The Way The Law Is:
On The Coherentist Character of American Legal Realism

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Introduction

Clifford Geertz claims that in a well-functioning legal system there should be a fit between what Geertz calls the "if, then" structure of legal rules and the "as, therefore" structure of legal decisions.1 Put simply, for a system of laws to work, the legal rules used to decide cases must make sense given how one understands the cases to which they are applied2, and the resolution of the case must make sense given the legal rule chosen to decide it. There must be, in a well-functioning legal system, a fit, a symmetry, between the rules allegedly used for deciding cases and the actual practice of deciding cases. For Geertz, the following question always makes sense in a legal system: "How, given what we believe, must we act; what, given how we act, must we believe."3 Geertz recognizes that his question parallels the sorts of questions that Nelson Goodman asks in epistemology, or that John Rawls asks in ethics, and he embraces what I take to be a Goodmanian, holistic approach to codifying the rules that govern practices.4

Geertz, however, writes as if a holistic approach to legal codification were totally alien to Anglo-American jurisprudence. He suggests that American jurists are either rule fetishists5 or fact worshipers6, there being little if any reasonable middle ground. On this score Geertz is simply mistaken. The program he advocates—bringing the methodology of law and legal science into the mainstream of contemporary epistemology (i.e., adoption of a holistic theory of codification in response to problems

2. It would be absurd, for instance, to call on a principle of bankruptcy law to decide a case that all concerned take to be a question of negligence (assuming that neither party is faced with potential bankruptcy).
3. Geertz, supra note 1 at 180.
4. Geertz goes on to explore three specific methods for achieving bilateral symmetry between the "if, then" structure of rules and the "as, therefore" structure of decisions. As one might expect, Geertz takes examples from Malaysian law, Islamic law and Indie law. Geertz’s analysis is fascinating in its own right, but beyond the scope of the present discussion.
5. Put briefly, the legal rule fetishist believes that a legal system is a complete and consistent set of norms that provides a uniquely correct answer to any legal question that falls within the set. The position is closely akin to that of the ‘mechanical jurist’ attacked by Roscoe Pound in his classic essay “Mechanical Jurisprudence” (1908) 8 Colum. L. Rev. 605. For a concise statement of the position attributed to rule fetishists, sometimes called rule formalists, see H. L. A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961) ch. 7.
6. Fact worshipers, polar opposites of rule fetishists, eschew the importance, if not the very existence, of legal rules. This position is explicated by some of those associated with the Legal Realist movement in the United States, most notable Jerome Frank in Law and the Modern Mind (New York: Tudor, 1936). Again, for a concise statement of the position of the fact worshiper, see Hart, supra note 5 ch. 7.
of symmetry)—is admirable, but the project has already been undertaken quite successfully by the American Legal Realists. In particular, the theory of codification underlying Karl N. Llewellyn’s work on the Uniform Commercial Code1 is clearly the sort that Geertz would have lawyers adopt—it is both holistic and pragmatic. It is my view that the Realist methodology of the UCC is that of holistic codification. Thus, far from being a fringe movement in legal theory, American Legal Realism should be seen as a part of the methodological mainstream of contemporary epistemology and ethics.

The remainder of this discussion is divided into four sections. In Section I, I define the central problem of symmetry in law, showing how it parallels certain key problems in epistemology and ethics. In Section II I discuss holistic, coherentist codification in epistemology and ethics as solutions to the problem of symmetry. In Section III I show that the Realist method underlying the UCC is that of holistic, coherentist codification. Finally, in Section IV I conclude with a few remarks about implications of recognizing the holistic nature of the Realist approach to codification and about the role of rules in legal realism.

**Section I:**
The Problem of “Fit” Between Rules and Practices in Epistemology, Ethics, and Law

The problem that Geertz describes—the problem of reconciling the rules that allegedly govern practices with actual practice—is not unique to law. I call this problem the problem of symmetry, and it is one that arises wherever there is allegedly rule-governed behavior. For almost any aspect of human endeavor it makes sense to ask “Is what we say about what we do consistent with what we actually do?” Law just happens to be one area of human endeavor in which Geertz has a particular interest, and an area in which the problem of symmetry is particularly thorny. In some respects, the problem of symmetry in law tracks upon Roscoe Pound’s famous distinction between the law on the books and the law in action.8 Does the law in action (i.e., how cases are actually decided) accurately reflect the law on the books (i.e., how we say cases should be decided) and does the law on the books reasonably predict the law in action? For reasons that will be described shortly, this question is a difficult one to pose in the context of law, and an even more difficult one to answer, although, I argue, American Legal Realism does answer it. Before moving to a direct examination of the problem of symmetry in law, and of the Realist’s resolution of it, I first want to look at some analogous philosophical problems and how holistic coherentism provides solutions to them.

The link between practices and the rules that purport to govern those practices

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has received considerable attention in contemporary holistic treatments of problems in epistemology and ethics. In epistemology it is always fair to ask “Are the rules which purport to govern what we can know consistent with what we actually claim to know?” and in ethics it is always fair to ask “Are the rules and principles we claim to use in making moral judgments consistent with the judgments we actually make?” If the answer to either of these questions is in the negative, then there is a lack of fit between theory and practice that, at the very least, casts serious doubt on either the theories we claim to hold or on the legitimacy (i.e. justifiability) of what we do. Two examples, taken from epistemology and ethics, might help clarify the nature of the problem here. Those examples concern the well-worn epistemic paradoxes of confirmation and the problem of counter-intuitive results in ethics.

A. The Paradoxes of Confirmation

Ever since David Hume first presented a skeptical challenge to the reliability of inductive inference, philosophers have been concerned with justifying induction; with stating precisely the conditions that must obtain between an evidence statement \( e \) and a general hypothesis \( H \) if, but only if, \( e \) can properly be said to confirm (to some degree) \( H \). One fairly obvious attempt at defining the inductive confirmation relation is to start with the well-defined and well understood deductive relation of logical consequence and work from there. Modern formal logic thoroughly explicates the concept of a logical consequence, that is, the relation that obtains between two statements \( S_1 \) and \( S_2 \) just in case \( S_1 \) can properly be said to be a consequence of \( S_2 \). Induction, then, works in reverse, evidence statements confirm hypotheses of which they (the evidence statements) are logical consequences. So, if \( e \) is a logical consequence of \( H \), then \( e \) confirms \( H \).

