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Law's Evolution and Law as Custom

WILLIAM A. EDMUNDSON*

To the extent that people share a purpose when they consult law, law itself could be said to have a purpose. “For what purpose do people consult the law?” asks Laurence Claus in his elegant and insightful book, *Law's Evolution and Human Understanding*.¹ He answers: not for enlightenment about what they ought to do, morally.² Lawyers are not moral experts and they are not consulted as such.³ The *Model Rules of Professional Conduct* authorize moral advice but emphasize its tactical utility.⁴ Therefore, Claus seems to suggest, the purpose and effect of law is not to fix what one ought morally to do.⁵ The purpose for which people consult legal experts is, rather, to learn what to expect others to do. People consult legal experts to learn what the experts predict will happen if one or another of certain alternative courses of action is taken. Often such a purpose presents itself as a request for assistance in achieving certain goals, but of course, that would encompass getting some assurance that the means proposed by the lawyer will succeed. Law,

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1. LAURENCE CLAUS, *LAW'S EVOLUTION AND HUMAN UNDERSTANDING* 2 (2012).

2. *Id.*

3. *See id.*

4. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2 (2014) (“Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”).

5. *See* CLAUS, *supra* note 1, at 5.

therefore, is a “purely predictive signaling system.”⁶ This will be news to those who think that laying down norms and making predictions are essentially distinct activities, and that law is essentially in the former business rather than the latter.

Claus says, “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.”⁷ The suggestion here seems to be that a purely predictive signaling-system account of the nature of law is uniquely able to unlock the insight that because-I-say-so authority cannot be the source of law’s value. That would be claiming too much. Many deny that because-I-said-so authority is now or could possibly ever be possessed by a legal system or its officials; but the persuasiveness of that denial does not depend on the acceptance of a purely predictive signaling account of legal systems. In saying this I do not deny that a purely predictive signaling system would have value. But I doubt that the value a legal system has, when it has value at all, can well be understood purely in terms of predictive signaling.

Claus is aware that law’s signals function not merely as predictors but as efficient causes of what they predict.⁸ Thus, he speaks of law as an *effective* predictor, even of law as a source of “self-fulfilling predictions” of what others in the community will do, forming a “self-perpetuating system” of such predictions.⁹ Here is where law and custom link up in Claus’s account: “The law of a community is the *expression* of its *customs*.”¹⁰ But law is not mere custom. It grows out of a particular kind of custom widely distributed across human communities: a custom

6. CLAUD, *supra* note 1, at 5. Brian Bix notes that, [t]he Scandinavian legal realist, Karl Olivecrona similarly argued for understanding legal rights and obligations as “signals” (this was his way of making up for the fact that, in his view, such rights and duties did not refer to anything in the world—he thought that rights and duties were like money: no referent but signals for behavior that works as long as people follow them).

Letter from Brian Bix, Professor, Univ. of Minn. Law Sch., to author (May 7, 2014) (on file with author).

7. CLAUD, *supra* note 1, at 5.

8. *See id.* at 7.

9. *Id.*

10. *Id.* Strikingly, “*the* expression,” not “*an* expression.” *Id.* (emphasis added). Presumably, customs can either remain unexpressed or find expression. Despite the singular pronoun, I doubt that Claus means to suggest that law, and law *alone*, is capable of expressing customs pertaining to officials—much less customs in all their variety. It is customary, for example, to address judges as “Your Honor,” but it is a further question whether that form of address is legally required. And, even so, a legal requirement may be forgotten while an informal custom arises, mandating the same conduct.

“of following leaders.”¹¹ This custom enables leaders to “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.”¹²

So, Claus tells us two things about the normativity of law: the first negative, the second positive. The negative point is that law’s normativity, also known as a law’s authority, does not and cannot involve a because-I-said-so right to be obeyed.¹³ I agree with this, but I want to restate it in terms that bring out somewhat differently what it is about because-I-said-so authority that makes it so implausible. Because-I-say-so authority involves the supposition that acts of obedience have some intrinsic value that stands apart from whatever instrumental value they have. Suppose a flight attendant possesses because-I-said-so authority to manage the passengers’ response in an emergency.¹⁴ Suppose the plane ditches in the surf just off an uncharted island and is about to sink. Thus, if the flight attendant tells a passenger to get bandages instead of water, and the passenger can plainly see that water will be more useful than bandages, the passenger’s getting bandages instead of water possesses intrinsic value, even if outweighed.¹⁵ To paraphrase David Estlund, we should be tolerant of an authority’s small errors.¹⁶ That means doing as they say unless it would be catastrophic. I agree with what I expect Claus would say: there’s no intrinsic value in following someone’s mistake, be it minor or otherwise.

Claus’s positive point about law’s normativity is more muted, and I want to state it in terms which may not precisely capture his view. The positive point, as I understand it, is that the normativity of *custom* is the key to understanding the normativity of law.¹⁷ I agree with this too, but

11. *Id.*

12. *Id.* at 7–8.

13. *Id.* at 6.

