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# Prediction Theories of Law and the Internal Point of View

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# Prediction Theories of Law and the Internal Point of View

MICHAEL S. GREEN\*

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The spirit of American legal realism lives on in Laurence Claus's *Law's Evolution and Human Understanding*.<sup>1</sup> Like the realists,<sup>2</sup> Claus offers a prediction theory of law, in which statements about the law are forecasts of people's behavior and attitudes.<sup>3</sup> Claus's tone, like the realists', is iconoclastic. He breaks from traditional approaches in the field. The tradition, it appears, would agree. After all, were prediction

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1. LAURENCE CLAUS, *LAW'S EVOLUTION AND HUMAN UNDERSTANDING* (2012).

2. See Michael Steven Green, *Leiter on the Legal Realists*, 30 *LAW & PHIL.* 381, 409–16 (2011) (discussing the realists' prediction theory of law).

3. See CLAUS, *supra* note 1, at 2.

theories not famously rejected by H.L.A. Hart in his critique of “rule-scepticism” in Chapter 7 of *The Concept of Law*?<sup>4</sup>

But is the iconoclasm more apparent than real? Just how different is a prediction theory of law from Hart’s? Indeed, how different can they be, given that both are positivist, in the sense that the existence and content of the law ultimately depend solely upon social facts? Does it not follow from positivism that someone making a statement about the law is predicting that the requisite social facts upon which the law depends are currently in place?

In my remarks here, I will try to defend Claus’s iconoclastic tone by identifying the important difference between prediction theories of law and Hart’s. I start with a number of distinctions. By a prediction theory of law I mean a theory under which a statement about the law, such as “The Securities Exchange Act is valid law,” is a prediction of the behavior and attitudes of people in a community. In addition to offering this theory, Claus tacks on what I will call a prediction theory of *lawmaking*, under which the words uttered or written by lawmakers are themselves essentially predictions of people’s behavior and attitudes. The Securities Exchange Act, Claus argues, was a prediction on the part of Congress concerning what Americans would think and do. Besides being highly implausible, I argue that Claus’s prediction theory of lawmaking does not follow from the other positions that he takes in his book.

Having set aside Claus’s prediction theory of lawmaking, I then distinguish Claus’s and the realists’ prediction theories of law from other jurisprudential positions that were targeted by Hart in Chapter 7 of *The Concept of Law*. That Hart rejected these other positions does not mean that he rejected prediction theories of law.

I then briefly explore whether prediction theories of law are unlike Hart’s because they do not treat a rule of recognition as essential to law. Although this reading might account for some of Hart’s criticisms of *the realists’* prediction theory, it cannot explain how Claus’s theory is different from Hart’s, for Claus’s theory also appears to rely upon the idea of a rule of recognition.

I then discuss what I believe is the fundamental reason Hart rejected prediction theories. For Hart, it is essential to law that officials take the internal point of view, which means that they use internal legal statements. Under prediction theories, not only is the internal point of view not necessary for law, internal legal statements are morally suspect. I conclude by arguing that Claus was right to adopt an iconoclastic tone. By

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4. H.L.A. HART, *THE CONCEPT OF LAW* 124–54 (3d ed. 2012).

rejecting the internal point of view, his theory of law, like the realists', presents an important challenge to traditional positivism.

#### I. DISTINGUISHING CLAUS'S PREDICTION THEORY OF LAW FROM HIS PREDICTION THEORY OF LAWMAKING

Under Claus's theory of law, laws are words.<sup>5</sup> But which words are law? Why is the United States Constitution law, rather than, say, the Articles of Confederation? According to Claus, when we say that the United States Constitution is law, we are predicting that the words in the Constitution will have systematic effects upon people's behavior and attitudes.<sup>6</sup> Creating these effects is the fundamental purpose of law. Law increases our capacity to anticipate one another's behavior and attitudes. And that, generally, is a good thing.

This is Claus's prediction theory of law. But Claus also claims that those words that make up the law are themselves essentially predictions of people's behavior and attitudes.<sup>7</sup> Let us call this a "prediction theory of lawmaking." Under the prediction theory of lawmaking, the Securities Exchange Act was itself a prediction by Congress—although it was a special kind of prediction—because it was "self-fulfilling" in the sense that it "shape[d] the actions and expectations of people in [the American] community."<sup>8</sup> When Congress passed the Securities Exchange Act, its very prediction of Americans' actions and expectations caused the prediction to be true.

I think Claus's prediction theory of lawmaking is clearly wrong. What is more, it does not appear to follow from other positions that Claus takes in his book. Or so I shall briefly argue.

