Coherence as a tool, not as an ambition

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> Can anyone doubt the value of coherence itself? One can if one is a philosopher. I do not mean that philosophers can be expected to say any silly thing. I mean that philosophers, some philosophers, have taken 'coherent' to mean not just 'intelligible', but something (some things) quite different. Nobody would think that a text ought to be believed just because it is intelligible. But some philosophers think that it ought to be believed just because it is coherent …[1]

The idea of coherence, as it is used in modern private law theory, is rather hard to pin down. Core meanings would no doubt be that coherence demands logical consistency in legal argument, and/or that legal argument be intelligible, that any proper legal argument has to be meaningful. But this clearly does not exhaust the ways in which 'coherence' is understood. It seems to be related to the arguments that like cases should be treated alike, and that the law should be reducible to a taxonomy or set of 'causative events', and that the law is a seamless web. It also plays a leading role in some of the more prominent theories of the law. Coherence, in short, makes multiple appearances whenever we consider private law or indeed any type of legal institution, and it is hard to envisage private law without it.

But the same is true of incoherence. We have no belief or expectation that two identical cases will be treated in precisely the same way by the legal system – we expect them both of them to be treated *fairly*, but we know that a number of different approaches can be justified as fair. The same evidence can lead different judges to different conclusions without any of those judges necessarily being in error. We know – indeed, we *boast* – that judges are not automata following rigid sets of instructions that can only lead them to one conclusion. And appeal judges, or at least the more sensible ones, respect these differences of approach, and do not reverse a trial ruling merely to demand consistency with what they themselves would have done in the trial judge's place. We do not demand that all judges behave in precisely the same way, or as if they were all following the same plan – only that they all behave judicially.

There is occasionally talk of all theorising about private law as a search for coherence, largely on the basis that it would be a terrible thing for the legal system to be *in*coherent, and so the further away from that awful fate we are driven, the better the law is. In practice, the dangers of incoherence tend to be over-stated, particularly by those who focus on doctrine rather than the everyday legal business of advising clients and resolving issues through litigation. Sufficient predictability in resolving disputes is often available without a very coherent law behind it, and despite occasional claims to the contrary, there is no very good evidence that a more coherent law is any easier to apply to real cases. We need not doubt that a wholly incoherent law would be bad, but once a certain bare minimum is attained it is not obvious that greater coherence makes the law any better.

That being so, we might possibly conclude that both coherence and incoherence are simply (legal) facts of life, and that it makes little sense to be 'for' one and 'against' the other, as both are always present to some degree. It makes even less sense to do so if both concepts refer to a wide range of arguments, that 'coherence' could relate to almost any aspect of a legal argument. In many situations we are content to assume that the pursuit of coherence leads to desirable results. But it is

[1] J Raz, 'The Relevance of Coherence' in J Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) 277, 280.

another matter to conclude that coherence itself is good, or that to make the legal system more coherent is necessarily to make it better. Sometimes the truth may be the reverse.

Different views?

This is why it *does* make sense to talk of some theorists being pro-coherence and others as anti-coherence – it is not an ideal terminology for discussing the matter, and is a *relative* difference, but it is comprehensible. The Weinribs[2], the Beevers[3], the Stephen Smiths[4], the Birkses[5], the Goldberg and Zipurskys[6], and others, have in recent decades insisted on the *coherence* of private law or at least of particular parts of private law, and have sought to fight off challengers by pointing out that those challengers have no coherent competing theory or system of classification. Those challengers – Hanoch Dagan[7], Tsachi Keren-Paz[8], Hugh Collins[9], amongst others – are not much interested in the question of coherence of private law and indeed are happy to stress the diversity of whatever part of private law is under investigation. So some care about coherence rather more than others.

