THE AUTHORITY OF LEGAL SCHOLARSHIP

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This symposium is a mixed blessing. On the positive side, all disciplines, including law, should find it useful to engage in serious self-reflection and self-criticism. Without it, the contingent methods and perspectives of the discipline begin to seem inevitable, making the exploration of alternatives less possible, and the understanding of the discipline itself less rich. When a discipline challenges its own understandings, it takes a step towards deeper appreciation of those understandings themselves.¹ Because normativity, in the sense of legal scholarship that attempts to persuade some participant in the legal system—such as a judge, lawyer, or legislator—to act in one way rather than another, is now so much the norm, there is a risk of forgetting that the norm of normativity is contingent and not inevitable. Insofar as this symposium represents in part an effort to show that what is now taken for granted could have been and might yet be otherwise, its consequences (if any) are likely to be positive.

Yet although this kind of disciplinary introspection can bring benefits, it may also be symptomatic of, and reinforce, an underlying weakness in the discipline itself. Whatever the virtues of introspection, the process rarely takes place within disciplines that are flourishing, and is rarely practiced by those at the center of flourishing disciplines. Symposia on legal scholarship are, in this sense, partly the most extreme pathology of the tendency of any discipline to look increasingly inward as it develops.² When members of the discipline go from talking to each other about the outside world to talking to each other about how they talk to each other, it may be strong evidence that something is amiss, or even stronger evidence of a tendency towards self-indulgence and self-

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¹ Especially within the domain of professional education, this is not an uncontroversial proposition, for there are those who believe that some unwillingness to challenge the foundations of a professional discipline is essential to the survival of that profession and the effective functioning of its members. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227-28 (1984).

² See, e.g., *Constitutional Scholarship: What Next?*, 5 CONST. COMM. 17 (1988); *Yale Law Journal Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981).

importance—hardly the peculiar provinces of the scholar, but hardly characteristics unknown in the world of scholarship.³

Still, the particular focus of this symposium holds out some hope for reconciliation. By critically examining the normative mode in legal scholarship, the symposium may prompt a re-examination of the self-importance undergirding much of legal scholarship. Implicit in the normative mode is the belief that prescriptive legal scholarship makes a difference, and makes it sooner rather than later, but this belief might be mistaken.⁴ The conceit of making a difference in the short or intermediate term—one that many scholarly enterprises avoid more successfully than legal scholarship—has both empirical and conceptual components. Because, like most legal scholars, I unfortunately treat empirical research as a disease rather than a method, I will stick here to the conceptual side. And because I have elsewhere expressed my tentative view that normative legal scholarship, while valuable, should be treated as less dominant

³ Lest this sentence be misunderstood, I want to make clear that talk among scholars about the outside world, rather than talking to the outside world itself, is not something to be condemned, although I hope that this sentence is also open to critical evaluation by me and others. A certain form of internal discourse is almost definitional of scholarship, and the value of scholarship (itself a proposition that should not be beyond debate) resides in the long-term external benefits of a practice that is in the short and intermediate term largely internal. For a better (and earlier) expression of the same idea, see H. PUTNAM, *Language and Philosophy*, in 2 MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 1, 1-3 (1975).

⁴ For an interesting debate concerning the proposition that the enterprise of offering theories of adjudication makes a difference to practice, see Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767 (1987); Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777 (1987). To the best of my knowledge, there has been little work on the impact of normative legal scholarship on legal and judicial practice, and what work there is has been devoted to the plainly accessible data provided by citations. See Sirico & Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986). This is a useful start, but citation—especially given the much larger role law clerks play in opinion writing than in case deciding—seems at first to be a poor measure of the factors that actually influence judicial decisionmaking. Insofar as the entire opinion is itself possibly a poor indicator of the decision process, the problem is compounded. See generally Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (examining whether judges' opinions actually reflect—or should reflect—the real reasons for their decisions).

a part of legal scholarship than it is now,⁵ I will stick here to one narrow conceptual question.

That narrow conceptual question is quite simple: What is the rhetorical or argumentative status of normative legal scholarship? What position does the scholar claim, and what is the attitude of the addressee towards that scholar's product? These are issues of authority—issues quite familiar to legal scholars, but rarely addressed in the context of the authority of their own product.