Claus's book has a number of themes, some critical and others constructive. One critical theme is a rejection of the possibility of legitimate authority.<sup>9</sup> Someone submitting to an authority, he argues, is short-circuiting her reasoning process in a manner that is not merely

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5. See CLAUS, *supra* note 1, at 7–8. I will not discuss Claus's decision to identify *words* as law rather than, say, norms or other propositional objects. This causes problems for him later when he speaks of laws that, as he puts it, "do not now derive legal status from showing up in the sequences of signals that emanate from our leaders"—such as customs that are law. *Id.* at 153.

6. See *id.* at 6–7.

7. *Id.* at 3.

8. *Id.* at 7.

9. See, e.g., *id.* at 38–44.

irrational but also morally reckless, because she is now insensitive to the moral reasons for action binding her conduct.<sup>10</sup> He argues, therefore, that legitimate authority, in the sense of a *because-I-said-so* moral right to be obeyed, is impossible.<sup>11</sup> Claus's skepticism extends even to Raz's service conception of authority,<sup>12</sup> which was crafted precisely to overcome the worry that submission to authority is irrational and morally suspect.

In part because he finds the notion of legitimate authority incoherent, Claus argues—also contra Raz—that it is not essential to the law that it claim such authority.<sup>13</sup> We can describe law as existing even in circumstances where lawmakers claim no *because-I-said-so* right to be obeyed. After all, it would be odd if law could exist only in situations where people claim something that is impossible.

Concerning this critical theme, I think quite a few philosophers of law would be sympathetic. To the extent that submission to authority, including in its Razian incarnation, means not acting in accordance with the balance of reasons of which one is aware, many find such submission irrational and morally suspect.<sup>14</sup> And plenty of philosophers—including some who think that legitimate authority is possible—would also say that it is not essential to law that lawmakers claim legitimate authority in this sense.<sup>15</sup>

But from the success of Claus's criticisms of the possibility of legitimate authority, the most we can conclude about the law is that it does not essentially purport to possess legitimate authority. Claus wishes to argue for two stronger positions: (1) that laws are not essentially instructions about how people ought to behave;<sup>16</sup> and (2) the prediction theory of lawmaking, that is, that laws are essentially predictions of people's behavior and attitudes.<sup>17</sup> I believe I understand why he adopts the first position. Why he adopts the second is a bit of a mystery to me, but he apparently thinks that it follows from his prediction theory of law—the idea that words are law only because they have systematic effects upon people's behavior and attitudes.<sup>18</sup>

Let us begin with the first position. Even if lawmakers cannot have authority, in the sense of some short-circuiting *because-I-said-so* moral

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10. See *id.* at 63–65.

11. See *id.* at 29.

12. See *id.* at 88–91.

13. See *id.* at 6.

14. See, e.g., Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611 (1991).

15. See, e.g., Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, in *HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 271, 293–94 (photo. reprint 2005) (Jules Coleman ed., 2001).

16. See CLAUD, *supra* note 1, at 25.

17. See *id.* at 3.

18. See *id.*

right to be obeyed, we still might have a moral duty to obey the law that should be factored into our determination of what we, all things considered, ought to do. The fact that a lawmaker says X might bring into existence or trigger a moral reason to X, although this duty of obedience will surely be only *pro tanto*, that is, capable of being overridden by other moral duties.

Claus recognizes this. True, he is skeptical about *some* arguments for a duty to obey the law, such as the argument from consent.<sup>19</sup> But he often says that we have a moral reason to act in accordance with the law, because it is good to have an effective legal system and disobedience will undermine the system.<sup>20</sup> Indeed, he sometimes appears to argue that this consequentialist duty to obey the law is *general*—with respect to every law of every possible legal system, everyone subject to the law has a *pro tanto* duty of obedience. He argues, for example:

The good of *having* the legal system is the *one* reason for conforming to the words we call law that applies *because those words are law*. On various occasions, we may well have other good reasons for doing what law's words happen to predict we will do, but those other reasons do not come distinctively from the fact that the words are law.<sup>21</sup>

In keeping with this position, Claus appears to argue that the *pro tanto* duty of obedience existed even concerning Nazi law<sup>22</sup> and that it currently exists concerning laws that have a negligible probability of enforcement.<sup>23</sup>

For the record, if that is Claus's position, I think he is mistaken. There are circumstances in which disobedience—for example, in secret—does not threaten the effectiveness of a legal system.<sup>24</sup> In such cases, the goal of preserving the system is irrelevant to whether one should obey the law. But regardless of whether Claus thinks there is a *general* duty to obey the law, there clearly can *sometimes* be such a duty. Thus, he cannot point to the *incoherence* of a duty to obey the law as a reason that laws are not essentially directions to people about how they ought to behave.

