

A Rejection of Contract Law's Metatheoretical Coherence Criterion

by

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I. INTRODUCTION

*I went to the woods because I wished to live deliberately.*¹

In 1845, Henry David Thoreau went into the woods near Walden Pond to see what he could find.² Imagine if Thoreau's friend Ralph Waldo Emerson³ had told him the following: "When you describe the pond, describe it as you want it to be. Do not let objectivity get in the way of your description." If Thoreau had followed this advice, he would not have been able to describe, explain, interpret, theorize, and make his famous normative statement to "Simplify, simplify."⁴ Yet, with a poorly constructed metatheory standing in for the fictitious words of Emerson, this is exactly what is happening as theorists walk into the woods of contract law. This paper aspires to improve contract theory through the rejection of the metatheoretical coherence criterion, which states that theorists must find that the justifications for the elements of contract law derive from a single idea.⁵

A current problem for contract theorists is whether to accept or reject the coherence criterion.⁶ Even without this question, legal theory development is already challenging for several reasons: 1) Law is fluid. The law includes cases, statutes, customs, norms, mores, and

¹ HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 85 (Barnes & Noble Books 2003) (1854).

² *Id.* at xi, 7, 85-86.

³ *Id.* at xix.

⁴ *Id.* at 86, 160-82, 288-300

⁵ ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 29-46 (1995); STEPHEN A. SMITH, CONTRACT THEORY 11-13 (2004).

⁶ SMITH, *supra* note 5.

values. Billions of people have interacted with each of these over literally thousands of years.⁷ 2) Law is practical. It must deal with real people in real circumstances. 3) Law is interdisciplinary. This makes law especially challenging because its participants lack some of the in-depth commonality of education, scholarly processes, and shared vocabulary that other disciplines cultivate. For example, a Ph.D. in mathematics will have an in-depth, shared understanding with others in the field of both the subject and the mathematical academic culture. The mathematician has many years of training with other mathematicians and a culture of building theory upon the works of others. However, legal theorists probably only have three years of a shared educational experience with people of diverse educational backgrounds. In addition, those three years do not focus on theory. 4) Politics affects the law and can leave it “untidy.”⁸ Although any theorist must decide what metatheoretical criteria to accept or reject, it is especially significant to explicitly choose the criteria used in the challenging environment of legal theory development. But how does a theorist decide what metatheory to use and correspondingly what criteria to use?

This paper offers one framework for making such decisions and concludes that theorists should reject the coherence criterion. By reject, this paper means that theorists should recognize the unsoundness of the coherence criterion and not use the criterion. This paper does not argue that there are any simple answers to constructing theory. Although there is a heavy underlying emphasis on modeling with both qualitative and quantitative concepts, this paper does not argue that a well-designed research project is going to produce contract theory in the same way that a well-designed accounting system will produce financial statements. However, this paper does argue that there should be consistency in theory construction and that, if there is not, the theorist should at least provide an explanation. The rejection of the coherence criterion can be beneficial

⁷ Cf. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 276-77 (1994).

⁸ Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 310 (1992).

in several areas.

The rejection of an unsound metatheoretical criterion can improve theory and contract law understanding, thereby contributing to the achievement of contract law objectives including, but not limited to, ordering individual autonomy, assisting the incapacitated, and promoting free markets. Specifically, theorists use metatheory to evaluate and develop theory. Theory is significant because it assists people in understanding contract law and understanding can contribute to the realization of objectives. Therefore, researchers can use metatheory to work toward the achievement of contract law objectives.

This paper proceeds as follows: first, this paper explains coherence along with its place in theory and metatheory; second, needing a framework with which to evaluate the coherence criterion and the lack of a comprehensive metatheoretical model of social inquiry,⁹ this paper presents an original metatheoretical model of theory and demonstrates its validity; third, this paper uses that model to construct metatheory and then demonstrates that the coherence criterion conflicts with consistent metatheory, leading to the conclusion that theorists should reject the coherence criterion.

II. THE COHERENCE CRITERION

*The pond rises and falls, but whether regularly or not, and within what period, nobody knows, though, as usual, many pretend to know.*¹⁰

The coherence criterion is a part of metatheory that states that a theorist must find that the justifications for the different elements of contract law cohere - i.e., that they come from one

⁹ Cf. METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES 5 (Donald W. Fiske & Richard A. Shweder eds., 1986) (discussing multiplicity of paradigms of research concepts).

¹⁰ THOREAU, *supra* note 1, at 166.

idea.¹¹ A thorough comprehension of coherence requires understanding the context of the criterion, degrees of coherence, and types of coherence.

A. THE CONTEXT OF THE COHERENCE CRITERION

The substantive law of contracts is concerned with the elements that make up contract law such as offer, acceptance, and consideration. Contract theory generalizes about and explains substantive contract law. Metatheory is the next higher level of analysis. A thorough understanding of metatheory is important for two reasons: first, to enable those interested in contract theory to communicate clearly with each other and not “end up comparing the theoretical equivalents of apples and oranges;” and second, to provide a better basis for comparing theories, because “many of the deepest differences in contract theory rest on disagreements, often unarticulated, about the criteria for assessing theories.”¹²

Stephen A. Smith outlines a contract law metatheory by addressing two areas. First, he addresses how one can evaluate theory by using four criteria: fit, coherence, morality, and transparency.¹³ Second, he outlines what constitutes a complete theory.¹⁴ Smith argues that a comprehensive theory of contract will be able to answer two questions: “what are the essential characteristics of a contractual obligation?” and “why give legal force to contractual obligations?”¹⁵ Answers to the first question can fall under promissory, reliance, or transfer theories.¹⁶ Answers to the second question can include utilitarian or rights-based theories.¹⁷ These answers do not exhaust the list of possible answers. However, According to Smith, using

¹¹ WEINRIB, *supra* note 5; SMITH, *supra* note 5.

¹² SMITH, *supra* note 5, at 3.

¹³ *Id.* at 7-37.

¹⁴ *Id.* at 41-53.

¹⁵ *Id.* at 42-43, 46.

¹⁶ *Id.* at 52.

¹⁷ *Id.* at 52.

both the answers to the two questions, and the four criteria, one should be able to identify and criticize a contract law theory.¹⁸

B. DEGREES OF COHERENCE

An area of law may have degrees of coherence.¹⁹ Smith divides the coherence criterion into three versions by degree of coherence.²⁰ A theory meets the weakest version “to the extent that it presents contract law as consistent or non-contradictory.”²¹ A theory meets the strongest version to the degree it reflects contract law as unified - i.e., flowing from a single principle.²² Supporting the latter, Ernest Weinrib defines a coherent legal system as one where there is a single justification that coherently ties together the considerations that underlie the features of that legal system.²³ He writes “For a private law relationship to be coherent, the consideration that justifies any feature of that relationship must cohere with the considerations that justify every other feature of it. Coherence is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a juridical relationship.”²⁴ Smith concludes that a third version - a compromise between the consistent and unified versions - is appropriate and concedes that “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.”²⁵ At least one author sees Smith’s book as making a contribution in the area of criteria, writing, “one of Contract Theory’s contributions is Smith’s sustained discussion and defense of a set of criteria for winnowing out defective

¹⁸ *Id.* at 7-37, 41-53.

¹⁹ Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL’Y 639, 641 (1993).

²⁰ SMITH, *supra* note 5.

²¹ *Id.* at 11.

²² *Id.* at 11-12.

²³ WEINRIB, *supra* note 5, at 32.