As plausible as this view of induction is, it quickly generates absurdities when conjoined with the claim that if \( e \) confirms \( H \), then \( e \) confirms all of the logical consequences of \( H \), a claim that fits neatly with our intuitions about confirmation.

9. As is discussed below, the work of Nagel, Quine and, particularly, Nelson Goodman illustrate the nature of holistic approach to codification in epistemology. See notes 39 through 50, infra and accompanying text.
10. The clearest example of a holistic approach to codification in ethics is found in the work of John Rawls and the development of that work by Norman Daniels. As I show below, Rawls’ test of reflective equilibrium is a tool for holistic codification. See notes 51 through 60, infra, and accompanying text.
11. Hume’s basic objection to induction was that for induction to be justified one needs a principle like the Principle of the Uniformity of Nature (roughly a belief that the future will be like the past) in order to make reliable predictions about future events on the basis of past events. Sadly, the only justification Hume could find for the Principle of the Uniformity of Nature was itself an inductive inference: we are justified in believing that the future will be like the past because in the past the future has always been like the past. Such reasoning is clearly circular, and viciously so. Absent some other justification, one not itself relying on the method whose legitimacy is to be established, induction cannot serve as a basis for making reliable predictions.
12. An excellent general treatment of the problems of confirmation theory can be found in I. Scheffler, *The Anatomy of Inquiry* (Indianapolis, IN: Hackett, 1981). The present treatment of these problems is far more compressed than is Scheffler’s and follows the outline provided by Nelson Goodman in *Fact, Fiction, and Forecast* (New York: Bobbs-Merrill, 1955) ch. 4, “The New Riddle of Induction”.
The difficulty is that any evidence statement can be shown to confirm any statement whatsoever. The proof works as follows: take evidence statement $e$ and any independent\textsuperscript{13} statement $S$. Conjoin $e$ and $S$ giving a hypothesis $H$. Clearly, $e$ is a logical consequence of $H$, and so $e$ confirms $H$. But $S$ is also a logical consequence of $H$, so if $e$ confirms the hypothesis (which it does) then it confirms $S$ (a logical consequence of that hypothesis), regardless of the content of $S$. Thus, our initial view of induction leads us to the unacceptable conclusion that every statement confirms every other. Some modification of our theory of induction is in order.

Carl Hempel offers one possible solution to this difficulty. The difficulty with the initial formulation of the confirmation relation is that $e$ does not confirm the entire class of cases covered by the hypothesis, but only a highly restricted class of the cases covered by $H$. Genuine confirmation, Hempel points out, occurs only when an evidence statement says of the thing observed what the general hypothesis says of the universe.\textsuperscript{14} In the example from the previous paragraph, $e$ is totally independent from $S$, so $e$ does not confirm $H$ since $H$ covers a class of cases (those mentioned in $S$) about which $e$ is silent.

Unfortunately, Hempel's solution only gives rise to the paradox of the ravens. Scientific hypotheses have the logical form of universally quantified conditionals. Thus, a hypothesis, say "All metal expands when heated," (subsequently referred to as $H_1$) is logically reformulated to say "For any object in the universe, if that object is metal, then that object expands when heated."\textsuperscript{15} Now, for any object $a$ what properties, when present in $a$, either confirm or disconfirm $H_1$, or make $a$ irrelevant to it? One suggestion, formalized by the French mathematician Jean Nicod,\textsuperscript{16} and one which sits well with our intuitions concerning confirmation, is that if $a$ is both metallic and expands when heated then $a$ confirms $H_1$, if $a$ is metallic and does not expand when heated then $a$ disconfirms $H_1$, and any other combination of properties in $a$ makes $a$ irrelevant (or neutral) to $H_1$\textsuperscript{17} The difficulty with Nicod's criterion,\textsuperscript{18} and with the logic of confirmation generally, is that when coupled with standard views about logic we find ourselves forced into bizarre views.

Specifically, "All metal expands when heated" is logically equivalent to "Any material that does not expand when heated is a non-metal" ($H_2$). Using Nicod's criterion, the cases which were deemed neutral with respect to $H_1$ are now either confirming or disconfirming, while the relevant cases for $H_j$ are now irrelevant. But $H_1$ and $H_2$ say exactly the same thing, and, it would seem, whatever counts as evidence for $H_1$ ought to count as evidence for $H_2$. If this equivalence condition is accepted, however, then a non-metal which does not expand when heated counts

\textsuperscript{13} By 'independent' I mean a statement neither logically implied by nor inconsistent with $e$. The reasons for this restriction will become obvious shortly.

\textsuperscript{14} See generally, Goodman, supra note 12 at 69.

\textsuperscript{15} Symbolically, $(x)(Mx \rightarrow Ex)$ where 'Mx = x is metal', 'Ex = x expands when heated', ' $\rightarrow$ ' stands for the conditional, and $(x)$ is a universal quantifier.


\textsuperscript{17} Symbolically, 'Ma & Ea' is a confirming instance; 'Ma & ~Ea' is a disconfirming instance; '~Ma & Ea' and '~Ma & ~Ea' are both neutral.

\textsuperscript{18} The phrase 'Nicod's criterion' is due to Carl Hempel, "Studies in the Logic of Confirmation" (1954) 54 Mind 1.
as evidence for the first hypothesis and a white shoe counts as evidence for the hypothesis $H_3$ "All ravens are black." As Nelson Goodman notes, "The prospect of being able to investigate ornithological theories without going out in the rain is so attractive that we know there must be a catch in it."\(^{19}\) Actually there are two. The first catch is that we illicitly import evidence that is not stated in the example into our analysis. The simple existence of a non-black non-raven can properly be said to confirm $H_3$, but also $H_4$, "No Ravens are black," or even $H_5$, "There are no ravens." We tend to ignore $H_4$ and $H_5$ because of the unstated (and thereby unusable) evidence that we have for the existence of black ravens.