19. See *id.* at 30–32.

20. See, e.g., *id.* at 51–52, 75.

21. *Id.* at 79–80. Another piece of evidence is what Claus says about customs in general: “Conforming to customs always has at least one thing to be said for it—the good of keeping the customs alive.” *Id.* at 153.

22. See *id.* at 79.

23. See *id.* at 21–22, 77–78.

24. For a criticism of such consequentialist arguments for a moral duty to obey the law, see M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 964–69 (1973).

Consider the following analogy. Assume no one knows which side of the road to drive on and they are not in a position to communicate a solution to this coordination problem to one another. I alone have a means of signaling a solution—by skywriting. Having skywritten “left,” everyone has a reason to think that everyone else will drive on the left. This fact gives each of them a moral duty to drive on the left, as a means of avoiding accidents. Because that is the case, why can I not skywrite “left” not merely to solve the coordination problem but also to express my (correct) view that people have a moral duty to do what I say? Why can I not mean by “left” that people ought to drive on the left? In saying that people ought to drive on the left, I need not attribute to myself a *because-I-said-so* moral right to be obeyed, for I can freely admit that people have a moral duty to do what I say only because I am positioned to solve the coordination problem. I am not asking people to act contrary to the moral reasons for action of which they are aware. I am merely expressing the fact that my words happen to generate or trigger moral reasons for action.

Although Claus’s prediction theory of law is not, or not solely, a coordination theory,<sup>25</sup> under his theory, law is similar to the word “left” in my example. Words are law because of their systematic effects on people’s behavior and attitudes, and given that they have these effects, they can give people a moral reason to act in accordance with what the words say. Thus, I see no reason why the words that are law might not be uttered to express the lawmakers’ view that, given the systematic effects of their words on the population, people have a moral duty to follow what the words say. And given that the words might be uttered with this purpose, a theory of law in which it is *essential* that laws be uttered with this purpose might still be true. Laws might essentially be directions to people about what they ought to do.

Although Claus is not as clear on this point as he might be, my guess is that he considers such a conceptual limitation on law unreasonable, given his account of law’s essential function.<sup>26</sup> Law can perform its function even if lawmakers claim no moral duty to do what they say.<sup>27</sup>

Let us assume that Claus is right. Even if he is, his second position would not follow. There remains no reason to think that the words that are laws are *themselves* predictions. They are laws by virtue of having

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25. From what I can tell, Claus thinks that the benefits of the systematic effects that law has on people’s behavior and attitudes extend beyond solving coordination problems.

26. See CLAUS, *supra* note 1, at 4–7.

27. See *id.* at 13–14.

systematic effects, but that does not make them predictions of those effects.

Consider, once again, my skywriting “left.” I wrote that word because of the effects that it will have on the population. It does not follow that in writing “left” I was saying, “I predict people will drive on the left.” If that is true of my word “left,” why can we not say the same thing about the words that make up the law?

It is worth noting that American legal realists, who held a prediction theory of law, did not hold a prediction theory of lawmaking. To be sure, they spoke of legal rules as predictions.<sup>28</sup> But they were talking about legal rules understood as descriptions of the law. They did not speak of statutes, judicial decisions, and the like as themselves predictions. What the realists concluded from their prediction theory of law—and perhaps what Claus should conclude as well—is that laws are essentially social events created to have predictable effects on the population.<sup>29</sup>

Indeed, by treating laws as predictions rather than just signals, Claus apparently commits himself to the view that the propositional content of laws must somehow describe their systematic effects. But there is no reason to think that is the case. A law saying that people ought to drive 65 miles per hour might predictably lead them to drive 75 miles per hour and be enacted precisely with the intention that they drive 75 miles per hour. It would be a serious distortion to treat the law as a prediction that people will drive 65 miles per hour. Here the legal realists were ahead of Claus, for it was a theme of the realists that the content of laws should be understood not on the basis of what the laws say but in the light of their effects within the relevant population.<sup>30</sup>

Let us set aside, therefore, Claus’s prediction theory of lawmaking. In the rest of my comments, my focus will be his and the realists’ prediction theory of law—their view that someone making a statement about the

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28. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 847 (1935) (“[L]egal rules are simply formulae describing uniformities of judicial decision.”).

29. *Id.* at 843 (“A judicial decision is a social event. Like the enactment of a Federal statute, or the equipping of police cars with radios, a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.”).

30. For a discussion of this theme in Felix Cohen’s writings, see Michael S. Green, *Felix Cohen on Legislation*, in 1 THE THEORY AND PRACTICE OF LEGISLATION 113, 125–28 (Pierre Brunet et al. eds., 2013).

law is predicting the likely behavior and attitudes of people in a community. To what extent does a prediction theory of law differ from Hart's?