14. See DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 124 (2008).

15. See *id.* at 125.

16. See *id.*

17. See CLAUS, *supra* note 1, at 7–8. Brian Bix wonders, “Is there perhaps also a connection to be drawn here between Claus’s view and that of the classical English Common Law commentators, who claimed that common law judging was not law-making, but rather the discovery of ‘immemorial custom’?” Letter from Brian Bix to author, *supra* note 6. That connection would of course seem more attenuated in today’s “age of statutes.” See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF*

then the question of the normativity, if any, of custom has to be confronted. I suspect that Claus would be skeptical of the notion that community custom possesses any because-I-said-so type of authority. But, then, does custom possess, ever or sometimes, some other kind of normativity? What is it, and how can it come about that people ever have a duty to go along with the customs of their communities? By shifting the focus from a sovereign to a community we also tentatively reattribute any correlative right to obedience.¹⁸ Can the community ever have a moral right to its members' obedience to its customs?

All of this has to be worked out because legal discourse centrally, and necessarily, involves a family of normative expressions—"obligation," "right," "permission," and so on—whose surface grammar parallels that of moral discourse. Claus's most extensive discussion of moral normativity appears by way of a parable of prelegal castaways on a desert island.¹⁹ We are to assume that "the right thing to do" is to forcibly keep the piggish child from helping himself to an inordinate share of the unowned reserve of food and water.²⁰ By this, I understand Claus to mean that the piggish child has a moral duty to restrain himself, and that all others, whether or not affected, have a moral permission to restrain him if he will not, or cannot, restrain himself. "What [moral] difference would it make if this incident occurred after we had law and government?" Claus asks.²¹ His answer seems to be: none, but with this qualification:

Ultimately, we humans each think through for ourselves the rightness of what we do, including the rightness of individual uses of force against others, regardless of what the law predicts. Notice, however, that in weighing reasons for acting . . . the fact that [a] particular action is signaled by our community's legal system adds a *distinctive* reason to do the action. That added reason for action is the good of *having* the legal system—of having a community identity that comes through an effective signaling system . . .²²

The good of having such a system is very great, as Claus emphasizes again and again. But, to be exact, the weight that the system and relevant signal add has got to be discounted in our deliberations.

Th[e] reason for doing what the system predicts we will do varies in weight from one instance of action-choosing to another, depending on how much danger to the system's predictive effectiveness is posed by the particular

STATUTES (1982) (noting that the legal system has shifted from one once dominated by court-divined common law to one in which statutes are the primary source of law).

18. See CLAUS, *supra* note 1, at 14–15, 24.

19. See *id.* at 20.

20. *Id.*

21. *Id.*

22. *Id.* at 21–22.

instance of potential nonconformity *and* depending on how valuable the legal system really is.²³

Claus offers an illustrative example. “If a judge disregards existing law when deciding disputes, that obviously hurts law’s predictive effectiveness more than if a late night pedestrian jaywalks”²⁴ So, the judge should give observing the law great, though not decisive, weight, and the late-night pedestrian may in good conscience give the law negligible weight.

I do not think I am alone in finding this analysis problematic. One objection is this: it is difficult to understand how a judge is supposed to disregard, or regard, “existing law” if existing law is nothing other than a prediction of what a judge will do. A more serious objection is that it seems to leave the judge free to depart from existing law whenever she may do so without detection. But it seems to be a mistake to say, for example, that if a judge believes that punishing insider trading is unjust, then she should feel morally free to frustrate the enforcement of laws against insider trading on any pretext that effectively conceals her motive. It may be that Claus can avoid these and other unpalatable implications, but I would rather explore what I think is right about the underlying idea.

The desert island example assumes there is no customary scheme of rationing, but it nonetheless presupposes that there are moral norms of distribution such that each of the islanders has a right to some of the resources but not all of them, and that all are morally permitted to enforce that limit.²⁵ So, altering Claus’s question, what moral difference would a *custom* make, if it makes any difference at all? A custom can satisfy the antecedent of H.L.A. Hart’s “mutuality of restrictions” principle, also known as the “fair-play” principle.²⁶ If others subject themselves to rules so that all benefit, then in fairness I have a duty also to abide by those rules, provided that sufficiently many others can be expected to do so as well.²⁷ The principle and its application to the problem of authority have been controversial, but what Hart said in 1955 remains true today: “political obligation is intelligible only if we see what precisely this is

23. *Id.* at 22.

24. *Id.*

25. *See id.* at 21.

26. *See* H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185–86 (1955).

27. *See id.*

and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it.”²⁸

The story Claus offers about the evolution of leadership, or, more precisely, the custom of following leaders, can be recruited here. We humans are social animals, and we are here at all only because we have descended from a very long chain of ancestors, who were able to reproduce only because they found shelter and succor within a group. Claus approvingly quotes Niklas Luhmann’s dictum that “there never have been societies without law,”²⁹ and this is because, as Claus says, “[g]roups that are effectively led compete successfully against groups that are not.”³⁰ Group-selectionist theories have been readmitted to serious discussion in evolutionary biology after a long exile.³¹ (The idea that led groups out-survive unled groups can be traced back to Warder Allee.³²) But it is not entirely accurate to think that this process merely involved “gene pools that reliably produced persons who liked to lead and persons who liked to follow.”³³ What is correct is that it involved gene pools that reliably produced persons who are *moral*.³⁴

The theory of natural selection faces a *prima facie* difficulty in explaining why people are moral, ever. That is, it faces a difficulty in explaining why people should ever take anyone’s interests into account other than their own.³⁵ In the terminology of evolutionary biologists, “altruism”

28. *See id.* at 185.

