1-1-1996

The Antinomy of Coherence and Determinacy

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"We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion."

—Lord Raymond, in *Reynolds v. Clark*[1]

I. INTRODUCTION

Two appealing ideas about law turn out to be in conflict. The first idea is that the law is or should be *coherent*, in some sense. That is, the law should or does make sense as a whole, hang together, or fit together in some way. The second idea is that the law is or should be *determinate;* that is, what the law demands is or should be fixed and unambiguous, and in that sense objective and independent of what courts or other legal interpreters make of it.

I will assume that both of these ideas are appealing both in the sense of actually possessing an appeal to many people and in the sense of meriting the appeal they have. I will argue that there is a tension between these two ideas that means that their respective appeals are bound to pull us in conflicting directions.

The conflict is not immediately apparent, nor is it a conceptual necessity. In part, it is the product of a contingent truth about the law that the Legal Realists first noted: to the extent that we wish our law to be determinate, we must be prepared to insist that the body of legal doctrine be structured, which is to say that it contain distinct internal territories, typically defined by explicit boundaries such as those between contract and tort, or between state action and private agreement—although the greater number of examples will divide much smaller territories, for example, economic strike versus unfair-labor-practices strike. I will call this the Partitioning Thesis.

Lacking such partitions, too many legal norms will become relevant in deciding a case, with the result that the decisionmaker will be called upon to consider and choose between conflicting norms without sufficient guidance or—what comes to the same thing—with a superabundance of

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1. 1 Strange 634, 635 (1725).

it.[2] This will in turn detract from the ordinary citizen's ability to know ex ante what the law demands of her.

The idea of coherence is the other contributor to the conflict. Coherence is widely understood to mean, in Ken Kress's words, a relation among propositions that is "more strict than logical consistency, yet less strict than logical entailment."[3] Were coherence nothing more than consistency, an antinomy[4] between coherence and determinacy would not exist. Whenever two inconsistent decisions remain unreconciled, there is a greater degree of indeterminacy than would otherwise obtain; and, by a process of mopping up inconsistencies in the law, one could enhance determinacy. Likewise, to the extent that the law loses determinacy—as a result of poor judicial craftsmanship or legislative hyperactivity, for example—the likelihood of outright inconsistencies popping up is increased. Consistency and determinacy could increase together without limit; law could, in that sense, "work itself pure." But coherence is not mere consistency—it is "consistency *plus*," and the "plus" creates the difficulty I want to discuss.

The key part of the "plus" component of coherence is captured by a principle stated by Laurence Bonjour, which I will call the Anti-Partitioning Principle:

> The coherence of a system of beliefs is diminished to the extent to which it is divided into subsystems of beliefs which are relatively unconnected to each other by inferential connections.[5]

Seeking coherence is, in part, a process of deciding between mutually incompatible theories on the basis of their relative degrees of coherence. Where legal theories T and T' differ only in that T contains rule or principle P and T' contains P', which in turn differ only in that P is "more connected" to other members of T than P' is to other members of T', valuing coherence demands that we accord

> great importance . . . to the degree of systematic connectedness involved; we will be more reluctant to give up a rule or principle which has many connections with other rules and principles we wish to hold on to than we will to abandon or modify one which stands in virtual independence of other rules and principles.[6]

To the extent that we prefer P to P', we will prefer T to T', according to the Anti-Partitioning Principle, and a court will be better justified in

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2. *See* Ken Kress, *Coherence and Formalism*, 16 Harv. J.L. & Pub. Pol'y 639, 678 (1993) [hereinafter Kress, *Coherence and Formalism*]. *See generally* Ken Kress, *Coherence*, *in* A Companion to Philosophy of Law and Legal Theory 533 (D. Patterson ed., 1996).

3. Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369, 370 (1984).

4. I am using the term "antinomy" to mean a conflict between otherwise well-founded principles. This is a looser sense of the word than Quine's, *see* W.V. Quine, The Ways of Paradox 5-6 (1966), and perhaps even Kant's, *see* I. Kant, Critique of Pure Reason 384-484 (N. Kemp Smith ed., 1929).

5. Laurence Bonjour, The Structure of Empirical Knowledge 98 (1985).

6. Rolf Sartorius, *The Justification of the Judicial Decision*, 78 Ethics 184 (1968).

grounding a decision on T and P than on T' and P'. We might go further and say that T and P are law, and T' and P' not the law, citing coherence as our ground.

The antinomy of coherence and determinacy is simply the conflict between the Anti-Partitioning Principle, as applied to the law, and the Partitioning Thesis, as derived from the Legal Realists' studies of Anglo-American law. The significance of the antinomy is that the two appealing ideas about the law, which I mentioned at the outset, pervasively undermine each other. Although they are in a logical sense reconcilable, reflection on the example of the tort of privacy will show that the balance we strike between them will be ad hoc, leaving us with a sense that their reconciliation can never reflect more than the evanescent particularity of the case at hand. To that extent, the antinomy has a skeptical and even antitheoretic import.

Before going further, however, I will first show why the Partitioning Thesis is plausible. I will then discuss the concept of coherence, and the role that the Anti-Partitioning Principle plays in it.

II. INDETERMINACY AND THE PARTITIONING THESIS

A. Legal Realism and the "Cluster" Problem

To appreciate the force of the Partitioning Thesis, it will be helpful to recapitulate the single most powerful of the observations that led the Legal Realists to conclude, contrary to what they perceived to be the orthodoxy of their day, that law is significantly indeterminate. This thesis is outlined in the work of Karl Llewellyn,[7] John Dewey,[8] Felix Cohen,[9] and Herman Oliphant,[10] and has more recently been highlighted by Andrew Altman, who has called it the "Cluster Problem."[11]

Llewellyn wrote:

> In any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, premises legitimate and impeccable under the traditional legal techniques—are at least two, and . . . the two are mutually contradictory as applied to the case at hand. Which opens the question of what made the court select the one available premise rather than the other. And which raises the gravest of doubts as to *how far* that supposed certainty

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7. Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931).

8. John Dewey, *Logical Method and Law*, 10 Cornell L.Q. 17, 25-26 (1924).

9. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 Yale L.J. 201, 215-20 (1931).

10. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); *see also* Oliphant & Hewitt, *Introduction* to J. Rueff, From the Physical to the Social Sciences: Introduction to a Study of Economic and Ethical Theory x-xxi, xxv-xxvii (H. Green trans., 1929), *reprinted in* Jurisprudence: Understanding and Shaping Law 435 (W. Reisman & A. Schreiber eds., 1987).

11. Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 Phil. & Pub. Aff. 205, 212 (1986), *reprinted in* Philosophy of Law 179 (J. Feinberg & H. Gross eds., 6th ed. 1995).

> in decision which derives merely from the presence of accepted rules really goes.[12]

Llewellyn is making the simple point that deductive reasoning proceeds from premises and, in law, disputed cases typically involve a dispute as to which of two competing major premises should be given effect. Llewellyn speaks of premises "mutually contradictory as applied to the case at hand," and it is important to note that the clusters of premises he has in mind are not formal contradictories as, say, "Pacta sunt servanda" and "Pacta non sunt servanda" would be. The sort of cluster Llewellyn has in mind is not of the form "P and not-P" but of the more complex form "If P then R and if Q then not-R." Trouble arises only if "the case at hand" presents both P and Q and there is no metarule determining when to follow the "P" rule and when to follow the "Q."

An aggravating factor is the ambiguity of the scope of the antecedents of the competing rules. Obviously, the wider the scope of P and of Q, the greater the chance of a case exhibiting both P and Q, and hence the greater the likelihood that the "P" rule and the "Q" rule will collide. However, Hart's core/penumbra idea points to a significant check on this factor.[13] Take, as an authority, Hart's celebrated ordinance forbidding vehicles in the park and, as a dispute, a citation challenged by a skateboarder. Maybe a skateboard is not a vehicle (construing "vehicle" narrowly, rather than broadly) but certainly a passenger automobile used for personal transportation is. Similarly, an ordinary pair of sneakers is not a "vehicle," unless the term is stretched beyond all recognition. The "core" of the concept's extension (cars are vehicles, sneakers are not) appears substantial compared to the penumbra (skateboards).

The contours of core and penumbra can be influenced by subsequent decisions. If the decision goes against the skateboarder (wrongly, we might think), what now of the rollerskaters? Their case, which formerly might have been considered part of the core, has become penumbral. Joggers should nonetheless continue jogging in the security of knowing that running shoes are core cases of non-vehicles. Moreover, all may be sure that there is no latent conflict between the "No Vehicles" rule and a "No Bare Feet in the Park" ordinance. No "cluster problem" looms here because no subsequent series of decisions can count ordinary footwear as a "vehicle" without breaking with the concept employed in the original language of the "No Vehicles" ordinance. If that break should come, it will have been the product of judicial error rather than judicial discretion exercised in a penumbral area.

Although Hart's core/penumbra point helps to confine the cluster problem, it cannot lay it to rest.[14] As Altman has pointed out, the Realists

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12. Llewellyn, *supra* note 7, at 1239-40.

13. H.L.A. Hart, The Concept of Law 129 (2d ed. 1994).

14. It is important to bear in mind the formal difference between cluster problems, having the form:

and their Critical Legal Studies successors have shown that in a mature system of law, responding to a variety of social needs and shaped by a diversity of values and interests, there is bound to be interference as ever-broader but still-plausible construals emanating from a multitude of authorities begin, inevitably, to collide—that is, to yield inconsistent directives.[15] Take any fact situation generating a legal dispute and any given "remote" legal authority. In the process of considering ever-more-general formulations of this remote authority,[16] one will frequently arrive —long before stretching beyond the breaking-point of plausibility—at a formulation bearing on the case at hand that is capable of interfering with —and unseating—more proximate authorities.[17]

Mark Tushnet has most vividly illustrated the unsettling potentiality of the cluster problem.[18] Suppose a case in which a private electric utility company seeks an injunction to oust a People's Power Collective, which has seized the company's plant and begun to operate it along socialist lines. Although the injunction would almost certainly issue, as Tushnet readily grants, it is surprisingly difficult to maintain that legal doctrine, standing alone, requires it. Given the "flexibility of legal reasoning and the variety of available legal precedents,"[19] Tushnet writes, a morally astute judge might well conclude, in short, that "'Socialism follows from *Shelley v. Kraemer* and *Griffin v. Illinois*,'"[20] and, hence, deny the injunction.

How can this be? *Shelley* was a case denying enforcement to restrictive racial covenants in a real estate deed. *Griffin* was a case requiring that an indigent criminal defendant be furnished, at no charge, the trial transcript necessary to perfect his appeal. What relevance have these cases to the injunction the utility company seeks? Read broadly, Tushnet answers, *Shelley* stands for the proposition that the "state action" sufficient to trigger

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If P then R and if Q then not-R

and boundary problems, having the form:

If P then R and if not-P then not-R.

Boundary problems present an indeterminacy problem distinct from that posed by cluster problems. In boundary problems the problem is simply the core/penumbra problem, *viz.*, how to classify the activity as P or as not-P. Boundary problems can aggravate cluster problems, but in a mature system of law cluster problems will exist even if, *per impossible*, boundary problems were eliminated.

15. Altman, *supra* note 11, at 208-09.

16. Then-Judge Cardozo is one among many to have noted the "tendency of a principle to expand itself to the limits of its logic." Benjamin Cardozo, The Nature of the Judicial Process 51 (1921).

17. Altman has also pointed out that the existence of rules is not doubted, but presupposed, in Llewellyn's formulation. The difficulty is independent of any having merely to do with skepticism or antirealism about rules, and so no amount of rehabilitation work done on behalf of rules alone is likely to touch this problem. *See* Altman, *supra* note 11, at 211.

18. Mark V. Tushnet, *Dia-Tribe*, 78 Mich. L. Rev. 694, 697 (1980), *citing Shelley v. Kraemer*, 335 U.S. 715 (1961), and *Griffin v. Illinois*, 351 U.S. 12 (1956).

19. *Id.* at 694.

