Much of the discussion of the rationality of judicial decision making is confined to the context of a judge's operating within a legal system with pre-existing rules to apply to the facts of instant cases. The extent to which this defies logical analysis is the extent to which, some argue, factors other than a rigid application of law to fact enter. Thus, we find various realist thinkers pointing to the role of the judge's discretion in construing applicable rules and in constructing facts from the evidence; some realists point to the judge's personality as being a factor in understanding his decision; some, to a flash of intuitive insight.

While I believe this debate to be an important one, I do think that it has us overlook areas of judicial making where, presumably, the primary reality is not one of the application of law to facts. The sorts of situations that I believe are commonly placed in this category are arbitration proceedings, interest balancings, and the allocation of equitable remedies. Here, the effecting of such a resolution is done supposedly in the absence of the decision maker's applying some rule of decision but his having as his primary mission doing justice for the case at hand. As is often the case, decision making in these areas is construed as marching in a direction quite different from the application of law to facts.

Ultimately the question I wish to address in this essay is one concerning the domain of judicial decision making that lends itself to logical analysis. What I finally suggest is that this territory is larger than is usually thought and that many of these equitable decision procedures do fall within this realm.

The presumption and common sense intuition that equitable decision procedures are fundamentally different from standard judicial determinations involving an application of rules to facts is strong. For example, in introducing his criticism of such procedures, Wasserstrom brings out this difference: "In all equitable procedures of justification, the necessary justification for any particular decision consists in the fact that the decision is the most just for the particular case. That the decision may be deducible from some legal rule is irrelevant; that the decision in itself is just for the case is alone significant." From here he goes on to offer his criticism, bringing out that insufficient guidance seems to be offered by its proponents. Says Wasserstrom, "But to insist that justice ought to be done is not to tell us how it can be done, and unfortunately, the advocates of an equitable decision procedure have not carried the task of specification very far. They seem rather to have assumed that once the goal of doing justice in the particular case has been postulated, the way in which this goal is to be realized is obvious. They have not indicated the nature of the specific decision procedure according to which justice is best attained."

Looking specifically at arbitration, we find that its very characterization seems to set it apart from usual judicial proceedings involving an application of law to facts: "Arbitration is the non-legal procedure in which a neutral third party or board, acting pursuant to authorization by both parties to a dispute, hears both sides of the controversy and issues an award,
usually accompanied by a decision, which is final and binding on both parties.... Unlike the judge who may base his decision upon rules developed over a long period of time in prior cases, the arbitrator must look largely to himself in formulating his opinion and rendering an award. The law has not developed rules to guide the arbitrator in settling the disputes that come before him, and in many cases the controversy between the parties is not one that is cognizable in a court of law or equity."

It is evident in surveying some of the criticisms of interest balancing that the foundation of many of them is the fashion in which it differs from usual judicial decision making. Thus, it is brought out that the process is ad hoc, that it does not lend itself to one's generalizing about the result, given the wide range of variables entering into the decision, and that the process employs not single criterion, let alone guidance by any concept of law -- it involves just a weighing. The upshot of comments of this sort along with those considered above about equitable decision procedures generally and about arbitration, I believe, would have us think that these areas of decision making are most infertile grounds for the tools of the logician to till. Let us investigate whether or to what extent this is the case.

Let us consider the adjudication of actions in equity. First, we should bring out that, although absent may be any specific rules that dictate specific decisions, we do, nonetheless, have general guiding principles. Consider the various maxims of equity like Equity will not suffer a wrong to be without a remedy, or Equity delights to do justice and not by halves, or Equity aids the vigilant, not those who slumber on their rights. Now, suppose we have some fact situation where plaintiff has contracted with defendant for the purchase of a diamond ring and defendant has not delivered. Further suppose that the qualities of the ring are unique -- it has once been in the possession of St. Odo of Clonl as well as of Marilyn Monroe -- making this particular ring of particular value to plaintiff, given his interests in medieval logic and American film. No damages which plaintiff could ever be awarded in a suit at law for breach of contract could ever substitute for the object for which he has contracted. But suppose plaintiff has been engaging in a series of actions designed to induce defendant to comply. Plaintiff has made threatening telephone calls; he has dumped garbage on defendant's lawn. And further suppose that plaintiff has waited two years before attempting to take possession of the ring because he could not afford insurance on the object.

