

# Legal Reasoning for Hedgehogs

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## 1. Introduction

Amalia Amaya's book *The Tapestry of Reason* (Amaya 2015) is a sophisticated, scholarly, and far-ranging examination of the nature of coherence in various areas of philosophy, and in legal reasoning in particular. It might be described, with a nod to Dworkin's later comprehensive theory of value (2011), as a theory of legal reasoning for hedgehogs. Hedgehogs, because of the idea Isaiah Berlin developed from a line of the ancient Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing." (2013, 1) Coherence-based reasoning is the one big thing, because coherence-based reasoning subsumes, unifies, and encompasses the whole of legal reasoning. It applies to all forms of legal reasoning, whether over propositions of fact or propositions of law, and it rejects any form of foundationalism in the justification of propositions of fact and law. Furthermore, it is optimistic about the capacity of reason in such a coherence-based theory to resolve value conflicts.

Fascinated as I am by the hedgehog, my own sympathies lie with the fox—with the idea of the plurality of values, the existence of irreconcilable value conflicts, and with the contingency of human life and social practices. In this discussion, therefore, I will pursue some vulpine worries about the hedgehog's project. That project is carried out in considerable detail, and I want to step back from the detail and raise some general questions about the aims and prospects for the theory. In particular, I will examine three major themes: (a) the methodology of the project; (b) the scope of the theory; and (c) the ambitions of the account of legal reasoning. My focus will generally be on reasoning about propositions of law, rather than propositions of fact, but theme (b) will give some attention to the latter.

To begin, however, I want to briefly summarise my understanding of the main features of the account of legal reasoning provided in chapter 10 of *The Tapestry of Reason*, following the formulations in the book as much as I can, but occasionally putting the points in my own terms for the sake of brevity. The theory is summarised as follows:

A belief about the law ... is justified if and only if it is optimally coherent, that is to say, if it is a belief that an epistemically responsible legal decision-maker might hold by virtue of its coherence in like circumstances. (Amaya 2015, 531, see similarly 552)

In the case of reasoning about the law we are seeking “interpretative coherence” (Amaya 2015, 496, 498), i.e. we are seeking the interpretation of the law which coheres best with the “rules and principles embedded in the relevant case law and statutory law as well as settled legal judgments” (498). There are four dimensions to this coherence reasoning:

- (1) the use of constraint satisfaction, to make
- (2) an inference to the best explanation, that
- (3) an epistemically responsible agent would make, in
- (4) the relevant legal context.

The use of constraint satisfaction (1) involves a series of positive and negative criteria by which the relative coherence of an interpretation of the law can be assessed, such as consistency with authoritative material, the ability to account for that material, etc. (Amaya 2015, 487–503). An inference to the best explanation (2) works as follows. In reasoning over the best interpretation of the law, we should examine plausible candidates for what the law is, revise them to make them as strong as they can be, and then choose the one that is best, according to the criteria in (1), i.e. the one that best satisfies the positive and negative constraints for coherence (Amaya 2015, 503–20). The best explanation according to the criteria is the one that an epistemically responsible agent would make (3): this leads to “optimal coherence” (Amaya 2015, 487). Thus the best interpretation of the law depends upon what an epistemically responsible agent would conclude in following steps (1) and (2). An epistemically responsible agent is one who properly manifests the epistemic virtues (e.g. diligence, open-mindedness, wisdom, insight) (Amaya 2015, 520–25). Finally (4), what an epistemically responsible decision-maker would do at stages (1)–(3) depends upon the context of the decision, for example whether it is a criminal case, whether the decision-maker is a trial judge or a member of a final court of appeal, what goals the legal process is pursuing. (Amaya 2015, 525–31) The context will have three dimensions that bear on the standards of justification that need to be satisfied: (i) how much coherence is required for the most coherent interpretation to be justified; (ii) how many alternative interpretations need to be considered at stage (2); and (iii) how broad the base of coherence needs to be (i.e. how much of the legal material needs to be considered).

This, then, is the theory of reasoning over propositions of law in brief. In determining the relevant law that applies to a case at hand, a decision-maker must consider possible interpretive ‘hypotheses’ about the law (Amaya 2015, 498) and determine which one is optimally coherent within the relevant context. The decision-maker does this by determining which interpretive hypothesis best satisfies the positive and negative constraints, as guided by the epistemic virtues.

## 2. Methodology

One question that naturally arises with a project exploring coherence reasoning in the law is its methodology. What is the relationship between existing legal reasoning and the theory that is being proposed? Is the theory being derived from existing legal practice, to show that it has a deeper structure than ordinarily assumed? Or is the theory being developed in its own right as an account of sound practical reasoning that is then applied to the legal context? Or is it a bit of both? And what are the criteria of success for the theory? Is it successful simply if it is normatively sound, or does it also have to bear some relationship to existing legal practice?