I

Following Hart and Raz, I want to focus on the way in which authority is, at its core, *content-independent*.⁶ Whether it be in the context of an argument from precedent,⁷ an argument for following a rule,⁸ or an argument for obeying the command of a superior,⁹ an argument for obedience to authority is an argument for taking some directive as a reason for action (or reason for decision) because of its *source* rather than because of its content.¹⁰

This is not to say that we do not frequently take directives seriously because of their content. But when we do so, it is because we are persuaded by that content rather than by its source. The notion of content-independence is designed to reflect the difference

⁵ See Schauer, *Constitutional Conventions* (Book Review), 87 MICH. L. REV. 1407 (1989); Schauer, *Judicial Self-Understanding and the Internalization of Constitutional Rules*, 61 U. COLO. L. REV. 749 (1990). For a more extensive analysis reaching similar conclusions about the current state of the discipline, but one more charitable to that current state, see Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

⁶ See H.L.A. HART, *Commands and Authoritative Legal Reasons*, in ESSAYS ON BENTHAM 243, 254-55 (1982); J. RAZ, *THE MORALITY OF FREEDOM* 35-37 (1986); see also Postema, *The Normativity of Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 81, 86 (R. Gavison ed. 1987) (discussing Hart's notion of "content-independent" reasons for obeying authoritative statements or commands).

⁷ See Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

⁸ See J. RAZ, *PRACTICAL REASON AND NORMS* (1975); F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (forthcoming 1991).

⁹ See, e.g., H.L.A. HART, *supra* note 6, at 253 ("The commander's expression of will . . . is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act."); Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 199-212 (1986) (suggesting a battlefield analogy to the judicial interpretation of statutes).

¹⁰ See Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CANADIAN J.L. & JURIS. 3, 7-11 (1990).

between the soldier who stops because a colleague has pointed out to him the presence of a mine and the soldier who stops because a sergeant has ordered him to do so. When the colleague says "Stop!" and no more, the soldier's first response is likely to be "Why?," requesting a reason *other than the mere issuance of the directive* for complying with its mandates. But when the sergeant says "Stop!," any good soldier knows that the last thing you say is "Why?"

The distinction between authority and persuasion, therefore, is content-independent and source-based.¹¹ When the source rather than the content of a directive is a reason for taking its indications as a reason for action, an argument from authority in the strict sense exists. As a result, we can distinguish at the outset two forms of normative enterprises: the authoritative and the persuasive.

II

Where does legal scholarship fall with respect to this distinction between the authoritative and the persuasive? No single characterization of the entire universe of legal scholarship is possible, because it is plain that some legal scholarship purports to be strictly persuasive, some verges on purporting to be strictly authoritative, and most involves some combination of both. But let us look more carefully at all of this, starting with the persuasive.

The term "persuasive" as an indicator of statements that make a difference because of their content and not because of their source is a bit misleading. To persuade is to prescribe, or to urge, but many statements, including those that might be found in legal scholarship, may make a difference other than by prescription. In the narrowest sense of the term, not all normative scholarship need seek to persuade. The most obvious example of this is scholarship in the nominally descriptive mode that provides information, but where the information provided may then be of value to those who would have the power to adopt the position favored by the scholar.

The provision of information may take a number of forms. One might be that of furnishing legal information, where I use the term "legal" to refer to a thin and pretheoretical conception of law as consisting largely of reported cases, statutes, regulations, and constitutional provisions.¹² Suppose, for example, I favored

¹¹ See J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); Raz, *Authority, Law and Morality*, 68 *MONIST* 295 (1985).

¹² Actually, I do not think this conception of law is all that thin or pretheoretical,

recognition of a common law or constitutional right of grandparents to visit their grandchildren even over the objections of the parents, and wished to have courts adopt this position. One thing I might do in furtherance of this goal would be to collect all of the cases that recognized this or a closely analogous right. In doing so, and then publishing the results of this enterprise, I would be providing information that courts (which are supposedly often persuaded by the actions of other courts) might use, or information that lawyers might use in making arguments to courts.¹³

