

COMMENTS ON "COHERENCE THEORY IN THE PHILOSOPHY OF LAW"

by William A. Edmundson

We are all coherentists now, just as surely as we were all Keynesians once upon a time. Legal theorists of diverse types have latched onto the idea of coherence as an indispensable element in their otherwise quite divergent theories of law. Ronald Dworkin is widely understood to have given coherence a central place in his theory of adjudication.¹ Ernest Weinrib has revived a legal formalism that features a very strong coherence requirement.² Jack Balkin would reformulate legal coherence in terms of the coherence of the legal subject, the self.³ Even Michael Moore, who would have judges descry real moral kinds, invokes coherence as a constraint upon raw moral intuition.⁴

Many theorists writing now seem to envisage a grander role for coherence than the sensible, local, and pragmatic one Professor Hill has described. The grand coherence vogue should puzzle us. I propose to take a look beyond legal theory, much as Professor Hill has done, to get an idea of where the notion of coherence has come from, and where it has been, before it got into jurisprudential discussions. Then I propose to look at legal theory itself, to identify the felt necessities that have driven so many to grasp the coherence lifeline.

Philosophical coherence theories come in two importantly different flavors-- an epistemological one and a metaphysical one. Metaphysical coherentism is the view that for some specified range of statements, the truth of those statements consists not in their correspondence with anything, but their coherence with one another. Epistemological coherentism focusses not on truth, but on justification or warrant in holding something to be true. It is the view that for some range of statements, one is justified in believing a statement within that range just in case that statement coheres with some other set of statements that one already believes. It is helpful to keep these two distinct flavors of coherence theory separate --not swirled.

Epistemological coherentism is a reaction to foundationalism, the idea that some beliefs are self-justifying or not in need of justification.⁵ The counterpart to foundationalism in legal theory, if there were one, would perhaps be the position that some legal assertions are justified simply because they are authoritative, as "commands of the sovereign" or what have you. But no one seriously doubts that some legal propositions are authoritative and to that extent privileged.

Take, for example, the clause of the first amendment that

states that "Congress shall make no law abridging the freedom of speech." It is perhaps conceivable that we are all mistaken and that this clause is not in fact a proposition belonging to the law of the United States. But this possibility is not one which legal theory need trouble itself about. Its trouble begins only when we move on to other matters, such as interpreting the free speech clause. Does it apply to nude dancing? To fighting words? How can or should judges decide? No one, at least since Justice Black, has seriously argued that the "plain meaning" of the words of the free speech clause settles these questions.⁶ Therefore the domain of legal theory contains no real and viable counterpart to the naive empiricism or sense-datum theory that Neurath and Quine attacked.⁷ And yet, despite the absence of any parallel motivation, legal theory is awash in coherentism.

Metaphysical coherentism is motivated by dissatisfaction with the alternative correspondence theory of truth, just as epistemic coherentism is motivated by dissatisfaction with its foundationalist alternatives. More specifically, metaphysical coherentism is born of dissatisfaction both with the "out there" that true propositions are supposed to mirror, according to the correspondence theory, and with the mirroring idea itself.

But, whatever the defects of correspondence theory, the

coherentist alternative does not get far before disintegrating under the centrifugal forces of its own relativism. If to be true is simply to be a member of the biggest possible consistent set of propositions, then every proposition and its denial is true, as can be seen from the fact that the set of all independent atomic propositions and the set of all denials of all independent atomic proposition are alike in: 1) being self-consistent, and 2) being as big as they can be without becoming inconsistent. The only way out of this absurdity is to embrace another, namely, to relativize truth. Despite the fact that the philosophical coherence theory of truth goes nowhere fast, legal theory right now seems often to toy with the view that to be a true proposition of law is simply to be a member of the biggest possible, best-connected, self-consistent set of legal propositions.

Looked at from an uncharitable, outsider perspective, legal coherentism has basically to be either of the epistemological type or of the truth-theoretic, metaphysical type. If it is of the metaphysical type, it looks as hopeless as its general philosophical counterpart. Moreover, as Joseph Raz has pointed out, it has the undesirable result that it unmoors law from practice, for so long as a proposition of the form "it is the law that p" coheres with some basic set of legal authorities, it is

true, no matter whether p has been accepted by or even thought of by anyone.⁸ Tinkering to avoid this result is possible but unpromising.

If, on the other hand, legal coherentism is of the epistemological type, then, to the extent that it reflects an effort to bring legal theory into line with sophisticated trends in philosophy, it appears vacuous and even silly, for there is no foundationalist foil within jurisprudence to give the doctrine its point. Bluntly, however you look at it, the grand coherentist vogue in legal theory is either silly or pointless, and probably both.

