



## REFLECTION

**Beyond Weber:  
Law and Leadership in  
an Institutionally Fragile World**

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Can one even imagine law without leadership? Walk inside a county courthouse anywhere in the country, and you will find more than jurors waiting to be empaneled or trial counsel holding juries rapt at attention. Down the hall, past judges adjudicating felony trials or contentious family disputes, is a presiding judge—the local trial court’s leader, who may be called on to decide which judge is assigned to the family law division, which judge moves to a felony courtroom, and whether it is feasible for a judge who previously ruled on a suppression motion to adjudicate a subsequent one if the case is dismissed and then refiled.<sup>1</sup> Across town, judges reviewing the trial court decision on an appellate panel lead by writing path-breaking opinions that persuade jurists on the other side of a continent or by finding principled reasons to protect the trial court’s discretion. Then there are the law schools these judges attended: Do they warmly welcome new students or run themselves smoothly without deans? No more so than any agency entrusted with legal power—under local, tribal, state, federal, or international law—runs itself. Even those law-related organizations replete with audacity struggle on their best days to eschew the familiar features of bureaucratic authority allocating power to chief judges, administrators, commissioners, secretaries, or other leaders in favor of the alluring—but consistently elusive—ideal of pure democracy, pure technocracy, or pure anything.<sup>2</sup>

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1. *See* *People v. Rodriguez*, 377 P.3d 832, 834-35 (Cal. 2016).

2. *See generally* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, Speech at the Second Century Conference at the University of Pittsburgh School of Law (Sept. 21, 1995), *in* 57 U. PITT. L. REV. 405 (1996).

Questions of leadership cast a long shadow, too, on another quintessential law-related setting beyond the judiciary, agencies, and schools of law: the legislature. From a distance, aspects of the legislative process may seem to reflect an abhorrence for hierarchy. Yet leadership seems to figure prominently in the lawmaking process. Institutional rules distribute agenda-setting power unequally.<sup>3</sup> And it is difficult if not impossible to understand, let alone predict the outcome of, the legislative process without expecting to find (at least frequently and perhaps always) certain deeply motivated, and likely quite expert, lawmakers along with their staff corralling a coalition then straining to hold it together even if it takes duct tape. Handing those legislators the metaphorical pieces of tape are leaders of a different kind, persuading people and organizations to raise their voices and working to ensure that the legislature hears them.<sup>4</sup>

If we are to understand law and its place in society, then we must reflect on what leadership *is*—and how it is exercised—in a legal context. But this enterprise is a subtle one, depending not only on an understanding of law-related contexts such as courts, agencies, and civil society groups but also on an appreciation of concepts such as discretion, politics, “charisma,” tradition, and institutions.

In what follows, I offer a variety of examples describing how leadership can affect law. I then advance three arguments about the likely relationship between law and leadership. First, the study of leadership in legal settings benefits from an understanding of the tangled relationships between discretion and leadership and between (nominally analytically distinct) projects focused on understanding the descriptive and prescriptive properties of leadership. Second, Max Weber’s prescient analysis of authority in the modern bureaucratic state offers a powerful framework for understanding core features of leadership in law-related contexts. Finally, despite the value of Weber’s approach to politics and authority, his account tends to underplay certain further aspects of leadership—how careful dealmaking can hold together fragile coalitions, for example, or how leaders trusted by their audiences can coax those audiences to reimagine the very nature of their interests. Important as it is to understand Weber’s indispensable triad of bureaucratic authority, tradition, and charisma, these additional elements convey a more telling, dynamic story describing how leaders and law influence each other, and therefore society, in a world of institutions that depend on leadership to function.

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3. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1846-49 (1999); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 514-17 (1981).

4. See, e.g., JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 38-49 (1996) (describing interest group participation before Congress).

