

Legal Processes and the Service Conception of Authority

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## ABSTRACT

JOHN LAWLESS: Legal Processes and the Service Conception of Authority  
(Under the direction of Gerald Postema)

On Joseph Raz's service conception of authority, one agent is normally justified in regarding another's directives as authoritative when and only when in doing so the former is likely to act in better conformity with the reasons holding for him than he would were he to attempt to work out independently what he has reason to do. I argue that the service conception imposes requirements on the kinds of processes of which authoritative directives can be the output: they must be open to and appropriately responsive to evidence about the reasons holding for subjects. I then argue for two theses about law: that law's content is influenced by (changing) evidence about the reasons holding for legal subjects, and that requirements that legal officials be open to and appropriately responsive to evidence about the reasons holding for legal subjects are expressions of law's claim to authority and Rule of Law requirements.

To Mom and Dad

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## **I. Introduction**

Practical reasoning serves a purpose. By reflecting on our desires and principles and by investigating the world, we acquire evidence about the ways in which we should act; and by running this evidence through appropriate (rational) transformations, we arrive at practical conclusions. When all goes well (when the evidence is complete and does not mislead, and when our practical rational processes are not subject to familiar distortions like bias and passion) we act in conformity with the reasons holding for us: we satisfy our desires in ways that reflect the principles to which we commit. (To be sure, this is only a rough sketch.) According to Joseph Raz, practical authority serves the same purpose. To regard another agent as an authority is to outsource one's practical reasoning to her and to substitute her practical conclusions for one's own. Making these substitutions can provide a valuable service: if the other has a better view on things, or is in general better at practical reasoning with respect to the matter at hand, or is less distracted by bias or passion, then by outsourcing my practical reasoning to her I will better comply with the reasons holding for myself than I would do by acting on my own practical conclusions.

This service conception of authority has played an important role in Anglo-American jurisprudence in the past several decades. But theorists have paid inadequate attention to the constraints that the service conception imposes on the processes by which practical authorities arrive at the instructions they offer their subjects. In this paper, I will argue that, unless directives are the output of processes that seek out evidence about the reasons holding for subjects and that reliably produce instructions that (the evidence suggests) will help subjects act in conformity with the reasons holding for them, they cannot be legitimately authoritative (in Raz's sense).

Focusing on these authoritative processes (and not just the directives that authorities issue) can help us to understand a number of important features of law. It can help us to clarify our conception of courts, and to see them as institutions apt for the provision of the Razian service (and not merely as appliers of the law). It can help us to see an important connection between what law *is* and what law *ought to be* that manifests itself in the ways in which courtroom officials are required to be open to evidence about the reasons holding for legal subjects, and to interpret law in ways that are appropriately responsive to that evidence. And it can provide us with a connection between the concept of law and the Rule of Law: law's claim to provide for legal subjects the Razian service expresses itself through requirements that legal officials remain open to and appropriately responsive to evidence about the reasons holding for legal subjects, thereby curbing opportunities for arbitrary exercises of power.

In this paper, I will (Section II) articulate the fundamentals of Raz's service conception of authority and (Section III) defend it against some pertinent criticisms, before (Section IV) articulating and arguing for an emphasis on legitimate authoritative processes. I will then (Section V) identify some of the procedural requirements that legitimate authorities must satisfy in order to acquire the kinds of evidence to which they must be responsive before finally (Section VI) deriving from these points several lessons about law and the Rule of Law.

## **II. The Service Conception of Authority**

### *(1) Two Ideas in the Background*

First, we need a brief sketch of what it might mean to act in conformity with reason. Two points are particularly relevant: (a) the distinctive roles of facts and beliefs in the guidance and assessment of actions, and (b) the distinction between first- and second-order reasons. This provides the resources to which I'll need access in my discussion of the service conception of

authority, but serves mainly as background. So while these points will be useful, my presentation of them will be brief.

(a) *Facts, beliefs, and reasons.* Say that Elena desires to purchase the most fuel-efficient car available in her region, and that the Nissan Leaf *is* the most fuel-efficient car available in her region. Purchasing a Leaf would count as purchasing the most fuel-efficient car in her region, so Elena has a reason to make the purchase—even if she does not believe that the Leaf is the most fuel-efficient car available in her region (and so does not believe that purchasing a Leaf counts as purchasing the most fuel-efficient car available in the region). Moreover, even if Elena mistakenly believes that a Cadillac Wagon is the most fuel-efficient car in the region, then though she takes herself to have a reason to purchase a Cadillac, she is mistaken (and even has a positive reason to not do so). In this example, the facts of the matter—not Elena’s beliefs—determine the reasons holding for Elena; her beliefs merely serve to represent (often imperfectly) facts to her so that they are fit to feature in her practical reason.

Now say that Elena, still in the grips of her false belief, purchases a Cadillac Wagon. When asked why she did so, she will first identify what she took to be her reason for doing so, namely, that it was the most fuel-efficient car available in her region. But when she later discovers (to her dismay) that it is, in fact, wildly inefficient, her story will change: she will say that she *believed* that it was the most fuel-efficient car available in her region. How ought we interpret this shift in Elena’s story? Two possibilities readily present themselves. First, we might think that Elena’s *belief* was her reason for acting. But typically we cite facts as reasons when we speak *normatively* about what we ought to have done, what we did right, what we have reason to do. We cite beliefs as reasons when we speak *explanatorily*, when we reflect on the reasons that an agent took herself to have in order to understand why she did what she did, or on what an agent is likely to do when we try to predict her future actions. When things go wrong, agents cite their

defective beliefs as reasons for action in order to explain *how* they went wrong, their correct beliefs when they explain how things went right. If this feature of our discourse is telling, then it suggests a second interpretation of Elena's second report: the agent who reports that the belief was her reason for acting merely signals that she believed she had a reason for acting.<sup>1</sup> When she cites as her reason for purchasing the Cadillac her *belief* that it was fuel-efficient, what she is really doing is citing her belief *that she had a reason* to buy the car.