At this point, given what we know about the goals of equity as stated in some of its maxims, a variety of possible decisions suggests itself. The judge may invoke the clean hands doctrine and allow plaintiff no relief; he may do that as well as issue an injunction for plaintiff to cease and desist from his current actions of harrassment. He may attempt to rely heavily on the notion of doing justice and not by halves and thus require specific performance of the contract, compelling defendant to deliver but also compelling plaintiff to reimburse defendant for the insurance policy he had been carrying as well as issuing an injunction for plaintiff to abandon his program of harrassment. Whatever the case, it seems clear that not just any decision will do and that the range of cogent decisions is determined, in part, by the relevant rules of equity; put differently, we are dealing with structured decision making and thus a species of rule-guided activity. As such, we should expect that an account can be given of the logic of this rule-guided activity or, if not, be offered some reason why this activity is so different from any other form of rule-guided activity that it cannot lend itself to logical analysis.
What of the charges against interest balancing concerning its being arbitrary and relativistic? First, it should be brought out that, although there are instances of balancing of interests where no specific guide directs the balancing, this is not always the case. On some approaches to balancing interests, we find a test used, such as material and substantial interference, or a searching for an interest of a particular sort, like a compelling interest. Consider, for example, a situation where the guide to the court's balancing takes the form of an antecedent commitment of the court's to look for a particular type of interest, which if present, will tip the scales, or weigh heavily in favor of, the party with that interest. In *Caldwell v. U.S.*, the court balanced interests of the public, of the Grand Jury, and appellant reporter. We find here that the government's interest, or need, as the Court refers to it, must be compelling before the reporter can be required to appear before the Grand Jury: "In light of these considerations we hold that where it has been shown that the public's first amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the government must respond by demonstrating a compelling need for the witness' presence before judicial process can issue to require attendance."

Another class of balancing methods within the general category of those in which some specific guide is influential in the balancing is that where a particular rule, test, or standard, is operative as a guide. In *Local 858 of the American Federation of Teachers v. School District No. 1 in the County of Denver and State of Colorado*, the court clearly claims to be balancing the interests of a non-representative teacher's union, which sought the use of school facilities against the school's interest to permit only the union that won the representative election to enjoy certain school facilities; the court invokes a test of significant interference as it balances the interests of the parties: "The delicate task of applying the constitutional balancing test to measure the substantiality of the reasons argued in support of restriction of the First Amendment freedom of association is made easier in a case such as this, where the interests asserted are numerous, a policy as vital as public education is the goal, and negligible impairment is proved. We find that the plaintiffs have not proved significant interference with their freedom of association..." Thus we see that regardless of how weighty the plaintiffs' interest may be, the scales will not tip in their favor unless the additional test of their being significantly interfered with is met.

In the foregoing cases, the decision maker can be seen as adhering to generalized guides. These guides, presumably, have been relevant for past cases and provide a ground for dealing with future cases and, in principle, need not admit of decisions any less arbitrary or relative than any others in which the model of *stare decisis* is employed; for, in essence, that is the model which balancings of these sorts are using. If so, again it seems that we can, at least in part, disperse some of the prejudicial air surrounding the issue of the rationality of interest balancing.

Last, let us consider the workings of arbitration proceedings. Here too it must be recognized that the reality shows something other than some of the charges would have us believe. We do find instances of arbitrators invoking prior rules of decision in adjudicating their instant cases. For example, in *Latronbe Steel Co.*, the arbitrator considered whether a prior holding was applicable to the instant case and decided it was not. He points out that in the case of *West Pittston Iron Works, Inc.* "it was held that the company could not unilaterally take from the employees a paid lunch period which has existed at the time the contract was negotiated. I held in that case that existing conditions upon the basis of which the contract terms were agreed to could not be altered by the company acting alone -- that to eliminate pay for the lunch period was in effect
to change the agreed upon wages. Similar cases were Namm's Inc., Fawrick Airflex, Inc., and International Harvester Co. I agree with all these cases, but I cannot agree that the principle is applicable here.12

One commentator predicts that "from the opinions being handed down by labor arbitrators will eventually come a body of concepts and principles to guide arbitrators in making their opinions. When this stage is reached, but not until then, basic principles will tend to be more uniformly applied in the settlement of grievances, and a counterpart of the legal doctrine of stare decisis ... may develop for the rules applied in labor arbitrations."13 Indeed, the U.S. Supreme Court suggests that it is interested in moving in this direction. In United Steelworkers of America v. America Manufacturing Co., the court referred to "our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements."14

In conclusion, we have seen that we can clear away misconceptions about how equitable decision procedures differ from usual judicial determinations. We were able to show that, in many instances, these procedures mirror those involving the application of law to fact, where the operating assumption has been that a logical analysis is possible. In so showing this, we can claim to have expanded the domain where it seems plausible to think that judicial decision making lends itself to logical analysis.

Footnote References

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8Id. at 1083.
10Id. at 1077.
12Id.
13LABOR LAW, supra note 3, at 4253 - 4254.