### Law, Leadership, and Weber's Triad

On a frigid January day in 1961, Chief Justice Earl Warren administered the oath of office to President John F. Kennedy.<sup>5</sup> In his short inaugural address, President Kennedy expressed certain aspirations quite familiar to policymakers and the public. Brimming with allusions to generational change against the backdrop of a decades-long Cold War touching almost every aspect of geopolitics, the speech also called for a “world of law, where the strong are just[,] . . . the weak secure[,] and the peace preserved.”<sup>6</sup> These aspirations were familiar because, among sophisticated observers and laypeople alike, sustained conversations about law and legal institutions in modern societies routinely turn to normative expectations about how law should be interpreted or implemented, how to ensure that it is intelligible to the public, or what its relationship should be to particular conceptions of justice.

Twenty-eight years earlier, President Franklin Roosevelt's inaugural address conveyed to a tense country that “fear itself” was the only thing the public had to fear.<sup>7</sup> The President's own apprehensions at the time are revealing. His concern was the fragility of institutions—the very institutions to which law-related aspirations are entrusted. “[I]f [I] prove[] a bad president,” he reportedly observed to an aide, “[I] w[ill] also likely . . . prove the last president.”<sup>8</sup> Whether or not President Roosevelt's wry comment accurately captured the country's condition at the time, what he instinctively grasped then and later was how profoundly institutions depend not only on shared aspiration but also on specific people making judgments constrained by their environments.<sup>9</sup> Subject to a variety of social and economic pressures, individuals exercising leadership inside and outside public institutions prove critical to realizing any robust normative vision associated with the rule of law. Through these individuals' actions, courts, legislatures, agencies, and civil society groups—in different ways—give meaning to legal concepts, adapt to changing circumstances or local conditions, and defend the integrity of institutions.

As leadership in legal settings might plausibly be taken to mean the exercise of influence over the people and processes shaping law in society, the

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5. CHRISTINE L. COMPSTON, EARL WARREN: JUSTICE FOR ALL 111 (2001).

6. President John F. Kennedy, Inaugural Address (Jan. 20, 1961), <https://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntFl7SVAjA.aspx> (to locate, select “Transcript” button).

7. President Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933), <https://www.archives.gov/education/lessons/fdr-inaugural>.

8. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 15 (1938).

9. See Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953, 76 U. CHI. L. REV. 587, 717 (2009).

concept must encompass creative forms of expression that mobilize society around shared legal ideals or concerns, as well as compelling examples or even acts of forgiveness undertaken by pioneers in law-related roles and civil society. Compelling examples are as wide-ranging as the substance of law itself. They include Nelson Mandela's nearly ten thousand days in prison and subsequent role in reforging his country's constitutional order,<sup>10</sup> Judge Mary Schroeder's authorship of the first Arizona law barring sex-based employment discrimination,<sup>11</sup> Judge Mildred Lillie's pioneering career and service on the state bench,<sup>12</sup> and Judge Constance Baker Motley's groundbreaking career.<sup>13</sup> Equally relevant are Representative Emanuel Celler's persistent effort to forge a new immigration system for the United States in the mid-1960s,<sup>14</sup> Gifford Pinchot's machinations to forge the U.S. Fire Service,<sup>15</sup> and the careful planning and litigation undertaken by lawyers challenging firearms regulations in *District of Columbia v. Heller*.<sup>16</sup>

These examples underscore how the conversation about leadership must encompass more than merely the work of individuals exercising official authority. Whether in civil society, private economic enterprise, or government, there is little room for leadership—at least in law-related settings—to exist without some discretion. Although it is not quite the same thing to engage in leadership and to exercise discretion, there is no escaping the bond between these two concepts.<sup>17</sup>

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10. See generally NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1994).

11. See Am. Bar Ass'n, 2001 Margaret Brent Honoree: Honorable Mary Murphy Schroeder (n.d.), [http://www.americanbar.org/content/dam/aba/migrated/women/bios/schroeder\\_mary\\_murphy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/women/bios/schroeder_mary_murphy.authcheckdam.pdf).

12. See Myrna Oliver, *Mildred L. Lillie, 87: Appeals Court Justice, Pioneer in Legal Field*, L.A. TIMES (Oct. 29, 2002), <http://articles.latimes.com/2002/oct/29/local/me-lillie29>.

