Law's Evolution and Human Understanding

LAURENCE CLAUS*

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What a privilege and delight it was to welcome the participants to this conference. I am deeply grateful to the outside commentators, Bill Edmundson, John Finnis, Michael Steven Green, Mark Greenberg, Fred Schauer, and Larry Solum, for contributing so generously. My thanks also go to the many faculty colleagues who joined in the celebration, and particularly to Larry Alexander for convening the event and leading the proceedings, as he so often does, and does so well.

This response to the insightful commentaries on *Law's Evolution and Human Understanding*¹ grows out of three propositions: law comes first, law is signals, law is *of* human community. These propositions underlie

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

the book's attempt to address "the three recurrent issues" that H.L.A. Hart identified at the heart of debates about the nature of law: law's relation to morality, law's relation to force, and the nature of rules.²

I. LAW COMES FIRST

Before we can locate the actions of "legal institutions,"³ we need to know what gives some human activities that character, what imbues them with legal identity. We cannot know what is legal until we know what is law. We know what is law when we know what is *custom* for us. Law expresses what is custom for us, including whom we have customs of following. Law precedes and ushers in the systems of government from which we receive much more law.

What lets people contribute to law is their being credentialed as lawgivers by existing law. The reality of leadership, even revolutionary leadership, depends upon the evolution of community customs, upon community *response* to the assertions of assertive individuals. No one is a leader, no one is a lawgiver, unless and until there has evolved a custom of following her.

II. LAW IS SIGNALS

Law is the *expression* of group customs. Law is signals, sent through signs, sounds, and symbols, and a legal system is a signaling system.⁴ Legal systems evolve through customs of following leaders that put led groups on a fast track to many more customs. Lawgiving actions are communicative actions. Lawgiving actions may add to the systems of signals that let us know the likely character of life in our communities. Lawgiving actions may signal scope for further elaborative lawgiving by others, effectively sharing leadership, sharing power, with those others. Lawgiving actions are the only ones that deserve to be called distinctively *governmental*. We all do law *applying*, at least to ourselves and often in our relations with others.

2. See H.L.A. HART, *THE CONCEPT OF LAW* 13 (3d ed. 2012).

3. Cf. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014) (arguing that legal obligations are the subset of our moral obligations that have been affected by the actions of "legal institutions").

4. See DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* 122–59 (1969) (using the phrase *signaling system* in a more general account of communication).

III. LAW IS *OF* HUMAN COMMUNITY

In human relations, “the law” is always “the law of” a human community. Community comes through communication. We have law anywhere humans have conversed with each other enough to form a group identity. Law lets us live together in large groups, with many people we do not know. Law supplies the information that makes community growth possible. When we live with people we do not know, our need to distinguish law from other human communications becomes much greater. We need to know which of our communications express group custom, which of our communications capture what even strangers are likely to do and to expect. We also need many *more* signals that self-fulfillingly start up many more customs. We need intricate interrelationships among those sayings, including signals that set up practices of reward for conformity and punishment for nonconformity, so that the behavior and expectations of others become sufficiently predictable to let us interact, to let us *live* together, with confidence. That confidence comes from the multifaceted character of law’s signals, which convey news not only of likely “official” reactions to things we might do, but of others’ likely actions and reactions too.

Identifying these core propositions helps us see more clearly law’s relation to our daily decisionmaking about what to do and how to do it, including when to follow the law and how to read it.

IV. LAW AND AUTHORITY

We use the word *authority* in a range of related but separate senses. When we say that *words* have or are an authority for us, we may mean that those words are law of some community to which we belong—that is, we may use the word *authority* as a synonym for legality. When we say that a *person* has or is an authority, we may have in mind some potential source of *auctoritas*, which for the ancient Romans described the kind of personal presence that is apt to attract a following. Accordingly, we may mean that the person is an expert—that she warrants our attention because of what she knows. Or we may mean that the person is a lawgiver—that she is in government, that she has power, and warrants our attention because the rest of our community is giving her theirs. If that is all we mean, then we are using the word *authority* as a synonym for government, as a synonym for systemically signaled power. When we say someone is acting “within her authority,” we may mean that

existing law signals scope for her to act in the way that she is acting, that our legal system credentials her to be a lawgiver in the way that she is trying to be, that her attempted exercise of power is not *revolutionary*. But maybe that is not all we mean. After all, such synonymous usage applies as much to the credentialed acts of officials in oppressive systems of law and government as it does to the credentialed acts of officials in liberal democracies. When we have rejected the idea that lawgivers ever have a moral right to be obeyed, might saying that lawgivers have “authority” still valuably signal something more than the mere fact that they are lawgivers? Perhaps saying lawgivers have authority may valuably mean that those people are *morally justified* lawgivers. The word *authority*, used in this way, would convey the idea of power plus moral justification for that power’s use.