This line of thought captures the general Razian conception of the relationship between facts, beliefs, and reasons: the agent's beliefs—which, as mental states, are fit to guide the agent's action by featuring in her practical reasoning—serve to represent to her the reasons holding for her (at least, when things go well), but they are not themselves the reasons holding for her.<sup>2</sup> When things *do* go well, agents discover the reasons holding for them through their true beliefs about their circumstances; when things go badly (say, because the evidence about the reasons holding for them is misleading or incomplete) agents act on false beliefs about the reasons holding for them. Of course, if Elena believes that the Cadillac is the most fuel-efficient car available, there is a sense in which she would be acting irrationally were she to purchase the Leaf, even though she has reason to buy the Leaf (and not the Cadillac). But this is only because our beliefs are often the our best guide to the reasons holding to us. The service conception of authority will provide us with an idea of the ways in which other agents might serve as better guides for us.

(b) *First- and second-order reasons.* Now take three facts, the fact that P, the fact that Q, and the fact that R. Say that *the fact that P* counts as a reason for Elena to  $\phi$  in circumstances C; that

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<sup>1</sup> Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), 18.

<sup>2</sup> Raz, *Practical Reason*, 17.

is, *the fact that P* is a “first-order reason” for Elena to  $\phi$  in C. Raz characterizes two ways in which other reasons might tell against Elena’s  $\phi$ -ing in C for the reason that P.<sup>3</sup>

First, strong reasons beat out weak reasons (roughly put). Take Elena again. She values fuel-efficiency, but she also values affordability. The Nissan Leaf (while wildly fuel-efficient) is also quite costly, and though Elena desires the most fuel-efficient car available in her region, it will cost her far more in the short term to purchase a Leaf than it would cost her to purchase, say, a Ford Fiesta. Elena’s reason to refrain from purchasing a Leaf (the fact that the Leaf is not affordable) may *outweigh* the reason she has to purchase a Leaf (the fact that it is the most fuel-efficient option).

Generally, if *the fact that P* counts as a reason for an agent to  $\phi$  in C and *the fact that Q* counts as a reason for Elena to not- $\phi$  in C, and if *the fact that Q* is a “stronger” reason for Elena than is *the fact that P*, then (abstracting from any other possible considerations) it would be on balance contrary to reason for Elena to  $\phi$  in C. Talk of one reason “outweighing” another, or of reasons being “strong” or “weak,” is of course a bit metaphorical, but the idea should be intuitive enough: one can think of the comparative strength of two reasons as akin to the comparative cost of failing to act in conformity with either reason.<sup>4</sup> This is why it will be in conformity with the balance of the reasons holding for Elena to purchase a Fiesta rather than a Leaf: to purchase a Leaf in spite of her reason to purchase an affordable car would be far more “costly” than it would be to purchase a Fiesta in spite of her reason to purchase the most fuel-efficient car in her region. Here, practical reasoning is essentially a matter of accounting.

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<sup>3</sup> The following discussion is based on Raz, *Practical Reason*, 39-40.

<sup>4</sup> I should emphasize that by invoking the notion of *cost*, I don’t mean to suggest that reasons are necessarily based in self-interest. I don’t offer a precise account of the way in which stronger reasons defeat weaker reasons, I only mean to suggest the general idea.

Second, some reasons might tell against allowing certain considerations to play a role in one's practical reasoning at all. This is not a matter of one reason defeating another; it is a matter of one reason *excluding* another. For example, if Elena and Ted are married, then the fact that their anniversary is coming up may count as a reason for Ted to buy Elena a nice shirt; and the fact that, were he to fail to give Elena a shirt, she would be less likely to give him anniversary presents in the future, may also count as a reason for Ted to buy Elena a nice shirt. But given the dynamics of a healthy marriage, it might also be that Ted has a reason *not* to give Elena a nice shirt for the *latter* reason. He might well still act in *conformity* with this latter reason (in Raz's terms), but he shouldn't act *for* it. He ought to give Elena a nice shirt for the reason that doing so will express his love for her, but for him to do so for the reason that doing so would secure the influx of future gifts would display an unfortunate fault line in his relationship with Elena.

Raz argues that this sort of phenomenon underlies the reasons-giving nature of practical authoritative instructions. I will present that argument in the next section, but first the general point: say that *the fact that P* counts as a reason to  $\phi$  in C, and *the fact that R* counts as a reason not to  $\phi$  in C for the reason that P. *The fact that R* is not a reason to not- $\phi$  in C, only a reason not to take *the fact that P* as a reason for  $\phi$ -ing in C. *The fact that P* is a first-order reason that can tell against (and be told against by) other first-order reasons. *The fact that R* is a second-order reason that excludes another reason (or multiple other reasons) from practical reasoning; it is a reason not to act *for the reason that P*. Other first-order reasons might tell in favor of  $\phi$ -ing in C, and further second-order reasons might tell in favor of taking *the fact that P* as a reason to  $\phi$  in C, or even against taking *the fact that R* as a reason not to  $\phi$  for the reason that P. Practical reasoning becomes a matter, first, of excluding from one's practical reasoning those reasons excluded by the balance of second-order reasons; and second, of balancing those first-order reasons that remain.

This is not to say there are not other roles that reasons might play in our practical reasoning, but I will not be concerned with the possibility here. With this background in place, we are now in a position to develop Raz's service conception authority.

(2) *The Service Conception of Authority*

The service conception of authority provides an account of (a) the role that directives play in agents' practical reasoning when they regard them as authoritative, and (b) the conditions in which their playing that role is justified. (I should mention that this is not enough to get an account of the meaning of claims of the form "Agent A has authority over another agent S" off the ground.<sup>5</sup> I'll turn to this point in Section III.)

