COHERENCE AND FORMALISM

KEN KRESS*

It is a pleasure to have this opportunity to re-examine the sophisticated and subtle jurisprudential edifice developed and refined over the past ten years by Professor Ernest Weinrib. Since I first encountered Weinrib's formalist theory I have been both bewitched and bewildered by it. Weinrib's theory is an impressive intellectual achievement involving multiple theoretical layers and intricate connections among many of its key concepts. His criticisms of other theories—particularly theories of tort law—are especially illuminating, as are his attempts to explain and justify the negligence principle. I find myself in general agreement with Weinrib's substantive positions. Nevertheless, I am sometimes unclear about the theoretical structure which supports those substantive conclusions and about the connections between Weinrib's theoretical structure and his substantive positions.

This essay consists of two partially overlapping and mutually reinforcing sections. Part I argues that Professor Weinrib's strict formalist conception of coherence is neither necessary for moral legitimacy nor sufficient for ultimate desirability in legal justifications, institutions, and doctrines. It also argues that Weinrib has provided no sound normative argument in favor of formalist coherence, yet there are strong substantive reasons to abandon that requirement.[1]

Part II examines recent conceptions of coherence in moral, legal and political theory and explores how formalist coherence compares to them. Many normative theorists employ coherence, yet almost no one defines this vague concept. Part II sug-

* I thank David Baldus, Peter Benson, Steven Burton, Jules Coleman, Izhak Englard, Richard Fumerton, Nancy Jones, Gregory Landini, Michael Moore, David Owen, William Schroeder, Michael Sullivan, and especially Jeremy Waldron and Richard Wright for helpful remarks. Renee Choe-Winter and Kathleen Forbes provided excellent secretarial support. Michael Kallas dispensed superior research assistance. Naturally, they bear no responsibility for the content of or any errors in this article. Stephen Perry's help, however, has gone beyond good colleagueship and friendship. At this point exchanges with him about Weinrib's formalist theory have been so extensive that he bears responsibility for at least 37% of any errors about it which remain.

1. Part I constitutes, with minor changes, the paper I delivered at the Section on Law and Interpretation of the Association of American Law Schools, on January 7, 1992. As she proceeds, the reader should bear in mind that Part I was written for oral delivery.

gests that there are at least twelve distinguishable subconcepts, methods, or requirements which might be thought to be part or all of what a particular normative coherence theorist means. Part II maintains that each of the twelve is partly constitutive of some version of normative coherence. Additionally, it analyzes Ronald Dworkin's, Weinrib's and, to a lesser extent, John Rawls's employment of these subconcepts as aspects of, or the entirety of, the conceptions of coherence which they explicitly or inexplicitly adopt.[2] Fortified with this background, Part II reconsiders the rationales supplied by Weinrib for a strict requirement of formalist coherence and concurs with Part I that they are inadequate.

I. Coherence, Moral Legitimacy, and Ultimate Desirability

I shall examine some aspects of the role of coherence within Weinrib's formalist theory, but I shall do so indirectly. I will start with the issue of what the normative consequences of being classified by Weinribian formalism as "coherent" or "incoherent" are for a doctrinal area and its justification, an institution and its justification, or a particular legal outcome and its justification. Gradually, I will work my way into a discussion of the normative value of coherence itself. We focus on coherence partly because it is, with the related claim of immanent intelligibility, the most distinctive aspect of Weinrib's formalist theory. Ultimately, however, our focus on coherence reflects the formalist claim that it is the crucial aspect of the formalist theory of legal justification. In effect, coherence is the core of formalism.

Weinrib's unusual conception of coherence requires of each legal doctrine, institution, or act that it and its justification form an integrated unity wherein each subpart or aspect reflects the whole. Moreover, each subpart or aspect is justified by an immanent principle (or some principle derivable from it) which monistically justifies all the subparts thereby integrating them

2. This discussion is part of a larger project not pursued in full here. Namely, what is coherence in political, legal, and moral theory, and what is its normative value? *See* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369 (1984); Ken Kress & Jeremy Waldron, Integrity Is Our Vulcan, seminar presented at IIT Chicago-Kent College of Law (Apr. 6, 1990)(unpublished manuscript, on file with author).

and bringing them into harmony.[3]

We might begin our inquiry with the formalist's foundational principle that "[c]oherence is the criterion of truth."[4] This statement, that coherence is prerequisite to being law—to legality itself—is too ontological for our ultimate concern.[5] We are instead interested in what formalism and its notions of coherence and unity tells *us* (nonformalists) about which substantive doctrines and principles should be law, are morally desirable, or are morally legitimate.

In his article *Legal Formalism*, Weinrib claims that his versions of conceptual coherence (and unity) are necessary for moral legitimacy.[6] This claim cannot be taken too strictly, however, because Weinrib also tells us that no legal system has ever achieved complete coherence.[7] Thus, if complete coherence is a requirement for legitimacy, then no legal system has ever been legitimate. For most of us that conclusion is too unpalatable to accept. Of those who do find the conclusion that no legal system has ever been legitimate appealing, most do so not because all legal systems lack coherence—or Weinribian coherence—but rather because they find fault with the procedures, substantive principles, and abuses of discretion which they perceive in all actual legal systems.

Therefore, perhaps it is time to regroup. Instead of construing complete coherence as a necessary requirement for legitimacy, we could instead say that legal systems can be more or less coherent, and that they are legitimate, justified, or desirable to the extent that they are coherent. This seems plausible enough. Many, especially in recent years, have found coherence a desirable quality in a legal system. Thus, formalism might maintain that the more coherent an area of law or legal system is, the more substantively desirable it is.

Unfortunately, we cannot rest with that easy statement, for if

3. Weinrib's notion of coherence is examined in greater detail *infra* at text accompanying notes 25-32, 65-79, and 94-150.

4. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 972, 976 (1988). Hereinafter, when formalism is discussed, the reference is to Weinrib's brand of it, and not other versions, unless context makes clear to the contrary. For another recent version of formalism, *see* Frederick F. Schauer, *Rules and The Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991); Frederick F. Schauer, *Formalism*, 93 YALE L.J. 509 (1988).

5. We will examine the ontological issue briefly *infra* at text accompanying notes 96-98.

6. *See* Weinrib, *supra* note 4, at 952.

7. *See id.* at 966 n.42.

it were true then formalism would make judgments about substantive desirability by considering the degree of coherence. On the contrary, Weinrib insists that formalism does not make judgments about substantive desirability—that formalist doctrine is in some important sense prior to the issue of substantive desirability.[8] Weinrib claims that formalism does not decide whether any particular area of human activity is better ordered by distributive justice or by corrective justice.[9] For example, formalism does not tell us whether we should have tort law embodying corrective justice, or, alternatively, an administrative insurance compensation scheme exemplifying distributive justice. Formalism takes no stand on whether tort law or a compensation scheme is more desirable.[10] Formalism only tells us that we must pick a scheme which *either* embodies corrective justice *or* distributive justice, but that we may *not* by any means pick a scheme consisting of some bastardized mix of distributive and corrective justice.

Perhaps our error is a fallacy of equivocation. Formalist doctrine is prior to substantive considerations, and formalism therefore cannot make judgments of substantive desirability. However, that does not imply that it cannot make judgments of some other kind of desirability—call them judgments of "formalist desirability." Indeed, Weinrib does think that coherence is importantly related to intelligibility and that both are importantly related to justifiability.[11] Thus, formalism does tell us that coherent doctrine is formalistically more desirable than incoherent doctrine because it is intelligible and normatively nonarbitrary, and thus formalistically justified.

It may appear that we are making progress, but the appearance is illusory. The ordinary notions of justification, desirability, and moral legitimacy differ from formalist notions with the

8. *See id.* at 972-73. In fact, Weinrib believes that formalism is independent of external substantive claims or atomistic internal doctrine. *Id.*

9. *See id.* at 973.

10. Despite Weinrib's claim, it appears that Weinrib's Kantian rationalism (but not Kant's) implies that corrective justice must be implemented and leaves no room for the operation of distributive justice. *See* Stephen R. Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 597 (1993). *But see* Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 601-24 (1992); Ernest Weinrib, *Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre*, 16 HARV. J.L. & PUB. POL'Y 683 (1993).

11. *See* Weinrib, *supra* note 4, at 972. But see the discussion of these concepts *infra* at text accompanying notes 97-118.

same names,[12] and it is the *ordinary* desirability, justifiability, and moral legitimacy of formalist coherence in which we are interested. Given the values which are true or which we justifiably believe to be true, we wish to know why we should pursue formalist coherence, what we get when we achieve it, and if and why we should trade off other values for it.[13]

Thus, our attempt to determine the normative consequences of formalist coherence is failing. We had hoped that formalism might tell us which legal arrangements were the most desirable, morally legitimate and the like, by its assessment and evaluation of the relative coherence of legal arrangements. We have instead discovered that formalism will not adjudicate between completely coherent distributive and corrective schemes. More generally, it will not distinguish between the desirability of corrective and distributive schemes of equal coherence. Indeed, it is unclear to me whether Weinrib's formalism would claim that a reasonably coherent corrective justice scheme is necessarily preferable to a less coherent distributive justice scheme, or vice versa. Moreover, although there is presumably only one correct and completely coherent scheme of corrective justice, there are presumably many different coherent schemes of distributive justice because distributive justice, for Weinrib, leaves open the question of whether the criterion of distribution is to be egalitarian, on the basis of merit, skin color, parentage, or some other factor.[14] Hence, there may be several different distributive schemes which are coherent or completely coherent and one corrective justice scheme which is completely coherent, and formalism itself will not choose which of these various schemes is most desirable.

However, suppose we supplement formalism, as indeed ultimately it must be supplemented if it wishes to be a complete normative theory, with some method to pick the most desirable of these various alternatives. Now notice the consequence for formalism, even when so supplemented. Even complete coherence is not a sufficient condition for ultimate desirability. As we noted, there is one completely coherent corrective justice scheme, and there may be multiple completely coherent dis-

12. For a discussion detailing the differences between ordinary and formalist notions of justification, see *infra* text accompanying notes 118-43.

13. For further discussion concerning these issues, see *infra* text accompanying notes 65-79, 98-151.

14. *See* Weinrib, *supra* note 4, at 988-90.

tributive justice schemes with different criteria of distribution. Yet of all these completely coherent possible modes of legal ordering, at most one of them will be most desirable, according to supplemented formalism. Therefore, it cannot be that complete coherence is a sufficient condition for ultimate desirability.

Let us again assess where we are. We began by noticing that complete coherence cannot be a necessary condition for moral legitimacy because no actual legal system has ever been completely coherent. We now find because many possible legal systems are completely coherent, and only one of them may be the most desirable, that complete coherence is not a sufficient condition for ultimate desirability. Much to our amazement, then, we must conclude that coherence is neither necessary for moral legitimacy nor sufficient for ultimate desirability, for the formalist theorist.[15]

What, then, could coherence be? Perhaps it could be one factor among many others, including substantive considerations that determine ultimate desirability. This seems much more plausible than embracing coherence as the be-all and end-all of ultimate desirability, moral legitimacy, or legality, as would be suggested by the formalist credo that "coherence is the formalist's criterion of truth."[16] We are left with the difficult question of why coherence is desirable or normatively necessary.

