

"One Man's Theory": a Metatheoretical Analysis of H. L. A. Hart's Model of Law

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"ONE MAN'S THEORY . . .": A METATHEORETICAL ANALYSIS OF H. L. A. HART'S MODEL OF LAW

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OUTLINE

I. INTRODUCTION: THE NEED FOR A JURISPRUDENTIAL METATHEORY	40
II. PROPOSED METATHEORETICAL PERSPECTIVE	42
A. Focus of Proposed Perspective	42
B. Criteria for Evaluating Theories	44
III. ANALYSIS OF HART'S MODEL OF LAW FROM THE PROPOSED META- THEORETICAL PERSPECTIVE	48
A. Hart's Theoretical Strategy	48
B. Formalization of Hart's Models	52
1. Implicit Models of Man and Society	52
2. The Model of Law — Law as Rules	54
a. The nature of rules	55
b. Pattern or formal structure of rules and legal systems in society	60
c. The content of law	66
d. Exclusions from the model	69
C. Critical Analysis of the Model	72
1. The "Validity" of a Model	72
2. Implicit Models of Man and Society	73
a. Model of Man	73
b. Model of Society	78
3. The Model of Law — Law as Rules	82
a. The nature of rules	82
i. The "internal aspect" of rules	82
ii. The "open texture" of rules	86
iii. The "types" of rules	87
b. Pattern or formal structure of rules and legal systems in society	90
i. The "Rule of Recognition"	91
ii. The elements of law in a developed legal system	94
c. The content of law	97
i. The identification of "law"	98
ii. The propositions concerning the content of law	99

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d. Exclusions from the model	102
i. Ronald Dworkin	104
ii. Lon Fuller	106
iii. Conclusion	108
IV. CONCLUSION: A MODEL OF JURISPRUDENCE	110
APPENDIX 1 — FORMALIZATION OF HART'S MODELS IN PROPOSITION FORM	114
APPENDIX 2 — FURTHER FORMALIZATION OF HART'S RULE OF RECOGNITION	118

[W]e shall make the general claim that in the combination of these two types of rule there lies . . . 'the key to the science of jurisprudence.'**

A science is any discipline in which the fool of this generation can go beyond the point reached by the genius of the last generation.***

I. INTRODUCTION: THE NEED FOR A JURISPRUDENTIAL METATHEORY

Jurisprudence is a tantalizing concern. The fundamental importance of its issues and subject matter entices scholars; but agreement on these fundamental matters, like the legendary fruits hanging over Tantalus, always eludes jurisprudents. A law student, who did not enjoy the role of Tantalus, recently offered a blunt characterization of this problem: "One man's theory is another man's bullshit." Despite pages and pages of considerably more polite discourse among jurisprudents, the student's comment still is uncomfortably close to the truth.

Underlying the fruitless aspect of this debate is the lack of a jurisprudential "metatheory" or "theory of theory," which would be addressed to three interrelated methodological tasks:

First, the selection of theoretical tasks or functions, i.e., the determination of the questions the science and its theory should consider.

Second, the construction of theories which are logically consistent, unambiguous, and "testable" in terms of objective criteria.

Third, the evaluation of theories to determine the degree to which their tasks are accomplished and to compare conflicting theories.

With such a metatheory it would be possible, for example, to identify areas of actual disagreement as opposed to perceived disagreement and to compare theories which are in conflict by some criteria of "validity."

** H. L. A. HART, *THE CONCEPT OF LAW* 79 (1961).

*** M. GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 60 (1965).

Thus, metatheory could play an important role in jurisprudence; however, with a few notable exceptions,¹ the development of meta-theory has generally been ignored. For example, jurisprudence has:

(1) Relied largely on "tradition" to define its theoretical tasks and neglected the development of a methodology for consciously selecting issues which might be more "fruitful."

(2) Relied almost exclusively on verbal methodology to construct models even though such models are more ambiguous than those expressed in terms of mathematics or symbolic logic.²

(3) Shown a remarkable disdain for the problem of "testing" models in terms of any criteria other than logical consistency or support from the traditional "authorities" in the field, such as Aquinas and Austin.

The result of this approach has been the problem of "one man's theory . . ." mentioned above. The time has come to shift to a new approach and to focus on the conscious development of a jurisprudential metatheory.

This article will make specific proposals for such a development and demonstrate the usefulness of metatheory in terms of constructing and comparing theories. The discussion begins with a summary of a proposed metatheoretical perspective. This perspective is then illustrated by examining the theory of law presented by H.L.A. Hart in *The Concept of Law*.³ Hart's book has been chosen for analysis for several reasons. First, it is relatively well known. Second, it has already been subjected to a considerable amount of conventional jurisprudential analysis.⁴ Third, Hart explicitly discusses some meta-theoretical issues both in *The Concept of Law*⁵ and in other writings.⁶ Finally, it presents a modern theory of law that is: (1) unusually well developed in that it discusses not merely the elements of law

1. See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Shubert, *Behavioral Jurisprudence*, 2 LAW & SOC'Y REV. 407 (1968); cf., e.g., F. NORTHRUP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* (1959).

2. See notes 33-34 and accompanying text *infra*.

3. H. L. A. HART, *THE CONCEPT OF LAW* (1961) [hereinafter HART, CONCEPT]. For a detailed, though dated, bibliography of other writings by Hart, see Pannam, *Professor Hart and Analytical Jurisprudence*, 16 J. LEGAL ED. 379, 403 (1964).

4. See, e.g., 13 INDEX TO LEGAL PERIODICALS 884.

5. HART, CONCEPT 1-17, 210-11.

6. E.g., Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954).

but also their interrelationships; (2) remarkably unambiguous for a verbal model; and (3) relatively free of logical inconsistencies. The discussion of Hart's model will be divided into two parts: the model will be presented in summary form and then subjected to a critical analysis. At several points in this latter discussion conventional jurisprudential criticism will be considered. However, the purpose of this article is not to present a complete or exhaustive account of this type of criticism. Rather the concern is to demonstrate the proposed metatheoretical approach by analyzing Hart's model in depth and by occasionally contrasting this approach with conventional theoretical criticism. This concern will be developed further in the concluding section of the article, which presents a sketch of a possible "model of jurisprudence."

II. PROPOSED METATHEORETICAL PERSPECTIVE

A. *Focus of Proposed Perspective*

The metatheoretical perspective proposed in this article focuses on the testing and comparison of theories. Thus, the primary concern is with two questions:

First, what is a "good" or "valid" theory?

Second, given two theories, do they conflict? If so, which of the theories is "better" or more "valid"?

The section that follows suggests that the basic answers to these questions are that a "good" theory is a theory that does what you want it to do, and that a "better" theory is one that does what you want it to do better than another theory. In short, the proposed test is pragmatic or functional. Before developing this test, however, it will be helpful not only to discuss why this focus has been selected but also to indicate the metatheoretical tasks which are *not* developed in this article.

The evaluation of theories is emphasized because if it were possible to compare theories and thus *reject* some (or part) of them, then jurisprudents could focus on the development of the "better" theories. In this way jurisprudents could begin the co-operative development of legal theories that could be compared, tested, refined, and improved. The result, hopefully, would be a cumulative process in which our awareness of the place of "law" in the world around us would be gradually improved. There would still be a necessary role for dialectic

and debate, but such dispute would occur within a framework where friction results in less heat and more light.⁷

Given this focus, the first task of metatheory — the selection of issues — is not developed in any detail in this article. However, the selection of issues should be made with the tasks of testing and comparison in mind. If it is impossible to test or compare conflicting theories which are addressed to a specific issue, then the suitability of the issue itself should be reconsidered. It might be that, even after such reflection on the issue, a problem involving untestable theories will still be considered appropriate for theoretical analysis.⁸ If this is the case, then the theorist should preface his theory with the rationale for constructing a theory which is untestable and incapable of comparison and which, therefore, may not add to the cumulative development of legal theory. Theoretical evaluation is also relevant to the selection of issues in another way. As indicated in the next section, some theoretical tasks rank "higher" than others. Consequently, jurisprudents should attempt to undertake the higher tasks rather than the lower to the extent this is possible.

Similarly, the second task of metatheory — construction of theories — is not developed in detail. The point to be emphasized here is that jurisprudents should reduce their reliance on verbal models. This reliance has hindered the development of jurisprudence because the inherent ambiguity of language has frequently resulted in a characteristic pattern of irrelevant, wasteful non-debate: "X meant A, B, C"; "No, he meant A, B, D"; "You are both wrong, X really meant A, C, D." With such a situation it is usually impossible to determine what X meant, much less whether his point was "valid."⁹ Moreover, the construction and analysis of such verbal

7. Cf., Hart, Book Review, 78 HARV. L. REV. 1281, 1296 (1965).

8. For examples of such an approach to the "untestable," but important, topic of justice, see C. FRIED, AN ANATOMY OF VALUES (1970) and J. RAWLS, A THEORY OF JUSTICE (1971). This topic is inherently untestable in terms of the criteria developed in this article because the focus of justice is on the "ought" rather than the "is," and the criteria proposed in this article rely on the empirical world of the "is" as the arbiter between conflicting theories. See discussion of empiricism in note 18 and accompanying text *infra*. Although the task is beyond the scope of this article, it should be possible to develop a metatheoretic perspective on theories of justice. For example, ambiguity can be reduced by using short propositional statements like those used in formalizing Hart's Model and as used in N. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE (1971). Logical consistency requirements can be imposed by using the concept of "coherence" — a coherent theory is one that is relatively clear, consistent, and not subject to logically consistent but substantively offensive counter examples. *Id.* at 14; RAWLS, *supra* at 46-53; Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004, 1018-21 (1972). Moreover, some aspects of justice can be examined empirically, as is indicated in note 18 *infra*.

9. For an example of such a problem, see note 220 *infra*.

models tend to focus on the subjective "meaning" of words rather than on objective events which can be observed. Thus, verbal models are often so "untestable" that they hinder advancement beyond the point of "one man's theory"

Alternative approaches to the use of verbal models include mathematical models¹⁰ and models relying on symbolic logic.¹¹ Where these tools of theory construction are inappropriate,¹² then the model-building process should rely on explicit definition and the use of short, relatively unambiguous propositions like those used in the following analysis of Hart's model of law. It should be stressed that these approaches are not necessarily a more "accurate" representation of "reality" than conventional verbal models expressed in prose discussion form; rather, their strength lies in their increased clarity and explicitness.¹³

B. *Criteria for Evaluating Theories*

One test for evaluating a theory is its "internal consistency." A theory which is logically inconsistent is obviously suspect. Another criterion is a functional measure of the theory — what should the theory do and how well does it do it. Among the general functions

10. APPENDIX 2 contains a mathematical or computerized version of part of Hart's model. There are numerous other examples of mathematical models in the social sciences. *E.g.*, Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUDIES 1 (1974) (economic model of legal process); Shinnar & Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 LAW & SOC'Y REV. 581 (1975) (sociological model of legal process).

11. *E.g.*, Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of "Legal Right": A Powerful Lens for the Electronic Age*, 48 S. CAL. L. REV. 428 (1974).

12. For a discussion of their inapplicability to the present article, see discussion in note 34 *infra*.

13. Jay Forrester makes this point in INDUSTRIAL DYNAMICS § 4.7 (1961):

A verbal model and a mathematical model are close kin. Both are abstract descriptions of the real system. The mathematical model is the more orderly; it tends to dispel the hazy inconsistencies that can exist in a verbal description. The mathematical model is more "precise." By precise is meant "specific," "sharply defined," and "not vague." The mathematical model is not necessarily more "accurate" than the verbal model, where by accuracy we mean the degree of correspondence to the real world. A mathematical model could "precisely" represent our verbal description and yet be totally "inaccurate."

Much of the value of the mathematical model comes from its "precision" and not from its "accuracy." The act of constructing a mathematical model enforces precision. It requires a specific statement of what we mean. Constructing a model implies nothing one way or the other about the accuracy of what is being precisely stated.

Id. at 57.

of theories or models are:¹⁴ (1) classification; (2) prediction; and (3) advancement of technological control of phenomena. And these functions can be divided even further. For example, prediction could refer to prediction of patterns of events rather than of specific events,¹⁵ or to the mere occurrence of a specific event rather than to the measurement of the amount or degree of such event.¹⁶

The most obvious way that functionalism can provide objective tests of validity is the following:

If one desires prediction from the theory and the theory can only classify, then the theory is inadequate from a functional point of view. If one desires prediction of *X*, and the theory predicts *Y*, then the theory is inadequate even though it predicts.

Validity in this scheme is relative: it is determined by the function one selects. For example, a theory which predicts *Y* but not *X* is valid for the purpose of predicting *Y* and invalid for predicting *X*. Thus, a straightforward functionalism can serve as a criterion of the *relative* validity of theories.

Functionalism of this sort can take us only so far, however, as an initial problem exists in determining whether a function has been performed "adequately." A predictive model which is correct 90% of the time would be adequate for some purposes, but not for others. Adequacy in this sense is a particular problem with classification models: although such models operate on the identification of similarities and dissimilarities, objects in the real world are only similar and dissimilar to a degree. Consequently, a classification model is adequate only if it is able to distinguish between degrees of similarity/dissimilarity with precision sufficient for the purposes involved. Thus, a legal theoretician not only must consider the function to be performed by a theory but also must develop some criterion of adequacy of satisfaction of that function.

14. The list in the text excludes:

(1) The persuasive function of theories of law. For example, a natural-law theory might attempt to persuade persons to refuse allegiance to a particular legal system. This function has been omitted because it overlaps with the technological control function; i.e., to "persuade" persons to revolt is to control that aspect of their behavior.

(2) The "explanatory" function of theories. This function is mentioned by HART, CONCEPT 79; however, terms like "explanation," "elucidation" and "understanding" are so ambiguous that they have not been used. Instead, these tasks have been more explicitly defined in the text as classification, prediction, etc. See further discussion in note 24 *infra*.

15. See, e.g., J. FORRESTER, INDUSTRIAL DYNAMICS § 13.7, at 123-28 (1961).

16. See *id.* at 128-29; K. DEUTSCH, THE NERVES OF GOVERNMENT 9-10 (1966).

Another problem arises where one wants to predict behavior X , and two theories — both internally consistent — predict that behavior “adequately.” How does one choose between the two theories? At this point, it becomes necessary to “rank” the functions of theory listed above according to the degree to which each “correlates” with the real world. For example, classification correlates if it “fits,” — *i.e.*, organizes — the empirical data in a manner such that an objective observer would agree with the classifier. Prediction must have an even greater degree of correlation because it both identifies an event as X and predicts when X will occur. Technological control has a threefold correlation: (1) identification of X ; (2) prediction of X ; and (3) manipulation of X . Thus, the functions of theories can be ranked as follows:

(1) *Classification*. This is the lowest functional ranking.

(2) *Prediction*. This function could be subdivided further. For example, prediction of mere events would rank lower than prediction of a measurable degree of an event, *e.g.*, “the chair will move” ranks below “the chair will move in X direction with Y velocity.”

(3) *Technological control*. This function could also be internally ranked. For example, control of a mere event ranks lower than control of degree of event.

With this ranking system it is possible to compare two predictive theories and rate one as superior if it is the only one that can be used to control events. Moreover, as indicated above,¹⁷ this ranking is relevant not only to the evaluation of theories but also to the selection of theoretical issues.

This particular ranking system is proposed because the empirical world is the only available standard for evaluating most legal theories.¹⁸

17. See text accompanying note 8 *supra*.

18. This constitutes a considerable commitment to empiricism as an epistemological basis. See C. CHURCHMAN, *THE DESIGN OF INQUIRING SYSTEMS* (1971); L. KOLAKOWSKI, *THE ALIENATION OF REASON: A HISTORY OF POSITIVIST THOUGHT* (1968); cf. R. UNGER, *KNOWLEDGE AND POLITICS* (1975). Therefore, the criteria proposed in the text are subject to the shortcomings of this epistemology. See *id.*

For example, as explained in note 8 and the accompanying text *supra*, theories of “justice” would be difficult to evaluate. Nevertheless, specific issues involving “justice” are subject to some empirical analysis. See G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS*, 72-78, 232-77 (1961); G. LENSKI, *POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION* (1966); P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969). But the difficulties involved in such empirical studies are enormous. For example, an apparently straightforward task like analyzing the distribution of income and wealth in a society can be extremely difficult. See, *e.g.*, A. PEACOCK, *INCOME REDISTRIBUTION AND PUBLIC POLICY* (1954); J. Rodgers, *Explaining*

Without such an ultimate impersonal standard, jurisprudence can never progress beyond the present stage of "one man's theory . . ."¹⁹ With such a ranking system it becomes possible to compare theories not only in terms of the degree to which they accomplish a particular function, but also in terms of whether one particular function is "better" than another.

In addition to the functional criterion and the ranking system proposed above, there are two other criteria for evaluating theories or models:

(1) *Efficiency*. Learning, studying, "testing," and "applying" models takes time. Therefore, a simple model which fulfills a function and requires less time in these processes is superior.

(2) *Originality*. Does the model tell us something that was not "obvious" beforehand?

These criteria are derived from the role that theories play in processing information about the world. The first test, efficiency, compares the amount of useful information gained from the model to the cost of utilizing the model. The second test focuses on the new information

Redistribution, in REDISTRIBUTION THROUGH PUBLIC CHOICE (H. Hochman & G. Peterson eds. 1974).

A further discussion of the limits of this epistemological framework is contained in the latter part of note 19 *infra*.

19. The textual statement is perhaps overbroad because a *cultural* standard could be used for evaluating theories *from the perspective of that culture*. Such cultural standards are indicated, for example:

- (1) Where jurisprudents support a particular position by reference to the writings of other theorists whose works form part of the cultural system. For an example of such a cultural reference, see notes 140-41 and accompanying text *infra*.
- (2) Where those who decide legal issues use some cultural criteria of a valid legal theory. Hart's concept of the "rule of recognition" reflects such a cultural standard. For a discussion of this concept, see text accompanying notes 77-85 and 201-06 *infra*.

Given such a cultural standard, it might be possible for theorists *within that culture* to get beyond the problem of "one man's theory. . . ." However, such a standard is subject to two criticisms: first, it is clearly limited to a particular culture; and second, it is often so vague that opposing theories can claim cultural support. Hart discusses such vagueness in the rule of recognition in HART, CONCEPT 144-50.

The same criticisms can be leveled at empiricism. See authorities cited in paragraph one of note 18 *supra*. Epistemological perspectives are cultural to a considerable degree and the "real world" is defined in part by cultural conceptions. Moreover, "facts" are often so ambiguous that no agreement is possible. It might be more accurate, therefore, to rephrase the text in terms of an argument that an increased emphasis on empirically "testable" theories will make possible a greater degree of agreement and make it possible to advance considerably beyond the present stage of "one man's theory. . . ." or "one culture's theory. . . ."

gained from the theory. These additional criteria can be combined with the above system as "tie-breakers": for example, if two models are both adequately predictive, then the more efficient, "simpler" model is superior.

With this metatheoretical framework in mind, it is now possible to evaluate Hart's model of law. It should be remembered that this analysis has several objectives. The primary purpose is to develop and demonstrate the use of the proposed metatheoretical perspective. In addition, there is the negative task of pointing out deficiencies in Hart's theory. Finally, there is the complementary goal of indicating his theoretical strengths which can be used for further theoretical development in the co-operative venture of a "legal science."

III. ANALYSIS OF HART'S MODEL OF LAW FROM THE PROPOSED METATHEORETICAL PERSPECTIVE

A. *Hart's Theoretical Strategy*

With the metatheoretical perspective developed above, it is possible to consider an individual jurisperit's particular theoretical strategy. The concept of a theoretical strategy refers to the particular answer given to the three basic questions: First, what do you expect your theory to do? Second, what methodology do you use in constructing the theory? Third, how do you evaluate your theory to determine if it does what you want it to do? Unfortunately, Hart, like most jurisprudents, generally neglects these questions in *The Concept of Law*.²⁰ Thus, his theoretical perspective must be gleaned implicitly from an overall reading of his book.

Hart's answer to the first question in theory construction is that his model is designed "to isolate and characterize a central set of elements which form a common part of the answer"²¹ to the following jurisprudential issues:

How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?²²

20. Hart does occasionally discuss metatheory, see notes 5-6 and accompanying text *supra*, but such discussions are exceptions to a general pattern of neglect. See notes 25 & 33 *infra*.

21. HART, CONCEPT 16.

22. *Id.* at 13.

The purpose of the book

is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena. The set of elements identified in the course of the . . . discussion . . . serve this purpose It is for this reason that they are treated as the central elements in the concept of law and of prime importance in its elucidation.²³

Thus, Hart's model is designed to classify, *i.e.*, to identify and organize the elements of the "real" world into categories such as "orders backed by threats," "rules," "morals," and "municipal legal systems." The result of such a classification process will be an increased understanding ("elucidation") of the elements and their relationship.²⁴

The tasks of a model often dictate the third theoretical consideration — the evaluation of the model. Therefore, this will be discussed next and the methodology of construction will be discussed afterward. Hart apparently feels that his model "organizes" data well because it establishes clearly delineated conceptual boxes — for example, a box labelled "law" which is different from the box labelled "orders backed by threats" — and provides a guide for determining what bit of the world goes into each box. However, a classification model is not very useful to a discipline until it gains widespread acceptance for only then can it provide a framework for intellectual discussion and experimentation. For example, Darwin's ability to develop his theory of natural selection was based in part on the existence of a well accepted classification scheme of plants and animals. Likewise, the success of Hart's model depends largely on its acceptance as an organizational or classification device. Without such approval, it is only "one man's theory"

Achieving this acceptance requires some commonly acknowledged criterion of similarity and dissimilarity, which will determine the structure of the classification model. Nonetheless, even though Hart proposes a scheme of classifying "elements" based on similarities

23. *Id.* at 17.

