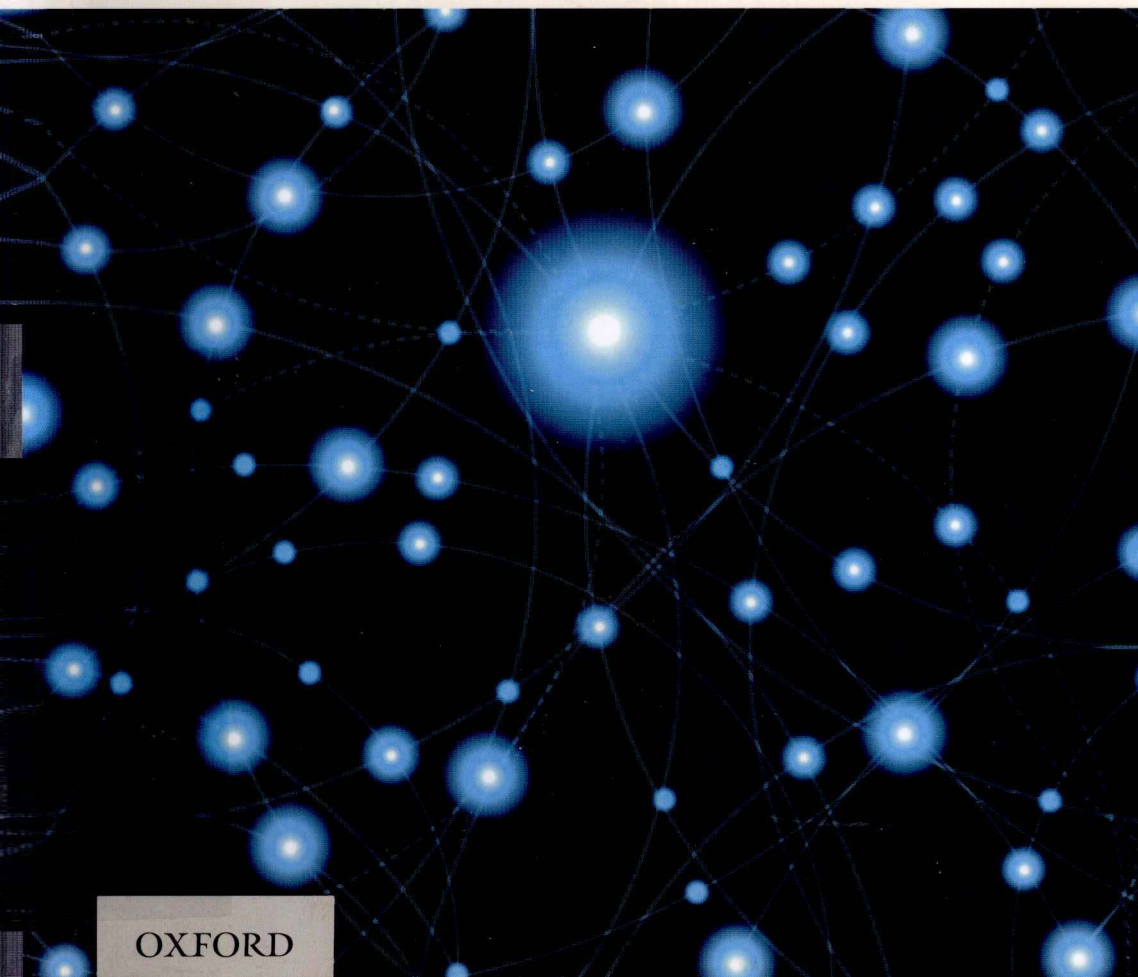


# LAW'S EVOLUTION AND HUMAN UNDERSTANDING

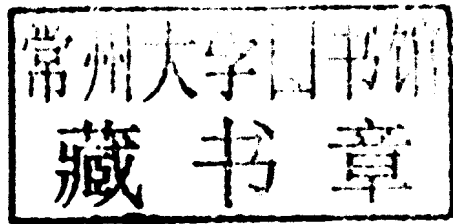
LAURENCE CLAUS



OXFORD

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Laurence Claus



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Published in the United States of America by

Oxford University Press

198 Madison Avenue, New York, NY 10016

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Library of Congress Cataloging-in-Publication Data

Claus, Laurence.