The second, and, for my purposes, more important catch is that no reasonable person takes a white shoe to be a piece of relevant data supporting $H_3$. Our best practices concerning the drawing of inductive inferences does not square with the inferences that are sanctioned (and sometimes required) by our best theory of induction. The paradox of the ravens can now be stated rather precisely:

> Our best theories about what do and do not count as confirming instances of scientific hypotheses are at odds with both our practices and our intuitions concerning the classification of data as relevant or irrelevant. Either we must alter our practices or give up some aspect of our theory or both.\(^{20}\)

This paradox presents a clear case of a tension or a lack of fit between rules and practices.

**B. Counter-Intuitive Results in Ethics**

In ethics similar problems obtain. Many of our normative ethical theories, theories which purport to govern the drawing of ethical inferences, do not sit well with our actual practices when it comes to drawing such inferences. Alleged counter-examples to utilitarian and deontological moral theories are legion. One need only construct a hypothetical scenario in which the right action, according to the constraints of the theory being attacked, is clearly inconsistent with the moral intuitions of most reflective individuals.

One standard challenge to utilitarian ethical theory is that it fails to take account of justice or fairness\(^{21}\) in the determination of what is right and wrong. It is fairly easy to construct a scenario in which doing that which would provide the greatest good for the greatest number requires acting in a way that seriously violates either individual rights or a slightly more vague sense of justice. Such is, after all, the life blood of ethical theorists devoted to criticisms of utilitarianism. Common examples involve using an innocent person as a scapegoat for a horrendous crime spree, one likely to incite civil unrest and further social evils if it goes unchecked. In order

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20. It should be noted that Hempel, taking a heroic tack, gives up his intuitions about confirmation in favor of what he takes to be the strongest theory.
21. Of course, one can argue that such objections simply beg the question in that alleging a particular act is unjust presupposes that one knows that what is right in a given situation, but the very purpose of an ethical theory is to allow us to determine what is right.
to quell public fears, and the very real danger of mass hysteria, the authorities frame an innocent person as the perpetrator. It is thoroughly plausible that such an action would, indeed, provide the greatest good, but such a deed is thoroughly incompatible with a sense of justice. Most people think it intolerable to frame an innocent person. Thus, again, our theory does not fit with our practices in the realm of making moral judgments.

One ought not assume that deontological ethical theories escape similar criticisms. For any putative rule put forth in the name of a deontological theory, a plausible counter-example can be constructed. One routine objection to Kantian ethics is that the stricture that one never lie flies in the face of our intuitions about how to behave in certain highly problematic situations. In an appropriate situation lying seems not only permissible but sometimes required of a moral agent. And theory again does not fit with practice.

In ethics, no less than in epistemology, serious problems of fit plague the relation between theory and practice. Unless one is willing to take a heroic tack and abandon either theory or practice, some adjustment between theory and practice is needed.

C. Legal Rules and Legal Decisions

In law, unlike epistemology and ethics, the situation is somewhat more complex and there are institutional obstacles that interfere with an intelligent treatment of the problem of fit. The principal obstacle preventing an intelligent treatment of the problem of fit in law is a widespread (and, though, I believe, ultimately ill-founded, understandable) belief in the absolute primacy of rules in law.23 The task of courts and judges, so the story goes, is to enforce the rules. Any departures from the strict enforcement of the rules is, to the extent of the departure, a defect in the actual practice, and in no sense evidence of a defect in a rule. Many shibboleths of our contemporary political culture support or reinforce this belief—the task of the judge is to interpret the law, not to make it; the rule of law; ours is a government of laws

22. In ethics Carl Wellman is one theorist who is willing to sacrifice his moral intuitions on the altar of good theory. Wellman finds act utilitarianism to be the best moral theory and he grudgingly concludes that his intuitions which are inconsistent with the theory should be abandoned. See generally, Carl Wellman *Morals and Ethics* 2d ed. (Englewood Cliffs, NJ: Prentice Hall, 1988) at 47.

23. One standard definition of a legal system is that one is an organized set of rules for the resolution of disputes arising from diverse social interests. According to such a model, it is of the essence of a legal system that it be a system of rules and that the rules and the rules alone settle disputes. In a famous passage Blackstone expresses such a view:

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him, who hath rode over my corn, I may recover damages by law: but A. hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact: but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice....

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not of men—all of which equate ‘law’ with strict rules that completely govern prac­
tices.24 Of course, strict rule priority in and of itself leads to bizarre results that of
themselves demonstrate the need for coming to grips with the problem of symmetry
in law. One of the difficulties that follows from uncritical acceptance of rule priority
is what H.L.A. Hart calls rule fetishism or rule formalism.25 In short, the rule
fetishist embraces manifestly unjust results simply because they seem to follow
from some rule. The case of Gluck v. Baltimore26 exemplifies the difficulty of rule
fetishism.

In Gluck, the city of Baltimore used its power of eminent domain to take part
of a piece of property and part of a building thereon in order to widen a city street.
Gluck had an unconditional lease on the property, requiring him to pay rent on it
for ten years after the condemnation. Gluck sought from the city the cost of paying
rent for the years following the condemnation until the end of the lease contract.
However, the rule for deciding damages in an eminent domain case was the dif­
ference between the value of the leasehold and the value of the leasehold less the
value of the portion taken through the condemnation. The result of applying the
rule of damages to this case was absurd. Gluck ends up with a only fraction of the
value of the property (the percentage of the value equal to the percentage of the
property taken) even though the property was, given the partial demolition of the
building, worthless to him.27 The rigid application of a legal rule, despite the appar­
ent applicability of the rule to the case, makes little or no sense given the underlying
purposes for the rule (in this case to give just compensation to those whose property
is taken for a greater social good).28 Rule priority in law, however, makes it
extremely difficult for a lawyer or judge to challenge the legitimacy of a rule that
fails to provide a fair or just resolution to a case.