## II. DISTINGUISHING A PREDICTION THEORY OF LAW FROM A DECISION THEORY OF LAW, AN OPINION THEORY OF LAW, AND A THEORY OF LEGAL INDETERMINACY

We cannot conclude that Hart's theory of law was different from a prediction theory simply because Hart criticized the realists in Chapter 7 of *The Concept of Law*, for much of this criticism was directed at other positions that the realists took—or that Hart claimed they took.

One of Hart's targets is what can be called the *decision* theory of law, that is, a theory under which the law concerning any set of facts is whatever judgment will be issued by the court that gets the case.<sup>31</sup> As Hart himself noted, decision theories of law are generally motivated by judicial supremacy—the fact that a judgment is binding, unless overturned on appeal, even if the court that issued the judgment misapplied or misinterpreted the law.<sup>32</sup> From judicial supremacy the decision theorist concludes that the law is the court's judgment itself, since that judgment, and not the legal rule the court misapplied, is what officials are bound to enforce.

Understood as a theory of law, that is, an account of what is essential to law in every possible legal system, the decision theory is an obvious nonstarter. After all, it is not necessary to a legal system that it have judicial supremacy. Officials might be legally licensed, or obligated, to ignore an otherwise valid judgment because the judge that issued it misapplied the law.<sup>33</sup> Concerning such legal systems, the decision theory would have nothing to say. What is more, as Hart himself noted, the decision theory cannot explain all the law even in those legal systems that have judicial supremacy, for it cannot account for the law that identifies the items to which the decision theory seeks to reduce the law, namely the binding judgments of courts.<sup>34</sup>

Granted, in certain cases judicial supremacy might apply even to judgments that misapply the law that identifies binding judgments. For

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31. For the distinction between a decision and a prediction theory of law, see Green, *supra* note 2, at 400–10.

32. See, e.g., HART, *supra* note 4, at 145–46; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 8 (2001).

33. Indeed, even in the American legal system it is arguably the case that judgments that involve egregious misapplications of the law are not legally binding. See Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 402–03 (2005).

34. See HART, *supra* note 4, at 136.

example, a judgment in which a court erroneously held that it had jurisdiction—and so the capacity to issue a binding judgment—might be treated as binding despite this error.<sup>35</sup> Courts have, it is said, jurisdiction to determine their own jurisdiction.<sup>36</sup> But they have this power only if they satisfy threshold jurisdictional requirements, concerning which judicial supremacy does not apply. If these threshold requirements are not satisfied, officials will treat the putative judgment as a nullity. It is for this reason that I do not have the power to issue binding judgments, even if I declare that I have such power. The decision theory cannot account for this threshold law.

The only charitable way of reading the decision theory is not as a theory of law but as a theory about the consequences of judicial supremacy. In areas where judicial supremacy applies, the decision theory concludes that the law is the court's judgment. As Hart correctly argued, however, the decision theory, so understood, is still flawed, for it is unable to make sense of how a court can misapply the law.<sup>37</sup> If the law is simply the court's judgment, the court cannot make a *mistake* with respect to the law.

But however the decision theory is understood—as a flawed theory of law or a flawed theory about the consequences of judicial supremacy—it is not the prediction theory. Indeed, Claus's prediction theory can explain why Hart's criticism of the decision theory is correct. Assume, for example, that a court decides that an oral agreement between *Smith* and *Jones* is a binding contract, even though, under the applicable statute of frauds, the agreement is not binding because it is not in writing. Claus can argue that the judge's decision deviated from the law because it is contrary to the statute's predicted effect on the behavior and attitudes of people in the community. The judgment is not what we predicted would happen, given the statute's existence. But he can also argue that the judgment is binding despite its error on the basis of *the judgment's* predicted effects.

The same points are true of the American legal realists. Although some realists—particularly Jerome Frank<sup>38</sup>—offered a decision theory of law, the most temperate and philosophically sophisticated among them advocated a prediction theory similar to Claus's. Felix Cohen, Walter

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35. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 115 (1963); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825).

36. E.g., *United States v. Reyes-Platero*, 224 F.3d 1112, 1114 (9th Cir. 2000).

37. See HART, *supra* note 4, at 141–47.

38. See Green, *supra* note 2, at 403–05; Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1966–67 (2005).

Wheeler Cook, and Karl Llewellyn all spoke of the law, not in terms of the particular judgment that a court would issue concerning a set of facts, but in terms of patterns of conduct that include not merely judges but also other officials.<sup>39</sup> Any judgment that is contrary to those patterns is contrary to the law.<sup>40</sup>

The prediction theory should also be distinguished from what can be called an *opinion* theory of law. Hart focused on *weak* judicial supremacy—the fact that a judgment, say that *Smith* is liable to *Jones* for \$100,000, is binding upon officials even if the judge who issued the judgment misapplied the law. He did not consider a stronger form of judicial supremacy, in which the *interpretation* of the law in the court’s written opinion is binding upon other officials going forward. There is strong judicial supremacy in the American legal system, for example, with respect to Supreme Court interpretations of the Constitution. Officials are obligated to enforce the interpretation in circumstances unrelated to the concrete case in which it was articulated.<sup>41</sup>

One might conclude that in those areas where strong judicial supremacy applies, the law simply is what the Court says it is, in the sense that the Court cannot make a mistake about the law.<sup>42</sup> Regardless of whether the opinion theory is correct, however, it is not the prediction theory, for the opinion theory, like the decision theory, is not a theory of law. It has nothing to say about legal systems without strong judicial supremacy.