Law's evolution and human understanding / Laurence Claus.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-19-973509-9 ((hardback) : alk. paper)

1. Law—Philosophy. I. Title.

K237.C53 2012

340.1—dc23

2012008784

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9 8 7 6 5 4 3 2 1

Printed in the United States of America on acid-free paper

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## CONTENTS

1. What Makes Words Law?	1
2. How Law Grows Up in a Group	9
3. The Invention of "Because I Said So"	25
4. The Empty Idea of Authority	38
5. Ideas that Endure	45
6. When <i>Should</i> We Do What Law Signals?	58
7. How Law Works	96
8. Evolution and Revolution	128
9. Reading to Understand Each Other	165
10. The Life of the Law	188

*Notes* 195

*Acknowledgments* 251

*Index* 253

## CHAPTER 1

# What Makes Words Law?

**T**his book is for anyone who has noticed that life cannot avoid encountering law. “It’s the law,” we hear people say to us, as if that news is supposed to affect how we live. What makes some sayings *law*? When a saying is the law, what difference should that make to us? This book is about the answers to those questions. What we understand law to *be* affects how we use it. What we understand law to *be* affects how we work out what law’s words mean. What we understand law to *be* affects how law helps us when we are deciding what to do each day.

Law is words, only words—signs, sounds, symbols that people use to communicate with each other. Words in themselves cannot have purposes, goals, perspectives, rights, or duties. Only *people* can have those things. To claim that *law* has a purpose or goal is really to claim that people’s attention to law has a purpose or goal. People attend to law in the same two ways that they attend to other communications—by giving and by receiving. People *contribute* to law’s evolution, and people *consult* the law as it is from moment to moment. If people share a purpose in contributing to and consulting

law, we might as shorthand say that the law has a purpose. This book suggests we can rightly say that, and learn a lot from that purpose about what law is, what it means, and what to do with it.

For what purpose do people consult the law? Why do we ever go to see lawyers? Not to learn the difference between right and wrong. Rarely would any of us think of lawyers as the best people to ask about moral truth. Neither the people who directly contribute to law's evolution, nor the people whom we pay to tell us about law, are necessarily better than anyone else at thinking about what is actually good, about what is actually the right thing to do. What lawyers distinctively offer us is *prediction*. In deciding what to do, we consult lawyers when we want to know what other people in law's community will likely do and expect in relation to what *we* might do. If I am thinking of promising to pay a lot of money in exchange for someone else's promise to sell me his business, I want to know how to act to make things most likely to happen the way I am hoping they will. Whether things happen that way depends on how the would-be seller acts, but if I do not know him well, my confidence about how he will act can be increased by knowing how other people will probably behave in relation to the two of us. If he breaks his promises at any point, will others within the community help me? What can I do to make it most likely that some of those whom my community calls government officials will back me up and force the seller to keep his promises, or to compensate me for having broken his word? With a lot of money at stake, it is worth consulting lawyers to give myself the best understanding I can get about how others will likely act in relation to an action I am contemplating. But law helps us understand what others are likely to do and to expect in many daily choices of action that must be made much faster, albeit not necessarily with lower stakes. When in driving toward an intersection I encounter a red traffic light, my life and the lives of others may depend on my ability to understand what that

signal is telling me about the likely actions and expectations of others. That red light conveys the same message in my community as the English-language word “stop.” It tells me not only what people whom my community calls police will likely do if I drive through it on their watch, but also what drivers coming toward the intersection from another direction will likely do and what they will likely expect of me, and therefore what I should do if I want to improve my chances of surviving the drive and not harming anyone.

If the purpose that people share when consulting the law is to find out what others will likely do and expect, that fact has to shape the purpose of those who contribute to law’s evolution. What do law’s contributors think they are accomplishing when they express themselves in words that lawyers will later tell clients about? If asked, they may say they are instructing; in substance, they are *informing*. In any human community, an opportunity to contribute to the law of that community is an opportunity to communicate a kind of information that those who consult that law want to know. What kind of information is that? It is information about what people in that community will likely do and expect. That is the common denominator that explains our shared attention to law. When people do things for the purpose of contributing to law and when people do things for the purpose of finding out what law is, they all share a core purpose of prediction. We have always seen that law helps us predict the behavior of others. This book will explain why we should see law as all about prediction. When a lawgiver “decides” what people will do and tells them so, she really just predicts what they will do and expect. This fact lets us say as shorthand that prediction is the irreducible, essential *purpose* of law.