20. *Id.* at 697.

the substantive requirements of the Equal Protection Clause of the Fourteenth Amendment is present whenever a court stands ready to enforce "private" rights.[21] And, read broadly, *Griffin* means that the Equal Protection Clause forbids state action to enforce the market's unequal allocation of important goods.[22] Read in this fashion, the precedents stand as obstacles to injunctive relief.

B. The Partitioning Solution

When the *Shelley* and *Griffin* cases were newly decided their potential to unseat settled doctrines aroused some amount of speculation and even alarm.[23] But the Supreme Court's and lower courts' subsequent decisions give these cases sharply narrower constructions. *Shelley* has virtually been confined to circumstances involving a willing, nondiscriminating seller of realty, and *Griffin* to cases involving goods whose provision is monopolized by the state or guaranteed by the Constitution.[24] However deplorable these confinements may be, judged from the standpoint of political philosophy, Tushnet would concede that they, too, exhibit the "flexibility of legal reasoning" in the service of a felt need.[25] In the progressive confinement of *Shelley* and *Griffin* we seem to find a judicial answer to Legal Realist Herman Oliphant's prayer for a return to stare decisis:

> [S]tare decisis meant something decidedly different at [common law], being more specific and definite. It was operated in terms of abstractions no wider than the propositions of law covering the several classes of [a] more specific classification of human transactions. The abstractions were, therefore, relatively narrower. When principles were enunciated, though stated too broadly, they related, and were applied, to only these narrow categories of fact situations.[26]

As particular confining decisions accumulate, they facilitate a scholarly approach described by Karl Llewellyn:

> [One] line of attack on the apparent conflict and uncertainty among the decisions . . . has been to seek more understandable statement of them by grouping the facts in new—and typically but not always narrower—categories. The search is for correlations of fact-situation and outcome which . . . may reveal when courts seize on one rather than another of the available competing premises . . . . The process is in essence the orthodox technique of making distinctions, and reformulating—but undertaken systematically . . . . The departure from orthodox procedure lies

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21. *Id.*

22. *Id.* at 701.

23. *See, e.g.*, Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Ralph K. Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 Sup. Ct. Rev. 41.

24. *See* Tushnet, *supra* note 18, at 698-701.

25. *Id.* at 694.

26. Oliphant, *supra* note 10, at 74.

> chiefly in distrust of, instead of search for, the widest sweep of generalization words permit.[27]

With the further accumulation of decisions, the "cluster problem" gradually succumbs to the progressive organization of a maturing legal domain, as described by Andrew Altman:

> The potential indeterminacy arising from the cluster problem is substantially tamed by the fact that the law is a structured network in which not all norms belonging to the cluster are equally pertinent . . . . [I]f the law were just a formless collection of norms, a list of rules with no particular organization to them, then the [skeptical Legal R]ealist would be right: you could almost always find one norm[] to support one decision and another to support an opposing one.[28]

Altman's "structured network," Llewellyn's "narrower categories," and Oliphant's "specific classifications," reflect a common response[29] to a common problem. The problem, as I have described it, is that the welter of norms present in mature legal systems threatens to unsettle doctrine[30] unless the reach of those norms is somehow kept in check.[31] What I have

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27. *See* Llewellyn, *supra* note 7, at 1241-42; *see also* Oliphant, *supra* note 10, at 71-75. Narrowing often opens gaps as it reduces overlap, but the Legal Realists did not abhor vacua in the law. Their program (insofar as Llewellyn was willing to avow one) was to expose gaps in the law both to 1) increase the predictive accuracy of "legal science" and 2) compel acknowledgment of, and gain room for the free play of, policy in adjudication.

28. Letter from Prof. Andrew Altman, George Washington University, to Author (April 19, 1991). Altman argues that Hart's criticisms of the Legal Realists' semantic theory "do not touch the realist thesis that there is a pervasive indeterminacy in the legal system owing to the existence of competing rules of law." Altman, *supra* note 11, at 212.

29. Joseph Raz's beautiful (if opaque) image of a legal system could be added to this list:

> Institutionalized systems [such as legal systems] consist of norms surrounded by a parameter [sic] of exclusionary reasons excluding the application of all reasons other than the norms of the system and at their core are authoritative applicative determinations excluding all other reasons including other norms of the system.

J. Raz, Practical Reason and Norms 146 (2d ed. 1990). What Raz is suggesting here is, essentially, that partitions exist within any legal system, and that these partitions function to compartmentalize legal reasons in the same way that a Hartian rule of recognition guards the perimeter of law against the encroachment of extralegal reasons.

30. The late John Mackie criticized Ronald Dworkin's theory of law in these terms:

> Dworkin's theory . . . would tend to make the law not only less certain but also less determinate than it would be on the rival positivist view . . . [because it] introduces a further source of indeterminacy. It is well known that the inference from a precedent to a general rule supposed to be implicit in it is not watertight; but a much larger degree of freedom is introduced if the judge has to frame hypotheses, not merely about rules which apply directly to cases, but also about far more general and abstract principles of justice and their implications.

John Mackie, *The Third Theory of Law, reprinted in* Philosophy of Law 167 (J. Feinberg & H. Gross eds., 6th ed. 1995). Mackie might have added that determinacy suffers even if the judge is freed only to the lesser extent of being permitted to appeal to rules that do not "directly" apply to the case at hand. As I argue in the text, once the judge is permitted, or required, to canvass the law "as a whole," determinacy is likely to be diminished.

31. Andrew Altman has referred to this as the "truncation thesis," which he attributes to

called the Partitioning Thesis is simply the statement that this is the condition of our law.

C. The Metaprinciples Solution

I noted above that the existence of a "P" rule and a "Q" rule is not enough to generate a cluster problem. There must, of course, be a case (actual or hypothetical) presenting both P and Q. Moreover, there is no problem if there is a metarule that decides when the "P" rule governs, and when the "Q" rule governs instead. For example, in *TVA v. Hill*,[32] the Court had to construe a statute whose plain meaning required, in the circumstances, the waste of over $64 million that had already been spent building a dam, which, if completed, would endanger a species of fish called the snail darter.[33] Two legal norms came into play: the first requires courts to give effect to plain congressional language; the second requires courts to construe statutory language in light of congressional intent. The statute's language was plain and the result likely contrary to Congress's intent. Must the dam be stopped? The Court concluded that it must but—a Legal Realist would insist—this was a policy choice, not a decision ordained by the "cluster" of relevant legal standards.