24. Hart often refers to tasks such as elucidation and understanding, but these concepts are too vague to be used as a definition of purpose. *See* discussion in note 14 *supra*. Therefore, the more explicit task of classification has been used to refer to Hart's purpose since this is a more precise term for what he is doing.

and dissimilarities, he does not offer any criterion for determining "likeness."²⁵ Consequently, if another jurisprudent thinks that legal rules are sufficiently "like" morality that it is possible to refer to a "morality of law,"²⁶ Hart cannot offer an objective criticism. He can only say that from his personal perspective they are not sufficiently alike.

This deficiency is perhaps best illustrated by examining Hart's criticisms of other models. He frequently criticizes some models as containing "too few" elements²⁷ and others as containing "too many."²⁸ Yet he never provides a measure of "too many" or "too few." He suggests that *too few* "distorts" reality²⁹ and that *too many* "confuses" analysis,³⁰ but he never tells how we know the mix is "just right." Nevertheless, despite this lack of a criterion of adequacy, Hart asserts that his model is the "key to the science of jurisprudence."³¹ This statement clearly claims too much;³² it does not require extended

25. See HART, CONCEPT 155:

[T]hough 'Treat like cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.

Unfortunately, Hart does not apply this same analysis to his own classification scheme. See notes 27-30, 188-93 and accompanying text *infra*.

26. E.g., L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

27. See, HART, CONCEPT 18, 35, 208-09. A model with *fewer* elements has a *less restrictive* or a *wider* view of what phenomena are included. For example, the following model of X says that X has two elements:

X is an animal:
 (1) with four legs, and
 (2) fur.

This is less restrictive (or broader) than a model which says that X has 3 elements:

X is an animal:
 (1) with four legs,
 (2) fur, and
 (3) weighs over 20 pounds.

The former is less restrictive because more phenomena would be included as examples of the general model.

28. *Id.* at 35, 152-53, 205-07. See note 27 *supra*.

29. HART, CONCEPT 18-19.

30. *Id.* at 205-07.

31. *Id.* at 79.

32. Hart himself has since rephrased his contribution in more modest terms, "I regarded my aim in the *Concept of Law* as complementary to and in no way exclusive of [other approaches] . . ." Hart, Book Review, 78 HARV. L. REV. 1281, 1291 (1965).

discussion to show that many problems still puzzle jurists and that these problems cannot be solved with Hart's key. The point to be made from a metatheoretic perspective is that *Hart's methodology of model construction is flawed from the beginning because he never discusses the problem of a criterion of validity*. The model may, nevertheless, be valid or useful in terms of some criterion that we might provide.

In approaching the second task of theoretical strategy, Hart adopts the usual approach of jurists and uses an entirely verbal methodology of theory construction.³³

In order to avoid the problems of ambiguity inherent in verbal models, the first stage in the metatheoretic analysis of Hart's model will be to translate his model into short, relatively unambiguous propositional statements.³⁴ This translation process — referred to as "formalizing" the model — will be effected in stages with textual analysis interspersed among "formal" statements. (Since the various propositions will be referred to by number throughout the article, a complete formalization with no textual discussion is included as APPENDIX 1.) This formalization process is divided into two parts. The first part develops Hart's underlying models of man and society.

33. Hart shows an awareness of the limits of language in his analysis of the "open-textured" quality of rules. See notes 70-71 and accompanying text *infra*. Unfortunately, however, he does not adopt a less "open-textured" method of theory construction.

34. Such a translation process, of course, runs the risk of wasteful debate along the lines mentioned previously, *i.e.*, I am stating that Hart's model is *A, B, C*; another person might assert that he said *A, B, D*. See note 220 *infra*. However, this risk is inevitable since Hart's model is verbal. The emphasis here is not on presenting a condensation of Hart. Instead, the thrust of this article is to point out the need for a jurisprudential metatheory and to make some proposals for such a theory. Thus, if my translation is challenged, the fault lies primarily with Hart — his verbal model is too ambiguous and he needs to adopt a different strategy of theory construction. Agreement by the reader on this point is more important than agreement on my "translation" of Hart. See text accompanying note 9 *supra*.

Even my translations are, of course, ambiguous since they are also verbal. However, the use of propositional statements like those in the text is a good procedure for constructing models which are less ambiguous than verbal models in discussion form. It is possible to go even further in eliminating ambiguity. *E.g.*, Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of "Legal Right": A Powerful Lens for the Electronic Age*, 48 S. CAL. L. REV. 428 (1974). However, such an extreme approach has not been used because the underlying ambiguities in Hart limit translation to such precise language and because the potential audience of this article would be considerably reduced. Moreover, there are a number of writers who use propositional statements as the methodology for the initial stages of developing models of man, society, and/or law. *E.g.*, THE SOCIAL ORGANIZATION OF LAW (D. Black & M. Mileski eds. 1974); G. LENSKI, POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION 24-42 (1966).

The second part formalizes his model of law. This division is necessitated by the fact that these underlying models are often testable where his model of law is not. In this way an objective criterion of theoretical validity can be used in the later critical analysis of the model of law.

B. *Formalization of Hart's Models*

1. *Implicit Models of Man and Society*

Hart regards law as an "instrument of social control."³⁵ For this reason his theory of law is based on models of man and of society.³⁶ Obviously, the "validity"³⁷ of these underlying models is crucial to the "validity" of his model of law. Yet Hart leaves these models largely at an implicit level. It will be helpful, therefore, to begin the analysis of his model with an explicit discussion of these underlying models.

Hart's model of man includes the following elements:

(M-1) Man is purposive or goal-oriented.³⁸

(a) Specific goals vary from individual to individual and from time to time, but all men are goal-oriented.

(b) Virtually all men have the goal of survival which is an equilibrium state called "life."³⁹

(c) There are *no* other goals common to *nearly all* men.⁴⁰

35. HART, CONCEPT 121.

36. Hart states that:

[I]t is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.

HART, CONCEPT 195.

37. "Validity" is used broadly in the text to refer to validity in terms of one or more of the criteria developed in the previous section. See § II(B) of this article. It should be remembered throughout that "validity" is an extremely relative term, because it depends on:

(a) the function involved;

(b) the criteria of satisfaction of that function;

(c) the relative ranking of the functions; and

(d) the general tests of internal logical consistency, simplicity, and originality.

The concept of validity is further discussed below in analyzing Hart's models. See notes 122-26 and accompanying text *infra*.

38. Although never explicitly stated, this aspect of human nature is implicit in many of Hart's statements. See HART, CONCEPT 185-90.

39. *Id.* at 187-88.

40. *Id.* This statement is implicit in Hart's comments concerning the arguable weaknesses of positions like those taken by Aristotle and Aquinas. For a discussion indicating that the proposition in the text above may be a slight distortion of Hart's position, see note 132 *infra*. As indicated in that footnote the problems in developing

- (M-2) Man is "rational" or "efficient" (more or less).⁴¹
- (M-3) Men are relatively equal⁴² in that they have common limits on:
- (a) their ability to protect themselves,⁴³
 - (b) their inclination to act altruistically,⁴⁴
 - (c) their ability to process information,⁴⁵
 - (d) their longevity,⁴⁶
 - (e) the material resources available to them for accomplishing goals,⁴⁷ and
 - (f) their physical abilities.⁴⁸
- (M-4) Man is uniquely capable of recognizing from an internal perspective the "binding" nature of certain standards.⁴⁹

Building on this model of man, Hart has an implicit model of society:

- (S-1) Social effort is more "efficient"⁵⁰ than individual effort.
- (S-2) Dynamic societies are more "efficient" than static societies.⁵¹
- (S-3) Societies with a division or specialization of labor are more "efficient" than societies where all men do the same work.⁵² Therefore, societies with "legal specialists"

Hart's model of man are caused by his limited and ambiguous treatment of the topic. For a general discussion of this problem, *see* note 34 *supra*.

41. Rationality, like purposiveness, is implicit throughout Hart's discussion. *See* HART, CONCEPT 185-89.

42. *Id.* at 190-92.

43. *Id.* at 190.

44. *Id.* at 191-92, 193.

45. *Id.* at 121-32. These limitations take various forms including the limitations of language, *id.*, limits on ability to determine facts, *id.* at 125, and limits on ability to anticipate future circumstances. *Id.*

46. *Id.* at 52-54.

47. *Id.* at 192-93.

48. *Id.* at 190-91, 194.

49. *Id.* at 55-57, 86-88, 96, 134-37.

50. "Efficiency" refers to ability to increase goal satisfaction per unit of input. Apparently, Hart assumes that, given man's weaknesses (Proposition M-3), co-operative social effort is more likely to provide efficient goal satisfaction. *See id.* at 189.

51. Hart contrasts a "dynamic" society which is characterized by a relatively high rate of change, with a "static" society which is characterized by a relatively low rate of change. Hart does not develop the concepts any further than this rough characterization. *See id.* at 90-96. The superiority of dynamic societies is implicit in Hart; for example, societies which are static are referred to as "defective." *Id.*

52. HART, CONCEPT 192-93.

("officials") are more "efficient" than societies without "officials."⁵³

(S-4) Societies require a certain minimum level of "order" or co-ordination.⁵⁴

Many aspects of Hart's model of law are based on these models of man and society. This relationship will be developed in the following section. Later in this article Hart's models of man and society will be examined in terms of metatheoretical criteria of "validity." In this way, those parts of Hart's model of law which rest on the models of man and society can also be measured by these criteria.

2. *The Model of Law — Law as Rules*

Hart unequivocally states that law consists of rules.⁵⁵ In reaching this conclusion he spends considerable time criticizing the shortcomings of other theories. This criticism will be referred to in

53. *Id.* at 92-96. The concept of "official" would appear to include, at least, legislators, judges, and police. However, Hart never defines "official." See notes 92, 204 *infra*; APPENDIX 2 *infra*.

One possible definition might be that an "official" is one who exercises power pursuant to a secondary rule. However, Hart distinguishes elsewhere between the official and private exercise of powers:

The *ordinary citizen* manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and identified in this way, and also makes claims and *exercises powers* conferred by it. HART, CONCEPT 60 (emphasis added); see *id.* at 40, 85, 95; cf. *id.* at 20-21, 38, 109-14. Thus, "official" is not adequately defined as one who exercises secondary power; something more is involved.

Two other possible definitions are suggested by various parts of Hart's discussion. First, Hart at times appears to define "official" by reference to the degree of *centralization* of power. See *id.* at 95, 211-15, 244. For further discussion of this approach see note 211 and accompanying text *infra*. Yet Hart does not develop this concept of centralization. Second, "official" seems at some times to be explicitly defined as a cultural concept, the meaning of which varies from society to society. This conception views an "official" as anyone designated as such by the rule of recognition of a particular society. Since the content of the rule changes from society to society, the specific definition of "official" also varies. See *id.* at 111-14; cf. discussion of internal point of view, *id.* at 54-60, 85-88, 96, 134-37, 244. Adopting such a cultural view of "official" would result in a serious flaw in Hart's model because concepts which are defined uniquely in each society cannot be used in cross-societal comparisons. See note 175 and accompanying text *infra*.

54. Although Hart never defines society, he apparently assumes that it has certain regularities, *i.e.*, that it is ordered and its component parts (*e.g.*, individuals) coordinate their action to some extent. See HART, CONCEPT 89-96. Moreover, he refers to a lack of social control as "fatal to social life." *Id.* at 192.

55. *E.g.*, HART, CONCEPT, ch. 5. This chapter, which is entitled "Law as the Union of Primary and Secondary Rules" (emphasis added), notes that earlier theories failed because they did not include "the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law." *Id.* at 78.

some succeeding sections. At present the focus will be on Hart's discussion of the central role that rules play in all legal systems.

a. *The nature of rules*

Before developing a general definition of rules, it should be noted that Hart distinguishes between two basic types of rules — primary and secondary. The basis of this distinction is the assertion that a rule of the form:

"Thou shalt not do X (*e.g.*, murder); if you do X then Y sanction (*e.g.*, hanging) will be imposed."

is "fundamentally" different from a rule of the form:

"If you want to do A (*e.g.*, make a will), then you must do B (*e.g.*, have three witnesses)."

In the first case failure to comply usually results in intervention and affirmative action by the legal system. In the second case non-compliance results in nullity, nothing more. Given this distinction, Hart develops a two-fold typology of rules:⁵⁶

(R-1) Rules can be divided into two basic types:

- (a) Primary rules which dictate certain behavior patterns and which usually, but *not necessarily*, provide that sanctions will be imposed for breach of the rule.
- (b) Secondary rules which
 - (1) confer "power":
 - (A) to create primary rules or subordinate secondary rules;
 - (B) to interpret primary rules;

56. HART, *CONCEPT*, ch. 5. The basic thrust of Hart's distinction is reflected in the following quotation:

It is true that the idea of a rule is by no means a simple one: we have already seen in Chapter III the need, if we are to do justice to the complexity of a legal system, to discriminate between two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.

Id. at 78-79.

- (C) to apply primary rules to facts; and
- (D) to apply sanctions for breach of primary rules; and,
- (2) nullify the attempted exercise of power if the rule is not followed.

It should be noted that in Hart's model a primary rule that prohibits murder is still a rule even though no penalty is provided; *by definition*,⁵⁷ however, no such separation of nullity and a secondary rule is possible.⁵⁸

With these two basic types of rule in mind, it is possible to discuss Hart's general definition of a rule. Hart does not define a rule at any one place in *The Concept of Law*. However, when the book is read as a whole, it is apparent that a "rule" is viewed by Hart in terms of four elements: (1) a symbolic communication of a specified standard of conduct to someone who must conform to the standard;⁵⁹ (2) an "internal attitude" toward the rule by those to whom it is directed, which is manifested as an awareness that the rule provides a "binding" standard, *i.e.*, behavior "ought" to conform and the rule "justifies" the sanction for non-conformity;⁶⁰ (3) a pat-

57. This article adopts Hart's usage of the term "definition" as a "rule by reference to which the correctness of the use of the word can be tested . . ." HART, CONCEPT 17.

58. Hart makes the distinction as follows:

In the case of rules of the criminal law, it is logically possible and might be desirable that there should be such rules even though no punishment or other evil were threatened. It may of course be argued that in that case they would not be *legal* rules; nonetheless, we can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, and suppose the first to exist without the latter. We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it was designed to maintain. But we cannot logically make such a distinction between the rule requiring compliance with certain conditions, *e.g.* attestation for a valid will, and the so-called sanction of 'nullity'. In this case, if failure to comply with this essential condition did not entail nullity, the rule itself could not be intelligibly said to exist without sanctions even as a non-legal rule. The provision for nullity is *part* of this type of rule itself in a way which punishment attached to a rule imposing duties is not. If failure to get the ball between the posts did not mean the 'nullity' of not scoring, the scoring rules could not be said to exist.

HART, CONCEPT 34-35 (emphasis in original). For a discussion of this aspect of Hart's model, see Tappen, *Powers and Secondary Rules of Change*, in OXFORD ESSAYS IN JURISPRUDENCE (A. Simpson ed. 2d ser. 1973).

59. HART, CONCEPT 121-22.

60. *Id.* at 55-57, 86-88, 96, 134-37. This internal attitude is related to, but not the same as, "obligation." *Id.* at 79-88. Since Hart regards an understanding of

tern of behavior in conformity to the rule;⁶¹ and (4) the effect of non-compliance with the rule.⁶²

These four elements are all necessary in "studying" or understanding rules, but the first two aspects are very different from the last two. In Hart's scheme a rule is *defined*⁶³ in terms of the first two elements — *there is no rule* unless there is both a communication and an internal sense of the binding nature of the communication. The third aspect of rules is not crucial to the *existence* of a rule because a

"obligation" as "crucial," *id.* at 82, some further development of this concept is in order:

A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. . . . The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was 'obliged' to hand over his money. It is, however, equally certain that we should mis-describe the situation if we said, on these facts, that B 'had an obligation' or a 'duty' to hand over the money.

. . . .
 . . . There is a difference . . . between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it. The first is often a statement about the beliefs and motives with which an action is done: B was obliged to hand over his money may simply mean, as it does in the gunman case, that he believed that some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences. In such cases the prospect of what would happen to the agent if he disobeyed has rendered something he would otherwise have preferred to have done (keep the money) less eligible.

. . . .
 . . . But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference. Thus not only is it the case that the facts about B's action and his beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are *not sufficient* to warrant the statement that he had an obligation to do this; it is also the case that facts of this sort, i.e. facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something. Thus the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience. Moreover, whereas the statement that he had this obligation is quite independent of the question whether or not he in fact reported for service, the statement that someone was obliged to do something, normally carries the implication that he actually did it.

Id. at 80–81. The thrust of these passages might be summarized by viewing obligation as the internal attitude accompanying primary rules. *Id.* at 84–85.

61. *Id.* at 54. With both social rules and habits "the behavior in question . . . must be general though not necessarily invariable; this means that it is repeated when occasion arises by most of the group . . ." *Id.*

62. *Id.* at 34–35, 78–88, 95. See text accompanying notes 56–58 *supra*.

63. For discussion of the role of definition, see note 57 *supra*.

rule is still a rule even if behavior does not conform: "broken" rules are still rules.⁶⁴

The final element in considering rules requires further discussion because the responses to or effects of non-compliance must be viewed not only in terms of the behavior which actually occurs when the rule is not followed, but also in terms of the "formal" theoretical requirements as to what the communication must declare concerning the effects of a breach. As indicated in the preceding discussion of the two types of rules,⁶⁵ the "formal" theoretical requirements are as follows: (1) A primary rule is defined as still being a rule even if there is no provision for penalty in case of breach; and (2) A secondary rule is defined as a rule which provides that the effect of breach is nullity. The *behavioral* response to breach is measured by a less stringent standard: both types of rules are still rules even if breach does not in fact result in a penalty (primary rule) or nullity (secondary rule). In other words, an unenforced rule is still a rule so long as the two formal definitional requirements of the concept of a rule are satisfied.

Hart's use of these four elements in his model can be summarized in the following perspective on a rule:

(R-2) A rule:

(a) *Requires:*

- (1) A "communication" of a prescribed standard of conduct (See Proposition R-3(a) below), and
 - (2) An internal attitude manifested as an awareness of the "binding" nature of the standard.
- (b) Is *usually* (but not always) accompanied by a pattern of behavior in conformity with the rule. (However, see Proposition R-5 below).

(c) Deals with breach of the rule as follows:

- (1) The formal declaration
 - (A) of a primary rule will *usually* (but not always) provide a penalty for breach;
 - (B) of a secondary rule will *always* provide that a breach results in nullity.
- (2) The actual enforcement for breach of rules will usually (but not always) conform with the declaration.

64. HART, CONCEPT 138-40.

65. See text accompanying notes 56-58 *supra*.

There is always a symbolic, informational aspect involved in dictating behavior (Proposition R-2 (a) (1)), and certain characteristics of a rule are imposed by this aspect. For example, no information has been conveyed if the rule is unintelligible to the persons subject to the rule; thus, rules must be communicated in an intelligible fashion if they are to control.⁶⁶ Similarly, the rules must be communicated prior to the actions involved if they are to be effective.⁶⁷ However, given man's limited ability to foresee future developments (Proposition M-3(c)), there may be situations where the symbolic communication occurs *after* the act.⁶⁸

As a result of man's limited ability to process information, other generalizations can be made about rules. First, rules cannot deal with every specific act. Instead, rules on the whole will have to be directed toward general classes of persons and/or classes of behavior.⁶⁹ Moreover, even relatively specific commands are plagued by the inherent ambiguity of language.⁷⁰ The net result of man's limited ability to foresee and consider all possible events and to communicate concerning those events is that rules cannot conclusively deal with all possible behavioral possibilities. There will always be a class of behavior which may or may not fall within the scope of the rule. This area of uncertain inclusion is referred to by Hart as the "open-textured" quality of rules.⁷¹

Thus, based on the communication aspects of a rule the following proposition is included in Hart's model:

(R-3) The symbolic component of a rule will

(a) *Usually* be communicated

(1) to those affected

(2) prior to the conduct involved, and

(3) in a form

(A) that is intelligible to those affected; and

(B) that refers to general classes of persons and conduct.

66. HART, CONCEPT 202.

67. *Id.*

68. *Id.*

69. *Id.* at 121.

70. *Id.* at 123-24.

71. HART, CONCEPT, ch. 7. For example, Hart notes:

Whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.

Id. at 124.