²⁴ *Id.*

²⁵ SMITH, *supra* note 5, at 13.

theories.”²⁶ This paper argues directly against that statement as far as it relates to the coherence criteria.

C. TYPES OF COHERENCE

Weinrib argues there are two ways to think of the “unity of the aspects that cohere.”²⁷ Interconnected unity occurs where “the aspects that are united are intelligible only through the integrated whole that they form as an ensemble.”²⁸ Weinrib writes that “each of the parts can be grasped only through comprehending its interconnection with the others and, thus, the relative position of each part in the whole that all the parts together constitute.”²⁹ Accidental unity, by contrast, occurs where “the aspects are independent of one another and fully comprehensible in isolation. When placed together, the aspects form an aggregate, a sum of individually intelligible items.”³⁰

D. AN EXAMPLE OF FINDING COHERENCE

An example of a theory that finds coherence will clarify the above explanations. In his book, Contract as Promise,³¹ Charles Fried presents a theory that finds coherence.³² Fried argues that contract law “can be traced to and is determined by a small number of basic moral principles” and “that the law of contract ... ha[s] an underlying unifying structure.”³³ He writes, “The promise principle, which ... I argue is the moral basis of contract law, is that principle by

²⁶ Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1484 (2005).

²⁷ WEINRIB, *supra* note 5, at 33.

²⁸ *Id.* at 34.

²⁹ *Id.*

³⁰ *Id.*

³¹ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

³² *Id.* at 132.

³³ *Id.* at unnumbered first page of Preface.

which persons may impose on themselves obligations where none existed before.”³⁴ Fried acknowledges that there are criticisms of his theory.³⁵ However - and this is the significant factor in showing that he finds coherence - he argues that the promise principle explains most of contract law.³⁶ For Fried, “[t]he law of contracts ... is rooted in promise.”³⁷

III. A FRAMEWORK FOR EVALUATION

*It is a vulgar error to suppose that you have tasted huckleberries
who never plucked them.*³⁸

Understanding the coherence criterion does not necessarily provide the tools for evaluating it. This section presents a model for theory construction, a metatheoretical model of theory, and an application of that model that identifies concepts useful in evaluating the coherence criterion. If theorists accept the validity of the model and the assumptions presented in the section regarding the critique of the coherence criterion, then theorists should accept the thesis.

A. DEFINITIONS

Clarity of definition is not always present in the scholarship of theory. As just one example of mixing concepts, one author writes, “We look to legal theory to tell us when the use of legal force against an individual is morally justified. We look to contract theory, in particular, to tell us which interpersonal commitments the law ought to enforce.”³⁹ As this paper defines the term, a legal theory does not make normative statements; it inductively generalizes as the first

³⁴ *Id.* at 1.

³⁵ *Id.* at 3-6.

³⁶ *Id.* at 132.

³⁷ *Id.*

³⁸ THOREAU, *supra* note 1, at 160.

³⁹ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986).

stage in a process that might lead to a normative statement. Theory does not have “ought” in it. Theorists need to either clearly follow the process of moving from empirical observation to normative prescription or at least explain why they are not. Thinking and writing about what law “ought” to be – whether or not it follows empirical observation - is of value. However, clearly defining and labeling it assists the reader. Mixing concepts does not further theory. In order to avoid confusion, this paper uses the following definitions.

Researchers can use the word “theory” as a larger category that includes inductive generalization, explanation, interpretation, and normative suggestion. If researchers are referring to this particular, inclusive idea of theory, they should consider using the phrase “inclusive theory” or another such indicator of this specific, expanded meaning. The significance is more than just semantic in that each stage of scholarship implies adding something to empirical observation. With the clear usage of words, one can understand what type of information constitutes the ideas presented.

This paper also uses the following definitions: “Theory” means inductive generalization. This is because theory moves from the specific to the general⁴⁰ and the method of logic that parallels this is inductive generalization.⁴¹ “Explanation” adds other information to the data in an effort to understand the subject area. Explanation can include adding historical context, constructing models, viewing the data in light of information from other academic disciplines, and constructing theory. “Interpretation” adds values to the explanations. As one example, a theorist can base interpretation on academic standards. The “normative stage” is where the researcher makes normative statements and often uses the words “should” or “should not.”

⁴⁰ CHAVA FRANKFORT-NACHMIAS & DAVID NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES 47 (1996).

⁴¹ DAVID A. CONWAY & RONALD MUNSON, THE ELEMENTS OF REASONING 50-51 (2000).

B. A MODEL OF THEORY CONSTRUCTION

A metatheoretical criterion, by definition, applies to theory development. “Theory” is often misunderstood.⁴² Therefore, it makes sense to begin an evaluation of a criterion with a brief overview of theory construction.

A sound social science theory addresses important issues, agrees with current knowledge, provides new insights into the issue, outlines constructs, explains construct measurement, improves on the explanations of data by existing theories; is falsifiable, efficient, coherent (the theory, not necessarily the subject matter), comprehensible; and, the hypotheses are specific and do not contradict each other.⁴³ This paper will use the following process: “1. Investigate a phenomenon and delineate its attributes. 2. Measure the attributes in a variety of situations. ... 3. Analyze the resulting data to determine if there are systematic patterns of variation. 4. Once systematic patterns are discovered, construct a theory.”⁴⁴ I use this process because, relating to the factors that are most relevant to this paper – i.e., theory coherency and consistency,⁴⁵ it provides a method of analyzing and synthesizing concepts at the level of attributes.⁴⁶

Relational database theory provides insights into working with conceptual relationships. Although relational database theory is a field of mathematics, one can use its insights in non-quantitative areas. Although an in-depth discussion is both unnecessary and beyond the scope of this paper, there is one concept that is especially useful relating to discreteness.

A database includes tables (representing entities), columns (representing attributes of the entity), and rows (representing instances of those attributes for an entity).⁴⁷ The intersection of

⁴² ROYCE A. SINGLETON, JR. & BRUCE C. STRAITS, *APPROACHES TO SOCIAL RESEARCH* 19 (2005).

⁴³ RICK H. HOYLE ET AL., *RESEARCH METHODS IN SOCIAL RELATIONS* 26-28 (2002).

⁴⁴ FRANKFORT-NACHMIAS, *supra* note 40.

⁴⁵ HOYLE, *supra* note 43.

⁴⁶ FRANKFORT-NACHMIAS, *supra* note 40.

⁴⁷ PAOLO ATZENI & VALERIA DE ANTONELLIS, *RELATIONAL DATABASE THEORY* 3 (1993).

the column and row is a field that can contain a value.⁴⁸ If the value can vary, then the field is a variable or, in other words, “an attribute on which cases vary.”⁴⁹

This paper defines a discrete value as one that is separate, not vague, and does not overlap as far as is possible (acknowledging the vagueness of language) with other values. Generally, there is a direct relationship between the discreteness of each value in the range of allowable values and the opportunity for the analysis of the construction of the generalized information or meaningful synthesis of generalized information from the discrete values

An example will clarify the concept of discreteness. Imagine a building made of bricks numbered with serial numbers indicating manufacture date, installation date, and load-bearing capacity. Compare that to a building made of poured concrete. It is obviously easier to find out detailed information about the brick building than the concrete building. This is true whether one is analyzing the building to see how the contractor constructed it or synthesizing the information from the serial numbers on the bricks to see what resulted, such as total load-bearing capacity.