Of course, whatever the *pro*s say, these *anti*s do not describe themselves as being against coherence – nor should they. They are not, after all, promoting a form of law that is logically inconsistent with itself, nor one that is unintelligible. They are only *incoherent* if we are assuming the broader conceptions of coherence, which effectively demand that we sketch out a simple model for each area of law and then demand that the law conforms to that model in all major respects. The *anti*s then are not so much against coherence as against the simpler models against which that coherence is being tested; not so much against classifying claims, as taking a gloomier view of how much such a classification can tell us. They would themselves say that it is not a case of being incoherent rather than coherent, but of being pluralist rather than monist: we ask many things of the law, not all of which sit easily with one another, and we should not be too quick to label as 'incoherence' what is merely diversity.

We do not, indeed, do justice to modern theorists if we present them as neatly grouped into two opposing camps: this would imply a bright and easily-discernible line between positions which are in fact hard to tell apart. Goldberg and Zipursky's apparently monist view of what tort is *for* – namely the provision of an avenue of recourse for someone who is wronged against their wrongdoers – is in fact a rather flexible conception, and is more open to criticism for vagueness than for over-rigidity. Conversely, Dagan's pluralist concept of private law, which waves several red rags at those who stress coherence – by arguing against monism, by explicitly adopting legal realism, and by stressing the irreconcilability of many of the objects pursued within private law – nonetheless argues for perfectionism, for trying to make private law better, in a way that is at least as coherent as other writers[10]. Arguably his case is not that we should not look for coherence, but rather than we should look for it at a lower level, at the level of individual legal doctrines rather than in vacuous monstrosities such as 'property' or 'unjust enrichment'[11]. There is no sharp line here.

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[2] Especially EJ Weinrib, *The Idea of Private Law* (Cambridge: Harvard UP, 1995).

[3] Especially A Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007).

[4] Especially SA Smith, *Contract Theory* (Oxford: Oxford UP, 2004).

[5] Especially P Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford UP, 1985).

[6] Especially BC Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgia Law Journal* 695.

[7] Especially H Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (Oxford: Oxford UP, 2013).

[8] Especially T Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate, 2007).

[9] Especially H Collins, *Regulating Contracts* (Oxford, Oxford UP, 1999).

[10] eg H Dagan, 'Pluralism and Perfectionism in Private Law' (2011), available at SSRN: http://ssrn.com/abstract=1868198.

[11] eg H Dagan, 'Private Law Pluralism and the Rule of Law' in LM Austin and D Klimchuk, *Private Law and the Rule of Law* (Oxford: Oxford UP, 2014) ch 7.

This paper: Coherence is ubiquitous as a tool but misguided as an ambition

Nonetheless, there is a real division of opinion as to the importance of coherence. Some writers place much of the weight of their argument on the attainment of coherence: they are very demanding both in what they imagine 'coherence' requires, and in the desirability of coherence – in some cases claiming that unless our conception of the law reaches their standards of coherence, we are not really dealing with law at all, as distinct from an unstructured and anarchic 'wilderness of single instances'. Others assign coherence a more modest role in the scheme of things. As someone who usually finds himself in the second camp rather than the first, I attempt in this paper to examine in general terms what is wrong with such over-reliance on coherence.

I proceed on the basis that, whatever else it may be, the search for coherence is an instrument, a tool to be used as part of the ordinary tool-kit of legal argument. When we look closely at any one legal phenomenon, one question we can ask is how it fits with other similar phenomena – whether it sits coherently with them, whether it can be included as an element in a bigger picture. But of course this is a question that can be asked in so many ways. We all have many commitments already – some doctrinal, some ethical, some political – and so there are many coherences we can examine. To ask whether a particular rule or case coheres with the rest of the law involves many connections, comparisons and value judgements. This is why we talk of the law as being a *seamless web*: any one legal phenomenon has links to many others, is pulled in many directions, and its coherence is tested in many conflicting ways. There is also the question of scale: how coherent the law is can be examined at the level of the individual case, or the level of doctrine, or at a higher level still, such as when someone invokes a general idea of what private law is all about, or indeed what law in general is about[12]. Coherence, then, is not a single argument but a whole family of arguments.