For context, it will be useful to set out two cases in which an agent's instructions might justifiably play an authoritative role in another agent's practical reasoning. First, one agent might regard another as an authority because the latter has *expertise* with respect to a relevant subject matter. Doctors, for example, are taken to have access to more information about human bodily health than most patients, so medical laypersons typically regard doctors as authorities on matters related to health.<sup>6</sup> Second, multiple agents might regard another as an authority because doing so allows them to coordinate their activities in a way that renders possible action in conformity with the reasons holding for them. Say that a group of people is playing on a football team. There might well exist a number of plays with which the team might move the ball down the field, but unless there is a reason to converge on *one* of them, the members of the team will not be able to execute *any* of them; it will be better for them if they regard one person's

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<sup>5</sup> Raz is fully aware of this: "My proposed account of authority is not even an account of the meaning of the phrase 'X has authority over Y'. It is an account of legitimate authority, whereas the phrase is often used to refer to *de facto* authorities." *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 65.

<sup>6</sup> For now, I ask that the reader set aside concerns that the doctor's prescriptions are not practically authoritative instructions, but merely an experts' advice; I'll say something about this concern in just a moment (Section III.3).

instructions (say, the quarterback's or the coach's) as authoritative so that when the ball is snapped, there won't be a counterproductive chaos on the field. Whoever calls the play need not possess the best football mind around—he need not be an expert with respect to the domain within which he has authority, as the doctor is. But he will at least be capable of identifying the sorts of plays that are likely to be successful. He does not solve the coordination problem simply by rendering one of its solutions salient, but by *identifying* a solution.

We are interested in two questions: (i) what is it for the medical layperson to regard the doctor as a medical authority, or for the linebacker to regard the coach as an authority? How do we characterize the relationship between subjects and authorities, and how do practically authoritative instructions give subjects reasons for action? And (ii) what justifies their doing so in these cases?

(a) *The analysis.* Through practical reasoning, agents attempt to act in conformity with the reasons holding for them. They acquire evidence about those reasons, put the evidence through a series of rational transformations, and at the end come up with a practical conclusion that is successful to the degree that it conforms with these reasons. But in a variety of situations, the cards are stacked against the agent: the evidence available to the agent is misleading or incomplete, the agent's practical rational processes are distorted by bias or passion, or the complexities of interactions with others and the uncertainties that such interactions engender block action in conformity with the reasons holding for her. In these circumstances, an agent's practical rational processes will not serve their purpose. But someone else's might. If another agent has a better view of the evidence, is free of those biases and passions that undermine practical reason, or has the capacity to coordinate agents' actions in a way that renders possible action in conformity with the reasons holding for them, then by outsourcing her practical reasoning to the better situated agent, the former agent will be better able to act in conformity

with the reasons holding for her. So when the latter agent says, “You should  $\phi$ ,” the former agent will do well to substitute this instruction for her own practical conclusion. If she has reason to believe that this is the case, then she will be *justified* in substituting the instruction for the conclusion she would reach were she to attempt to work out independently what she has reason to do in the matter at hand. This is the basic shape of the service conception of authority.

Now let’s look to its details.

(i) An agent substitutes another’s instruction to  $\phi$  for her own practical conclusions by regarding those instructions as protected reasons—that is, as a first-order reason to  $\phi$  that is protected from defeat by a second-order reason excluding certain other first-order reasons. For example, when Doctor Penrose instructs Elena to take Zanolon twice daily, Elena regards the instruction as a reason to take the pill, and takes that reason to be protected from defeat by certain other considerations.<sup>7</sup>

(ii) Raz argues that in paradigmatic cases a subject will be justified in regarding another’s instructions as protected reasons if doing so helps her to act in better conformity with the reasons holding for her than she would otherwise have done. For the sake of parsimony, I’d like to introduce some new terminology. Call the actions that S would perform were S to act on his own practical conclusions (the conclusions to which S would come were he to attempt to work out independently what he has reason to do in the matter at hand) S’s *independent acts*. Call the acts that S would perform were S to act on A’s instructions S’s *instructed acts*; these are the conclusions of A’s practical reasoning when A reasons about what S ought to do, and they are the instructions that A issues to S. We are interested in three relations: those holding between

R1 (a) S’s independent acts and (b) the reasons S has for acting,

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<sup>7</sup> Which reasons are excluded will depend on the scope of A’s authority; I’ll touch on this point in a moment (p. 15).

R2 (a) S's instructed acts and (b) the reasons S has for acting, and

R3 (a) relationship R2 and (b) relationship R3.

R3 involves some kind of comparison between, on the one hand, how the agent would do by the reasons holding for him were he to act on his own practical conclusions, and, on the other hand, how the agent would do by the reasons holding for him were he to follow the authority's instructions. On the service conception of authority, it is this comparison in which we are interested. As Raz puts the point:

...the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.<sup>8</sup>

This is Raz's *normal justification thesis* (NJT).<sup>9</sup> Generally, the idea is that for any two agents A and S, S will be justified in the normal way in regarding A's instructions as authoritative only if:<sup>10</sup>

C1 S's instructed acts would likely conform better with the reasons holding for S than would S's independent acts.

What are we to make of the qualifier "likely" in C1? I suggest that, when one agent A's instructions are legitimately authoritative for S, S's instructed acts are more likely to conform with the reasons holding for S than are S's independent acts in the sense that S should have a higher credence that his instructed acts will conform with the reasons holding for him than that his independent acts will. In Section IV, I'll be concerned to show what justifies this higher

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<sup>8</sup> Raz, *Morality of Freedom*, 53.

<sup>9</sup> I'll say in a moment what it means to call this justification "normal" (p. 11).

<sup>10</sup> I should point out that I present this as a necessary, but insufficient, condition. Over the next few sections, I will show what more is needed, and will give a complete condition in Section IV.4.

credence in paradigmatic cases. But first I want to show how C1 works to justify S's taking A's instructions as protected reasons, and to make a few caveats.