In the *TVA v. Hill* example, one is tempted to deny that the two major premises are equally available. One might say that a court is not free to plumb congressional intention unless an ambiguity exists in the statute. This would subordinate the "reasonable intention" rule to the "plain meaning" rule. Alternatively, one might say that "plain meaning" is but one guide to congressional intent, which is the ultimate aim of judicial interpretation. The adequacy of interpretation must always, finally, be judged by whether the intention imputed to Congress is reasonable, even if unwise.[34] This would subordinate "plain meaning" to "reasonable intention." Wherever there is a cluster of legal norms, there is a longing to locate what could be termed an *adjusting metaprinciple* that determines which of the norms in the cluster is to dominate in what range of cases.

How does an adjusting metaprinciple differ from a partition? Both are types of metaprinciple and, abstractly, both are of this form:

> For any case C, follow the "P" rule, rather than the "Q" rule, if but only if C is F.

The difference between a partition and an adjusting metaprinciple lies in

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Roberto Unger. Altman's view differs from Unger's in that Altman believes that truncation is not ultimately arbitrary, shaped only by the current state of endless pitched political battles, but determined by the structure of a network of legal norms. *See* Andrew Altman, Critical Legal Studies: A Liberal Critique 139-48 (1990).

32. 437 U.S. 153 (1978).

33. *Id.* at 172-73.

34. According to Michael Moore, judges have a general license—wholly apart from any subservience to legislative intent—to overrule or amend legislation that, in light of the event, would have absurd consequences. Michael S. Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 258-65 (1981).

the substantive constraints imposed on the specification of features F. A partition, as mentioned before, typically invokes traditional doctrinal boundaries. A partition rather arbitrarily lays it down that, for example, contributory negligence is not a defense in contract, or in intentional tort, although it is a defense in negligence. Thus, in the above schema, F might simply be "a negligence action," or "a Mississippi cause of action arising before the decision in *State Stove Manufacturing v. Hodges*."[35]

Although the features F a partition picks out typically are doctrinally recognized ones, other salient features sometimes function here, as, for example, in *Thomas v. Winchester*[36] (and here I "brief"):

> For any case C arising from injury occasioned by a manufactured article, follow the general rule of negligence, rather than the rule that a lack of privity between plaintiff and defendant is a defense, if, but only if, the article is of a type designed to injure or destroy.[37]

An adjusting metaprinciple, in contrast, seeks a synthesis of the "P" rule and the "Q" rule; therefore its invocation of features F will have to meet a test of adequacy that is more stringent. The tests of adequacy one might impose are various. Kress would make it *moral relevance*;[38] Dworkin appears to require something more like *morally best balancing of fit and justice*;[39] others, like Sartorius[40] and Weinrib,[41] emphasize overall fit or coherence.

Whether such adjusting metaprinciples (and—where needed—adjusting metametaprinciples) can be counted upon to exist, and to be accessible, is a matter of difficulty. Sometimes they may be, but sometimes they may not. Reconsider Tushnet's hypothetical.[42] It is far more plausible that *Shelley* and *Griffin* have been domesticated by partitioning rather than by any identifiable metaprinciple or system of metaprinciples. From the standpoint of determinacy, any quick, narrow, even seemingly arbitrary[43] confinement of these cases is preferable to setting sail on a sea of doubts about the morally or globally best articulation of an adjusting metaprinciple.

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35. 189 So. 2d 113 (Miss. 1966). See Kress, *Coherence and Formalism*, *supra* note 2, at 679, for a more extensive discussion of how partitions might expediently be introduced into the law. *See also* Stephen Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 Harv. J.L. & Pub. Pol'y 597, 607-08 (1993).

36. 6 N.Y. 397 (1852).

37. *Cf. id.* at 399.

38. *See* Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 301 (1989). The adequacy criterion in Kress's present view is not moral relevance, simpliciter, but moral relevance as ascertained with special reference to institutional facts and rule-of-law values.

39. *See* Ronald Dworkin, Law's Empire 176-224 (1986).

40. *See* Sartorius, *supra* note 6.

41. *See* Ernest Weinrib, The Idea of Private Law 39 (1995).

42. *See supra* notes 17-18 and accompanying text.

43. Arbitrariness, in the "morally defective" sense, may be held at bay by rationales—along "better decided than decided rightly" lines—for using a random procedure to break an otherwise "Buridan-some" impasse. *See* Jon Elster, Solomonic Judgements 36-122 (1989).

Adjusting metaprinciples, to stand in contrast to mere partitions, must necessarily be more powerful than partitions, in the sense that they have implications beyond simply settling the priority between a "P" rule and a "Q." Therefore, they are bound to be more liable than partitions to come into conflict with still other norms. In particular, the more ambitiously outward-looking the adequacy criterion one imposes, the likelier it becomes that an adjusting metaprinciple will come into conflict with other norms that the adequacy criterion makes relevant.

This is not to say that the partitioning solution is the more satisfactory one. Something in us, and in the law, yearns for the deeper synthesis that metaprinciples promise, and this brings us to the Anti-Partitioning Principle.

III. COHERENCE AND THE ANTI-PARTITIONING PRINCIPLE

A. Conceptions of Coherence

Although there are many conceptions of coherence, the two most prominent ones in recent legal theory are—as Ken Kress has termed them—"monism" and "internal relations."[44] Monism, to put it crudely, holds that a theory is coherent if it is derivable in its entirety from a single component principle, a "single fountain" from which all else flows. For reasons that Kress and Stephen Perry have elaborated, monistic theories are implausible accounts of law in modern, heterogeneous, pluralistic societies.