And we do not *always* invoke coherence as a *good* thing. Coherence suggests a broader picture, a wider view on the world. Sometimes we use coherence to paint an *ugly* picture, to show that a particular development or proposed development fits a pattern which should be rejected. For example, a feminist might discern a coherent pattern in the law pointing to male domination, as a reason for doubting that coherence is to be regarded uncritically as a good thing.[13] So coherence always demands attention, but not necessarily in a good way.

Coherence, then, is primarily a tool for legal argument, a way of placing the matter in a wider context. But there is always a choice as to the context chosen. And the argument is never simply whether law should be coherent, but what it should be coherent with. A demand that personal injury law be coherent looks very different depending on whether we take a narrow view of context (say, just the essentials of negligence law) or a wide one (looking at how such claims are made and enforced within the legal system) – the first account might stress personal responsibility for harm, the second is more likely to emphasise litigation finance and relations between insurers, and to deem personal responsibility of wrongdoers almost entirely irrelevant, if not an outright legal fiction. Both accounts are accurate enough; which one is *better* must depend on what question we are asking.

In a nutshell, then, my thesis is this: that it is certainly misleading, and probably flat wrong, to think of coherence as something to be aimed at in legal exposition, if by coherence we mean something beyond mere clarity or intelligibility. Certainly in some situations we can have too little coherence, but equally in others we can have too much. After a certain point, coherence can only be achieved at

[12] Compare Levenbook's 'area-specific coherence': BB Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355.

[13] eg J Conaghan, *Law and Gender* (Oxford: Oxford UP, 2013) especially 27-28.

the expense of other values which are unequivocally good, such as fidelity to the facts and to justice. Most of this paper is concerned with theories that go too far, I argue, in their pursuit of coherence. While many theorists, inevitably perhaps, see their endeavours as the pursuit of coherence, in reality this is a truly Sisyphean quest: if we push our material too far in the direction of coherence, we will soon find it rolling back down in the opposite direction, regardless of our efforts. Increased coherence has consequences, and very often argument reveals that those consequences are not ones we desire.

Over-reliance on coherence

What is happening when one party relies on coherence either alone or as their primary argument? Typically, it is a carefully-crafted appeal to one particular argument from coherence: to one particular criterion, or one particular interpretive vision, or one particular taxonomic scheme. So Weinrib appeals to the *correlativity* of private law, that it is about what each defendant owes each plaintiff, and if the law is to be coherent it should ignore matters extrinsic to that relationship. Or again, Stephen Smith's account of contract doctrine argues that the best doctrine will provide the most convincing interpretive vision of it – its convincingness to be judged by the four criteria of fit, 'coherence' (taken here to mean 'intelligibility' or perhaps a little more[14]), morality and transparency. Or again, Stevens suggests that the law of torts makes most sense if we regard it as a system for the vindication of rights rather than the recovery of losses[15]. Or again, Birks postulated that certain liabilities should be understood as liabilities in unjust enrichment, with the various elements of unjust enrichment ('injustice', 'enrichment', 'at the expense of the plaintiff' and defences) being understood in a coherent and consistent way.

These theories have a structural similarity – that they all propose a single, deliberately simple, coherent interpretive framework for their subject-matter. A simple conception of the subject is proposed, a demonstration is made that many basic features of the subject are compatible with it, followed by the assertion that *other* theories cannot do the same job, cannot explain the same features of liability, and threaten us with incoherence if they try. The result of such arguments is always that well-established features of the subject under investigation are nonetheless declared not to be part of the essence of the subject, and might indeed be regarded as dispensable. So Weinrib knows perfectly well that many, including many judges, justify private law by reference to the social purposes it serves, but nonetheless argues that such an approach is incoherent and wrong[16]; Stephen Smith knows perfectly well that economic ideas are thought by many to justify much of the law of contract, but insists that economics only explains a limited range of phenomena in contract and so must be doubted on coherence grounds[17]; Stevens knows perfectly well that most tort lawyers regard tort remedies as aiming at the recovery of losses, rather than the vindication of rights[18]; Birks was well aware that the common law and equitable sides of restitution grew up with quite different organising principles, but nonetheless insisted on the coherence of unjust enrichment to minimise the differences[19].