29. CLAUS, *supra* note 1, at 18 (quoting NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 488 (Fatima Kastner et al. trans., 2004) (1993)).

30. *Id.* at 13.

31. *See* John Beatty, *Ecology and Evolutionary Biology in the War and Postwar Years: Questions and Comments*, 21 *J. HIST. BIOLOGY* 245, 246–247 (1988); Mark E. Borrello, *The Rise, Fall and Resurrection of Group Selection*, 29 *ENDEAVOUR* 43, 43–44, 47 (2005).

32. *See* WARDER CLYDE ALLEE, *COOPERATION AMONG ANIMALS: WITH HUMAN IMPLICATIONS* 204 (rev. ed. 1951) (discussing how well-organized flocks of hens with an established social hierarchy are more successful and produce more eggs than unorganized, unled flocks).

33. CLAUS, *supra* note 1, at 13.

34. I do not say that all persons are naturally moral, or that none are natural leaders or followers. The point is rather that most people are naturally attuned to rules and cheating. *See id.* at 14. The groups that survived the million years or so of hominin history were the groups in which most members were naturally disposed to be on the lookout for rules and naturally disposed to look to the group as the enforcer of those rules. *See id.* at 13. Call these rules the customs of the group, some of which, as Claus rightly notes, are constitutive of the group’s identity. *See id.* at 14. Leaders are those who act as agents of the group, and Claus describes compellingly how groups come to delegate authority to individuals to administer the customs of the group. *See id.* at 13–15, 17.

35. *See* ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1999).

refers to any behavior that is costly to the actor but beneficial to someone else, where benefits and costs are cashed out in terms of reproductive fitness.³⁶ How could altruists thrive, over evolutionary spans of time, in a population, when by definition they are disposed in ways that enable egoists to out-reproduce them?

Evolutionary biologist William Hamilton proposed that altruists would in fact out-reproduce egoists if egoism meant not making any sacrifices to benefit one's close kin.³⁷ Altruists would exhibit "inclusive fitness" through the mechanism of "kin selection."³⁸ But this proposal left unanswered the question: how did humans evolve a morality that respected unrelated humans? Paleoanthropologists tell us that, for millions of years, humans and their ancestors lived in bands averaging above twenty-five members.³⁹ Bands of this size were proficient at hunting, but too numerous to consist exclusively of close blood relatives.⁴⁰ Why did the kinfolk-only altruists not out-reproduce the whole-group altruists, reducing human bands to sizes too small to survive by hunting large and elusive game?

Evolutionary biologist Robert Axelrod showed how groups of unrelated individuals who are disposed to follow cooperative rules and punish cheaters could thrive and out-reproduce groups dominated by free riders and pure egoists.⁴¹ Where groups can benefit by cooperation, rules punishing freeriding can secure that benefit.⁴² True, pure altruists might seem to be able to secure the benefits of cooperation too, but Axelrod showed that an individual strategy of tolerating cheaters would lose out

36. See, e.g., Herbert A. Simon, *A Mechanism for Social Selection and Successful Altruism*, 250 SCIENCE 1665, 1665 (1990).

37. See W.D. Hamilton, *The Genetical Evolution of Social Behaviour. I*, 7 J. THEORETICAL BIOLOGY 1, 1, 11 (1964).

38. See Michael J. Wade, *Kin Selection: Its Components*, 210 SCIENCE 665, 666 (1980).

39. See Bruce M. Knauft et al., *Violence and Sociality in Human Evolution*, 32 CURRENT ANTHROPOLOGY 391, 393 (1991).

40. See CHRISTOPHER BOEHM, *HIERARCHY IN THE FOREST: THE EVOLUTION OF EGALITARIAN BEHAVIOR* 199 (1999).

41. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 49–53 (1984). Computer-simulated tournaments demonstrated that the nicer, more cooperative "TIT FOR TAT" strategy thrived for successive generations, tournament rounds, while exploitive, less cooperative strategies gradually dropped out of the tournament. See *id.*

42. See Özgür Güerç et al., *The Competitive Advantage of Sanctioning Institutions*, 312 SCIENCE 108, 108–09 (2006).

in the long run.⁴³ The hardest strategy by far, he showed in a celebrated series of simulations, was the simplest: “TIT FOR TAT,” which means treat everyone else cooperatively at the outset, but thereafter do as done unto by the other in the prior round.⁴⁴ In effect, shun a cheater. Further studies have discovered better strategies, but Axelrod’s larger point remains.⁴⁵ A disposition to cooperate but shun noncooperators is better than a purely egoistic disposition or a disposition to limit one’s cooperation to one’s kin.