In chapter 1, introducing existing theories of coherence reasoning about the law, Amaya singles out MacCormick’s and Dworkin’s theories (as well as Peczenik’s) for detailed discussion. Now MacCormick’s methodological approach in his book *Legal Reasoning and Legal Theory* can be described as one of *rational reconstruction* (1994, xiii–xiv). He takes the processes that are characteristically followed in legal reasoning in the common law tradition, and presents them in an idealised form, i.e. in the form that they would have if judges were consistently and conscientiously following the accepted canons of common law reasoning. He seeks to show that the use of coherence based reasoning within the common law can be vindicated, i.e. that it rests on rational grounds, but it is the common law that he is modelling.

The same is true, in a way, of Dworkin’s theory of law in *Law’s Empire* (1986). Dworkin presents his account of the law as the best *interpretation* of common law practice, in the sense of being what Dworkin calls a “constructive interpretation” of the practice (1986, chapter 3). So it is an account that both (sufficiently) fits and (adequately) justifies that existing practice. One consequence of Dworkin’s theory is that some aspects of the practice may not be defensible, because they are not compatible with the best interpretation of the practice and so should be regarded as mistakes to be abandoned (e.g. prospective overruling). Dworkin’s approach is a far

more ambitious idealisation of common law practice than MacCormick's, but it is still grounded in common law practice (see 1986, 65–6, 90–1).

Now an alternative to both MacCormick's and Dworkin's approaches would be one that was frankly revisionary. It would argue that irrespective of current practice, judges ought to reason about the law in a particular way, because only on this basis would their conclusions be justified, i.e. rationally defensible. In the case of *The Tapestry of Reason*, it wasn't clear to me which of these strategies, or some other, was being pursued in the proposed theory of legal reasoning. The book states that:

The main tenet of the theory of coherence defended in this book is that a belief about ... what the law requires is justified *if and only if* it could be the outcome of epistemically responsible coherence-based reasoning (Amaya 2015, 2, emphasis added)

So this sounds revisionary. On the other hand, one example discussed in chapter 10 is the English criminal law case of *Sweet v Parsley*<sup>1</sup> (Amaya 2015, 499–502, 515). In this case the defendant (Sweet) had been convicted of being “concerned in the management of any premises used for [smoking cannabis]” because she had sub-let rooms in a cottage which she only occasionally visited, and the occupants of the cottage had smoked cannabis in her absence. Sweet was completely unaware that the smoking of cannabis had taken place on the premises. The question that arose for decision in the courts was whether the offence in question<sup>2</sup> should be interpreted as one of strict liability, requiring no *mens rea* on her part as to the cannabis smoking, or whether properly interpreted there was a requirement that she either intended or knew that cannabis was being smoked on the premises.

The analysis of the case given in the *Tapestry of Reason* seems to reconfigure the reasoning of the court to fit within the proposed theory (Amaya 2015, 499–502).<sup>3</sup> The House of Lords itself approached the question (in five separate speeches) as a matter of statutory construction: was the offence to be interpreted as one involving a defendant being concerned in managing premises to be used for cannabis smoking, or was the offence one in which the defendant was concerned in the management of premises, and cannabis smoking took place on those premises. If it was the first, then defendant must have at least known (or suspected) that cannabis would be smoked; if it was the

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<sup>1</sup> [1970] AC 132 (House of Lords).

<sup>2</sup> s.5 of the Dangerous Drugs Act 1965: “if a person—(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking . . . cannabis resin . . . or (b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act.”

<sup>3</sup> Amaya 2015, 515 speaks of “reconstruct[ing]” the Court's reasoning.

second, the defendant's knowledge or suspicions about the cannabis smoking were not necessary for conviction. The House of Lords followed a fairly conventional approach of statutory construction in English criminal law: viz. that there is a presumption of *mens rea* in the criminal law, even where a statutory offence makes no mention of it, and this presumption must be rebutted on the basis of factors such as the broader statutory context, the type of offence (i.e. whether it is "truly" criminal or merely quasi-criminal—such as those dealing with health and safety requirements), whether conviction for the offence carries social stigma, the utility of strict liability in preventing the offence being committed, and the consequences of the offence being one of strict liability. The Law Lords, in different ways, held that these factors strongly favoured the existence of *mens rea* over the cannabis smoking.

As the case stands, it seems to follow a standard linear pattern found in much statutory interpretation in the common law. Statutory interpretation in the common law begins by considering the "ordinary" meaning of the language in its statutory context (including any stipulative definitions provided by the statute), and resolves any ambiguities in a section or conflicts between sections by balancing a range of factors, such as general presumptions, established "canons of construction", the overall structure of the Act, the wording of other sections in the Act, existing interpretations of similarly worded sections in other Acts (including earlier versions of the same Act), the apparent purpose of the provision (and the Act generally), the practical consequences of adopting a particular interpretation, and the extra-legal attractiveness of one interpretation over another.<sup>4</sup> Sometimes, as in *Sweet v Parsley*, the factors line up in favour of one interpretation over another, whereas sometimes they pull in different directions and the court has to decide which is the more strongly supported view. Depending on the context, a certain type of factor can vary greatly in its weight, from providing compelling support for one interpretation to merely providing some support to it.