13. See Douglas Martin, *Constance Baker Motley, Civil Rights Trailblazer, Dies at 84*, N.Y. TIMES (Sept. 29, 2005), <https://nyti.ms/2lk8Nx0>.

14. See *Representative Emanuel Celler and Immigration Laws* (C-SPAN television broadcast May 6, 2016), <http://c-spanvideo.org/x9iwh>.

15. See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928*, at 1-2, 255-58 (2001).

16. 554 U.S. 570 (2008).

17. See Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229-36 (2006) (arguing that some measure of discretion is implicit in the routine administration of many if not most major statutory responsibilities, enabling agencies to engage in learning and adaptation and to make use of the knowledge they gain over time). For an analysis of the social welfare case for allowing administrators to exercise discretion over major decisions in the American constitutional system, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). Courts also recognize the importance of discretionary judgments in a variety of institutional settings. See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill.

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Discretion lets a leader make choices about how a group or organization pursues its mission. Leadership nearly always pivots on the ability to use resources in a manner that is not entirely constrained or to reimagine a situation in terms that lessen the importance of some constraints and highlight the relevance of certain possibilities. It is tempting to imagine that we can understand how leaders make discretionary choices by segregating the purely descriptive questions of managerial technique, individual interest, and institutional culture from somewhat more prescriptive discussions of why institutions justify discretion and whether those exercising it—police officers, senior defense officials, asylum adjudicators, or trial court judges—live up to even their own stated ideals. In practice, such segregation is difficult. Societies tend to treat law as deeply bound up with institutions that aspire to legitimacy, so it is difficult to say much about leadership in law-related contexts without not only acknowledging that descriptive and prescriptive enterprises are analytically distinct in principle but also recognizing that key actors and the public will likely be influenced by their judgments about the ideals that leaders are pursuing.

So important is discretion to leadership that it is worth pondering the implications of any ambitious project to extinguish discretion entirely, at least to the greatest extent feasible. Agency officials, leaders of social movements, and judges play starkly different roles in society. But without a measure of discretion, they have little to contribute by adapting existing practices to changing circumstances, reconciling divergent imperatives relevant to advancing social welfare, or taking responsibility for justifying particular applications and interpretations of legal norms. Whether one seeks to curtail discretion drastically by replacing all standards with rules, by relying on software deploying artificial intelligence deep-learning algorithms, or by subjecting decisions to enormously intrusive and risky *ex post* review, eliminating discretion essentially entails accepting the premise that institutions can dispense with leadership. To explore how leadership works in legal contexts, we must consider both how and to what ends people with the capacity to shape institutions exercise their discretion.

Perhaps because we often tend to conceive of discretion as the absence of constraints, courts rarely say much about what constitutes the sound exercise of discretion. Whether the case involves the exercise of routine discretion or the more significant issues where prudence or doctrine may leave a matter largely in the ambit of another institution's choice, courts often confine themselves to declaring whether an action constitutes a permissible exercise of

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App. Ct. 1968) (holding that the business judgment rule supported not interfering with the directors' decision, given the range of legitimate stakeholder interests); *Anderson v. Peden*, 587 P.2d 59, 68-69 (Or. 1978) (holding that a county's discretionary denial of a permit to place a mobile home on the petitioner's land merited deference).

discretion in a particular setting.<sup>18</sup> But when courts do manage to convey ideas about sensible uses of discretion, their insights are telling—and, indeed, they sound like the attributes of leadership. Courts may reference fidelity to underlying values associated with a statutory scheme or constitutional principle, consideration of different points of view, assessment of relevant technical or scientific explanation, and reflection on practical consequences and how they may affect the legitimacy of an institution.<sup>19</sup>