Power in a group is an ability to change group custom, to change what people in the group will likely do and expect. Power to change someone’s “legal position”⁵ is an ability to change how people in law’s group will likely treat that person, how they will relate to her, what they will expect of her. Regardless of how a powerholder, a lawgiver, acquired power, particular instances of the power’s use, of lawgiving, may or may not be morally justified. To speak of a “moral power” to change others’ moral situation⁶ risks obscuring the fact that whether any particular exercise of power is morally justified can be discovered only by an individualized all-things-considered moral judgment at the time of the exercise. The moral justification of lawgiving, like the moral justification of all other

5. Cf. John Finnis, *Freedom, Benefit and Understanding: Reflections on Laurence Claus’s Critique of Authority*, 51 SAN DIEGO L. REV. 893, 896 n.8 (2014) (“In Hohfeldian terms, authority to make a rule or order creating a legal obligation is a power, and its correlative is *not a right to be obeyed*, or even a duty to obey, but the subjects’ *liability*—roughly, susceptibility—to have their legal position thereby changed. How is it changed? By the creation of the obligation lawfully and validly specified by the exercise of power/authority. To whom is the obligation owed? If to anyone, to all other law-abiding citizens, and/or to the intended beneficiaries of the performance of the obligation/duty.” (citation omitted)).

6. Cf. William A. Edmundson, *Law’s Evolution and Law as Custom*, 51 SAN DIEGO L. REV. 875, 888 (2014) (“Political authority, as traditionally understood, consists in a moral power to impose moral duties by mere say-so. On any workable construal of this conception, official utterances of certain officials must satisfy the antecedent of some true, general moral principle whose consequent is that citizens have a moral duty they would not otherwise have had.”); see also Stephen Perry, *Political Authority and Political Obligation*, in 2 OXFORD STUDIES IN PHILOSOPHY OF LAW 1, 72 (Leslie Green & Brian Leiter eds., 2013) (“The main conclusion of this chapter is that the value-based conception of a moral power, which holds, very roughly, that one person has practical authority over another if there is sufficient value in the former person’s being able intentionally to change the normative situation of the latter, is the moral and conceptual core of the concept of legitimate political authority.”).

human behavior, is instance-specific. No one who becomes situated to lead a group receives a mantle of moral justification inside the lining of his mantle of power. Even when a lawgiver came to power in a good way, on every occasion that he considers exercising his power, he is morally obliged to ask whether, all things considered, he is morally justified in doing as he contemplates. And even when he is morally justified in issuing a law, the moral impact⁷ of that law on the moral decisionmaking of people in his community may vary from person to person⁸ and over time. Acts of lawgiving are morally justified piecemeal, and acts of law following are morally required or permitted piecemeal.⁹ When we see that there is no moral relation of right to be obeyed and duty to obey between law's issuers and law's audience, we cease to be surprised that there is imperfect congruence between when lawgiving is morally justified and when law following is morally required. The gap or asymmetry¹⁰ is explained by the moral independence of the two phenomena. Decisions by some humans about whether and how to use opportunities they have to lead and decisions by other humans about whether and how to use opportunities they have to follow are each individual moments of all-things-considered moral reasoning. The two sets of decisions are of course mutually relevant—the rightness of trying to issue laws is affected by whether people are likely to follow and whether following is likely to be the right thing for those people to do, and the rightness of trying to follow laws is affected by whether others are likely to follow and whether lawgivers and laws were well chosen. But these considerations are all just factors in the mix, to be weighed with whatever else is morally relevant to what we do on a given occasion; we can never prejudge them to determine conclusively what should later be done. A source of historic confusion about this was the old idea that lawgivers had authority in the now-discredited sense of a moral right to rule that had built in a moral claim to others' *obedience*.