- (b) *Always* be "open textured" — i.e., of the set of "possible behavior" there will be three subjects:
- (1) a "closed" subset of behavior which is clearly included;
 - (2) a "closed" subset of behavior which is clearly excluded;
 - (3) an "open" subset of behavior which is not clearly included or excluded. (This conflicts with Proposition R-3 (a) (2), (3) (A), but is necessitated by Propositions M-3(c) and R-3(a) (3) (B)).

b. *Pattern or formal structure of rules and legal systems in society*

Society requires a certain minimum of order (Proposition S-4). However, given man's limitations (Proposition M-3, particularly M-3(b)), this co-ordination will not occur automatically. Therefore, constraints on behavior must be *imposed*.⁷² Obviously, these constraints cannot be imposed effectively unless they are communicated to the members of society. (Proposition R-3 (a)). Because of man's limited ability to process information (Proposition M-3 (c)), these communications must be generalized. (Proposition R-3(a) (3) (B)). Moreover, given man's limited ability to impose his will on other men (Proposition M-3), those subject to the constraints must conform to them at least in part out of something more than "fear" of sanctions. This "something more" could be a number of things, but Hart asserts that it always includes an internal sense of obligation to some extent.⁷³ (Compare Proposition R-11 below). Therefore, Hart's model contains the following proposition:

(R-4) Societies *must* have rules.⁷⁴

Since a society must have a minimum of order (Proposition S-4), there must be not only rules but also some *consistency in rules*. Otherwise, different rule-prescribed patterns of behavior could con-

72. *Id.* at 192-93.

73. This is implicit in his statement that in "any large group general rules, standards, and principles must be the main instrument of social control," *id.* at 121, because rules by definition include the internal aspect. See Proposition R-2(a)(2) and discussion accompanying notes 59-63 *supra*. Hart develops this point in another context by noting that there are societies characterized by a "simpler decentralized pre-legal form of social structure which consists only of primary rules. . . . [These] rules must be widely accepted as setting critical standards for the behaviour of the group. If, there, the internal view is not widely disseminated there *could not logically* be any rules." *Id.* at 113-14 (emphasis added).

74. HART, CONCEPT 121.

flict and the minimal order could not be achieved. Thus, societies must have "systems" of rules which form a coherent whole.⁷⁵ This coherence is achieved by a "rule of recognition," which determines whether the other subordinate rules comply with the system — *i.e.*, whether they are "valid."⁷⁶

The content of the rule of recognition — its definition of validity — is developed over time.⁷⁷ This development has two dimensions:

[O]ne is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.⁷⁸

The first element is required because without a minimum level of obedience to the rule of recognition (which provides consistency),⁷⁹

75. *See id.* at 90, 92-93, 112-13, 228-31.

76. *Id.* at 92, 97-114. The textual discussion preceding this note could be expressed more formally as follows:

(1) A society is in a state of disintegration (D) if its level of order (O) falls below a certain level (X). (Proposition S-4).

$$(O < X) \rightarrow D$$

(2) In a society without rules (R), the level of order will fall below level X. (Proposition R-4).

$$\neg R \rightarrow (O < X) \rightarrow D$$

(3) Even with rules, a society will fall below level X if the consistency or internal order (C) of the rules falls below a certain level (Y).

$$(C < Y) \rightarrow (O < X) \rightarrow D$$

(4) With a rule of recognition (R o R), the level of consistency (C) will rise above (Y).

$$(R \circ R) \rightarrow (C > Y) \rightarrow (O > X) \rightarrow (\neg D)$$

77. *See* note 84 and accompanying text *infra*.

78. HART, CONCEPT 108.

79. The "obedience" does not need to correlate with an internal perspective toward the rule:

[O]beying a rule (or an order) *need* involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. He need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply. Instead, he may think of the rule only as something demanding action from *him* under the threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others

the minimum-order requirement of Proposition S-4 is not satisfied. The second aspect is essential because the *rule* of recognition must satisfy the two requirements of the definition of a rule set out in Proposition R-2. The communication aspects of a rule (Proposition R-2 (a)(1)) are satisfied by the *overt* reference to the rule by those who use it. Similarly, the internal aspects of a rule (Proposition R-2 (a)(2)) are satisfied by these same people recognizing the binding nature of the rule of recognition.

It should be noted that there are two characteristics of the rule of recognition, each of which makes it a unique type of rule. First, the internal acceptance need only be satisfied by the "officials" of the legal system.⁸⁰ Second, the minimum-obedience aspect of the rule of recognition makes it the only rule which requires that behavior conform to some degree of its prescriptions. A totally disregarded rule of recognition is logically impossible in Hart's system, while a

as having an obligation to do so and without being disposed to criticize either himself or others for deviations.

HART, CONCEPT 112 (emphasis in original). See note 104 *infra*.

80. Hart summarizes this distinction:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other's deviations as lapses.

Id. at 113 (emphasis in original). Hart also notes that:

Here surely the reality of the situation is that a great proportion of ordinary citizens — perhaps a majority — have no general conception of the legal structure or of its criteria of validity. The law which he obeys is something which he knows of only as 'the law'. He may obey it for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so. He will be aware of the general likely consequences of disobedience: that there are officials who may arrest him and others who will try him and send him to prison for breaking the law. So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists.

Id. at 111. For a further discussion of the distinction between obedience and internal acceptance, see sources cited in note 49 *supra*, and quotation in note 79 *supra*.

totally disregarded lesser rule can logically still be termed a rule. (Proposition R-2 (b)).

Given these two aspects — external observance and internal acceptance — the process of determining the existence and content of the “rule of recognition” in a society involves the following steps: (1) observe the society over time to determine whether its various rules are consistent;⁸¹ (2) if they are consistent, determine whether this consistency correlates with a supreme “rule” of validity which is “accepted” by the “officials” in the society;⁸² (3) if this acceptance exists, determine whether the behavior of citizens generally conforms to the supreme rule of validity, *i.e.*, whether they generally obey the “rules” promulgated by the “officials.”⁸³ (See APPENDIX 2 for a more formal development of this observational process.) In other words, the “rule of recognition” identifies a pattern persisting in the society over some period of time. Consequently, a particular statement of that society’s rule of recognition at a given time cannot provide a prediction concerning the content of the rule in the *future*. Moreover, one cannot say that the content of the rule of recognition has changed until after a change has persisted for a period of time.⁸⁴

This concept of a rule of recognition is summarized in the following proposition:

(R-5) Legal rules are unified into a system by a “rule of recognition” which is a type of secondary rule authorizing certain persons (“officials”) to exercise various powers in a consistent, systematic manner. (Proposition R-1(b)).

(a) The rule of recognition has two dimensions:

- (1) A minimal level of obedience by citizens to the rules promulgated by the “officials” identified by the rule; and
- (2) A shared acceptance by the “officials” of the rule of recognition. Such “acceptance” is manifested by

81. *Id.* at 111, 113–20.

82. *Id.*

83. *Id.*

84. The dynamic aspect of the rule of recognition is developed throughout Chapter 6 of *THE CONCEPT OF LAW*. An example of the time span involved in dealing with the rule of recognition as the unifying element of a legal system is illustrated by Hart’s comment that “the statement that a legal system exists is of a sufficiently broad and general type to allow for interruptions; it is not verified or falsified by what happens in short spaces of time.” *Id.* at 115.

- (A) a minimal level of obedience to the rule of recognition in exercising their power under the rule,
 - (B) an internal awareness of the binding nature of the rule, and
 - (C) external references to the rule.
- (b) The rule of recognition is developed over time as the above pattern of obedience and acceptance manifests itself. Therefore,
- (1) it can only be identified retrospectively, and
 - (2) changes over a short period of time do not affect it.

A society which has only primary rules is relatively static because it can change rules only gradually.⁸⁵ (Proposition R-1 (b) (1) (A)). Similarly, without secondary rules to create "official powers," a society cannot use specialists in interpreting and applying rules and in imposing sanctions.⁸⁶ (Proposition R-1(b)(1)(B), (C), (D)). Therefore, primitive societies with few or no secondary rules are less "efficient" than dynamic societies with a large proportion of complex secondary rules.⁸⁷ (Propositions S-2, S-3). Hart divides these secondary rules into four types,⁸⁸ but for present purposes it is sufficient to express the relationship between the society and secondary rules as follows:

85. *Id.* at 90-91, 93-94. The basis of this statement is developed more fully in the text accompanying notes 212-16 *infra*.

86. *Id.* at 91-96.

87. *Id.* at 89-96. See note 51 *supra*.

88. The four types are:

(1) "Rule of recognition." HART, CONCEPT 92-93.

(2) "Rules of change." *Id.* at 93-94.

(3) "Rules of adjudication." *Id.* at 94-95.

(4) Secondary rules which "provide the centralized official 'sanctions' of the system." *Id.* at 95.

This typology has not been followed because it is inconsistent with the definition of rule of recognition developed in detail by Hart in Chapter 6. If both approaches were followed, there would be *two* types of Rule of Recognition:

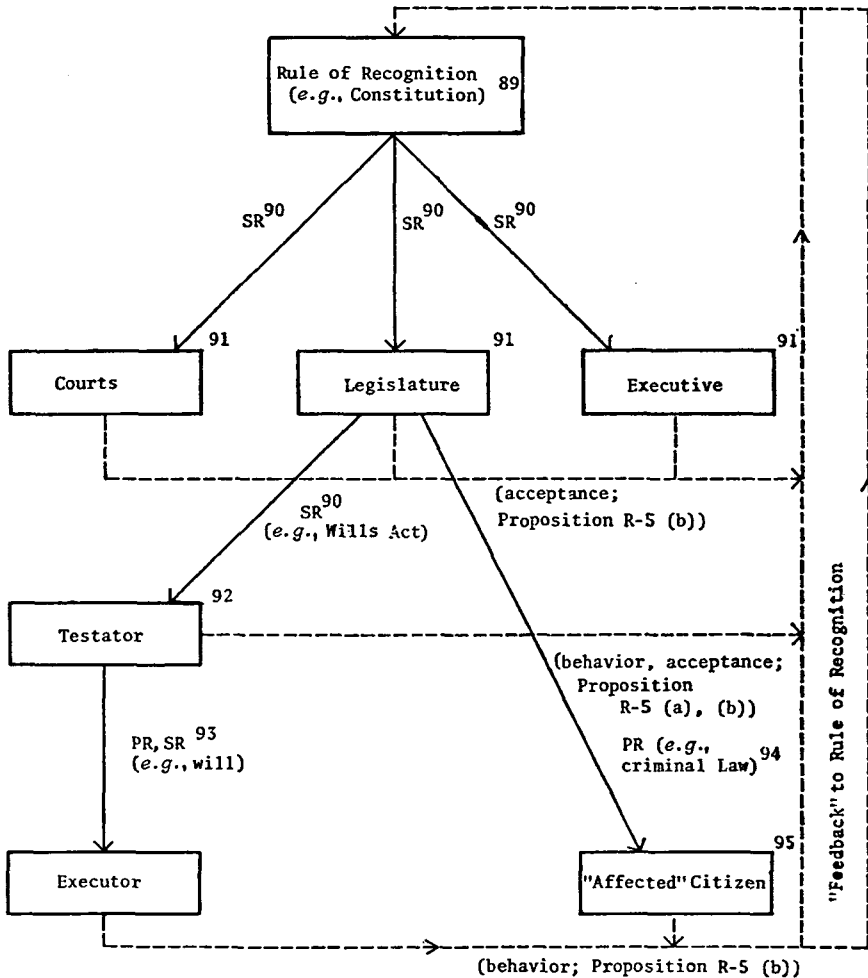
(1) The authoritative text (*e.g.*, a stone tablet) with no officials. *Id.* at 92.

(2) Rules identified by reference to "officials" (who promulgate rules, apply rules, etc.) *Id.* at 93, 95, ch. 6. See Proposition R-5.

Since this inconsistency of terminology makes Hart's model very hard to formalize, the fourfold typology has not been followed. If the typology were to be kept, the first sense of rule of recognition should be given a name like "Rule of Identification." This Rule of Identification solves uncertainty and thus is like a Rule of Recognition in the second sense, but is only a *primitive approach* to a Rule of Recognition since it lacks "officials." The use of two senses for Rule of Recognition is a minor inconsistency because the existence of a society with a Rule of Identification but no officials is very unlikely.

(R-6) Secondary rules make it possible for society to be dynamic and to have legal "officials." (Proposition R-1). Therefore, societies with such rules are more "efficient" than societies without them. (Propositions S-2, S-3).

The following diagram summarizes the development of Hart's model to this point:



KEY

SR - Secondary Rule
PR - Primary Rule

89. The rule of recognition need not be a written constitution, but if one exists then it is an obvious candidate for the rule of recognition in that society. HART, CONCEPT 103. See note 202 *infra*.

90. The diagram refers to the fact that institutions such as courts, legislatures, and executives are created by a secondary rule. For example, Hart states that "the

It should be noted that Hart is not merely asserting that *some* societies have this structure. The assertion is that *all* non-primitive societies have this pattern and that his model enables us to identify the pattern and "classify" its component parts.

c. *The content of law*

Hart's model is not limited to the formal structure of rules in society. He also comments on the necessary substantive *content* of legal rules. The first such assertion is:

- (R-7) The legal rules must limit the use of deadly force.⁹⁶ (See Propositions M-1(b) and M-3(a)).

Given the central role of survival in Hart's model of man, the necessity of this requirement is obvious. The other substantive requirements demand more discussion.

Men have limited resources available to them. (Proposition M-3(e)). In order to provide minimal order (Proposition S-4), these resources must be divided in some reasonably stable, identifiable manner. Thus, a legal system must have some rules substantively concerned with material property:

- (R-8) The legal rules must contain some substantive "property" rules governing material resources whereby:
- (a) at any particular time
 - (b) a particular person(s) may exclude all others
 - (c) from a particular material resource.⁹⁷

existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative." *Id.* at 133.

91. The concepts of "court," "legislature," and "executive" are meant to serve as *examples only*. The rule of recognition does not necessarily create such institutions.

92. Although the testator is certainly exercising power granted by a secondary rule, it is not clear whether he is an "official" in Hart's scheme. Therefore, it is also uncertain whether his internal perspective on the rule is relevant in determining the rule of recognition. For a more general discussion of the ambiguity of "officials," see discussion and references in note 53 *supra*. Hart provides no assistance here by stating that:

[M]any of the features which puzzle us in the institutions of contract or property are clarified by thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals.

HART, CONCEPT 94.

93. The executor may be granted powers by the testator.

94. Criminal law is used as an example only. There are other types of primary rules. See HART, CONCEPT 27.

95. As indicated in notes 274 and 275 to APPENDIX 2 *infra*, determining which citizens are "affected" presents conceptual problems.

96. HART, CONCEPT 190; see *id.* at 85, 89, 167.

97. HART, CONCEPT 192. Hart also phrases this point by noting that "rules must contain in some form restrictions on . . . theft . . .", *id.* at 89, and that "[a]mong

Hart has assumed that dynamic societies with a division of labor are more efficient (Propositions S-2, S-3). Thus the system of rules should include a way to achieve a society which is characterized by both change and a division of labor.⁹⁸ Individuals, therefore, must be given some authority to engage in exchange and to determine the conditions of exchange. The following proposition results:⁹⁹

(R-9) The legal rules must contain some secondary rules which authorize individuals:

- (a) to *exchange* property and services, and
- (b) to "contract" for *future exchanges* of property and/or services.

Hart notes that the property rules (Proposition R-8) need not involve individual ownership,¹⁰⁰ which is a broader concept than the power of exchange developed in Proposition R-9.

These exchange relationships will not be successful unless the communications between individuals are reliable. Therefore, individuals must be forbidden from dishonest, misleading communications, *i.e.*, fraud and such dishonesty in exchange must be prohibited by the rules.¹⁰¹ More generally, a society where the members could not trust one another in vital matters would face difficulties in satisfying the minimal function of survival. Consequently, because societies must have rules which substantively limit dishonesty, the following proposition emerges:

(R-10) The legal rules must limit the use of dishonest or deliberately misleading communications.

Given limited resources (Proposition M-3(e)) and limited altruism (Proposition M-3(b)), the preceding rules will not work unless there is some element of coercion.¹⁰² Moreover, these sanctions would not work unless men were all relatively equal (Proposition M-3),

such rules obviously required for social life are . . . rules forbidding the destruction of tangible things or their seizure from others." *Id.* at 167.

98. *Id.* at 192.

99. *Id.* at 192-93. Just as theft is implicit in the concept of property, *see* note 97 *supra*, so also is the concept of limiting deception and fraud (Proposition R-10) necessarily involved in developing these exchange rules. *See* HART, CONCEPT 85, 89.

100. HART, CONCEPT 192.

101. *Id.* at 85, 167. *See, e.g.*, G. TULLOCK, THE LOGIC OF THE LAW 228-40 (1971).

102. HART, CONCEPT 193.

because if it were otherwise, "superstrong" rule violators could escape sanctions.¹⁰³ Thus, all legal systems will have some substantive coercive elements:

(R-11) The legal system must impose sanctions for some breaches in order to coerce behavior.

This proposition does not contradict the earlier statement that a rule does not necessarily require coercion. (Proposition R-1 (b) (2)). A rule is more likely to be *effective* if coercion is involved; consequently, Proposition R-11 asserts that societies must use sufficient coercion in support of (some) rules so that the requisite minimum order will be assured. (Proposition S-4; Proposition R-4).

One aspect of the model of man is that no single person can impose his behavioral requirements on others for any period of time (Proposition M-3); therefore, an individual "ruler" needs the co-operation of a *significant part* of the society.

[I]t is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope

. . . .

. . . [But] if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation . . . the coercive power of law and government cannot be established.¹⁰⁴

Thus, Hart asserts that rules must be minimally beneficial to a substantial portion of a society by granting this portion mutual benefits in the content of law.¹⁰⁵ The following proposition summarizes this mutuality in the content of law:

(R-12) The rules must have some minimal mutuality of content for a significant part of society so that this segment of society will be given an incentive for co-operation with the rules.

The final requirement concerning the content of a system of rules is that the behavior must be possible.¹⁰⁶ (See Proposition M-3

103. *Id.* at 191, 194.

104. *Id.* at 196 (emphasis in original). Similar language is found at 88-89, 191, 195-97.

105. To accomplish this minimal mutuality, not *all* laws must be accepted by a substantial portion of society. Instead it is sufficient if a substantial portion of society supports the *system* of rules. *See id.* at 197; *cf.* Proposition R-5. Even with this qualification Proposition R-12 is ambiguous. *See* text accompanying notes 145 & 228-30 *infra*.

106. HART, CONCEPT 202; *see id.* at 167.

(f)). Rules which require the impossible will clearly fail as a method of social control. Thus the following proposition is part of the model:

(R-13) Rules, particularly primary rules, must contain provisions that can in fact be obeyed.

d. *Exclusions from the model.*

Models are designed to identify and focus on certain features in the real world so that men can discuss the world without being overwhelmed by detail and trivia.¹⁰⁷ (Proposition M-3(c)). Such a focusing process necessarily involves some exclusion of elements which in the "real world" may be related to the elements in the model. Thus, modeling has several aspects: first, the identification of particular elements for focus with the necessary exclusion of other elements; second, an analysis of the relationships among the elements included in the model; and third, an evaluation of the model.¹⁰⁸ The identification of elements and relationships in Hart's model has already been discussed. The evaluation of his model will be discussed in the next section. The present section discusses some of the significant elements which Hart does not include in his model even though he admits that they have "real-world" relationships with the elements of his model.

There are two significant elements which Hart concedes are relevant but which he excludes nonetheless¹⁰⁹ — (1) morality, and (2) justice, which Hart views as a subset of morality.¹¹⁰ Since these

107. For a discussion of model building, see K. DEUTSCH, *THE NERVES OF GOVERNMENT* 3-21 (1966); J. FORRESTER, *INDUSTRIAL DYNAMICS* (1961); *THE PROCESS OF MODEL-BUILDING IN THE BEHAVIORAL SCIENCES* (R. Stogdill ed. 1970). The focusing is usually accomplished by a process of limiting the variables to be considered. One common method of limiting the variables that is relevant to Hart's models is to group or "aggregate" numerous individual characteristics with "similar" characteristics into one variable. See, e.g., J. FORRESTER, *supra*, 109-11 (1961); A. STYNCHCOMBE, *CONSTRUCTING SOCIAL THEORIES* 28-30 (1968). In extreme cases of aggregation the resulting variables are referred to as "typologies." See, e.g., J. MCKINNEY, *CONSTRUCTIVE TYPOLOGY AND SOCIAL THEORY* (1966). Classification by the use of typologies is particularly helpful where a continuum is involved. For example, continuous gradations in income can be grouped into a small number of conceptually discontinuous income levels or classes for the purpose of theoretical discussion.

108. See note 107 *supra*.

109. Hart also excludes a third element — "international law" — from his model because there is no rule of recognition which unifies the various rules into a consistent system. Thus, although there are similarities between international law and municipal law, these two phenomena are sufficiently distinct to warrant excluding international law from Hart's model of law as a *system* of rules. HART, *CONCEPT* 208-31.

110. HART, *CONCEPT* chs. 8 (Justice and Morality) & 9 (Laws and Morals).

concepts are not involved in his model, Hart does not develop them in any depth. Instead, he goes only far enough to show that they are different from the system of rules, which forms the core of his model of law. Because of these differences, morality and justice are excluded from the general conceptual model even though particular concepts of morality and justice are extremely important in the content of a *particular* legal system.