[14] Smith argues over whether 'coherence' merely means intelligibility, or should have the stronger meaning of requiring a single master concept. He settles on a 'relatively undemanding' conception which is somewhere between the two, that 'to explain why contract law merits the title of 'contract law', a good theory must show that *most* of the core elements of contract law can be traced to, or are closely related to, a single principle' (*Contract Theory*, above n 4, 13).

[15] R Stevens, *Torts and Rights* (Oxford: Oxford UP, 2007).

[16] Weinrib, *Idea* (above, n 2) especially chs 1-2.

[17] Smith, *Contract Theory* (above, n 4) 136.

[18] eg R Stevens, 'Rights and Other Things' in D Nolan and A Robertson, *Rights and Private Law* (Oxford: Hart Publishing, 2012) 115, 117-121.

[19] P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1.

Clearly, the merits or otherwise of these theories must be pursued in relation to each of them on their own. But the similarity of approach is I hope clear. A simple conception of each subject is proposed, and then elements of those subjects that do not sit well with the simple conception are dismissed as promoting incoherence. The simple conception can always be disputed by pointing to things that don't fit, and in certain respects I have made this argument elsewhere[20]. My purpose here is rather different, to isolate the attractions of such models, and to look at the reasons why they seem attractive to many *despite* the obvious difficulties of fit. In other words, while it is obvious that Weinrib's account of private law departs from the facts of the matter – judges can and do appeal to community values on a regular basis – it should not be supposed that those who favour it are ignorant of these facts. If *legal* theories could be slain by a single ugly fact[21], then Weinrib's theory would not have survived its first presentation to a legally literate audience. This paper seeks to examine the real attractions of the theory, which are only partly to do with any descriptive accuracy it might have.

The next section of this paper argues that the repeated appeal to coherence is in fact a confusion. The models proposed by Birks and Weinrib are neither more nor less coherent than the models to which they are opposed. The real argument between these writers and their critics is not so much over who provides the most coherent explanation of the subject-matter at issue, but over what is the most appropriate subject-matter. To put the same point another way, it is no surprise that Weinrib finds that the best explanation of private law avoids reference to the state and its purposes, because he defines the 'private' parts of the law by reference to the apparent absence of those purposes. The real issue is therefore how much sense it makes to separate out the parts of the law where state influence is 'present' from those where it is 'absent'.

The final substantive section notes that these unitary, 'coherent' descriptions of the law tend to put on one side the merits of the relevant law: so Birks does not argue that there *should be* a law of unjust enrichment, rather that there *is* one. Yet the normative question can only be submerged briefly, not made to vanish; people care about the state of the law, even if their leading theories do their best to ignore them. And, indeed, this concentration on the positive alone is at least in part a sham; it cannot be supposed that these theorists have strong views whether the law conforms to a particular pattern yet are entirely indifferent whether it should continue to conform to it in future. This neglect of the normative question, I argue, has a distorting effect on the debate, as the 'coherence' theorists do their best to shore up a particular positive version of the law while giving no good normative reason why it matters.

'Coherent' against what background?

Even if we confine ourselves to the simpler models, it is obvious that there are many possible coherent versions of the legal system. Suppose we are concerned with how to fit the decision in *Donoghue v Stevenson*[22] into a coherent picture of the law. We might end up with very different pictures depending on *which* law we seek to fit it into: into Scots law? The law of the United Kingdom (if there is such a thing)? 'The common law tradition'? 'European common law'? A further

[20] Especially 'The Shock of the Old: Interpretivism in Obligations', in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Oxford: Hart Publishing, 2008) 205; 'Looking Outward or Looking Inward?' in A Robertson and T Wu (eds), *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 193; and 'Courts as Public Authorities, Private Law as Instrument of Government' in K Barker and D Jensen (eds), *Private Law – Key Encounters with Public Law* (Cambridge: Cambridge UP, 2013) 89.