Both those who contribute to law and those who consult law may think that their actions will have good consequences or are for some other reason the right thing to do, but that need not be true, and in

fact, in our human experience, it sometimes isn't. Moralizing about choices to contribute to or consult law is commonplace, but not always honest. Sometimes it just covers for drives to dominate or to possess. Morality talk is no good guide to the full range of people's real motivations for contributing to or consulting law. People can be wonderful. People can be awful. Their reasons for contributing to or consulting law may often accurately be characterized in one of those ways or the other. But among those reasons, motives, purposes, what is always shared by those who seek to contribute to or learn about the law of a human community is the purpose of contributing to or learning about what people in that community will likely do and expect.

Law is, as Oliver Wendell Holmes famously phrased it, "systematized prediction."<sup>1</sup> Every human community has evolved its own unique prediction source, its own signaling system<sup>2</sup> for what people in that community are likely to do and to expect. Community comes through communication. We have law anywhere humans have talked to each other enough to form a group identity.<sup>3</sup> As community identity evolves, that evolution is expressed through a cross-referenced system of communications that both insiders and outsiders understand to be the *law* of that community. What do they understand the expressions of community we call law to achieve? They may have all sorts of hopes for what those expressions will achieve, which is just to say, they may have all sorts of hopes for the character of life in that community. But the common denominator of achievement, the essence of what makes those expressions of community always seem worth contributing and consulting, is *understanding each other better*—understanding what distinctively follows from the fact of community for what those in it are likely to do and to expect.

A theory of law that sees this is not limited to communities that we might call nation states. It is not limited to community institutions that we often call government. It applies to systems of communications



that signal the character of life in even the most simple communities, such as the expressed customs of people who live together in small numbers as hunter-gatherers, and in even the most savage communities, such as the rules of a Manhattan co-op.

Law is not a morality meter. What law signals and what people *ought* to do are not always the same thing. In some human communities at some moments in history, they are *often* not the same thing. Historic claims that they *are* the same thing have often been immoral, manipulative efforts by some humans to control others. Once we understand our community's legal system to be a purely predictive signaling system, we can see that its value to us does not depend on claims that those who contribute to law have a "because I said so" right to be obeyed. And our human history affords strong reason to suspect that those claims were never true. Even coming from the lips of exasperated parents, "because I said so" draws whatever moral force it seems to have from an altogether different reason for attention, namely, expertise at living. Parents sometimes say "because I said so" when they are just too impatient to explain why what they say is truly the right thing to do; right not merely because the parent says it, but right all things considered. Parents rightly tell young children that parents know better. During teenage years, as the plausibility of that claim begins to recede and nascent adults begin to contest it, parents tend to shift rhetoric away from "because I said so" and toward a totally different basis for attention, namely, "while you're under my roof." Now the assertion is no longer that the parent knows best. Maybe the teenager's musical tastes are superior, but those whom the legal system signals to have what that system calls property rights can make a moral argument for those rights, including the right to decide what music is played (and at what volume) on premises called theirs.

Why am I raising the specter of recent parenting problems or unhappy childhood memories by going on about "because I said so"?

Because the philosophers who over our history have most busied themselves with talking about what counts as law have mostly argued or assumed that words can be law only if those words come from people who imitate exasperated parents—people who claim that they can rightly say: “because I said so.” The claim of *authority* in the historic sense of a “because I said so” right to be obeyed has been very widely treated as a defining ingredient of law and government. But it is not, and this book is meant to help make that clearer, by suggesting how law’s evolution likely happened with no thanks to any such thing. The *claim* of authority has often been present when law appeared, but that correlation was not necessarily causation. The claim of authority seems especially unlikely to be part of what makes words law if authority actually never exists. Most of us would now acknowledge that the arguments used to support ancient authority claims were bad, and that the motives of many who historically claimed authority were worse. To the tale of authority, we shall return.

Being predictive is not enough to distinguish the words we call law from many other things that we say to each other. To separate law from all the rest, we need at least one more essential feature. Fortunately, we can readily recognize a feature of law that really is unique, freeing us to forsake and ignore false claims of right to be obeyed. We find what truly distinguishes law in Holmes’s key phrase. Law is *systematized* prediction. Holmes just threw those words out in a public speech, revealing only a fraction of their explanatory power. Modern systems theory<sup>4</sup> helps us comprehend the concept more fully. Law’s signals of what people are likely to do and to expect emerge within a system that grows itself.<sup>5</sup> Law’s signals can predict the potential for further predictions, signaling who in law’s community is likely to succeed in adding effective signals to the system. In this way, a system evolves sequences of signals, which we may visualize as emanating from a core or descending in a hierarchy. Those branching sequences

of signals credential potential signalers with signaled scope for likely success at starting new branches, adding to the system through further effective signals of likely behavior and expectation.