Max Weber, ever an astute observer of both institutions and leadership, would recognize certain familiar ideas in these formulations.<sup>20</sup> He would see in these descriptions an acknowledgment of the importance of bureaucratic legality, one of the forms of authority that he considered especially central to understanding the modern bureaucratic state.<sup>21</sup> A tragic yet admiring perspective on politics—ever the handmaiden of leadership—is at the core of Weber’s remarkable essay “Politics as a Vocation.” Amid the elements of pragmatic political theory, social psychological insights, and organizational analysis, Weber finds that politics reflects what makes us human.<sup>22</sup> For Weber, it is human to strive, to scheme, to plan, to adapt, and perhaps above all to face the dilemma of acting not alone but in concert. It is human to dream and aspire to ideals greater than oneself. It is human, too, to fall prey to vanity or impatience, to lose hope, to fail. Here is a keenly observed summary of the stuff politics therefore entails—the profound tensions at the core of a civilization that has come to rely on organizations to reconcile daily life with legal aspirations: between the ideal and the practical, between the noble and the violently coercive, and between the institutional and the personal. Despite these tensions, Weber understands the role politics can and probably should play and celebrates it.<sup>23</sup>

Along the way, the German social theorist reminds the reader of critical factors that are likely to recur in the political places and spaces where law is forged, implemented, and interpreted. He explores the role of organizations

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18. See, e.g., *Berkeley Hillside Pres. v. City of Berkeley*, 343 P.3d 834, 849-51 (Cal. 2015).

19. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Sargon Enters. v. Univ. of S. Cal.*, 288 P.3d 1237, 1253 (Cal. 2012); *Bailey v. Taaffe*, 29 Cal. 422, 424 (1866); *Platypus Wear, Inc. v. Goldberg*, 83 Cal. Rptr. 3d 95, 97-98 (Ct. App. 2008); *Davis v. Bos. Elevated Ry. Co.*, 126 N.E. 841, 844 (Mass. 1920); *Operation Save Am. v. City of Jackson*, 275 P.3d 438, 447 (Wyo. 2012).

20. See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77-128 (H.H. Gerth & C. Wright Mills eds. & trans., 1958).

21. *Id.* at 78-80.

22. *Id.* at 127.

23. *Id.* at 83-84, 95, 127.

and the state itself in life;<sup>24</sup> the role of passions for ideals as well as more conventional narrow, personal goal-seeking;<sup>25</sup> and the fact that authority does not flow from one source but at least three: tradition, “charisma,” and bureaucratic legality itself.<sup>26</sup> The Weberian perspective would also emphasize how anywhere discretion *may* be exercised, a leader may choose or be forced to rely on more (or, in a fragile institution of contested legitimacy, less) than just a secretarial order or its equivalent.<sup>27</sup> The evocative term “charisma” long ago entered the lexicon of both popular culture and our understanding of leadership. But for Weber, the personal qualities associated with this concept—the capacity to inspire trust that some members of the public would someday associate with President Roosevelt, for example, and to forge bonds of loyalty—could routinely make the difference between a leader’s inspired success or abject failure.<sup>28</sup>

In the background there looms the possibility of an appeal to tradition and, through it, an opportunity to leverage the norms that structure individuals’ relations with their culture(s).<sup>29</sup> Tradition may weigh especially heavily in legal contexts because law-related goals and activities imply some concern with institutions that are at least in part conceived as capable of enduring. A canny appellate lawyer nudging a court to adopt a new understanding of statutory purpose when interpreting a complex regulatory statute is apt to make the case in part by appealing not only to bureaucratic authority—by urging that the judges defer to an agency’s construction—but also by contending that her argument is most consistent with tradition. Even the leaders of social movements or corporations seeking to disrupt aspects of the existing legal order are likely to invoke precedents—or to otherwise leverage tradition by seeking to imbue new legal or social compromises with that aura of legitimacy of those institutions or preexisting social movements that inspire public acceptance.

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24. *Id.* at 80-81 (discussing the role of organization); *id.* at 92-93 (describing the major types of professional politicians by the context in which they arose).

25. *Id.* at 95, 115.

26. *Id.* at 78-79.

27. *See id.* at 95 (“The honor of the political leader, of the leading statesman, . . . lies precisely in an exclusive *personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer.”); *see also id.* at 92-93 (describing different types of politicians).

28. *Id.* at 79-81.

29. *See id.* at 78-79.