(b) *Paradigm cases.* It's easy enough to see how to apply this framework to the two paradigm cases considered above. Doctor Penrose has access to more information about human health than does Elena (a medical layperson) and is more experienced with the types of reasoning associated with medical science, so Elena will be justified in taking Penrose's prescription as a protected reason to take Zanolon twice daily. In doing so, she is more likely to act in conformity with the (health-related) reasons applying to her than she would be were she to act on her own practical conclusions. Were Elena to insist on acting on her own practical conclusions rather than on Penrose's prescriptions, she would actually undermine her chances of acting in conformity with the reasons holding for her. And the coach's instructions help the members of the football team coordinate their activities in a way that renders possible the movement of the ball down the field. The members of the team have a common goal (winning), and the fact that divergent strategies  $\alpha$ ,  $\beta$ , and  $\gamma$  all constitute potential winning strategies gives them a reason to execute strategy  $\alpha$ , a reason to execute strategy  $\beta$ , and a reason to execute strategy  $\gamma$ ; but unless they are able to converge on *one* of these strategies, they will not be able to execute *any* of them. They will be unable to act in conformity with the reasons applying to them. But by treating the coach's instructions as authoritative, they are able to do so. They can converge on, say, strategy  $\alpha$ , which (if executed properly) will enable them to move the ball down the field and score a touchdown.

(c) *"Abnormal" cases.* These are two paradigmatic cases in which agents are justified in "the normal way" in taking another agent's instructions as protected reasons. Raz offers two cases in which he claims that authority is (as it were) "abnormally" justified. In the first case, (i) one agent claims authority (that is, he claims to provide the Razian service) and (ii) considerations tell in

favor of acting as though the claim is true, even if one has no reason to believe that it is (or even positive reason to doubt it). In the second, (i) multiple agents regard one agent's instructions as authoritative, and (ii) considerations tell in favor of acting as though they are right, even if one has no reason to believe that they are (or even positive reason to doubt it). Let me cite Raz's examples before making some comments.

First,<sup>11</sup> take Alex—a sweet but foolish man who thinks he is much smarter than he is, and continually offers his friend Ted advice. Ted might regard Alex's instruction to  $\phi$  as a protected reason to  $\phi$ , not because he is likely to do better by the reasons holding for him than he would were he to attempt to act directly on those reasons, but merely because Ted does not want to hurt Alex's feelings. If this is all that justifies Ted in regarding Alex's instructions as protected reasons, then Ted may have a perfectly good reason for taking Alex's instructions as authoritative, but it is not the "normal" one identified above. It *is* in some sense parasitic on the "normal" justification, because (in claiming authority) Alex claims to perform the Razian service for Ted. He certainly does not *intend* that Ted take his instructions as protected reasons for the reason that, in doing so, Ted will not hurt Alex's feelings; he intends that Ted take his instructions as protected reasons for the reason that his instructions are sound. In that sense, Ted's justification for taking Alex's advice as a protected reason is parasitic on, but distinct from, the "normal" justification.

Second,<sup>12</sup> if Shelley is the leader of a group, and most members of the group take her instructions as authoritative (or at least seem to do so), then other members of the group might

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<sup>11</sup> This example is due to Raz, *Morality of Freedom*, 53-54.

<sup>12</sup> This example is due to Raz, *Morality of Freedom*, 54-55.

take her instructions as protected reasons simply because doing so is an important way in which one identifies with that group.

It seems more appropriate to describe these as cases of justified *deference*, not as cases in which agents are abnormally justified in regarding another's instructions as authoritative. Perhaps Raz thinks that the two are identical. In any case, there has been some pushback recently against the thesis that C1 identifies the *normal* justification; theorists like Scott Hershovitz and Scott Shapiro have argued that there are reasons to take an agent's instructions as authoritative that are not in any way parasitic on the normal justification. I'll say more about their critique in the next sub-section (II.3). First we should clear up six details about this service conception of authority.

(d) *Six caveats*. First, I should remind the reader that the NJT is not yet an analysis of the meaning of statements of the form "A has authority over S."<sup>13</sup> It *is* an analysis of (a) the roles played by authoritative directives in agents' practical reasoning and (b) the normal justification for their playing this role. One natural suggestion for an analysis of authoritative roles that hooks up neatly with the NJT—that A has authority over S if and only if S would be justified in the normal way in taking A's instructions as protected reasons—will not do the trick; we'll see arguments to this effect in Section III.1, and I'll argue for an alternative analysis in Section III.3.

Second, there might be circumstances in which or matters on which it is more important that agents choose for themselves than that they choose rightly. Raz suggests that, if we are not given the space within which to choose for ourselves at times, our own practical rational processes may atrophy, and we may become utterly dependent on the advice of practical authorities. If we have reason to remain self-reliant, we will have to exercise our practical rational capacities now and again, and so will need some space within which to choose for ourselves.

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<sup>13</sup> See n. 5.

Again, there might be acts (like marriage in contemporary Western cultures) with felicity conditions that cannot be satisfied unless the agent herself performs the action, without the intervention of another agent nor on the instructions of a superior.<sup>14</sup> And surely there are psychological benefits to feeling that one is more or less in control of one's life and responsible for its development. So in the complete condition on legitimate authority below (Section IV.4), we will include what Gerald Postema calls the "autonomy proviso,"<sup>15</sup> limiting the circumstances in which one agent can have legitimate authority over another to those in which it is more important that the latter agent act in conformity with the reasons holding for her than it is that she choose for herself.

Third, one agent can be responsive to another's advice without regarding her instructions as protected reasons. At times an agent will be justified in regarding another's claim "You should  $\phi$ ," not as creating a reason for her to  $\phi$ , but merely as identifying reasons that already exist. The instructor gives the instructed *a reason to believe* that she has reason to  $\phi$ . We can distinguish expert advice from practical authority, then, by identifying the distinct roles played by each in our practical reasoning.

Fourth, a subject S need not regard the instruction to  $\phi$  as a reason not to *deliberate* about the reasons for and against  $\phi$ -ing; as long as such deliberation takes place "offline" (that is, without immediate consequences in S's actions), S will still regard authority A's instructions as authoritative. This distinguishes the Razian account of authority from the Hobbesian account, in

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<sup>14</sup> Raz, "The Problem of Authority: Revisiting the Service Conception," in *Minnesota Law Review* 90 (2005-2006): 1015-16.