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39. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 33 (1942) (“[W]e must as always guard ourselves against thinking of our assertion that ‘rights’ and other legal relations ‘exist’ or have been ‘enforced’ as more than a conventional way of describing past and predicting future behavior of human beings—judges and other officials.”); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 *MOD. L. REV.* 5, 8 (1937) (“Applied within the field of law itself, [the functional] approach leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state-force.”); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431, 456 (1930) (“[T]he focus, the center of law, is not merely what the judge does . . . but what *any* state official does, officially.”).

40. Claus himself recognizes this similarity between his prediction theory and the realists’. But he suggests that the realists erred by focusing exclusively on *officials* rather than the population as a whole. See CLAUS, *supra* note 1, at 100. The realists were closer to Claus’s theory of law than he realizes, however, for they too recognized that a statement about the law entails predictions not merely about official behavior but also about the general population. See, e.g., Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457, 476 n.54 (1924) (“If, for example, a majority of the community were not in the habit of acquiescing in the acts of the officials, there would be not law but the absence of law.”).

41. The Supreme Court declared that its constitutional rulings are binding in this stronger sense in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

42. Something like the opinion theory is arguably evident in Claus’s book. See CLAUS, *supra* note 1, at 177–81.

Nor can it explain all the law even in legal systems, like our own, with such supremacy because even in those systems there must be some law identifying the opinions to which supremacy is assigned. Concerning that law, strong judicial supremacy cannot apply. Rather than being a theory of law, the opinion theory is a theory about the consequences of strong judicial supremacy.

Another of Hart's targets in Chapter 7 of *The Concept of Law* concerns the realists' claims about the scope of legal indeterminacy.<sup>43</sup> Hart criticized the realists for exaggerating the indeterminacy of the law, that is, the extent to which the law can justify more than one outcome in a case on a particular assumption about the facts.<sup>44</sup> Because law is pervasively indeterminate, the realists allegedly argued, courts must always rely upon extra-legal considerations—in particular, perceptions of fairness.<sup>45</sup>

Whether Hart was right about the realists can be questioned.<sup>46</sup> In any event, the prediction theory is distinct from claims about global legal indeterminacy. Even if the law were completely determinate, in the sense that it always recommended a unique decision to a judge adjudicating a case, the prediction theory could still be true. Claus himself makes no extravagant claims about legal indeterminacy. And a number of legal realists—most notably Cohen, Cook, and Llewellyn—advocated a prediction theory despite believing that the law is often determinate.<sup>47</sup>

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43. See HART, *supra* note 4, at 124–36.

44. See *id.*

45. See BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 24 (2007).

46. See BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY, *supra* note 45, at 59, 73–79.

47. Indeed, Cohen criticized his fellow realists, especially Jerome Frank, for exaggerating the extent of legal indeterminacy. See FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 237–38 (1933); Cohen, *supra* note 28, at 823, 842–44.

### III. HOW CLAUS'S PREDICTION THEORY OF LAW IS SIMILAR TO HART'S THEORY OF LAW

With these distinctions in mind, to what extent is a prediction theory, properly understood, different from a standard positivist theory such as Hart's? Indeed, how different can they be given that under both theories the existence and content of the law is fundamentally a matter of social facts about a community?

For Hart, two social facts are essential to a norm's being law.<sup>48</sup> The first is the existence of a practice among officials of accepting a set of ultimate criteria for identifying norms that can be backed up by official power.<sup>49</sup> The second is efficacy, in the sense that there is general, although not necessary total, obedience by the population to the mandatory norms identified by the rule of recognition.<sup>50</sup>

Notice that, for Hart, the law ultimately depends upon *current* social facts, not past facts.<sup>51</sup> To be sure, acts of lawmaking can have occurred in the past. But they *are* acts of lawmaking only because there is a current rule of recognition identifying them as such. Thus, anyone making a statement that a norm is law must be predicting, on the basis of evidence from the past, that the requisite social facts are still in place. That the prediction is easy, setting aside cases of revolutionary transition, does not mean it is not occurring. We have reason to believe, therefore, that Hart's theory of law is itself a prediction theory.