### Transactional Interests and Transcendent Interests

The concepts of bureaucratic authority, charisma, and tradition tell us a great deal about leadership in law-related settings. Weber deserves credit for recognizing both the importance and the limitations of formal bureaucratic authority, for identifying dilemmas about whether laudable ends justify questionable means, and for identifying how a leader's personal qualities and a culture's deep-seated hold on our imagination could affect life inside and around institutions. These forms of authority seem relevant whether one seeks to understand a judge's choices in crafting a precedential opinion or an administrator's decisions as she seeks to preserve her agency's integrity and capacity amid staggering budget cuts. But to make cautious analytical generalizations about how we might understand different forms of leadership, and what they imply for our efforts to explain, teach, and improve law, we may also need to extend the reflection somewhat beyond the heartland of Weber's concern with tradition, charisma, and bureaucratic legality.

Weber has relatively little to say, for example, about the raw dealmaking (subject to institutional rules) that sometimes facilitates power and influence. Such "transactional" leadership pivots on the idea that a leader can create a margin of flexibility and influence gained from negotiating, at a reasonable cost, solutions that are valuable to multiple individuals and either resolve law-related disputes or avoid the need for formal legal arrangements. For a theoretical framework to analyze such behavior, one can draw on transaction cost economics—an approach that shares with Weber a concern for the formal structures of authority.<sup>30</sup> A vivid example can be found in Robert Caro's account of Senator Lyndon Johnson's rise to power as Senate Minority Leader and, eventually, Senate Majority Leader.<sup>31</sup> Senator Johnson inherited a position with almost no formal authority but leveraged his ability to negotiate compromises that enhanced the well-being of his caucus.<sup>32</sup> Over time, Senator Johnson could leverage this form of leadership by using other techniques—including, eventually, tradition.<sup>33</sup>

Tradition, meanwhile, like charisma and the exercise of bureaucratic authority, is also different from what we might call "principle-based" leadership. This technique depends heavily on setting an example or otherwise

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30. See, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 15-42 (1985).

31. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 383-419 (2002) (describing how Senator Lyndon Johnson used his knowledge of Senators in his caucus, and their interests, to expand the power of the leadership offices he occupied in the U.S. Senate).

32. See *id.* at xx-xxiv.

33. See *id.* at xv-xx.

conveying a degree of (costly) personal investment in a principle that is compelling enough to lead people to reshape their conception of their own interests. This kind of leadership is also distinct from charisma as Weber understands it and does not depend on deploying bureaucratic authority or engaging in dealmaking of the kind associated with transactional leadership.

A focus on how coalitions are forged and maintained emphasizes the importance of recognizing not only that a leader seeking to implement or reform the law can use different forms of authority but also that the leader may need to work over time to gain the capacity to use such authority. Unless we read the concept of charisma as nothing more than a residual variable encompassing anything not otherwise explained, Weber's framework is not obviously geared to explaining how someone who initially lacks much bureaucratic authority, support from tradition, or conventional charisma may nonetheless exercise leadership effectively or how leaders work successfully to redefine attitudes or even interests among their constituencies.

Just how leaders could go about coaxing their constituents to redefine their interests is a major focus of an ambitious empirical and theoretical project undertaken by John Ahlquist and Margaret Levi. They examine labor mobilization and related contexts to explore how organizations initially conceived to focus on their members' economic interests came to engage in broader efforts to achieve legal and policy change.<sup>34</sup> Their account is certainly compatible with aspects of Weber's framework, inasmuch as they describe behavior that sometimes involves leveraging bureaucratic authority, tradition, or charisma.<sup>35</sup> But their analysis also suggests an alternative perspective on leadership that is more dynamic—involving a process of mutual education, persuasion, and constraint regarding shared individual and institutional interests.<sup>36</sup> The leadership of the International and Longshore Workers' Union (ILWU), for instance, was keen to do more than lead workers in pursuit of their economic rights under law; it sought to coax members into accepting that "[a]n injury to one is an injury to all."<sup>37</sup> So when ILWU workers refused to load Japanese ships in protest of the Nanking massacre in 1938, their leaders' discretion likely expanded as members came to see their interests—and the organization's—in broader terms.<sup>38</sup> This kind of principle-based leadership sometimes rests on the example set by leaders and the subsequent deliberation

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34. JOHN S. AHLQUIST & MARGARET LEVI, *IN THE INTEREST OF OTHERS: ORGANIZATIONS AND SOCIAL ACTIVISM* 27-31 (2013).