Instead of seeing the legal system as a pyramid down which is delegated a right to be obeyed, we can take law's *systemic* nature more seriously and find a more accurate way to think about how legal systems work. Law 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. Law evolves because to live in community is ever to be looking to the left and to the right, seeking to understand the likely attitudes, actions, and expectations of the people with whom we live. Law evolves in tandem with the life of a human community, so that law's signals form a self-perpetuating system, ever expanding like the universe from the community's earliest beginnings. In human relations, there is never "law" without an "of" immediately following, and that "of" always turns our gaze to a human community.

The law of a community is the *expression* of its *customs*. As we will discuss in chapters 2 and 7, when our group grows beyond people we personally know, one mode of conveying to others those behavioral regularities we call group customs takes center stage—the mode of using *words*. The signs, sounds, and symbols of a group language let us communicate even beyond those with whom we interact personally. The moment when we expand beyond those personally known is the moment when linguistic description of custom becomes critical. It is also the moment when we need a way to have many more customs that will let us live with people we do not know by letting us understand much more about those unknown people—what they are likely to do, what they are likely to expect. That is the moment when our customs of following leaders come into their own. Our leaders supply self-fulfilling expressions of many more customs. And those

expressions, along with our existing descriptions of group customs, are what we come to call . . . laws.

We have always known that law helps us predict what others in our community will likely do and expect, but too often when consulting law for this purpose we have mistakenly seen ourselves as mere observers of a separate, active reality called the exercise of authority. In truth, the reality is just us. Prediction is not passive when it converges with the predictions of others and is about our life together in community. Systematized prediction is active, it self-fulfills its predictions, it is human community listening and talking to itself.<sup>6</sup> We experience law authentically as a conversation about who we together are and who we together are becoming. To be law is to be predictive, to be systemic, and to belong uniquely to a human community. The law of a human community is dedicated and devoted to telling truths about the character of life in that community, the community which that law defines and to which that law belongs.

## CHAPTER 2

# How Law Grows Up in a Group

**I**n any human community, there are just people doing actions, forming attitudes, and nursing expectations. What we say to each other can help us do all three things better. The sayings that are law in our community join the rest of our life experience in helping us decide from moment to moment what to do and what to think.

Law lets us live with people we do not know. In a small group, we can hope to know each other through personal interaction, at least enough to live together. Our direct communications with each other, including our uses of a group language to talk, help us discover truths about each other, and so understand each other in the ways we need to do if our lives in community are to flourish. But how do we live together in a big group? Law is our answer to that question. Law is the way our growing group uses our group language to fulfill our need to understand those in the group whom we do not know, to learn about people we may never have met. Law tells us what those people are likely to do and to expect, just because they are in our group. And like many other communications among us, law has a self-fulfilling

effect—law helps make true what law expresses. Law lets us *expect* of people we do not know.

Have you ever tried to work with someone from whom you could *not* expect anything much, someone who proved to be unpredictable? How was it for you? In our lives together, spontaneity has a precious place. But it is a small place. If our relations with each other are to grow in depth and duration, we must be able to *expect* of each other. That, after all, is what lets us look forward to good things in life. As Niklas Luhmann observed of our deepest human relations, of love: “One finds oneself expected in the worldview of the other as the person one endeavours to be. . . . Accompanying this . . . is . . . a reciprocal expecting of expectations and of all that this implies: joyfulness of steps coming through the door, and the certainty of thinking the same thing at the same moment.”<sup>1</sup>

As sane people, we cannot nurture and sustain the expectations that grow relationships, whether in business or pleasure, if the buds of expectation are too often savaged by disappointment. Instead, we rationally give up and move on to other, more predictable people. Within ourselves we may feel a certain tension between the benefits of belonging in real relationships, with all of the expectations that they allow and introduce, and the allure of adventure, of acting unpredictably. But we know that relationships mostly make reliability worthwhile. Even when tempted to do differently, most of us would readily concede the great value of all the reciprocal expecting that shapes most of our work and play.