One could try to distinguish Hart's theory of law from a prediction theory in the following way: under a prediction theory, statements about the law predict only the *behavior* of officials in a community, whereas Hart's theory takes into account social facts about behavior *and attitudes*, both official and popular. But Claus is explicit that words are law due to their systematic effect on attitudes as well as behavior.<sup>52</sup> And despite their occasional behaviorist language, the realists—Underhill Moore excepted—did not take a purely behaviorist approach.<sup>53</sup> It is very likely that the realists also would have accepted that legal statements predict attitudes,

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48. See HART, *supra* note 4, at 94, 116–17.

49. See *id.* at 94. Like Hart, I will use the term *rule of recognition* sometimes to refer to the practice and sometimes to refer to the criteria. Hart also requires that officials take the internal point of view toward the rule of recognition. I will discuss this requirement in Part IV, *infra*.

50. See *id.* at 116–17.

51. See, e.g., *id.*

52. Claus repeatedly speaks of words as law because they accurately predict not just what people will do but also what people will *expect* of us. See, e.g., CLAUS, *supra* note 1, at 3–4, 9.

53. See LEITER, *supra* note 45, at 24 n.49.

not just behavior. They would not have said that a legal system exists if they found out that all of its participants were robots.

A more promising way to distinguish Hart's theory of law from prediction theories is that Hart's theory looks to a rule of recognition. A norm can be law if it is identified as law by the rule of recognition, even if it has no effect upon people's behavior and attitudes in other respects. In focusing on a rule of recognition, Hart is able to explain how a norm can be law despite being routinely violated by those subject to it. A speed limit that everyone ignores can be the law under Hart's theory because it satisfies the criteria in the rule of recognition.

In addition, Hart's theory can explain why a norm can be law even if it has no actual effect upon courts' decisions. An example is the rule for personal jurisdiction over out of state corporations articulated in Justice Cardozo's opinion in *Tauza v. Susquehanna Coal Co.*,<sup>54</sup> under which a corporation is subject to personal jurisdiction in state court if the corporation is *present* within the state. As Felix Cohen masterfully argued, this rule failed to provide any concrete recommendations to judges. In the end, their personal jurisdiction decisions were based upon other, nonlegal criteria, such as the burden on the corporate defendant of appearing in the forum state and the burden on the plaintiff of travelling to the defendant's state of incorporation or principal place of business.<sup>55</sup> Hart's theory is able to explain why the *Tauza* rule, despite having no effect on the outcome of personal jurisdiction cases, is still the law.<sup>56</sup>

Hart's theory can also explain why a norm that is routinely enforced by officials, but not identified as law by the rule of recognition, is not law.<sup>57</sup> Consider, for example, an obligation of good faith in contractual dealing, which Karl Llewellyn thought regularly motivated decisions in contract cases even before it was explicitly identified as law in the Uniform Commercial Code (U.C.C.).<sup>58</sup> Under Hart's theory, the obligation was not the law before the U.C.C., because it did not satisfy the criteria in the rule of recognition.<sup>59</sup>

I think it is clear that, to some extent, the legal realists offered a theory of law that diverged from a rule of recognition theory. Some realists

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54. 115 N.E. 915, 918 (N.Y. 1917).

55. See Cohen, *supra* note 28, at 809–12.

56. See HART, *supra* note 4, at 97.

57. See *id.* at 116–17.

58. See LEITER, *supra* note 45, at 30.

59. See HART, *supra* note 4, at 100.

would say that the *Tauza* rule was not the law because it had no effect on official decisionmaking.<sup>60</sup> And some would say that the obligation of good faith in contractual dealing was the law because it did have such an effect.<sup>61</sup> In offering this theory of law, however, the realists recognized that they were diverging from the normal concept of law.<sup>62</sup> Frank drew a distinction between the law as he thought it should be understood and “formal law.”<sup>63</sup> And Llewellyn described as “paper rules” those rules that “have been treated, traditionally, as rules of law.”<sup>64</sup>

But what about Claus’s prediction theory? At times it appears that he too does not consider rules of recognition to be relevant to identifying the law. He allows that law can exist even when there is no rule of recognition or indeed identifiable officials. Law exists “anywhere humans have talked to each other enough to form a group identity.”<sup>65</sup>

Although I found the question remarkably difficult to answer, I think that in the end, Claus does offer something like a rule of recognition theory. In a large community, law is *systematized* in the sense that “[l]aw signals who in law’s community is likely to be effective at issuing self-fulfilling predictions that shape the actions and expectations of people in that community.”<sup>66</sup> This signaling of effective signalers sounds like a rule of recognition. As Claus puts it, someone is a “lawgiver so long as the actual customs that constitute the group’s identity include a custom of treating what she says as signaling what those in the group are likely to do and to expect.”<sup>67</sup>

For this reason, Claus is not like the realists in identifying all regular determinants of official decisionmaking as law. He does note that sometimes “those within the very institutions that issued the law on the

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60. See Green, *supra* note 38, at 1993–96.