7. See Greenberg, *supra* note 3.

8. See Brian H. Bix, *When Law Becomes Morality: Comments on Mark Greenberg's Moral Impact Theory of Law* 6–7 (University of Minnesota Law School Legal Studies Research Paper Series, Paper No. 14-27, 2014) available at <http://ssrn.com/abstract=2434075>.

9. Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 80 (1986) (describing “a piecemeal approach to the question of the authority of governments”).

10. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 53–55 (2001); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695, 695–96 (1991); Frederick Schauer, *Imposing Rules*, 42 SAN DIEGO L. REV. 85, 87 (2005); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 692–93 (1991).

It would be valuable to use the word *authority* in a separate sense of “morally justified lawgiving” if morally justified lawgiving *explained* the morality of law following. But it does not. That lawgivers are morally justified in issuing a law is neither always sufficient, nor always necessary, to make following that law the right thing to do. We are all familiar with examples of situations where the right thing to do is to break a law that was justifiably made, such as breaking speed limits in emergencies. And equally, the right thing to do will sometimes be to follow a law that was unjustifiably made, such as after a tyrant arbitrarily changes routine procedures for doing routine everyday things.

The service performed by the old idea of authority was to provide a source of moral continuity to match the factual continuity of power. Power flowed from the fact that across the group and over time we were mostly doing, and expecting others to do, what the leader said. Authority supposedly supplied moral support for this group dynamic. The claim of authority was that we were continuously obliged to do what we were mostly doing anyway. Having authority was supposed to be potentially a durable and discoverable status, just as having power is potentially a durable and discoverable status. Authority was supposed to be a feature of power, and to demarcate *ex ante*, for both the prospective lawgiver’s benefit and ours, the range of possible laws that we would be morally bound to obey. The reason we historically talked so much about authority was because we thought it could fulfill this function, that it could give us this guidance. A concept of authority that is coextensive with no one’s power, and not clear *ex ante* about its own extent, and not in itself the answer to when we should follow, is of no use to the powerful, and of little use to anyone else. Perhaps citing its absence has rhetorical value when condemning bad leaders, but arguing about the incidence of authority is fighting on their prefabricated turf. Why shouldn’t our discourse focus directly and explicitly on our real moral reasons for paying attention to law and lawgivers?

V. LAW AND MORAL REASONING

Existing law is an informational input to moral decisionmaking, not a subset of it and not a substitute for it. Law’s rules do not exist to relieve us from moral reasoning. Law’s rules exist to inform us about each other, about what is likely to be done and expected in our community. Rules are vehicles for understanding each other, at least enough to let us live together in the ways that law’s words contemplate. Discovering that a saying expresses a “valid legal obligation” inside our community does not conclusively settle what we should do, but is clearly relevant to answering that question. Legal sayings are signal code, information

about likely actual behavior and actual expectation among people in law's community. That information morally belongs inside our all-things-considered moral reasoning about what to do each day.

Having a community depends on having a legal system, and having a legal system depends on most members mostly doing as the system signals. The self-fulfilling character of legal systems supplies a distinctive reason for community members to "follow the law." That reason is additional to the various other moral reasons to act that do not always exist when there is law and that may exist even without law, such as coordination for good ends and following expert advice for good ends. The weight of *having the system* as a distinct moral reason will vary from one life decision to the next, depending on what effect nonconformity would have on the system and how valuable to human flourishing the system really is. The value of our legal systems is always a relevant consideration when deciding whether to conform to their signals. And when we are deciding whether to follow any of our communities' many laws that manifestly promote the common good, our moral duty to do so will usually be overdetermined, and the good of maintaining the legal system will just pile on, superfluously supporting the morality of our conformity.

Custom is at the core of every community, from a social club to a "state." Maintaining the scope for shared understanding that lets community live is a morally relevant consideration when deciding how to act inside *any* community, but is a morally overriding or preemptive consideration in none of them. The choice to call a particular community "the state" should not change how we approach life choices inside it. For example, individual decisions to use force remain matters for individual moral judgment, and are not immunized from potential wrongfulness by state endorsement, nor necessarily rendered wrongful by state condemnation. Law's value to us in curtailing wrongful exercises of force is, however, certainly one of its greatest potential accomplishments. The accomplishment comes, when it does, primarily through law's effectiveness at self-fulfillingly signaling how and by whom force will be used against those who use it wrongly.

