

Sidebar: Law as an attempt to deal with the irrational in a rational manner

- At the end of the day, whether certain conduct is reasonable or unreasonable comes down to a value judgment.
- Any such judgment has an irreducible irrational core.
- Irrationality cannot be avoided, but it can be contained. That, in general, is the strategy of the law: *To deal with the irrational in a rational manner for as long as possible.*
- The per se and ROR treatment of restraints of trade are a great example of that strategy at work.

Rationalism, empiricism, virtue ethics, substance and process

- Consider how the law fences in the realm of the final irrational value judgment
- First, we identify easy cases, for which there is a strong empirical basis (per se)
- Second, the ROR proceeds in three steps, mixing elements of procedural rationality (burden shifting) with substantive criteria
 - Motion to dismiss: Is there a plausible theory of harm? (= rationalism)
 - Summary judgment: Is there proof of harm? (= empiricism)
 - Trial: Have an impartial arbiter make the final, irreducible value judgment
 - Judge (virtue, e.g., disqualification if there is even the appearance impropriety/bias; institution)
 - Jury (common sense)