What is needed here is a normative argument showing the connection, if any, between coherence and moral legitimacy, justifiability, and ultimate desirability. A theory of this sort is sketched in the last half of Ronald Dworkin's *Law's Empire*, es-

15. Weinrib might be able to avoid some of these embarrassing consequences if he accepted the Kantian rationalist and deontological aspects of formalism as foundational and lexically prior to or more weighty than the internal perspective and the integrationist-coherentist impulse, instead of claiming the three to be mutually interdependent. *See id.* at 955. Weinrib could then maintain that corrective justice is required by principles of rationality, and that there is no room for distributive schemes. *See* Perry, *supra* note 10, at 602-05. Thus, institutionalized corrective justice would be the most desirable legal arrangement, and the rationalist foundation would lead to the best legal institution—namely, that instantiating corrective justice. Coherence would still not be necessary for legitimacy, but it would at least be arguable that coherence is sufficient for ultimate desirability because only corrective justice—and not distributive justice—is truly coherent.

There are independent reasons for preferring Kantian rationalism and deontology to internalism and to coherence. The full argument cannot be developed here, although much of it is implicit in the criticism of formalist coherence and internalism in the text which follows.

16. Weinrib, *supra* note 4, at 972, 976.

pecially in Chapter 6.[17] Dworkin gives several arguments explaining how the form of coherence exemplified in the theory he calls "law as integrity" legitimizes law as integrity. The argument that he develops at greatest length, and on which he relies most heavily, is the argument from community. In order to understand this argument, we must recall that for Dworkin, integrity involves discerning principles that underlie and justify governmental acts (such as legislation and judicial decisions) and following those principles in making future governmental decisions (such as decisions in hard cases at law). Dworkin claims that "[A] political society that accepts integrity as a political virtue becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force."[18]

Dworkin's argument for this proposition is difficult to decipher, but what follows is my most charitable reconstruction.[19] Dworkin begins with the claim that the traditional grounds for political legitimacy and political obligation do not succeed in bestowing legitimate authority on governments to coerce and use force; nor do they generate moral obligations on citizens to obey the law. An interpretive reconstruction of the argument from fair play, however, is sufficient. Dworkin's new interpretive version of the argument from fair play reconstrues political obligation as a form of associative obligation—that is, the obligations arising within groups or communities such as families, law faculties, and clubs. For Dworkin, a bare political community, such as the United States, is a true community giving rise to true associative obligations only if the obligations arising from the community have the following four characteristics:

(1) each must be special to those who are in the association, rather than applying to everyone whether or not she is a member of the association;

(2) each must be personal—that is, owed to the other members of the association as individuals, rather than to the association itself;

(3) each must be thought of as flowing from an underlying and pervasive concern for the other members; and

17. *See* RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986).

18. *Id.* at 188.

19. For a more detailed analysis, *see* Kress & Waldron, *supra* note 2.

(4) each must be predicated not only on concern for the other members, but on equal and reciprocal concern.

Of particular concern here is the third requirement that particular obligations must be thought of as flowing from a deep, underlying, and pervasive concern for other members of the community, because Dworkin argues that a community that accepts integrity as a political ideal is better able to meet this requirement than a community that does not.

Dworkin claims that citizens' political obligations clearly include those obligations laid down in explicit rules of law. In order to satisfy the third requirement, however, citizens' obligations cannot be thought of as exhausted by the explicit rules. Citizens must think of themselves as having whatever obligations and rights can be shown to flow from the values of equal concern that underlie the explicit rules.

Citizens can infer such inexplicit obligations and rights from the values underlying the explicit rules only if the explicit rules are coherent. If the explicit rules are incoherent, the only principles and values that can be said to be underlying them will be similarly incoherent, or even contradictory. This incoherent or contradictory foundation would frustrate citizens' attempts to successfully infer, and engage in dialogue about, what their inexplicit obligations and rights are. Thus, the political system can be legitimate only if its explicit rules are coherent.

We need not pause over whether this argument of Dworkin's is valid—surely, there are many ready avenues of attack[20]—or even over whether this is a proper reconstruction of Dworkin's text.[21] Rather, the point of this example is to show what an argument connecting coherence to legitimacy or ultimate desirability might look like. Regrettably, there is no such argument in Weinrib's corpus, with one possible exception.

Weinrib does tell us that the notion of coherence that he has in mind goes well beyond consistency and is not a matter of ordering competing principles by weighing and balancing, lexically ordering, or fitting them into an overall equilibrium that makes sense even though the parts are at cross-purposes.

20. For example, as part of his argument Dworkin summarily rejects the duty to uphold just institutions. The duty to uphold just institutions deserves more respectful consideration. *See* Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFF. 3 (1993).

21. I predict, with a high degree of confidence, that Dworkin would object to this interpretation of his argument from community.

Rather, for Weinrib coherence is a matter of the justifications of each aspect of an area of law cohering together, so that there is a single overarching immanent justification which justifies and unifies them all. Put differently, an area of law is coherent if each of its aspects are justified by a single integrated justification which simultaneously justifies all and only those aspects. So, for example, negligence law is coherent only if a single immanent justification justifies simultaneously the bipolar procedure, the duty requirement, the fault requirement, the causation requirement, the proximate causation requirement, and the damages requirement, and also integrates these aspects into a unity. For Weinrib, coherence is a principle of unity of the aspects of an area of law by means of a single integrated justification.[22]

Coherence therefore assures that an area of law has a justification, and only one ultimate justification. In this way, Weinrib's theory connects coherence to justification, by definition. Regrettably, however, from the perspective of our initial inquiry into why coherence is desirable and what its normative consequences are, Weinribian coherence does not get us very far. While it assures us that there is a single justification, it does not give us any assurance that the justification is any good. Anything—as long as it can be considered a single justification—will fit the bill. This may be perfectly acceptable to Weinrib, and part of what he means to claim when he asserts that formalism is not substantive. But I, for one, remain unconvinced that formalist coherence bestows moral legitimacy or normative desirability.

Weinrib's formalism excludes from consideration any doctrine for an area of law that does not have a single, unified, integrated, immanent justification, even if the doctrine can be seen to be a compromise among competing considerations, a lexical ordering of otherwise-competing considerations, an equilibrium of countervailing justifications, or the like. He thus excludes from our consideration doctrinal possibilities that may be substantively quite desirable, simply because their norms, principles, and justifications are truncated and cannot be seen to be justified by a single, integrated, internal justification. Conversely, he leaves open for our consideration substan-

22. Coherence, and Weinrib's particular version of it, is discussed in more detail *infra* at text accompanying notes 25-94.

tively abhorrent doctrine which meets the integrated justification requirement.

Thus, suppose that for practical political reasons, we can enact either a doctrine that embodies truncated justifications but that nevertheless gives substantively desirable outcomes in most situations, or else a substantively horrendous doctrine that is completely coherent and that permits a weak justification its full scope. Most of us, I believe, would prefer the substantively desirable doctrine with truncated justifications; Weinrib's formalism would not permit this. Weinrib sacrifices justice for coherence because, with Kant, he makes the implausible argument that form (including coherence) leads to substance. I can see no adequate ground for limiting ourselves to justifications that are integrated, coherent, and internal, beyond Weinrib's unsupported claim that only a justification which is extended to its full scope can indeed justify.[23] From that claim Weinrib concludes that justifications or principles which compete with one another, and thereby limit each other's force, must completely undermine each other and cease to be justifications.[24] It seems to me more plausible to say that such justifications constitute reasons for particular actions (or evidence for particular propositions) that have been partially outweighed, or limited, by competing reasons (or evidence).

II. Coherence and Normativity

A. *Coherence in Normative Theory and in Weinrib's Formalism*

As we have seen in Part I, the central tenet of formalism is the importance of coherence: "Coherence is the [formalist's] criterion of truth."[25] Coherence appears to be a requirement that applies to the justification of legal systems, areas of law (such as torts, contracts, and administrative law), sub-areas of law (such as negligence law), procedural structures, and outcomes to immediate interactions (such as a particular doing and suffering of harm). Coherence is thus both a requirement of acceptable justifications and a quality of institutional acts, doctrines and structures which those coherent justifications justify. Since, for Weinrib, "law is constituted by thought," a mat-

23. *See* Weinrib, *supra* note 4, at 971.

24. *See id.* This conclusion is discussed in more detail *infra* at text accompanying notes 118-51.

25. Weinrib, *supra* note 4, at 972, 976.

ter of grasping "concepts," it would appear that coherence applies primarily to justifications as propositional or sentential properties, and only secondarily to institutional acts that instantiate coherent, justified propositions.[26]

It is important to notice that Weinrib's notion of coherence does not conform to ordinary linguistic usage, or modern technical usage, but is instead a specialized definition. As he puts it, it is "an extremely ambitious conception of coherence."[27] Coherence, for Weinrib, is a principle of unity of the aspects of an area of law by means of a single, internal, integrated justification.[28] The institutional response to an immediate interaction between two individuals is coherent if all of the doctrinal elements employed in that response are justified by some justification that thereby integrates and unites those elements. Alternatively, the doctrinal elements may be justified by differing intermediate justifications, so long as those intermediate justifications are all justified and united by a single overarching justification, which thereby integrates the doctrinal aspects into a mutually supporting circle.[29] Weinrib's notion of coherence is, among modern theorists, unique.

Modern coherence theorists in the legal, moral, and political realm are pluralists[30] who describe the best theory as the one that fits together best and who attempt to say something about how to adjudicate, resolve, or accommodate competing norms, principles, values and judgments.[31] These theories arose in contrast to monistic and foundational theories such as utilitarianism, which reduces all values to a single pleasure-pain scale and claims deductive certainty for its judgments, once one inputs the relevant facts. Thus, Weinrib's single-valued, foundational theory more closely resembles deductive, foundational, monistic theories than modern coherence theories.[32] This is part—but by no means the entirety—of why the formalist label is appropriate.

---

26. *Id.* at 962.

27. *Id.* at 970.

28. *See* Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993).

29. *See id.* at 592-93.

30. For one possible exception to this classification, see STANLEY FISH, DOING WHAT COMES NATURALLY (1989).

31. *See generally* John Stick, *Formalism as the Method of Maximally Coherent Classification*, 77 IOWA L. REV. 773, 786 (1992).