<sup>15</sup> Gerald Postema *Legal Philosophy in the Twentieth Century: The Common Law World* (Dordrecht: Springer, 2011), 364.

which the sovereign *defines* right and wrong action for her subjects.<sup>16</sup> Nor does the authoritative instruction sap the reasons holding for the subject *ab initio* of their normative force; it is only because these reasons still have normative force that action in conformity with them is valuable for the subject, and so only because these reasons remain in force that the subject has reason to act on the authoritative instruction. The exclusionary reasons associated with authoritative instructions do not eliminate reasons, but only give the subject reason not to act *for them*.

Fifth, the scope of an agent's authority may be limited to a particular subject matter. Doctor Penrose's authority is limited to issues related to human health. So when Penrose directs Elena to take Zanotab twice daily, Penrose's instructions cannot protect Elena's reason to take the pills from defeat by considerations unrelated to health. Say that the pharmaceutical company responsible for the production of the prescribed pill is known to test its medication on animals, and Elena is profoundly opposed to animal testing. She may have a reason to take a principled stand against the pharmaceutical corporation that is not excluded by the fact of Penrose's expertise. Practical rationality here will consist in balancing Elena's reason to treat her malady against her un-excluded reason to boycott the pharmaceutical corporation in question, and the doctor does not stand in a position to do this for her.

Sixth, even if A is mistaken about how S ought to act in a particular case, S may still be justified in regarding A's instructions as authoritative.<sup>17</sup> Recall the relationship between beliefs and reasons described in Section II.1: our beliefs are often our best guide to the reasons holding for us, and since we have to make do with what we've got, we must act on our beliefs even when they are mistaken—unless better guides are available. Practical authorities—like our own

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<sup>16</sup> “[I]t was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, &c.” Thomas Hobbes, *Elements of Law*, ed. Ferdinand Tönnies (Cambridge: Cambridge University Press, 1928), 150.

<sup>17</sup> Raz, *The Morality of Freedom*, 47.

beliefs—may be mistaken, but when they are available *they* are our best guides to the reasons holding for us, and so we are justified in regarding their instructions as protected reasons even when they are mistaken. So if Doctor Penrose tells his patient Alma that she ought to take Zanotab twice daily, but his prescription is mistaken, Alma will still be justified in taking the prescription as a protected reason to take Zanotab twice daily. This is because, by substituting Penrose’s instruction for her own practical conclusion, she is still *likely* to do better than she would were she to act on her own practical conclusions. C1 only requires that subjects be *likely* to better act in conformity with the reasons applying to him should he substitute A’s instructions for his own practical conclusions, which is consistent with occasional mistakes on A’s part.

What about cases in which, from the subject’s perspective, A’s instructions are *clearly* mistaken? Take a case from Raz:

I am driving my car in flat country with perfect visibility and there is no other human being, animal, or car for miles around me. I come to a traffic light showing red. Do I have any reason to stop? There is no danger to anyone and whatever I do will not be known to anyone and will not affect my own attitude, feelings, or beliefs about authority in the future. Many will say that there is not even the slightest reason to stop at the red light in such circumstances.<sup>18</sup>

There is a superficial response: if legal subjects are free to determine for themselves whether or not the legal directive to stop at red lights applies to the case at hand, then law’s authority itself will be undermined. But the fact that  $\phi$ -ing will undermine an authority’s capacity to coordinate constitutes a reason to not- $\phi$ , if one has reason to support the coordination. So if it is true that running the red light in the case at hand will undermine law’s capacity to coordinate traffic, then the driver *does* have a reason to refrain from running the red light. Presumably, it is for precisely this reason that Raz stipulates that no one will ever know we have run the red light, that it will not affect the driver’s attitudes, feelings, or beliefs about the authority of the law. If these

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<sup>18</sup> Raz, “Legitimate Authority,” in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009), 16.

stipulations don't show that our running the red light won't undermine law's authority, then the case will no longer be one in which the driver has no reason to refrain from running the red light—but it is a reason that holds for the driver prior to the issue of the authoritative instruction, namely, the reason to support the coordination of motor traffic so that she may safely and efficiently travel by automobile. But where running the red light will not undermine the state's efforts to coordinate motor traffic there seems to be no reason at all for the driver to stop.

### (3) *Communitarian Justifications of Authority*

I mentioned a moment ago that Herskovitz<sup>19</sup> has criticized the NJT on the grounds that, in calling the “normal” justification *normal*, Raz ignores other important ways in which practical authority is justified. In particular, Herskovitz concedes that while a part of any *democratic* government's authority surely derives from its provision of the Razian service to legal subjects, but argues that this is not the main source of its legitimacy.<sup>20</sup> Robustly democratic governments might well be authoritative because their decisions represent the decisions *of the community they rule*. They may arrive at decisions that are (to some degree) substantively incorrect, and so may fail to provide the Razian service for legal subjects; but because their decisions are the products of processes that respect subjects' dignity and autonomy by involving them in fair, public deliberation, the government's decisions in an important sense *belong* to the members of the community. The autonomy proviso is at work here: just as it is sometimes more important that we choose for ourselves than that we choose rightly, so (the proceduralist argues) it is sometimes

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<sup>19</sup> Herskovitz develops the critique primarily in number of articles, including “Legitimacy, Democracy, and Razian Authority,” *Legal Theory* 9 (2003): 201-221. Shapiro offers a similar critique in “Authority,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman et al. (Oxford: Oxford University Press, 2002), 431-439.

<sup>20</sup> Herskovitz, “Legitimacy, Democracy, and Razian Authority,” 213-219.

and to some extent more important that the community decide *for itself* than that its decisions be right.