35. *See id.* at 39-44.

36. *Id.* at 27-31.

37. *Id.* at 79 (quoting ILWU's slogan).

38. *Id.*

among organization members about how they should understand their own concerns in light of the examples set and their context.<sup>39</sup>

This work embodies both the advantages and the challenges associated with projects reflecting ambitious intellectual goals rather than the proverbial instinct for the capillary. It eschews the instinct for the capillary or obsessive concern with causation that can sometimes make projects tractable but not that interesting. But it is also grounded in theory and careful empirical thinking, as reflected particularly in these characteristics. It reflects not only deep engagement with history but also an effort to link this work about why people act beyond the narrowest conception of their interest to interesting literatures on contentious politics, resource mobilization, leadership, new institutional economics, and what is sometimes called “behavioral economics.”

In the process, Ahlquist and Levi push back on two resilient notions in social science that are deeply relevant to understanding leadership. The first concerns ideas that treat “interests” as fairly static starting points for making positive and normative assessments of the world, including concepts of “revealed preference,” most neoclassical economic models, and considerable amounts of work in the heuristics and biases from the school of psychology.<sup>40</sup> The second is the garden-variety principal-agent model, often used to describe everything from the relationship between military commanders and soldiers to the bond between citizen and state or shareholder and manager.<sup>41</sup> These models sometimes offer useful analytical insights and indeed incorporate much of the logic of transaction-based leadership. But rarely do the conventional principal-agent models have room for Weber’s concern with tradition<sup>42</sup> or concepts like the “pleasure of agency” that Ahlquist and Levi develop.<sup>43</sup> I take Ahlquist and Levi’s work to be instead about making complicated phenomena more tractable while recognizing the complexities that arise when leaders are trusted by their followers to lead a conversation about what counts as a legitimate interest and when the conversation reshapes a shared understanding of viable courses of collective action.<sup>44</sup> Plainly, sometimes leaders adapt their own ways of thinking and even their values, changing in some sense who they are. And even more interestingly, by creating institutions and narratives that shape their followers, leaders can help them become invested in goals beyond

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39. *Id.* at 39-44.

40. *See id.* at 164-66.

41. *See id.* at 52-56.

42. *See* WEBER, *supra* note 20, at 86-92 (discussing the role of tradition in developing professional politicians in Germany, Spain, Switzerland, the United States, England, and other countries).

43. *See* AHLQUIST & LEVI, *supra* note 34, at 167-73.

44. John S. Ahlquist & Margaret Levi, *Leadership: What It Means, What It Does, and What We Want to Know About It*, 14 ANN. REV. POL. SCI. 1, 2-3 (2011).

those they would have associated with their narrow economic interests. Jamming these ideas into a conventional principal-agent model is at best kind of a mess—and often not one worth cleaning up.

If we return to Weber's framework, we can appreciate a certain convergence in how these approaches find in leadership an ability to diagnose current conditions and an appreciation that collective action depends on multiple forms of authority and persuasion. We can see how likely it is that nearly any kind of collective action problem may prove easier to resolve where leaders make robust use of bureaucratic authority, tradition, and their personal charismatic qualities. To understand Teamsters leader Daniel Tobin's patient and carefully executed accumulation of authority as his union went from 38,000 members to roughly one million, for example, we must understand not only how Tobin used formal authority in the organization's constitution to place local affiliates in trusteeship for corruption and incompetence but also how he worked to manage floor debate at constitutional conventions and how he forged deals adding to his reservoir of discretion.<sup>45</sup>