One attempt at a solution to problems of asymmetry involves the use of a legal
device called ‘characterization’ which brings the conflict within the scope of a rule
that produces a more acceptable result.29 Characterization, put simply, is the

24. One apparent proponent of this view is Ronald Dworkin, who claims that a legal system must
be complete, that is, that it must provide a uniquely right answer to each and every problem pre­
presented to the system. See generally Dworkin’s “Model of Rules I,” and “Model of Rules II” in
and in “Is Law a System of Rules?” in R. Summers ed., Essays in Legal Philosophy (Berkeley,

25. Hart, supra note 5.

26. 81 Md. 315, 32 A. 515 (1895).

27. Judge McSherry has some fascinating things to say about the “apparent hardship” worked by
the application of the rule to the case. “A principle, if sound, ought to be applied wherever it
logically leads, without reference to ulterior results...Its consequences in special cases can never
impeach its accuracy.”

28. For an outstanding theoretical presentation of a problem of asymmetry see, Lon Fuller, “The
Case of the Speluncean Explorers” (1949) 62 Harv. L. Rev 616. In this hypothetical case the
demands of the law are quite clear, as is the injustice of that demand. The dilemma faced by the
decision makers is whether to do something that is clearly unjust in the name of the law or whether
to abandon the clear rules in order to achieve a just result.

Cardozo explicitly embraces a “realist” solution to the problem of finding a rule which produces
a reasonable solution to the case. Despite the availability of a clear legal rule that resolves the
case at hand, Cardozo characterizes the case as falling within the scope of a different rule that
produces a more just solution.
(normative) description of legal fact which enables the application of legal rules. One fair, if unflattering, description of how the process of characterization is used to resolve disputes has it that “When the nature of the dispute is unclear, but the desired result is clear, characterize it so as to fall within the scope of a rule yielding the desired result. When the characterization is clear, but the available rules provide an undesirable result, change the rules so as to fit the characterization.” A few brief examples of characterization at work should show both the promise and the ultimate unacceptability of this approach to the problem of asymmetry.

Although the problem of asymmetry is present in all legal analysis, one field of law in which the problem is particularly prevalent, and one in which it has received considerable scholarly attention, is that of conflicts of law.30 Put simply, conflicts of law problems arise when the parties to a legal dispute reside in different jurisdictions and the legal rules of those jurisdictions produce different resolutions of the dispute.31 In any such dispute, the problem can always be asked by the court hearing the dispute “which state’s law should govern the resolution of this case?” Each jurisdiction has choice of law rules that direct the selection of applicable legal principles in conflicts of law situations. Serious problems arise, however, when the choice of law rule for the jurisdiction hearing the case directs the applications of another jurisdiction’s law, and the law of that jurisdiction has been explicitly rejected by the forum state.32 In such situations there is a clear asymmetry between rules and practices. The rule which appears to govern the resolution of the case does not fit with the established or entrenched practices of deciding such cases within the forum state. [The rule directing the court what to do (in effect deciding the case) does not make sense given the established practices (the way things are done in the forum court; the ideas of the forum state as to a proper resolution of such cases) of the forum court]. Thus the court is faced with a problem of either following the applicable rule, thereby doing something that the court considers ill-informed, if not stupid, or of ignoring the applicable rule, something that courts are, understandably, hesitant to do. The traditional practice of characterization, however, provides a way out of the difficulty.

In Haumschild v. Continental Casualty Co.33 the Wisconsin Supreme Court was faced with a conflict between the laws of Wisconsin and those of California. Mrs. Haumschild, a resident of Wisconsin, was injured in an automobile accident in California through the negligence of her husband (also a resident of Wisconsin). She sued in Wisconsin courts for damages. Her suit was dismissed because in

30. Conflicts of law problems are sometimes referred to as “the law of multi-state problems” or as “choice of law” problems. For a host of reasons, many of which I will not go into here, I prefer the term “conflicts of law” to describe the relevant phenomenon.
32. Such cases frequently involve doctrines like interspousal tort immunity (an antiquated rule holding that one cannot sue one’s spouse for tort injuries) or automobile guest-passenger statutes (rules that host/drivers are responsible only for injuries caused by gross or wanton negligence, but not for injuries caused by ordinary negligence). These two particular conflict of laws problems have occupied the attention of courts and legal scholars for some time.
33. 7 Wis.2d 130, 95 N.W.2d 814 (1959).
California, the site of the wrong, the doctrine of interspousal tort immunity was in force. She appealed the dismissal on the grounds that since Wisconsin had rejected the doctrine of spousal immunity, she should be allowed to sue in Wisconsin courts. Should a Wisconsin court apply a choice of law rule requiring the application of a substantive rule of law that Wisconsin itself had decided was unwise? The trial court decided that it should, the clear asymmetry notwithstanding.

Justice Currie, however, found a way to characterize the problem so as to avoid the problem. Currie asked “Which law controls, that of the state of the forum, that of the place of the wrong, or the state of domicile? Wisconsin is both the state of the forum and of the domicile while California is the state where the alleged wrong was committed.” What is informative in the question posed is that, traditionally, domicile was considered irrelevant in deciding choice of law issues. What Currie did, however, was to characterize the dispute between the Haumschilds as one primarily of family law rather than as one of tort law. Currie then went on to argue, quite plausibly, that questions of family law should be decided by the law of the state of domicile (i.e., Wisconsin). In effect, the Wisconsin court turned a question of tort law into a question of domestic relations law so as to resolve the asymmetry created by Wisconsin’s choice of law rules for tort actions.

It should be clear that the device of characterization provides a valuable tool for solving the problem of asymmetry. Characterization allows a court, faced with a symmetry issue, to present the dispute in such a way that it can be brought within the scope of a rule which will produce a result consistent with the entrenched practice of deciding such cases in the forum. Despite its value, however, characterization ultimately is an unacceptable, if not openly dishonest, approach to the resolution of symmetry problems.