So I was left unsure whether *Sweet v Parsley* was meant to exemplify the very approach to coherence reasoning outlined in chapter 10, or whether it was simply amenable to a reconstruction in terms of the interpretative principles outlined there (Amaya 2015, 498–9). Is the project in chapter 10 an exercise in rational reconstruction, similar to what MacCormick was doing in *Legal Reasoning and Legal*

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<sup>4</sup> In rare cases, the extreme unattractiveness of the outcome of the ordinary understanding of the provision may lead a court to give the provision a strained or unusual interpretation to avoid that outcome.

*Theory*, or is it a revisionary exercise, showing how coherence reasoning should be applied in the legal context, and how it alone provides a justification for legal decisions? Or is it doing something else again?

This last point bears on another issue, namely, whether the account is meant to apply to *all* legal systems, irrespective of their history and tradition. To my eye, the ways that French courts justify their legal conclusions is very different to how common law courts do so (see e.g. Steiner 2010, chapters 7 and 8).<sup>5</sup> Are these appearances deceiving? Are we in fact all following the same basic pattern of reasoning without realising it? Or again, is it simply that we *should* all be following the preferred theory of coherence reasoning? And if it is the latter, is that to say that many decisions in the common law are not justified because, although they are impeccable instances of common law reasoning, they could not be justified on the preferred theory? The theory is very ambitious in saying not merely that coherence legal reasoning justifies propositions of law, but that no other form of reasoning justifies propositions of law. On the other hand the arguments in the book are directed to showing that coherence reasoning serves certain values (see e.g. Amaya 2015, 324–8, 481–2, 541–4), rather than showing that no other forms of reasoning are capable of serving those values (or that there are no other values that could justify alternative forms of reasoning). So even if one accepts that coherence reasoning provides a justification for propositions of law, it still seems an open possibility that alternative forms of reasoning could also justify propositions of law, on the basis of the same (or other) values.

This is connected to another important theme that runs through the book, namely the ambition to enlarge the “scope for reason” in legal decision-making (Amaya 2015, 3, 11, 23, 56, 65, 551). What exactly is entailed by this ambition is not clear. Assuming that “reason” means acting on the right or correct judgements of value, it is not clear that coherence theories of legal reasoning provide more scope for reason than even very basic rule-based theories. After all, theorists who hold that legal reasoning is essentially rule-based (e.g. Alexander and Sherwin 2008), need not thereby exclude “reason” from legal decision-making. A rule-based view of legal reasoning may hold, for example, that where a legal rule is tolerably clear it should be applied to the case in question, but where there is no applicable rule or the rule is susceptible to more than one interpretation, the court should be guided by reason to reach the correct result, by

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<sup>5</sup> And even within the common law family itself there are significant differences, most notably between approaches in the United States as opposed to Commonwealth countries (England, Canada, Australia, New Zealand, etc).

creating a new rule (where there is none) or by clarifying the content of an existing rule. What the court should do, therefore, is act on the correct reasons that are applicable to the situation. What should be done, all things considered, will of course depend in part on the existing law: what might have been the best decision in the absence of an extant body of rules may not be the best decision in the light of those rules. So it is not obvious that coherence reasoning need give a larger role for reason in legal decision-making than rule-based reasoning does.

Indeed a standard worry about understanding common law legal reasoning as basically reasoning from rules is not that it gives too little scope for reason, but that it gives too much. This worry is not, of course, really a worry about the use of reason itself in decision-making. Who, after all, could complain about judges deciding a case on the basis of sound normative considerations? The worry instead is about the potential uncertainty of such recourse to reason. Decision-makers do not necessarily agree about which reasons *are* sound, or about how conflicts between them should be resolved. The worry is that instead of cases being determined by the law, many will be determined by the views of the particular judge or judges who hear the case. The worry then is that value-disagreements undermine the possibility of the “objectivity” of law (in the sense of the law being relatively clear, certain and predictable on the basis of legal considerations and legal methods of reasoning). Of course legal decisions can be relatively *predictable* without the law being objective in this sense. If the judiciary has a sufficiently homogeneous world-view, then there will be many cases where it will be predictable how they will decide a case because it will be predictable how they see the merits of that case. But this goes against a rule of law ideal that cases should be determined by the law rather than according to the views of individual judges.