Lawgivers should try to avoid telling people to do the wrong thing. And so should we all. All of us should try to avoid misleading others into doing less well than they could. Lawgivers should strive to achieve the common good through their words, and that is one context for realizing the more general duty of human communicators to communicate for good

ends and not for evil ones. That our moral obligations in using language require its use for good does not stop us noticing that the way language helps us do good (or evil) is by helping us understand each other. And law, as a subset of language use, helps us understand what is likely to be true even of people with whom we never directly speak, because law lets us know what is customary in the groups to which we together belong.

VI. LAW AND EXPECTATION

Sometimes we say someone “expects” us to behave in a certain way when we believe that the person will hold us to a particular moral standard of behavior. Notice that this use of *expect* need not imply any actual belief by the “expecting” person that the “expected” behavior is likely to occur. People use *expect* in this way (“I expect you to behave”) to influence and increase the probability that other people will behave in the indicated way. By saying “I expect you to behave” in way X, the speaker seeks to increase the probability that the hearers will behave in way X by implying that the speaker will react adversely (at least with disapproval) if the indicated behavior is not forthcoming. When someone sees reason to say “I expect you to behave,” that reason resides in doubt about whether the behavior will be forthcoming and a felt need to bolster the probability of its occurrence. In other words, people say “I expect you to behave” when they want to be able to expect behavior and are unsure whether they can.

What distinguishes law from all the other sayings through which people seek to influence each other’s behavior? Law lets us have community-wide *actual* expectations, actual perceptions of high probability that behavior will occur within the group. Law self-fulfillingly signals what people in law’s community will likely *actually* believe is (a) likely to occur and (b) likely to be thought likely by everyone else in that community.

How does “expectation” relate to moral obligation? When people say “I expect you to behave” in way X, they often mean to convey that they think X is how their hearers should behave, all things considered. The “I expect” adds to “you should” by importing the moral significance of the interpersonal relation between speaker and hearer, and implying consequences for that relationship if the hearer fails to behave in the indicated way. Where words are law for a group, the moral significance of the group relationship is a correspondingly relevant moral consideration for someone deciding whether to conform to the actual group expectations that law’s words self-generate. When we value belonging to a group, we have reason to avoid actions that might make less effective the system of communications that lets group members form *actual* expectations, actual beliefs about each other’s likely actions and likely beliefs about likely

actions and beliefs. Feeding the feedback loop that lets us have law, that lets us live together in a large group with many people we do not know personally, is a reason that deserves to be considered whenever we are deciding whether to conform to law.

We can easily see the value to our lives of the actual expectations that law helps us have, the actual confidence we acquire from law about what strangers will likely do at an intersection or in a commercial transaction, and about what they will likely believe about us, about our likely actions and beliefs. This is what lets us live together. Human community exists through and is defined by its customs. Having the system that lets these expectations form and flourish is a moral reason for conformity in any instance where nonconformity might make a difference. Whether our conformity to law makes a difference to the overall effectiveness of the legal system always deserves to be considered. And where we conclude that conformity might make a difference to the system, that becomes a reason, albeit one of finite and relative weight, that joins all the other reasons that we must weigh when deciding what to do each day. Often some of those other reasons will also be about meeting expectations, namely the expectations that evolve distinctively through our individual interpersonal relations.

VII. LAW AND CUSTOM

Law self-generates the sources of its future self. Law self-generates social facts—facts about what people in law's community are likely to do and to expect, including facts about whose words everyone is likely to treat as additional news of what people are likely to do and to expect. Our customs of following leaders sprout branches of further following as leaders “delegate” or “cede” aspects of leadership to others, expanding our communities' networks of signalers and signals. Primary shared understandings about who is leader can metamorphose over generations into shared psychological support for the legality of complex systems of signals that symbiotically sustain elaborate structures of interrelated institutions.

Once we see the customary foundations of our legal systems, we can also see that our customs of following leaders may well share space with other foundational customs. If we want to appreciate law's full contribution to defining human community and letting us understand each other's likely behaviors and expectations, we need to supplement the news we get from our “formal” legal systems. For an outsider or newcomer, this can

be difficult to do; it may require quite a lot of “asking around.” Among the great social benefits of formal legal systems that evolve through our customs of following leaders is their efficiency at conveying legal information through readily researchable sources of “pedigreed” signals. Finding out in what ways a community’s customs of following leaders, of conforming to formal law, are qualified and cut down by other customs, is much easier when we have been living awhile inside the group. How do we find out about those other customs? Sometimes just by observing patterns of behavior, but often by actually talking about them.