The "internal relations" conception of coherence is hospitible to multiple independent principles, for example, a fault principle and a deterrence principle in tort law. On this view, the coherence of a theory is enhanced when the inferential connections between its principles, norms, and outcomes are strengthened and increased in number. Internal relations can be insisted on with varying degrees of rigor. A *minimal* conception of internal relations, for example, might hold that a theory is coherent if

> 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.[45]

But, as Bonjour has shown, so minimal a conception of internal relations does not guarantee coherence. Imagine a theory partitioned into three independent subtheories, each having no inferential or other connection to any other subtheory and in fact pertaining to entirely different subject matters. If each subtheory satisfies the minimal conception of internal relations, then so does the theory as a whole. But the independence of the three subtheories renders the theory as a whole less coherent than it would

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44. Kress, *Coherence and Formalism*, *supra* note 2, at 657.
45. *Id.* at 658.

be if it satisfied the more-than-minimal conception of internal relations that Bonjour suggests, which I have called the Anti-Partitioning Principle.

B. Coherence and Justification

Coherence is important because justification is important. The idea of justification is in turn closely tied to the idea of legitimacy. Law as a body, and a judicial decree as an instance, make no legitimate moral claim upon us unless, and only to the degree that, they are justified. To be legitimate, a judicial outcome must be justified with reference to some set of justifying authorities and justification-transmitting methods of legal reasoning.[46] Moreover, in light of the fact that the law often is an accreting body, capable of increasing in its detail and reach as judicial decisions and other official acts occur over time, such new territory must continuously be justified.

In epistemology generally and in moral epistemology particularly, coherence has become prominent as elucidating the relation of justification between beliefs.[47] For example, David Brink writes:

> [O]ne's moral belief p is justified insofar as p is part of a coherent system of beliefs, both moral and nonmoral, and p's coherence at least partially explains why one holds p.[48]

Coherence is a matter of degree, however:

> The degree of a belief system's coherence is a function of the comprehensiveness of the system and of the logical, probabilistic, and explanatory relations obtaining among the members of the system.[49]

Therefore, to be justified in holding a belief that p, p must belong to a system of beliefs S such that all of S are believed by the believer and S is more coherent than any other set S' of beliefs available to the believer. In other words: "A coherence theory of justification in ethics demands that [all of one's moral and nonmoral] beliefs be made into a maximally coherent set of beliefs,"[50] rejecting those that cannot be included in that set.

The coherentist approach Brink describes in the context of justification in ethics applies equally to law:

> The more firmly entrenched within the legal system a principle is, the more legal weight it has. The way in which we determine what the law requires in some controversy, then, is to see which decision coheres best with the total body of legal standards duly weighted. In a legal system such as ours, what the law requires in

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46. *See, e.g.*, Frank I. Michelman, *Jurgen Habermas, Between Facts and Norms*, 93 J. Phil. 307 (1996) (book review).

47. "Modern moral theory has been dominated by a reverence for coherence," according to Geoffrey Sayre-McCord, *Coherence and Models for Moral Theorizing*, 66 Pac. Phil. Q. 170, 170 (1985).

48. David O. Brink, Moral Realism and the Foundations of Ethics 103 (1989).

49. *Id.*

50. *Id.*

> any given case is that decision which coheres best with existing legal principles, constitutional provisions, statutes and precedents.[51]

The notions of weight and entrenchment are for Brink ultimately to be explicated with reference to coherence, for deciding conflicts between competing legal standards

> requires the legal interpreter to engage in (or at least rely upon) . . . *descriptive* [rather than normative] . . . political theory . . . . That is, the legal interpreter must try to identify the moral and political values underlying our laws and legal institutions and practices and organize them into a coherent theory of political morality (or at least as coherent a theory as possible).[52]

In criticizing Hart's doctrine of judicial discretion, Rolf Sartorius had earlier written to similar effect:

> [T]he obligation of the judge is to reach that decision which coheres best with the total body of authoritative legal standards . . . . The correct decision in a given case is that which achieves "the best resolution" of existing standards in terms of systematic coherence as formally determined . . . . [This] model of justification in terms of institutional coherence explicitly makes relevant the systematic import of a judicial decision as seen against an enormous and complex body of interrelated authoritative standards.[53]

Although both Brink and Sartorius are less certain about the desirability of judges seeking a coherence that embraces both law and norms having *no* legal pedigree, they agree that the coherentist method of justification is one that is "holistic" at least in the sense that it requires that the judge attend to the entire body of law.[54]

Saying that judges should have the whole of the law within their gaze does not commit the coherentist to saying that they must ignore doctrinal boundaries altogether. These may shed light on the expectations of the parties, for example, where that is relevant. Moreover, doctrinal boundaries may reflect real differences that the judge cannot ignore any more than the scientist can. Just as physical science sometimes uncovers categorial differences—between gravity and electromagnetism, for example—legal science may also reveal what Bentham called a "natural" (rather than merely "technical") "arrangement" of topics, such as he found in the Synopsis of Blackstone's *Commentaries*.[55] "We there read of 'corporal

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51. David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 Phil. & Pub. Aff. 105, 131-32 (1988).

52. *Id.*

53. Rolf Sartorius, *Social Policy and Judicial Legislation*, 8 Am. Phil. Q. 151, 158 (1971).

54. Ronald Dworkin's position on the role of coherence in legal reasoning is a matter of (perhaps whimsical) dispute; compare the appendix to Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. Rev. 273, 315-21 (1992) (coherence unimportant to Dworkin), with Kress, *Coherence and Formalism*, *supra* note 2, at 652-54 (coherence important to Dworkin).

55. Sir William Blackstone, Commentaries on the Laws of England (1765-69).

injuries'; of 'offenses against peace'; against 'health'; against 'personal security'; 'liberty'; —'property'— . . . ."[56] Such a "natural arrangement" may be useful "in repelling an incompetent institution,"[57] by clarifying the precise type of mischief a law is supposed to remedy. But even Bentham's short list will suggest simplifications (for example, combining "corporal injuries" and offenses against "health") to the coherentist, ever restless to have an uncluttered view of the whole.