Returning to the theory building process, note that, to depict attributes in step 1, one must first select a unit of analysis.⁵⁰ The experienced theorist will immediately spot a crucial point in the process here, as the values assigned to the “why” variable have great effect on the theory later. Note also that, during the second step, the theorist should study many instances of units of analysis and assign values to the variables in a meaningful set of cases.⁵¹ Finally, if the researcher has discovered patterns, then the researcher can develop a theory.⁵²

⁴⁸ *Id.*

⁴⁹ ALAN BRYMAN, *SOCIAL RESEARCH METHODS* 29 (2004).

⁵⁰ FRANKFORT-NACHMIAS, *supra* note 40, at 47, 53-54.

⁵¹ *Id.* at 47.

⁵² *Id.*

C. METATHEORETICAL MODEL OF THEORY

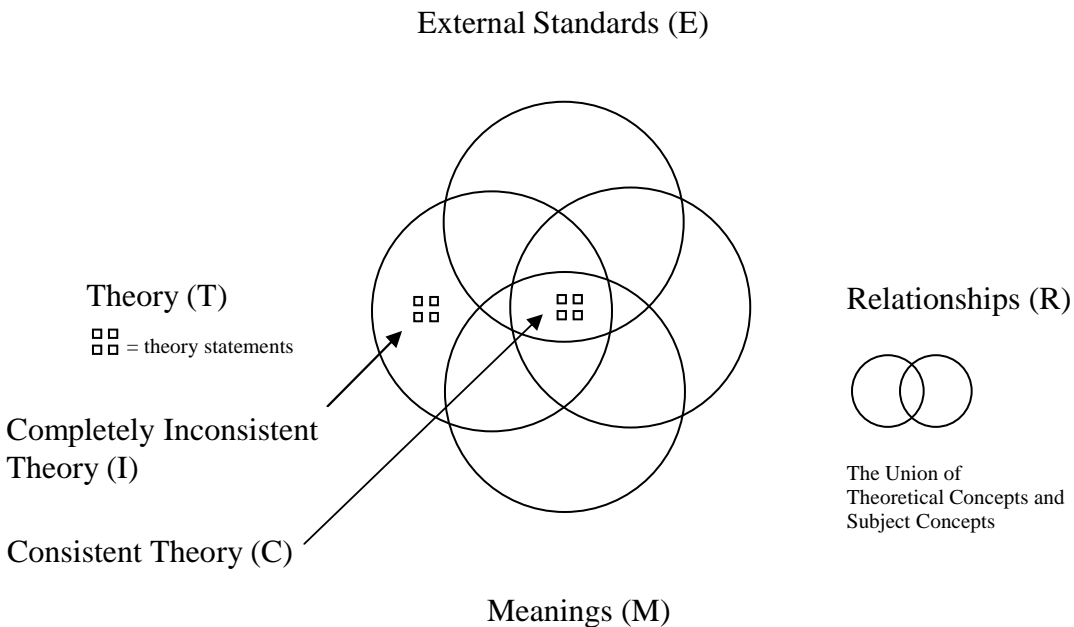
Although there is a need for a framework that provides a process for developing and evaluating metatheory - i.e., a metatheoretical model of theory - there is not one readily available. Of course, every theorist uses metatheory even if the theorist simply bases theory development on personal preferences. However, here this paper refers to a disciplined, independent metatheory. There is a wide range of contract law theory⁵³ but not the depth of metatheory one would expect to support such a large amount of theory. Indeed, it is almost nonexistent. Thorough searches using library databases, legal research databases, and Internet search engines turn up very little. These searches have not turned up even one law review article or book that, as its major topic, addresses metatheory in contract law. This paper develops such a model and presents it in Venn diagram form, followed by detailed explanations of its components and usage.

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⁵³ See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS OF CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 7-41 (1998).

Metatheoretical Model of Theory

Diagram 1



Where C = consistent theory, I = completely inconsistent theory, T = statements in the completed theory, E = external standards, R = stated or inferred relationships between the concepts in the union of theoretical concepts and subject concepts, M= the meaning of the theoretical concepts and subject concepts.

This model consists of four overlapping areas. Theory (T) represents the statement(s) in a theory. For example, one can place Fried’s statement that “The law of contracts ... is rooted in promise”⁵⁴ within the Theory circle. External standards (E) are a set of standards for theory that apply to most areas of social inquiry and are not specific to one particular area of study. For example, an external theoretical standard might be that a researcher should be truthful about theoretical research. Relationships (R) are relationships between theory development concepts and concepts of the subject of study. This section will explain relationships in more detail

⁵⁴ FRIED, *supra* note 31, at 132.

following these introductory explanations. Meanings (M) represents concepts that may not be in a relationship but are still meaningful to the project. There may be instances of individual discrete concepts. For example, a definition of a word could be in this section. Of course, the theorist must be aware of the vagueness of language. For example, although this paper differentiates between explanation and interpretation, some authors use interpretation to mean the same as explanation: “the concept of interpretation is a vague one, which means that there are bound to be disagreements about its applicability which are linguistically irresolvable.”⁵⁵ Clearly stated meanings, at least, provide a basis for discussion.

It is obvious that a theory should be consistent with external standards and the meanings of discrete concepts such as the words the theorist uses. It is less apparent that the theory should be consistent with inferred relationships. Therefore, clarification is in order.

In this process, a theorist can take the selected theory of model construction and the subject area and analyze them identifying their concepts at a low and meaningful level. The theorist can then work with all of the concepts together. This paper refers to this process as the union of theoretical concepts and subject area concepts. Next, the theorist can look for relationships both between the theoretical concepts and the subject area concepts and between the concepts in the subject area. Although it is possible to look for relationships in the theoretical model of construction, one would think that a mature model of theory construction would already have identified such relationships.

Simply applying a list of theory-building steps to a subject area does not ensure consistency between the statements of the completed theory and the inferred relationships between the concepts of the theory and the concepts of the subject. In complex research, such as legal theory, consistency at the lowest levels is a necessary but not sufficient factor of ensuring

⁵⁵ ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 13 (1992).

consistency at the higher levels of generalization. When theorists only work at the highest levels, they may not only produce inconsistent theory but may not even address the lowest levels of generalization.

An example will help clarify this process. Following hypothetical steps 1, 2, and 3 relating to hypothetical concepts A and B, the theorist may develop statements consistent with A and B. However, what if the relationship of A to B means there is a relationship C? The theory should consider this relationship in order to be consistent. In order for a theory to be completely consistent, each part must be consistent. Therefore, the theorist needs to complete this additional process. The Relationships (R) circle reflects this process. I demonstrate this process in depth later in this paper.⁵⁶

The metatheoretical concept that a theorist should present a theory that is consistent with external standards, internal relationships, and related conceptual meanings is the basis for this model. A theory is *externally consistent* if each statement in the completed theory is consistent with external standards applicable to social inquiry. A theory is *internally consistent* if each statement in the completed theory is consistent with the stated or inferred relationships of the union of theoretical concepts and subject concepts and is consistent with the meaning of individual theoretical and subject concepts.⁵⁷ A theory is completely consistent if all of its statements are both externally and internally consistent.

⁵⁶ See *infra* at Part IV(B).

⁵⁷ A theorist can place theory statements in seven areas of the Venn diagram. Only where all of the theory statements are in the area where all four circles overlap is the theory consistent i.e., $C \ni (\forall_x (T_x \ni (E_x \& R_x \& M_x)))$. If a statement of a theory is incongruent with any other circle then that is sufficient to constitute an inconsistent statement and therefore an inconsistent theory. If the theory does not overlap with any other circle then the theory is completely inconsistent i.e., $C \ni (\forall_x (T_x \ni \sim(E_x \& R_x \& M_x)))$. Any other combination reflects partial consistency i.e., $P \ni (\exists_x (T_x \ni (E_x \& \sim R_x \& \sim M_x) \vee (E_x \& R_x \& \sim M_x) \vee (\sim E_x \& R_x \& M_x) \vee (E_x \& \sim R_x \& M_x) \vee (\sim E_x \& \sim R_x \& M_x)))$ where P = partial consistency. Although a more sophisticated model is not necessary to support the thesis of this paper, one could add to this model a method of accounting for the relationships between theoretical statements and the various areas in effect weighting the relationships.