32. *See id.*

1. *Coherence in Normative Theory*

In order to understand coherence generally, and to understand Weinrib's notion of coherence specifically, it will be useful to examine various properties and techniques thought to be aspects of, explanations of, or requirements of coherence. I will examine techniques and requirements aimed at ensuring coherence and at avoiding incoherence. The discussion will focus on justificatory coherence within normative theory, particularly ethics and law, although I will not hesitate to use examples from general epistemology.[33]

It is uncontroversial that in order to be coherent, a theory or justification must be *consistent*.[34] More controversial is the claim that it must be *comprehensive* and cover the entirety of the relevant field, supplying an answer to each question within its scope, including, where appropriate, the answer "indeterminate." So, for example, a moral theory might maintain that the answer to the question of whether abortion is moral is neither "yes" nor "no," but rather "indeterminate." At least, that might be the answer given by some moral theories under certain circumstances involving conception and at certain periods during gestation. This latter position might be advocated, for example, by a theory that considers crucial the issue of whether the fetus is a being with a right to life, and that holds the right to life in turn depends upon the fetus's degree of embryonic development. Thus, at early stages in its development the fetus might lack a right to life, at late stages it might have that right, while at intermediate stages it is vague or indeterminate whether the fetus has that right.

The relationship between incoherence and lack of comprehensiveness is complex and will depend crucially on "where" the gaps lie and what shape(s) they manifest within the field of inquiry. Insofar as the gap areas appear randomly distributed, or "splotchy," the appearance of incoherence is heightened. Where the gaps are neatly contained within a peripheral area,

33. I also will not differentiate between coherence theories of justification and coherence theories of truth, as the distinction is not relevant to our purposes here. Additionally, I will not distinguish among norms, principles, rules, policies, and other standards as possible objects of coherence. I will employ these terms interchangeably.

34. This is not true if one considers moral, legal or political systems not just at a given time, but over time. The coherent development of a legal system, along Dworkinian lines, will result in later doctrine being inconsistent and incoherent with earlier doctrine. Kress, *supra* note 2, at 380-83.

even filling it entirely, lack of comprehensiveness is no bar to coherence, although the latter situation might be better described as comprehensive over the original field less the gap area.

More controversial yet is a third possible requirement of coherence, the *completeness* requirement. Called by some the "right answer thesis" and by others the "bivalence thesis," it maintains that each proposition within the scope of the theory is either true or false, with no gaps, no unanswerable questions, and no indeterminate truth values.[35]

The most famous coherence methodology in normative theory is the technique of reflective equilibrium developed by John Rawls in *A Theory of Justice*[36] and *Outline of a Decision Procedure for Ethics*[37] as a rational means for resolving issues about ethics and justice. Rawls's method is clearly inspired by his colleague Willard Van Orman Quine's path-breaking and widely followed coherence epistemology.[38] This is not to deny that certain disanalogies are required in the translation from the theory of knowledge to normative theory.

Rawls's method requires that we determine the considered judgments about day-to-day normative issues that would be made by individuals who have at least average intelligence and open minds, who are aware of and try to negate their own biases, who have habits of mind and imagination characteristic of the virtues of moral insight, and who decide actual cases under judicial-like circumstances—including insulation and no self-interest—that promote integrity and lack of bias.[39] Under the method of *Outline of a Decision Procedure for Ethics*, one then induces principles much like a scientist would—only the data to be explained are the morally competent actors' considered judgments, not scientific observations.[40]

In *A Theory of Justice*, the method is extended substantially.

35. For a discussion of the right answer thesis, see *infra* text accompanying notes 91-94.

36. JOHN RAWLS, A THEORY OF JUSTICE (1971).

37. John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177 (1951).

38. WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20, 42-46 (2d rev. ed. 1980)[hereinafter QUINE, *Two Dogmas*]; WILLARD VAN ORMAN QUINE, WORD AND OBJECT 1-25 (1960); Rawls, *supra* note 37, at § 4.5; *see also* RAWLS, *supra* note 36, at 579 n.33.

39. *See* Rawls, *supra* note 37, at §§ 2.3-2.6. There are a few additional requirements, which I omit here.

40. *See id.* at §§ 3.2-3.3.

Considered convictions no longer have epistemic priority over principles. We compare our considered convictions—now about justice—to the principles chosen under the veil of ignorance[41] to determine whether the principles and convictions fit together. There is an appropriate fit if someone following the principles would reach the convictions or, in the alternative, if the convictions could be viewed as a normatively attractive extension of the principles.[42] If so, all is well and good. If not, the method of reflective equilibrium is employed to do some real work. Insofar as there are discrepancies between the principles and considered intuitions, one or the other (or both) must be revised. The antifoundational aspect of the method consists in giving neither the principles nor the convictions *a priori* preference in the process of revision. As Rawls puts it:

> [W]e have a choice. We can either modify the account of the initial situation [and the principles it provides] or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the [initial position and its ensuing principles], at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium. It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation. At the moment everything is in order. But this equilibrium is not necessarily stable. [New principles or intuitions could arise.] Yet for the time being we have done what we can to render *coherent* and to justify our convictions of social justice.[43]

Dworkin follows a similar method of reflective equilibrium in law, with appropriate changes to reflect the different subject matter.[44]

---

41. No doubt Rawls would approve the extension to principles obtained by appropriate rational means other than through the original position and veil of ignorance.

42. RAWLS, *supra* note 36, at 19.

43. *Id.* at 20-21 (footnote omitted) (emphasis added). *See generally id.* at 14-21, 43-53, 578-82.

44. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 159-68 (rev. ed. 1978); DWORKIN, *supra* note 17, at 45-113. Dworkin's theory differs from Rawls's method of reflective equilibrium in that it takes as the data the preinterpretive practice, rather than considered moral convictions, and seeks equilibrium with a justification of that practice, not a formal theory of justice. Ken Kress, *The Interpretive Turn*, 97 ETHICS 834, 839 n.11

Dworkin has built a theory of legal reasoning and law on the notion of coherence. The law of a particular jurisdiction, according to Dworkin, is the most coherent reconstruction of that jurisdiction's official acts, including its constitutions, statutes, precedents, and administrative rulings.[45] In *Law's Empire*, what Dworkin most frequently appears to mean by "integrity"—his current term for "coherence"—is the requirement that the principles that underlie and justify the official rules and acts be consistently applied.[46]

At a superficial level, I believe Weinrib would not object to this Dworkinian notion of coherence, although he would find it insufficient. Weinrib would surely agree that the underlying (read: immanent, if presupposed) principles should be consistently applied. Weinrib would want to add that ultimately each area, transaction, and the like should be governed by one and only one integrating justificatory principle. Dworkin's failure to maintain such a uniqueness and integrationist requirement for principles means that he contemplates them competing over the same domain, with a consequential *weighing and balancing* against each other, a fifth potential aspect of coherence.[47] This would result in justificatory principles being limited, outweighed, and truncated in interactions with opposing principles. Weinrib maintains that a justification that is so limited, and not permitted to apply over its full scope, is no justification at all.[48] Thus, at a deeper level, Weinrib should reject Dwor-

(1987). It is unclear whether this justification of legal practice imports a monistic element into Dworkin's theory because it is unclear whether Dworkin requires a *single* justification. A second ground for interpreting Dworkin's theory monistically is his claim that "[c]onsistency in principle [requires that justifications for state coercion] . . . express a single and comprehensive vision of justice." DWORKIN, *supra* note 17, at 134. Given the overall pluralistic flavor of *Law's Empire*, however, a pluralistic interpretation seems more plausible. *See* Kress, *supra*, at 835-38.

45. *See* DWORKIN, *supra* note 44; Kress, *supra* note 2, at 378 n.53. *But see* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 315-21 (1992)(arguing that Dworkin's theory is not a coherence theory). Statements suggesting or asserting that adjudication or Dworkin's theory of it are coherence theories can be found at DWORKIN, *supra* note 44, at 163, 159-63; DWORKIN, *supra* note 17, at 134, 165, 166-67, 184, 185, 189-90.

46. Dworkin also requires that the particular principles underlying various bits of explicit doctrine fit coherently together into an overall scheme of principles expressing "a single and comprehensive vision of justice," thus moving him somewhat closer to formalism's monism. DWORKIN, *supra* note 17, at 134; *see also id.* at 166; DWORKIN, *supra* note 44, at 88, 116, 116-17. Still, the immanence requirement is not present in Dworkin. Nor is the formalist's unity requirement.

47. *See* DWORKIN, *supra* note 44, at 25-27; DWORKIN, *supra* note 17, at 274-75. *But see* DWORKIN, *supra* note 17, at 134.

48. *See* Weinrib, *supra* note 28, at 586; Weinrib, *supra* note 4, at 971; *infra* text accompanying notes 118-51.

kin's notion of coherence. Insofar as it contemplates the "gravitational force"[49] of principles taking those principles where on formalist grounds they do not belong—namely, in competition with other justifications—Dworkinian coherence is unacceptable to the formalist. More generally, formalism would reject Dworkinian theory on the ground that it employs external moral principles and is thus not immanent.

The formalist would also reject the notion of "equilibrium" as a method of achieving coherence. Equilibrium occurs if things fit together even when individual elements are warring; an overall theory or justification may make sense even though its parts are at cross purposes.[50] The formalist would find the lack of integration and unity among the parts of such a theory especially objectionable.

A seventh possible method for achieving coherence is through lexical ordering. John Rawls employs this method to order his two principles of justice.[51] In a lexical ordering, the first principle must be completely satisfied before the second principle is considered; the second must be completely satisfied before the third is considered; and so on. In this way, Rawls asserts, a lexical ordering avoids weighing and balancing and gives earlier principles "absolute weight, so to speak, with respect to later ones."[52] Alternatively, one could see each earlier principle as having weight at a higher order of infinity than each later principle. In this way, Rawls ranks his principle of equal liberty before the difference principle regulating social and economic inequalities.[53]

Thus, in a lexical ordering, principles lower in the order are truncated and not permitted to apply to their full scope whenever there is a competing principle of higher lexical order cov-

49. *See* DWORKIN, *supra* note 44, at 110-18.

50. DWORKIN, *supra* note 17, at 183; THOMAS HOBBES, LEVIATHAN 105, 110, 164, 229 (Michael Oakeshott ed., Collier 1962)(1651); ROLF SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS: A UTILITARIAN ACCOUNT OF SOCIAL UNION AND THE RULE OF LAW (1975).

51. *See* RAWLS, *supra* note 36, at 42-43, 60 ff. Dworkin states that overall theoretical coherence may require "a coherent ranking of different principles of justice or fairness or procedural due process." DWORKIN, *supra* note 17, at 184.

52. RAWLS, *supra* note 36, at 43.

53. *See id.* at 61. Rawls's position may be said to be coherent for at least three reasons. First, as noted, it is lexically ordered. Second, it is the product of the original position, including its assumptions of rationality and the veil of ignorance. Third, it instantiates a version of the Kantian idea of personality.

ering some or all of the same area. The coherence achieved by lexical ordering is thus unacceptable to the formalist.

An eighth potential method for achieving coherence is careful determinations of scope. By restricting the principles to mutually exclusive areas, concrete conflicts cannot arise. Each standard is limited to its own sphere of influence.