Hart asserts that justice is a more narrow and specific concern than morality.¹¹¹ Basically, justice is concerned with fairness, which is usually interpreted to mean "treat like cases alike, unlike cases unlike."¹¹² This same requirement is built into Hart's view of law as a system of rules, *i.e.*, rules are concerned with classes of behavior (groups of "like" behavior) (Proposition R-2) and must have some mutuality of content (Proposition R-12). Hart recognizes that his statements constitute only a partial perspective on justice because a "complete" model of justice would include a criterion of likeness.¹¹³ But, because of the lack of a universal pattern of agreement on such a criterion,¹¹⁴ expanding his general model of law by incorporating a particular test of likeness would destroy its generality.¹¹⁵ Therefore, since Hart is seeking a model of law that will be applicable to the classification and explanation of legal systems in various cultures at various times and places, he excludes justice from his model of law even though he admits that each culture's perspectives on justice are extremely relevant to its own legal system.¹¹⁶

Morality is identified by Hart as a form of social control which is based on rules and which is unique in that it has all four of the following cardinal features:¹¹⁷

(1) *Importance* (*vis à vis* the unimportance of some legal rules — *e.g.*, parking meter ordinances — and of social rules of manners or dress).

(2) *Immunity from deliberate change* (There are no secondary rules; only primary).

111. *Id.* at 153-54.

112. *Id.* at 155.

113. *Id.* at 155-56.

114. *Id.* at 157-59.

115. *See id.* at 204-05. Hart notes that including morality as an element in the model

must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules. Study of its use involves study of its abuse.

Id. at 205.

116. *See id.* at 163-65, 176-80, 199-207.

117. *Id.* at 165-76.

(3) *Voluntary character* (A "good try" is all that is required).

(4) *The form of social pressure* (Enforcement of moral rules is characterized by (a) appeals to "binding" nature of rule and (b) diffused application of sanctions because there are no secondary rules authorizing centralized application of sanctions).

Thus, morality is a unique method of social control by rules which can be distinguished from law. Moreover, there is no necessary general relationship between the content of law and the content of morality. Different societies can reach extremely different positions on the content of morality and its relationship to the content of law.¹¹⁸ Thus, there are no general patterns of the form: law must (must not) enforce or comply with *X* moral rules. Consequently, morality is excluded from Hart's general model of law.¹¹⁹

The basis of Hart's exclusion of justice and morality from his model can be illustrated by the following metaphor. Suppose one wanted to analyze mechanical thermostats used in regulating the temperature in large buildings. One could learn a lot about the general form of operation of all such thermostats. Moreover, given certain knowledge concerning human beings, broad statements could be made about the range of temperature settings — for example, 32° and 150° F would probably be excluded. Suppose, however, one wanted to know the particular setting of the thermostat in a specific building. At this point general design features of thermostats would not be very helpful — one would have to examine the unique aspects of that building and its occupants.¹²⁰ To complete the analogy, law is like a thermostat; it regulates behavior rather than temperature. And it is extremely useful to learn the general principles underlying both regulators. However, this study becomes confused if one starts asking why the *X* building has a setting of 68° F rather than 65° F or why a particular society has a "fault" system of tort rather than social insurance. These are important questions to the citizens of those cultures; but they do not advance the discussion of the *general* design of regulators. Thus, Hart has excluded specific concepts of justice and morality from his model of law so that he can focus on the general underlying features of using law as a social regulator.

Having asserted that law is distinct from morality, Hart then addresses the problem of classifying any general patterns of interaction between the two distinct models: the model of law and the

118. *Id.* at 163-65, 176-80.

119. *Id.* at 163-65, 176-80, 205-07.

120. See, e.g., W. ASHBY, INTRODUCTION TO CYBERNETICS § 11/14 (1963) (distinction between regulation and control).

model of morality and justice. The following propositions summarize this interaction:¹²¹

- (R-14) Morality affects the content of a particular legal system by influencing:
 - (a) The content of rules — both secondary and primary; and
 - (b) The interpretation of rules in the “open textured” area.
- (R-15) Relationships between law and morality more specific than these identified in Proposition R-14 are culturally determined. Thus,
 - (a) there is no necessary direct relationship between the *validity* of a law (based on the content of the society’s “rule of recognition”) and the morality or justice of that law, and
 - (b) there is no necessary direct relationship between morality and content of laws. (Compare Propositions R-7 through R-12).

C. *Critical Analysis of the Model*

1. *The “Validity” of a Model*

Because validity is a relative matter, one cannot evaluate Hart’s model without considering: (1) the functions involved (*e.g.*, it is a “valid” classification scheme by some measure of validity of such schemes);¹²² (2) the possible degrees of adequately fulfilling a particular function;¹²³ and, (3) the relative rankings of the various theoretical functions.¹²⁴ Consequently, the following text will discuss validity in terms of the functions involved. In particular, the emphasis will be on: (1) the extent to which Hart’s model provides an “objective” classification system which can be used as an analytical tool by diverse jurists;¹²⁵ and (2) the need for developing models which satisfy the functions of prediction and technological control more “adequately” than does Hart’s model. The latter focus has been included to demonstrate the need to go beyond classification models and develop prediction and control models.¹²⁶

121. HART, CONCEPT 176–80, 195–207.

122. See text accompanying notes 9–16 *supra*.

123. See text following note 16 *supra*.

124. See text preceding note 17 *supra*.

125. See text accompanying notes 21–24 *supra*.

126. See text accompanying notes 8–9 *supra*, and text preceding note 17 *supra*.

2. *Implicit Models of Man and Society*

a. *Model of Man*

Hart's model of man was developed earlier in terms of four propositions. The first proposition is:

(M-1) Man is purposive or goal-oriented.

- (a) Specific goals vary from individual to individual and from time to time, but all men are goal-oriented.
- (b) Virtually all men have the goal of survival which is an equilibrium state called "life."
- (c) There are *no* other goals common to *nearly all* men.

Behavioral scientists disagree concerning Proposition M-1. Some support Hart's view of man as purposive,¹²⁷ while other theorists reject this model.¹²⁸ The basic criticism of models like Hart's is that particular events or occurrences which are deemed desirable in the future are inherently unobservable since they have not taken place and therefore internal desires are also beyond observation. Therefore, such phenomena are beyond the boundary of a strictly empirical model of man.¹²⁹ Those behavioral scientists who support models like Hart's argue that the concepts of goal, purposiveness, and rationality can be phrased in terms of objectively observable phenomena.¹³⁰ Although examination of this debate is beyond the scope of this article,¹³¹ it should be noted that these aspects of Hart's model are not the obvious truisms that he asserts and that, therefore, his model falls short of providing an "objective" classification scheme.

Proposition M-1(c) presents further difficulties because it is inconsistent with some behavioral data which suggest that other goals

127. See authorities cited in note 130 *infra*.

128. See authorities cited in note 129 *infra*.

129. E.g., THE SOCIAL ORGANIZATION OF LAW 5-6 (D. Black & M. Mileski eds. 1973); Taylor, *Comments on a Mechanistic Conception of Purposiveness and Purposeful and non-Purposeful Behavior: A Rejoinder*, in MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST 226-31, 238-42 (W. Buckley ed. 1968); Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972).

130. See, e.g., Rosenblueth, Weiner & Bigelow, *Behavior, Purpose, and Teleology*; Rosenblueth & Weiner, *Purposeful and Non-Purposeful Behavior*; and Churchman & Ackoff, *Purposive Behavior and Cybernetics*, in MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST 221-25, 232-37, 243-49 (W. Buckley ed. 1968).

131. For an introduction to the debate, see sources cited in notes 129-30 *supra*. For a presentation of the issues within the context of the sociology of law, see THE SOCIAL ORGANIZATION OF LAW 5-6, 16-56 (D. Black & M. Mileski eds. 1973); Hubbard, "Sociology of Law: One View from the Lawyers' Side of the Fence," 7 RUTGERS-CAMDEN L.J. 458 (1976).

are common to all men. Proposition M-1(b) states that the set of situations characterized by "life" is preferable to situations characterized by "death," *i.e.*, it is better to be alive than dead. Proposition M-1(c) makes the additional assertion that, although *individual* humans prefer some life situations over others, for man *in general* all the possible situations in life are the same. Initially this seems incomplete because all men also seek to avoid physical pain even where such pain does not involve a threat to life. Sexual gratification also would seem to be a goal common to nearly all adult humans. Moreover, if Proposition M-1(c) were valid, then people/societies with such "quality of life" concerns as the "standard" of living, "justice," privacy, and the intimate relationships of love and friendship should be no more common than people/societies without such concerns. However, such a random distribution of concerns does not seem to exist.¹³² Instead, there does seem to be a sense in which virtually all people/societies share a concern for the "quality of life." This concern is often evidenced by a willingness to encounter a "risk" (as opposed to a "certainty") of death to accomplish this "quality-of-life" goal. Furthermore, "quality of life" seems to be delineated by a common set of goals, although the relative importance of the various goals may vary. Consider, for example, the following aspects of "quality of life:"

Standard of living: societies which produce in "excess" of the minimum necessary for survival are more common and this surplus manifests itself primarily in *certain aspects of life*, *e.g.*, better housing, clothing, food, education, and health care.¹³³

132. The difficulty here may be terminological. Hart may be saying only that: (1) without life other goals are unimportant; or (2) compared to life other goals exhibit less pattern or regularity. However, the first limit on the thrust of Proposition M-1(c) does not reflect the importance of "risk," *i.e.*, other goals may exhibit a pattern of more importance where the chance of achieving these goals is great and the risk of death is small. If the second limitation is applicable, Hart should have developed it explicitly and also considered the other patterns.

133. The argument is that: (1) the quality of housing, food, and clothing exceeds the bare minimum for survival, and (2) that this qualitative excess is preferred over "luxury" items like "color televisions." Empirical support is difficult to develop. Modern "welfare" programs that provide goods in kind (*e.g.*, food stamps, public housing, public education, public hospitals) lend some support to the argument. *See generally*, G. LENSKI, *POWER AND PRIVILEGE* 37-41 (1966); P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL SOCIETY* 3-34, 75-120 (1969). This view is also reflected in the economic concept of "merit wants," which are desires,

considered so meritorious that their satisfaction is provided for through the public budget, over and above what is provided through the market. . . . [M]erit wants include such items as publicly furnished school luncheons, subsidized low-cost housing, and free education.

R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13 (1959); *cf.*, J. RAWLS, *A THEORY OF JUSTICE* § 11, at 62 (1971) (concept of "primary goods").

Aesthetic concerns: food, clothing, and housing take on the dimensions of "gourmet" food, stylish dress, and architecturally pleasing housing in nearly all societies. The content of aesthetics may vary, but strict, bare functionalism is not the common mode of societies.¹³⁴

Personal concerns: nearly all legal systems recognize certain personal relationships, *e.g.*, marriage, blood kinship.¹³⁵ It is at least doubtful that such an overwhelming pattern can be explained solely on the basis that "survival" is furthered by these personal relationships. Instead, the pattern suggests that there is a personal, "quality of life" dimension common to all men. Status, self-respect, and prestige are additional personal dimensions of life which appear to be common human desires.¹³⁶

Thus, Proposition M-3(c) of Hart's model of man is open to serious question in that it is inconsistent with a considerable amount of data. How does traditional jurisprudence deal with this disparity between his model and empirical data?

Turning initially to Hart, we find virtually *no* discussion of the issue. This is, of course, disappointing. But, it is even more disconcerting that this omission has not been adequately analyzed by Hart's jurisprudential critics. Some such critics have argued that Proposition M-1(c) ignores the empirical fact that men risk death for a variety of goals. Lon Fuller, for example, refers to Aquinas' remark that "if the highest aim of a captain were to preserve his ship, he would keep it in port forever."¹³⁷ However, Proposition M-1(a) of Hart's model of man acknowledges the existence of *other* goals in addition to survival. Thus, Hart would agree with Fuller's quotation from Aquinas because Hart's point is not that there are no other goals, but that there is no *universal pattern* in these other goals — some men leave port for a religious pilgrimage, others for commerce. Fuller's criticism does not controvert Hart's model because Fuller does not distinguish between other individual goals and universal goals. Not only does Fuller fail to confront the issue of the completeness of Hart's analysis of universal goals, he also perpetuates the basic jurisprudential problem of "one man's theory. . . ." by countering

134. As with the prior argument, it is difficult to support the argument empirically because the terminology is admittedly vague, *e.g.*, what functionally superfluous characteristics of an object are aesthetic rather than merely accidental? However, the statement seems to be at least as valid a truism as Hart's Proposition M-1(c).

135. Again empirical support is tenuous. However, the universality of the "law of persons," *i.e.*, the legal regulation of personal relationships such as marriage, is reflected in anthropological studies. *See, e.g.*, E. COTRAN & N. RUBIN, 2 READINGS IN AFRICAN LAW (1969); E. HOEBEL, THE LAW OF PRIMITIVE MAN 285-86 (1954).

136. *See, e.g.*, G. LENSKI, POWER AND PRIVILEGE 37-41 (1966).

137. L. FULLER, THE MORALITY OF LAW 185 (rev. ed. 1969).

Hart's incomplete analysis with his own equally unsubstantiated opinion that:

- (1) the search for common goals may never be successful;¹³⁸ and
- (2) "if we are forced to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellow man."¹³⁹

Underlying the shortcomings of Hart's model of man are more fundamental methodological deficiencies of jurisprudence. In particular, these are:

First, a preference for reliance on the "grand masters" rather than empirical studies. For example, both Hart¹⁴⁰ and Fuller¹⁴¹ refer to Aquinas in their analysis of the goals of men and society, yet offer no basis for relying on him other than his eminence in the field.

Second, the use of verbal models which increases the likelihood of occasional misapplications of logic in constructing and criticizing models.¹⁴²

Third, a marked lack of inhibition in offering unsubstantiated opinions.¹⁴³

Fourth, a metatheoretical vacuum in which "one man's theory . . ." is contrasted with "another man's theory" and no objective criteria are ever advanced to deal with the issue of which theory is superior.¹⁴⁴

Given this pattern, it is not surprising that jurisprudence has not progressed beyond "one man's theory . . ."

This situation is particularly disappointing because it is often possible to reject the tradition of sterile scholasticism and go "look in the horse's mouth to see how many teeth he has." For example, cross-cultural comparisons, based on empirical studies of different societies, could be used to detect patterns of goal orientation. Such studies would present new difficulties; but attempts to construct a "natural law" based on the "nature of man" would be more successful

138. *Id.*

139. *Id.* at 186.

140. HART, CONCEPT 156, 187, 234, 251, 253, 254.

141. L. FULLER, THE MORALITY OF LAW 185 (rev. ed. 1969).

142. See text accompanying note 137 *supra*.

143. See note 138 and accompanying text *supra*.

144. See notes 27-32 and accompanying text *supra*. Fuller also omits any discussion of this issue.

if this approach were substituted for a reliance on the "grand masters" like Aristotle, Aquinas, Hobbes, and Hume.

The second proposition in the model of man is:

(M-2) Man is "rational" or "efficient" (more or less).

From a behavioral perspective, this proposition is necessarily intertwined with Proposition M-1, for if a man is irrational how can we say that a pattern of seeking outcome A indicates that A is a goal? He might be seeking B but is stupid, irrational, or grossly inefficient in accomplishing his aim. Thus, Proposition M-2 is subject to the same precautionary comments that accompanied Propositions M-1(a) and M-1(b), *i.e.*, there is dissent which does not regard the proposition as an obvious truism and/or considers it beyond the proper bounds of jurisprudential analysis.

In marked contrast, the following proposition is almost universally accepted as valid:

(M-3) Men are relatively equal in that they have common limits on:

- (a) their ability to protect themselves,
- (b) their inclination to act altruistically,
- (c) their ability to process information,
- (d) their longevity,
- (e) the material resources available to them for accomplishing goals, and
- (f) their physical abilities.

However, the existence of the qualifying adverb "relatively" should be noted because from another perspective men are relatively unequal. There is a range of acts that no man can perform and men are equal within this range, but within the range of human capability there is considerable variation and inequality in "natural" capacities. Yet, Hart never attempts to relate this aspect of human nature to his model of law.¹⁴⁵

The final proposition in Hart's model of man is that:

(M-4) Man is uniquely capable of recognizing from an internal perspective the "binding" nature of certain standards.

145. This qualification might be important in interpreting Proposition R-12. Does mutuality of content refer to mutuality in terms of *opportunity* to seek gain or in terms of actual substantive gain? If the first meaning is used, the effects of relative inequality should perhaps be reflected in a model of law. For a discussion of the ambiguities in Proposition R-12, see discussion accompanying notes 228-30 *infra*.

This element of the model presents two difficulties.¹⁴⁶ First, there is the problem of developing empirical tests to provide indirect evidence of unobservable feelings. Verbal statements might provide the desired behavioral reference for determining whether men recognize a particular standard as "binding." However, it is so difficult to use statements as evidence of an internal state that this approach is only a partial solution.¹⁴⁷ A second problem develops when the criterion of simplicity is considered because it is not clear what the concept of internal recognition of "bindingness" adds to Hart's model of man. If it adds little to our understanding of man, it may conflict with the simplicity standard. Our attention should perhaps be addressed to direct, externally visible phenomena rather than to invisible, internal "feelings," which can only be indirectly studied.¹⁴⁸ A resolution of these problems is beyond the scope of this article. Nevertheless, this element in Hart's model of man is particularly questionable when viewed in terms of the criteria discussed above; therefore, any aspects of his model of law which are based on this proposition are similarly suspect. (See discussion below in section on the "internal aspect" of rules).

b. *Model of Society*

The propositions in Hart's model of society are:

- (S-1) Social effort is more "efficient" than individual effort.
- (S-2) Dynamic societies are more "efficient" than static societies.
- (S-3) Societies with a division or specialization of labor are more "efficient" than societies where all men do the same work. Therefore, societies with "legal specialists" ("officials") are more "efficient" than societies without "officials."
- (S-4) Societies require a certain minimum level of order or co-ordination.

The last proposition is a definitional requirement: if the minimum does not exist, then we say the society has collapsed or disintegrated. It is included explicitly because of its importance in developing the model of law.

146. These difficulties underlie the earlier criticisms (discussed in text preceding note 129) of models of man which include elements like Proposition M-1.

147. For a discussion of the difficulties of using verbal statements as evidence of an internal state, see G. HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* 265-77 (1961). For an example of a survey of internal feelings of obligation to obey the law, see Sarat, *Support for the Legal System*, 3 AM. POL. Q. 3 (1975).

148. See notes 129-31 *supra*.

Hart's analysis here is clearly "functionalist": he is asserting that social arrangements have a function.¹⁴⁹ Moreover, he is explicitly ascribing two such functions to social ordering:

(1) Furthering the survival of individuals (Proposition M-1).

(2) Furthering the survival of society (Proposition S-4; Propositions R-4, R-5).

Although there are numerous advantages to such an approach, Hart's societal model is subject to a number of criticisms.

The first criticism concerns his ambiguous description of the functions. For example, how is society defined? Does a sudden social change so alter the pattern that the society has ended? Or, if society is defined in terms of its members, does the death of half of them mean the end, at least in part, of the society?¹⁵⁰ The temporal aspects of individual survival also present problems. For example, is the survival of unborn individuals included? If not, is Hart excluding any goal of survival of the species?¹⁵¹

The second criticism is purely logical in nature; it would seem that there are situations where the two functions listed above could conflict. However, Hart never reveals any awareness of such a potential conflict even though the concept of efficiency becomes highly questionable when such societal goals are conflicting. For example, Hart asserts:

It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a régime of unofficial [*i.e.*, only primary] rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways.¹⁵²

Hart then suggests various remedies. Considerable care, however, must be used in analyzing these additions: it does not necessarily follow that large societies improve the individual's chances of survival. For example, a particular type of small, simple society may be more efficient at promoting human survival than some large complex society. In such a case, the larger society would be *less* efficient than the smaller one in achieving *human* survival, although it may be

149. For a general discussion of "functionalism," see FUNCTIONALISM IN THE SOCIAL SCIENCES (D. Martindale ed. 1965).

150. For a discussion of this problem, see Noonan, Book Review, 7 NATURAL L.F. 169, 175 (1962).

151. See note 153 *infra*.

152. HART, CONCEPT 89-90.

more efficient in accomplishing the perpetuation of a particular form of society.¹⁵³ The analysis of "efficiency" becomes even more complex when goals other than human survival are included.¹⁵⁴ Such complications can occur even where Hart's limited statement of alternative goals (Proposition M-1) is adopted.¹⁵⁵

The other criticisms of Hart's model, which can be directed at most functional models of society, include the following:¹⁵⁶

(1) A "conservative" bias resulting from (a) a concern with order and function rather than with change and dysfunction, and (b) an acceptance of functions as given rather than as dependent variables.¹⁵⁷

(2) A vagueness in the future-oriented concepts of function and purpose that makes empirical studies extremely difficult (if not impossible).¹⁵⁸

(3) A difficulty in developing a theory of social (and legal) change which can do more than identify changes after they have occurred.

(4) A focus on "closed systems" rather than on "open systems."

Hart, of course, never claimed to be developing a model which would satisfy such criticisms. Nevertheless, an adequate analysis of his model should include a reference to the limits of his underlying model of society.

153. The goal of survival of the individual or of the society could also conflict with survival of the species. Consider, for example, infanticide of defective newborns. See, e.g., B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 175-83 (1971).

154. For a discussion of other goals which are at least exhibited in many societies, see text accompanying notes 133-36 *supra*.

155. For example, even if all societies shared only the goal of survival, a particular society could have a unique social goal (e.g., religious purity, world conquest) which conflicted with survival.