D. APPLYING THE MODEL

This section will use the model to develop a metatheory that will assist in evaluating the coherence criteria. The results of this process, in the form of numbered concepts, appear later in this section. Although it is beyond the scope of this paper to “prove,” or even argue for, each concept, a brief explanation of the process of developing one concept is illustrative. The next paragraph lists the general steps. The paragraph that follows then illustrates how to use the first four steps to develop one relationship concept.

Theorists can use categorical models in nonsequential ways. However, the following series of steps illustrates one method of developing a metatheory. 1) Divide a theory-construction model into discrete concepts, 2) divide a specific area of study into discrete concepts, 3) examine the relationships between all of the discrete concepts, 4) make inferences from these relationships (i.e., draw corollaries and clarify relationships), 5) identify external standards, 6) identify meanings of individual discrete concepts (note that these are non-relationship concepts – all other meanings are determined when working with their respective concepts), and 7) examine the relationship of the statements of the theory to the concepts identified. This is an iterative process, and a theorist may complete it, in whole or part, many times for a particular project.

For example, one obvious concept relating to the coherence criterion is that there is an inverse relationship between coherence and the variety of reasonable explanations for the elements of contract law.⁵⁸ One can arrive at this conclusion, and a more detailed concept, in a more structured manner by applying the steps from the last paragraph. 1) Part of the theory-construction model selected for this paper involves defining variables.⁵⁹ 2) The subject area of

⁵⁸ See *infra* at Part III(D)(1), Concept 2.

⁵⁹ FRANKFORT-NACHMIAS, *supra* note 40.

coherence is largely concerned with the coherence of the ideas that explain contract law.⁶⁰ 3) One can infer that, if the theory requires variables,⁶¹ and the subject area requires the study of variables at the level of explanation,⁶² then the variable of explanation will be a relationship that a theorist should possibly study. 4) Moving one step down the chain of inferences, one can formalize this relationship by stating that there is an inverse relationship between coherence and the standard deviation of the variable that relates to coherence. One can further formalize this concept, and place it into a more useful form, by stating it as it appears below in Concept 2.

1. Concepts

Once again, it is beyond the scope of this paper to argue for each concept. Detailed explanations of each concept used in an evaluation appear in the corresponding sections. For ease of reference throughout this paper, each number represents a concept. At the beginning of each statement is a letter that indicates where it can fit in the model.

1. (E) There is a direct correlation between inductively strong arguments and the inductive generalization of theory construction.
2. (R) There is an inverse relationship between unity coherence and a standard deviation of explanations for the elements of contract law (this assumes a low level of generality in the range of possible values and adhering to the unity coherence criterion) that can be restated as Unity Incoherence = the standard deviation of $(V^1 \dots V^n)^1 \dots (V^1 \dots V^n)^n$ where: V = value of the variable; $(V^1 \dots V^n)^1 =$ a unit of analysis.⁶³
3. (E) The inductive process is an objective process. The purpose of a premise in an inductive argument is to support the probability of a conclusion.⁶⁴ Objective premises have the potential to provide more support than subjective premises because, in part, an objective premise is testable and more likely to have a common meaning whereas a subjective premise is more likely to be vague and ambiguous; therefore, there is a direct relationship between objectivity and sound induction.
4. (E) The resultant theory must fit the facts all the way back to the values of the variables.

⁶⁰ SMITH, *supra* note 5.

⁶¹ FRANKFORT-NACHMIAS, *supra* note 40.

⁶² SMITH, *supra* note 5.

⁶³ *Id.* at 11-12.

⁶⁴ CONWAY, *supra* note 41, at 48-50.

5. (E) A metatheory is strong to the degree it assists in theory construction.⁶⁵
6. (E) The lower the meaningful level of generalization is for the range of acceptable values the more ability there is for one to examine the underlying data and, by definition, the more depth the theory has as a basis.⁶⁶
7. (R) The higher the level of generalization is for the range of acceptable values the more ability there might be for one to combine the data and, by definition, the more easily a researcher may find coherence in the data.
8. (E) The more thorough the theorist explains how ranges of values are determined, the better another theorist may evaluate the theory.⁶⁷
9. (E) There is an inverse relationship between overlapping values and the clarity of the resultant theory. Values overlap to the extent that they are vague i.e., that an objective researcher could use either value.
10. (E) There is an inverse relationship between mixed values and the clarity of the resultant theory. Values are mixed to the extent they contain two or more meanings of a more meaningful and lower level of generality.
11. (E) The modeling for the units of analysis, variables, and values will provide the data basis for the theory; therefore, the researcher must base the design on strong research methods.
12. (E) There is a direct relationship between the clarity of the relationship between variables, both between units of analysis and within units of analysis, and the clarity of the resultant theory.
13. (E) There is a direct relationship between the sample of the instances of the units of analysis, as compared to the entire object of study, and the ability of the resultant theory to project.

This may seem an overly-regimented approach. However, as this paper demonstrates, contract theory needs some discipline. This paper also recognizes that many advances in academic disciplines have come from not following the rules. It might be a fair guess, though, that more advances have come from following the rules simply because students generally first learn about a subject by learning the rules relating to that subject. In any case, non-traditional advance does not mean there should not be rules, if for no other reason than to structure

⁶⁵ By definition, a theorist uses metathory to assist in theory construction. So, the metatheory must necessarily be strong to the degree the theorist can use it successfully.

⁶⁶ A generalization is “lower” the closer it is to a distinct concept. A generalization is “higher” the closer it is to a non-distinct concept.

⁶⁷ The theory may eventually consist of the values assigned to a justification variable of a unit of analysis that addresses an element of contract law.

discussion - i.e., to give those inclined to follow something to follow and for those not inclined something to break.

Because the analysis of legal theory is a fluid, qualitative field - that this paper argues is properly not a subjective endeavor - theorists will not always agree with the assumptions that another theorist uses to make an argument. This is not a flaw in the model; rather, it shows the flexibility of categorical reasoning models. Those who disagree may make other assumptions and argue for them. One strength of categorical reasoning is that theorists can use it to provide structure to arguments, allowing them to focus on substantive issues within an agreed framework. If the model is accepted, the assumption is the argument. If theorists agree that theory should be consistent with external and internal standards and recognize the validity of the categorical reasoning used, then their support of this paper's conclusions will rest on their acceptance of the support for the concepts as placed in the model.

E. OTHER USES OF THE MODEL

The purpose of this section is to demonstrate uses of the model for purposes other than analyzing a metatheoretical criterion - i.e., evaluating and developing theory. This will not only clarify the model by providing examples of its use, but will demonstrate its flexibility.

1. Evaluation

I will briefly evaluate Fried's theory because he finds coherence.⁶⁸ Recall that the main point of Fried's theory is that, "The law of contracts ... is rooted in promise."⁶⁹ The question for this part of the paper is "What metatheory is Fried's theory based upon?" One must turn to

⁶⁸ FRIED, *supra* note 31, at 132.