C. Coherence in the History of Science

To get a sharper idea of how coherence is hostile to partitioning, it will be helpful to consider a nonlegal example. For centuries, the reigning Ptolemaic, geocentric theory of the universe was confounded by apparent irregularities in the orbits of the then-known planets. According to the theory, planetary motion was circular about the Earth as center. When combined with plausible auxiliary assumptions, the theory logically generated a range of precise, testable, predictive hypotheses about planetary motion. Frustratingly, these hypotheses were found not to correspond to observational data. Backward, or "retrograde" movements were apparent in the paths of the planets. As data accumulated, they could not be discounted as the product of observational error or mathematical miscalculation.

Rather than abandon the key, geocentric tenet in the face of the recalcitrant data, cosmologists in the Ptolemaic tradition supplemented their theory by positing a system of "epicycles" intended to explain the retrograde motions of the planets. Over time, the epicycles had constantly to be redrawn to account for new and divergent data, but there was an enduring belief that the refinements represented a progressive approach to reality.

Copernicus despaired of the epicyclical fixes and rejected the geocentric account altogether. Eventually, with the help of the theoretical genius of Kepler and Newton and the observational scrupulousness of Brahe, a heliocentric theory of planetary motion unseated its geocentric ancestor. But why?

The best answer is that the heliocentric theories were progressively more coherent than their geocentric counterparts. In particular, the epicycles required to keep the geocentric theories in the running were ad hoc, "nomological danglers"[58] logically unconnected to each other and to the remainder of the theory. In contrast, in Kepler's formulation both the

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56. Jeremy Bentham, A Fragment on Government 29 (J.H. Burns & H.L.A. Hart eds., 1988) (italics omitted).

57. *Id.* at 29 n.e1.

58. The phrase "nomological dangler" can refer to any posited connection between an element otherwise well-connected to a theory and another element having, otherwise, no connection. *See* Herbert Feigl, *The "Mental" and the "Physical," in* II Minnesota Studies in the Philosophy of Science 370, 382, 428 (H. Feigl, M. Scriven & G. Maxwell eds., 1958); J.J.C. Smart, Philosophy and Scientific Realism 68, 90, 94 (1963).

elliptical paths of the planets and their merely apparent retrograde movements were explained as consequences of a few simple, powerful ideas.

Ptolemaic theories were rife with partitions, that is, special, ad hoc doctrines that existed in isolation from each other and from the more central assumptions of the theory. Ptolemaic theories were abandoned not because they could not account for observations, but because their elements lacked the overall connectedness and comprehensiveness, governed by central principles few in number and of great predictive power, that scientists almost instinctively take to be the hallmarks of scientific truth. As Philip Kitcher has put it,

> A science should be *unified.* A thriving science is not a gerrymandered patchwork but a coherent whole. Good theories consist of just one problem-solving strategy, or a small family of problem-solving strategies, that can be applied to a wide range of problems. The theory succeeds as it is able to encompass more and more problem areas. Failure looms when the basic problem-solving strategy (or strategies) can resolve almost none of the problems in its intended domain without the "aid" of untestable auxiliary hypotheses [epicycles, for example].[59]

When irregularities in the orbit of Uranus challenged the Newtonian theory, its response was to posit an as-yet unseen outer planet, whose gravitational influence upon Uranus would explain the anomaly. As though following a "maxim of minimum mutilation,"[60] Newtonian theory treated the anomaly as an effect of its otherwise well-confirmed central ideas, rather than as a reason to reject them. This was not tantamount to positing an epicycle, however, for the existence of the posited planet was itself testable (and, in fact, was observationally verified). The crucial difference between a hypothetical Ptolemaic epicycle and a hypothetical Newtonian planet being that the latter, unlike the former, had inferential connections that went beyond the immediate data it was invoked to explain.

As modern science has become ascendant as a mode of knowledge,[61] the epicycles of Ptolemy's followers have become emblems of falsehood, if not folly. No wonder that a jurisprudence that aspires to be scientific should be influenced by a hostility to partitioning.

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59. Philip Kitcher, Abusing Science 47 (1982).

60. *See* W.V. Quine, From Stimulus to Science 49 (1995); W.V. Quine, The Pursuit of Truth 15, 56 (1992); W.V. Quine, Quiddities 148 (1987).

61. The ascendancy of physical science as the paradigm of knowledge is so secure that both its critics and its apologists seem prone to pranksterism. *Compare* Paul Feyerabend, Against Method (1975) (author's astrological chart supplied on dust jacket, in the place usually reserved for institutional affiliation) *with* Alan Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, 46/47 Social Text (Spring/Summer 1996) (a hoax intended to expose the arrogance of postmodern critics of science).

D. Coherence and Legal Reasoning

Many of the most celebrated judicial landmarks and classics of legal scholarship exhibit the Anti-Partitioning Principle in action. Judge Cardozo's opinion for the court in *MacPherson v. Buick Motor Co.*[62] is a prime example of the former, and Warren and Brandeis's seminal article on "The Right to Privacy,"[63] of the latter.

In *MacPherson*, an automobile owner was injured when a wheel suddenly disintegrated. Although he had bought the car from a retailer, he sought damages from the manufacturer, with whom he was not in the contractual "privity" demanded by the line of precedents descending from the English case of *Winterbottom v. Wright.*[64]

Two alternative major premises presented themselves to the court. One was a narrower, the other a broader, construal of the principle of *Thomas v. Winchester*,[65] which had upheld a recovery, in the absence of contractual privity, by a purchaser against a supplier of a mislabelled poison. The narrower construal of the principle of *Thomas v. Winchester* would have it applicable only in cases involving articles destructive in their normal employment, "poisons, explosives, and things of like nature."[66] Under this construal, the plaintiff's suit would fail because cars are not "imminently dangerous" in that sense. A broader construal of *Thomas* would encompass any article, known to be used without inspection by persons not in privity, which if negligently made will, with reasonable certainty, endanger life. Automobiles would be "imminently dangerous" in this sense because, although not designed to run off the road, they will likely do so if poorly built.