Whether the method of scope is acceptable to the formalist will depend upon whether there is a principled, internal justification for restricting the standards to the mutually exclusive areas employed. If not, the formalist will think that the method of scope degenerates into pragmatism.[54]

Preemption, a ninth potential part of coherence, can assist in avoiding conflict among standards, and thus aid in achieving coherence. If occasionally, or always, when two principles conflict, one preempts the other over all or some portion of their range, potential inconsistency and incoherence will be avoided. Preemption is similar to, but not necessarily identical to, lexical ordering. In a lexical ordering, one ordinarily conceives of the principles operating serially. In Rawls's theory, for example, principles of equal liberty must be respected first, and only then may principles about distribution of primary goods be considered. By contrast, the preemption metaphor suggests two principles operating simultaneously, with one rendering the other ineffective. As with scope, barring an overarching, internal justification for the pattern of preemptions, the formalist will find it incoherent and unintelligible.

In their arguments that law is indeterminate, incoherent, and contradictory, critical legal scholars cite the lack of explicit meta-principles to adjudicate among competing principles and counterprinciples.[55] A tenth possible way for a theory to achieve coherence is to encompass explicit meta-principles which resolve conflicts among principles.[56] Such meta-principles are a generalization of lexical ordering. Put differently, the principle which lexically orders a set of principles is one kind of

54. *See generally infra* note 87.

55. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723-24 (1976); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 15-18 (1984). For an analytic philosopher making the same point, see Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 218-19 (1986). For a contrary view, see Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

56. Of course, the meta-principles must themselves be coherent, lest their incoherence give rise to a need for meta-meta-principles, and so on, in an infinite regression.

meta-principle among many for resolving potential conflicts. Reflective equilibrium, weighing and balancing, equilibrium, scope, and preemption can also be viewed as instances of the method of meta-principles, if one accepts that there are underlying norms or methods for weighing and balancing, fitting together into equilibria/reflective equilibria, scope, and preemption that are, in principle, articulable in explicit meta-principles. This claim of explicit articulability is, of course, a controversial matter.[57]

The method of meta-principles is not likely to yield formalist coherence. For one thing, there will generally be several meta-principles, not one unifying meta-principle. Second, even if there is but one meta-principle, there is no assurance that the resolution of conflicts among underlying principles will be done in a normatively intelligible fashion. The meta-principle could apply in a mechanical or mathematically formalist way over part or all of its domain. Third, even if there is one normatively intelligible meta-principle that justifies its resolutions of conflicts among underlying principles, it may fail to integrate and unify the underlying justifications into a mutually supportive circle.[58] Indeed, the mere fact that there are *conflicts* among principles and counterprinciples would seem to disqualify a theory from manifesting formalist coherence.

From Dworkin's response to critical legal scholarship, it appears that he also rejects the method of meta-principles, although for different reasons than the formalist. Apparently, he believes that accommodations between competing (not contradictory) principles are achieved without resort to formal meta-principles.[59]

The method of meta-principles discussed by critical legal scholars is an example of the requirement of an explicit decision procedure, understood in the mathematician's sense of giving a single right answer to each possible question (within a finite, specifiable number of steps).[60] An explicit decision pro-

57. As an illustration of my own hesitation on the matter, see Kress, *supra* note 55, at 332-34. *But see* Robert Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 839-41 (1990)(criticizing Kress's alleged views on meta-principles). *See generally id.* at 833-41.

58. *See* Weinrib, *supra* note 28, at 592-93.

59. DWORKIN, *supra* note 17, at 271-75, 440-41 n.19, 441-44 n.20; *see also id.* at 266-71.

60. *See* HERBERT ENDERTON, A MATHEMATICAL INTRODUCTION TO LOGIC 61-62 (1972); Kurt Gödel, *Ein Spezialfall des Entscheidungsproblems der Theorischen Logik*, 2

cedure may fail to meet formalist scruples for the reasons discussed in connection with meta-principles. However, it need not fail, and may be acceptable to the formalist, if it resolves questions via a single integrating immanent justification. Of course, there could also be meta-principles that give guidance, but do not uniquely resolve all conflicts and vagueness among principles and counterprinciples. Such meta-principles would not be equivalent to mathematical decision procedures.

Another method for avoiding incoherence is the "single fountain" or monistic theory. By confining the theory to one fundamental principle from which all subprinciples follow, it is hoped that conflicts between principles in concrete cases will be avoided, or, if not avoided, will be easily resolved by recourse to the fundamental principle. Some monistic theorists hope for more: right answers for all covered situations. Utilitarianism is a well-known example of a single fountain theory.

In fact, monism does not guarantee the absence of concrete conflict. First, conjoining multiple principles into a "complex fundamental principle" will permit the conjoined principles to conflict as in any pluralistic theory, and there is no easy way to discriminate between true monistic theories and pluralistic theories in monistic dress. Even true monistic theories may yield conflicting directives under certain factual circumstances. For example, consider the situation where "obey your parents" is the fundamental principle, but mother and father give inconsistent commands. Similarly, the principle may be "follow the law," yet the law both proscribes and commands a certain act. Moreover, even when a monistic theory avoids conflicts, it may well fail to provide right answers as a result of vagueness or a failure to be applicable under the circumstances. Although strong forms of monism, such as Weinrib's, might prohibit it, moderate forms of monism may permit, or even encourage, pluralism at a middle level of concepts. For example, a monistic consequentialism such as utilitarianism might employ agent-relative and institution-relative means to allocate goals among institutions and individuals.

A final means to coherence is the internal architecture within the theory—that is, the internal relations among the principles

---

ERGEBNISSE EINES MATHEMATISCHEN KOLLOQUIUMS 27-28 (1932), *reprinted in* 1 KURT GÖDEL, COLLECTED WORKS 230-33 (Solomon Feferman et al. eds., 1986); Kress, *supra* note 55, at 332 n.202.

(and norms, rules, policies) of the theory. In its strictest version, internal relations require that each principle entail and be entailed by every other principle. Such strict versions of internal relations are implausible for most normative theory. Less strict versions of internal relations require that each principle entail or be entailed by some other principle or principles of the theory.[61] Even less strict versions hold that each principle must justify or be justified by some other principle, explain or be explained by another principle, make probable or be made probable by another principle, or be evidence for or be supported by some other principle. These even less strict versions of internal relations may be called one-one versions, to distinguish them from the one-many or one-all versions. For example, one-all versions of internal relations require that each principle be related by some "inferential" or evidentiary relation such as the above, not to a single other principle, but to all the rest as a whole. That is, the other principles, taken as a whole, entail, or justify or similarly support the principle in question.

Internal relations attempt to avoid incoherence by ensuring that the principles of the theory are about the same or related subject matters. For example, consider the following three sentences: Gottlob went swimming. Inflation is not a function of the money supply. Fifty-six percent of American men aged twenty to seventy-four have total cholesterol to HDL cholesterol levels exceeding four and one-half to one. This list lacks coherence because it is about too many different subject matters. Internal relations promote coherence by limiting the prospects for multiple subject matter incoherence.

Another version of internal relations is narrative. I came. I saw. I conquered.

Strong versions of internal relations have been out of style for half a century.[62] Weaker forms have survived—for instance, in Dworkin's requirement that the individual coherent princi-

61. This requirement can be accomplished in artificial sets of principles by the use of logicians' tricks. Let $A=\{P, Q, P\rightarrow Q, Q\rightarrow P\}$. Every proposition in A is entailed by some subset of A. Perhaps the appropriate notion of implication must be strengthened from material implication to relevance implication. *See* ALAN ROSS ANDERSON & NUEL D. BELNAP, JR., ENTAILMENT: THE LOGIC OF RELEVANCE AND NECESSITY (1975).

62. *See* BRAND BLANSHARD, THE NATURE OF THOUGHT 264 (1939). *But see* LAURENCE BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE 96-97 (1985)(criticizing Blanshard's entailment—including synthetic entailment—coherence test of truth).

ples underlying doctrine fit coherently with each other.[63]

Internal relations as described above in either one-one or one-many versions do not guarantee coherence. Thus, it is possible that a number of subsystems of principles exist, where each member of each subsystem is related by the relevant inferential or justificatory relation to other members of that *same* subsystem, yet the different subsystems have at most weak or no relation to one another.[64] In this way, internal architecture that relates principles one to one, or unidirectionally many to one, does not necessarily prevent multiple subject matter incoherence. Prevention of multiple subject matter incoherence is more likely if the justificatory-inferential relations among principles are reciprocal, holistic, and pervasive.[65]

2. *Coherence in Weinrib's Formalism*

Weinrib's formalist coherence involves a return to a strict form of internal relations. Weinrib tells us that the essential justificatory aspects of an area of law, such as torts, form an "intrinsic ordering" in which "the whole of tort law's basic structure is implicit in any individual feature."[66] The essential aspects are "mutually dependent," "intelligible through each other,"[67] and "unintelligible apart" from each other[68] in the sense that "[t]he functioning of any constituent of th[e] unity can be fully understood only in the light of the functioning of all the others."[69]

In the end, Weinrib's notion of internal relations is characterizable in terms of Stammler's conception of an essential property: a property of a subject matter which, if it were left out of the account, would cause us to lose "our entire mental representation" of that subject matter.[70] That is, each element or aspect of the theory or doctrine is internally related to each other, and to all the rest together in Stammler's sense. This

63. *See* DWORKIN, *supra* note 17, at 134, 184.

64. The subsystems may be thought to materially imply one another, since each is held to be true. A stronger form of implication, such as that in relevance logic, appears appropriate here, as it was in connection with the requirement that each norm be entailed by some subset of the rest of the norms. *See supra* note 61.

65. *See* BONJOUR, *supra* note 62, at 97-98.

66. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 511 (1989).

67. *Id.* at 511.

68. *Id.* at 513.

69. Weinrib, *supra* note 4, at 969.

70. Rudolf Stammler, *Fundamental Tendencies in Modern Jurisprudence*, 21 MICH. L. REV. 862, 883 (1922-23); Weinrib, *supra* note 66, at 493 & n.22.

mentalistic and epistemic notion of essentialism contrasts with more metaphysical definitions of essentialism. Aristotle, for example, defines an essential property as one that an object (or institution) could not lose while remaining the same object.[71] The modern modal logician, by contrast, defines an essential property as one that an object has in every possible world (complete possible history of the universe) in which it exists.[72]

Weinrib's strict requirement of internal relations among the aspects of a doctrinal area serves the function of confining the area to a single subject matter, and in particular to a single justification. In keeping with these uniqueness requirements, Weinrib maintains that all of private law is justified by and has as its subject matter corrective justice, while all of public law is justified by and has as its subject matter distributive justice.

Weinrib clearly intends that formalism be monistic. He requires that each legal justification and doctrinal area be justified by a single overarching justification that unifies and integrates all doctrinal aspects or subjustifications.[73]

By contrast, Dworkin (along with most modern coherence theorists) rejects monism. Dworkin's rejection of monism is manifested in his view that there is competition among principles (although not incoherence or contradiction)[74] and his claim that law is grounded in controversy.[75]

Formalism's version of coherence can be characterized as the combination of monism and internal relations. In this particular form of internal relations, each aspect is dependent upon each of the others for complete intelligibility, and, more opaquely, the resulting unity forms an "intrinsic ordering."[76]

Formalism's notion of coherence is also maximally inclusive, in two senses. First, all aspects which cohere with the other aspects of the intrinsic ordering must be included. All essential[77] elements are part of the intrinsic ordering. Second, the justifi-

71. VII(Zeta) ARISTOTLE, METAPHYSICS ch. 5 (W.D. Ross trans.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 788-89 (Richard McKeon ed., 1941).