⁶⁹ *Id.*

implicit metatheory because Fried does not expressly address his metatheory or research methods in any detailed way.⁷⁰

This section will examine the first step of the theory construction process i.e., 1) units of study, 2) variables, and 3) values.⁷¹ The theory does not address this step well enough to allow meaningful analysis of the rest of the theory.

Fried addresses many major areas of contract law including, but not limited to, consideration, offer, acceptance, mistake, and duress.⁷² The theory does not suffer from lack of areas of study.

The problems begin with the selection of variables. Fried does little more than implicitly use the variable of justification to which he assigns the value of promise.⁷³ The reader wonders what other variables are available and what their relationships might be to the justification variable.

The problems continue with the assignment of values to the variable of justification. Fried has implicitly assigned promise.⁷⁴ Promise is not at a low enough level of generality to provide the basis for a theory of depth.⁷⁵ One can argue that Fried finds promise an acceptable value for the variable of justification for each instance of the units of the elements of contract law.⁷⁶ Fried does attempt to define promise: “The promise principle ... is that principle by which persons may impose on themselves obligations where none existed before.”⁷⁷ This definition adds to ambiguity rather than clarifying the word. Fried should have considered analyzing and synthesizing the concept until promise became a mid-level concept. For example, Fried could

⁷⁰ See generally FRIED, *supra* note 31.

⁷¹ FRANKFORT-NACHMIAS, *supra* note 40.

⁷² FRIED, *supra* note 31, at 28, 40, 57, 58, 74, 92, 93.

⁷³ See FRIED, *supra* note 31, at 132.

⁷⁴ *Id.*

⁷⁵ See *supra* at Part III(D)(1), Concept 6.

⁷⁶ See generally FRIED, *supra* note 31.

⁷⁷ FRIED, *supra* note 31, at 1.

have divided the elements of his definition into discrete parts that, when combined, formed his definition of promise. Then readers could examine the underlying concepts. This would lead to a theory based on elements that are more distinct. Fried does not clearly discuss how he determined which ranges of values to use.⁷⁸ Fried does not clearly discuss the relationship between variables.⁷⁹ Fried does not address what sample of cases he looked at to draw his conclusions.⁸⁰ This makes it difficult to accept his conclusions relating to the cases he looked at and to know if the cases are representative.⁸¹

The many metatheoretical problems at the lowest levels of the theory make it impractical to evaluate the other areas.⁸² Fried's metatheoretical problems keep his theory out of the External Standards circle. Therefore, it cannot be in the center area of the Venn diagram and it is inconsistent as defined in this paper.⁸³ If Fried had presented his book as what he wished contract law to be then these criticisms would disappear. However, he presented it as explanatory theory writing, "At the level of theory I hope to show that the law of contract does have an underlying, unifying structure."⁸⁴ Note that in that sentence he did not normatively write, "should have."⁸⁵ He is clearly referring to already existing structures and, therefore, his intent was to explain them, not argue for what they should be.⁸⁶

The point of this section is not to disprove Fried's theory, but to demonstrate that the model provides a structure a theorist may use to evaluate a theory. Analyzing Fried's theory by utilizing the model is straightforward and simple. The ease with which one can use the model to

⁷⁸ See generally FRIED, *supra* note 31; See *supra* at Part III(D)(1), Concept 8.

⁷⁹ See generally FRIED, *supra* note 31; See *supra* at Part III(D)(1), Concept 12.

⁸⁰ See generally FRIED, *supra* note 31.

⁸¹ See *supra* at Part III(D)(1), Concept 13.

⁸² See *supra* at Part III(D)(1), Concept 12.

⁸³ See *supra* at Part III(C).

⁸⁴ See FRIED, *supra* note 31, at unnumbered first page of Preface.

⁸⁵ *Id.*

⁸⁶ *Id.*

provide a framework for evaluating Fried's theory perhaps does not disprove the theory (that would depend on agreeing with the assumptions) but does demonstrate that the model may be extended to not only criticize metatheoretical criteria but theory as well.

2. Development

A theorist may also use the model to develop theory. First, a theorist would have to recognize the need for metatheory. This may be difficult, as theorists may want to jump into the existing debates. Second, the theorist would have to select a theory-construction process to use as a basis from which to draw inferences. Third, the theorist would need to use the model iteratively to develop a thorough metatheory for the subjects the theorist will study.

Although not intended in any way to constitute a theory, the following partial modeling of one small area illustrates the application of the metatheory process that a theorist could attempt. For example, we can take the following general steps to model four variables related to justification for a study of consideration. This example uses Lon Fuller's model regarding consideration.⁸⁷

The study unit is consideration. The next step is to define variables and acceptable values. In order to provide for depth of the theory and the ability to look at the theory at all levels; the acceptable values need to be at the lowest meaningful level.⁸⁸ Based on Fuller's model, we can set up three variables: justification type, justification function, and justification form.⁸⁹ Each variable could have an acceptable range of values. In Fuller's model, justification type could

⁸⁷ Lon L. Fuller, *Consideration and Form*, in PERSPECTIVES ON CONTRACT LAW 200, 200-22 (Randy E. Barnett ed., 2001).

⁸⁸ See *supra* at Part III(D)(1), Concept 6.

⁸⁹ Fuller, *supra* note 87.

contain: “formal.”⁹⁰ Justification function could contain: “evidentiary,”⁹¹ “cautionary,”⁹² or “channeling.”⁹³ Justification form could contain a document that is written,⁹⁴ notarized,⁹⁵ or attested to.⁹⁶ We can set up another variable, “justification for assignment of variable” - acceptable values for which might be: “as expressed in the opinion if different from the view of the plaintiff and/or the defendant,” “as determined by a survey of attorneys,” “as in the view of the plaintiff,” and “as in the view of the defendant.” We have an explanation of how the range was determined so that others can evaluate the theory.⁹⁷ The values do not appear to overlap or mix i.e., they appear distinct.⁹⁸

Fuller recognized that there is an interrelationship between the function variables.⁹⁹ In order to produce a clear theory there needs to be an explanation of the relationships, if any, between variables.¹⁰⁰ One can see there is a one-to-many relationship between type and function - i.e., more than one function could be assigned to type. It is possible that there is a one-to-many relationship between function and form. However these are defined, they are then available for evaluation and criticism.

At this stage, there is the basis for one small area of analysis. We choose a sampling of representative cases.¹⁰¹ This may or may not assist in finding coherence; but, that is irrelevant based on the concepts identified.¹⁰² This small example demonstrates benefits in three areas.

⁹⁰ *Id.* at 201-07.

⁹¹ *Id.* at 201.

⁹² *Id.* at 202.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* at Part III(D)(1), Concept 8.

⁹⁸ See *supra* at Part III(D)(1), Concepts 9-10.

⁹⁹ Fuller, *supra* note 87, at 204-05.

¹⁰⁰ See *supra* at Part III(D)(1), Concept 12.

¹⁰¹ See *supra* at Part III(D)(1), Concept 13.

¹⁰² See *supra* at Part III(D)(1), Concept 3.

First, if a theorist correctly models this and completes a sound research project then something may be learned. Second, even an unsound research project that is clearly described may provide the basis for criticism, discussion, and improvement. Finally, if it proves practically impossible and unworkable, then, by comparison, that would make current theories even of less value. An explanation is in order. Assume that a sound research project modeled on the lowest levels of meaningful values produces no value. It is not likely under these circumstances that a theory produced from one's personal experiences, even honed over years of experience, is going to produce better results.