[21] '[T]he great tragedy of Science – the slaying of a beautiful hypothesis by an ugly fact': TH Huxley, in 'Biogenesis and Abiogenesis', *Collected Essays* (London: Macmillan, 1870) VIII, 292, 244.

[22] [1932] AC 562.

issue would be the assumed subject-matter of the relevant law. Are we trying to make sense of the decision as part of the law regulating soft drinks and other consumer products? The law controlling snails and other dangerous beasties? The law of tort/delict? Or the 'law of negligence' (if there is such a thing – which might have been a bold assumption at the time of the decision)? While the significance of the decision might become clear once we have picked the right frame of reference, it is that prior choice that will often be more important. Davie Stevenson could reasonably have demanded that there should be a coherent law of soft drinks, and competing manufacturers in towns in England could reasonably have demanded to know whether the decision affected only the Scots or applied more widely. Different observers with different interests will, entirely legitimately, have different perspectives on this.

As to the decision in *Donoghue* itself, of course, we can be sure of the right frame of reference to view the case: the way the issue was framed, and the judicial personnel involved, made it practically inevitable that the case is to be taken as concerning a tort of negligence, and that the Scottish and English jurisdictions are to be taken as equally affected by it. Judges have the issues framed for them, and only rarely get a chance to redefine them.

Academics, by contrast, have a great deal of freedom in the matter: we can address what questions we like. This very freedom, however, opens up a risk of circularity. Take Weinrib's claim that private law is not properly understood unless we ignore 'extrinsic' questions of what the law is *for* and concentrate on 'internal' questions of the parties' mutual entitlements. The obvious riposte is that private law is made under the eye of state bodies, that parliaments can and do modify it as they see fit, and make access to it more or less difficult as they see fit: if the law were not thought to be fulfilling its proper functions, it would be modified, as indeed has happened on many occasions throughout the common law's history. Weinrib does not address that point: rather, he evades it, by focusing on common law rather than statute, and by dodging repeatedly the question of which jurisdiction he is describing. Obviously it is hard to trace the state's influence on the law if it is quite unclear which state is in issue – even though *every* state has placed major qualifications on the law that Weinrib describes. There can be no objection, of course, to an attempt to synthesise a single set of common law values out of the cases from the US, Canada and the UK, as Weinrib has done. But if the main point of this synthesis is to prove that no coherent pattern of state action can be discerned, it is apparent that questions are being begged. Weinrib sees no coherent notion of what private law is *for* because he goes to great lengths *not to look* for evidence that it has a purpose, and to ignore any apparent pattern as irrelevant to his thesis. The frame of reference adopted deliberately obscures the state; Weinrib then supposes that he has demonstrated the irrelevance of the state, when in fact he has merely ignored it.

Similarly with Smith's account of contract law, which seeks the most convincing interpretation of contract law, which again and again in his survey of the law he finds in theories referencing a morality of promising. Going back to how the question is posed, however, the conclusion might seem to be inevitable. His account is indeed *premised* on the idea that there is such a thing as a general law of contract, an idea which has always been strongly tied to contract-as-promise. He is just as vague as Weinrib about which jurisdiction he is describing – vaguer, indeed, as he is happy to hint that much of his account might be relevant to civil law jurisdictions[23] – and he builds in a preference for doctrinal accounts by insisting that a properly interpretive approach requires 'transparency', that is that we evaluate legal systems by reference to what the judges actually say they are doing rather than how a theorist, or for that matter a legislator, might prefer to describe what they are doing[24]. Clearly this builds in a preference for morality (to which judges often make reference) over economics (to which they barely refer). Indeed, Smith barely engages with those

[23] *Contract Theory* (above, n 4) ix.
[24] *Contract Theory* (above, n 4) 24-32.

who start from a different place: so there is one footnote mentioning Hugh Collins's theory of contract as the law regulating market transactions. But this must be wrong, says Smith: contract law isn't confined to any one type of human activity, he says, and anyway Collins's view would (horror of horrors) blur the line between contract and tort[25]. Given the question Smith asks, his conclusion is of course inevitable.