The narrower construal would have maintained the authority of the "privity" rule and would have been consistent with precedents involving a boiler and mechanical saw, and with persuasive authority that assimilated automobiles to the coach that figured in *Winterbottom*. But a decision following the broader construal was also supported by the broader principle, derived from a wide range of cases, that "one who invites another to make use of an appliance is bound to the exercise of reasonable care," irrespective of contractual privity. Such an invitation is implicit in the very nature of mass production and mass marketing, Cardozo saw. Moreover, the broader construal was capable, as the narrower was not, of supporting the pro-plaintiff decisions in cases involving articles such as scaffolds, coffee urns, bottles of aerated water, elevators, and ropes.[67] Although to say so does not fully mine Judge Cardozo's

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62. 111 N.E. 1050 (N.Y. 1916).

63. 4 Harv. L. Rev. 193 (1890).

64. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

65. 6 N.Y. 397 (1852).

66. *MacPherson*, 111 N.E. at 1053.

67. *See* Cardozo, *supra* note 16, at 40-41, 76-78; Melvin Aron Eisenberg, The Nature of the Common Law 58-61 (1988); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 545-62 (Willam N. Eskridge, Jr. & Phillip P. Frickey eds., 1994); Edward H. Levi, An Introduction to

reasoning, the broader construal of *Thomas v. Winchester* supported a wider net of inferential connections than the narrower, and pro tanto may have seemed the more appealing.

Brandeis and Warren's discovery of a right of privacy similarly exhibits the role of coherence in legal reasoning (just as that right's further history illustrates the countervailing movement toward partitioning). Is there a ground for legal redress for an ordinary person aggrieved by the publication of offensive, though truthful, descriptions of what transpires in her home? Brandeis and Warren evidently thought that there should be a legal remedy, and were encouraged by decisions such as *Prince Albert v. Strange*[68] (enjoining the unconsented publication of a list of etchings done by the Queen's consort), and *Pollard v. Photographic Co.*[69] (enjoining the sale and showing of copies of a woman's photograph, where the photographic negative was made with the subject's consent).

The difficulty was that the decided cases rested on doctrines of intellectual property, implied contract, or breach of trust, which had no easy application to the type of case that the authors were most concerned to meet, that is, gossip columns and scandal sheets. So long as these doctrinal boundaries were respected, the common law would simply be unable to provide "full protection" to the "right to an inviolate personality."[70] The boundaries, therefore, had to come down.

The authors' method of bringing them down was ingenious, if commonplace. It involved making an a fortiori argument for recovery in hypothetical cases crafted to take them just out of range of the doctrinal principle upon which the courts had thought to rest. Does a portrait photographer impliedly contract with his sitter not to circulate prints other than those she buys? Well, suppose the photographer makes his exposure secretly, without the sitter's consent. Surely, the defendant's conduct is more reprehensible now, and recovery and injunction must be allowed, but hardly on grounds of contract.

And, again, does a person's right not to have a list of his personal effects published rest upon his property in the profits he might realize by publishing such a list himself? But suppose the effects listed are such things as "stoves and chairs." Surely, as "intellectual property" such a list is of negligible value, but as touching the intimate feeling of the plaintiff, its publication might give much graver offense.

By repeated use of this method, Brandeis and Warren opened the reported decisions to explanation by a "broader principle" than any announced in them, or necessary to any of them. To obtain the intuitively correct result in the hypothetical cases, one of two moves would be necessary. Either the narrower legal principle would have to be assisted by

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Legal Reasoning 8-27 (1949).

68. 2 DeGex & Sm. 652, 64 Eng. Rep. 293 (1849).

69. 40 Ch. Div. 345, 349-52 (1888).

70. Warren & Brandeis, *supra* note 63, at 193, 211.

adding an "epicycle"—the surreptitious photographer's implied contract; the intellectual property right in the list of household bric-a-brac—or a broad explanatory principle would have to be posited. The former alternative being unsatisfactory, the latter becomes irresistible, and so we find, "forged in the slow fire[s] of the centuries,"[71] a right of privacy.

A right of privacy served to connect subsystems of decision and doctrine that otherwise would have stood in relative isolation. Therefore, by the Anti-Partitioning Principle, a rendition of the common law containing a right of privacy was to be preferred to a rendition without it.

E. From Coherence to Indeterminacy to Partitioning

Positing a right to privacy in the jurisprudential firmament was one thing, getting courts to see it was another. In 1902, the right to privacy was denied existence in New York, in the case of *Roberson v. Rochester Folding Box Co.*;[72] but three years later it was sighted from a more southerly latitude, in the Georgia case of *Pavesich v. New England Life Insurance Co.*[73] Both cases involved the unconsented use of a plaintiff's photograph in the defendant's advertising. The *Roberson* court—in the same reticent spirit as Judge Bartlett's dissent in *MacPherson*—feared the flood of litigation, the line drawing, and the chilling of press freedom that would ensue by admitting the right; in brief it feared the indeterminacy it would introduce into the law. The *Pavesich* court was impervious to such fears and its decision, rather than *Roberson*, became the landmark of the law.

By mid-century, the burgeoning law of privacy had come persistently to resemble "a haystack in a hurricane."[74] Take, for example, the unconsented use by a magazine of a photograph of a married couple embracing in a marketplace. Two suits, both brought by a couple named Gill, against two publishers of the same such photograph, reached different results in the same jurisdiction, California.[75] After sifting the cases in the scrupulous manner championed by Herman Oliphant, Dean Prosser observed,

> Disarray there certainly is; but almost all of the confusion is due to the failure to separate and distinguish . . . four forms of invasion and to realize that they call for different things . . . . Taking them in order—intrusion, disclosure, false light, and appropriation—the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third or fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other

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71. *Id.* at 220.

72. 64 N.E. 442 (N.Y. 1902).

73. 50 S.E. 68 (Ga. 1905).

74. Ettore v. Philco Television Broad. Co., 229 F.2d 481 (3d Cir. 1956).

75. *Compare* Gill v. Hearst Publ'g. Co., 253 P.2d 441 (Cal. 1953) (dismissing with leave to amend) *with* Gill v. Curtis Publ'g. Co., 239 P.2d 630 (Cal. 1952) (denying motion to dismiss).