An argument form is valid if it is the case that when its premises are true then the conclusion must be true.¹⁰³ A Venn diagram is useful to demonstrate the validity of categorical reasoning.¹⁰⁴ I have defined the terms of consistent theory such that if the premises are true (what one enters in the circles) then the conclusion must be true. Therefore, by definition, the model is a valid method of evaluation. This intentional construction turns the focus toward the premises or assumptions. Admittedly, there may be disagreement about the assumptions. That is why I have chosen five different sufficient assumptions to support the thesis. The argument does not rest on any one assumption. Metatheorists have the burden of proving why finding coherence should be required if they are the ones requiring that it be found. This paper raises pointed questions as to whether they can meet this burden. We now turn to the critique.

¹⁰³ CONWAY, *supra* note 41, at 42-45.

¹⁰⁴ *Id.* at 89.

IV. A CRITIQUE OF THE COHERENCE CRITERION

*I sometimes despair of getting any thing quite simple and honest done in this world by the help of men. They would have to be passed through a powerful press first, to squeeze their old notions out ...*¹⁰⁵

This section uses the model to evaluate the coherence criterion. The first concept is an external standard.¹⁰⁶ The second is a relationship concept.¹⁰⁷ Note that the model is interdisciplinary and does not imply what tools to use to apply a specific concept or concepts.¹⁰⁸ There is a range of tools available including, but not limited to, logic, mathematics, political science and, of course, legal reasoning. This section presents a range of methods.

A. THERE IS A DIRECT RELATIONSHIP BETWEEN INDUCTIVELY STRONG ARGUMENTS AND THEORY CONSTRUCTION

This subsection demonstrates that a theorist cannot place the coherence criterion in the center of the model if a theorist accepts this external standard in its circle of the Venn diagram. Note that I do not argue that metatheorists must correctly use inductive logic. That is because “There are no universally accepted rules for constructing inductively strong arguments; no general agreement on a way of measuring the inductive strength of arguments; no precise, uncontroversial definition of inductive probability.”¹⁰⁹ However, there are pitfalls one can avoid when making inductively strong arguments. One such pitfall is that of requiring meaningless order.

The coherence criterion requires finding order, which comes from a principle or

¹⁰⁵ THOREAU, *supra* note 1, at 27.

¹⁰⁶ See *supra* at Part III(C).

¹⁰⁷ See *supra* at Part III(C).

¹⁰⁸ See *supra* at Part III(C).

¹⁰⁹ BRIAN SKYRMS, CHOICE AND CHANCE: AN INTRODUCTION TO INDUCTIVE LOGIC 18 (1966).

principles.¹¹⁰ However, one can always find order in a series of events; therefore, finding order is, in and of itself, virtually meaningless. Those that fall into this pitfall can identify the principle of their theory and then spend the rest of the time looking for and justifying the underlying order without highly defined levels of generalization.

Mathematics holds that “For any finite string of numbers which begins a series, there are generating functions that fit that string of given numbers and yield whatever next number is desired. Whatever prediction we wish to make, we can find a regularity whose projection will license that prediction.”¹¹¹ How does this translate to metatheory? If something with as few attributes as a number in a series (generally, measurement) can always be found to have order,¹¹² then it follows that a series of members with virtually unlimited attributes (such as court decisions made up of words, actions, and many other factors) can be found to have order. In other words, think of a contract theory as the generating function of the members of a set of court decisions. Of course, one can find an order because one can change theory until the members of the set produce what the theorist is trying to explain, justify, or theorize. The theorist may not try to find the relationships between all facets of all elements but may simply pick from such a large selection of attributes to find order.

What meaning can one draw from the fact that theorists find order where one can always find an order? None. Therefore, there is no use for a criterion that requires the finding of order where the finding of order is virtually meaningless. Thinking that finding order is meaningful, where it is not, is a pitfall. When one places the concept of avoiding this pitfall into the model as an external standard then the coherence criterion is repelled and, by the rules of this model, found to be inconsistent with the model.

¹¹⁰ SMITH, *supra* note 5, at 11-12.

¹¹¹ SKYRMS, *supra* note 109, at 66.

¹¹² *Id.*

B. THERE IS AN INVERSE RELATIONSHIP BETWEEN COHERENCE AND THE STANDARD DEVIATION OF THE VALUES IN JUSTIFICATION VARIABLES

This subsection places a concept in the relationship area of the model such that any statement that there is currently coherence in contract law is repelled. It is nonsensical to support a criterion that requires the placing of a statement in the overlapping center section of the model only to be repelled.

Kenneth J. Vandavelde has proposed that “the American legal system rests on a set of dualisms.”¹¹³ There is a fundamental dualism of the universal and the particular.¹¹⁴ In politics, this is reflected in the community and the individual.¹¹⁵ There are oppositions between majoritarianism and individualism, paternalism and autonomy, efficiency and justice, and utilitarianism and rights theory.¹¹⁶ Vandavelde’s theory is that “the fundamental paradox of the American legal system is that to pursue any one policy to the exclusion of the opposing policies would ultimately be destructive of the ends represented by that very policy.”¹¹⁷ “In politics, individual freedom, if taken to its extreme, leads to anarchy Individual freedom can be guaranteed only by ... the state. State power, by contrast, if taken to its extreme, leads to a completely totalitarian society in which individuals have ... no stake in preserving the state.”¹¹⁸ To make the point this paper requires, I will examine only autonomy and paternalism.

Where the legal system engages in paternalism it seeks to assist the weak from being dominated by the strong.¹¹⁹ Where the legal system supports policies of autonomy it seeks to not

¹¹³ KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 162 (1996).

¹¹⁴ *Id.* at 164.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 142.

¹¹⁸ *Id.* at 165-66.

¹¹⁹ *Id.* at 146.

interfere with individual choice.¹²⁰ This tension is apparent in cases addressing unconscionability and readily apparent in Williams v. Walker-Thomas Furniture Co.¹²¹ Here a woman with seven children living on public assistance purchased household items on credit over a period of six years.¹²² The furniture store attempted to repossess all of the items arguing that the contract said all payments were prorated over all of the items - meaning that there would be a balance due on every item until all items were paid off.¹²³ The court eventually held that the contract could be found (that it was for the trial court to decide) to be unconscionable and therefore remanded the case clearly reflecting paternalism.¹²⁴ However, in the dissent it was argued that “the appellant seems to have known precisely where she stood” reflecting an autonomous approach.¹²⁵ Even the dissent reflected tension as the judge paternalistically worried that the decision might adversely affect the chances of the poor obtaining credit.¹²⁶

Vandevelde writes that this conflict between autonomy and paternalism is unresolvable.¹²⁷ He argues that “If autonomy were to prevail in every case, the court would enforce all private arrangements If paternalism were to prevail in every case, then no individual decision would be free from judicial intervention.”¹²⁸

What would happen to contract law cases dealing with unconscionability in Vandevelde’s paradigm? In the extreme, if autonomy prevailed every time it would lead to anarchy and the strong would tyrannize the weak with the counterintuitive result that the state could not guarantee the interests of the individual - which is the original objective of those in favor of

¹²⁰ *Id.*

¹²¹ *Williams v. Walker-Thomas Furniture Company*, 198 A.2d 914, 915-16 (D.C. Ct. App. 1964), rev’d, 350 F.2d 445 (D.C. Cir. 1965).

¹²² *Walker-Thomas Furniture Company*, 198 A.2d at 915.

¹²³ *Id.*

¹²⁴ *Walker-Thomas Furniture Company*, 350 F.2d at 447-50.

¹²⁵ *Id.* at 450.

¹²⁶ *Id.* at 450-51.

¹²⁷ VANDEVELDE, *supra* note 113, at 147.