Alternatively, the information provided might be factual or empirical rather than legal in my narrow sense of "legal." The Baldus study that was at the heart of *McCleskey v. Kemp*¹⁴ did not need to conclude with the directive, "you, the courts, ought to declare the death penalty as now practiced to be an invidious and unconstitutional discrimination on the basis of race" in order to provide information that those urging that position could use, or that those inclined to support that position from the bench could use as well. Similarly, someone in 1973 wishing the Supreme Court to declare total prohibitions on abortion unconstitutional might have compiled a compendium of the history of abortion regulation quite similar to the one that Justice Blackmun in fact did compile for use in his opinion in *Roe v. Wade*.¹⁵ That compendium, had it been published or otherwise made available to the lawyers or to the Court, might have provided useful information for Roe's lawyers, or useful information for Justice Blackmun and his clerks.

but explaining why is beyond the scope of this essay. See Schauer, *Rules and the Rule of Law* (forthcoming 14 HARV. J.L. & PUB. POL. (1991)); see also Gavison, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART, *supra* note 6, at 21, 30-31 (referring to "first stage law").

¹³ Embedded in this sentence is an interesting issue about how, in the crudest sense, the products of normative legal scholarship get into the hands of, or before the eyes of (which is hardly the same thing), prospective judicial readers. Although I want to disclaim (whether successfully or not I will leave to others to decide) any knowledge of the entrepreneurial side of scholarship, a number of possibilities present themselves, including presenting ideas in class to students who may then become law clerks or judges, speaking at judicial conferences, sending reprints to judges, sending reprints to students who are now law clerks, sending reprints to parties, appearing as an advocate, writing a brief on behalf of a party or an amicus, or (rarely) writing a true amicus brief on behalf of only the author of the brief and only for the purpose of assisting the court, or sitting back and hoping that one's efforts will be located by the normal methods of legal research. Thus far, there has been surprisingly scant work done on these aspects of the transmission of legal information.

¹⁴ 481 U.S. 279 (1987).

¹⁵ 410 U.S. 113 (1973).

I intend by all of this to describe the process of providing information in such a way that the element of the authoritative drops out. Let me make this clearer with a fictitious example. Suppose I hire a research assistant to find for me, for one project, all of the cases and commentary on grandparents' visitation rights, and, for another project, all of the cases and commentary dealing with claims that video games are protected by the first amendment against state and local regulation. In April, I receive the requested material for both projects. Turning first to that on grandparent's visitation rights, I find it to have been sloppily executed, including some cases that would better have been excluded, and, even worse, omitting some materials directly on point. Shortly thereafter, I turn my attention to examination grading and then discover, after I submit my anonymously graded exams, that this same research assistant has received the lowest grade in my course.¹⁶ And then I learn from conversations with colleagues that this same person has done poor work for them on several occasions, and moreover, apparently performed quite unsatisfactorily at her previous summer's employment with a law firm.

It is now July, and time to turn in earnest to *Video Games and the First Amendment: A Hegelian Perspective on Artistic Freedom*. What do I do with the video game-related work product of this same research assistant? Should I assume it to be of no value whatsoever? Should I throw it away? I would think not. However much I now distrust the abilities of the compiler, the compilation itself is still likely to save me much time and effort, and even if I have to duplicate much of the work and make sure I read every case with special care, the compilation itself nevertheless has some value. It will only have the value it actually has, in the sense that now "my research assistant said so" is no argument at all, even for me, and nothing upon which I can rely. But the product may still have worth independent of its source, perhaps in the same way that anonymously published tracts like the *Federalist Papers* and *Cato's Letters* were assumed in the eighteenth century to have argumentative utility even if the readers did not know who wrote them. Similarly, therefore, scholarship that provides information may be valuable, and may support the normative goals of the provider of the information, even if the

¹⁶ Readers may insert a grade anywhere from B+ to F depending on the practices of their own institutions.

reader of the article has no reason whatsoever to trust the provider of the information.

It should be obvious that the task I have just described is not likely, to put it mildly, to be the quick route to tenure and fame in the legal academy. Yet it is important to distinguish the norms of scholarly evaluation from the potential social worth of the product. It is not inconceivable that the two might be quite close, but it is equally conceivable, and more likely in practice, that the two will diverge. My aim here is not to talk about the standards for promotion and tenure in law schools. Still, thinking about those standards is crucial to thinking about the normativity of legal scholarship, for it may well be the case that the normative goal, however dominant it may be, remains ill-served by the incentive process that supports it.¹⁷ But I will not press this digression too far. My point is only that a work's value in supporting a normative goal is not the same as its value in securing tenure and fame, unless the standards for the latter are themselves the former, which is plainly not the case.