What has any of this to do with law? Law expresses the expectation that comes from community.<sup>2</sup> The law of any community gives us a heads-up on what others in that group will likely do and expect just because they are *in the group*. This lets us relate to them without the kind of individualized, personalized knowledge that might otherwise be essential for any kind of trust. We are willing to risk driving

on the same roads as strangers without actually knowing what they are thinking. Likewise, we willingly transact all sorts of business with them. Our lives would be much less interesting and much less productive if the risks in doing those things were too high to tolerate. What makes risk tolerable is the expectation of others' behavior that the law of our communities helps us have.

How did we get law? How did we humans find a way to express what our lives in community would be like? Imagine the beginnings of a new community, perhaps one emerging from an accident, like the group of children marooned together on a desert island in William Golding's staple from high school English class, *Lord of the Flies*.<sup>3</sup> Living together is unavoidable—the accident has deposited quite a number of us here, and the island is just not that large. That seems a fair metaphor for the lives of our human billions, who mostly must cluster in large numbers in the habitable spaces of this little planet.

The first thing to notice when we are looking for law in a group is talk about “what we do” or “what is done” in the group. When actions work well, when we see consequences that seem good to us or we otherwise sense goodness in what happened, our intelligent minds tend to return to those actions. Successful repetition reinforces our sense of actions' rightness *for us*. In a small group whose life together works through direct communication with each other, we may start to see support added for some of the things we say to each other through expressions such as “our practice has been to do that,” or “that is our way.” For example, if in early days on the island some of the children managed to get a fire going or to catch some food by working together in a particular way, that record of success may become part of the reason that some of them express for trying the same action again. Notice that while perceptions of goodness may help turn behaviors into customs, once they are customs, that fact is worth knowing even when we think that some other behavior might be better. The behavior that

is custom is what others in the group will likely do and expect, and anyone in the group who is contemplating doing differently needs to weigh the likely consequences of disappointing expectations against whatever good might come from doing differently. Elman Service observed:

Very powerful forces of social control inhere in small face-to-face societies; this is especially so in primitive societies where the individual normally spends his whole life among his kinsmen. Since escape is impossible he cannot recover by moving to some new group the esteem he might have lost by a social mistake in his own group. Cooperation, alliance, love, reciprocities of all kinds are totally important to the survival of any individual in primitive society. This must be why such people seem so extraordinarily sensitive to the reactions of the group to any social action. Praise and blame, affection and withdrawal, and other such socio-psychological sanctions are extremely powerful reinforcers in small societies of stable membership, and it has been noted over and over by many observers of egalitarian societies how carefully social customs, especially in etiquette, are observed. . . .<sup>4</sup>

The distinction between sayings that express customs and all the other expectant things we say to each other may not be sharply drawn when our numbers are small. Only when we grow in numbers do we really need a way to learn about people we do not know well, a way to understand what strangers are likely to do and to expect. That is when the sayings that express our community customs need to become clear and distinct from all the other expressive and expectant chatter that fills our days. Not only do our customs need to become clearer, but we need more of them. The more that our lives involve relating to people we do not know, the more information about



them we need to be able to get from the fact of their membership in our community. How can the evolution of our customs, of who we communally are, be sped up? Through *leadership*, or as we come to call it, *government*.

Leadership may exist among us long before we are conscious of really needing it. We see it in even the smallest groups of chimpanzees.<sup>5</sup> Natural selection supplies an obvious explanation for this prevalence. Groups that are effectively led compete successfully against groups that are not,<sup>6</sup> so we should be unsurprised that the groups of humans who have survived and thrived have had gene pools that reliably produced persons who liked to lead and persons who liked to follow, and that those desires in at least some instances tracked abilities—qualities of body and mind, personality and character, that made some persons “born leaders” and others, instinctive followers.<sup>7</sup> Max Weber described this psychological dynamic within a group as the experience of “charismatic authority.”<sup>8</sup> The ancient Romans called it *auctoritas*.

An emerging leadership co-opts custom. We could say that through leadership, custom converts itself into a more nimble, more dextrous, more comprehensive way for us to understand each other in a group.<sup>9</sup> We have leadership when a group evolves a custom of treating the sayings of particular people as expressions of new customs or . . . laws. The mechanism of evolution is human nature, the fact that some people assert themselves within groups and relate to others within groups in such a way that those others are drawn to treating particular assertive persons as leaders. Treating people as leaders means treating them as people whose words succeed self-fulfillingly in signaling what others will likely do and expect.

We have leadership, we have government, whenever someone has succeeded in situating herself as the signaler of what is likely to happen in a group. We say that she has *power*. Power in a group is effectiveness