¹²⁸ *Id.*

complete autonomy.¹²⁹ In the extreme, if paternalism prevailed every time then it would lead to totalitarianism where individual liberty is lessened and therefore citizens would have less interest in the state with the counterintuitive result that the state may be overthrown resulting in no ability for paternalism – which is the original objective of those supporting complete paternalism.¹³⁰ Neither extreme will work.¹³¹

A theorist can more clearly understand Vandevælde's theory by using Concept 2.¹³² Recall that this concept formalizes the relationship between coherence and the variety of explanations for contract elements. Consider Vandevælde's argument that policies will balance each other and that one policy cannot override the other.¹³³ Vandevælde has not set up a false dilemma with the mutually exclusive choices of autonomy or paternalism.¹³⁴ To the contrary, one may think of those two policy choices at the ends of a spectrum where any case may fall on an end, or somewhere in between, but where all cases can never fall on any one side all of the time.¹³⁵ If the unit of analysis is a judicial decision, the variable is political policy, and the corresponding values are paternalism or autonomy then, applying Vandevælde's theory, the theorist will not find coherence.¹³⁶ For example, there will be a balancing of paternalism or autonomy or roughly half the time (or half the weight of the effect) V (value) will be paternalism and half the time it will be autonomy.¹³⁷ The intuitive conclusion is that there is no coherence. Calculating the standard deviation will confirm this. The standard deviation will approximate .5 - meaning the coherence will not be high. If there can never be one theory followed exclusively

¹²⁹ *Id.* at 164-166.

¹³⁰ *Id.*

¹³¹ *Id.* at 142.

¹³² See *supra* at Part III(D)(1), Concept 2.

¹³³ VANDEVELDE, *supra* note 113, at 142.

¹³⁴ *Id.* at 142, 146-147.

¹³⁵ *Id.*

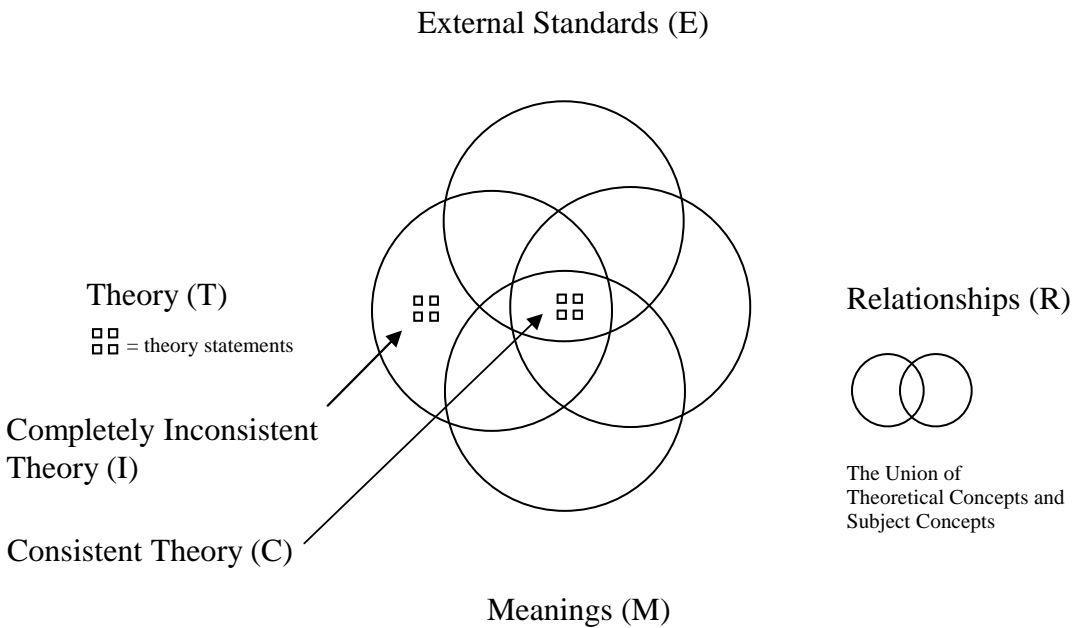
¹³⁶ *Id.* at 142.

¹³⁷ *Id.*

then the coherence criterion cannot assist contract theory in accurately describing contract law. And if it cannot describe contract law what is the value of a criterion that requires it? None. The underlying premise in this argument is that one should not be required to look for something that cannot be found. Let us examine this thought using the model.

Metatheoretical Model of Theory

Diagram 2



Where C = consistent theory, I = completely inconsistent theory, T = statements in the completed theory, E = external standards, R = stated or inferred relationships between the concepts in the union of theoretical concepts and subject concepts, M= the meaning of the theoretical concepts and subject concepts. One may also refer to $C \hat{=} (\forall_x (T_x \hat{=} (E_x \& R_x \& M_x)))$.

As explained, each statement of a consistent theory must be consistent with external standards, relationships, and meanings.¹³⁸ Vandeveldelde’s theory suggests a standard deviation of approximately .5 for the values in the explanation variable.¹³⁹ This value then becomes an element in the relationships circle. The external standard that inductive reasoning must be

¹³⁸ See *supra* at Part III(C).
¹³⁹ VANDEVELDE, *supra* note 113, at 142.

objective means the standard deviation of the explanation variable can be any value i.e., the external standard does not restrict the standard deviation. The meanings circle, in this argument, is an empty set meaning it does not restrict the standard deviation. The unity coherence criterion can be restated such that the standard deviation of the explanation variable must be 0.¹⁴⁰ However, one cannot place that value in the relationship circle based on the assumption of Vandeveldel's theory.¹⁴¹ Therefore, the coherence criterion is not consistent with a necessary area of the model and theorists should therefore reject the criterion as part of a metatheory that would require an inconsistent theory.

Perhaps coherence should be a normative aspect of contract law. However, the law in its present state balances different principles. The law is able to function in its present form without being theoretically and logically consistent.¹⁴² "Participants in any legal system disagree on basic principles. ... They must nonetheless make a wide range of particular decisions. ... In accomplishing this task, they seek to achieve incompletely theorized agreements on particular outcomes. ... It is ... the law's distinctive approach to the problem of social pluralism."¹⁴³

C. THE INDUCTIVE PROCESS IS OBJECTIVE

Constructing theory requires objectivity.¹⁴⁴ "Researchers must approach the field with an open mind to ensure that their ultimate theory is grounded. Because field research is based on observation, preconceived ideas and rigid hypotheses may influence the observations a researcher chooses to record for analysis, which can compromise the resultant theory."¹⁴⁵ This

¹⁴⁰ SMITH, *supra* note 5.

¹⁴¹ VANDEVELDE, *supra* note 113, at 142.

¹⁴² CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 191 (1996).

¹⁴³ *Id.*

¹⁴⁴ FRANKFORT-NACHMIAS, *supra* note 40, at 294-95.

¹⁴⁵ *Id.*

required objectivity also applies to legal theory: Theorists should use an “approach to legal theory which seeks to pick out and explain the important and significant features of law, without prejudging the issue of whether or not they render law a good or justified phenomenon.”¹⁴⁶

Theorists use induction.¹⁴⁷ Theorists sometimes become confused as to the difference between objectively inducing and normatively arguing. For example, read this sentence: “If I seek to ascertain the principles of a given legal system, I ought to search for those general norms which the functionaries of the system regard as having ... the relevant justificatory and explanatory function in relation to the valid rules of the system.”¹⁴⁸ The author clearly states, in part, “I ought to search for those general norms.”¹⁴⁹ However, when referring to what one may find, there is no “ought”¹⁵⁰ in inductive. An objective theorist finds what is there to find.