III

Much that I have just said about providing information applies also to persuasion by argument. I used the examples of the *Federalist Papers* and *Cato's Letters* to show how persuasion may still occur when there is no source and thus no possibility of source-based authority, but the same phenomenon exists even more pervasively in the context of the lawyer's brief. Because of the nature of the lawyer's task, the object of persuasion—typically the judge or law clerk—is hardly likely to take anything said in a brief on faith, and thus as authoritative in the sense I am discussing. On the contrary, the reader knows that anything said in the brief is said from the perspective of a role quite different from that of the decisionmaker, and consequently the fact of a lawyer's saying it, apart from what is said, will carry no positive weight for the

¹⁷ To make myself a bit clearer, I mean to suggest that if prescriptive scholarship is thought to be valuable, then more attention might be paid to the actual success of the prescription, and to the use of those forms of scholarship, some now quite unfashionable, that increase the likelihood that the prescription will make a difference. If instead, the standards of evaluation are those of appeal to the scholarly community itself (as I think they should be), then the dominance of the prescriptive form seems quite a bit more surprising.

decisionmaker, and might even carry some negative weight, in the sense of raising suspicions greater than those that would have been raised by merely anonymous persuasion.¹⁸

Despite these reasons for skepticism about what lawyers say on behalf of their clients, briefs apparently do some good, or at least the system acts as if they do.¹⁹ I can hardly deal here with the psychology, sociology, or philosophy of persuasion, but it will be sufficient to note that people are sometimes persuaded by the content of a persuasive utterance independent of the source of the persuasion. Arguments sometimes matter, ideas sometimes matter, people sometimes change their minds, and even more commonly, often develop beliefs as to subjects about which they previously had none.²⁰

Just as briefs may at times persuade, so may what is essentially the same style of writing persuade when it takes the form of an article in a law review. Even if it is clear that the author of the article is representing (officially or not) a point of view or a litigant, and thus advocating a result in much the same way that a lawyer would in a brief, the possibility that the arguments in the article will themselves have persuasive force independent of their source seems likely to be roughly the same as the possibility that arguments in a brief filed in a court will have persuasive force independent of the source.

¹⁸ This gets more complicated once we think of the lawyer as potentially performing multiple roles, or at least having multiple responsibilities and constituencies within a single role. For example, it may be the lawyer's role as officer of the court that gives her authority in the sense that courts will take her word for the fact that language directly quoted from a case in fact appears in that case. And it may be that other lawyers, such as the Solicitor General of the United States, have roles which make them partly advocates and partly the repositories of authority.

¹⁹ Because almost all of normative legal scholarship presupposes the falsity of Legal Realism, I will indulge that presupposition here. In fact, I believe the contrary—that within the realm of the appellate decisions that most normative scholarship seek to influence, Legal Realism is more true than false. See Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

²⁰ In saying this, I do not intend to recant my skepticism about the empirical underpinnings of Enlightenment-inspired "marketplace of ideas" views about public discourse. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); cf. Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 5 (1989) ("And how better to discover the truth than to engage in discussion with anyone and everyone who professes an answer?"). But even if Ackerman now, Milton then, and many in between have learned less than the sellers of oatmeal, basketball shoes, and presidential candidates about the determinants of popular or political (or legal) belief, legal argument surely presupposes a degree of rationality that must in turn accept the possibility of source-independent (and, hopefully, packaging-independent) persuasion.

Still, minds are not blank slates, and the enterprise of persuasion takes place against a background of prior factual beliefs and normative opinions held by the addressee of the persuasion. What a person is likely to believe after persuasion is at least partly a function of what she believed before persuasion,²¹ a factor influencing both how messages are understood and the extent to which the messages understood will be accepted or rejected. This suggests that persuasion is likely to be most effective when this background of prior factual beliefs and normative opinions is thinnest, or, if thicker, then when conflicting background beliefs are in equipoise.²² Compare two cases. In one, the author of a law review article attempts to persuade the Justices of the Supreme Court of the United States to reverse *Roe v. Wade*.²³ In the other, the author of an article attempts to persuade whatever judges might hear the issue to interpret sections 514(a) and 514(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) as pre-empting state remedies for wrongful discharge in cases where the discharge was based on the employer's desire to avoid making pension payments.²⁴ I would conjecture that the likelihood of a persuasive act actually moving the decisionmaker is much greater in the second case than in the former. In the second case, the decisionmaker's background set of beliefs is likely to be far less focused on the issues raised by the case, and those beliefs that are held are likely to be held with substantially less fervor.