So should we think of coherence reasoning as desirable in the law because it will produce decisions that are morally best in the light of the existing law, or should we think of coherence reasoning as desirable because it provides a framework of reasoning that helps to guide decision-makers and reduce disagreement in cases where the law is unclear? It would of course be best of all if coherence reasoning achieved both of these goals at once, but that would depend upon the nature of morality, and it is not the primary justification normally given for modes of legal reasoning. Arguments that legal reasoning should give priority to reasons of authority (especially legislative reasons) are generally second-order arguments that seek to justify the allocation of decision-making power to particular institutions on the basis that they have the expertise and/or the political legitimacy to make these decisions. Methods of reasoning from those

authoritative reasons generally emphasise the value of predictability in enabling individuals to ascertain their legal position, and the subordinate role of the judiciary in law-making. This rationale for methods of legal reasoning is quite open to the possibility that there are many different ways in which predictability can be achieved, and so there are a range of methods that could reasonably be adopted to achieve this goal. And this would explain why different legal traditions manifest different methods of legal reasoning. From this point of view, we would not expect there to be one single form of legal reasoning that could justify decisions.

So the concern over what methodology being pursued in *The Tapestry of Reason* is also related to a concern over the ambitions of the theory. Is it seeking a uniformity in legal reasoning between different legal cultures that is at odds with existing legal practice, and is it sufficiently open to the diversity of acceptable methods of reasoning that legal traditions can follow? It is of course open to reject existing practice, and deny the acceptability of different methods, but that carries a heavy argumentative burden which the arguments in the book do not, as far as I can see, attempt to discharge.

### 3. Unity and Foundationalism

Although the focus of this comment is on coherence reasoning over questions of law, the book of course offers a *unified* theory of coherence reasoning covering both fact-finding and the law. This is regarded as a virtue of the theory, since it makes it a comprehensive theory of reasoning in law. But at an intuitive level it is unclear why we would expect that both fact-finding and law-finding would fit into the same overall framework. Let me explain.

In fact-finding, we assume that there is some fact of the matter which exists independently of any of our beliefs, e.g. who committed the crime, whether the defendant failed to deliver the goods on time, whether the official took into account irrelevant considerations. All that courts and lawyers have to work with, however, is the evidence that is available to support the existence of those facts. We have to consider the evidence that we can collect, and decide whether the evidence supports the existence of the fact in question. A coherence approach may well be the best methodology for determining the facts in a legal case. The sort of evidence that the law considers is not the sort that might be thought to be incorrigible: any individual piece of evidence might be rejected in the overall context of the evidence available to a decision-maker. Now determining the truth about some fact is, of course, not the only aim of legal procedures. Rules on the exclusion of evidence, for example, typically



serve a non-truth-finding role. But we assume that truth-finding is a central goal of legal decision-making. One virtue it would be hoped that an account of legal reasoning could claim is that it was likely to reveal the truth, or at least, for example, that it was unlikely to lead to the innocent being convicted, or that it was unlikely to lead to the undeserving winning their civil dispute, or that it was unlikely to lead to administrative decisions being upheld when they were reached erroneously. The rules of evidence serve ends in addition to determining the truth, but the truth is *central* to fact-finding, and the truth of the matter is something that is *independent* of our inquiries. So in the case of fact-finding we have the evidence, which is the data from which we have to work, we have the fact of the matter whose existence is independent of our beliefs about it, and we are seeking a method of using the data that is more likely to reveal the truth (whilst serving other goals) than other available methods.

In the case of questions of law, on the other hand, it is not at all obvious that the same framework obtains. We have data from which the law is to be ascertained—sources (depending upon the particular jurisdiction) such as legislation and judicial decisions, general principles of the law, academic treatises—but unlike the case with fact-finding, we do not seem to have some fact about the law that exists independently of the methods of legal reasoning that are employed within a particular legal system. What is “the law” on some matter just seems to be what we would conclude from following the current methods and techniques of legal reasoning in our system. From this perspective, it would not make any sense to suggest that (one of) the reason(s) for coherence reasoning is that it is “truth-tracking”, i.e. that it is a reliable way of finding out some *independent* fact about what the law is. There might be all sorts of virtues served by our legal reasoning (e.g. predictability, ease of use, reliability, co-ordination, tendency to produce morally acceptable conclusions), but ascertaining the *legal* truth that exists independently of the reasoning is not one of them.

The book recognises this issue early on (Amaya 2015, 66–9), but when it returns to the question in chapter 10 it comes to an uneasy conclusion:

The problem of coherence and truth is particularly recalcitrant if truth is understood along realist lines, but a realist construal of the truth of propositions of law is highly implausible. Thus, the problems deriving from connecting up coherence with truth do not, in principle, put any serious obstacle to analysing the justification of normative conclusions in law in terms of coherence.