156. For discussion of these types of criticism, see Martindale, *Limits of and Alternatives to Functionalism in Sociology*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES* 144, 156-60 (D. Martindale ed. 1965); Whitaker, *The Nature and Value of Functionalism in Sociology*, *id.* at 127, 139-43.

157. The following are examples of the effects of this "conservative bias" on Hart's models:

(1) Although recognizing that survival is only one function, Hart does not deal with the problems of a shift in the relative importance of various functions. See notes 150-53 and accompanying text *supra*.

(2) The exclusion of morality and justice from his model. See notes 107-21 *supra*. Such considerations are often included in models that focus on change. See, e.g., P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969).

158. See text accompanying notes 129-31 *supra*, for reference to the problems of purposiveness in Hart's model of man. The empirical problems of examining societies rather than individuals render the implementation of research based on purposive models of society even more difficult.

The first three criticisms do not require elaboration. However, the fourth merits further discussion. The following passage illustrates the distinction between open and closed systems:

Open and Closed Systems. Most organic systems are *open*, meaning they exchange materials, energies, or information with their environments. A system is *closed* if there is no import or export of energies in any of its forms such as information, heat, physical materials, etc., and therefore no change of components, an example being a chemical reaction taking place in a sealed insulated container. An open system becomes closed if ingress or egress of energies is cut off.

Whether a given system is open or closed depends on how much of the universe is included in the system and how much in the environment. By adjoining to the system that part of the environment with which an exchange takes place, the system becomes closed.¹⁵⁹

Hart's model of *law* is an example of a closed system. In the schematic presentation of the model in Diagram 1 (page 65), there are no arrows indicating exchanges with the environment. Although Hart recognizes interaction with the environment (for example, morality "influences" law (Proposition R-14)), the focus of his model is on the closed-system aspects of law. The importance of such a closed model will be discussed in the later analysis of exclusions from his model of law.

Despite all these criticisms, functional models of society have considerable utility in analyzing social behavior.¹⁶⁰ The primary strength of the approach lies in the fact that society is viewed as a whole system, thereby compelling analysis of the structural interrelationships among its components. For example, a non-functionalist legal theorist could ignore the relationship between the legal subsystem and other social institutions. A functionalist like Hart, however, views the entire social system and attempts to determine the relationship of law to the other subsystems as well as to the social system as a whole. One may criticize Hart's resolution of the attempt, but the task is certainly worthwhile. Likewise, the above discussion of the limits of functionalism should not be construed as

159. Hall & Fagen, *Definition of a System*, in *MODERN SYSTEMS RESEARCH FOR THE BEHAVIORAL SCIENTIST* 81, 86-87 (W. Buckley ed. 1968) (emphasis in original). For further authorities discussing systems concepts, see note 210.

160. For discussions of the strengths of functional models, see Martindale, *Limits of and Alternatives to Functionalism in Sociology*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES* 144, 156-60 (D. Martindale ed. 1965); Whitaker, *The Nature and Value of Functionalism in Sociology*, *id.* at 127, 143.

an argument for the rejection of such an approach. Instead, the criticisms are offered as precautionary warnings of its underlying assumptions and of the limiting factors to be considered in using such models.

3. *The Model of Law — Law as Rules*

The following discussion analyzes both Hart's model of law and the general nature of jurisprudential comment on his work. The latter analysis is accomplished by examining some criticisms of Hart's model in order to demonstrate his critics' lack of concern with criteria for comparing jurisprudential models and to illustrate the advantages of the proposed criteria in evaluating jurisprudential theories.

a. *The nature of rules*

i. *The "internal aspect" of rules*

Hart defines a rule in terms of four variables: (1) communication, (2) internal awareness, (3) behavior conformity, and (4) effect of breach. Using these variables, the following proposition emerges:

(R-2) A rule:

(a) *requires:*

- (1) A "communication" of a prescribed standard of conduct (See Proposition R-3(a) below), and,
- (2) An internal attitude manifested as an awareness of the "binding" nature of the standard.

(b) *is usually* (but not always) accompanied by a pattern of behavior in conformity with the rule. (However, see Proposition R-5 below).

(c) deals with breach of the rule as follows:

(1) The formal declaration

- (a) of a primary rule will *usually* (but not always) provide a penalty for breach;
- (b) of a secondary rule will *always* provide that a breach results in nullity.

(2) The actual enforcement for breach of rules will *usually* (but not always) conform with the declaration.

Using the metatheoretical perspective developed in this article,¹⁶¹ the principal problem with the definition is the "internal aspect" of rules. (Proposition R-2 (a)(2)). This internal recognition of "binding-

161. See text accompanying notes 8-18 *supra*.

ness" cannot be observed, so an empirically oriented jurisprudent would hesitate to include it in a model of law.¹⁶² Hart argues, nonetheless, that this internal aspect is a necessary element in a model of law because:

- (1) A "proper" organizational model of law should distinguish between:
 - (a) behavior in response to "mere" force (*e.g.*, a gunman) as opposed to behavior in response to a "proper" legal rule (*e.g.*, a statute);¹⁶³ and,
 - (b) patterns of behavior based on rules as opposed to mere patterns of conduct (*e.g.*, habit).¹⁶⁴
- (2) It is necessary to analyze rules from the perspective of those subject to them, an approach which includes consideration of the individual's internal awareness.¹⁶⁵

But why is this typology crucial to a jurisprudential model? Hart asserts that the classification issues are important because "[s]peculation about the nature of law . . . has centered almost continuously upon [such issues.]"¹⁶⁶ Hart derives his issues from tradition rather than from some purposive or functional structure such as: "This organization is important because it has the ability to accomplish the following functions."¹⁶⁷ Thus, Hart's organizational structure appeals primarily to those who accept the traditional formulation of jurisprudential issues.

However, even if one accepts the importance of the distinction, a second problem remains because law can be distinguished from force and habit by characteristics other than the internal perspective. For example, "mere" force could be said to exist where the rule is not followed as soon as the threat is removed.¹⁶⁸ Habit can be distinguished from rules by reference to two empirical phenomena: (1) the communication of a standard of conduct (see Proposition R-2 (a))

162. See note 18 and accompanying text *supra*. Cf. analysis of Proposition M-4 at notes 129-31 and accompanying text *supra*. This earlier discussion concerned the issue of whether goals and rationality could be phrased in terms of objectively observable empirical facts. This is not the same as that raised in the text above by Hart's argument that admittedly unobservable elements should be included in a model. Cf. text accompanying notes 198-201 *infra*.

163. HART, CONCEPT 6-7, 18-25.

164. *Id.* at 54-60.

165. *Id.* at 55-57, 85-88, 96, 134-37, 244.

166. *Id.* at 6. See *id.* at 13.

167. See text accompanying notes 14-15 *supra*.

168. Cf. J. MILLENSON, PRINCIPLES OF BEHAVIORAL ANALYSIS 89-114 (1967). See note 172 and accompanying text *infra*. It might be helpful to compare Hart's perspective with B. F. Skinner's, as formulated in B. F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

(1)); and (2) acknowledgement of that standard by those following it, by those criticizing deviations from it, and/or by those whose deviations are criticized.¹⁶⁹ If repetitive behavior exists without these phenomena, then the behavior pattern is not the result of a rule.¹⁷⁰ Thus, objective external variables could be used to make the distinctions which Hart insists must be made.¹⁷¹

Even though empirical definitions of rule-oriented patterns of behavior can be devised, Hart would object to the exclusion of the internal element.¹⁷² This objection results from Hart's insistence that rules be viewed from the perspective of those affected. This argument has a certain appeal since we are all personally affected by rules. However, it should be noted that *Hart does not face the issue of why such a perspective is "necessary."* He only says that without it our model is "incomplete" because one who observes only external variables "will miss out a whole dimension of the social life of those whom he is watching."¹⁷³ Perhaps this is true, but it is not possible to develop a *general* model or concept of law without excluding some dimensions of the observed social life. (Proposition M-3(c)). Even if we limited ourselves to only one society, we could not include *all* the dimensions.¹⁷⁴

Moreover, even if this dimension (rather than others) is necessary, a further problem remains. A general classification which includes legal systems in different societies requires general, cross-cultural categories or "boxes" to hold the data to be organized. But

169. Hart utilizes this distinction:

[F]or the group to have a *habit* it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism. But such general convergence or even identity of behaviour is not enough to constitute the existence of a rule requiring that behaviour: where there is such a rule deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity, though the forms of criticism and pressure differ with different types of rules.

HART, CONCEPT 54 (emphasis in original). However, he adds other distinctions based on the "internal aspect" of rules. See note 172 and accompanying text *infra*.

170. Hart notes:

There is certainly one point of similarity between social rules and habits: in both cases the behaviour in question (e.g. baring the head in church) must be general though not necessarily invariable; this means that it is repeated when occasion arises by most of the group: so much is, as we have said, implied in the phrase, 'They do it as a rule.'

HART, CONCEPT 54 (emphasis in original). The two variables referred to in the text would enable us to determine whether repetitive behavior results from rules.

171. See note 18 and accompanying text *supra*, and note 178 *infra*.

172. See text accompanying note 165 *supra*; HART, CONCEPT 54-55 (rule/habit distinction requires consideration of "internal aspect").

173. HART, CONCEPT 87.

174. See notes 232-34 and accompanying text *infra*.

a member of an African tribal society may have a perspective on rules that is different from that of an Englishman. A focus on internal perspectives thus raises fundamental questions about our ability to make meaningful comparisons of culturally determined internal perspectives. If each culture is somehow unique, then internal perspectives may also be unique and, therefore, incapable of comparison.¹⁷⁵ In other words, once one starts down the road of "looking inside people," how far does one go? How is the stopping point determined?

A final problem with Hart's inclusion of the internal aspect of rules in his model is the manner in which the argument is structured. Although Hart generally is very careful to avoid any assertions regarding the "essence" of law,¹⁷⁶ his use of such terms as "necessary" and "crucial" in the analysis of the internal aspect suggest that he regards this aspect as "essential." However, as this article has attempted to demonstrate, no element in a model can be termed "essential" until one has first indicated the purpose of the model and then shown that this purpose cannot be fulfilled without including the particular element. In this limited sense an element can be said to be "essential." Using this definition, the internal aspect is not "essential" to Hart's organizational scheme because alternative classification models using only external data can be proposed.¹⁷⁷ If an analysis of the internal perspective is a function of a model, then the internal aspect is, of course, essential. But this essentially is tautological, not functional, because the "need" for the element has been included in the definition of the task.

On the other hand, "nonessentiality" is also a relative concept. Thus, there has been no attempt to show that Hart is "wrong" in including the internal aspect or that the internal aspect is "mythical" or nonexistent.¹⁷⁸ Instead, the discussion illustrates the proposed metatheoretical perspective by showing, first, the reasons for hesitating

175. See *LAW IN CULTURE AND SOCIETY* 2-7, 337-48 (L. Nader ed. 1972); Bahannon, *Ethnography and Comparison in Legal Anthropology*, *id.* at 401; Gluckman, *Concepts in the Comparative Study of Tribal Law*, *id.* at 349; March, Book Review, 8 *STAN. L. REV.* 499 (1956).

176. But see HART, *CONCEPT* 151: [T]he "union [of primary and secondary rules] may be justly regarded as the 'essence' of law . . ."

177. See text accompanying note 168 *supra*.

178. See, e.g., I. LITTLE, *WELFARE ECONOMICS* 54-55 (2d ed. 1957), who argues that to deny interpersonal comparisons is the equivalent of denying the existence of minds and internal feelings; see also P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958).

The point in the text is not that the internal aspect is unreal or nonexistent but rather that it is difficult to reach objective agreement concerning such a phenomenon because the observable evidence is so indirect. For authorities discussing this problem, see notes 147 & 175 *supra*.

to include it in a model of law, and, second, the considerations necessary if the element is included.

ii. *The "open texture" of rules*

The second element in Hart's model of law as rules is:

(R-3) The symbolic component of a rule will

(a) *usually* be communicated

(1) to those affected;

(2) prior to the conduct involved; and

(3) in a form

(A) that is intelligible to those affected; and

(B) that refers to general classes of persons and conduct.

(b) *always* be "open-textured" — *i.e.*, of the set of "possible behavior" there will be three subsets:

(1) A "closed" subset of behavior which is clearly included;

(2) A "closed" subset of behavior which is clearly excluded;

(3) An "open" subset of behavior which is not clearly included or excluded. (This conflicts with Proposition R-3(a)(2), (3) (A), but is necessitated by Propositions M-3(c) and R-3(a)(3)(B)).

This proposition is based primarily upon that part of Hart's model of man which asserts that men have common limits in their ability to process information. (Proposition M-3(c)). Once this component in the model of man has been accepted, the communication elements in Hart's model of rules are similarly acceptable from the proposed metatheoretic perspective. Nevertheless, two points should be discussed.

First, Hart's analysis of open texture is "formal" because his model addresses only the apparent coverage or scope of the rules rather than their actual application. A situation may be clearly included in the formal language of a rule; but the situation might not actually be included if, for example, the rule is changed, violated, or mistakenly applied (or "bent" severely) by a court, by an enforcement agency, or by the person involved. (Compare Proposition R-2 (b) & (c)). Thus, to say that a given form of behavior is clearly within the rule (*i.e.*, it is not within the open-textured set or the clearly

excluded set), is not the same as predicting that the rule will in fact influence the behavior either of a citizen or of an official. The principal difference between a "formal" and a "predictive" conception of rules is that, from the latter perspective, rules can affect only the degree of certainty (*i.e.*, probability) of coverage or exclusion: there is never certainty since there is always the possibility of abuse, change, error, or other aberrations. Of course, in Hart's system the existence of a legal system necessarily entails a significant factual correlation between rules and behavior. (See Proposition R-5 (a)(1)). Nevertheless this correlation is reflected only in reduced uncertainty: there are never situations where one can predict with 100% certainty that behavior will in fact be excluded or included in the application of the rule. Yet Hart contemplates just such certainty in his "formal" concept of the open texture of rules.

There is, of course, nothing wrong *in the abstract* with a formal model which says that a rule is a rule even if broken or misapplied (Proposition R-1 (b)) and that the rule certainly covers a specific behavior even if not in fact applied to that behavior (Proposition R-2(b), (c) (2)). Indeed, such analysis can be extremely useful in performing such important tasks as the determination of whether the content of a rule has changed.¹⁷⁹ The point is that such formal models are limited to *formal* analysis and may be of limited utility in *behavioral* analysis.

The second point concerning Hart's analysis of open texture is the lack of any elements in the model that relate to the exercise of "discretion" within the open-textured area: there is no concern with the actual exercise of the powers granted to "officials" by secondary rules. Since the exclusions from Hart's model will be discussed in detail in a later section, it is sufficient for the purpose of this section to indicate the lack of any element relating to this aspect of a legal system.

iii. The "types" of rules

Hart asserts that a model which treats all rules the same "distorts" reality and that, therefore, rules should be distinguished as follows:

(R-1) Rules can be divided into two basic types:

- (a) Primary rules which dictate certain behavior patterns and which usually, but *not necessarily*, provide that sanctions will be imposed for breach of the rule;

179. HART, CONCEPT 141.

- (b) Secondary rules which
 - (1) confer "power":
 - (A) to create primary rules or subordinate secondary rules;
 - (B) to interpret primary rules;
 - (C) to apply primary rules to facts; and
 - (D) to apply sanctions for breach of primary rules; and,
 - (2) nullify the attempted exercise of power if the rule is not followed.

Hart is here proposing a classification model which will "fit" the real world with varying degrees of accuracy.¹⁸⁰

This taxonomic scheme presents two fundamental problems. First, it is not always clear what phenomena in the "real world" are contemplated by Hart. For example, he identifies a number of items which are involved in the concept of a "legal sanction":

- (1) a sanction is an evil,¹⁸¹ and/or a threat of retribution or recompense of any sort which can be used to coerce behavior,¹⁸² and
- (2) a sanction is imposed as a punishment¹⁸³ or remedy for the breach of a duty.¹⁸⁴

He also notes that certain governmental actions are not sanctions, for example, the nullification of the attempted exercise of a power¹⁸⁵ and the imposition of taxes.¹⁸⁶ A large number of varying empirical phenomena are thus categorized, yet their interrelations are not made clear.¹⁸⁷

The second fundamental difficulty with Hart's typology of rules is his failure to justify his preference for this form of organization

180. See text accompanying notes 14 & 21-24 *supra*.

181. HART, CONCEPT 33, 34.

182. *Id.* at 16-25, 27, 33, 34, 48.

183. *Id.* at 27, 33.

184. *Id.* at 27, 32-33, 39-40, 68-69, 95.

185. *Id.* at 33-35, 68-69.

186. *Id.* at 39.

187. The difficulties arising from this lack of clarity are vividly illustrated when one attempts to classify the following examples as primary or secondary rules: (1) Employers who hire and train unskilled workers are eligible for certain tax deductions, *cf.* HART, CONCEPT 39; and, (2) Contracts resulting from the fraud of one party are voidable by the other. See *id.* at 85. For discussion of similar difficulties with Hart's model, see note 192 *infra*.

over some other classification.¹⁸⁸ Such other typologies, for example, might be:

- (1) A division of rules into property rules, liability (tort) rules, and inalienability rules (conferring rights and duties which which cannot be exchanged).¹⁸⁹
- (2) A division of rules into formal, "public" rules and informal, "private" rules.¹⁹⁰
- (3) A division of rules into strategic (or constitutive) and tactical.¹⁹¹

Hart does assert that the following "test" supports his distinction between primary and secondary rules:

[P]ower-conferring [secondary] rules are *thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?*¹⁹²

But, since this same common-usage test also supports the alternative typologies of rules listed above, it is too imprecise and variable to serve as a standard.¹⁹³

These various rule-classification models cannot be compared until one has first postulated a function for the model. Hart's classifica-

188. For a general discussion of Hart's failure to develop criteria for justifying his classification scheme, see text accompanying notes 23-32 *supra*.

189. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

190. E.g., F. BAILEY, *STRATAGEMS AND SPOILS: A SOCIAL ANTHROPOLOGY OF POLITICS* (1969).

191. E.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 385-86 (1971). This typology is, of course, similar to Hart's distinction between the "rule of recognition" as a basic or constitutive rule or set of rules and the other rules of a legal system. However, these concepts are different from Hart's because they emphasize the relative importance of the rules and do not add a requirement of behavior conformity. See Proposition R-5(a).

192. HART, CONCEPT 41 (emphasis added).

193. The shortcomings of employing the common-usage test to justify Hart's typology might be better understood by noting how his system *fails* to meet this test. For example,

(a) Persons normally view the *loss* of a *reward* as a sanction, yet denying the grant of a "reward" *might* not be a sanction in Hart's system. See example (1) in note 187 *supra*.

(b) Persons differentiate between punitive damages and compensatory damages as remedies, yet Hart's system fails to so distinguish them. See HART, CONCEPT 85; cf. *id.* at 27.

Hart himself recognized similar shortcomings of this test when talking about "classifying" law. See text accompanying note 218 *infra*.

tion scheme may be very useful not only to traditional legal scholarship¹⁹⁴ but also to behavioral studies.¹⁹⁵ Nevertheless, its utility is relative to the purposes at hand. Viewed from this functional perspective, Hart's distinction between primary and secondary rules may be more than just "one man's theory . . ." At the same time, however, it is something less than the "key to the science of jurisprudence."¹⁹⁶

b. *Patterns or formal structure of rules and legal systems in society.*

The first proposition in Hart's formal analysis of the structure of rules in society is:

(R-4) Societies *must* have rules.

Since this proposition is meant to be a statement of empirical fact, its "validity" depends largely on the accuracy of the underlying assertions that:

(1) Society requires a minimum of order. (Proposition S-4).

(2) This order requires communication among society's members; and, because of man's limited ability to process information (Proposition M-3(c)), these communications must be generalized to some extent. (Proposition R-3 (a)(3)(B)).

(3) Because of limits on man's altruism, this order must be *imposed* where self-interest conflicts with societal order. (Proposition M-3(b); Propositions R-3(a) & R-11).

(4) Given common limits on the ability of men to impose their will on one another (see Proposition M-3), mere coercion is not sufficient to establish a legal order. In addition, there must be a sense of internal obligation to conform behavior to the system of rules.¹⁹⁷

The first three assertions are consistent with the valid elements of Hart's underlying models of society and man. Consequently, if Proposition R-4 relied only on these assertions, it would be unobjectionable.

194. See note 258 and the text accompanying notes 258-63 *infra*.

195. Cf. L. NADER, *LAW IN CULTURE AND SOCIETY* 2-4 (1969), which contains a discussion of the use of the classification scheme presented in Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 *YALE L.J.* 16 (1913), 26 *YALE L.J.* 710 (1917). Hohfeld's system is used by E. Adamson Hoebel in his anthropological study of primitive social systems, *THE LAW OF PRIMITIVE MAN* (1954). Hart's system could be used in a similar manner. Another illustration of the use of the distinction between primary rules and secondary rules is developed at text accompanying notes 210-16 *infra*.