Of course it might be better to think of this as a question of expected value. If some scholar wants to have the vocation of influencing the courts in the service of social justice, and if that scholar believes that abortion rights are a hundred times as important as ERISA determinations in securing social justice, then a .05% chance of making a difference with respect to abortion is an enterprise just as valuable as one that involves a 5% chance of making a difference with respect to ERISA.²⁵ Presumably, this

²¹ See C. CRONKITE, *PERSUASION* (1969); C. HOVLAND, I. JANIS & H. KELLEY, *COMMUNICATION AND PERSUASION* (1953); J. KLAPPER, *THE EFFECTS OF MASS COMMUNICATION* (1960); Bauer, *The Obstinate Audience*, in *THE PROCESS AND EFFECTS OF MASS COMMUNICATION* 326 (W. Schramm & D. Roberts eds. 1971).

²² Actually, the likelihood of success is greatest when the object of persuasion is already leaning in the right direction, and may need only a bit of a normative shove to keep her there.

²³ 410 U.S. 113 (1973).

²⁴ See *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990).

²⁵ Any scholar who thinks these numbers too low seems to me to be engaged in a serious act of self-delusion. If anything, the numbers seem to me to be unrealisti-

kind of calculation is implicit in various decisions about what to do with one's life, but it is reasonable to suppose that making the issues and the relationships more explicit would have beneficial effects.

IV

All of this, however, is about content-dependent persuasion, and thus assumes a lack of authoritativeness in the sense in which I am speaking of authority. Might legal scholarship also be authoritative, as well as being, on occasion, informative or persuasive? That is, are there circumstances in which a decisionmaker, primarily a court, would treat the source of a piece of legal scholarship as an independent reason for taking what that source (i.e., a book or article) says as a reason for deciding in accordance with what the source suggests?

Before addressing that question, it may be useful to examine the sources that might account for source-based authority. One would be the particular identity of the author. "Holmes said so" counts for more in legal argument than "Schauer said so," and that is because something attached to Holmes as a person justifies relying on him independently of the content of what he is saying on some particular occasion. I will address presently why this authority might attach, but I want at the moment only to identify the way in which, first, it might attach to an individual.

Second, authority might attach not to an individual author but to her affiliation. Otherwise anonymous people may be validated or legitimated by their institutions, such that an author hitherto unknown by the addressee of the article might be taken as authoritative if she is associated with a prestigious institution,²⁶ less so if associated with a less prestigious institution of the same genre (a less prestigious law school, for example), and still less so if associated with an even less prestigious type of institution.²⁷

The third possible locus of authority would be the format of the publication, by which I mean the class of publication and the rank within that class that a publication may have, all as seen by the objects of the prescription.²⁸ Again, some law reviews are more

cally high.

²⁶ And that is why it matters far less where one winds up than where one starts.

²⁷ Think of the likely reaction if the author of a law review article were identified not as "Professor of Law, Siwash University," but as "Headnote Writer, West Publishing Company," or "Citation Compiler, Shepard's/McGraw-Hill, Inc."

²⁸ The previous clause is important. Authority exists when, and only when, the

prestigious, and thus more likely to be authoritative than others, and within the realm of legal writing, most law reviews are more authoritative than many other forms of publication. Even assuming author anonymity, "as it says in the *Siwash Law Review*" is more likely to be taken as authoritative than "as was written in the *Parade Sunday Supplement*." And depending on the audience, "as it says in *Corpus Juris Secundum*" may be more authoritative than "as it says in the *Harvard Law Review*," which for some audiences is in turn likely to be much more authoritative than "as Habermas says."

V

But why might any of these factors—author identity, author affiliation, or format of publication—be taken as authoritative? Why might any of these source-based rather than content-based factors provide added legitimacy for the content of what was said? In this context, three reasons seem the most likely candidates, and I want to treat them in turn.²⁹

First is what we might call "effort-based authority." With some frequency, we rely on the fact that others have engaged in some task that we have neither the time nor the inclination to duplicate. Suppose I want to know the square root of 134 to 23 places, or the day of the week on which January 15, 1996 will fall. I could work out the answers, but in place of doing the calculations myself, I could look up the results in any of a number of standard reference books. The authors of those books have already done the work, I might think, so why should I duplicate it? And since I have independent confirmation of the accuracy of the work they do,³⁰ I take their results, standing alone, as authoritative. I would be less inclined to take the results as authoritative had the same results come from a less trustworthy source.