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while it cannot be shown that endorsing a coherence theory for the justification of factual and normative propositions in law will never misguide us, for it may certainly lead us to accept beliefs about the facts and the law as justified which are, nevertheless, false or incorrect, there are still good reasons for supporting the desirability of such methods from the perspective of

advancing the goal of truth in law. (Amaya 2015, 540)<sup>6</sup>

Whether these two views are consistent depends upon the view taken of the status of propositions of law. In the course of discussing truth and objectivity in *ethics* (Amaya 2015, 401–17) the book notes that coherence theories of morality may be relativist (412–15) or non-relativist (403–12), and that non-relativist theories may be realist or anti-realist, with the most popular form of anti-realism being some type of constructivism (407–12). Now the first quotation above favours an anti-realist account of propositions of law, and this would seem to also commit it to a constructivist view of such propositions, since no other form of anti-realism in ethics is explored (Amaya 2015, 401–2). Constructivism is (roughly) the view that the truth (or correctness) of a proposition follows from it being the outcome of the appropriate methods of reasoning in the particular domain. Now if this is the case with law (which seems quite plausible), then there is no distinction between a proposition being justified and a proposition being true: a justified proposition is one that follows from the appropriate method of reasoning, and a true proposition is one that follows from the appropriate method of reasoning. What makes the proposition justified is the same as what makes the proposition true. To say a proposition is justified is to say that it is true, and vice versa.

If one adopts a constructivist view of legal truth, therefore, and if coherence reasoning is the appropriate form of legal reasoning, then coherence reasoning should be adopted because it guarantees (if properly followed) the truth of the resulting proposition of law. But if that is the case, then it is not true to say, as the earlier quote says, that: “it cannot be shown that endorsing a coherence theory for the justification of ... normative propositions in law will never misguide us, for it may certainly lead us to accept beliefs about the ... law as justified which are, nevertheless, false or incorrect” (Amaya 2015, 420). If one is a constructivist about legal reasoning (and being a constructivist does not necessarily commit one to a coherence account of legal reasoning), then the reasoning (if properly followed) *does* guarantee the truth (or correctness) of the resulting proposition: it cannot misguide us because there is nothing independent of the method from which we may be misled.

Now given that evidentiary facts exist independently of our beliefs about them, and that we are seeking (at least as one of our goals) to determine what they are, whereas legal facts are *constituted* by our legal reasoning, why would the *same* method of

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<sup>6</sup> On the other hand, when the relationship between truth and justification is first revisited in chapter 10 (476–7), this aspect of the issue is not explored.

reasoning be appropriate to justify the results of each? It strikes me that it would be surprising if the two turned out to be the same. Fact-finding must answer to a significant extent to the independent truth of the fact under investigation, whereas law-construction answers primarily to how desirable the method is in achieving goals such as reliability, co-ordination, and morally acceptable outcomes. Truth-conduciveness simply doesn't come into the law-ascertaining task.

There is another way in which reasoning over propositions of law might be said to be different from reasoning over facts: the status of the data from which the reasoning proceeds. It is obvious that evidence of the kind used in legal proceedings is fallible, and thus while different types of evidence deserve different weight in coming to a conclusion, no individual piece of evidence is "foundational", in the sense that it is immune to rejection. In the case of propositions of law, however, legal sources often *do* seem to be foundational in just this way. Take the case of lower courts in a common law system with a strict doctrine of precedent. A High Court judge in England, sitting at first instance, is bound by decisions of the Court of Appeal and the UK Supreme Court. She must consider the decision if it is applicable to the case before her. She is not bound to *follow* the decision regardless of the circumstances: the common law binds judges to either follow or distinguish a decision of a superior court, not to apply them blindly (Lamond 2005, 9–15). What she cannot do, however, is disregard or reject the decision, unless it has been overruled, or was delivered *per incuriam* (i.e. made in ignorance of a contrary decision binding on the superior court in question). Equally, and more obviously, the High Court judge is bound to apply relevant enactments of the UK Parliament (and bound to resolve any conflicts between different statutes that are applicable to the case before her).

Now it is said to be a virtue of coherence theories that they are anti-foundationalist, i.e. "they reject that there is any set of ... normative propositions that provide the basis upon which the justification of the rest of ... normative propositions in law depends" (Amaya 2015, 545). It is never made entirely clear why foundationalism is so problematic in reasoning over propositions of law. It *is* said that foundationalism confronts serious difficulties in epistemology and ethics (Amaya 2015, 536). But even if we accept this, it does not follow that foundationalism is inappropriate in *law*. Law, after all, is a distinctive social practice, and it does not seem impossible that (a) the best characterisation of legal reasoning (at least in some jurisdictions) is foundationalist, and/or (b) that (some forms of) foundationalist legal reasoning may be susceptible to justification in terms of the values it serves and how it serve them.

Of course, a sophisticated coherence theory can allow, as the book argues, for a “discriminating” coherence (Amaya 2015, 546, and see chapter 4) which gives “priority” to certain data (533) (the “principle of data priority”, 546),<sup>7</sup> namely to “reasons from authority” (61–3, 545–6). It is argued that this is *not* a foundationalist element in the theory “because the justification of the elements which—according to the principle—enjoy priority depends, as much as the justification of any other element, on their coherence with the rest of the elements” (Amaya 2015, 546). Furthermore, this principle “is justified because it coheres best with second-order beliefs about the weight that some kinds of elements ... have in justification in a legal context” (Amaya 2015, 546).