61. See *id.*

62. The realists probably recommended a change in the concept of law because it was in keeping with their other reformist tendencies. In general, they wished to improve the law in the books by incorporating into that law the nonlegal considerations that were actually driving judicial decisionmaking. As we have seen, Llewellyn’s proposed reform of the U.C.C. to include an obligation of good faith and the Supreme Court’s reform of personal jurisdiction over corporations in *International Shoe* and its progeny are examples. See generally *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945); Llewellyn, *supra* note 39, at 434. But rather than just pursuing this reform in a piecemeal fashion, they also sought to do so more efficiently by reforming the concept of law itself to identify as law all and only systematic determinants of official decisionmaking, regardless of whether they were in the paper rules. For a discussion, see Green, *supra* note 2, at 406–07; Green, *supra* note 38, at 1993–96.

63. See Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 648–63 (1932).

64. Llewellyn, *supra* note 39, at 448.

65. CLAUS, *supra* note 1, at 4.

66. *Id.* at 7.

67. *Id.* at 14.

books consistently act in ways that differ from what the law on the books signals.”<sup>68</sup> But he does not suggest that that makes the deviant patterns of behavior law.<sup>69</sup> First they need to be identified as law by the rule of recognition. They are law when “these patterns of differing behavior become talked about in ways that spread the word about what is really likely to be done and expected.”<sup>70</sup>

#### IV. HOW CLAUS’S PREDICTION THEORY OF LAW IS DIFFERENT FROM HART’S THEORY OF LAW

What then is the difference between Claus’s theory of law and Hart’s? Because under Hart’s theory identifying the law depends fundamentally upon predictions of social facts, it would appear that Hart should understand statements about the law as these predictions. “The Securities Exchange Act is valid law” would be roughly equivalent to “The Securities Exchange Act satisfies the criteria employed in the rule of recognition in the United States and the mandatory norms identified by those criteria are generally obeyed.”

But Hart did not adopt such an approach.<sup>71</sup> For Hart, “The Securities Exchange Act is valid law” is, at least when uttered by an official in the American legal system, an *internal* legal statement,<sup>72</sup> whereas a descriptive statement about the social facts upon which a legal system is based is *external*.<sup>73</sup> In an internal statement, acceptance of the rule of recognition is expressed.<sup>74</sup> In this way, Hart sought to explain why someone speaking about the law uses normative terminology<sup>75</sup> and takes his statement to entail reasons for action.<sup>76</sup> Nor can we understand internal legal statements as descriptions of the rule of recognition—and the other social facts upon which law is based—*plus* the expression of acceptance of the rule.

68. *Id.* at 161.

69. *See, e.g., id.*

70. *Id.*

71. *See* HART, *supra* note 4, 104.

72. *See id.* at 102.

73. *See id.* at 103.

74. *See id.* at 102.

75. Examples are “You [legally] ought . . . to” or “You have a [legal duty].” *Id.* at 57, 90.

76. *See* Kevin Toh, *Hart’s Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75, 82 (2005) (discussing the connection for Hart between “a judge’s judgment that a law exists, on the one hand, and his *taking* or *considering* the law as providing him with a reason or justification for punishing [an] offender, on the other.”).

In internal legal statements, the social facts upon which the law ultimately depends are *presumed*, not described.<sup>77</sup> Indeed, Hart argues that someone who speaks of the presupposed social facts cannot be talking about legal validity at all.<sup>78</sup> The crucial difference between Claus's prediction theory of law and Hart's, therefore, is that Claus's theory dispenses with the *internal point of view*, for it is through internal statements that participants in a legal system manifest that point of view.<sup>79</sup>

To be sure, Claus *says* his theory accommodates the internal point of view, which he describes as the idea that people who live inside a legal system "view the details of the law not just as interesting facts about the world but as relevant to what they and other insiders *should* do."<sup>80</sup> The only disagreement he has with the internal point of view as Hart describes it is that Hart thought "people might have all sorts of reasons for holding the internal point of view, but the important fact about legal systems was that people on the inside did in fact share the view."<sup>81</sup> Claus, in contrast, argues that moral considerations—in particular the value of doing what the law signals as a means of "preserving and promoting law's effectiveness at helping us understand each other"—are what are essential to the internal point of view.<sup>82</sup>

But taking the law to be morally relevant to what one ought to do is not enough for the internal point of view. Consider Judge Claus, who is adjudicating a Securities Exchange Act action. He reasons as follows:

The Securities Exchange Act is a set of words that were first spoken back in 1934 by a set of people who call themselves "Congress." There is a signaling system in place among Americans, which causes Congress's words to have systematic effects on Americans' behavior and attitudes. The goal of preserving and promoting this signaling system is morally important. Although I might have some moral reservations about acting in accordance with what this set of people has signaled, the goal of preserving and promoting the signaling system takes precedence. I will therefore utter the words "judgment against the defendant," which, under the signaling system, will themselves have systematic effects on the behavior and attitudes of Americans—in particular, making it likely that the defendant will have to pay money to the plaintiff.