Effort-based authority exists in legal scholarship as well, but it appears to be less prevalent than in the past, largely for the same

subject of a directive *treats* what is said as authoritative. Authority is in this sense significantly subject-relative.

²⁹ As should be apparent, many of the standard reasons for recognizing authority—maximizing predictability or certainty, increasing stability for stability's sake, solving Prisoner's Dilemma or coordination problems, ensuring a cohesive community, and effecting a division of labor—seem (except for perhaps the last) quite inapt in this context.

³⁰ I believe, for example, that a book of square roots published in its third printing by a reputable publisher would not have reached this stage if the square roots published were incorrect.

reasons that compilatory treatises and their equivalents are less prevalent than in the past. Some of this relates to the incentives that now exist in the legal academy (would Williston get tenure today if Williston wrote *Williston* today?). And part of it relates to the ways in which loose-leaf services, computerized legal research, and other changes in the provision of legal information have now made textual compilations less necessary. Still, there have been in the past and remain today equivalents in legal scholarship to the compilations of square roots and dates in future years. If a lawyer were to say in a brief that "Wigmore cites no case in which a parrot has been permitted to testify," the claim embedded in that proposition, that Wigmore read all the cases and found no cases allowing parrots to testify, is not that different from the claim implicit in relying on compilations of dates or square roots—here the reliance is placed on Wigmore's efforts, and these efforts have proved thorough in the past.³¹ Similarly, when a scholar, known to be reliable, reports that the overwhelming majority of cases says this or that, or that the French law on such-and-such a point is the same as the American, we rely on the fact that someone else's efforts provide reasons for taking what she said seriously.

Alternatively, authority in the context of legal scholarship may be "process-based." Here I do not mean to call on any narrow or law-based notion of "process." Rather, I want to suggest that, under some circumstances, the way in which someone has reached a conclusion might give that conclusion independent legitimacy, and, consequently, authority. Here we can think of some number of processes that might be relevant, such as double- or triple-checking of results, guarantees against bias, or peer review as practiced in some number of academic disciplines, although generally (and unfortunately) not in law. Suppose that legal scholars were constrained by conflict-of-interest rules as stringent as those applied to judges, that they were constrained by an obligation to cite to opposing authority that was substantially stricter than the existing similar obligation now applied to practicing lawyers, that all journal submissions were blind reviewed by three reviewers before publica-

³¹ I use this example because I have the recollection from law student days of seeing every day outside of James Chadbourn's office the latest deliveries of *all* of the federal and regional reporters. Part of how he defined his task included reading *every* evidence case decided by *every* American court. I hope it comes as no surprise to the readers of this article that there were few emulators of Chadbourn's practice then, and far fewer now.

tion, that every article was subject to the kind of substantive cite-checking that occasionally still takes place with some law reviews, and that no article could be published unless accompanied by a written opposing commentary of a scholar of equivalent stature. I make no claim that the results of such a combination of processes would necessarily be correct in some ultimate or foundational sense, but it still seems likely that many people would suppose that any article that had survived this rigorous a process would bring with it sufficient assurances of comparative soundness such that it would be sensible to give the products of that process some degree of source-based authority.³²

Finally, authority might be based on the subject's view about the greater expertise of the authority.³³ When I take the medication prescribed by my physician, or cancel a holiday because of the weather forecast provided by a meteorologist, or follow the instructions on how to set up my computer, I am not, except in the most attenuated sense, merely saving time. By the time I train myself to be a meteorologist, even supposing I could, it would be too late to decide what to do next week. And in many other areas, I rely on an expertise I could never hope to attain, giving someone appropriately validated as an expert—whether by credentials, past performance, or validation by someone whose expertise as a validator of experts I respect—a degree of authority such that what they say is for me a reason for acting in accordance with it just because *they* have said it.