Hershovitz has argued for this conception of authority by pointing out that we sometimes take *de facto* authorities to be illegitimate on procedural grounds, and by arguing that the service conception of authority cannot capture this phenomenon. Here's Hershovitz:

Our discourse about the legitimacy of governments indicates that we believe a government can fail to be legitimate on procedural grounds. If a government's electoral system favors some interests in society, or appears corruptly financed, or causes portions of the population to be marginalized and voiceless, we are quick to judge it illegitimate, or at least less legitimate than it might be otherwise. Where these deficiencies are present, it counts for little that a government may produce substantively good decisions, decisions that the normal justification thesis would hold authoritative.<sup>21</sup>

Hershovitz has taken this fact of our discourse as evidence that the authority of the government in question is not based solely on its provision of the Razian service:

They fail to be legitimate because, even though they produce good law, they do it without showing proper respect toward their citizens, without allowing them appropriate opportunity to participate in the structuring of their own lives, without regard for a just allocation of political power, and perhaps in ways that breed resentment and alienation.<sup>22</sup>

If we cannot make sense of our concerns about procedurally incorrect governments with the tools afforded us by the NJT, then we will have reason to reject Raz's claim that the thesis identifies authority's *normal* justification; this fact of our discourse about democratic authority counts as evidence in favor of the sort of Hershovitz's communitarian conception of authority, which places procedural considerations front and center.

One way of responding to the point—one that seems to have tempted Raz<sup>23</sup>—is simply to point out that if an agent has reason to take as authoritative decisions reached by a certain

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<sup>21</sup> Hershovitz, "Legitimacy, Democracy, and Razian Authority," 216.

<sup>22</sup> Hershovitz, "Legitimacy, Democracy, and Razian Authority" 217.

<sup>23</sup> See Raz, "The Problem of Authority," 1030.

kind of process, then there is a trivial sense in which that agent will act in better conformity with the reasons holding for her if she takes those decisions as authoritative than she would were she to act on her own practical conclusions. She will, after all, act in conformity with the reason she has to take as authoritative the instructions produced by procedurally correct decision-making processes. Take a familiar case: Alonso might have reason to do as his mother tells him (because, in doing so, he'll express his love for her); and Alonso will act in conformity with this reason when he substitutes his mother's instruction for his own practical conclusions. So (one might think) Alonso will be justified in the normal way taking his mother's instructions as protected reasons. Similarly, the members of a community might have a reason to do as their community (given voice by democratic institutions) instructs. So, when their community reaches a decision, they will act in conformity with *that* reason when they substitute their community's instruction for their own practical conclusion. The members of the community will be justified in the normal way in taking their community's instructions as protected reasons.

But Hershovitz rightly notes that this sort of a move would be disastrous for the service conception because it would rob the NJT of any content, boiling it down to the uninteresting claim that agents have reason to do what they have reason to do:<sup>24</sup> “So conceived, the normal justification thesis would accommodate all theories of legitimacy that turned out to be true; hence it ceases to be a competitor with other candidate theories of legitimacy.”<sup>25</sup> I find this point persuasive, and so am inclined to think that it would be imprudent to dismiss out of hand the idea that there might be some matters on which it is better that the community decide for itself than that the community get it right; and that, with respect to such matters, democratic procedures respecting community members' dignity and autonomy might be the appropriate

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<sup>24</sup> Cf. Hershovitz, “The Role of Authority,” *Philosophers' Imprint*, 11 (2011): 5.

<sup>25</sup> Hershovitz, “Legitimacy, Democracy, and Razian Authority,” 219.

manner in which such decisions are to be made. Of course (as Hershovitz recognizes), this would *not* show that the Razian normal justification is not an important way in which agents are justified in taking another's instructions as protected reasons; it only shows that it is not really as *normal* as Raz has claimed.

I raise this point here in part because I will argue (in Section V) on *Razian* grounds (laid out in Section IV) that legitimately authoritative instructions must derive from processes that to some extent overlap those that are associated with authority justified in the way Hershovitz suggests. In particular, I will argue that legitimate practical authorities must consult with subjects, foster and pay attention to normative discourse (much of which should involve subjects), and must make public the evidence on which their decisions have been based (so as to make it available for critique, plausibly by legal subjects). If this is right, then the mere fact that some practically authoritative roles and institutions (like democratic government) involve processual elements would not necessarily show that their authority is justified on the communitarian grounds that Hershovitz identifies.

If we're to think that this project is viable, we'll have to address two concerns. First, do authoritative decision-making processes that involve subjects stand in tension with the spirit of the service conception of authority, on which subjects *outsource* their practical reasoning to another? And second, when these processes are associated with a practically authoritative role or institution, is there any principled way to determine whether this counts as evidence that the role is justified on communitarian grounds, or on Razian grounds?

I will say that the answers (respectively) will be "No" and "Yes." But before showing why I'd like first to motivate the claim that we should associate these processes with providers of the Razian service. That will take up the bulk of Sections IV and V; in Section V.4, I'll return to these two concerns. In the meantime, in order to maintain continuity with the literature, I'll

continue to describe the Razian normal justification as it's been described (that is, *as normal*), though in doing so I don't mean to downplay Hershovitz's point.

### III. "A has authority over S"

I've acknowledged that the service conception of authority does not provide a complete account of the meaning of claims of the form "A has authority over S."<sup>26</sup> It's easy enough to show that an agent providing the Razian service for another does not necessarily have the standing to make demands on those for whom she would perform the Razian service. Say that a financial advisor<sup>27</sup>—well-versed in tax law, the workings of the stock-market, the state of the current business climate, and so on—knows precisely what Paul should do with his money; and say that Paul would do better with respect to the reasons holding for him (at least, in financial matters) were Paul to substitute the financial advisor's instructions for his own. Paul is under *no obligation* to obey the financial advisor; she offers expert advice, not binding directives, and has no standing to make demands of Paul or to hold Paul accountable should he fail to do as she directs. But authority necessarily involves the power to impose obligations; if our account of authority does not get us that, then what have simply is not an account of authority.

While this purported counterexample shows that we cannot take claims of the form "A has authority over S" to be true when and only when A would provide the Razian service to S, that doesn't yet show that the service conception of authority is inaccurate, only that it is incomplete. In fact, this point is entirely consistent with the NJT, which, as I've said, is *not* a thesis about the meaning of claims of the form "A has authority over S," but a thesis about the role played by directives in an agent's practical reasoning when she regards them as authoritative,

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<sup>26</sup> And as Raz has acknowledged—see n. 5.