196. HART, *CONCEPT 79*; see note 32 *supra*.

197. See discussion in note 73 *supra*.

However, since Hart's definition of a rule includes an internal aspect (Proposition R-2 (a)(2); Proposition R-5 (a)(2)(B)), the fourth assertion is necessary to support Proposition R-4. Within that assertion the contention that there are limits on coercion is unexceptional; but, the additional statement that coercion is *always* supplemented in part by an internal sense of obligation poses problems. There are alternative methods of maintaining order that do not rely on a sense of obligation.¹⁹⁸ Indeed, Hart himself recognizes such alternatives:

It is often said that a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on mere power of man over man But the dichotomy of 'law based merely on power' and 'law which is accepted as morally binding' is not exhaustive. Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.¹⁹⁹

However, Hart does not consider the role that these alternatives could play in supplementing coercive power even though such a consideration is crucial to his argument. Without such a consideration, Hart shows only that rules, defined to include an internal sense of obligation, *could* provide the requisite social order by supplementing coercion with obligation; he does not show that no other methods could be used. Thus, Hart fails to demonstrate that "rules . . . *must* be the main instrument of social control,"²⁰⁰ because the prerequisite of social order (Proposition S-4) could arguably be provided by coercion, supplemented by considerations other than internal acceptance.

i. *The "Rule of Recognition"*

The satisfaction of the minimal-societal-order requirement of Proposition S-4 requires that the rules in a society must have some

198. For a discussion of possible alternative explanations, see Austin, *The Province of Jurisprudence Determined*, in JURISPRUDENCE 573-74 (G. Christie ed. 1973).

199. HART, CONCEPT 198-99.

200. *Id.* at 121 (emphasis added).

minimal consistency. Hart asserts that this coherence is achieved by a "rule of recognition":

(R-5) Legal rules are unified into a system by a "rule of recognition" which is a type of secondary rule authorizing certain persons ("officials") to exercise various powers in a consistent, systematic manner. (See Proposition R-1(b).)

(a) The rule of recognition has two dimensions:

(1) A minimal level of obedience by citizens to the rules promulgated by the "officials" identified by the rule; and

(2) A shared acceptance by the "officials" of the rule of recognition. Such "acceptance" is manifested by

(A) a minimal level of obedience to the rule of recognition in exercising their power under the rule,

(B) an internal awareness of the binding nature of the rule, and

(C) external references to the rule.

(b) The rule of recognition is developed over time as the above pattern of obedience and acceptance manifests itself. Therefore,

(1) it can only be identified retrospectively, and

(2) changes over a short period of time do not affect it.

There are many difficulties with this concept. Problems arise initially because the "rule of recognition" does not meet all of Hart's requirements for a rule.²⁰¹ Hart defines a rule in terms of a number of variables (Proposition R-1), one of which is that there be an internal awareness of the "binding" nature of the rule. (Proposition R-1(a)(2)). However, this internal aspect presents a problem here because many citizens may be unaware of the rule of recognition. Hart nimbly sidesteps this problem by requiring that only "officials" have this internal awareness. (Proposition R-5(a)(2))

201. Hart has indicated an awareness of this problem and suggested that the rule of recognition is in many ways more like a moral rule than a legal rule. Hart, Book Review, 78 HARV. L. REV. 1281, 1294 (1965). Apparently the reference is to that aspect of Hart's model which asserts that moral rules, like the rule of recognition, are immune from deliberate change, *i.e.*, both are defined in part by the sum of the behaviors of a group of individuals over time. See HART, CONCEPT 171-73; Proposition R-5; text accompanying note 117 *supra*; APPENDIX 2 *infra*.

(B)). Thus, the formal definition of a rule has been modified considerably. Further modification occurs when Hart asserts that the rule of recognition requires a pattern of obedience to and by "officials." (Proposition R-5(a)). No other rule requires such a behavioral conformity. (See Proposition R-1 (b)(2)). Insofar as the "rule of recognition" has these unique features, it is highly questionable whether it should be called a rule.

It would be more accurate to term the rule of recognition a hypothetical construct which refers to the apparent "fact" that:²⁰²

(1) Systematic geographical and temporal patterns of "legal" behavior exist that cannot be explained by reference to a rule from an "official."

(2) These patterns may be correlated with external references to a standard requiring such pattern and an internal concern on the part of some persons that the pattern "should" not vary, that such variation "should be" criticized, and that such criticisms are "justified."

Distilling these patterns into a concept like "rule of recognition" may be a necessary part of a classification scheme: there is a set of facts that needs an appropriately labeled "box." There are considerable problems, however, in using this crude classification model to analyze specific societies. For example, suppose one wanted to determine the rule of recognition (if there is one) in Northern Ireland today.²⁰³

202. The factual patterns may also be correlated with a written document, *e.g.*, a constitution. See note 89 *supra*. However, the constitution can be called the rule of recognition only when its acceptance is reflected by the requisite factual patterns of behavior and internal awareness. Political scientists have noted a pattern, similar to the rule of recognition, in which basic norms of proper decisionmaking are shared by "elites" while the general populace lacks any consensus on such norms. See Lawrence, *Procedural Norms and Tolerance: A Reassessment*, 70 AM. POL. SCI. REV. 80, 82-83 (1976); but see *id.* at 83-100.

203. APPENDIX 2 to this article indicates the process necessary to answer this question if we treat it as a factual issue. Although Hart refers to the identification of the rule of recognition as (at least in part) an "essentially factual" determination, HART, CONCEPT 106, he also refers to certain circumstances where the officials of a particular legal system may ignore this aspect of the rule of recognition by simply "bypassing" the factual determination of "validity." *Id.* at 115-16; see *id.* at 105. For example, there is nothing constraining an American court from determining the validity of a particular law of Northern Ireland without undertaking a factual inquiry like that developed in APPENDIX 2. However, in such a case, a proper statement of the situation would be that the American — and not the Northern Irish — rule of recognition had conferred validity on the law. See *id.* at 105 (first supposition). It is also true that a court in Ulster might similarly determine that the law is valid under the Northern Irish rule of recognition without making a factual inquiry. But such a determination involves only the official-acceptance aspect of the rule of recognition. See Proposition R-5(a)(2). If the Northern Irish people reject this official version, then the rule of recognition does not regard the "law"

This process requires not only the development of further concepts ignored by Hart,²⁰⁴ but also the gathering and processing of vast amounts of data.²⁰⁵ If these obstacles could be overcome, what exactly would one learn about Northern Ireland? Would this knowledge be worth the effort? If not, then the concept of "rule of recognition" should not be used as a classification device for analyzing empirical situations because it violates the simplicity criterion,²⁰⁶ *i.e.*, it does not include sufficient information about the real world to justify its inclusion in the model. The point here is not that the rule of recognition is wrong, but rather, that its utility from a metatheoretic perspective is questionable.

ii. *The "elements" of law in a developed legal system*

Hart distinguishes between primitive societies with few, if any, secondary rules and developed societies with numerous such rules. He then proposes the following proposition to compare the two types of societies:

- (R-6) Secondary rules make it possible for society to be dynamic and to have legal "officials." (Proposition R-1). Therefore, societies with such rules are more "efficient" than societies without them. (Propositions S-2 & S-3).

This proposition, which is based on Hart's functional model of society, is subject not only to the shortcomings of such models²⁰⁷ but also to the criticism that Hart's particular functional model is potentially inconsistent insofar as it refers to a society with a lack of secondary

as valid. See Proposition R-5(a)(1). At the same time, by rejecting the official version, the populace has simultaneously refused to authorize the officials' act of interpretation. This refusal also defines the content of the rule of recognition but from a different perspective: the officials are not empowered by the rule of recognition (1) to interpret the rule of recognition concerning this rule; or (2) to interpret the rule of recognition in this manner.

204. See note 53 *supra*. The ambiguity is illustrated by considering whether or not, in Diagram 1, the testator is an "official" because he is exercising power conferred by a secondary rule. See note 92 *supra*. Legal realists have also encountered problems with defining "officials." Rumble, *Law as the Effective Decisions of Officials: A "New Look" at Legal Realism*, 20 J. PUB. L. 216, 224-26 (1971).

205. For example, since Northern Ireland appears to be a partly pathological system, it will be necessary to distinguish laws regulating deeds and wills from laws regulating the use of physical force. Moreover, it will be necessary to distinguish among the various segments of the populations, *e.g.*, rebels (of one sort or another) *vis-à-vis* citizens willing to recognize all laws. See generally HART, CONCEPT 114-20.

206. See text following note 18 *supra*.

207. See text accompanying notes 149-59 *supra*.

rules as "defective."²⁰⁸ However, the latter criticism can be avoided by eliminating such reference, and the limits of functional models are countered by their strengths. Proposition R-6, therefore, is useful so long as the strengths and weaknesses of the underlying model of society are kept in mind.²⁰⁹

Moreover, these concepts are highly compatible with the purposed metatheoretical perspective because they parallel statements of several "cybernetic" principles. Cybernetics is variously defined, but basically it is concerned with the interrelation of the variables of information, communication, and regulation or control of systems.²¹⁰ Because cybernetic analysis attempts to make "predictive" statements about these relationships, it is a "higher order" theory than Hart's classification model.²¹¹

Consequently, it is fruitful to consider Hart's model from this perspective in order to demonstrate how a classification model can be modified to fulfill at least some of the "higher order" predictive functions. One example of a predictive cybernetic statement is the following:

- (C-1) If the variety of behavior to be regulated exceeds the ability of the regulator to process information concerning such variety, then there will be at least a partial failure of regulation.²¹²

For example, since the variety of behavior possible with 1000 citizens exceeds the ability of one person, Rex, to process information about those 1000 individuals, a possible failure in regulation can be predicted. This is, of course, very similar to Hart's Proposition M-3(c). However, by explicitly including a predictive capability, the cybernetic perspective goes beyond Hart.

Before presenting more cybernetic principles, further development of Hart's concept of a secondary rule is necessary. In a system with no secondary rules, all persons in the society would be relatively

208. See text accompanying notes 152-53 *supra*.

209. See text accompanying note 160 *supra*, and sources cited therein.

210. A good introduction to cybernetics (which is sometimes called "systems analysis") is W. ASHBY, AN INTRODUCTION TO CYBERNETICS (1963). There are numerous other works in the field ranging from the very general, *e.g.*, N. WEINER, THE HUMAN USE OF HUMAN BEINGS: CYBERNETICS AND SOCIETY (1954), to the extremely complex, *e.g.*, M. MESAROVIC, D. MACKO, & Y. TAKAHARA, THEORY OF HIERARCHICAL, MULTILEVEL SYSTEMS 34-65 (1970). A more complete bibliography concerning both cybernetics and various related perspectives is found in Cowan, *Decision Theory in Law, Science and Technology*, 17 RUTGERS L. REV. 499, 525-30 (1963).

211. See text accompanying notes 17-18 *supra*.

212. See, *e.g.*, W. ASHBY, AN INTRODUCTION TO CYBERNETICS § 11/6 (1963).

equal in their ability (or *lack* of ability) to declare and identify rules, make rules, interpret rules, apply rules and impose sanctions. (Proposition M-3). In this system, control of concerted social action can be said to be *diffused* through society, and change is assured only when unanimity is approached. In a system with secondary rules which grant certain persons in the society relatively more power than other citizens, a *hierarchical* pattern emerges.²¹³ Diffused and hierarchical patterns can be compared by use of the following additional cybernetic propositions:

- (C-2) Where a diffused pattern of social control is used, there is a clear, finite limit on information processing because all or nearly all individuals must process the information so that unanimity can be approached.²¹⁴ Thus, even with simultaneous communication, the total society is still limited to the amount of information that *one* person can process.
- (C-3) The larger the group, the more difficult it is to reach unanimity, because:
 - (a) The time required for nearly all persons to process the information increases with the size of society unless it is technologically possible for all or nearly all persons to approach simultaneous communication regardless of size.
 - (b) People may have conflicting goals and, therefore, be unable to approach unanimity on an issue. The likelihood of such goal conflict increases as size increases.
 - (c) The equality necessary for diffused control is always threatened by the possibility of some inequalities²¹⁵

213. For a discussion of typologies similar to that developed in the text, see R. BENDIX, *NATION-BUILDING AND CITIZENSHIP* 18-21 (1964) (authority/association); R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS AND WELFARE* (1953) (price system/hierarchy/polyarchy/bargaining); A. Etzioni, *Toward a Macrosociology*, in *THEORETICAL SOCIOLOGY* 80-97 (J. McKinney & E. Tiryakian eds. 1970) (control/consensus); L. FULLER, *THE MORALITY OF LAW* 233-34 (rev. ed. 1969) (horizontal/vertical); J. MCKINNEY, *CONSTRUCTIVE TYPOLOGY AND SOCIAL THEORY* 100-15 (discussion of several typologies), 194-98 (power diffuse/power concentrated systems) (1966). The distinction developed in economics between concentrated control ("private" or "state" ownership) and diffused control ("communal" ownership and market allocation) of scarce goods is also useful in grasping the basis of this typology. See H. Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV. PAPERS & PROCEEDINGS* 347, 350-53 (1967); cf. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972); Sahlins, *On the Sociology of Primitive Exchange*, in *MODELS IN ANTHROPOLOGY* 141-45 (Banton, ed. 196 ...).

214. It is assumed that co-ordination of behavior through mere coincidence, i.e., persons acting all in unison without any communication, is extremely rare.

215. See note 145 and accompanying discussion *supra*.

which can be transformed into inequality in control. The larger the group, the greater the likelihood that there will be such inequalities.

- (C-4) Social systems that rely on diffused control are limited to groups of
- (a) small size (Proposition C-3),
 - (b) relatively stable environments (if the environmental change exceeds the ability of one person to process data, a failure of regulation in some degree will result) (Propositions C-1 & C-2),
 - (c) relative equality in social and economic status (Proposition C-3(c)), and
 - (d) some common ties mitigating goal conflict, *e.g.*, family bonds. (Proposition C-3(b)).
- (C-5) Where the conditions of Proposition C-4 are not satisfied, then regulation will fail to some degree and the society will either disintegrate to some extent (see Proposition S-4) or the society will develop hierarchical patterns of control, *i.e.*, Hart's secondary rules.

Proposition C-5 avoids the problems in Hart's model because there is no suggestion that larger, more complex societies are anything but that, *i.e.*, larger and more complex. Whether such societies are more efficient in achieving a specific goal such as survival is a separate and distinct issue. Thus, there is no potential logical inconsistency in referring to smaller societies as "defective." Hart never specifically discusses the relationship between size/complexity and the accomplishment of particular social goals. The development of such a question is beyond the scope of this article, but for present purposes the points to be stressed are: first, the limits of Hart's proposition; and second, the ways in which a general, prediction-oriented theoretical perspective (as demonstrated by the above cybernetic principles) can be applied to add a predictive dimension to a model of law which is oriented primarily toward classification.²¹⁶

c. *The content of law*

The following analysis of law is divided into two parts. The first part focuses on the standard developed by Hart for identifying the

216. Cybernetic principles also support such Hart propositions as (1) the need for division of labor, *i.e.*, each person specializes to deal with a particular portion of the complexity of the environment (Proposition S-3; Proposition C-1 & C-2); and (2) the need for individual autonomy at lower levels of decision-making hierarchies since the higher levels are limited in their information-processing capabilities. See Proposition R-9. See note 226 and accompanying text *supra*.

distinctly "legal rules" in a society. Then, the specific propositions concerning the content are discussed.

i. *The identification of "law"*

In his introductory chapter Hart discusses several problems involved in attempting to define "law":²¹⁷

- (1) "[T]here is no familiar, well-understood category of which law is a member"²¹⁸ and which can be used to define law by inclusion in that category or class.
- (2) Even if such classes are proposed — *e.g.*, law is a member of "the general family of rules of behavior" — there will be borderline cases which render the definition problematic.
- (3) Law is sufficiently complex that there are different ways of placing it in various general classifications.

Rather than attempting to "define" law, Hart adopts the procedure of constructing a model of law by isolating and characterizing a central set of elements involved in analyzing jurisprudential issues.

The elements thus isolated and characterized are:

- (1) Rules (see Propositions R-2 and R-3);
- (2) The two types of rules — primary and secondary (Proposition R-1); and
- (3) The "rule of recognition" (Proposition R-5).

Not all rules are legal in nature; for example, "honor thy father and mother" is a moral and religious rule.²¹⁹ Legal rules are unique because a developed system of law has a rule of recognition which identifies "valid" legal rules.

This model excludes from study certain types of behavior control, such as, diffused social control by moral pressure. However, it also includes a considerable amount of behavioral control, *i.e.*, any hierarchical system which makes rules and which satisfies the consensus and behavioral requirements of the rule of recognition. Such systems include not only "governmental" legislatures, courts, and administrative agencies but also private institutions such as unions and large corporations. Thus, when Hart speaks of the content of law

217. HART, CONCEPT 13-16; *see also* H. Hart, *Definition and Theory in Jurisprudence*, 70 LAW REV. Q. 37 (1954).

218. HART, CONCEPT 15.

219. *See* text accompanying notes 117-19 *supra*.

he is referring to the content of a large number of behavioral systems.²²⁰

ii. *The propositions concerning the content of law*

The first proposition concerning content is derived from the role of survival as a goal of all men (Proposition M-1(b)) and the vulnerability of men to physical harm by other men (Proposition M-3(a)). This proposition is:

(R-7) The legal rules must limit the use of deadly force. (See Propositions M-1(b) and M-3(a)).

Because the underlying propositions concerning men are "valid," this proposition concerning the content of law has a certain initial appeal.

220. It might be argued that this is too broad a statement of Hart's model, but he never presents any other criteria for limiting the model. See text accompanying notes 203-05 *supra*. It has been asserted that other limiting criteria are implicit in Hart's model. For example, one writer argues that the crucial identifying characteristic of law in Hart's system is the monopoly of coercive force. Note, *Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions*, 84 YALE L.J. 584 (1975). This assertion is based upon the combined effect of Proposition R-7 (limits on force) and Proposition R-11 (coercive sanctions). There is a certain merit in the contention because the two propositions do tell us that, if we find a rule enforced by legitimate coercive force, we have found a legal rule as opposed to a nonlegal rule.

However, this interpretation is not sound. Even though Hart's model is verbal and therefore somewhat ambiguous, such a view of his model substantially distorts the thrust of his theory. This distortion is apparent in a number of ways. First, to the extent that the interpretation focuses on breach of rules and on extreme physical coercion as the penalty for breach, it distorts Hart's emphasis on the distinction between the internal attitude of "obligation" (Proposition R-2(a)(2); compare Proposition 2-12) and the external phenomena of being "obliged," see HART, CONCEPT 79-88; notes 60, 163-65 and accompanying text *supra*. Second, it excludes from the class of legal systems part or all of a system of rules where physical coercion is imposed by the populace at large. This again distorts Hart. HART, CONCEPT 84, 89-95, 108-09; cf. M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 111-54 (1965); L. MAIR, PRIMITIVE GOVERNMENT 7-122 (1970); J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 744 (1966). A final distortion is the shift in emphasis from the rule of recognition, which identifies the distinctly legal, to one particular power authorized by the rule of recognition, i.e., coercive force. See Propositions R-1(b)(1)(D) & R-5. It is the rule of recognition that tells us we have found legitimate, "legal" force rather than "gunman"-type, "illegal" force. See HART, CONCEPT chs. 2-6 *passim*.

Even if such an interpretation of Hart were acceptable, there would still be a large number of social control systems which are "legal." For example, any "private" rules "recognized" and enforced by organs authorized to use force are "legal." Moreover, although Proposition R-7 *limits* the use of force, it does not forbid it. Any use of force authorized by the rule of recognition or a subordinate secondary rule would be a "legal" use of force, whether imposed by a policeman in making an arrest, a father on a son, a husband on an adulterer, shopkeeper on shoplifter, a defender on attacker, etc. Thus, even under a substantially distorted view of Hart's model, a considerable amount of behavior is labeled "legal" or "official" action.

However, implicit in this assertion is the assumption that law, *i.e.*, the hierarchical system of rules unified by a rule of recognition — is so superior to a non-hierarchical, nonunified system of rules, *e.g.*, moral rules — that legal rules *must* be used to limit deadly force. Without such an assumption, Hart could not go *from*:

In order to fulfill the function of survival of individual men (Proposition M-1(b)), a society must impose *some* limit on the use of deadly force (Proposition M-3(a));

to

This limitation on deadly force *cannot* be accomplished *unless* the legal system is used because *no* other system of social control can adequately limit deadly force.

This assumption is vital to Hart's model; yet he does not even show an awareness of it.²²¹ *This omission is particularly damaging to his model because it is reflected in all of his propositions concerning the necessary content of law.*

The above content proposition (R-7) relates to the personal "right" to be free from the threat of deadly harm to one's body. The second content proposition provides that there must be "rights" in nonbodily "things":

(R-8) The legal rules must contain some substantive "property" rules governing material resources whereby:

- (a) at any particular time
- (b) a particular person(s) may exclude all others
- (c) from a particular material resource.

As thus stated, the proposition does not give proper weight to the fact that man is also limited in his ability to enforce rights like "ownership" (Proposition M-3). If the "cost" (measured in terms of limited resources) of enforcing rights exceeds the "cost" of not enforcing rights, an efficient society (Propositions S-1, S-2 & S-3) would *not* have rules establishing rights in things.²²² Such a situation

221. For an example of a model which phrases the role of law in such conditional terms, see *THE SOCIAL ORGANIZATION OF LAW* (D. Black & M. Mileski eds. 1973); R. KORN & L. McCORKLE, *CRIMINOLOGY AND PENOLOGY* 75-77 (1959). Black and Mileski, *supra* at 6-7, assert:

Much empirical evidence is now available to support at least one relevant theoretical claim: law comes into play when other forms of social control are weak or unavailable.