My sense—and here I am being even more impressionistic than I have been throughout the balance of this article—is that expertise-based authority presents the greatest dilemma for the legal scholar engaged in normative legal scholarship. We want to *persuade* the decisionmaking readers of our normative scholarship, but if we cannot do so, then we will settle for relying on our own expertise as a second best. Or perhaps I have it backwards. We would prefer that our expertise be acknowledged and our utterances be taken as authoritative, but failing that, we hope that we are persuasive for content-dependent reasons. But whatever is going on, there is little

³² Much of the authority of scientific inquiry is based on this kind of process-based control, including the special feature of replicability of results not wholly applicable to legal scholarship.

³³ On expertise as an argument for authority, see Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795, 803-04 (1989).

doubt that comparative expertise is a significant part of the authoritative component of normative legal scholarship.

If this is so, then it is likely that the argument for expertise as a reason for acknowledging authority will be strongest when the subject perceives the greatest gap in expertise. A citation to *Loss on Securities Regulation* or *Areeda on Antitrust* is likely more authoritative in the Barnstable Superior Court than it would be in the Second Circuit, just as *Martindale-Hubbell's* summary of the Austrian law of intestate succession is likely to carry much more weight in an American court than the same citation would carry in Vienna.

These examples point us in the direction of the extreme case, the case in which the addressee of a prescription can see no reason for acknowledging the greater expertise of the prescriber. When the normative purchase for a prescription with respect to a matter of legal change is a question of politics, morality, or public policy, there is little reason to expect that the typical addressee of a work of normative legal scholarship will acknowledge the comparative expertise of the typical prescriber. The typical legal scholar's views about abortion or affirmative action, however sincerely held or carefully worked out, or however correct, are unlikely to be acknowledged by the typical judge as coming from a vantage point of superior expertise. Here, as an empirical matter, the argument for comparative expertise as a source of authority is likely to be weakest.³⁴

³⁴ Note that I am making a psychological and empirical claim and not a metaethical one. I am inclined to think that there is moral and political and policy knowledge, and that some people are better at working these things out than others. But this claim is independent of my claim that most addressees of prescriptive legal scholarship would not acknowledge the comparative expertise that I believe both can and does exist (which is not to say that legal scholars are necessarily the ones who possess it).

Recognizing that the scholar's own comparative advantage as political or moral reasoner is likely to be under-appreciated, a common tendency is to rely on the authority of others, usually from other disciplines. It is valuable to point a reader to useful literature, and both valuable and honest to attribute non-original ideas to their proper source. But all too often the reliance on Rawls or Rorty as authority is used merely as a substitute for an argument when there is no good reason for not providing one.

Moreover, the fact of greater expertise is not a conclusive argument for deferring to it. In many contexts, independent values allocate decisionmaking authority to those who are not best at using it. Just as we do not put the care of all children into an elite of expert child-raisers, so too might we not want to put the making of 6political and moral decisions, decisions that necessarily provide almost all of the purchase for legal change, into a group of experts, even were such experts to exist. "[T]here are profound moral objections to a society run by experts, objections which

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Although I have separated three sources of authority—individual, institutional, and format—and three reasons for acknowledging authority—effort-based, process-based, and expertise-based—I make no claim that these ideal types occur in the real world in such pristine form. They are much more likely combined, as when, for example, the impossibility of reading everything (the effort-based constraint) leads one first to read those books and articles written either by acknowledged experts or people at prestigious institutions or published in prestigious journals or by prestigious book publishers. Still, although my distinctions are crisper than real life, these distinctions and associated conceptual tools may provide assistance to those who would wish to examine these issues either more empirically or more normatively.

Implicit in what I have said, however, is that although I frequently have sympathy for arguments from and for authority, many of those arguments seem strangely ill-suited to the academic enterprise, and perhaps equally ill-suited to the use of legal scholarship as authority by actual decisionmakers such as judges. Perhaps it would be better if judges instructed their law clerks to give them law review articles with the names of the authors, their affiliations, and the names of the journals expunged, or to give them passages from books with again the names, affiliations, and publishers eliminated, so that only the persuasive or informational value would seep through. But, again, life is short, time is limited, and people are better at some things than they are at others. For all of these good reasons, and an even larger number of bad ones, legal scholarship may at times be treated as more authoritative than a perfectly rational decisionmaking environment would allow. Again, in an ideal world, one might expect scholars to fight this phenomenon rather than to contribute to it. But whether this is the case, and if so to what extent, is something that is best left to each scholar's individual self-reflection.