72. *See* SAUL A. KRIPKE, NAMING AND NECESSITY 46-48 (1980).

73. *See* Weinrib, *supra* note 28, at 592. Weinrib's strict monism at the level of particular legal institutions and justifications of outcomes is curious in light of his dualistic commitment to both corrective and distributive justice, which he claims are mutually irreducible. *Id.* at 586; *see also* Perry, *supra* note 10, at 608-10.

74. *See* DWORKIN, *supra* note 17, at 241, 268-69, 274-75.

75. *See id.* at 11, 88-89, 136-39; Kress, *supra* note 40, at 836.

76. Weinrib, *supra* note 66, at 510-11.

77. *See id.* at 493 & n.22.

cation that integrates the aspects must be coherently related to neighboring justifications.[78] If the justification is of the outcome of a particular allegedly tortious act, it must be coherently related to the justifications given for the outcomes in other potentially tortious acts. If the justification is of an entire doctrinal area, such as torts, it must be coherently related to the justification given for related doctrinal areas, such as contracts and property.

3. *The Characterization of Normative Coherence Theories*

From here on, my remarks are limited to coherence in normative theory and would not uniformly apply to coherence theories of epistemology.[79] What follows is not intended to be definitive remarks about coherence in normative theory. Coherence is much too difficult a concept for that. I will suggest that there is a range of conceptions of coherence, not just one. What is offered here is a first approximation of a taxonomy of conceptions of coherence.

In serious discussions of normative coherence theories, it should not suffice to make passing reference to reflective equilibrium and conclude the discussion. This article provides the analytical tools for a richer, deeper and more comprehensive analysis. Characterizing the varying conceptions, and how they differ, will assist in the effort to assess their normative virtues. Once we distinguish the twelve subconcepts of coherence, we can identify which are part of a particular conception of coherence, singly or in combination. We then can better assess

78. I am unclear whether this requires maximal coherence, including identity of justification, or simply exceeding some threshold of coherence. At a high level of generality, formalism invokes only two justifications, corrective justice for private law and distributive justice for public law. Thus, within private (public) law, the strong identity of justification condition is met. At a less general level, however, the justifications within torts, contracts, and property likely differ at least marginally, if only to distinguish the subject matters. Perhaps formalism could maintain that the justifications of torts, contracts, and property are identical and the subject matters are distinguished on some other ground.

79. I am agnostic about whether coherence theories of politics, morals, and law are committed to or constitute coherence theories of truth about those subjects, or are compatible with correspondence theories of truth.

I should also acknowledge that in a more complete work, the role and form of coherence in law, morals, and political theory might be distinguished; for example, because of the unique method of common-law reasoning or in consequence of the institutional nature of law and politics. Within law, coherence might operate differently before a court than before an administrative body or a legislature, or in property or torts than in criminal law (for reasons of notice, liberty, etc.). Finally, coherence might play varied roles in different jurisdictions.

whether that conception is morally legitimate, desirable, or partakes in any other normative virtue by determining whether the subconcepts it has induce those virtues.[80] For example, Weinrib's subconceptions of monism and (in part) internal architecture will be examined shortly to determine the normative value of his unique conception of coherence.[81]

The three issues of consistency, monism, and unity all are related to coherence and perhaps are sufficient to explain what constitutes the coherence of most normative coherence theories. A fourth issue, the "bivalence" or "right answer" thesis, is not necessary for coherence, despite the views of some theorists. Still, bivalence enhances coherence in many circumstances. Fifth, as noted earlier, comprehensiveness may enhance—but is also not necessary for—coherence.

Consistency at a time is necessary for normative coherence, but is not sufficient for it. By normative coherence, I mean a coherence theory in a normative area where the coherence requirements do substantial normative work. *Consistency over time* is not necessary for a coherence theory such as Dworkin's, which permits—indeed requires—change over time.[82] Insofar as common-law adjudication is one of the features to be explained by coherence, the theory should not demand consistency or coherence among the principles of the theory at different times, but only a coherent path of movement over time. Even here, much depends upon which cases come up for appellate adjudication. Coherence theories of adjudication with a significant doctrine of precedent are path-dependent because the order in which cases are decided partly determines what is included within the authoritative precedents with which later cases must cohere in order to themselves become law.[83] While Weinrib would require consistency over time with the two justificatory forms, corrective and distributive justice, he would allow for some change over time in resolving indeterminacy and responding to contingency.[84]

Finally, even though consistency at a time is necessary in the-

80. *See* Kress & Waldron, *supra* note 2.

81. *See infra* at text accompanying notes 98-151.

82. *See* Kress, *supra* note 2; Ken Kress, Precedent, Coherence, and Moral "Mathematics" in Adjudication, seminar at the University of Chicago (Apr. 24, 1992)(unpublished manuscript, on file with author).

83. *See* Kress, *supra* note 2, at 386-88, 400-02.

84. *See* Weinrib, *supra* note 4, at 1008-12.

ory, or metaphysically, for coherence, it is not necessarily required in practice. Although we aim for consistency in the long run, modest skepticism may recommend that we do better day-to-day if we retain some inconsistencies until we are able to resolve them satisfactorily, rather than force consistency via ad hoc solutions.[85]

The relationships among coherence, monism, and unity are more interesting than that between coherence and consistency, but they are also more opaque. As there are many conceptions of coherence, we should expect the different conceptions to be constituted by differing versions of monism and unity.

As noted, monism and its relationship to coherence is a more difficult concept than consistency. For current purposes, we should distinguish between three versions. These are not the only possible versions or the only way to categorize the versions. Nevertheless, this distinction will suffice for current purposes.

First, there is strict monism, as I understand Weinrib's position, which requires that the entire theory "flow from" one master principle so that each subprinciple is implicit in the master principle. "Flow from" means entailment, near entailment, or similar logical and theoretical relations. Moreover, the subprinciples must flow from the master principle together and in harmony.

Second, there is moderate monism, wherein methods of reflective equilibrium, weighing and balancing, equilibrium, lexical ordering, scope, preemption, meta-principles, and the like resolve competition and conflict among principles and counterprinciples, thus achieving substantial or complete coherence and consistency. Moreover, some master principle or norm explains for each of the following subprinciples that are employed in that instance of monism:

1) why reflective equilibrium eliminates some particular concrete and abstract data and principles, keeps the rest, and adds others;

2) why principles and counterprinciples are balanced as they are; that is, why each has the weight (in context) it does

85. *But see* DWORKIN, *supra* note 44, at 159-63 (claiming that the doctrine of political responsibility requires that government may not act except upon articulated reasons which justify past, present, and hypothetical institutional behavior).

(and why the particular weighing mechanism employed is used);

3) why the equilibrium works and makes overall sense of the theory or doctrine (why it has the degree of stasis it does);

4) why the lexical ordering is arranged as it is;

5) why the various norms are limited in scope as they are;

6) why those norms which preempt others do so;

7) why the particular meta-principles employed for resolving conflict are appropriate; and so on.

In short, the master principle must explain arithmetical and abstract methods for resolving conflict among principles in a way that makes the resolution normatively intelligible.[86] Such a master principle, in combination with the resolution device, serves as a functional substitute for strict monism. Yet it is not strict monism, because it allows for disharmony among subprinciples and for subprinciples that do not flow from the master principle. In weaker forms of this second version of monism, a small number of principles irreducible to each other perform the function of the master principle.

In a third version of monism, resolution of concrete cases is accomplished via reflective equilibrium, weighing and balancing, equilibrium, lexical ordering, scope, preemption, meta-principles, and the like, without recourse to any master principle. This conception of monism is supported by pragmatic theory and by atheoretical interpretations of Wittgenstein.[87] It is unclear that these really are forms of monism. If, however, the resolution devices are interpreted as creating functional monism (plausible, perhaps, if they resolve almost all issues), version three may be monism. As noted earlier, Dworkin is a pluralist who accepts that conflicting principles can be resolved by garden variety weighing and balancing without the need for explicit meta-principles.[88] The use of a resolution "device"

86. "Intelligible" is used here in its ordinary sense, not Weinrib's strict sense. *See infra* text accompanying notes 102-03.

87. *See generally* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (Gertrude E.M. Anscombe trans., 3d ed. Macmillan 1973); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1881 (1990).

88. *See* DWORKIN, *supra* note 44; *see also supra* note 44 (describing Dworkin as a pluralist). *But see* Raz, *supra* note 45, at 315-17 (considering whether Dworkin should be understood as a monistic interpretivist).

need not entail monism. Therefore, a weak form of three is not monistic.

Ironically, the first two versions of monism appear foundationalist, or built upon a master principle (excluding the weaker version of form two). Weinrib would accept this. Modern coherence theorists can perhaps deny this by saying that the master principle is induced, like all others, by Peircian abduction or inference to the best explanation.[89]

The concept of unity is close to monism in spirit, especially for Weinrib, but it is distinguishable in form, focusing more on internal architecture among the principles of the theory. Thus, one way to look at unity is through the version of internal architecture employed, as discussed above.[90] I will not, however, develop a taxonomy of internal architectures, interesting although that might be. Rather, I will develop a taxonomy halfway between that and the classification provided for monism.

First, unity might be provided by a single master principle that entails all the principles, and thereby relates each to the others in a normatively intelligible fashion. In weaker forms of this first version of unity, the single master principle justifies, explains, makes probable, is evidence for, or otherwise supports all the rest of the principles.

Second, the principles might be united by some form of reflective equilibrium, weighing and balancing, equilibrium, lexical ordering, scope, preemption, meta-principles, or the like that is entailed (or, in weaker versions, justified, explained, made probable, or otherwise supported) by a master principle.

Third, unity might be achieved by one or more of the techniques of reflective equilibrium, weighing and balancing, equilibrium, lexical ordering, scope, preemption, meta-principles, or the like without any supporting master principle. In its strongest form, this unity would be a matter of entailment between the principles, each to every other. In a weaker version, each would entail some other. In even weaker versions, entailment will be replaced by justification, employing probabilistic and similar less-strict evidentiary relations. Finally, some minimal unity may be achievable by the above techniques without any evidentiary relations being created (or existing?) among

89. *See* Gilbert H. Harman, *The Inference to the Best Explanation*, 74 PHIL. REV. 88 (1965).

90. *See supra* text accompanying notes 61-65.

the principles of the theory. Strong versions of monism entail some version of unity or internal architecture.

Weinrib chooses the strongest form of the first versions of both monism and unity as a foundational theory. His formalist coherence requirement is thus a foundationalist theory. Note also that if a theory exemplifies weak forms of version three for both monism and unity, it is difficult to maintain that one has a substantial coherence theory.