Now it is true that legal reasoning involves both first-order elements (statutes, cases, etc) and second-order elements (e.g. about the status of the first-order elements, or about dealing with conflicts between them). Furthermore, the law is a dynamic system, and allows for the deliberate alteration of (at least some) first-order and second-order elements. But it might be said that at a certain foundational level the practice consists of those second-order elements and methods of reasoning that are generally practised by the judiciary in a system. What gives them this status is their use by the judiciary collectively, rather than their coherence with the rest of the practice.<sup>8</sup>

So if the collective practice of the judiciary endorses a coherence theory of the law, then yes, earlier decisions of the courts are merely provisional data from which a legal conclusion can be drawn. But if the collective practice of the judiciary endorses a foundationalist theory of the law, then there are certain fixed points that are not susceptible to being treated as merely provisional. And practices can change: a foundationalist legal culture might shift to a coherence legal culture, or *vice versa*. Looking at English law, for example, my assessment would be that at present it is a hybrid theory, combining elements of foundationalism and coherence.<sup>9</sup> Lower courts, for example, must treat the decisions of superior courts as fixed data points to be analysed and reconciled,<sup>10</sup> whilst the Supreme Court need not regard any individual decision as beyond review. But even in the case of the Supreme Court, it rejects

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<sup>7</sup> Or a “privileged” status (531), or “degree of acceptability” on their own (501, 546).

<sup>8</sup> I am here of course adopting a Hartian view of the foundations of a legal system: Hart 2012, chapter 6. Unlike Hart, however, I do not regard the foundations of a legal system as simply “judicial custom”, but rather as judicial customary *law*: see Lamond 2014.

<sup>9</sup> Although hybrid foundationalist-coherence theories are mentioned in passing (Amaya 2015, 138 n.2), they are not explored in the book.

<sup>10</sup> Subject to exceptions recognised by the superior courts themselves, such as *per incuriam*.

existing decisions of the courts by formally overruling them, i.e. by depriving them of their legal force, rather than by simply regarding them as having merely a *pro tanto* force in legal reasoning. Again, this seems to fit within a foundationalist paradigm, inasmuch as existing decisions of the Supreme Court are taken as fixed starting points for legal argument. The fact that the Supreme Court can overrule its own decisions involves the exercise of a legal power analogous to the legal power of Parliament to repeal statutes. But a statute (like a precedent) remains legally binding until it is repealed (overruled). At least on the face of it, therefore, English law as it is currently practised has a foundationalist cast. This is not to deny that there are also coherence elements in legal reasoning: as we saw above with *Sweet v Parsley* there are points in the decision-making processes of the courts that involve a balancing of certain factors, which seem to be susceptible to a coherence analysis.<sup>11</sup>

At a more general level, the question remains why reasoning over propositions of law *must* be anti-foundationalist in order to be justified. It is not sufficient to say that foundationalism is inadequate in epistemology and ethics, or even that it is inadequate for legal reasoning over facts. The argument needs to be made for why foundationalism in reasoning over propositions of law is inadequate. After all, it is uncontroversial that reasons from authority play a central role in legal reasoning, a role that has no analogue in moral reasoning. The centrality of authority to the practice of law provides at least some *prima facie* support for a foundationalist view of legal practice. And there seems to be a *prima facie* plausible case on the grounds of expertise and political legitimacy for making (at least some) authoritative reasons foundational in legal reasoning. Here I think the ambition for a completely general theory of legal reasoning, covering both propositions of fact and law, leads the book astray. It is simply unclear why a general theory of both should be thought preferable to two theories that treat these quite different domains in their own terms.

#### **4. Criterion of correctness or decision-procedure?**

In Bales' well-known article about act utilitarianism (1971), he asks whether the basic principle of utilitarianism—that we should do the act that will maximise overall utility—is meant to operate as a *decision-procedure*, i.e. as the basis on which we should decide what to do, or whether it simply provides a criterion of the rightness of actions. The reason this distinction matters is that trying to apply the basic principle as

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<sup>11</sup> Hence part of the attraction of MacCormick's account of common law reasoning (1994), where coherence plays a significant, but not all-encompassing role.

a decision-procedure is very likely to be self-defeating (due to the information, time and resources that would be needed to apply this in making a decision). But it might still be argued to provide the correct criterion of rightness, even if it was not suitable as a decision procedure.