Now comes a problem.⁴⁶ Cooperative norms are sustainable only if cheaters are punished.⁴⁷ Although an environment in which cheaters are punished is fraught with risks to all involved, studies show that people tend to gravitate toward sanctioning institutions and away from sanctionless ones.⁴⁸ But not every instance of cheating hurts someone.⁴⁹ Sometimes, even often, there is a temptation to free ride.⁵⁰ A cooperative benefit can be realized if most sacrifice their immediate advantage, but often it can be realized even if a few slack off.⁵¹ One “beater,” more or less, might

43. See AXELROD, *supra* note 41, at 52 (determining that strategies that allowed exploitation were less successful than the TIT FOR TAT strategy).

44. *Id.* at 13.

45. *Id.* at 38–40; see also Lorens A. Imhof et al., *Tit-For-Tat or Win-Stay, Lose-Shift?*, 247 J. THEORETICAL BIOLOGY 574, 574–576 (2007) (analyzing a study of four different cooperation strategies to promote win-stay, lose-shift as a superior strategy lacking the disadvantages of the tit-for-tat strategy); Martin Nowak & Karl Sigmund, *A Strategy of Win-Stay, Lose-Shift That Outperforms Tit-For-Tat in the Prisoner’s Dilemma Game*, 364 NATURE 56, 56, 58 (1993) (suggesting win-stay, lose-shift remedies the two primary weaknesses of the tit-for-tat strategy rendering it as a better strategy for cooperation behavior).

46. I am indebted to Keith Jensen correcting me in midcourse as I have made my way through some of this literature.

47. See Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137 (2002).

48. See Güerke et al., *supra* note 42, at 109.

49. Ernst Fehr & Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 EVOLUTION & HUM. BEHAV. 63, 64 (2004). As Ernst Fehr and Urs Fischbacher write, “if only second parties imposed sanctions, a very limited number of social norms could be enforced because norm violations often do not directly hurt other people.” *Id.* Moreover, the second-party sanctions are more difficult to disambiguate from mere dominance-seeking aggression. See Katrin Riedl et al., *No Third-Party Punishment in Chimpanzees*, 109 PNAS 14824, 14826 (2012).

50. See Douglas D. Heckathorn, *Collective Action and the Second-Order Free-Rider Problem*, 1 RATIONALITY & SOC’Y 78, 79–80 (1989).

51. See *id.* (“[T]he potential exists for actors to enjoy the fruits of the sanctioning system without bearing any costs associated with its creation and maintenance.”); see also Pamela Oliver, *Rewards and Punishments as Selective Incentives for Collective Action: Theoretical Investigations*, 85 AM. J. SOC. 1356, 1362, 1369 (1980) (discussing how individuals may be incentivized to defect because the belief that perfect unanimity is not necessary to achieve collective good).

not affect the success of a mastodon hunt, but the slacker will want a share too, and there is more than enough for everybody. The cost to an individual of punishing a slacker is greater than the benefit the punisher will garner for himself.⁵² How can cooperative groups not be eroded by free riding at the second level? Without third-party punishment, cooperation withers, but third-party punishers incur a cost.⁵³ Those who are indifferent to norm violators, except when they are directly hurt, would tend to out-reproduce those who are disposed to engage in costly punishment.⁵⁴ This is the puzzle of third-party punishment,⁵⁵ or what Karthik Panchanathan and Robert Boyd call the “second-order free-rider problem.”⁵⁶

Claus indirectly suggests that the puzzle is solved by punishing those who fail to punish cheaters.⁵⁷ The problem with this is that only in very specialized environments, such as military academies, is failure to report—much less, to punish—a violation itself punishable.⁵⁸ To complicate matters further, in experimental settings in which the human subjects are all authorized to punish others in a second round of a standardized “public goods game,” they often exhibit puzzling and even perverse behavior. In summary, these experiments support the following propositions: (a) people will normally express a sentiment favoring punishing a cheater, even if they are not directly affected; (b) people show no reliable willingness properly to administer costly third-party

52. See Fehr & Gächter, *supra* note 47, at 137 (stating that cooperation and punishment are costly and yield no pecuniary benefits). *But see* Fehr & Fischbacher, *supra* note 49, at 85 (“[A] large percentage of subjects are willing to enforce distribution and cooperation norms even though they incur costs and reap no economic benefit from their sanctions.”).

53. Fehr & Gächter, *supra* note 47, at 137.

54. See Bettina Rockenbach & Manfred Milinski, *To Qualify as a Social Partner, Humans Hide Severe Punishment, Although Their Observed Cooperativeness Is Decisive*, 108 PNAS 18307, 18311 (2011). Accurate punishers of course can realize a net benefit from having a reputation of being so, but, surprisingly, experimental subjects do not appear to select punishers over other cooperators as social partners, and punishers even take pains to conceal their readiness to punish. *See id.*

55. See Fehr & Fischbacher, *supra* note 49.

56. See Karthik Panchanathan & Robert Boyd, *Indirect Reciprocity Can Stabilize Cooperation Without the Second-Order Free Rider Problem*, 432 NATURE 499, 499 (2004).

57. See CLAUS, *supra* note 1, at 16.

58. See, e.g., 10 U.S.C. § 6965 (2012) (noting that if Naval Academy officers fail to report hazing activity conducted by their subordinates, the officers face punishment up to dismissal from the Navy if convicted at court-martial).

punishment, even when all players are explicitly authorized to do so;⁵⁹ and (c) it is difficult to design an experiment to test people's willingness to engage in third-party punishment without at least implicitly signaling to them that they *are* authorized, and perhaps expected, to do so and may be monitored as to how they exercise that authority.