Finally, there is the right answer or bivalence thesis: each proposition within the scope of the theory is either true or false, and none is indeterminate. It might be thought that Dworkin's advocacy of the right answer thesis shows coherence theories to be committed to it. That would be a mistake; Dworkin argues for the right answer thesis on grounds independent of his views on coherence.[91] Moreover, he has either diluted or jettisoned the doctrine in recent writings.[92] Weinrib clearly accepts indeterminacy, thus rejecting the right answer thesis, even while holding a form of coherence theory.[93]

A normative theory may be substantially coherent, even while leaving some vague or borderline cases unanswered, as the above abortion example demonstrates.[94] The right answer thesis is not necessary for coherence. Nonetheless, it cannot be denied that in certain circumstances, right answers will enhance coherence, while gaps will undermine it.

Consistency (except for practical limitations) and at least one of monism or unity are clearly necessary for coherence. It is less certain whether both monism and unity are necessary for coherence. But it is clear that, with consistency, they are sufficient for it. Stronger forms of monism and unity give rise to stronger versions of coherence.

B. *Conceptual and Ontological Foundations for Formalist Coherence*

With this understanding of coherence and formalist coherence behind us, we can now ask ourselves the crucial question: why should we want, or need, in the law the particular version of coherence articulated by formalism? Is coherence concep-

91. *See* RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *in* A MATTER OF PRINCIPLE 119 (1985).

92. *See* Ken Kress & Scot W. Anderson, *Dworkin in Transition*, 37 AM. J. COMP. L. 337, 338-40 & n.17 (1989).

93. *See* Weinrib, *supra* note 4, at 1008-12.

94. *See supra* text accompanying note 34.

tually necessary for the existence of a legal system, and thus for law as it exists in modern states? Is coherence ontologically required in the sense that it is a necessary condition for legality? Is formalist coherence normatively desirable?

We can deal quickly with the first issue, that of conceptual necessity. It is certainly possible that a social institution exists that lacks formalist coherence, but is properly characterized as a legal system manifesting modern varieties of law. Indeed, Weinrib agrees that positive law may lack coherence: "I make no claim about the extent to which the positive law of any jurisdiction (or set of jurisdictions) has achieved coherence."[95]

Next, that coherence is an ontological precondition for legality may perhaps be inferred from the formalist's dictum that coherence is the criterion of truth.[96] If a purported law, legal structure, or legal justification lacks coherence, it fails to be true or legally valid and thus fails to exist as law. However, this claim that coherence is a necessary condition for legal existence is implausible for the same reason as the conceptual necessity claim: positive law may, and probably frequently does, lack formalist coherence. Weinrib therefore backs away from the ontological "necessary condition" claim: "The point is not that the positive law of a given jurisdiction necessarily embodies justificatory coherence, but that such coherence is possible, and that positive law is intelligible to the extent that it is achieved and defective to the extent that it is not."[97] In more recent writings, Weinrib further recasts the point of coherence away from ontological claims and toward normative and justificatory ones.[98]

C. *Normative Grounds for Formalist Coherence*

We should therefore ask ourselves the third set of questions: what is the value of achieving formalist coherence, and is achieving formalist coherence desirable? Weinrib tells us that "law's moral legitimacy" depends upon its coherence.[99] We have just seen that Weinrib also believes that law's intelligibility

95. Weinrib, *supra* note 4, at 957-58 n.28; *see also* text accompanying note 97.

96. *See id.* at 972.

97. *Id.*

98. *See* Weinrib, *supra* note 28, at 592-93. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1993).

99. Weinrib, *supra* note 4, at 952.

depends upon its coherence.[100]

1. *Immanent Intelligibility*

Weinrib believes that coherence is connected not only to legitimacy, justifiability, and intelligibility, but more specifically to its immanent, or internal, intelligibility. By "immanent intelligibility," Weinrib means that a subject matter is understandable "in and through itself," that is, in terms of itself, without recourse to external concepts or means.[101] Thus, law neither requires nor permits explanation or justification in terms of external disciplines such as economics, history, or philosophy. Law is autonomous.

Weinrib may well believe that coherence, internal intelligibility, and justifiability are conceptually connected. At the very least he thinks they are coextensive: a legal justification is internally intelligible only if it is coherent, and coherent only if internally intelligible, and justified if and only if it is both coherent and internally intelligible.[102] We should therefore explore Weinrib's notion of internal intelligibility as a first step in our inquiry into the normative value of formalist coherence.

We should note at once that Weinrib's usage of "intelligible," like his usage of "coherence," does not conform to ordinary linguistic practices. We normally suppose that more than one theory for a doctrinal area of private law (and more than one for an area of public law, even given a criterion of distribution) would be intelligible. Weinrib would have us believe that the only intelligible theory of tort law is his version of corrective justice. The theories of Guido Calabresi, Jules Coleman, Richard Epstein, George Fletcher, and Richard Posner are not just wrong, or theoretically or morally mistaken, but unintelligible.[103] This is an extraordinarily restricted sense of "intelligible."

Weinrib employs the term "internal" both ambiguously and vaguely.[104] First, sometimes "internal" is used in opposition to

100. See *supra* text accompanying note 91; *see also* Weinrib, *supra* note 4, at 969.

101. Weinrib, *supra* note 4, at 956.

102. *See id.* at 972 ("The reason coherence functions as the criterion of truth is that legal form is concerned with immanent intelligibility.").

103. *See* Stick, *supra* note 31, at 794.

104. *See id.* at 790-91 (arguing that Weinrib's use of "internal" is vague). *See generally id.* at 788-93. At this point, the logic of the analysis suggests that examination of the three aspects of Weinrib's conception of coherence—consistency, internal relations, and monism—be undertaken in an attempt to assess normative value. Consistency is

external, and suggests the hermeneutic method, so that internal intelligibility requires an understanding and justification in terms employed by the participants in the practice—that is, lawyers. In this sense, Weinrib contrasts lawyerly explanations with explanations from other fields, such as economics, history, social science and philosophy.

Nevertheless, Weinrib does not take at face value all statements and justifications by lawyers, but rather suggests that the deep structure of lawyerly doctrine or justification may differ from its surface structure. For example, according to formalism, American lawyers are mistaken about tort law when they develop doctrines of strict product liability, thereby bringing in distributive and efficiency concerns and being untrue to the corrective justice deep structure of tort law. One way of looking at this would be to say that for Weinrib, "internal" means not what lawyers say, but rather what is presupposed by what lawyers say, or what is presupposed by what is presupposed by what lawyers say, and so on. Even this reconstruction of internality is not quite accurate to Weinrib's practice, at least if "presupposed" is given a theoretically neutral, descriptive, and explanatory interpretation, rather than a normatively charged interpretation. Weinrib's usage of "internal" is normatively charged, and not merely descriptive: he always interprets private law as embodying Kantian rationalist deontological theory (Kantian corrective justice), no matter how far black-letter doctrine diverges from that perspective, and he always interprets public law as a version of distributive justice, no matter how far doctrine diverges from that view.[105] Weinribian interpretation is not descriptively neutral.

So, for example, Weinrib insists on a *single*, integrating, coherent justification, even though lawyers describe tort law as having several purposes including deterrence, compensation, punishment, loss spreading, and others. Moreover, Weinrib insists that the single justification integrate all the aspects of tort into an intrinsic *unity*, even though lawyers speak of weighing and balancing multiple factors.[106] Most probably, Weinribian interpretation is either normative in the Dworkinian sense, and

trivial. Weinribian internal relations have been thoroughly critiqued in Richard Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 631-39 (1992). Consequently, I will assess monism and the normative value of only the immanent aspect of internality.

105. *See* Weinrib, *supra* note 4, at 988-92.

106. *See id.* at 969.

attempts the best combination of fit and normative appeal while (like Dworkin) giving overwhelming weight to normative appeal,[107] or else he is not really interpreting at all, but merely asserting pure natural-law dogma—in particular, Kantian rationalism.[108]

This brings us to Weinrib's second use of "internal," as deontological and noninstrumental.[109] This usage itself involves a widening from Weinrib's early usage of "instrumental" as including consequentialist, utilitarian, and law and economics theories to all nonformalist, externalist, or nonrationalist theories in his recent writings.[110] That is, he has extended that characterization to nearly everyone except himself.[111]

Weinrib argues that internal explanations are preferable to external explanations through a form of regress argument detailed below. Weinrib discusses this issue as a matter of intelligibility, understanding, and *explanation*, but it would appear that similar issues arise if we consider internal and external *justifications*. Indeed, given the normative nature of law, justification may be the more germane notion.

In any event, Weinrib argues that each explanation is either internal or external. Suppose an explanation is external—that is, it is applied in terms of some other area of understanding, knowledge, or theory that we will call "A." Either A can itself be understood internally, or else it must be understood externally.[112] If A is not intelligible in terms of itself—that is, internally—then it must be intelligible externally in terms of something else called "B." But unless B is intelligible in terms of itself, it can only be intelligible externally in terms of something else called " C." Thus explanation will continue in an infinite regression unless we finally arrive at something, called " W," which is intelligible in terms of itself. Weinrib therefore

107. *See* DWORKIN, *supra* note 17, at 45-86; *see also* Kress, *supra* note 44, at 838-42, 845-46.

108. *See, e.g.*, Weinrib, *supra* note 4, at 969, 974.

109. For a similar use of terms, *see* Perry, *supra* note 10, at 620-25. At one point, Weinrib argues that noninstrumentality is a consequence of immanent intelligibility. *See* Weinrib, *supra* note 4, at 964-65.

110. *See* Wright, *supra* note 104, at 631-34 & nn.22-33.

111. Peter Benson would also be classified as noninstrumental under this definition, but I do not know of any other modern writers who would be so classified. *See generally* Benson, *supra* note 10; Peter Benson, *Abstract Right and the Possibility of a Non-Distributive Concept of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989); Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559 (1987).

112. Note the implied assumption that everything must be intelligibly justified.

concludes that intelligibility in terms of itself (or "immanent intelligibility"), is not just "one form of intelligibility among others," but is instead inherently superior to all other forms of intelligibility.[113]

Weinrib's conclusion is a non sequitur. Even if it is true that every explanatory chain must end either in an explanation not itself further explained or in a subject matter intelligible in and of itself, it does not follow that internal explanations (and justifications) are necessarily superior to external ones. Suppose that A is explained internally in terms of itself and is also explained externally in terms of B, which is explained externally in terms of C, which is explained internally in terms of itself. First, notice that Weinrib has provided us no reason to believe that the internal explanation in terms of A is superior to the explanation or justification in terms of B and then C, which contains both external steps to B and C and then an internal explanation in terms of C. Second, Weinrib does not demonstrate that an internal explanation in terms of A is in fact superior to an external explanation in terms of B, which is not further explained either in terms of C or in terms of itself. Third, there is the possibility of an explanatory or justificatory circle in which A is explained in terms of B, which is explained in terms of C, which is explained in terms of D, which is explained in terms of A. An example of such a chain may be found in Quine's circular definitions of analyticity, necessity, synonymy, and possibility.[114]

A more complicated structure of mutual justification and explanation resembling a spider's web or double geodesic dome may be said to exist in modern—not formalist—coherence theories. Such theories also have a non-linear structure and are thus not subject to the regress argument, even if it were valid. Therefore, Weinrib has given us no reason to think that internal explanations are superior to holistic explanations advanced by modern coherence theorists.