<sup>27</sup> See Stephen Darwall, "Authority and Reasons: Exclusionary and Second-Personal," *Ethics* 120 (2010): 259.

and an important way in which they are justified in playing that role. Stephen Darwall identifies NJT with the claim “If B would do better in complying with independently existing reasons were B to treat A’s directives as preemptive reasons, then A has authority with respect to B.”<sup>28</sup> But in this he is simply mistaken.<sup>29</sup>

How are we to connect Raz’s account of *legitimate* authority with an account of claims of the form “A has authority over S”? I suggest that we should define institutional authority in terms of *legitimate* authority. I will flesh this idea out more completely in Section III.3. But first, we should take note of two arguments to the effect that the service conception of authority is not apt to play a role in such an account. In this section, I’ll discuss and critique (1) Stephen Darwall’s argument and (2) Andrei Marmor’s argument before (3) developing more completely the idea that practically authoritative roles are best understood in terms of the conditions of their legitimacy.

#### *(1) Darwall’s Critique*

Darwall<sup>30</sup> calls attention to what he describes as the “second-personal” aspect of authoritative demands. Authoritative instructions are necessarily addressed from one agent to another; they are in an important sense agent-relative.

Darwall makes this point by distinguishing two types of reasons an agent might have to stop standing on another’s foot. (i) The agent might see pain as bad, and on learning that by stepping on the latter’s foot he creates pain, he might recognize that he has a reason to stop

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<sup>28</sup> Darwall, “Authority and Second-Personal Reasons for Acting,” in *Reasons for Action*, ed. David Sobel et al. (Cambridge: Cambridge University Press, 2009), 150.

<sup>29</sup> See, again, n. 5.

<sup>30</sup> Darwall draws on material from his book *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge: Harvard University Press, 2006) to advance his critique of the service conception of authority in several articles, particularly “Authority and Second-Personal Reasons for Acting.”

standing on his victim's foot. Anyone who points out to this agent that he is standing on another's foot, or that standing on the other's foot creates pain, or that pain is bad and ought to be reduced, is not *giving* a reason (in the sense of creating it) so much as *identifying* one. The guidance is epistemic, rather than practical: the advisor gives the agent reason to believe that he has a reason to get off of his victim's foot, but does not create a new reason for action. (ii) On the other hand, the victim might *demand* that the offending agent step off. In issuing this demand, she does more than point out that the villain has a reason to get off her foot. She creates a new one that essentially involves its being addressed to another by someone with the power to make demands.<sup>31</sup> Darwall calls reasons of this second variety "second-personal" reasons, and I'll adopt that terminology here.

Darwall argues that legitimately authoritative instructions have an essentially second-personal element, and (as such) presuppose authority and accountability relations between the issuer and the addressee.<sup>32</sup> But (Darwall argues) that one agent would provide the Razian service for another does not necessarily earn that agent the power to issue authoritative demands that justify holding the latter responsible to the instructor. It is an *insufficient* condition on practical authority. (This is why the financial advisor discussed above does not have authority over Paul.) Moreover, he argues that the fact that agent A would provide the Razian service for agent S is not sufficient because it is *the wrong kind of reason* to justify A's holding S responsible. Claims to authority (that is, claims to the standing to issue second-personal reasons) are necessarily justified *second-personally*,<sup>33</sup> on Darwall's account. Here, I'll focus on this second point.

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<sup>31</sup> Darwall, *The Second-Person Standpoint*, 6-7.

<sup>32</sup> Darwall, *The Second-Person Standpoint*, 8.

<sup>33</sup> Darwall, *The Second-Person Standpoint*, 13.

Darwall argues that the second-personal concepts *second-personal authority*, *valid claim*, *second-personal reason*, and *responsibility to* are defined in terms of one another, and imply one another:<sup>34</sup> authoritative claims and demands presuppose authority–subject relations which accord to the authority the power to create a second-personal reason that holds for the subject, which is a reason for the subject to comply and which renders the subject responsible to the authority for his compliance; and that accountability, too, implies authority–subject relations. But Darwall goes further: “...there is no way to break into this circle from outside it. Propositions formulated only with normative and evaluative concepts that are not already implicitly second-personal cannot adequately ground propositions formulated with concepts within the circle.”<sup>35</sup> A proposition of the form “A has authority over S” cannot be “grounded” (as Darwall puts it) on propositions that do not include second-personal reasons. By this, I take Hershovitz to mean that any purported justification for an agent A’s having authority over another agent S that made no appeal to second-personal reasons would be a *failed* justification, because it would include only the *wrong kinds* of reasons. That is desirable that A have authority over S, for example, cannot ground A’s *actually having* authority over S.

Darwall argues this by drawing on the familiar point that *the fact that it would be beneficial to believe that P* is the *wrong kind of reason* to believe that P; we should believe that P only if we have evidence that P. And we should desire that P only if it is desirable that P. “Similarly,” Darwall argues,

the *responsible* and the *culpable* concern norms for the distinctive attitudes and actions that are involved in holding people responsible and blaming them. The desirability—whether moral, social, personal, or otherwise—of holding them responsible, or reasons why that

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<sup>34</sup> Darwall, *The Second-Person Standpoint*, 11-12.

<sup>35</sup> Darwall, *The Second-Person Standpoint*, 11-12. See also “Authority and Second-Personal Reasons for Acting,” 145.

would be desirable, are simply reasons of the wrong kind to warrant doing so in the sense that is relevant to whether they are responsible or blameworthy.<sup>36</sup>

So, agents will be justified in believing that P only if it is credible that P; agents will be justified in desiring that P only if it is desirable that P; and any agent A will be justified holding agent S accountable for  $\phi$ -ing only if, in  $\phi$ -ing, S is *responsible to* A for  $\phi$ -ing. When any agent A punishes any agent S for  $\phi$ -ing, A's act cannot be justified on the grounds that it is desirable that S be punished for  $\phi$ -ing because "Desirability is a reason of the wrong kind to warrant the attitudes and actions in which holding someone responsible consists in their own terms."<sup>37</sup> But (the argument runs) *responsibility to* is a second-personal concept, and S's being responsible to A for  $\phi$ -ing presupposes that A and S stand in an authoritative relationship, that A has the standing to make demands on S. So (Darwall concludes) in order to justify A's holding S accountable for  $\phi$ -ing, appeal must be made to second-personal reasons.