While characterization does give some degree of stability to the resolution to the problem of asymmetry in conflict of law situations, the device is not without its difficulties. Perhaps the most obvious difficulty with characterization is that, in practice, it amounts to little more than labeling. As one leading textbook on conflicts of law puts it:

The decider stands off from the problem for a moment, contemplates his navel, and concludes “this specimen looks like a tadpole,” or a minnow or a chameleon. The conclusion reached is thought to be so obvious (“can’t you see that it’s a minnow”?) that supporting reasoning is not necessary. Taxonomy, however, is not without its difficulties: Tadpoles and minnows both have fins and gills, but not every minnow grows up to be a toad.


35. Haumschild v. Continental Casualty Co. 7 Wis.2d 130 at 134, 95 N.W.2d 814 at 817 (1959).

36. It should be noted that stability in choice of law—thought necessary to prevent forum shopping—though desirable, can quite easily be achieved through the rigid application of rules like the lex loci rule. The cost of stability, however, is asymmetry. For many conflicts theorists and practitioners, stability in law at the cost of asymmetry is no bargain.

Put simply, even if one agrees that the court in *Haumschild* was right, that tort law should govern tort cases and that domestic law should govern domestic relations cases (something that it would be difficult for a rational person to deny), it is still not at all clear that the problem in *Haumschild* was a family law rather than a tort problem. As Rudyard Kipling’s Painted Jaguar complained, his mother had taught him how to deal with both the tortoise and the hedgehog. The trouble was, she had not told him how to tell which was which. A complex labeling device is of little practical value unless the criteria for the application of the various labels are specified in advance.

Perhaps a more serious objection to the use of characterization is that, in practice, when courts relied upon characterization they always ended up applying the law of the forum state to the case. Characterization appears to be a question begging solution to the problem of asymmetry—one which practically denies the reality of the problem. The reasoning of courts using characterization frequently follows the pattern “Whose law governs, ours or theirs? I don’t know. What Kind of case is it? Well, how ‘bout that, its one of those cases where our law applies.” The intellectual dishonesty of such an approach is obvious. From a philosophical point of view, this approach is subject to a far more damning criticism: it gives total primacy to forum state practices, without regard for the forum state’s choice of law rule, thereby denying the need for a holistic approach to law. The answer to the questions “which shall we revise, our rule or our practice?” is always “change the rule and do things our way.” Thus characterization fails as a solution to the problem of asymmetry, in part because it is an unworkable solution, and in larger part because the solution denies the bilateral symmetry between legal rules and legal practices that lies at the heart of a holistic approach to law. Accordingly a more systematic approach to the problem is necessary. Interestingly, such an approach has been provided by some of the American legal realists.

Section II:
Holistic Coherentism as a Solution to the Problem of Fit

In both epistemology and ethics one approach to the problem of congruence between rules and practices has been the adoption of a holistic or coherentist approach to the codification of rules. Put briefly, holistic codification entails the development of a bilateral containment between the rules governing good practice

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38. As a matter of historical fact, modern trends in conflict of laws theory have made characterization obsolete in most jurisdictions. What goes under the name ‘interest analysis’ vitiates the need to characterize. For an example of contemporary interest analysis, see Leflar, *supra* note 31; and Weintraub, *supra* note 31.

39. The notion of bilateral or reciprocal containment comes from Quine’s seminal essay “Epistemology Naturalized.” Quine argues in that essay that there must be a reciprocal containment of epistemology and psychology according to which our best psychological theories make possible the epistemic claims we actually make and in which our best epistemic theories allow us to make the claims advanced by psychological science. See, W.V.O. Quine, “Epistemology Naturalized” in *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969) ch. 3 at 69-90.
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and the behavior of good practitioners. Rules prescribe what good practitioners will do and good practice provides a basis for establishing rules.

A. Holistic, Coherentist Epistemology

Holistic and coherentist thinking have been present in Anglo-American epistemology since the turn of the century debates between the coherentist F. H. Bradley and foundationalist Bertrand Russell. Although Russell won those early debates and foundationalist epistemology dominated the first half of the twentieth century, coherence theory did not vanish. In modern epistemology Quine proclaims himself a holist, and something of a coherentist, although both the degree and the appropriateness of his holism remain matters of some dispute. Ernst Nagel’s work in the philosophy of logic lays a foundation for much contemporary holistic epistemology. Even Rudolph Carnap’s post-foundationalist work shows strong tendencies towards holism. However, the philosopher best known for, and the clearest proponent of, holistic coherentist epistemology is Nelson Goodman. Goodman’s coherentism can best be seen by examining his solution to the paradoxes of confirmation and induction discussed earlier.

Goodman begins his solution to the problem of induction by pointing out that the ultimate justification of the rules of inductive inference is no different than is the ultimate justification of the rules of deductive inference. To be sure, to validate a deductive inference it is enough to show that it conforms to the rules of deductive logic. But how, then, do we go about justifying the rules of deductive logic? A Priori foundationalist attempts at the justification of rules of inference, whether in logic or mathematics, have not fared well. Attempts at establishing a priori the truth of Euclid’s five basic postulates resulted in the development of non-Euclidean geometries. And, in the realm of deductive logic, Lewis Carroll successfully demonstrated that even as basic a rule as modus ponens is not self-evident. Rather than searching for an a priori justification of the rules of logic, for some deductive analog to the Principle of the Uniformity of Nature, Goodman argues that the justification of the rules of deductive inference lies in their conformity with good deductive practice—in effect, the rules codify the practices. But practices alone do not settle the matter. For Goodman, the rules which regulate the drawing of inferences are not


41. Quine does make some claim to a correspondence theory of truth for science, although his views on underdetermination of theory and the indeterminacy of translation make his commitment to such a view dubious. Quine quips that while science still has some claim to a correspondence theory, coherentism apparently is the lot of ethics.