Law is the expression of our customs in the full sense. Law includes not only the systems of pedigreed signals that evolve through our customs of following leaders, but also all of the other sayings among ourselves that accurately express patterns of group behavior and expectation. Our everyday learning about law rarely involves consulting the actual text of formal regulations. Most of the law we live by is law we learn through relevantly accurate paraphrasing, whether picked up from parents or from schools or from websites.

Law is *all* accurate expression of our customs, including pedigreed phraseology we get from systemically credentialed signalers *and* all true synonyms for that phraseology that we employ among ourselves to spread the word about what is custom for us *and* all the sayings that accurately express customs we have evolved without the aid of our current formal legal systems. Some of our “informal” customs may have long histories, perhaps even longer than the histories of our current formal systems. Some may go back further than any eye can see; others may be traceable to one of our formal systems’ antecedents. When we experience revolutionary change in our formal legal systems, many ways of doing things may survive even though they were started up by sayings of leaders long since deposed.

Our informal customs may evolve in tandem with our formal legal systems, interacting with and taking account of those systems’ content in various ways. For example, we may have a custom of traveling no more than ten miles per hour faster than whatever the formal system signals for maximum speeds. The custom will be discernible to anyone inside the community from some combination of her experience on the road and her conversations with other insiders. She may pick it up by noticing what speeds other drivers are doing and which drivers are actually being pulled over by the police. Or she may pick it up even sooner by being told about it. If she ever becomes relevantly situated to be a lawgiver, her decisions about what formal speed limits to set will be made with an eye on the customs that shape the way her community will likely react to her words.

Our informal customs may also flatly contradict and fully neutralize some of the signals we get from our formal legal systems. In those

instances, our leaders discover that our customs of treating them as leaders just do not extend to those matters. The book gives as an example a European state whose formal leadership dutifully purports to regulate cheese and sausage making in ways that accord with new European Union directives.¹¹ If over time we find that cheese and sausage makers ignore the regulations and persist in using their traditional methods, and no one forcibly stops them, we might conclude that the community's custom of following its formal leaders just does not extend to cheese and sausage making, however much that leadership is effective in other respects. If the formal regulatory words about cheese and sausage making stay on the statute books, we might conclude that those words have a legal status comparable to an unrepealed statute that the courts have held unconstitutional. And just as courts can change their minds about whether a statute is unconstitutional and resuscitate it by overruling themselves, so informal community custom can change in ways that resuscitate regulatory words that had hitherto been disregarded.

Recognizing law's *descriptive* character assimilates our use of the word about human relations to our use of the word about the rest of the natural world. John Stuart Mill thought the two uses wholly distinct.¹² In H.L.A. Hart's approving account, Mill saw a

perennial confusion between laws which formulate the course or regularities of nature, and laws which require men to behave in certain ways. The former, which can be discovered by observation and reasoning, may be called 'descriptive' and it is for the scientist thus to discover them; the latter cannot be so established, for they are not statements or descriptions of facts, but are 'prescriptions' or demands that men shall behave in certain ways.¹³

In fact, the law of a human community expresses the course or regularities of that community and may be discovered by observation and reasoning. We communicate among ourselves about the laws of science to understand the world better—to understand how the physical world around us is likely to act and to react in our encounters with it. We communicate among ourselves about the laws of our community to understand each other better—to understand how people in our group are likely to act and to react in our encounters with each other. If a “law” of science fails to

11. CLAUS, *supra* note 1, at 160–61.

12. JOHN STUART MILL, *Nature*, in THREE ESSAYS ON RELIGION 3 (2d ed. 1874).

13. HART, *supra* note 2, at 187 (commenting on JOHN STUART MILL, *Nature*, in THREE ESSAYS ON RELIGION 3 (2d ed. 1874)).

describe accurately, it ceases to be seen as law. And that is just as true for the “law” of a human community that fails to describe what people in that community are likely to do and to expect. Law describes a regularity and successfully predicts the continuation of that reality. Words that fail to describe and to predict accurately do not fulfill for us law’s function. Mill’s error was not seeing the element of nature that “human” law successfully describes. Our law describes the character of our community, not the isolated behaviors of individuals. A difference between human law and scientific law is, however, that when we describe ourselves, we affect how we think of ourselves, and how we think of ourselves affects who we are. Human law’s descriptions contribute to their own truth.