For example, a theorist with a coherence theory of justification who holds a Putnamian version of the theory of direct ref-

113. *See* Weinrib, *supra* note 4, at 963, 965.

114. *See* QUINE, *Two Dogmas*, *supra* note 38, at 20-37 (arguing—unsuccessfully, in the author's view—that definability only in terms of the limited circle of words is evidence against the meaningfulness of the notions of analyticity and necessity).

erence,[115] such as Michael Moore, will think that evidentiary relations are an aspect of meaning.[116] In this view, the many mutually supporting propositions in one's field of justified beliefs about a subject matter are each part of the meaning and thus the intelligibility and explanation of the others (although, of course, some play a greater role than others).

One should not think that a coherence theory such as Moore's is simply a global version, applying to all of law, of formalism's claim that each aspect of an area of law is intelligible only in terms of all other aspects.[117] First, Moore holds a coherence theory of justification, not a coherence theory of truth. As a direct reference theorist and a moral and philosophical realist, he holds a correspondence theory of truth. Second, the concepts or propositions within Moore's theory constitute a conventional, not intrinsic ordering, in Weinrib's sense. The vast bulk of the relationships that exist among the concepts are normative and theoretical, not conceptual.

Thus, Weinrib's theory provides no reason to think that internal explanations are always or even usually superior to external explanations. This same conclusion follows *mutatis mutandis* for internal *justifications*. Thus, even if formalist coherence is conceptually connected to or coextensive with immanent intelligibility, immanent intelligibility does not provide substantial support for the normative value of formalist coherence. One wonders why Weinrib does not directly confront his apparent opponents. They include at least foundationalist externalists, who believe that justifications end in intrinsic values, and coherence theorists, who think that justification proceeds

115. *See generally* HILARY PUTNAM, *The Meaning of "Meaning," in* MIND, LANGUAGE, AND REALITY 215 (1975).

116. *See* Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1122, 1128-30; Michael Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981). Other coherence theorists of justification will similarly maintain that there is no sharp distinction between meanings and beliefs, language and theory.

117. This raises the interesting question of how formalism individuates subject matters, that is, breaks law up into different doctrinal areas. Weinrib claims formalism divides law into the largest coherent subject matters: "Coherence is inherently expansive . . . ." Weinrib, *supra* note 4, at 976. Weinrib himself appears to create such distinctions, marking a boundary between private law (corrective justice) and public law (distributive justice). If so, then he must hold that the use of workers' compensation for accidents occurring within the scope of employment, but tort law for accidents occurring outside the scope of employment, is incoherent because it is a mix of distributive justice and corrective justice.

in terms of a mutually supporting (and explaining) circle of values.

2. *The Formalist Claim of the Normative Arbitrariness of Truncated Justifications*

Weinrib does argue directly that only legal forms that exhibit formalist coherence truly justify. Any justification or legal structure that lacks the "ambitious" form of coherence sought by legal formalism cannot justify, but rather must be "normatively arbitrary."[118] Once again, it should be noted that Weinrib's usage of "justify" and of "normatively arbitrary" do not correspond to normal linguistic practices. Instead, his usage of "justify" is extraordinarily stringent, and his usage of "normatively arbitrary" unusually expansive.

Weinrib illustrates his claim that only coherent legal justifications truly have normative force with reference to the principle of loss spreading and its application to tort law.[119] Loss spreading is incoherent as a justification of tort law because the rationales underlying loss spreading (income redistribution, diminishing marginal utility of money) justify compensation in a much broader range of cases than the area in which tort law provides compensation. Tort law's bipolar procedure requires the occasion of an accident (and, moreover, a tortiously caused accident) as the stimulus for compensation. In contrast, loss spreading would justify compensation not only in non-tortiously caused accidents, but whenever there is a significant loss, including illnesses, natural disasters, and other losses. Thus, the bipolar procedural aspects of tort law, whereby plaintiff sues defendant for an allegedly tortiously caused harm, do not cohere with the justification underlying loss spreading. Thus, the formalist's integrationist requirement that all of the aspects fit coherently together (the requirement of intrinsic ordering) is violated by a loss-spreading justification of tort law in combination with tort's bipolar adjudicative procedure.

Tort law's bipolar procedure, according to Weinrib, truncates the scope of the normative principle underlying loss spreading and prevents it from applying to its full scope. It restricts the justification of loss spreading to tortiously caused

118. *See id.* at 970-71.
119. *Id.*

losses, instead of allowing it to apply to all losses. It is therefore normatively arbitrary and undercuts whatever normative force loss spreading might otherwise have.[120]

Formalism does not deny that loss spreading can have normative force in appropriate contexts—namely, where its underlying justification has not been truncated, but rather has been allowed to fill its full space. For example, as part of a compensation scheme, the loss-spreading rationale can coherently combine with institutional features appropriate to such a structure, namely, an administrative distributional mechanism.[121]

The alleged traditional tort law goals of compensation and deterrence provide another example of the formalist's claim of a total depletion of the normative force of theories and justifications that violate formalist coherence. An instrumentalist theory that justifies tort law as the attempt to achieve deterrence and compensation is a conventional ordering, not an intrinsic ordering, since each goal is intelligible independently of the other. As a consequence of this independence, the goals conflict because the amount of liability necessary to provide the appropriate deterrence to potential defendants may well differ from the amount of damages necessary to compensate potential plaintiffs.[122] As with loss spreading, neither goal is coherently linked with the procedural and substantive requirements of tort law. First, specific deterrence is exacted only from those who have actually caused injury, thus ignoring unreasonable risk creators (and other tortious actors) whose actions fortuitously do not cause harm. The scope of the justification underlying deterrence is artificially limited to those who tortiously cause harm, rather than being allowed to apply to all who create unreasonable risks. Second, compensation is permitted only to those plaintiffs whose injurers should have been, but were not, deterred by the law, even though the need for compensation is independent of the unreasonableness of the defendant's behavior. The scope of compensation is limited, as we just saw, to tortiously caused losses, rather than being allowed to apply to all losses. Weinrib concludes that "[t]ort damages tie compensation to deterrence in a way that frus-

120. *See id.*
121. *See id.* at 973.
122. *See id.*

trates the achievement of either."[123]

Thus, formalism holds that treating damages in tort as a consequence of two justifications not intrinsically related undercuts the normative force of each justification. Compensation and deterrence limit each other, thereby preventing each from filling "its appropriate space."[124] This is normatively arbitrary, thereby preventing either justification from having *any* of its ordinary (that is, in appropriate contexts) normative force.[125]

This example illustrates the breakdown of formalist coherence in two separate respects. First, the internal architecture of an intrinsic ordering required by formalist coherence is absent in several ways. According to the formalist, criminal regulation, not tort law, is the mode of ordering appropriate to deterrence as a justification. Thus, deterrence is linked to the bipolar adjudicative procedure of tort law only conventionally, and not as an intrinsic ordering. Additionally, an administrative compensation scheme, not the bipolar structure of tort law, is the appropriate mode of legal ordering to achieve compensation.[126] Compensation, like deterrence, is linked to tort law's procedure conventionally and not intrinsically.

Second, this example also illustrates violation of the principle of monism, which constitutes another aspect of formalist coherence. The existence of two justifications, deterrence and compensation, which are not integrated together by an overarching justification, constitutes a pluralism (or at least dualism) that is unacceptable to the formalist.

Formalist coherence may be violated in two principal respects that correspond to the two major requirements of formalist coherence: monism and intrinsic ordering. First, a justification might be pluralistic; next, it could manifest a conventional ordering. *What is critical to note, however, is that the gravamen of Weinrib's complaint, either when monism is violated or when there is a conventional and not intrinsic ordering, is that an underlying justification has been limited or truncated and not allowed to "expand completely into the space that it naturally fills."*[127] This is obvious

123. Weinrib, *supra* note 66, at 502.

124. *Id.*

125. *See* Weinrib, *supra* note 4, at 971.

126. Other respects could be enumerated, but these will suffice for present purposes.

127. Weinrib, *supra* note 4, at 971. Why is its "natural" space the space it fills when unopposed by any other justification? Why not the space it fills when working together

when the justification or theory is pluralistic, since if the justifications are truly different, they must recommend opposing outcomes in at least some concrete circumstances, so that at least one of them will not be permitted what would be its full scope if no other justification were in play.[128] What might be less obvious is that the same charge applies to conventional orderings, because in essence Weinrib's complaint is that the various elements or aspects of the justification or theory are themselves justified by different and incompatible underlying principles or justifications, which must conflict in at least some concrete situations.

D. *Monism and Formalism*

In sum, the truth of formalism depends upon (among other things) monism in normative theory, or at least in law. Monism is necessary but not sufficient for the truth of formalism.

I will not tackle the problem of monism in its entirety here, but a few remarks may be ventured. First, in the modern world, the burden of persuasion lies with Weinrib. Yet, he has done little to support his monism. He has claimed that pluralism is unintelligible. As we have seen, that claim involves an extraordinarily restricted usage of "intelligible" that is inconsistent with our linguistic practices.[129] Moreover, he has not given us any reason to revise our current usage. He has claimed that only immanent, internal explanations are coherent and that such explanations are superior to external explanations. Part of their alleged superiority consists in their monism. However, we have seen no reason to accept this formalist claim, and good reason to reject it.[130]

Finally, Weinrib claims that a justification that is limited, or that competes with other justifications, loses all of its normative force because it is normatively arbitrary for it not to be permitted to expand fully to fill its space.[131] This is an unsupported metaphor. In part, Weinrib's metaphor gains rhetorical force

with, or in opposition to, justification(s) *xyz*? Weinrib's use of "natural" begs the crucial issue of whether pluralism is coherent and normatively intelligible.

128. If the technique of, or explicit metaprinciples of, scope restrict multiple justifications to mutually exclusive spheres (except where they agree), conflict and incoherence need not arise.

129. *See infra* text accompanying note 103.

130. *See infra* text accompanying notes 22-24. 111-18.

131. *See* Weinrib, *supra* note 28, at 586; Weinrib, *supra* note 4, at 971.

by the way Weinrib describes pluralistic theories, such as the theory that tort law is justified by compensation and deterrence. If instead of stating that tort law is justified by the twin goals of compensation and deterrence, he asserted that tort law was justified by the attempt to achieve the best combination of compensation and deterrence, the pluralism would cease to appear conceptually and normatively incoherent and instead seem theoretically and practically workable. Alternatively, one might think of multiple principles as ingredients in a complex recipe, which complement each other and do not conflict. I should hasten to add that I am not asserting that compensation and deterrence are indeed the goals or justifications of tort law. I only mean to assert that under these metaphors one could understand, and not think it conceptually and normatively impossible, when one of the goals dominates in a particular concrete context.[132] Similarly, it is not conceptually or normatively impossible for the correct outcome to be the "sum" or "resultant" of the applicable principles.