43. R. Carnap, “Empiricism, Semantics, and Ontology” reprinted in H. Morrick, Challenges to Empiricism (Indianapolis, IN: Hackett, 1980) at 28.

merely informed by good inferential practices, they also inform such practices.\footnote{To be sure there is a difficulty in identifying which inferential practices are good ones and which are bad ones. Goodman’s pragmatism leads him to the view that those which work (and which have some record of working over time) are the good ones.} Goodman denies foundational primacy\footnote{By ‘foundational primacy’ I mean the degree of importance or centrality traditionally accorded to a single source of knowledge in foundationalist epistemology.} to either rule structures or to the experiential base of actual practices. Rules of inference, must, for the most part, describe good inferential practice, and good inferential practice must, for the most part, follow accepted rules. When there is disharmony between rules and practices, neither has \textit{a priori} primacy. Both the rule and the practice are subject to revision:

> Principles of deductive inference are justified by their conformity with accepted deductive practice. Their validity depends upon accordance with the particular deductive inferences we actually make and sanction. If a rule yields unacceptable inferences, we drop it as invalid... The point is that rules and particular inferences are justified by being brought into agreement with each other. A rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend.\footnote{N. Goodman, \textit{supra} note 12 at 67.}

And the same can be said of induction. Rather than search fruitlessly for some general theory of inductive inference, we ought to be examining good inductive practice, for “confirmation of a hypothesis by an instance depends rather heavily on features of the hypothesis other than its syntactical form.”\footnote{N. Goodman, \textit{supra} note 12 at 71-72.} We have a long history of good inductive practice, a practice in virtue of which practitioners by and large formulate law-like rather than non-law-like hypotheses. To make a rather complex story short, good inductive practice involves formulating hypotheses that utilize predicate terms that are well-entrenched in our vocabulary and that have served us well in the past.

To be sure, the details of Goodman’s analysis of how one goes about distinguishing well-entrenched from non-well-entrenched predicates, how one distinguishes law-like hypotheses from those that are not, is a fascinating story in its own right, but one that need not concern us here.\footnote{For a full discussion of the concept of entrenchment and on the techniques for distinguishing entrenched from non-entrenched predicates, see \textit{Fact, Fiction Forecast, supra} note 12, ch. 4 at 84-124.} What is important here is that a formulation of the rules governing induction begins with an examination of good inductive practice, remembering all the while that even well-established practices may have to be sacrificed for the sake of a well-ordered rule system and that seemingly sound rules may have to be abandoned in favor of practices we are unwilling to give up.

B. \textit{Coherentism in Ethical Theory: Reflective Equilibrium}

In ethical theory John Rawls adopts a coherentist approach to the problem of reconciling the theory governing the drawing of ethical inferences with the actual practice of good ethical judges. For Rawls, the construction of a good ethical theory...
begins by developing a data set of the moral intuitions (the basic moral judgments) people actually make. This initial data set, however, is likely to contain spurious data points (bad judgments) and it needs to be distilled so that it contains only the most reliable or trustworthy judgments. Trustworthy judgments are those most likely to be made by people identified as ‘competent moral judges’ and the distilled data set can properly be called a set of ‘considered moral judgments.’ From the set of considered moral judgments, one then formulates hypotheses about theoretical moral judgments, or moral principles. Finally, the set of moral principles must be brought into a refined balance with the set of considered moral judgments. This mutual refinement of both sets, that of considered moral judgments and that of moral principles, will result in a ‘reflective equilibrium’ existing between the two. Put briefly, a set of moral principles stands in reflective equilibrium with a set of considered moral judgments the intuitions of competent judges when the principles, by and large, prescribe the results that competent judges reach in absence of a theory, and, on the other hand, when the judgments made by a competent moral judge, by and large, can be codified and underwritten by the moral principles. In a good ethical theory, Rawls argues, this state of reflective equilibrium exists. But this is not the whole story.

The state just described is best called one of narrow equilibrium existing between principles and judgments, but what is needed is a wide reflective equilibrium that exists between a moral theory and other nonmoral judgments and theories (background theories about persons, society, theory acceptance and the like). There are two important results that follow from the move from narrow to wide reflective equilibrium: the ultimate revisability of any moral judgment becomes clear, as does the fully coherentist nature of this method. Norman Daniels argues convincingly that wide reflective equilibrium allows for dramatic “theory-based revisions of moral judgments.” The upshot here is that every moral judgment is, at least in

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50. One readily apparent objection to the entire procedure involves the identification of competent moral judges. Rawls addresses the difficult task of discerning moral competence in “Outline of a Decision Procedure for Ethics” (1951) 60 Phil. Rev. 177. Despite Rawls' efforts to resolve this difficult issue, one cannot help but be reminded of Bertrand Russell's conjugation of the highly irregular verb "I am firm, you are obstinate, he is a pig-headed fool," whenever the issue of moral competence arises.

51. It is important to note that the set of considered moral judgments itself is subject to further revision. No judgment has foundational primacy for Rawls. Following Norman Daniels, I agree that it is error to read Rawls as a foundational intuitionist in ethics for whom the considered moral judgments carry epistemic privilege. See generally, N. Daniels, “Wide Reflective Equilibrium and Theory Acceptance in Ethics” (1979) 79 J. of Phil. 256, particularly 264–68.

52. I should point out here that there are two different levels at which the test of reflective equilibrium operates: on a narrow level (as described in the text) and on a wide level. Wide reflective equilibrium involves establishing a balance between an ethical theory and other non-moral judgments and theories. In ethical theory proper, establishing wide reflective equilibrium is a major concern, but beyond the scope of the present paper. See Daniels, supra note 51; N. Daniels, “Reflective Equilibrium and Archimedean Points” (1980) 10 Can. J. of Phil. 83; Timmons, “On The Epistemic Status of Considered Moral Judgments” (1990) XXIX (supplemental) Southern J. of Phil. 97.

53. Excellent statements of the difference between wide and narrow equilibrium can be found in Daniels, supra note 51, and in Timmons, supra note 52.