So how does the coherence criterion fare when compared to this external standard? It fails on its face. It is the opposite of objective for it states quite clearly what is to be found and then is used as a measuring stick for the theory.¹⁵¹ In effect, those who support it as a criterion construct the following sentence: A good theory will find coherence because if it does not find coherence it is not a good theory. This is not objective and begs the question as well.

D. THE THEORY MUST FIT THE FACTS

A theorist should be able to reconcile a theory with facts. “The dimension of fit is self-evident: to say that a conception must fit the practice is to say that it must account for many

¹⁴⁶ JULIE DICKSON, *EVALUATION AND LEGAL THEORY* 144 (2001).

¹⁴⁷ FRANKFORT-NACHMIAS, *supra* note 40, at 294.

¹⁴⁸ NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 152-53 (1978).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ SMITH, *supra* note 5.

aspects of the practice generally believed to belong to that practice.”¹⁵² It is unacceptable to limit a theory to the facts that fit the theory. “There cannot be too many instances which a theory of the practice leaves unaccounted for: a theory presenting itself as an interpretation of a certain phenomenon cannot leave much of that phenomenon outside its scope.”¹⁵³ On the other hand, a single theory does not have to address every fact. “Conceptions of social practices seek to pinpoint the *essential* features of those practices.”¹⁵⁴ A theorist must be concerned with this external standard.

This paper assumes that any theoretical inductive generalization should reflect factual situations. To argue otherwise would be absurd. Restated, the question becomes: Is law at the case level coherent? Note that the fact that this is a feasible question makes the point that contract law is not always coherent i.e., that it is possible it is not coherent and therefore it is unsound to require a theory to find coherence. If one can find an example of incoherence, then by the reasoning just stated, theorists should reject the coherence criterion.

E. METATHEORY MUST ASSIST THEORY CONSTRUCTION

If a metatheory is useful to the degree it supports theory construction then it follows that a criterion that is part of metatheory is also strong to the degree it assists in theory construction. The question then becomes: Does the coherence criterion assist in theory construction and, if so, when is it helpful? This subsection argues it is not helpful.

Evaluating a theory by how well it finds coherence does not assist in completing the tasks

¹⁵² OFER RABAN, MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY 42 (2003).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 43.

in step one.¹⁵⁵ Step one requires the modeling of study units, variable, and values.¹⁵⁶ Requiring an eventual theory to find coherence does not assist at this stage because it removes the objectivity necessary to competently complete the tasks. For example, while the theorist should be concerned with the data model, there might be more concern with generalizing at a high enough level to eventually find coherence.

Evaluating a contract law theory by whether it finds coherence is not helpful in completing the tasks in step two.¹⁵⁷ Theorists should compile objectively.¹⁵⁸ Knowing that whatever is compiled will eventually be judged by whether coherence is found, is not useful because, again, data compilation is an objective process.¹⁵⁹

Evaluating a theory by whether it finds coherence is not useful in realizing the objectives of step three.¹⁶⁰ The theorist should find what they find. The theorist should not compile data in a certain way only to support a theory.

Evaluating a contract law theory by how well it finds coherence is not useful in completing the tasks in step four.¹⁶¹ Step four¹⁶² will only be completed if there is meaningful information i.e., pattern(s) or relationship(s) are found. This paper argues that a great theory could find many patterns and relationships all based on different ideas. The coherence criterion argues that a theory is great theory to the degree it finds one basic idea.¹⁶³ At this stage, the theory construction process should be a result of the previous steps¹⁶⁴ and the introduction of a

¹⁵⁵ FRANKFORT-NACHMIAS, *supra* note 40.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* at Part III(D)(1), Concept 3.

¹⁵⁹ See *supra* at Part III(D)(1), Concept 3.

¹⁶⁰ FRANKFORT-NACHMIAS, *supra* note 40.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ SMITH, *supra* note 5.

¹⁶⁴ FRANKFORT-NACHMIAS, *supra* note 40.

criterion is not helpful because this stage does not require the criterion in order to complete the step.

The criterion is not useful in any of the four external steps.¹⁶⁵

V. CONCLUSIONS

*I sat at a table where were rich food and wine in abundance ... but sincerity and truth were not; and I went away hungry from the inhospitable board.*¹⁶⁶

This paper began by noting that there are no easy answers to theory construction. However, a theorist can approach this broad and fluid area in a disciplined manner. This paper has presented one such way to evaluate a metatheoretical criterion. Two major conclusions are apparent from this critique.

First, the metatheoretical model of theory provides a flexible framework with which to evaluate the coherence criterion. There are several other benefits of the model as well: First, it divides theory into internal and external requirements so theorists may recognize and use either part in evaluation and/or development.¹⁶⁷ Second, a researcher may take any area of social inquiry, including any area of legal behavioral inquiry, and derive an internal theory that is specific to the area studied.¹⁶⁸ Third, because a theorist may base relationships on the union of theoretical concepts and subject concepts, the theorist may identify and infer relationships both between concepts (between theoretical concepts and subject concepts) and within concepts.¹⁶⁹ Fourth, the model also recognizes a category of conceptual meanings that are individually

¹⁶⁵ *Id.*

¹⁶⁶ THOREAU, *supra* note 1, at 298.

¹⁶⁷ See *supra* at Part III.

¹⁶⁸ See *supra* at Part III.

¹⁶⁹ See *supra* at Part III.

discrete.¹⁷⁰ Fifth, a theorist can use this model to develop theory.¹⁷¹ Sixth, a theorist can use the model to evaluate a theory.¹⁷² Seventh, the model is interdisciplinary - i.e., the methods of applying the model are not limited to any one discipline.¹⁷³

Second, theorists should reject the coherence criterion. This paper presents a model of theory construction and a metatheoretical model of theory. It uses the latter model to construct a metatheory that provides a framework for criticizing the coherence criterion and demonstrates the thesis statement that the coherence criterion conflicted with the proposed metatheory and theorists should therefore reject the criterion. Five areas were incongruent with the model: First, those who use the criterion fall into an inductive logic pitfall. Second, because the criterion argues for the objective of describing contract law as consistent with one ideology or idea¹⁷⁴ but if contract law was always consistent with utilitarianism or rights theory then, taken to its logical conclusion, the implementation of the ideology would destroy its own objectives which therefore makes contract law coherence theoretically impossible.¹⁷⁵ Third, the coherence criterion confuses normative with descriptive. Fourth, it does not assist in constructing a theory that fits the facts. Fifth, the coherence criterion does not assist in the process of theory construction. Although coherence may be a normative objective of contract law, theorists must reject it as a criterion of contract theory. If metatheorists want to require theorists to find coherence, then they have the burden to prove why it should be required. This paper has raised serious questions as to whether they can meet that burden.

Returning to the Walden analogy, Thoreau explained that he left the woods because it

¹⁷⁰ See *supra* at Part III.

¹⁷¹ See *supra* at Part III(E)(2).

¹⁷² See *supra* at Part III(E)(1).

¹⁷³ See *supra* at Part III.

¹⁷⁴ SMITH, *supra* note 5.

¹⁷⁵ VANDEVELDE, *supra* note 113, at 164-65.

was time for further exploration, writing, “It is remarkable how easily and insensibly we fall into a particular route, and make a beaten track for ourselves.”¹⁷⁶ In order for contract theorists to get off their beaten track, they must not only occasionally step back and look at the track they are on but also review how they are looking.

¹⁷⁶ THOREAU, *supra* note 1, at 291.