be right. I mean it could be her whole law career up in smoke.

[a few guffaws from the class]

Professor: So, you argue that we should amend the rule. How should it read now?

Mensch: I don't really think it's an amendment—it's just implicit in the rule. I mean a professor would be totally unreasonable to say "no late papers, period." I guess I could try to make the rule a little more explicit. . .um. . .I don't know. . .Maybe, no late papers except in emergencies.

Barbara: But that doesn't follow from the case! Why not: No late papers except when a house fire destroys one's computer and back-up files?

Mensch: But there are other sorts of cases in which we wouldn't want to penalize a student for handing in a late paper. If we listed them all, we'd be here all night.

Ferio: But how do we know what to do then, if we don't have a reasonably precise rule that allows for a deductive inference? We might as well get rid of the late paper rule altogether.

Barbara: Let's just define emergency. Then we will have a workable rule.[17]

Celarent: Good idea. Mensch said something about circumstances the student can't control. How about this: No late

17. I can't resist sharing a quotation from Stanley Cavell at this point, in which he resists solving the problem of defining art by stipulating a definition: But I am confident that the redefinition or extended application of the term 'music' is not what is needed, for that leaves the behavior of composers and critics and audiences and the experience of the works themselves, old and new, incomprehensible—a problem has not been solved, but made invisible. Convinced that swans are white, and one day stopped by a black bird for all the world a swan, I have some freedom: 'So I was wrong'; I learned something. 'So there is a swan-like bird which is black'; but then I had better have a good reason for taking color to be so important. But in the present case it is as though there is something on the horizon which *for some reason* I insist on calling swans (and after all, it isn't as though I *knew* the reasons, or even had reasons, for calling the old ones swans), but which sometimes look and behave so differently that not only do I feel called on to justify *their* title, I feel called on to justify my hitherto unquestioned ability to recognize the old ones. How do I do it; what *is* it about them? Surely that graceful neck is essential . . . But it may be that my experience of the new ones makes the old neck rather a distasteful feature sometimes, as though it were somehow arbitrary, as though the old ones now sometimes look *bent*.
STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? 214(1976).

papers except when there are circumstances beyond the student's control?

Mensch: I don't think I meant exactly that. I mean there are probably cases beyond the student's control that still shouldn't warrant a paper extension. Like if the student were really upset because his pet lizard died, or if the student were arrested on an outstanding warrant, or if the student got a sprained ankle. And what does "beyond the student's control" mean anyway? Even if I'm held up at gunpoint, I still have a choice, right — just not one I like much. I mean I have to see the case first to say whether something is really beyond the student's control in the way I mean. Why not just give a list of examples?

Professor: Hmm. Let's see about that. Let's say that I allow one student to turn in a paper late because his children's babysitter quit suddenly, and he, a single father, could not find a replacement until the paper due date. I also allow a second student to turn in a paper late because he was given, at the last minute, the chance to travel to East Timor with a United Nations Human Rights Delegation to observe human rights violations. A third student claims exemption from the rule because she was hospitalized with a collapsed lung just days before the paper was due. What should I do in the third case, and what is the relevance of my decisions in the first and second cases?

Darii: Well, there's no rule, so we have no way to judge the third case. And the third case has nothing obviously in common with the other two — there's no babysitter or unforeseen trip. I don't see what the third case has to do with the others anyway.

Mensch: Oh, this is easy. Of course you should grant the extension in the third case, if you are granting extensions in the other two. The third circumstance is more serious, I mean, it's the classic case of when an extension is warranted, isn't it?

Darii: But Mensch, how do you know that? What rule of severity are you following, anyway?

Mensch: Oh, I don't have any particular rule in mind, I guess. I mean there's not really one way to measure all the cases along the same axis of severity like you could if they were all diseases (you know, like a cold, the flu, or pneumonia). But I just know from the first two examples that the third one follows, because if you are going to allow the first two sorts of reasons, you have to allow the third. Besides, the collapsed lung — well you can't write a paper while you have a collapsed lung. But it's also just because, well, when I think of good reasons not to write a paper, being hospitalized is one of the first things I think of. It's sort of the paradigm case.

Ferio: I give up! You are impossible. You never say how you reach your conclusions! You are so illogical! We should have just stayed with the original rule: No late papers, period. Otherwise,

how will we know what the outcome will be? If you are the one judging, you can't even give a reason for your decision that doesn't keep changing all the time and sometimes you can't articulate a reason at all!

Mensch: Maybe not, but at least I get the judgments right. You just don't know an injustice if it hit you in the face! Besides, I'll bet you can't even apply your rule either. The rule is no late papers, right?

Ferio: Yes.

Mensch: Period.

Ferio: Yes.

Mensch: Well, what if the student's paper is five minutes late?

Ferio: The penalty applies.

Mensch: What if the student's paper is five seconds late?

Ferio: The penalty applies.

Mensch: Five milliseconds?

Ferio: Well, I guess we have to specify a margin for error here.

Mensch: Go ahead.

Ferio: Ok. Within five minutes of the due date.

Mensch: You still have the problem, at your new cut-off.

Ferio: Yeah, I guess. But you have to draw a line.

Mensch: But don't you get it? Late is late according to a lot of background practices about what counts as late, you know, a lot of pragmatics. You can't write everything down! At some point you have to rely on common sense. You know, I've read Professor Brewer's work too, and I think he is mistaken that pragmatics supervenes on semantics.[18] I would say semantics supervenes on (and is an abstraction from) pragmatics.[19] Whenever we state a

18. *See* Brewer, *supra* note 1.