> three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.[76]

Dean Prosser's article became as influential in partitioning the law of privacy as Warren and Brandeis's had been in launching it. Like a comet worked apart by the gravitational force of other bodies, the right of privacy disintegrated into four distinct causes of action. Ironically, the type of case that had motivated Warren and Brandeis "very probably"[77] would not have resulted in relief under any of the four separable theories.

The tort of privacy now exists in an uneasy tension. On the one hand, we find a particularized field largely dominated by Dean Prosser's partitions and precedents enforcing them. On the other, there is a yearning for synthesis[78]—a yearning tempered by the suspicion that perhaps too much territory had been claimed under the Warren and Brandeis formulation.[79]

Examples of a similar, if less dramatic, movement from partitioning to synthesis to partitioning can be drawn from many legal domains, although tort is perhaps the richest. For example, in *Dillon v. Legg*[80] the court, overruling *Amaya v. Home Ice, Fuel & Supply Co.*,[81] rejected the "zone of danger" rule limiting bystander recovery in tort, in favor of the general formula of reasonable foreseeability.[82] *Dillon* was itself overruled in *Thing v. La Chusa*,[83] where the court imposed a rule employing concededly "arbitrary lines"[84] to discipline the "amorphous"[85] unruliness of *Dillon*. One variation on this theme is to discard a traditional framework while retaining its categories as mere "factors," as in *Rowland v. Christian*,[86] in which the court rejected the commonlaw invitee-licensee-trespasser categories as determining landowner duty, but allowed status to have "some bearing."[87] Subsequent application may reveal that the factors exercise the same decisive control as before;[88] moreover, the legislature may intervene to the same effect.[89]

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76. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 407 (1960).

77. *Id.* at 397.

78. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964).

79. *See* Harry Kalven, *Privacy in the Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326 (1966).

80. 441 P.2d 912 (Cal. 1968).

81. 379 P.2d 513 (Cal. 1963).

82. *Dillon*, 441 P.2d at 915.

83. 771 P.2d 814 (Cal. 1989).

84. *Id.* at 827.

85. *Id.* at 840.

86. 443 P.2d 561 (Cal. 1968).

87. *Id.* at 568.

88. *See* Lucas v. Pollock, 8 Cal. Rptr. 2d 918, 919 (Cal. App. 1992); Totten v. More Oakland Residential Hous., Inc., 134 Cal. Rptr. 29, 33 & n.3 (Cal. App. 1976).

89. *See, e.g.*, Ornelas v. Randolph, 847 P.2d 560, 562 (Cal. 1993) (holding that under Cal. Civ. Code §846 (1982) "the landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser as it existed prior to *Rowland v. Christian*.").

Given that the law aspires to coherence and to determinacy, and that coherence is hostile to partitions, the antinomy endemic to one department of law—torts, for example—is bound to infect the whole.[90] This is because the Anti-Partitioning Principle prefers renderings of the law that allow tort principles play outside the boundaries of tort—even at the expense of determinacy—to those that do not. Once those principles get a foothold elsewhere, and the concern for determinacy makes itself felt, the partitions that cabin the invading principles will either be newly drawn ones within the territory invaded, or the old boundary reimposed. In either case—retrenchment or novel line-drawing—determinacy and coherence must be traded off against each other.[91]

The conclusion I draw is that legal doctrine generally, as well as the law of torts in particular, is bound to remain in a state of deep tension between the centripetal force I have named the Anti-Partitioning Principle and the centrifugal forces in a pluralistic society which make the Partitioning Thesis a contingent, but practically irreversible, truth. John Rawls has described one such force as "the fact of reasonable pluralism," by which he means that

> the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines will come about and persist if such diversity does not already obtain.[92]

Because legal doctrine inevitably mirrors the conditions of the society it orders, the fact of reasonable pluralism assures that legislation and adjudication will continue to generate conflicting norms needing the discipline of partitioning. But, just as inevitably, any network of partitions will appear—especially to the morally ambitious and the intellectually fastidious—as an unlovely cobweb needing to be swept aside.

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90. On tort's tendencies to penetrate the law of contract, see Grant Gilmore, The Death of Contract (1974) and P.S. Atiyah, The Rise and Fall of Freedom of Contract (1979); the criminal law, see Randy Barnett, *Restitution: A New Paradigm for Criminal Justice*, 87 Ethics 279 (1977); and constitutional law, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

91. Simply reimposing the old boundary means cutting loose the overruling precedent, which the Anti-Partitioning Principle is loath to do. A mere overruling is a partitioning in its starkest form: "Apply the P rule to cases decided prior this decision, and the Q rule thereafter," unless the decision at least attempts to justify itself, which typically it will do by appeal to overall coherence and to the merits of the Q rule. An overruling of an overruling, or retrenchment, enhances determinacy by stanching the earlier overruling as a conduit into new territory, but it gives additional offense to coherence by logically isolating the period of interregnum.

92. John Rawls, Political Liberalism 36 (1993).

IV. CONCLUSION

In recent years, coherence theories of justification and truth have figured prominently in otherwise competing conventionalist, formalist, and moral realist accounts of law and adjudication. Coherence has been invoked as a constraint upon the troublingly wide scope accorded to judicial discretion in H.L.A. Hart's account. Those who believe that an uncabined role for judicial discretion vitiates the legitimacy of law are drawn to coherence as a constraint upon judges. My thesis has been that, in the legal systems of pluralistic societies, coherence of legal doctrine can only be bought at the cost of sacrificing a degree of determinacy, and vice versa. Those whose conception of legitimacy demands constraints of judicial discretion will therefore find coherence to be a less than satisfactory tool.

But the antinomy of coherence and determinacy that I have described is a frustration not only to those who find Hart's account unsatisfying. All of us, to one degree or another, would like our law both to be coherent and to be determinate. The legitimacy of law, and the very idea of a "rule of law," seem to demand that coherence and determinacy both be maintained in high degree. It is irritating, and perhaps depressing, to discover that we cannot have more of one without rather quickly cutting into our supply of another. Legitimacy and rule of law survive this discovery, surely, but work has to be done on the conceptions of legitimacy we use. Coherence, like determinacy, has little further to offer as an *explicans*—an "explainer." It is time to relegate them both to the category of *explicanda*—"things to be explained."