Other studies show the advantages of single-punisher arrangements, in which a single player in a cooperative game is known to all players to be the sole player authorized to punish.⁶⁰ This is consistent with Claus's idea that "[l]eadership may exist among us long before we are conscious of really needing it."⁶¹ Taken together, the empirical findings to date are consistent with the thesis that although people naturally hate cheaters, they are naturally inhibited when it comes to punishing cheaters. That natural inhibition is overcome if the actor is either a direct victim or has been specifically authorized to punish. In these latter instances, people readily punish even where doing so is costly to them and gains them nothing. But when they are authorized along with all others, uncoordinatedly, they are bad at it. Not only is a wide diffusion of responsibility a notoriously iffy way of assuring that someone takes responsibility,⁶² errors and excesses constantly threaten to spur an escalating spiral of retribution and counter-retribution.⁶³ Human cooperation and human morality were adaptive because the permission to punish was never distributed in a diffuse, Lockean way. An inhibition of the natural, retributive impulse was adaptive. The groups likeliest to thrive were those which delegated the business of enforcement to some subset of the whole, often to a powerful leader.

59. See Matthias Cinyabuguma et al., *Can Second-Order Punishment Deter Perverse Punishment?*, 9 EXPERIMENTAL ECON. 265, 278–79 (2006); Benedikt Herrmann et al., *Antisocial Punishment Across Societies*, 319 SCIENCE 1362, 1362 (2008).

60. See, e.g., Rick O'Gorman et al., *Constraining Free Riding in Public Goods Games: Designated Solitary Punishers Can Sustain Human Cooperation*, 276 PROC. ROYAL SOC'Y B. 323 (2009).

61. CLAUS, *supra* note 1, at 13.

62. See John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968); James M. Hudson & Amy S. Bruckman, *The Bystander Effect: A Lens for Understanding Patterns of Participation*, 13 J. LEARNING SCI. 165, 165, 170 (2004).

63. See Laurent Denant-Boemont et al., *Punishment, Counterpunishment and Sanction Enforcement in a Social Dilemma Experiment*, 33 ECON. THEORY 145 (2007); Nikos Nikiforakis, *Punishment and Counter-Punishment in Public Good Games: Can We Really Govern Ourselves?*, 92 J. PUB. ECON. 91 (2008). In experimental designs, setting aside problems of error and excess in the administration of punishment is tempting because accounting for such types of error can "add sufficient mathematical complexity that analysis becomes intractable." Panchanathan & Boyd, *supra* note 56, at 499.

The punisher or order-keeper role is a regulated one in hunter-gatherer societies living today and even, as Claus notes, in chimpanzee groups.⁶⁴ It is possible to discern a line from the early Pleistocene circumstances of human existence, or about one to two million years ago, up to the advent of agriculture, forty thousand years ago. This is the “early evolutionary environment,” and it contains the major determinants of any native normative endowment that we humans possess.⁶⁵ It is therefore natural, in this sense, for people to be *legal*, that is to say, to regard the enforcement of serious customs and moral norms as a matter for their group, in the first and final instance. The argument is reinforced by anthropological evidence adduced by Christopher Boehm and others for the hypothesis that early human societies, in contrast to primate societies, exhibit a “reverse dominance hierarchy,” that is, a pattern of restraints that keep the most powerful member of a group from lording it over all.⁶⁶ Of course, the most powerful member is also very likely the most effective order-keeper and custom-enforcer. Therefore, the evolution of human societies and human social dispositions has had to maintain equipoise between tendencies toward dominance and tendencies contrary to dominance. Morality and cooperation among humans first became possible when “reportorial” punishment—gossip—made it possible for the weaker members of a group to assure that the group’s designated rule-enforcer dealt with cheaters without becoming oppressively dominant.

This story offers some normative resources that are not obvious in Claus’s more streamlined account. Cooperative rules that succeed would quickly become customary. But it is also clear that such rules are normative, that is, they rest on and give reasons that reflect interests that encompass but are not limited to those of the individual actor or her kin. Some customs are mere customs, in a sense that is often contrasted with moral rules. But many customs are morally binding, especially where they represent entrenched solutions to important coordination problems.⁶⁷ These customary rules are normative also in the robust sense that they are not mere factors to be weighed on each occasion by each individual,

64. See CLAUS, *supra* note 1, at 13. Order-keeping and third party punishment should not be equated. See Riedl et al., *supra* note 49, at 14824.

65. See William A. Edmundson, *Politics in a State of Nature*, 26 *RATIO JURIS* 149 (2013), and sources cited therein.

66. Christopher Boehm, *Egalitarian Behavior and Reverse Dominance Hierarchy*, 34 *CURRENT ANTHROPOLOGY* 227, 236–37 (1993).