Should we stop trying to be coherent, then? No. "Coherence" in the sense of intelligibility, in the sense of simple logical consistency, is an undoubted virtue practically everywhere (pace those who misunderstand Emerson). The idea of coherence that Professor Hill has outlined fits the reasonably modest ambition that the "black-letter" law and the law in action not drift too far apart. This will sometimes involve giving a gloss to legal texts that departs from lay understanding and plain meaning, but comes closer to fulfilling other interpretive desiderata. But there is an important difference between glossing a text and treating it as possibly unreal. The

coherentist method Professor Hill describes is not "antifoundationalist" in any interesting sense, for it unsettles interpretations, not authoritative sources.

To understand how the coherence boom in jurisprudence got its start we have to go back to Ronald Dworkin's "frontal assault" on positivism. Dworkin saw that Hart's positivism represented law as "gappy" and judges as discretionary gap-fillers. But, on Dworkin's view, discretionary gap-filling is a legislative function that judges cannot legitimately perform. Judges have to do something else, then, and law has to be something else for them to be able to do it. Crudely put, Dworkin's idea of coherence transformed the law into a kind of polyurethane foam, flowing and seeking out the gaps and expanding into them to shut them up.

Unfortunately, once the foam gets going it becomes very difficult to contain. Used sparingly, as Professor Hill suggests, coherence can be useful idea. But, as Joseph Raz and Barbara Levenbrook have argued, we should give up on the idea that coherence is some sort of grand, systemic virtue or that it possesses much independent explanatory power.⁹ The legitimacy problem that got Dworkin going against Hart will have to be treated in some other way. That way, I suggest, will involve

uprooting the assumption, implicit in Dworkin's criticism of Hart, that adjudication is legitimated only to the extent that it is an application of pre-existing legal rights and duties. This is the way toward a contextualized conception of adjudicative legitimacy, as Steven Burton has proposed.¹⁰ Whether contextual legitimacy will encounter insuperable difficulties of its own has yet to be seen. What is clear enough is that such difficulties can hardly prove greater than the ones which coherence in the grand style falls prey to.¹¹

[Delivered at a meeting of the Central Division of the American Philosophical Association, Kansas City, Missouri, May 6, 1994, in response to a paper by Hamner Hill. ©1994 William A. Edmundson]

ENDNOTES

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1. See R. Dworkin, Taking Rights Seriously 159-68 (1977); R. Dworkin, Law's Empire 19-20, 45-113, 176-275 (1986); Kress, "The Interpretive Turn," 97 *Ethics* 834 (1987); Kress, "Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Ordering of Decisions," 72 *Cal. L. Rev.* 369 (1984); S. Hurley, Natural Reasons 262-63 (1989). But cf. Raz, "The Relevance of Coherence," 72 *B.U. L. Rev.* 273, 315-21 (1992); Kress, "Coherence and Formalism," 16 *Harv. J. L. & Pub. Pol'y* 639, 652-53 & nn. 44-45 (1993).
2. See Weinrib, "Legal Formalism: On the Immanent Rationality of Law," 97 *Yale L.J.* 949 (1988). For critical discussion of Weinrib's view, see Kress, "Coherence and Formalism," supra note 1; Stick, "Formalism as the Method of Maximally Coherent Classification," 77 *Iowa L. Rev.* 773 (1992).
3. See Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence," 103 *Yale L.J.* 105 (1993).
4. See Moore, "Moral Reality," 1982 *Wis. L. Rev.* 1061, 1136.
5. See, e.g., Bonjour, "Can Empirical Knowledge Have a Foundation?," 15 *Am. Phil. Q.* 1 (1978).
6. See Black, "The Bill of Rights," 35 *N.Y.U. L. Rev.* 865 (1960).
7. See W.V.O. Quine, "Two Dogmas of Empiricism," in From a Logical Point of View 20 (2d ed. 1963); Neurath, "Protocol Sentences," (Schick, trans.) in Logical Positivism 199 (A.J. Ayer ed., 1959).
8. See Raz, supra note 1, at 285.
9. See Raz, supra note 1; Levenbrook, "The Role of Coherence in Legal Reasoning," 3 *Law & Phil.* 355 (1984).
10. See S. Burton, An Introduction to Law and Legal Reasoning 165-85; see also Kress, "Legal Indeterminacy," 77 *Cal. L. Rev.* 283, 285-95 (1989); Edmundson, "Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies," 24 *Seton Hall L. Rev.* 557, 593-602 (1993).

11. Efforts to work out a servicably legal conception of coherence can be found in Sartorius, "Social Policy and Judicial Legislation," 8 Am. Phil. Q. 151 (1971) and Hoffmaster, "A Holistic Approach to Judicial Justification," 15 Erkenntnis 159 (1980).