Of course, barring a meta-principle for adjudicating potential conflicts between deterrence and compensation (or any competing principles), there will be some uncertainty and perhaps even some metaphysical indeterminacy about the outcomes in concrete cases.[133] It does not follow from the mere existence of such indeterminacy or uncertainty (if they exist) that such a theory is normatively inferior to a monistic theory. First, the outcome may well be clear in the vast bulk of situations, leaving uncertainty or indeterminacy in a manageable minority of cases. Second, as we noted earlier and as Weinrib acknowledges,[134] monism is no guarantee of complete determinacy or of complete certainty and predictability.

More important than the possibility of uncertainty and conflict among principles in a modest proportion of cases are the outcomes the theory produces, the justifications it provides, and the means by which it proceeds in the overwhelming bulk of the cases.[135] We should prefer a theory that does well over-

132. With respect to the issue of damages discussed by Weinrib, compensation of course wins out in nearly all contexts except those involving punitive damages, so this is not a good example of the point on this particular issue.

133. *See* Kress, *supra* note 55, for a more detailed discussion of this issue.

134. *See supra* text accompanying notes 60-61; Weinrib, *supra* note 4, at 1008-12.

135. *See* Kress, *supra* note 55, at 297 n.46; Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U. L. Rev. 134, 141 (1990).

all, even if it creates a few difficult conflicts which we must resolve as best we can, to a theory that easily decides every case, but results in undesirable outcomes in the vast majority of situations. Thus, a coherent, intelligible, monistic theory, even if easily applicable, is not necessarily preferable to a pluralistic theory.

Weinrib misstates the phenomenology and epistemology of pluralistic decision- making. Pluralism is not normatively arbitrary, even if some reasons or justifications are not permitted to extend to their full scope. To be normatively arbitrary would be to act with no reason or justification, or in an unprincipled manner. Pluralism, far from inducing action without reasons, may well suffer from a surfeit of reasons.

Note, by the way, that simply by reconceiving of justifications as *reasons*, pluralism becomes more plausible. We often think of ourselves as considering a number of competing reasons for action, and we do not think when one wins out that the other has lost its normative or practical force. Bernard Williams has noted perceptively that in cases of severe moral conflict, a person may reasonably feel regret about the alternative not taken even while thinking she did the right thing.[136] So, for example, a mother who is forced to choose which of her children shall be taken to a concentration camp to die may feel she has made the right choice when she chooses the child with a disabling or fatal illness, rather than the healthy child. Nonetheless, she will have something to regret and indeed is likely to agonize over it for the rest of her life.[137] This suggests that even a reason that has been outweighed (the ill child's right to life), let alone one that has been compromised, continues to have force even when it does not fully "fill its [justificatory] space."[138]

Similarly, when a judge or jury weighs a community's right to security, retribution and deterrence against mercy and a convicted murderer's claim of innocence or repentance and decides either to impose or not impose a death sentence, it may well have something to regret even when it makes the right decision. Moreover, almost every appellate case analytically interesting enough to be included in casebooks will display losing

136. *See, e.g.*, B.A.O. Williams, *Ethical Consistency*, 39 PROC. ARIST. SOC'Y Supp. 103 (1965).

137. *Cf.* WILLIAM STYRON, SOPHIE'S CHOICE (1979).

138. Weinrib, *supra* note 66, at 502.

justifications that continue to have force even when they do not fully "fill[their justificatory] space."[139]

There may be excellent pragmatic reasons for not allowing a justification to expand to its full space. Consider workers' compensation, for example. It may be that we would prefer a compensation scheme for all accidents and illnesses, but we do not have the legislative votes to enact it. We do have enough, however, to enact workers' compensation. We may choose this path, leaving the rest of accident law subject to ordinary tort principles even though we acknowledge that we have reduced coherence in tort law. Next, consider medical malpractice in the field of obstetrics. We may find as an empirical matter that doctors, particularly in rural areas, are leaving obstetrics because of perceived or actual high malpractice insurance and risks.[140] As a result, we think it substantively preferable to enact a compensation scheme in the obstetrics area while leaving the rest of medical malpractice subject to ordinary tort principles. We prefer some incoherence to having pregnant women in rural areas unable to obtain local medical care. Finally, consider no-fault insurance plans. We would like a compensation scheme for all injured and ill persons, but given our limited tax funds and other needs, we cannot afford a universal one. Instead, we create one only in the area of automobile accidents. These decisions compromise coherence in the law in return for substantive or pragmatic virtues. These perfectly reasonable choices do not seem to be available to the formalist, who must satisfy requirements of formalist coherence before considering substance and who must give an integrated justification for the law in any area, including a justification which integrates neighboring areas. Moreover, these suggestions, insofar as they involve distributive schemes, may be prohibited to the formalist by the formalist's Kantian rationalism, as Steven Perry has urged in this symposium.[141]

Weinrib's formalism asserts that form is prior to substance.[142] The most important aspect of form is formalist coherence. Prior to considering a legal doctrine's substantive

139. *See id.*

140. *See generally* INSTITUTE OF MEDICINE, COMMISSION TO STUDY MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE (1989).

141. *See* Perry, *supra* note 10, at 607-08.

142. *See* Weinrib, *supra* note 4, at 951.

virtues, formalism maintains that we must consider its formal virtues, especially its possession of formalist coherence. Indeed, formalism prohibits us from considering any theory that lacks formalist coherence because it improperly combines considerations of corrective and distributive justice, for example, or otherwise embodies pluralism. Ironically, although it abjures lexical orderings, formalism imposes one: first a doctrine must be formally coherent, and only after that has been achieved may we consider its substantive virtues. The formalist might retort that form is substance. Consequently, there might be no reason to consider other substantive virtues once the requirements of form are satisfied. This argument failed Kant, and it is no more successful for the formalist. Moreover, even if it were successful for the formalist, it only would apply to corrective justice, where politics is not necessary to determine substance, and not to distributive justice, where politics, in addition to form, is necessary to determine substance.[143]

Because Weinrib admits that no positive law has ever achieved complete formalist coherence,[144] he cannot permit himself the luxury of a lexical ordering in which the first requirement is complete coherence. At most, he could set some high threshold of coherence and make that lexically prior to substantive considerations. But once one has dropped down from complete coherence to a high threshold of coherence, one appears to be on a slippery slope. What is the justification for an absolute lexical ordering, rather than, as in the example two paragraphs ago, a willingness to trade off some coherence for additional pragmatic or substantive virtues?

Liberal pluralists aim to build coherent institutions from a diversity of values in such a way that the resulting coherent justificatory framework reflects in some intelligible way each of the diverse values from which it was produced, even if some or all of those values do not ultimately survive in the final product. No one thinks this is an easy task, and we certainly cannot be assured of succeeding. Nonetheless, it is a noble and worthy enterprise. By contrast, formalism appears to truncate all but one of the diverse values from the start, and never engages in the difficult but noble attempt to produce coherence from diversity. As Bertrand Russell once said, "[This has all] the ad-

143. Ken Kress, *Formalism, Corrective Justice and Tort Law*, 77 IOWA L. REV. i, i-ii (1992).
144. *See id.* at 966 n.42.

vantages of theft over honest toil."[145]

Several examples of such diversity or pluralism resulting in a principled, coherent final outcome appear in Dworkin's *Law's Empire*; I will describe two. When one group in society favors abortion on demand, while another opposes it even in the case of rape, a statute, permitting abortion only when rape has caused the pregnancy can be seen as "giv[ing] effect to two principles, ordered in a certain way . . . ."[146] By contrast, Dworkin urges that permitting only women born in a particular decade in each century abortions would be arbitrary, unprincipled, and incoherent.[147]

A second example concerns the opposition between proponents and opponents of the death penalty. A compromise reduces the list of crimes punishable by death, providing that those receiving the penalty are more morally culpable than those not receiving it. This is preferable to a system where convicts pick straws, or which is otherwise arbitrary.[148]

The values which impinge on each of us are multiple and often conflicting: general moral and political rights, specific undertakings (parent, doctor, co-adventurer), associational obligations, utility, sensations, perfectionist ends, life, health, spirit, art, love, friendship, work, play, personal commitments, and more. In some way, law must reflect these varying values, by permitting, prohibiting, commanding, or regulating their pursuit. Weinrib's formalism must demonstrate that its monistic, integrationist coherence theory best accommodates these values within legal theory. To date, Weinrib has avoided this task, preferring truncation of most of these values to explanation and justification. We need a more direct and plausible argument why truncation of so many values is preferable to their maintenance and coordination or, if not, about how formalism can better integrate and justify multiple values than its competitors.

In Part I of this article, I argue, first, that complete formalist coherence is not necessary for moral legitimacy. Second, implicitly assuming that form does not fully or even substantially

145. BERTRAND RUSSELL, AN INTRODUCTION TO MATHEMATICAL PHILOSOPHY 71 (1919).

146. DWORKIN, *supra* note 17, at 183.

147. *Id.*

148. *Id.* at 436 n.8; *see also id.* at 436 n.7.

determine substance—contrary to formalist doctrine—I argue that even if formalism were supplemented by substantive doctrine, it would still be the case that a doctrine's or theory's manifesting complete formalist coherence would not be sufficient for ultimate substantive desirability. Finally, anticipating a fuller discussion in Part II, I argue briefly in Part I that there are strong substantive and pragmatic reasons not to accept Weinrib's strict formalist coherence requirement, while noting that Weinrib also provides no sound normative argument in favor of it.

Part II examines twelve potential subconcepts, requirements, or aspects of coherence in normative theory, finding all partially constitutive of some conception of coherence. Coherence is then analyzed in terms of these aspects with a broad and inclusive definition, acknowledging multiple conceptions of coherence. This framework is then applied to Weinrib, disclosing that he maintains a strict view of both internal relations, in two senses, and monism. Part II then discusses Weinrib's claims that internal explanations (and justifications) are preferable to external explanations, and then his claim that only monistic theories can truly justify. Both claims are found to be insufficiently supported.

In arguing against the normative value of formalist coherence, I am not denying the normativity of corrective justice or distributive justice. I acknowledge their normative force. I am only denying that formalist coherence, in and of itself, has significant normative value. The formalist may object on the grounds that the only possible forms of justice are corrective and distributive justice.[149] That is, they are the only possible *coherent* forms of justice. I admit that they are possible justificatory schemes, but deny that they are the only possible ones. First, they may exist in combination, not merely singly, and justifiably so. Second, there are forms of justice arguably distinct from either, for example, commutative justice, retributive justice,[150] or utilitarian justice. Finally, I am not *here* objecting to Weinrib's Kantian rationalism, nor his deontological stance. I applaud them. But I would prefer to see Weinrib apply them to tort law after he has jettisoned his formalist dogma.

149. *But see* Perry, *supra* note 10, at 612.

150. Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 Iowa L. Rev. 713 (1992).