Judge Claus unquestionably takes the existence of the law, as understood by the prediction theory, to be morally relevant to his decision about what he ought to do. But Hart would not say that he has adopted the

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77. See HART, *supra* note 4, at 102–03.

78. See *id.* at 107–08.

79. See *id.* at 102.

80. CLAUS, *supra* note 2, at 125.

81. *Id.*

82. *Id.* at 127.

internal point of view.<sup>83</sup> This is because he fails to make internal legal statements: he does not speak of the law using normative language.<sup>84</sup> For Judge Claus, the law is described purely in terms of social facts. Normative language comes into play solely when speaking his moral obligations concerning those facts.

Because under Hart's theory it is apparently essential to law that most officials take the internal point of view, a community in which all officials were like Judge Claus would apparently *not have law*, despite the fact that official and popular behavior would be exactly the same as in a community with law—the same people would end up paying money, the same people would wind up in jail, and so on. For Hart, it is crucial to the existence of law that officials justifying their actions not speak solely of social facts and nonlegal normative considerations such as morality or prudence.<sup>85</sup> They must speak of law itself in normative terms for law to exist at all.

One of the reasons that Hart required that officials adopt the internal point of view is that it helps make sense of legal *authority*—something he thought a purely predictive account of the law could not do.<sup>86</sup> Hart did not mean that officials must see lawmakers as possessing a *because-I-said-so* moral right to be obeyed. He did not even mean that officials necessarily thought of themselves as having a moral duty of obedience to lawmakers. Nevertheless, by taking the internal point of view, officials could see the lawmakers as having normative powers that would be absent if they spoke only of social facts and moral reasons for action.

We have now identified an important difference between Claus's theory of law and Hart's. Hart insists that officials must take the internal point of view, whereas Claus does not. Furthermore, it is not clear to me that Claus does not have the better of the argument. If one adopts a positivist approach, under which the existence and content of the law are ultimately matters of social fact, why not conclude that a nation of Judge Clauses—who speak about the law solely in terms of social facts—can have law? One cannot help thinking that Hart, in insisting that officials take the internal point of view for law to exist, is expressing some deep unresolved ambivalence about legal positivism itself.

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83. See HART, *supra* note 4, at 102–03.

84. See *id.* at 57, 90.

85. See *id.* at 202–03.

86. See *id.* at 63.

There is also a moral argument for the prediction theory. Officials and private citizens who speak of the law solely in terms of social facts are more likely to come to a correct conclusion about whether they morally ought to act as the law says. This argument is clearly evident among the legal realists. The benefit of a predictive account of the law is, as Felix Cohen put it, that “we see legal concepts as patterns of judicial behavior, behavior which affects human lives for better or worse and is therefore subject to moral criticism.”<sup>87</sup> A normative conception of the law, in contrast, “hides from judicial eyes the ethical character of every judicial question.”<sup>88</sup>

Granted, it is not impossible for an official who uses internal legal statements to reason accurately about when the law ought to be obeyed. But internal legal statements do seem to be an invitation to moral confusion. As Hart understands it, the acceptance expressed in such statements may have its source not merely in moral considerations of various weights but also in “calculations of long-term interest; . . . an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”<sup>89</sup> If officials use internal legal statements when justifying their actions, they can lose sight of which of their reasons for accepting the law are appropriate and which are morally irrelevant or even pernicious.

A similar moral argument for the prediction theory is evident in *Law's Evolution and Human Understanding*. Thinking about the law as a signaling system allows for clarity about how the law ought to figure in our moral reasoning.<sup>90</sup> To be sure, a good deal of Claus's criticism is directed at the idea of authority in the sense of a *because-I-said-so* moral right to be obeyed. But throughout the book one finds suspicion about the general idea of legal authority—the idea that lawmakers exercise normative powers of any sort—a notion that Hart attempted to preserve with the idea of the internal point of view.

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87. Cohen, *supra* note 28, at 828–29.

88. Cohen, *supra* note 39, at 17.

89. HART, *supra* note 4, at 203.

90. See CLAUS, *supra* note 1, at 74–95.