The point here is not that Smith is wrong about this, though obviously I think that he is. The point is that there is no real engagement with opposing views, and that the argument from coherence is manipulated to make this lack of engagement seem natural. If the desired conclusion is that morality, rather than politics or economics, is the mainspring of the law, we must first take seriously the idea that the state may have an influence: defining the law so that its essence is case law does not do that. Or if the desired conclusion is that judges in Ireland have more in common with judges elsewhere than they do with non-lawyers in Ireland, again we must first take seriously the idea that local influences might count. And if the desired conclusion is that it is doctrine that matters in characterising a legal system, rather than questions of who actually has access to justice and on what terms, then again the contrary view must first be taken seriously. An effective demonstration of a particular view requires engagement with the evidence to the contrary. That is not what these writers do. They discuss a creature of their own imagination – what 'the law' would be if there were no jurisdictional boundaries – and ignore the statutes and limitations on access to justice that exist everywhere in the real world. None of this *proves* they are wrong, of course. But it shows how steep a hill they have to climb to establish their case.

The problem is not the attempt to classify, it is the privileging of one classification above others: the difficulty is not the appeal to coherence, but that only one sort of coherence is appealed to (what a cross-jurisdictional common law would look like) rather than others (what the actual law in a real jurisdiction looks like).

'Pluralism'

It is around this point in the argument, on past experience, that the other side retorts, 'Oh, you're just some sort of pluralist!' and demands some sort of manifesto of pluralist values if what I'm saying is to have any philosophical merit. I've never found this demand a very convincing one – the wide variety of phenomena in any one legal system is obvious enough, and can be pointed out by anyone, without relying on any particular -ism. 'Pluralism' doesn't belong on a list of theories of law, any more than baldness belongs on a list of possible hairstyles. And 'pluralism' is a term which is bandied about as if it had a definite meaning, or indeed by some as if it were a particular club with a definite membership list. In fact, 'pluralism' is used in a variety of ways, of which I'll now mention three which have particular relevance to this discussion.

Firstly, and particularly as used by comparative lawyers, pluralism means the presence of more than one legal system within the same territory. So we might say for example that Irish law was 'pluralistic' before 1367 (as both common law and Brehon law were invoked in disputes), but not so much afterwards, as harsher penalties were imposed on those who invoked Brehon law. More subtly, a detailed look at a legal system may reveal the influence of more than one system. We might regard the modern law of tort in Ireland and the UK as pluralistic, for example, as in part it is native common law but in other aspects it reflects EU law, and in yet others the ECHR. Jurisdictional barriers ancient and modern might also create pluralism – contract law before an employment tribunal is a rather different creature from contract law before the Commercial Court. And the rules applicable at common law are still rather different from those applicable in equity, even though the

[25] *Contract Theory* (above, n 4) 43 n 1.

jurisdictional divide that gave rise to those differences withered some time ago. This, then, is one type of pluralism[26].

A second type of pluralism, perhaps the most common one in the context of private law theory, starts from the idea that law has been established as a rational act, with particular aims in mind; 'pluralism' is the notion that there might be many of these aims, and that they do not necessarily fit well with one another. This is how Keren-Paz[27] talks of pluralism in private law, and indeed unless we mean to ignore the influence of statute entirely it is hard to see how it can be ignored. Those of a more pro-coherence mindset have occasionally attacked recognition of this sort of pluralism, saying that they are against 'mixed' theories as lacking purity. So for example Robert Stevens:

> Unfortunately, while the 'mixed' or pragmatic view of law is popular it cannot be true, or at least not true in relation to a legal system which make any sense. Law is not like minestrone soup. One cannot simply add together a number of disparate ingredients and hope to get a satisfactory result ... One cannot be a bit of a utilitarian or a half-hearted Kantian, and it is certainly impossible to try and be a combination of the two. Attempting to form a view as to what the law of torts specifically or private law in general is about is unavoidable. Why would they be worth considering as distinct topics if they were not 'about' something or other? A 'mixed' theory is not a theory at all[28].