In the theory presented in chapter 10 of *The Tapestry of Reason*, by contrast, the aim seems to be have a method for ascertaining the legally correct solution which is also the method that should be deployed by legal decision-makers. Hence the emphasis on the “psychological plausibility” of the coherence method (Amaya 2015, 537–8) and its location within a “naturalised” conception of philosophy (549–51). On the other hand, the account of coherence reasoning outlined above incorporates the requirement of “epistemic responsibility”. A proposition of law is only justified if it “could be the result of epistemically responsible coherence-based reasoning” (Amaya 2015, 524). Being epistemically responsible does not merely involve the correct application of certain rules in decision-making (a “deontic” approach), but rather an “aretaic” approach, according to which:

one is epistemically responsible insofar as one properly exercises a number of intellectual virtues, such as diligence, courage to face criticism, perseverance in following a line of inquiry or open-mindedness. Epistemically responsible action amounts, in this approach, to intellectually virtuous behaviour. (Amaya 2015, 521, footnotes omitted)

This is further explained as follows:

virtue approaches to epistemology are in a better position than deontological ones to give an account of epistemic values such as wisdom, insight or understanding, which are surely critical in the context of legal decision-making. Last, virtue epistemology allows us to put forward *an ideal of the legal agent* according to which legal decision-makers do not merely aspire to avoid prohibited epistemic conduct, but they aim to engage in epistemically valuable conduct. Thus, an aretaic approach to epistemology has some distinctive advantages over a deontic one. (Amaya 2015, 522, emphasis added)

There seems at the least to be a tension between the “psychological plausibility” of the account of epistemic responsibility and its characterisation in terms of an “ideal agent”. Clearly it satisfies the demand that “ought implies can” (Amaya 2015, 550) in the sense that it is *conceivable* that a decision-maker could possess these epistemic virtues. Unlike Dworkin’s Hercules, the possession and exercise of these virtues do not require *super-human* powers (1978, 105; 1986, 239). And of course, the theory is less ambitious than Dworkin’s in eschewing his holism about justification (Amaya 2015, 473–4, 478–9). The “contextualism” constraint removes the need for a decision-maker to consider the totality of legally relevant considerations (including the totality of reasons from authority) in the “base” for reasoning. But as chapter 10 also observes:

this contextual strategy for individuating the base of coherence, brings the model of coherence closer to what legal decision-makers are able to achieve, given their cognitive resources (Amaya 2015, 534, emphasis added)

That some form of reasoning is “closer to what legal decision-makers are able to achieve” is not the same as saying that it is realistic, i.e. that one could reasonably expect conscientious and intelligent judges to generally possess and exercise such epistemic virtues in their legal reasoning.

This issue of epistemic responsibility returns us to some of the questions raised earlier about the relationship between justification and truth (correctness). As noted earlier, in matters of empirical fact, we normally distinguish between our beliefs about those facts being true (whether or not they are justified), and our beliefs about those facts being justified (whether or not they are true). We can be justified in believing something that is false (because we had excellent grounds for holding that belief), and we can be unjustified in believing something that is true (because we have no good grounds for the belief). Ideally we want our beliefs to be both justified and true. Constructivist views of the correctness of propositions of law, on the other hand, remove the distinction between justification and truth, since the fact that a proposition of law is justified is what makes it true (correct). One way for a constructivist to make room for the distinction between justification and correctness over propositions of law would be to say that a proposition of law is correct when it would be the result of epistemically responsible coherence-based reasoning. On the other hand, we could be justified in *believing* that a proposition of law was correct if our belief was the result of coherence-based reasoning that reached an adequate threshold of epistemic responsibility (e.g. the one set by those epistemic duties that can be derived from an aretaic conception, see Amaya 2015, 523–4). The belief might be false, because an epistemically virtuous agent would come to a different conclusion, but it would be reasonable to hold the mistaken view. This might matter in the law because it might be that the best we can hope for is that legal decisions are justifiable, not that they are correct. In legal life, this second-best is the best we can realistically expect.

This connects to a further issue that hovers in the background to these concerns: the question of the *determinacy* of the law. One of the advantages of coherence-based reasoning is said to be that it provides a means of resolving value conflicts, and that it is not restricted to means-ends reasoning (Amaya 2015, 542–3, 551). For instance it is argued that:

coherence is not merely instrumental to the ends that the law aims at promoting, but it crucially

helps us deliberate about these very ends. In so doing, it expands the space of reason in law by providing a method for reasoning about ends in law, and not only for rationally assessing which, among competing courses of action, is best in promoting a given set of goals that are placed beyond the pale of deliberation. The ability of coherence-based theories to provide guidance about how to deliberate about ends, and thus, to realize law's function of resolving conflict by argumentative means, provides a strong reason in support of legal coherentism. (Amaya 2015, 543)

What is not entirely clear from the discussion in chapter 10 is whether the theory of coherence-based reasoning is committed to the view that it always leads to a *single* justified proposition of law. In the case of propositions of *fact*, of course, it makes sense that there is a single right answer: after all, the fact either obtained or it did not. Even if we extend this to the question of whether it can be established on the admissible evidence that the fact obtained, there are default rules (such as who bears the burden of proof for establishing some fact) to resolve cases where the evidence is evenly balanced, or the evidence is irreconcilable. The existence of a fact of the matter that holds independently of the evidence for its obtaining supports the determinacy of propositions of fact.