54. See generally, Timmons, supra note 52 at 99.

55. Daniels, supra note 51 at 266.
principle, subject to revision or even exclusion from the set of considered moral judgments. Thus wide reflective equilibrium as a test of the adequacy of an ethical theory rules out any foundationalist theories. As Daniels puts it "Wide reflective equilibrium does not merely systematize some determinate set of judgments. Rather, it permits extensive revision of these judgments. There is no set of judgments that is held more of less fixed..."56 And no judgment gains special epistemic status. Thus, the ultimate justification of moral judgments is coherence. As Mark Timmons puts it "Moral judgments that survive to the point of wide reflective equilibrium are members of a maximally coherent set and are, in virtue of that membership, justified."57

To be sure, the method of reflective equilibrium invites constant reassessment of both our moral principles and our actual practices of making moral judgments, but this is not at all disturbing. Coherentism in ethics, no less than in epistemology, denies foundational primacy or special epistemic status to either principles or practices.58 When a tension exists between a rule and a practice, the basis for resolving the tension, for the coherentist, is the degree to which either the rule or the practice is closely held or well-entrenched within one’s general belief structure. Modifications of the rule or practice are to be made so as to minimize disturbances within one’s web of belief—core beliefs or practices are not to be sacrificed so as to preserve peripheral practices59, and vice versa.60 But what has all this to do with American Legal Realism?

Section III: Holistic Coherentism as the Realist Method: “If I were a cheque...”

The central tenet that I must now defend in order to make the case that Geertz has grossly misunderstood the nature of modern American jurisprudence is that the Realist method is that of holistic codification. While there was great diversity amongst the various proponents of Realism, I rely chiefly on the work of Llewellyn as the exemplar of the movement. And I take it as well-established today that the Uniform Commercial Code counts as the first significant Realist statute61 and that

56. Ibid.
57. Timmons, supra note 52 at 100.
58. Some moral realists attempt to argue that moral realism is compatible with the method of reflective equilibrium, even though realism gives considered judgments special epistemic status. For a devastating critique of moral realist attempts to use the method of reflective equilibrium, see Timmons, supra note 52.
59. As Daniels argues, it is in principle possible to imagine giving up the principle that “It is wrong to inflict pain gratuitously on another person,” but that such a move would be made only after an almost unimaginable set of broader revisions in our nonmoral background theories. Daniels, supra note 51 at 267.
60. Goodman does not discuss the possibility that there could be a tension between equally well-entrenched, central beliefs. The possibility that such tensions could arise is fascinating, but beyond the scope of this paper.
61. Gedid, “UCC Methodology: Taking a Realistic Look at the Code” (1988) 29 Wm. and Mary L. Rev. 286. It should be clear that if the Realists were involved in creating statutes that the common caricature of Realism as radical rule-skepticism simply will not do.
the entire Code was informed by Llewellyn’s Realism and his method.\textsuperscript{62}

One of the central beliefs that guided Llewellyn’s early work on the UCC, a belief that lies near the heart of his Realism, is that legal rules must both govern social interactions but change in response to changing social needs. Writing in the 1937 NCC Handbook about the need for a Uniform Sales Act, Llewellyn said “The longer I have studied sales the more I realized that things have changed since 1906 and that the law of sales needed amendment.”\textsuperscript{63} The things that had changed, of course, were the realities of commercial transactions, the actual practices of those doing good business, but the law that governed those transactions had not developed accordingly, nor did those framing the laws have an adequate understanding of the practices being regulated. The core of Llewellyn’s critique of the American legal system during the first quarter of the twentieth century was that while lawyers and judges could be perfectly fluent in the law of commercial paper, contract, or sales, they frequently had little if any real understanding of how commercial paper was used, they knew not that offer and acceptance played little role in the actual making of contracts, nor did they understand sales.

Llewellyn’s clear prescription was that those drafting and enforcing the rules had to become quasi-professional social scientists (quite the opposite of Pound, whose call for professionalism was directed to traditional common-law elaboration of legal doctrine). And he applied this prescription wholeheartedly to the drafting of the UCC. The Code was to be a pragmatic solution to a whole host of problems in the law, a solution that would satisfy the traditional needs of a codification: an orderly and authoritative statement of the rules for a given field that is selective, comprehensive and unified.\textsuperscript{64} But the codified statement of the rules would take account of business realities, tailoring the rules to actual practices as empirically discovered and altering practices when necessary to foster other values (e.g. consistency within the Code). The clearest example of this method, and one that illuminates the coherential nature of Llewellyn’s Realism, is in empiricism underlying his treatment of the law of commercial paper.

Llewellyn was committed to the practice of scientific law-making, a procedure according to which the legislator must, prior to legislating, gather a large body of data about the practices to be governed by the legislation.\textsuperscript{65} To be sure there are legitimate questions about the rigor and adequacy of Llewellyn’s social science


\textsuperscript{63} Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fiftieth Annual Conference (1940) at 87.


\textsuperscript{65} On this score alone, serious differences between Llewellyn and Pound become clear. Pound was at the very least suspicious of lawyers and judges who tried to become social scientists. For Llewellyn, becoming a social scientist was necessary to be a good jurist.
methods, but his aims were both proper and clear. Before discussing banking regulations, Llewellyn and other drafters of Article 2 visited major banks and interviewed bankers with a view toward gaining a businessperson's understanding of banking practices. Llewellyn was fond of asking "If I were a check and I arrived at your bank, what would happen to me?" The point of such a question was twofold: it gave the drafters a much needed practitioner's perspective of the world of banking and it allowed the drafters to shape rules that would codify the practices of the best practitioners. It would be difficult to overstate the importance that Llewellyn placed on the functional nature of commercial legal rules. The proper consumers of commercial rules are not lawyers and judges but ordinary businesspersons. As such, good commercial rules had to be accessible to, and descriptive of the behavior of, "mediocre men." The principle needs to be served by commercial law are the needs of people doing business. Thus, it was possible for an established rule, while serving the goal of simplicity, to amount to a "mere word formula which does not fit the situation and the situation's set of problems." In such cases, "what is needed is to re-examine the problems and the material to come out with language that really fits the need."