So when forced to choose between the idea that the law might have many purposes and the idea that there is a 'distinct topic' of torts, Stevens's choice is for the latter. That is perhaps the core of the dispute over the relevance of coherence. The attack seem to me to blame the messengers for accurately bringing the message. It was never really to be expected that private law would *entirely* conform to one theory, or answer to only one set of values; noting that the legal system is more varied is merely accurate reporting. If the resulting picture is not pretty, perhaps prettiness is the wrong criterion – or if it is not, we need to begin discussion of what concrete changes would make it prettier. A deeper question is whether there is some coherent way of co-ordinating all the demands that the political system makes of private law: whether a law adequate to modern needs can be coherently stated, or whether the legal system is doomed to remain as a booming, buzzing confusion. But that question can hardly be answered if we cannot talk of the political needs the law satisfies in the first place.

The third sense of pluralism plays an increasing role in private law theory, confusingly so as it is somewhat orthogonal to the first two meanings. Many legal philosophies – pre-eminently positivists, though to a certain extent others as well – tend to look at law from the point of the view of the state and its officials; and if they talk about the purposes of the law, it is the purposes that the state has or ought to have that are in view. However if – as many theorists now argue – one of the major purposes of the law is to provide for the autonomy of those subject to it, then a thorough-going commitment to autonomy will demand that a wider range of purposes be looked at. So on this view contract law and property law represent in great part a commitment to pluralism, to respecting the various intentions of the people involved and providing them with legal mechanisms to carry out their plans; much of the rest of private law is about minimising the frictions generated by people as they each try to achieve their various goals. It is in this sense that Hanoch Dagan is a pluralist[29], and while neither Morgan[30] nor Merkin and Steele[31] use quite that language it largely fits their accounts

[26] On 'pluralism' in this sense see M Davies, 'Legal Pluralism' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Research* (Oxford: Oxford UP, 2010) ch 33.
[27] *Egalitarianism* (above, n 8) 8 .
[28] R Stevens, 'The Conflict of Rights' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 139, 140-141, footnote omitted; and to similar if less emphatic effect see Smith, *Contract* Theory (above, n 4) 51.
[29] eg 'Pluralism and Perfectionism' (above, n 10).
[30] J Morgan, *Contract Law Minimalism* (Cambridge: Cambridge UP, 2013) especially chs 9-10.

of commercial contract too. Coherence, in this vision, begins to fade away: we do not seek to make different human plans cohere with one another unless that is what they themselves plan, but rather to give as much scope to each as we fairly can[32].

Reference to pluralism, then, considerably broadens the range of issues and phenomena under review, and makes it less plausible that any one theory will adequately describe it. As will be clear by now, a simple theory of common law at least can usually only be made plausible by drastically restricting the range of issues that are considered relevant – and so the task of justifying that theory has involve a justification of whatever limits are imposed. And even so, it will not often happen that that the case law fits some restrictive pattern in all respects. There may, however, be other reasons than fit to promote a particular theory; as Smith notes, the normative attractiveness of the theory may also be a point in its favour[33]. That is the issue to which I now turn.

Suppressing the normative

Assuming, then, that an appeal to consistency alone can only be part of the case for a particular theory of private law, can another part be an appeal to normative values? More simply, might not a theory such as Weinrib's or Birks's be attractive because it calls out to values we already hold? It's often assumed that such theories automatically have normative appeal. Rob Stevens hints at this, with his claim that we can't be half-hearted Kantians[34] – in other words that if we're attracted to a Kantian view of the law it must be that we buy into Kantianism generally, and not just when we feel like it.