VIII. LAW AND PREDICTION

What turns some people’s sayings in some settings into the law of a group? A widely shared understanding within the group that the sayings have self-fulfilling effect, that the sayings succeed in communicating what people in the group are likely to do and to expect, that the sayings both express and help constitute group custom. This one characteristic is both necessary and sufficient to let us call those sayings law. It is not necessary that the lawgiver intend the self-fulfilling effect, not necessary that the lawgiver intend to be a lawgiver. A community may latch onto words that came from someone who had no intention of being a lawgiver, no intention to instruct, direct, order, command the group of people who are treating his words as law. In other words, it is possible, though unusual, to lead involuntarily. The sayings of revered religious figures may acquire legal status in a group without those figures harboring any aspirations to leadership. Of course, in fact, most lawgivers do intend to be lawgivers—they intend to instruct, direct, order, command, and they expect their words to have self-fulfilling effect inside the community to whom those words are directed because they can see that they are being treated as lawgivers by that community. Only the self-fulfilling group effect of lawgivers’ words, not their directive character, is necessary to law. And only the self-fulfilling group effect is distinctive to law. When we say that a lawgiver is instructing or directing or ordering or commanding, we can notice that she might take a similar tone with people in other settings that no one would ever call lawgiving, such as when buying goods and services. We often tell other people to do or not do things, without giving them law in the process. Intending to be directive is not only insufficient to be lawgiving, it is also neither a necessary feature of lawgiving nor a distinctive feature of lawgiving.

“Retroactive” laws help us see that being directive is not essential to law, that law’s essence is its prospective signaling of likely behavior and

expectation, not duty-imposing direction. To announce that people's duty requires behaving in a way never mentioned before and that they have already disobeyed if they did not behave that way in the past is absurd. But in fact, retroactive laws are not absurd. They just resemble laws that predict consequences for other unalterable attributes, such as age. Whether a lawgiver is morally justified in newly signaling adverse consequences for past conduct is a question for all-things-considered moral judgment. Much that we value in the common law emerged through decisions resolving disputes that newly announced legal liabilities for actions that people had already done.

Oliver Wendell Holmes advanced our understanding of the nature of law and lawgiving when he identified self-fulfilling effect in a group as law's essential feature, calling it systematized prediction.¹⁴ That was an innovation. It was also an insight. It told us a truth we had missed. And in the wake of that innovative insight, we can see that lawgivers' self-understandings about what they are doing are not an essential element of lawgiving. As to *Holmes's* self-understanding, he called statutes and law reports part of a "body of dogma or systematized prediction."¹⁵ His self-understanding was that the essence of what he was accomplishing through his official words was self-fulfilling prediction. Over the century since Holmes's celebrated characterization, lawgivers who have wondered what affords their words unique social significance have had access to an articulate answer: systematized prediction.

Why has Holmes's self-understanding not been more overtly shared among lawgivers? We have long and widely appreciated law's predictive value, so why has our rhetoric characterizing law and lawgiving not adequately reflected the centrality to those phenomena of systematized prediction? We find an answer when we notice the role that claims of

14. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–58 (1897).

15. *Id.* ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. . . . I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law . . .").

rights to rule have played in our politics over much of human history. We have talked about rights to lead not merely to consider what morally justifies people in attempting acts of lawgiving. Rather, in talking about rights to lead, the well-situated among our ancestors were often in the business of persuading their populations of a moral duty to obey particular people, continuously over time. They claimed that particular people were morally entitled to occupy particular lawgiving roles for particular periods of time to the exclusion of rival aspirants, and that the rest of us owed a correlative duty *to those people* to treat them as lawgivers, self-fulfillingly making them so.

As we now more widely see and say, our real moral reasons for treating people as lawgivers are not about what we owe them, but about what we owe ourselves and each other as people living together in community. And among the things we owe each other is doing what we can to maintain law's way of letting us live together unless we have morally weightier reasons to do differently. But it is hardly surprising that so much of our historic discourse about the nature of law and lawgiving was dominated by the dominant, and that so many of our leaders and their senior subordinates favored framing the moral landscape as about what we owed leaders. The priorities of our politics, and of our political theorizing, were too often the priorities of squabbling, self-serving elites.¹⁶

Our rhetorical framework for talking about law and government, including the language of authority and of duty to obey, does not come from a conventionalist understanding of the legal system. We inherited that framework from our long history of trying to locate rights in leaders. Contemporary legal theory has tried to graft a conventionalist account of systemic foundations onto a framework for legal discourse that developed from quite different premises about how we have law. Had we always understood law as the expression of our customs, we would doubtless have talked about it differently.