19. It is not the case that the semantic meaning is the "true" meaning, nor is it the case that the speaker must grasp semantic meaning first in order to understand pragmatic meaning. I would (if I had time) defend the view (not original with me) that all meaning is pragmatic and that semantic meaning is an abstraction from it (sort of an average of everyday pragmatic meaning) that we use when we don't have context (as when words are written) or when we are doing logic. *See, e.g., Id.* at 42 ("It is unfortunate that artificial language has come to seem a general *alternative* to natural language; it would, I suggest, be better thought of as one of its capacities.") It might be useful at times to "rewrite" sentences in abstraction from specific contexts, as logical form does. But that doesn't mean that the rewritten sentence "means" the same thing as the original or that we have uncovered the "true" meaning of the sentence. We have only reconstructed the sentence so that it can be used in logical analysis. For example, "Teach the children a game," and "Strip poker is a game," may imply, as a matter of logic, "teach the children strip poker," if all of these statements are taken for their semantic meaning. But "teach the children a game," spoken in conversation, is understood to mean "teach the children a game-suitable-for children" — or at least we acknowledge

rule, we are trying to articulate a practice. Lots of stuff goes "without saying," at least when the point of the rule is fairly clear. Take for example the command, "teach the children a game." If I teach the children strip poker, well, we know that the command shouldn't cover that situation. When the "plain" meaning leads to an absurdity, you have to assume it's not the true meaning.

Celarent: Common sense is illogical. It doesn't follow a rule. It can't be articulated. How on earth can law be predictable and fair if it is administered by the Chancellor's foot?

Mensch: Because common sense is what we all know already. I know I'm not that good at articulating it, and I know I have to learn to do that better. And yes, I make deductive mistakes sometimes that I can correct, especially if I learn to look for them. But I can't ignore what I know is right, what I know about the background norms and practices, just because the rule doesn't mention them. And, I can only articulate the norms here and there, for specific problems, and maybe generalize a little. But my generalizations are only rules of thumb, and when I see a case that the generalization doesn't fit, I have to change the articulation of the rule. But the rule itself, the practical judgment, is the same.

Ferio: But that's just my point! How do you know the case doesn't fit the rule? You must have some other rule, then, for you to know that.

Mensch: I might be able to think of one. But I don't think through a bunch of rules and then check them against the case. The case just strikes me as one in which the rule would do an injustice. And it strikes me that way because I already know what to do in that case. Because it is part of my background understanding of the world, maybe, or it is the kind of situation I know how to face or fix. And then I try to say what it is that struck me. And that's how I figure out how to frame the rule.

Sometimes, though, I don't need a rule at all. A set of examples can serve just as well — you know, x, y, z, and other

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this equivalence when someone makes the "mistake" of teaching them strip poker. If someone made the mistake of teaching the children about the history of chess in the 15th century, we would have to explain to them what was "understood" about our direction, "teach." But because we understand what the command means in a natural context, there is no need to trot out explanations of every term (which themselves could be misunderstood and would need further explanations)

I don't think this commits me to the view that thinking and speaking are the same (and therefore if we can't speak, we can't think), because I certainly think that much of what we know is difficult to articulate. I only say that the logical relations that may be abstracted from natural language are not somehow truer to thought than the natural language itself. Underlying both natural language and its abstracted version is the practical know-how and possibilities of perception that makes both possible. Logic, in other words, is not (by itself at least) the language of thought.

things of the same sort. Well, I know what the "same sort" is already, as long as I know something about the point and context of the directive. I may not be able to articulate the "same sort" as a rule precise enough to allow for deduction. But that doesn't mean that I don't know what the "same sort" are. Ever read Wittgenstein's comments about games? We can't come up with a definition of them, but we still know them when we see them. If I were to ignore all that background practical stuff, I would make poor judgments, even if they were deductively valid.

Professor: All right, students, that's enough for today. Please read the next three cases for Thursday's class.

Two years later, Mensch graduated Order of the Coif. Barbara, Celarent, Darii, and Ferio, flunked out of law school. The professor gave them the following letter of explanation:

Dear BCDF,

I regret that we were unable to teach you to think like lawyers. While you were all very accomplished logicians, you never learned the following skills: to pick out the relevant facts in a case and state a holding at the appropriate level of generality; to apply common sense and background norms to legal problems; to envision creative solutions to legal problems; to recognize a pattern in a set of cases; to apply the principles of ceteris paribus and ejusdem generis; in short, to develop a sense of justice and good judgment. I recommend that you consider another career, perhaps in mathematics or logic. As consolation, consider this quotation from Immanuel Kant:

Judgment is a peculiar talent which can be practiced only, and cannot be taught. It is the specific quality of so-called mother-wit; and its lack no school can make good. For although an abundance of rules borrowed from the insight of others may indeed be proffered to, and as it were grafted upon, a limited understanding, the power of rightly employing them must belong to the learner himself; and in the absence of such natural gift no rule that may be prescribed to him for this purpose can ensure against misuse. A physician, a judge, or a ruler may have at command many excellent pathological, legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. He may comprehend the universal *in abstracto,* and yet not be able to distinguish whether a case *in concreto* comes under it. Or the error may be due to his not having received through examples and actual practice, adequate training for this particular act of judgment.[20]

20. KANT, CRITIQUE OF PURE REASON 177-78 (N.K. Smith trans. 1929).

Yours sincerely,

Professor Urteil