The problem is that these arguments tend to concentrate on the descriptive rather than the normative. And if we're simply using Kant's thought to help us *describe* the law, there's no reason why we *shouldn't* be half-hearted Kantians, using Kant's deontology when it's descriptively convenient but ignoring it the rest of the time. In this, Smith's account seems more persuasive, since he is prepared to allow other values as well as coherence to determine which law is best. But what of those who put more weight on coherence?

Arguably Weinrib is the very embodiment of half-hearted Kantianism, as he insists on a Kantian description of private law but refuses to defend it on normative grounds. This is surprising, as Weinrib is often taken to be a principal defender of traditional private law, and of its exposition without reference to public values. But his argument goes to description only. He insists that the current law is *unintelligible* unless his way of looking at it is adopted, but never addresses the question whether that law is a good one, or whether it should be replaced. At an earlier point in my researches, I wondered whether this was simply a quirk of his writing strategy, and I've been assured by a room-full of Kantians that Weinrib *must* believe that his scheme generates moral rights, that if he is explaining (say) negligence liability in that framework then he *must* have meant both that correlativity explains the relevant law *and* that negligence defendants owe a moral duty to negligence plaintiffs to make good the damage they have done. But even if so – and I can't see much of a hint of it in the text – this can only be the start of a moral defence of the law. Weinrib makes no case that the law *should* reflect such moral concerns. It may be that he actually holds the view of the matter expressed in Jules Coleman's *Risks and Wrongs* – that the law ought to do *something* for the

[31] R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford: Oxford UP 2013) especially ch 7.

[32] See more generally R Kreitner, 'On the New Pluralism in Contract Theory' (2012) 45 *Suffolk University Law Review* 915.

[33] Smith, *Contract Theory* (above, n 4) 13-25.

[34] Above, n 28.

victims of wrongdoing, but that a state insurance scheme such as is in force in New Zealand might satisfy those legitimate claims at least as effectively as a system of recovery for negligence[35].

Birks was similarly quiet on the question of morality. The theory is that enrichments were only recoverable if they were *unjust* enrichments, but Birks carefully de-fanged the idea of injustice so that it had no moral connotations – to 'bring it down to earth', as he put it[36] – and while there is continuing controversy over how that requirement is to be expressed, morality has little to do with it. In moral terms, indeed, 'unjust enrichment' is a standing puzzle. Everyone agrees that the central case – mistaken payment of a debt, mistaken either in that the debt has already been paid, or in that it was never a valid debt – represents a clear case for recovery. But this rests almost entirely on moral intuition, and it is remarkably hard to articulate *why* the law should intervene in such a case, particularly given the inconvenience it means for the payee, who is usually blameless in the matter. Theories proposed include variants on corrective justice, respect for autonomy, and proprietary theories which argue over who an enrichment 'belongs' to. The debate is still continuing, though it is fair to say that no one theory commands a great deal of support as yet[37].

In both these instances, then, the weight of the argument falls on descriptive coherence alone: it will receive support to the extent that it coincides with the fact of the matter. To the extent that it does not – and inevitably there will be *some* divergence between theory and reality – it gives us no reason to make the law conform to it. Without a good normative argument, the plea that 'We shouldn't depart from Birks's scheme!' will receive the answer 'Why on earth not?'.

Conclusion

In summary, then, there is a certain Sisyphean masochism to arguing in private law primarily on grounds of coherence. Sometimes the theorist will feel that progress is being made, that a more coherent law has been revealed, or at least that the way towards such a law has been indicated. But the consensus on values within this particular argumentative community does not really go very deep, and the more rigorous the proposed law is, the more opposition it will encounter. In a sentence: We can see our endeavour as a search for coherence, but it would be very surprising if we achieved it – nor should we regret our failure to do so.

[35] J Coleman, *Risks and Wrongs* (Oxford: Oxford UP, 1992) especially ch 19.

[36] *Introduction* (above, n 5) 23.

[37] See eg R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford UP, 2009).