IX. LAW AND INTERPRETATION

We read law not to understand *lawgivers*, but to understand each other. We read law much as we read the rules of a game. Our purpose is not to obey an author; our purpose is to play satisfyingly with other would-be players. What we need to know when we read law is how others in our community are reading it, regardless of what the author intended. The extent of law's success in shaping how we live together depends on the

16. See KARL R. POPPER, 1 *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* 121 (4th ed. rev., Harper & Row 1963) (1945) (criticizing our historic theoretical fixation on the question "who should rule?").

extent to which we are able to share an understanding of it across the group and over time.

The possibility of a shared and continuous public meaning is built into the possibility of law, though both the sharing and the continuity will always be matters of degree. When we consider controversies about constitutional interpretation, we can notice that no constitutional court in the world actually claims for its opinions a higher legal status or greater legal effect than the constitution under which the court is constituted. And no constitutional court in the world thinks that those in the audience for *its* words, we the receivers of constitutional court opinions, should each read those words to mean whatever we personally think it would have been best for the constitutional court to have written. We might therefore ask: should the words of constitutions constrain constitutional courts in the way that those courts take for granted *the courts'* words constrain everyone else?

The wide-ranging lawgiving in which the United States Supreme Court has engaged when deciding what the United States Constitution requires has in many instances followed predictably from the American community's custom of living under a document that is old, abstract, and moral. That combination of traits opens up substantial scope for disputes about meaning that can be resolved only by further elaborative lawgiving of a kind that the Constitution itself contemplates. The possibility of shared and continuous meaning remains intrinsic to law, and sets boundaries on the scope of constitutionally contemplated elaborative lawgiving. The good of *having* the legal system calls for us all to do our best to read our existing law the same way, so that it can be for us a source of shared understanding across the community and over time. Our need of that shared understanding is partly why lawyers are in such demand. Ronald Dworkin's Judge Hercules' contributions to the law would be lost to us if we lacked a shared understanding of the words through which he expressed himself. His words would not help us know what to expect of each other if we were not reading them the same way. His words would not be law for us.

Where there is a discernible public meaning in our shared language that lets law guide across the community and over time, reading law to mean something else is revolutionary. If a revolutionary reading catches on, we have an actual mini-revolution. Revolution is any unpredicted turn in a legal system's evolution, any success in changing law outside the scope for change signaled by the existing system. Whether revolutionary

behavior deserves to be called *illegitimate* depends on whether, all things considered, it is morally justified. The United States Constitution became law in a revolutionary way, outside the scope for legal change signaled in the existing Articles of Confederation. Lawgivers who issue rules of change have moral reason to seek an optimal balance between the benefits of stable expectations and the benefits of responsiveness to new insights and experience. If later lawgivers think their predecessors got that balance wrong, the value of stable expectations deserves to weigh heavily in their moral calculations about what to do next, because *revolutionary* change poses greater threat than lesser change to our community-wide ability to *expect* of each other. But acting in a revolutionary way will sometimes be the right thing to do. And not only for judges. Just as Hercules brings an integrated moral vision to deciding what words to add to the law when resolving disputes about the meaning of existing law, so each of us should bring an integrated moral vision to deciding what weight to give Hercules' words (and all the rest of our law) when choosing what to do each day.

We humans argue all the time. What makes the outcomes of some arguments *lawgiving* is that we have customs of letting the say-so of some humans *settle* some arguments and signal what our likely behaviors and expectations will be. Hercules' words distinctively matter to us in a way that causes us to call them law and similar sounds coming from an eccentric on a soapbox *not* law. The focus of enquiry into the nature of law therefore needs to be on what Hercules' communicative actions distinctively succeed in doing and how they succeed in doing it. Hercules' deciding what to do, like all of our individual decisions about what to do each day, is a matter for all-things-considered moral judgment. In making those moral judgments each day, we reflect on "the people we want to be and the community we aim to have."¹⁷ What *existing law* contributes to those judgments are the reasons for action that we get from learning about the people we already are and the community we already have.

17. RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986).