For a critical discussion of this proposition, see Hubbard, *The "Sociology of Law: One View from the Lawyers' Side of the Fence*, 7 *RUTGERS-CAMDEN L.J.* 458 (1976).

222. Cf. Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J. LAW & ECON.* 163 (1975); H. Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV. PAPERS & PROC.* 347 (1967).

might exist where there is no actual scarcity; for example, concern about rights to clean air and water develops only after pollution reaches a certain level.²²³ Furthermore, an efficient society would not have legal rules allocating property rights if non-legal, social control were effective in accomplishing this function. However, as discussed above in connection with Proposition R-7, Hart never considers whether a non-legal, social-control mechanism might adequately accomplish a "necessary" social function. Given these inherent limits on the efficient and necessary use of legal rules in establishing rights in things, it may be that a given legal system will have few, if any, property rules. Moreover, in those systems which do have property rules, the "cost" of enforcement will have a significant effect on the specific rules adopted.²²⁴

Hart not only asserts that there must be property rights in an efficient society; he also asserts that it must be possible to exchange these rights:

(R-9) The legal rules must contain some secondary rules which authorize individuals:

- (a) to *exchange* property and services, and
- (b) to "contract" for future exchanges of property and/or services.

Once again Hart assumes that no other social-control system (*e.g.*, informal bargaining, enforced by "good faith" and the need to maintain the exchange relationship)²²⁵ will accomplish this function adequately. Except for this qualification, the proposition is a valid statement concerning legal rules.²²⁶

The next proposition concerning the content of law is:

(R-10) The legal rules must limit the use of dishonest or deliberate misleading communications.

Given the crucial role of information and communication in any social system (see Propositions M-3, S-1 through S-4, and C-1 through C-5), this proposition is valid insofar as it can be shown that no social-control system other than law fulfills this function.

223. See, *e.g.*, M. GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 123 (1965):

Land rights, where the population does not press heavily beyond the land's capacity, are permissive. . . . A man who first settled in a particular local area retains a little prestige from this, but he cannot stop others following him.

224. See, *e.g.*, Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

225. See, *e.g.*, Macaulay, *Contract Law Among American Businessmen*, 28 AM. SOC. REV. 55 (1963).

226. For further support of Proposition R-9, see note 216 *supra*.

The last three propositions concerning the content of rules are:

- (R-11) The legal system must impose sanctions for some breaches in order to coerce behavior.
- (R-12) The rules must have some minimal mutuality of content for a significant part of society so that this segment of society will be given an incentive for co-operation in obeying the rules.
- (R-13) Rules, particularly primary rules, must contain provisions that can in fact be obeyed.

Proposition R-11, although ambiguous in some respects,²²⁷ and Proposition R-13 seem clearly supported by Hart's model of man (Proposition M-3) and the relevant portion of this underlying model are empirically valid. However, because of the vagueness of its formulation, Proposition R-12 presents difficulties, such as:²²⁸

What is "minimal" mutuality?²²⁹

What is a "significant" portion of society?²³⁰

Does "content" refer to all laws or only to certain types of laws, *e.g.*, laws relating to limits on deadly force?

Indeed, because R-12 is inherently so ambiguous that it is not possible to determine whether it accurately describes the real world, it can neither classify nor predict. Consequently, one using the metatheoretical perspective proposed in this article would find the proposition to be of little functional utility.²³¹

d. *Exclusions from the model*

Men are limited in their ability to process information. (Proposition M-3(c)). Given this limitation, men cannot process *all* the information about *all* the "real world" *all* the time. A selection process is necessary. Thus, jurists must select and organize the real

227. See notes 187 & 193 *supra*.

228. Since I have phrased the proposition, it might be argued that the ambiguity is mine. However, it is not possible to be more explicit than Hart, and he is very vague here. See notes 34 & 91 *supra*.

229. For an example of Hart's ambiguity on this point, see discussion in note 145 *supra*.

230. The ambiguity of this term is reflected in the following:

[Coercive power] may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master groups, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of the former.

HART, CONCEPT 197.

231. See text accompanying notes 8-18 *supra*.

world by the use of a theory or model of law which will (1) identify particular aspects of the world — *e.g.*, rules — that are sufficiently similar so that they can be said to form one element or unified set of elements; (2) focus on such elements and the interrelationships among them; and (3) exclude all other aspects of reality, in whole or in part.²³² As exclusions are inherent in any model, criticizing Hart's model merely because of exclusions is not sufficient. In addition, some criteria must be developed which indicate why some particular elements should or should not have been excluded.²³³ Such tests were developed above in the section entitled "Criteria for Evaluating Theories,"²³⁴ and they can now be used to discuss Hart's exclusions and some jurisprudential criticisms of them.

Hart explicitly excludes morality from his model:

(R-14) Morality affects the content of a particular legal system by influencing:

- (a) The content of rules — both secondary and primary.
- (b) The interpretation of rules in the "open-textured" area.

(R-15) Relationships between law and morality more specific than those identified in Proposition R-14 are culturally determined. Thus,

- (a) there is no necessary direct relationship between the *validity* of a law (based on the content of the society's "rule of recognition") and the morality or justice of that law, and
- (b) there is no necessary direct relationship between morality and content of laws. (Compare Propositions R-7 through R-12).

This exclusion is based on the assertion in Proposition M-3(c) that survival is the only goal common to all men. Since there are no other common goals, Hart argues that the structure and content of a model of law need not go beyond the boundaries established by Propositions R-1 through R-13.

However, if there are other common goals such as providing minimal health care, furthering education, or protecting aesthetic values,²³⁵ then it might be necessary to develop additional propositions.

232. See HART, CONCEPT 13-17; Hart, *Definition and Theory in Jurisprudence*, 70 LAW. Q. REV. 37, 42 (1954). For further authority on the use of models, see note 107 *supra*.

233. See text accompanying notes 25-26 *supra*.

234. See text accompanying notes 14-18 *supra*.

235. See notes 132-35 and accompanying text *supra*.

Moreover, even if survival is the only common goal, at least one other proposition concerning content would seem justifiable. The costly legal apparatus contemplated by Propositions S-3, R-1(b), R-5, and R-6 necessitates some rules to allocate the costs of supporting this system.²³⁶ Thus, even if one accepts Hart's view that only functionally necessary elements should be included in a model of law, his model appears incomplete.

In order to illustrate the utility of the proposed metatheory, this article will consider conventional jurisprudential criticisms of the exclusions of Hart's model. In particular, attention will focus on Hart's exclusion of any non-rule elements which shape the exercise of the powers granted by a secondary rule and on two critics — of this exclusion — Ronald Dworkin and Lon Fuller.

i. *Ronald Dworkin*

One instance of the exercise of powers under secondary rules is a court's conduct in deciding a case. For example, a court has the power to interpret and apply a rule within the open-textured area. Moreover, courts often have the power to change rules. If one seeks to "predict" the decision of a court (*which Hart does not*),²³⁷ then the aspects of the real world which affect that decision are of interest. Since rules are only one such aspect, a model which included only rules would not be equipped to accomplish a predictive function. But the designer of a predictive model of courts faces the problem that the variables which influence a judge's decision — *e.g.*, his social "class," educational background, and "mood" — are so myriad that no manageable model could include them all.²³⁸

Ronald Dworkin has developed a "predictive" model of judicial behavior which is broader than rules alone but not so broad that it includes all the aspects of the "real world." Dworkin's model is limited to the "formal" aspects of decision, *i.e.*, the elements which courts formally declare to be involved in their determination.²³⁹ Ob-

236. See E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 233 (1954). Various mechanisms can be used: fines, fees, "taxes," "public" ownership of productive goods, etc. But there must be some such mechanism.

237. See text accompanying notes 64-65 & 179 *supra*.

238. See, *e.g.*, S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969); *JUDICIAL DECISION-MAKING* (G. Schubert ed. 1963); Schubert, *Behavioral Jurisprudence*, 11 *LAW & SOC'Y REV.* 407 (1968).

239. Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14 (1967). Dworkin's article is designed to "examine the soundness of positivism, particularly in the powerful form that Professor H.L.A. Hart of Oxford has given to it." *Id.* at 17. Dworkin criticizes Hart's model as unsound because it excludes some aspects of "reality," yet Dworkin never offers any basis for identifying valid exclusions. As a consequence, it

viously, rules are one such element. In addition to rules though, there are also "principles" which formally guide decision in the open-textured area and which shape the formulation of new rules.²⁴⁰ Principles are logically distinct from rules in that:²⁴¹

- (1) Rules are an all-or-none proposition: they apply or they do not; and if they apply, they determine the decision. Principles, however, may be applicable but may not determine the decision. For example, the principle that no man should profit from his own wrong is nearly always applicable to wrongdoers, but it does not necessarily determine judicial decision in adverse possession cases.
- (2) Rather than apply in all-or-none fashion, principles have a dimension that rules do not — weight or importance. Thus, when two applicable principles conflict in a given case, both are still valid and applicable (contrasted with rules where one would yield and become invalid or inapplicable). However, the principle which is more important in the particular case would prevail.

Based on this definition of principles, Dworkin criticizes Hart and the other legal positivists for excluding principles from their models of law.²⁴²

Underlying this criticism, however, are two theoretical premises which Dworkin never develops:

- (1) That the analysis or prediction of *decision*, particularly judicial decision, is the function of the model; and
- (2) That there are legitimate criteria for excluding "informal" aspects of decision (*e.g.*, the judge's personal values and prejudices) while including the "formal" elements of rules and principles in the model of judicial decision.

These premises may be acceptable. However, until jurisprudents confront such underlying premises openly, we will never get past the point where *A* constructs a theory to accomplish *X* function, *B* criticizes the theory because it does not satisfy *Y* function, and the underlying comparison of *X* function and *Y* function is ignored.

is necessary to infer some test of "proper" exclusions. Because principles could be used to predict decision, Dworkin's model is viewed here as a predictive one and the predictive function is used as the basis for a functioned evaluation of the validity of exclusions.

240. *Id.* at 22-46.

241. *Id.* at 22-29.

242. *Id.* at 29-46.

ii. *Lon Fuller*

Lon Fuller has recognized the importance of these underlying theoretical premises. Hart and Fuller have been engaged in debate (or non-debate depending on one's analysis of points of actual disagreement²⁴³) over the proper analysis of jurisprudential issues for years.²⁴⁴ In the latest installment in this exchange Fuller notes that:

As critical reviews of my book [*The Morality of Law*] came in, I myself became increasingly aware of the extent to which the debate did indeed depend on "starting points" — not on what the disputants said, but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions. What was needed therefore, it seemed to me, was to bring these tacit assumptions to more adequate expression than either side has so far been able to do.²⁴⁵

While he develops a number of assumptions, Fuller asserts that two are particularly relevant to the exclusion of morality from Hart's model of law:

[I] perceive *two* assumptions underlying my critics' rejection of "the internal morality of law." The *first* of these is a belief that the existence or nonexistence of law is, from a moral point of view, a matter of indifference. The *second* is an assumption I have already described as characteristic of legal positivism generally. This is the assumption that law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself upon the citizen.²⁴⁶

Unfortunately, the exact nature of these "assumptions" and of Fuller's criticisms of them is unclear.

Hart's first "assumption" cannot be that law and morality are unrelated because Proposition R-14 explicitly recognizes that morality influences law. Moreover, Hart also notes that "the law of some societies has occasionally been in advance of the accepted morality . . . ;"²⁴⁷ and that "the enactment or repeal of laws may well

243. See, e.g., Hughes, *Rules, Policy, and Decision Making*, 77 YALE L.J. 411 (1968).

244. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law — a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); HART, CONCEPT 202; L. FULLER, *THE MORALITY OF LAW* 95-151, 184-86 (1964); Hart, Book Review, 78 HARV. L. REV. 1281 (1965); L. FULLER, *THE MORALITY OF LAW* 187-242 (rev. ed. 1969).

245. L. FULLER, *THE MORALITY OF LAW* 189 (rev. ed. 1969).

246. *Id.* at 204.

247. HART, CONCEPT 196.

be among the causes of the change or decay of some moral standard"²⁴⁸ Thus, Hart concedes that there is a two-way interchange between the moral system and the legal system. However, his point is that there are *two distinct* systems which can and should be analyzed separately.²⁴⁹ (Proposition R-15). This analytical distinction is not a "tacit assumption" of Hart; it is part of the core of his model. Fuller's criticism then must be that such an analytical distinction is "invalid." However, he never offers any criterion of "validity" to use in evaluating such conceptual classifications.²⁵⁰

The nature of the second "assumption" identified by Fuller — the one-way projection of authority in a hierarchical fashion — is also unclear. Hart recognizes that law is the "product of an interplay of purposive orientations between the citizen and his government"²⁵¹ in numerous ways:

- (1) The rule of recognition requires at least general acquiescence by citizens (Proposition R-5(a)(1)), and this acquiescence requires that mutual protection be extended to a significant portion of society. (Proposition R-12).
- (2) Rules must be viewed from the perspective of those affected by them. (Proposition R-2(a)(2)).
- (3) Hart's model of society is functional or purposive (Propositions S-1 through S-4) and he views law as having a role in accomplishing social functions. (Propositions R-1 through R-13).
- (4) The legal system is most efficient when it enables individuals to accomplish certain purposes. (Proposition R-9).
- (5) Moral views of "proper" law influence the content of "positive" law, *i.e.*, rules enacted pursuant to the rule of recognition. (Proposition R-14).

As with the first "tacit assumption," Fuller seems to use some implicit criterion of validity to determine that the purposive interplay between law and citizens is somehow so *underemphasized* by Hart that the resulting model is invalid.

248. *Id.* at 172. Similarly, Hart has stated:

No doubt it is true that if deviations from conventional sexual morality are tolerated by the law and come to be known, the conventional morality might change in a permissive direction. . . .

H. HART, *LAW, LIBERTY AND MORALITY* 52 (1963).

249. See text accompanying notes 117-20 *supra*; Hart, *Concept* 172, where he argues that the interchange has no pattern, *i.e.*, law may or may not effect a change in morality.

250. Hart is subject to the same criticism. See text accompanying notes 23-32, 188 & 193 *supra*.

251. L. FULLER, *THE MORALITY OF LAW* 204 (rev. ed. 1969).

An obvious lesson of this very brief examination of Fuller's criticisms is that one cannot evaluate a classification model of law without first developing a metatheoretical test for the "validity" of the analytical boundaries used in such a model.²⁵² Fuller, in discussing both of the underlying assumptions quoted above, did not develop any such criterion. Consequently, he can only say that Hart's model is inadequate because it does not include the elements which Fuller would include.²⁵³ The debate thus stagnates at the level of "one man's theory"

A second lesson to be learned from this consideration of Fuller's criticism is the need to develop more explicit, formal models of law. If Fuller and Hart had used such a methodology, there would be less need to analyze their "interpretations" of each other and more opportunity to focus on areas of actual disagreement.

iii. Conclusion

A model has a "boundary" between included and excluded elements:²⁵⁴ (1) Hart places that boundary around rules alone; (2) Dworkin would extend it to include "principles"; and (3) Fuller would extend it in a somewhat different manner to include morality and an increased emphasis on "purpose."²⁵⁵ The fundamental issue, therefore, is *how does one define the boundaries of one's model*. Consequently, while it is important to note these boundaries and relevant interchanges across boundaries, it is also important to develop criteria for comparing models based on different boundaries.

252. See text accompanying notes 19, 23-32, 188, 193 & 250 *supra*.

253. See quote in text accompanying note 246 *supra*. Note Fuller's reference to how law "should be viewed."

254. See text accompanying notes 232-34 *supra*.

255. L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969):

[T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it *results in something that is not properly called a legal system at all*

Id. at 38-39 (emphasis added).

The functional test discussed above provides such a criterion. If, for example, one is concerned with assisting and training people who exercise secondary powers (one function performed by American law professors like Fuller),²⁵⁶ then Fuller's theory is superior to Hart's because Hart excludes more elements relevant to such tasks than does Fuller.²⁵⁷ Thus, Fuller and Dworkin could devise functional tests and Hart's model would be incomplete in terms of those particular tests.

However, it should be noted that this does not mean that Hart's model is "wrong" or "invalid"; it is only incomplete relative to some functions. To a considerable degree *Hart's model satisfies the function for which he designed it — the organization and classification of legal phenomena in diverse societies*. The model of law-as-rules organizes in two ways. First, it can organize Dworkin's and Fuller's arguments by translating their criticisms into one model with minimal change in their positions.²⁵⁸ Second, the translation process sheds

256. Fuller explicitly adopted such a functional perspective in *The Law in Quest of Itself*:

Though there are no doubt many permissible ways of defining the function of legal philosophy, I think the most useful is that which conceives of it as attempting to give a profitable and satisfying direction to the application of human energies in the law. Viewed in this light, the task of the legal philosopher is to decide how he and his fellow lawyers may best spend their professional lives. In keeping with this pragmatic conception, we may test the reality of any particular controversy of legal philosophy by asking: Would the adoption of the one view or the other affect the way in which the judge, the lawyer, the law teacher, or the law student, spends his working day?

L. FULLER, *THE LAW IN QUEST OF ITSELF* 2-3 (1940).

257. *E.g.*, Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968):

[I]t is true that the law can in some fashion be reduced to a body of rules, as indeed happens with collected editions of the statutes or with such works as the Restatement. But every law student quickly discovers (if he ever thought to the contrary) that he does not come to a law school to learn the content of these volumes, and it is a familiar cliché that no lawyer can know very much of the law. *The tasks of law teaching are to impart sophistication in techniques of arguments and reasoning. For this purpose*, and for the elucidation of a legal system, we must add to the concepts of duty-imposing and power-conferring rules the notion of canons or standards of interpretation which serve more than one purpose.

Id. at 436-37 (emphasis added). See Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961):

When we enter the realm of the judge's "serious business," the prosecutor's discretion, the practicing lawyer's choices, we need a moral theory fully as demanding as the older natural law tradition but more directly addressed to the points of strain at which moral insights are most needed. In realist perspective, choice, decision, and responsibility for decision are central elements for a philosophy of law.

Id. at 809.

258. Dworkin has explicitly rejected attempts to "reconcile" his model with Hart's. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 868-74 (1972). Dworkin's

considerable light on the work of Dworkin and Fuller by indicating the exact thrust of their criticisms. In this manner, Hart's model can assist in developing a model which is more complete in terms of a particular function.

In short, exclusions from a model are a very relative matter. From one functional perspective, particular exclusions can constitute a fatal flaw. Yet, from another viewpoint limiting the model by exclusion can be very helpful in simplifying and organizing analysis. The main point from a metatheoretic perspective is that jurists should focus less on the criticism of mere exclusions from models and more on a close analysis of the underlying tests for exclusions. The time has come to develop a metatheory or a "model of jurisprudence" which provides criteria for evaluating the "boundary" decisions in a particular model of law.

IV. CONCLUSION — A MODEL OF JURISPRUDENCE

Jurisprudence has not developed a metatheory and this neglect has fostered a subjective morass in which "one man's theory . . ." has been contrasted with another's with only minimal co-operative development of a science of law. To help solve the problem, this article has proposed a metatheoretic perspective and has illustrated that perspective by analyzing Hart's model. It has been emphasized throughout that the primary purpose of this analysis has been to develop and illustrate the proposed metatheory, not to provide yet another summary of Hart's views. To provide a sharp and final focus on metatheory and jurisprudence, this conclusion will sketch a provisional "model of jurisprudence" by employing the same propositional method of model construction used in formalizing Hart's legal theory.

The first elements in a model of jurisprudence are:

- (J-1) Jurisprudence is a human activity; therefore, it requires an underlying model of man.
- (J-2) Jurisprudence is a social activity; therefore, it requires an underlying model of social activity.

objections to Hart are similar in some respects to those discussed in this article's critical analysis of the rule of recognition. See text accompanying notes 238-42 *supra*. But in the above cited article Dworkin goes beyond the present article and interprets Hart's rule of recognition in an extremely restricted manner. A complete resolution of this new aspect of their disagreement is beyond the scope of this article. However, the point should be made that this debate (or nondebate) results largely from the use of ambiguous verbal models which have been used too often. Compare the formal model of the rule of recognition presented in APPENDIX 2.

If Hart's models of men and society are adopted, then the following propositions emerge:

- (J-3) Jurisprudence requires "rules"²⁵⁹ to co-ordinate its activities.²⁶⁰ (Compare Proposition R-4).
- (J-4) Jurisprudence requires a *system* of rules to co-ordinate its activities.²⁶¹ (Compare Proposition R-5).
- (J-5) Jurisprudence will be more "efficient" if it has secondary rules.²⁶²
- (J-6) The ability of jurisprudence to process data is limited by man's inherent ability to process information (Proposition M-3(c)) and by the quality and quantity of the other resources available to support such data-processing (Proposition M-3(e)). Therefore, some jurisprudential rules must address the allocation of these resources. (Compare Proposition R-8).

The above propositions would apply to any system of jurisprudence. However, as participants in a particular system of jurisprudence, we are not indifferent to the specific content of our system. Thus, we must go beyond "jurisprudential positivism" and develop some concepts regarding the "proper" content of our particular jurisprudence. For example, this article has proposed the following specific rules:

- (J-7) The "validity" of theories can be tested by a functional approach.
- (J-8) Theoretical functions can be ranked as follows:
 - (a) Classification (the lowest functional ranking),
 - (b) Prediction, and
 - (c) Technological control.