67. See John M. Finnis, *Law as Co-ordination*, 2 *RATIO JURIS* 97, 102 (1989).

but are presumptively binding. The practices of the community form a link between some (doubtlessly complicated) general moral principle and official acts intended to trigger moral consequences, in the form of moral duties, for actors within the range of that principle.⁶⁸ The normativity of such customary rules would be expressed and maintained by enforcement of some kind, whether persuasive or coercive. But the enforcement of these rules had itself to be governed by moral norms that restrict the degree and agency of justified punishment. I do not think that Claus would deny that in such circumstances the community would come to have a right—defeasible, of course—to enforce the customary norms believed essential to the group’s cohesion and survival. And punishment cannot intelligibly be administered solely for the offense of getting the balance of all reasons wrong. Punishment makes sense only in the context of presumptively categorical norms.

The community is not merely the happenstantial holder of sundry rights correlative to undirected, general moral duties. As Stephen Perry has pointed out, the Hohfeldian moral power that is the nubbin of political authority, as traditionally conceived, belongs to a different category from any aggregate of disconnected moral liabilities.⁶⁹ Claus promisingly suggests that a custom of following leaders is what both systematizes and extends the reach of existing community customs,⁷⁰ or of those of them that are, as Hart put it, “in some sense non-optional” because backed by “serious social pressure.”⁷¹ The universal human custom of following leaders, which Claus speaks of, is itself an expression of something more deeply embedded.⁷² It is in our nature to refer the application of the “serious social pressure” that backs a community’s moral norms either to the community itself as “the Entirety”—the anthropologist E. Adamson Hoebel’s term⁷³—or to its leadership.

68. Cf. David Enoch, *Authority and Reason-Giving*, 89 *PHIL. & PHENOMENOLOGICAL RES.* 296, 299–300, 310 (2014) (pointing to authoritative directives as the catalyst for normative changes in the reasons for actions).

69. See Stephen R. Perry, *Political Authority and Political Obligation*, in 2 *Oxford Studies in Philosophy of Law* 1 (Leslie Green & Brian Leiter eds., 2013).

70. CLAUS, *supra* note 1, at 13–14.

71. See H.L.A. HART, *THE CONCEPT OF LAW* 82, 169 (Paul Craig ed., 3d ed. 2012).

72. See CLAUS, *supra* note 1, at 13–14.

73. E. Adamson Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 *YALE L.J.* 951, 955 (1942). The term is also used by Carl Schmitt:

The oldest justification for parliament, constantly repeated through the centuries, takes into account an extreme “expedient”: The people in its entirety must decide, as was originally the case when all members of the community could assemble themselves under the village tree. But for practical reasons . . . one helps oneself quite reasonably with an elected committee of responsible people, and parliament is precisely that.

The community benefits if it appoints leaders to manage the group's norms. Holmes's remark that the business of government cannot always be done in a town meeting or an assembly of the whole⁷⁴ is as true of Pleistocene hunter-gatherers as it was of the burgeoning city of Denver, Colorado. The master custom that Claus invokes, that of following leaders, is itself a solution to the problems that diffuse enforcement of other "primary" cooperative norms would create.⁷⁵ Robert Nozick's critique of Locke's "natural executive right" explains why.⁷⁶ "Do-it-because-I-say-so" grew out of "Do-it-because-*we*-say-so-and-I-am-the-one-permitted-to-make-you-do-it."⁷⁷

Not every solution to a coordination problem creates a moral duty.⁷⁸ But if coordination problems are endemic in social life, and there is a pro tanto moral duty to comply with those customs that suitably solve those problems (and are not merely Nash equilibria at a low level of overall benefit) then that might tell us something about how we stand vis à vis a signaling system that effectively predicts how instances of those problems will be dealt with. It is not superstitious to think that there is an at least pro tanto moral duty not to disappoint the expectations others have reasonably formed about how one will conduct oneself in what Scott Shapiro has called "the circumstances of legality."⁷⁹ True, such a duty is not the same as a duty to do as the law says simply because it says so. But that nonidentity should encourage rather than squelch the hope that a worthy conception of political authority is within reach.

So, Claus has not shown that the idea of authority is empty, although he has shown, as others have, that a certain conception of authority is implausible. I do not mean to disparage the importance of dismantling this empty conception of the nonempty concept of authority: it has

CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 34 (Ellen Kennedy trans., 1988).

74. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915).

75. See CLAUDIUS, *supra* note 1, at 13–14.

76. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174–182 (1974).

77. See *id.*

78. Moral errors on the part of others can trigger moral duties on one's own part. Suppose actor *A* belongs to a group that observes custom *C*, which it believes to be morally obligatory. If a catastrophic panic will result if *A* does not conform to custom *C*, then *A* has a pro tanto duty to conform to custom *C*, and this is so regardless of whether custom *C* is otherwise morally obligatory to follow.

79. SCOTT J. SHAPIRO, *LEGALITY* 170–73 (2011).

enabled great injustices and harms.⁸⁰ The positive achievement of Claus's argument consists in the linkage he makes between law and custom, or more exactly, between the authority of law, properly conceived, and the authority of custom.