In the case of propositions of law, on the other hand, as we have seen, there is no matter of truth that is independent of our method of justifying it. A proposition of law is correct when it follows from the appropriate method of justification for propositions of law. The question is: does the process of satisfying the positive and negative constraints in the relevant legal context always leads to a unique result? On the face of it, there seems to be scope for ties, where two propositions of law could *both* be the result of epistemically responsible coherence-based reasoning. This would also seem to be the outcome if two or more of the values at stake are incommensurable (i.e. neither is more important than the other, but nor are they equally important).<sup>12</sup> Of course, on some views it is not fatal to reasoning over propositions of law that more than one proposition could be justified in the circumstances of a case. Such indeterminacy can be resolved by a choice by the decision-maker between the eligible propositions. A decision of a court can be justified even if another, conflicting, decision would also have been justifiable. Justification still plays a crucial role, since there are many propositions of law that would *not* have been justified in the circumstances. On this view it is not possible to rationally resolve all value conflicts: reason narrows the acceptable options, but does not determine one. Here, the decision of a court

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<sup>12</sup> The problem of incommensurability is noted (Amaya 2015, 63–6) and Hurley's response explored in chapter 7 (Amaya, 331–48, drawing on Hurley 1989). But this response, as the book notes, does not itself guarantee determinacy (Amaya 2015, 347).



transforms a justifiable proposition of law into the law by virtue of its being adopted by the court.

On the other hand, it may be that the theory in *The Tapestry of Reason* is committed to there always being one right answer—that coherence-based reasoning guarantees that only one proposition of law is justified in any particular context. This is of course a possible position, though it comes at a certain cost. In light of the fact that decision-makers are fallible, and few (if any) will possess the epistemic virtues to the full, it is likely that many decisions, particularly in arguable cases, will not be justified, because the judge(s) will fail to identify the correct result (and will not be lucky enough to settle on the result that is in fact correct<sup>13</sup>). Similarly it will often not be possible to confidently determine the law in situations where the courts have not decided, because this will depend upon what an epistemically responsible judge would decide. If the coherence theory is meant to deliver rational determinacy in law, then it might be said to deliver a pyrrhic victory for reason. There *is* a right answer, and it is *possible* for decision-makers to reach it, it's just that we (and they) will often not know if they have reached it, and thus whether or not their decisions are justified.<sup>14</sup>

It might be said that there are two fundamental differences between law and ethics that are of particular importance to legal reasoning. The first is that law must provide a publicly ascertainable system of considerations to govern social life in a community, whereas ethics of course does not. The second is that law must operate in non-ideal circumstances, not merely in the sense that there is less than full compliance with the law, but in the sense that it must accommodate the human limitations of those charged with adjudicating upon and applying the law. Law must be fit for humans, inasmuch as law must be fit for creatures with typical human capabilities. The circumstances of the law, therefore, lean in favour of a more coarse-grained method of legal reasoning where decisions are justified if they are the result of the competent application of the method, and the method itself is both manageable for typical adjudicators and is a reasonable way of promoting the goods of legal governance. Such a method may not hold out the theoretical possibility of legal determinacy over all questions of law, but it may still offer a workable and morally acceptable approach under the non-ideal conditions of human life.

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<sup>13</sup> The theory endorses a counterfactual test for correctness: i.e. could the decision have been reached in the appropriate way, rather than whether it was in fact: Amaya 2015, 524–5.

<sup>14</sup> And of course unjustified decisions will be parts of the “base” of coherence just as much as justified decisions, since reasons of authority enjoy “priority” in the base: Amaya 2015, 531, 533–4, 546.

## 5. Conclusion

As I noted at the beginning, *The Tapestry of Reason* is an impressive analysis of philosophical approaches to coherence reasoning, from which a sophisticated theory of coherence-based reasoning in the law has been constructed. It significantly advances our understanding of coherence reasoning, particularly in law. But *The Tapestry of Reason* also presents the hedgehog's drive for unity and comprehensiveness, with coherence absorbing all legal reasoning within it—whether between very different legal traditions, or between questions of law and questions of fact—and providing both a criterion for the correctness of propositions of law and fact that is simultaneously the decision-making method for ascertaining those propositions, while holding out the promise of providing a method for the rational resolution of value conflicts. So coherence-based reasoning subsumes, unifies and encompasses the whole of our legal reasoning. My overriding reservation about the project is the fox's suspicion that law is a more heterogeneous and diverse practice than the theory allows, and that law has its own distinctive character. Even if one shares the optimism about the resources of reason to resolve conflicts of value, the circumstances of law defeat the possibility of these resources being straightforwardly deployed in legal reasoning. Law involves a series of compromises and concessions to human limitations, and to the need for social co-ordination and co-operation. Theories of legal reasoning need to be responsive to these circumstances, and to the fact that for law to be morally worthwhile it must also be practically workable.

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