259. We could provisionally accept Hart's definition of a rule. See Propositions R-2 and R-3.

260. Our jurisprudence has many "rules." For example,

- (1) Theories should be internally consistent.
- (2) Theories presented in American law reviews will use the form of citation and abbreviation prescribed in (HARVARD LAW REVIEW ASS'N) A UNIFORM SYSTEM OF CITATION (11th ed. 1967).
- (3) There are certain secondary rules which confer "power"; for example,
 - (a) Publishers and editors have the power to determine which theories are communicated.
 - (b) Academic faculties have the power to determine who will be a jurisprudent since this is primarily an academic task.

261. Our jurisprudence is extremely primitive in this regard. See text accompanying note 1 *supra* and notes 267-68 *infra*.

262. See notes 260-61 *supra*.

- (J-9) The methodology of constructing the theory should be as unambiguous as possible; therefore, models should be as explicit and formal as the state of theoretical development will allow.²⁶³
- (J-10) One of the tasks of jurisprudence is the examination of law in terms of morality and justice. (This does not mean that "positivism" is excluded from jurisprudence or that a particular model could not exclude morality and justice. Instead it means that more than positivism will be studied in our jurisprudence and that some models will include morality and justice.)
- (J-11) Theoretical issues should be selected with the following in mind:
- (a) The ability to "test" for satisfaction of the theoretical function (Proposition J-7),
 - (b) The "rank" of the function (Proposition J-8),
 - (c) The ability to construct a relatively unambiguous model (See Proposition J-9), and
 - (d) The importance of the issue to mankind²⁶⁴ (Proposition J-10).

An empirical investigation of our jurisprudential system indicates that there are some rules, both primary and secondary.²⁶⁵ However, none are unified in any formal manner and the secondary rules are rare and primitive.²⁶⁶ Consequently, our jurisprudence remains characterized by a situation like Hart's primitive legal system.²⁶⁷ For example, since we lack the fundamental jurisprudential rules required by Propositions J-3 and J-5, each jurisprudent is individualistic and intuitive. As a result, men like Hart, Dworkin, and Fuller, who under present standards²⁶⁸ are regarded as jurisprudential geniuses, are *individualistic* geniuses; their models lack criteria of comparability with other models. Moreover, they are intuitive geniuses; their insights are more the result of pure intellect than of conscious methodology. Unfortunately, however, the strengths of these men reflect the weaknesses of our primitive jurisprudential "theory of theory."

This article has proposed a metatheory which would provide criteria of comparison and foster the use and development of explicit methodologies. Even if one disagrees with the particular metatheory

263. See text accompanying notes 10-13 *supra*.

264. See text accompanying notes 8 and 108-20 *supra*.

265. See note 260 *supra*.

266. See note 260 and accompanying discussion *supra*.

267. See notes 260-61 and accompanying discussion *supra*; HART, CONCEPT 89-96.

268. Cf. notes 260-61 and accompanying discussion *supra*.

proposed, it seems clear that jurisprudence must focus more on meta-theoretical issues and on the development of some metatheoretical perspective. Such a metatheory would be the foundation for explicit, objectively comparable models which would facilitate co-operative efforts and enable lesser persons to make substantial contributions. It is only in this way that jurisprudence can go beyond "one man's theory" and move toward the status of a science, which is a "discipline in which the fool of this generation can go beyond the point reached by the genius of the last generation."²⁶⁹ When this is done, perhaps we will have found another of the elusive "keys to the science of jurisprudence."

269. M. GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 60 (1965).

APPENDIX 1

FORMALIZATION OF HART'S MODELS IN PROPOSITION FORM

I. Model of Man

(M-1) Man is purposive or goal-oriented.

(a) Specific goals vary from individual to individual and from time to time, but all men are goal-oriented.

(b) Virtually all men have the goal of survival which is an equilibrium state called "life."

(c) There are *no* other goals common to *nearly all* men.

(M-2) Man is "rational" or "efficient" (more or less).

(M-3) Men are relatively equal in that they have common limits on:

(a) their ability to protect themselves,

(b) their inclination to act altruistically,

(c) their ability to process information,

(d) their longevity,

(e) the material resources available to them for accomplishing goals, and

(f) their physical abilities.

(M-4) Man is uniquely capable of recognizing from an internal perspective the "binding" nature of certain standards.

II. Model of Society

(S-1) Social effort is more "efficient" than individual effort.

(S-2) Dynamic societies are more "efficient" than static societies.

(S-3) Societies with a division or specialization of labor are more "efficient" than societies where all men do the same work. Therefore, societies with "legal specialists" ("officials") are more "efficient" than societies without "officials."

(S-4) Societies require a certain minimum level of "order" or co-ordination.

III. Model of Law

A. The Nature of Rules

(R-1) Rules can be divided into two basic types:

- (a) Primary rules which dictate certain behavior patterns and which usually, but *not necessarily*, provide that sanctions will be imposed for breach of the rule.
- (b) Secondary rules, which
 - (1) confer "power":
 - (A) to create primary rules or subordinate secondary rules;
 - (B) to interpret primary rules;
 - (C) to apply primary rules to facts; and,
 - (D) to apply sanctions for breach of primary rules; and,
 - (2) nullify the attempted exercise of power if the rule is not followed.

(R-2) A rule:

- (a) Requires:
 - (1) A "communication" of a prescribed standard of conduct. (See Proposition R-3(a) below), and
 - (2) An internal attitude manifested as an awareness of the "binding" nature of the standard.
- (b) Is *usually* (but not always) accompanied by a pattern of behavior in conformity with the rule. (However, see Proposition R-5 below).
- (c) Deals with breach of the rule as follows:
 - (1) The formal declaration
 - (A) of a primary rule will *usually* (but not always) provide a penalty for breach;
 - (B) of a secondary rule will *always* provide that a breach results in nullity.
 - (2) The actual enforcement for breach of rules will *usually* (but not always) conform with the declaration.

(R-3) The symbolic component of a rule will

(a) *Usually* be communicated

(1) to those affected,

(2) prior to the conduct involved, and

(3) in a form

(A) that is intelligible to those affected; and

(B) that refers to general classes of persons and conduct.

(b) *Always* be "open textured," *i.e.*, of the set of "possible behavior" there will be three subsets:

(1) a "closed" subset of behavior which is clearly included:

(2) a "closed" subset of behavior which is clearly excluded;

(3) an "open" subset of behavior which is not clearly included or excluded. (This conflicts with Proposition R-3(a)(2), (3)(A), but is necessitated by Propositions M-3(c) and R-3(a)(3)(B)).

B. Formal Structure of Rules and Legal Systems in Society

(R-4) Societies *must* have rules.

(R-5) Legal rules are unified into a system by a "rule of recognition" which is a type of secondary rule authorizing certain persons ("officials") to exercise various powers in a consistent, systematic manner. (See Proposition R-1(b)).

(a) The rule of recognition has two dimensions:

(1) A minimal level of obedience by citizens to the rules promulgated by the "officials" identified by the rule; and

(2) A shared acceptance by the "officials" of the rule of recognition. Such "acceptance" is manifested by

(A) a minimal level of obedience to the rule of recognition in exercising their power under the rule,

(B) an internal awareness of the binding nature of rule, and

(C) external references to the rule.

(b) The rule of recognition is developed over time as the above pattern of obedience and acceptance manifests itself. Therefore,

(1) it can only be identified retrospectively, and

(2) changes over a short period of time do not affect it.

(R-6) Secondary rules make it possible for society to be dynamic and to have legal "officials" (Proposition R-1). Therefore, societies with such rules are more "efficient" than societies without them. (Propositions S-2, S-3).

C. The Content of Law

(R-7) The legal rules must limit the use of deadly force. (See Propositions M-1(b), M-3(a)).

(R-8) The legal rules must contain some substantive "property" rules governing material resources whereby:

(a) at any particular time

(b) a particular person(s) may exclude all others

(c) from a particular material resource.

(R-9) The legal rules must contain some secondary rules which authorize individuals:

(a) to *exchange* property and services, and

(b) to "contract" for future exchanges of property and/or services.

(R-10) The legal rules must limit the use of dishonest or deliberately misleading communications.

(R-11) The legal system must impose sanctions for some breaches in order to coerce behavior.

(R-12) The rules must have some minimal mutuality of content for a significant part of society so this segment of society will be given an incentive for co-operation in obeying the rules.

(R-13) Rules, particularly primary rules, must contain provisions that can in fact be obeyed.

D. Law as Rules and Morality

- (R-14) Morality affects the content of a particular legal system by influencing:
- (a) The content of rules — both secondary and primary.
 - (b) The interpretation of rules in the “open-textured” area.
- (R-15) Relationships between law and morality more specific than those identified in Proposition R-14 are culturally determined. Thus,
- (a) There is no necessary, direct relationship between the *validity* of a law (based on the content of the society’s “rule of recognition”) and the morality or justice of that law; and,
 - (b) There is no necessary, direct relationship between morality and content of laws. (Compare Propositions R-7 through R-12).

APPENDIX 2

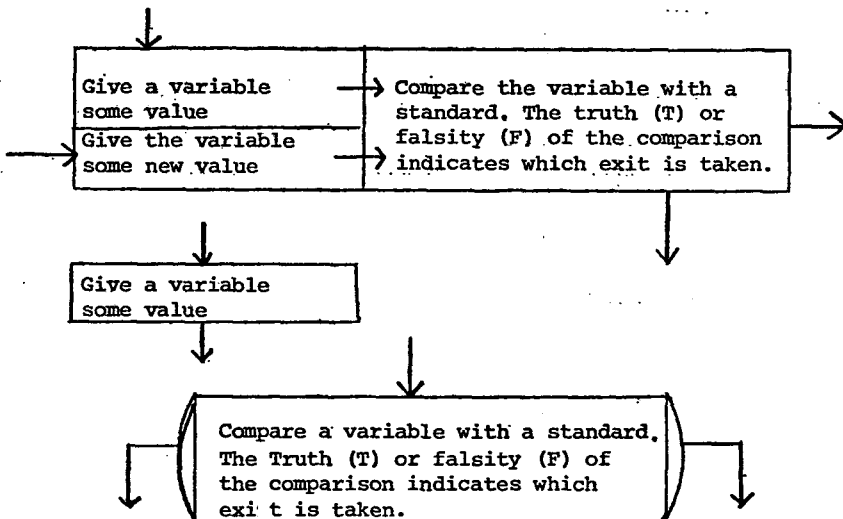
FURTHER FORMALIZATION OF HART’S RULE OF RECOGNITION

This article argues for increased precision in the construction of jurisprudential models. APPENDIX 1 uses a proposition method to construct a more precise model than the one Hart developed using conventional verbal methodology. The present Appendix demonstrates how the formalization process can be carried even further by presenting a more explicit statement of part of the “rule of recognition” than that given in Proposition R-5(a)(1).

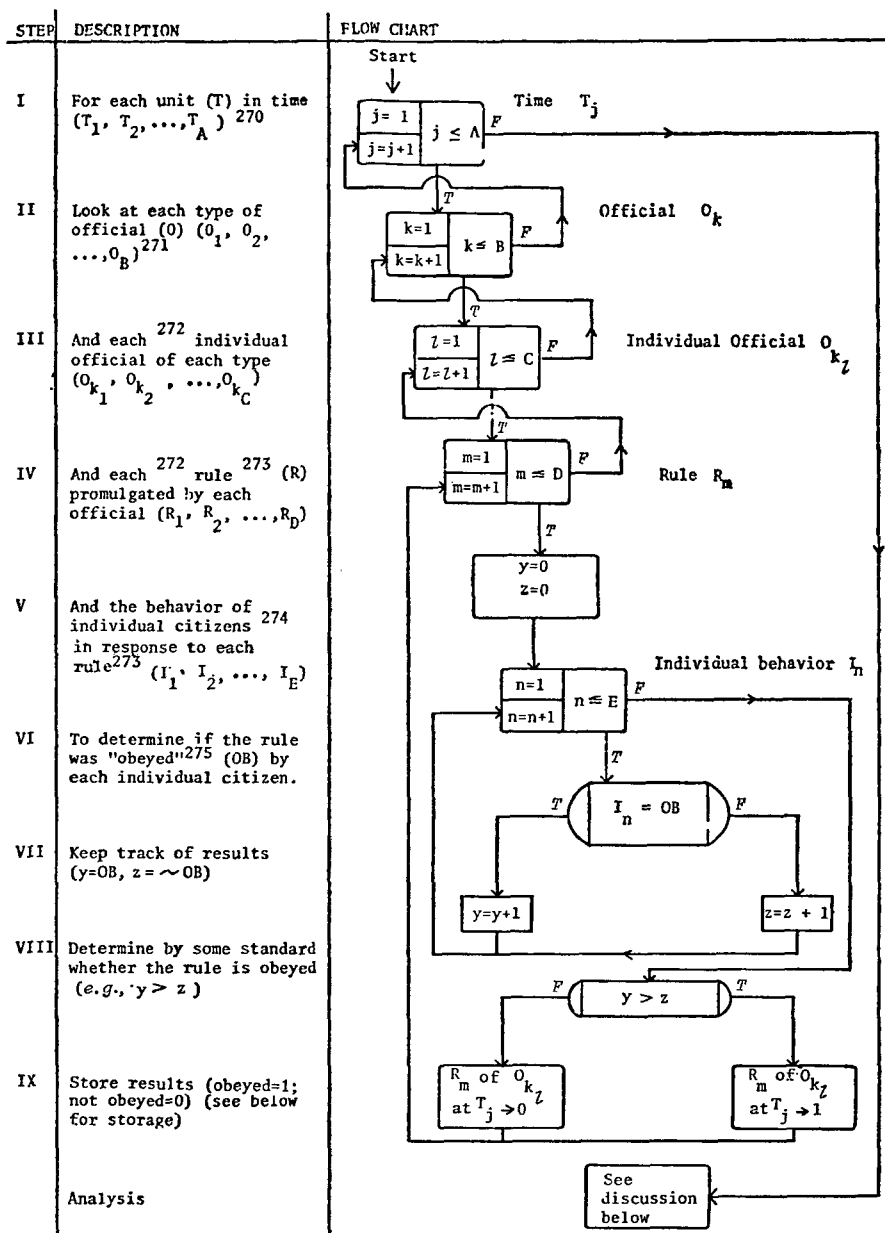
This increased precision is presented in the form of a computer-oriented flow-chart which illustrates, step-by-step, one possible method of determining the content of a society’s rule of recognition. Since the purpose of this presentation is illustrative, the flow-chart examines only the behavior of citizens in response to rule-making by officials (Proposition R-5(a)(1)). Omitted are the steps involved in examining citizen response to the exercise of other official powers, in determining consistency, and in investigating “acceptance” of the rule of recognition by officials. A flow-chart is used because it is a precise method of presentation, because a computer would be needed to process the large amounts of data involved, and because this method of explicit formalization is easier to understand than, for example, a mathematical model.

In order for computer novices to follow the flow-chart, it might be helpful to point out certain basic symbolic conventions used in writing computer programs:

- (1) Arrows indicate the order in which the analytical steps are undertaken.
- (2) Boxes are used to indicate analytical units. Arranged sequentially they indicate the steps in analysis:



- (3) Subscripted variables are often used to direct the computer. For example, if there are ten discrete units of time involved, then the subscript a (T_a) in Step I has the value of 10. The lower case variable " j " controls the computer by starting at time unit one ($j=1$), increasing by one each time the examination of a unit of time is completed ($j=j+1$), and "telling" the computer to move to the next step when 10 units of time have been examined, *i.e.*, when $(j \leq a)$ is false.



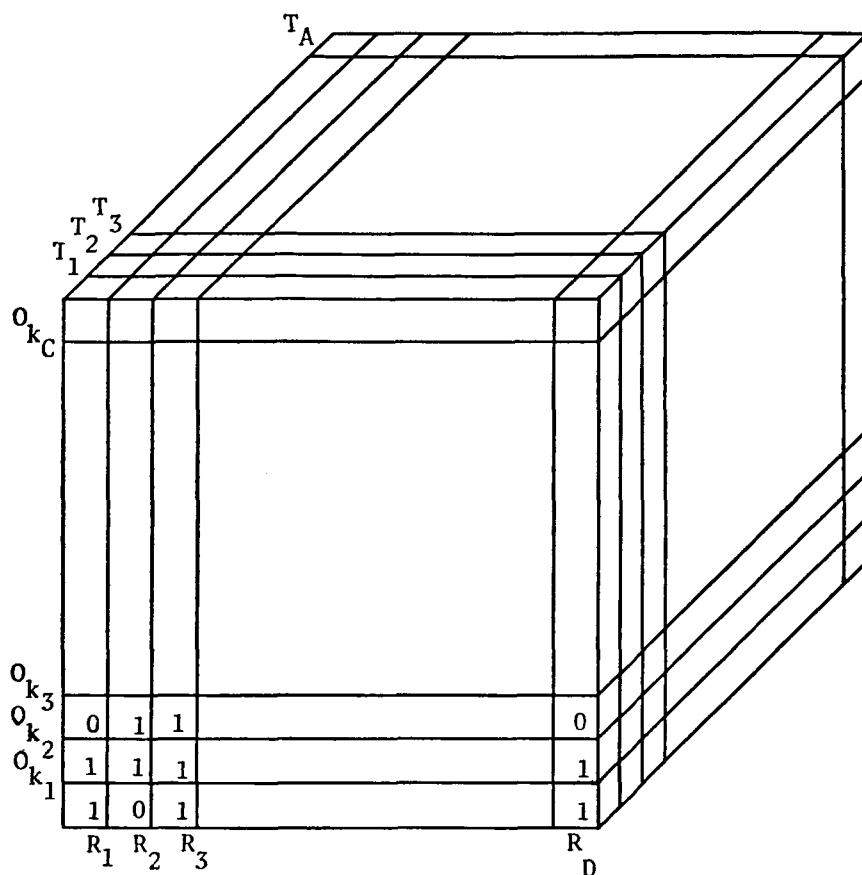
270. Selection of discrete units or points in a continuum like time will require some sampling and aggregation of data. See note 107 *supra*.

271. What is an "official"? See notes 53, 92, 204, 220 *supra*.

272. A representative sample could be used.

273. Determining what constitutes a distinct individual rule could present problems. See note 258 *supra*. See Funk, *Pure Jurimetrics: The Measurement of Law in Decision-Regulations*, 34 U. PITT. L. REV. 375 (1973); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 825-29 (1972).

The various results from the preceding nine steps would be stored in Step IX on the basis of the following diagram:



274. The assumption here is that all citizens count equally in determining obedience. However, this is admittedly a questionable simplification because it is not clear whether a rule should be regarded as obeyed if three citizens — Doe, Roe, and Moe — are affected by a rule covering an act, and if:

- (1) Doe undertakes the act once and follows the rule;
- (2) Roe undertakes the act once and follows the rule; and
- (3) Moe undertakes the act one hundred times and never follows the rule.

275. What does “obey” mean? Problems such as defining classes of persons and “behaviors” “affected” by rule, *see* note 95 *supra*, and dealing with degrees of compliance would have to be resolved to make the test workable. For example,

If the SEC places restrictions on the sale of stock, is an individual “affected” if he never sells stock?

How does one determine whether a citizen’s behavior would not have been the same without the rule?

If a citizen obeys the rule sometimes and disobeys it at others, when (if ever) can we say that he obeys it?

With these arrays of data for each type of official (Ok), various conclusions could be drawn in Step X. For example:

(1) A pattern of nonobedience to all "officials" of a particular type would suggest that their rules are no longer valid and that their delegation of "official" status from the RoR is no longer in effect.

(2) One might determine that R_2 of Ok_5 is generally obeyed from T_6 to T_3 but has shown a decline since then. Over the same time period other rules of Ok_5 have been generally obeyed. Since other rules of Ok_5 are obeyed, he is still an official. R_2 is valid even though not obeyed if citizens obey rules similar to R_2 which are issued either by Ok_5 or by other officials of the type Ok ; otherwise R_2 is invalid because the behavior of the citizens indicates that Ok_5 no longer has the power to make such rules.²⁷⁶

Even with these arrays of data there will be problems. Borderline cases where the evidence does not clearly indicate obedience or non-obedience will present difficulties. Another problem will be in distinguishing between a shift in the RoR and a shift in "delegation" by a lower-order secondary rule to a subordinate by a superior "official" whose status is derived from the RoR. For example, the failure to obey the order of an inferior court could result either from a change in the legislation establishing the court (a lower-order secondary rule) or from a change in that part of the RoR which authorizes the legislature to establish such courts.

Despite such difficulties the gains from a precise statement of the rule of recognition are considerable. For example, dispute over "what" Hart said is diminished. Unfortunately, it is not eliminated: Hart is still ambiguous. Indeed, the identification of these ambiguities is one of the benefits derived from formalizing his model.²⁷⁷ (See footnotes to flow chart for examples of such identification). This increased precision also clarifies the steps necessary to gather, classify and manipulate the relevant empirical data. This clarification facilitates not only the implementation of these steps but also the initial determination of whether they are worthwhile.²⁷⁸

276. See HART, CONCEPT 100.

277. For examples of such identification see notes 273-75 *supra*.

278. See text accompanying notes 204-06 *supra*.