Yet we can also discern some patterns that sound more in the key of dynamic change: how leaders not only deploy but acquire those Weberian resources, how audiences' values shape leaders' strategies, and, in the process, how leaders may in limited ways shape attitudes about institutions and legal commitments even as those very leaders remain somewhat bound by them. Where leadership involves actions associated with dealmaking or efforts to shape constituents' ideas of their own interests, these activities reflect not only the goals and styles of leaders but also the constraints of the environment and, in particular, how leaders adapt to those constraints.<sup>46</sup>

### **An Institutionally Fragile World**

The story of how law adapts or remains stable—how it forces reflection or inspires defection—is written not only in the crisp typeface of case law and statutes but in the curved and occasionally smudged longhand of strategy, personal choices, self-imposed limits, bureaucratic authority, and dialogue over interests and values. Facets of that story emerge in the work of Weber, the work of Ahlquist and Levi, and scholarship in a similar vein exploring how societies govern themselves through institutions. Versions of that story are

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45. AHLQUIST & LEVI, *supra* note 34, at 61.

46. The capacity of organizational leaders to manage change by shaping individuals' perceptions of their own interests turns out to be relevant to resolving questions arising in a variety of domains. *See, e.g.,* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660-61 (2d Cir. 1989) (suggesting that the company's liability for violating an antitrust consent decree depended not only on the existence of a compliance program but also on its work to foster values that ensure compliance).

discernible across the full range of law-related problems I have worked on over the years, including criminal justice and sentencing reform, public health legislation, immigration and refugee policy, education equity, and access to justice in California's judiciary for people with limited English skills. Only rarely if ever does legal change or stability entail some anodyne technical judgment beyond reasonable dispute. Nor is it common to find statutes, case law, or implementation changing in response to some purely organic, spontaneous process. More often than not, narratives of technical justifications or putatively spontaneous change are forged through effort and strategy, subject not only to institutional convention but also to choices and tradeoffs involving collective action.<sup>47</sup>

If it is difficult to imagine law without leadership, it is just as much of a stretch for most reasonable minds in advanced industrialized countries to envision this process of leadership and change without (some preexisting) law. The term "law" can plainly encompass more than simply the conventionally specified legal system of courts, agencies, legislatures, and enforcement capacities or even the broader institutional framework that extends to wider sources of legitimacy, making institutions loom larger in our lives than the papers on which their missions and authorities are printed. Yet even if one describes leadership in the broader terms used colloquially to encompass activities such as the convening of an unruly assemblage of protesters or the determined effort to spearhead repeal of a longstanding statute, people expect leadership to be exercised in accordance with certain institutional conventions that make the world at least feel more predictable and less arbitrary. We depend on leadership not only for law's evolution but for its stability—because achieving continuity in institutions takes leaders who both recognize the risks of casting aside carefully forged institutional norms and are willing to adapt new strategies for maintaining frequently unstable coalitions. But for leaders there is more than just a private moral consolation in accepting constraints, because adherence to institutional norms can also become an important source of reputational capacity empowering a leader to shape what becomes of laws and institutions.

Even when those institutional conventions are taken seriously, they often leave enormous room for ingenuity and strategy across legal settings. That leadership can take different forms in law-related domains is a function of both the range of problems society uses law to confront and the inevitable quirkiness of the human condition as it responds to a changing world. Here you will see an organization whose general counsel deftly deploys some mix of charisma and transactional leadership to keep her institution's worst impulses at bay. There you will find an agency leader who understands that implement-

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47. See generally JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964).

ing a new statute will take a steady appeal to tradition coupled with aggressive use of legally sanctioned authority or a lawyer who is keen to persuade a court that ignoring some arbitrary instance of coercion poses subtle but profound risks to fragile institutions. Across town or across the world, an arrested protester inspires a thousand others to see the world in a different light.

Across all of these domains, there is no escaping how legal arrangements routinely depend not only on norms of obeisance but also on value-laden acts of leadership—persuasion, strategy, organization, and conscience—that determine which legal norms endure and which lose their allure. Yet ironically, there is no sane way to weigh the consequences of such acts without reflecting on those ineluctable questions about what society should value that we depend on law itself to help us resolve.