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. The perennial difficulty is that no proposed general principle of the needed scope has escaped controversy. On the reconception I endorse, and which I think Claus has proposed, there is no principle that can instantaneously generate a moral duty unless there is a strong general disposition to treat official utterances as a sufficient guarantee of future cooperative behavior. "Instant custom" sounds like an oxymoron on the same order as "instant tradition." But it is not. If traffic is uncontrolled on the streets, creating a serious coordination problem of moral importance, and people customarily solve serious moral problems by doing what Simon says, then, if Simon says, "Drive on the right," *presto*, there is a general, pro tanto duty to drive on the right. Now, were Simon to have said instead, "Drive on the right because I say so," there can still be a pro tanto duty to drive on the right. But Claus is right to stick a needle into Simon's balloon in this latter case. Simon's signal generates duties only because of the normativity of custom.

Often, the custom of following a leader's signals is imperfect. It may be that the leader signals "drive 55 mph" but the custom that develops is "drive 65 mph." It would be tedious to insist that drivers are nonetheless morally obligated to drive 55 rather than 65. There is slippage between the signal the lawgiver sends and its customary effect. Moral duty tracks the customary effect, unless of course the effect is beyond the bounds of critical morality. The traditional conception of authority wrongly represented the sovereign's commands as instantly, frictionlessly imposing duties.

Custom is among the sources of law. That much is universally agreed. But custom can also *be* law, independently of promulgation, as many, but not all, have agreed. This raised further questions. Is custom normative, and if so, how? Insofar as a customary norm is or becomes a

80. He suggests, correctly I think, that contractualist accounts of political obligation have perversely tended to perpetuate the conception of political authority as a because-I-said-so moral power. As Claus explains, social-contract contractualism ousted the divine pedigree theory of political authority but retained the idea that political authority consists in something like a because-I-said-you-could-say-so moral power, but one conferred promissorially. See CLAUS, *supra* note 1, at 150.

legal norm, does it manifest or acquire a different kind of normativity? Or does its original normativity contribute to the normativity of law? The answer I favor, and I think Claus favors, is that law's normativity is derivative. In being codified, a custom does not acquire its normativity. Rather, legal promulgation depends upon custom for whatever normativity it confers.

This view will have to be worked out with answers to related questions having to do with custom as a condition of legal validity. Kelsen wrote that the doctrine of *desuetudo* states a necessary condition of a norm's legal validity.⁸¹ In contrast, Hart's view was that *desuetudo* is a doctrine that a legal system might take or leave, and that norms that are customarily ignored may nonetheless possess legal validity.⁸² I incline toward Kelsen's view even though it seems to involve a paradox. Law can have any content whatever, he believed, but it cannot validly, or at least not coherently, include the denial of the doctrine of *desuetudo*.⁸³

In summary, my hypothesis, and I hope Claus's, is that every legally normative utterance resolves into one expressing (a) custom-implicating moral normativity, (b) custom-extending moral normativity, or (c) normativity "in the manifesto sense," to borrow a phrase of Joel Feinberg's: the proclamations of leaders whose effectiveness is marginal or imperfect can have this manifesto quality.⁸⁴ I leave aside official utterances that do not purport to describe obligations and so are not normative, directly anyway, in the relevant, obligation-implicating sense. Thus, I set aside those official utterances that purport to express solely the kind of conditional normativity typical of warnings, "obligings," rather than "obligations," in Hart's sense; and I likewise set aside those that serve only to express what could be called "recipe normativity," the kind that attaches to statements of how to do what we do not have to do if we do not want to (such as writing a will or forming a contract).

81. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 172–73 (Anders Wedberg trans., 1961) (1945).

82. See HART, *supra* note 71, at 103. Kelsen's attachment to *desuetudo* is as ironic as Hart's doctrine that unpracticed but valid primary legal rules exist. One would expect existence to follow from validity, efficacy or no efficacy, for Kelsen, given the positing of a *grundnorm*; for Hart, one would expect nonexistence to follow from *desuetudo*, validity or no validity, given his practice theory of rules.

83. See KELSEN, *supra* note 81, at 119.

84. JOEL FEINBERG, *Nature and Value of Rights, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 143, 153 (1980).

If this is correct, there is no such thing as a distinctively legal brand of normativity.⁸⁵ Claus overstates that “[w]hen we say that [someone] has an obligation to [do something], we mean a *moral* obligation. There isn’t really any other kind.”⁸⁶ Well, whether there is or there is not, sometimes people mean to say there is. More than a few sincerely think legal idioms express a special, perspectival, or “scare quote” kind of normativity. The manner in which various normative idioms are jumbled together is what makes an understanding of distinctively legal normativity so elusive. And, of course, expressing normativity and possessing it are two different things. Whatever kind of normativity legal utterances *express*, moral normativity, either custom-dependent or custom-extending,⁸⁷ is the only kind of normativity they can actually *possess*.

What I have said so far has not addressed a further issue: that of the content of law. If the only kind of normativity law can possess is moral normativity, it is tempting to take a further step and say that the *content* of law simply is the moral difference that specified official acts succeed, in the right way, in making. This is the step that Mark Greenberg proposes we make.⁸⁸ I suspect that the plausibility of his proposal will turn on

85. This is not quite—yet?—the consensus view, but it has broken out of the workshops and specialist journals into the pages of a leading generalist law review. *See, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. (forthcoming 2015).