But Llewellyn was not, contrary to the popular caricature of the Realists, a fact worshiper who could dispense with norms altogether. I should think it clear that the very act of writing a commercial Code establishes this. More importantly, however, Llewellyn was not so enamored of good practice that he merely sought to codify (in a purely descriptive sense of "codify") that practice. He believed that there were values (e.g., consistency, simplicity, comprehensiveness) internal to a system of norms (i.e., the codification) that could override the inclusion of a behavior exhibited by good practitioners into the system as a norm. In discussing the problems of codifying the law of secured transactions, Llewellyn mused that the developing practice of granting unsecured credit, while clearly good for business, presented some thorny, and perhaps insurmountable, problems for that body of law. The point here is that a practice, even a good practice, that does not fit with an established and well-functioning body of law should not be codified therein. The practices that are codified in law must be adjusted so as to fit with good rules, just as the rules in a codification must be adjusted so as to allow and facilitate the best practices.

66. There was, for instance, a lack of coordinated data gathering and an absence of tests on the reliability and validity of what data was gathered. Not only in the UCC but also in The Cheyenne Way, a modern sociologist can find methodological fault.

67. The instances in which Llewellyn criticizes lawyers, judges and legislators for a shocking ignorance of the realities of commercial practice are legion. In a blunt statement to the New York Law Revision Commission in 1954 Llewellyn stated:

No person associated with the undertaking had at the outset any remotest suspicion of how deep, how widespread was ignorance of our commercial law among both our bar and business community; still less did any man have suspicion of how much of the 'knowledge' of many 'experts' was smug, flat ignorance, ignorance that was dangerous to their clients.

Reprinted in Twining, supra note 62 at 537.


Legal rules, for Llewellyn, are justified by their conformity to (they are descriptively accurate of) sound legal practices, which, in turn, are justified by their conformity with legal rules; the process of justification ultimately being a fully pragmatic one of careful mutual adjustments. Rules are modified to reflect changing practices, practices are modified to reflect newly adopted rules, and the cycle continues. The circularity here, however, is virtuous rather than vicious, for legal rules and legal practices thus ‘fit’ one another in the very sense desired a pragmatist like Dewey.

For Llewellyn the judicial task, the Grand Style of judging, involved a constant adjustment and renovation in legal doctrine, a process that produced a “harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need.” This harmonization was to be achieved by paying careful attention to the principle that where the reason for the law (i.e., an underlying social practice) stops there stops the law. Grand Style judging requires a judge to “look back upon the heritage of doctrine and also look forward into prospective consequences and prospective further problems.” In this the harmony with Dewey’s legal logic of consequences rather than antecedents should be clear. The very language that Dewey used to describe a logic relative to consequences rather than to antecedents portends Llewellyn’s formulation. Dewey argued that a proper judicial logic of inquiry must look to the “probable consequences” of legal rules in operation and that the justification of legal rules rests “on the work that they do.”

Llewellyn’s view of commercial legal rules (or any legal rules, for that matter) can be stated as a paraphrase of Goodman on rules of inference:

A legal rule is amended if it yields legal practices that society is unwilling to accept; a legal practice is rejected if it violates a legal rule that society is unwilling to amend. The process of justification is a delicate one in which mutual adjustments must be made between abstract legal doctrines and concrete business practices; and in the agreement reached between better business practices and better legal doctrines lies the only justification needed for either.

It is now a commonplace among students of Hans Kelsen’s legal philosophy that each and every act of law application is itself an act of law creation. But law-

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71. Llewellyn, supra note 68 at 36.
73. Llewellyn, supra note 68 at 44.
75. Twining correctly notes that it is a serious error to divorce Llewellyn’s theoretical writings from his commercial writings. For Llewellyn, the UCC and other commercial law projects were attempts to put theory into practice. In all such attempts Llewellyn sought to balance abstract doctrine with real practice. See, W. Twining, “The Quest for Llewellyn” in The Karl Llewellyn Papers (Chicago: University of Chicago Law School, 1968).
76. Wiseman makes the point that Llewellyn was in the business of making mutual adjustments between norms and practices, but does not pursue the point. Wiseman, supra note 64 at 471-72.
77. For Kelsen a norm, be it general or individual, exists only as a result of a direct act of the will—positing. Thus for an individual norm to be valid, e.g., “Smith shall be sentenced to jail for a term of not less than three and not more than five years”, some duly empowered norm-authority must have posited it. But in so positing an individual norm, even if it appears to be a mere application of a general norm to a specific case, the judge (or jury as the case may be) creates law.
making is world-making. When we decide, rightly or wrongly, that a certain legal rule will prevail, or that a certain legal practice will be allowed or followed, we are constructing a legal world-view. In the methodology of Llewellyn’s realism, as presented in the *Uniform Commercial Code*, one sees a clear recognition of this fact in his attempt to find a better way to make our legal world.

Section IV: Concluding Remarks

There are several theses that I hope to have established here. The first, and most secure, though perhaps least interesting, is that Geertz is simply wrong in his claim that Anglo-American jurisprudence is devoid of holistic, coherentist thinking. The brand of American Legal Realism associated with Karl Llewellyn and exemplified by the UCC is coherentist in precisely the way that Nelson Goodman’s epistemology is coherentist or John Rawls ethical theory is coherentist.

The second, and more significant, thesis follows directly on a showing that the Realist method is coherentist. Contrary to the popular caricature of Realism as nihilistic rule-skepticism, I have shown that, at least methodologically, the Realists belong in the mainstream of contemporary philosophical thought. Far from being a fringe movement, the Realists do for legal philosophy precisely what Quine and Goodman do for epistemology and what Rawls does for ethics. Realism ought not be dismissed with a sneering “But that’s Legal Realism” (a charge I have heard far too often). Rather, Realism deserves significant philosophical reexamination.

Finally, and most significantly, I hope to have shown that, again contrary to popular caricature, there is a place for rules within a Realist philosophy of law. To be sure, that place is not the place of honor and foundation sought by the likes of Hart and Dworkin, but a place nonetheless. One should expect as much from the principal author of the *Uniform Commercial Code*, and a man whose unpublished works contains an incomplete manuscript entitled *A Theory of Rules*. The very possibility of a normative legal realism strikes many as bizarre, if not absurd (in light of popular caricature and misunderstanding), but it is towards precisely such a theory that much work needs to be done.