86. CLAUS, *supra* note 1, at 103. “Law may add concrete detail to [one’s] moral duty,” however, “by . . . telling us [what] other[s] . . . will expect.” *Id.* Putting the point this way seems oddly circuitous. If what others expect me to do can change what my moral duty is, it must be that the expectations of others about what I will do are reasons for me to do as they expect. And Claus does endorse this, too: “Law is effective at predicting what you will do because law gives you reasons for doing it” by contributing “to your understanding of what others will likely do and expect.” *Id.* So, it looks as though Claus’s view is that the only duties we have, broadly speaking, are moral duties that derive from the balance of all reasons, but certain details of what moral duty requires can be gleaned from the expectations of others, as encapsulated in propositions of law. Whether one has an obligation to serve in the military is a matter of moral obligation; legislation cannot create such a duty but it can signal where and when one “should” report for duty. I cannot give an unqualified endorsement to this as a picture of moral obligation because (a) I think categorical moral restrictions and moral permissions are not so easily assimilated into a view that represents moral requirements as entirely a matter of case-by-case balancing, and (b) I see no reason why the expectations of others should not be capable of determining what is morally required in gross, as well as in detail.

87. Some utterances of law merely duplicate independent moral truths. In such cases, Claus and others may be correct in thinking that the normativity of such utterances is mere reflection. I incline toward what I take to be John Gardner’s view that law’s taking an obligation seriously adds something, even if the obligation is already a moral one. *See* Richard Marshall, *Law as a Leap of Faith*, 3:AM MAG. (Sept. 6, 2013), <http://www.3ammagazine.com/3am/law-as-a-leap-of-faith> (interview of John Gardner).

88. *See* Greenberg, *supra* note 85.

how plausibly the qualification “the legally proper way” gets spelled out, as he acknowledges he has yet to do.⁸⁹

One thing that Claus’s approach and Greenberg’s approach have in common is the recognition that law takes up a role on an already-set normative stage, and that it is this backdrop that gives shape to the moral difference that officials may make. Legal theory need not invoke a newfangled shadow normativity to explain what goes on in the gap between what officials attempt to do and what they succeed in doing. Greenberg attributes the mistake to the assumption, plausible as it may be, that legal content, involved as it is in texts, is a linguistic content.⁹⁰ Of course it is puzzling how linguistic legal content can have normative force if, as seems obvious, texts are not per se norms, moral or otherwise. The official production of texts (written or oral—I’ll call them “utterances”) may *trigger* (David Enoch’s useful term) moral obligations, but it can also fail to do so.⁹¹ The tenor and even the effectiveness of official utterances seem to require that they invariably generate norms of some kind, which then either earn morality’s imprimatur, or do not. Hart proposed a neat solution: there are *legal* norms, which are all and only those norms that satisfy certain criteria which legal officials recognize as validating.⁹² Officials regularly produce legal utterances that are candidate moral norms, usually successful candidates if circumstances are right, but invariably are legal norms.

The move that Hart made that has caused the most trouble, in my view, is that of disjoining two sets of social practices from one another. One set of social practices consists of those that, together, constitute the effectiveness of a legal system. The other set consists of official, or “insider,” practices that constitute the existence of a special social rule he called the rule of recognition. (Hart attracted criticism for his practice theory of rules, but that is not the problem I am trying to describe.) Once this disjunction is taken seriously, the effectiveness of a legal norm is conceived as one thing, and its existence as another, and its moral value of course yet another. The norms that form the content of the legal system are those picked out by operation of the rule of recognition, rather than those adopted as, and having impact as, social, supra-official practices.

89. See *id.* at 1323 & n.72.

90. Mark Greenberg, *supra* note 85, at 1295–96.

91. See David Enoch, *Authority and Reason-Giving*, 89 *PHIL. & PHENOMENOLOGICAL RES.*, 296, 299 (2014).

92. See, e.g., Hart, *supra* note 26, at 185.

Up to a point, of course. If officials' utterances and social practices are at too great a variance, there isn't a legal system; but the legality of a given norm is not conditional on its having any effect whatsoever outside, or even inside, the official circle. The "criteria" of a rule of recognition are capable of reaching norms that have yet to, and might never, appear on any official's psychological radar screen.⁹³

The alternative picture that Claus offers is one that highlights the customary social background. Custom is normative, and law works by channeling custom-in-gross into progressively finer and more precise grooves. If there is normative moral value resident in the custom of elevating and following leaders, then that normativity ought to flow downstream into the finer channels officials carve and into the fresh territory they wish us to occupy. In places, that flow is too diluted, and normativity trails off. In places, officials direct the stream over a cliff, and it is no longer normative at all. In places, the stream is overtaken by stronger normative streams and can only make a difference yet farther downslope, where it reaches to details of procedure, compensation, and punishment. Empty channels into which custom does not reach are simply not law. Nothing is gained by saying that *legal* normativity flows there.

93. In this regard, Hart's account shares an implausible feature with Dworkin's: it is committed to the legal validity of unknown and never-to-be-known norms. It is not, however, committed, as Dworkin's is, to the legal validity of humanly unknowable norms, and the legal invalidity of all humanly believed and knowable norms.