But even if this argument goes through, it shows only that individual instances of one agent's holding another accountable must be justified second-personally. It does *not* show that institutions affording some agents authority over others must be justified second-personally. When A holds S accountable for  $\phi$ -ing, *that act* is plausibly justified only in second-personal terms. But that does not show that A's having the standing to demand that S not- $\phi$  can be justified only in these terms. This leaves open the possibility that institutions affording to some agents the power to make demands on others, and that they might be justified in doing so in terms of a non-second-personal standard. This sort of a move has gained some traction in recent interpretations of Kant's theory of punishment. As Thomas Hill observes:

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<sup>36</sup> Darwall, *The Second-Person Standpoint*, 16-17; emphasis in the original.

<sup>37</sup> Darwall, *The Second-Person Standpoint*, 12; emphasis removed. See also "Authority and Second-Personal Reasons," 139; "Authority and Reasons," 263-64.

Various commentaries have suggested ways in which deterrence and retribution might be mixed in Kant's theory of punishment. A common first step is to distinguish the rules governing the practice (or institution) of punishment from the justification of having such practice. Given this distinction, it has been suggested that *deterrence* is the justifying aim of having the institution and *retributive policies* are constitutive features of the institution, features that either promote the justifying end or serve as side constraints. Another proposal is that the *threat of punishment* is justified by the aim of deterring crime, but the *execution of punishment* is justified independently by considerations of justice and the requirement to treat persons as ends in themselves.<sup>38</sup>

To be sure, the role of punishment in Kant's political framework is not that simple,<sup>39</sup> but that discussion lies beyond the scope of this paper. For now, it is enough to note that, even if Darwall is right that the exercise of a power to hold an agent accountable must be answerable to norms concerning *culpability*, this is not enough to show that the distribution of powers to make demands must be answerable to the same norms. And to my knowledge, Darwall offers no further arguments that would suggest that institutions placing agents in authority–subject relations must be justified second-personally.

I have not shown that Darwall *could not* advance such an argument. But until such an argument is advanced, I will take it for granted it remains plausible that institutions according to an agent A the standing to make demands on another agent S might be justified in terms of a non-second-personal standard. (I'll articulate a *Razian* standard in terms of which some authoritative roles are justified in Section III.3.)

## (2) Marmor's Critique

Marmor argues that what the service conception of authority misses out on is authority's *institutional* nature: in order for an agent A to have practical authority with respect to another agent S, A and S must exist within an institutional framework that confers on A normative

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<sup>38</sup> Thomas Hill, "Punishment, Conscience, and Moral Worth," in *The Southern Journal of Philosophy* 36 (1998), 54; emphasis in the original. See also Sharon Byrd "Kant's Theory of Punishment," *Law and Philosophy* 8 (1989): 157, 184-198; Don E. Scheid, "Kant's Retributivism," *Ethics* 93 (1983): 262-282.

<sup>39</sup> See Hill, "Punishment, Conscience, and Moral Worth," 54-5 for some brief comments.

powers to alter S's normative relationships—her rights and obligations with respect to others. This is why the financial advisor does not have authority over Paul: she doesn't occupy an institutional role conferring on her normative powers to change Paul's normative relationships. Moreover, Marmor argues, we can understand what it is to have such an institutional standing *without* appeal to its justification, and so can make sense of institutional roles independently of *their* justification. In other words, we should not base our conception of institutional authority on our conception of legitimate authority. Here, I'll focus on this second point.

Marmor makes the argument by offering up a case:

The dean of our college has issued a requirement, applying to each member of the faculty, to submit a report of their research activities for the last five years, by a certain date. The dean's instruction contained a detailed list of criteria about what counts as 'research activity' and what doesn't count. Now let us make several assumptions about this case: first, we will assume that the dean's requirement is well within his official authority as dean. It is the kind of requirement that the dean is authorized to make. Second, we will assume that some of the criteria that he laid down for what counts as 'research activity' are not warranted by reason; substantively, they are wrong. Finally, we will assume that there is a clear sense in which we, as faculty members subject to the dean's authority, are obliged to comply. (*Pro tanto* obligation, of course, and not all things considered.)<sup>40</sup>

Because the dean's instruction is substantively wrong, Marmor argues that professors will *not* be helped to act in conformity with the reasons holding for them by complying. But, he points out, there is still a sense in which professors have an obligation to do as the dean requires, and we will not be able to make sense of this by appeal to the service conception of authority. Because the instruction is *clearly* wrong, there is *no* sense in which professors will in this case *likely* act in better conformity with the reasons holding for them than they otherwise would have done. So if the dean's instruction creates a protected reason for the professors (and Marmor accepts that it does), then it cannot do so simply because the dean provides the Razian service for them in this case.

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<sup>40</sup> Andrei Marmor, "A Dilemma of Authority," University of Southern California Legal Studies Working Paper 66 (2010): 9-10.

We might point out that Raz is quite comfortable with the fact that authoritative directives can be reasons-giving even if they are mistaken, as I noted in the sixth caveat at the end of Section II.2. So (one might wonder) where is the objection? According to the NJT, one agent S is justified in taking another agent A's directives as protected reasons only if S is likely to do better by the reasons holding for him than he would were he to act on his own practical conclusions, and I have suggested that we can understand this to mean that S justified in taking A's directives as protected reasons only if S would be justified in having a *higher credence* that he would do better by the reasons holding for him were he to take A's directives as protected reasons than he would were he to act on his own practical conclusions. This higher credence will sometimes be justified even if A is mistaken. There are circumstances in which doctors misdiagnose their patients, and yet patients are still justified in taking their prescriptions as protected reasons.

Perhaps Marmor means to argue that agents have reason to do as authorities instruct even when they are *clearly* mistaken. As we've seen, this *would* conflict with the Razian view. If Marmor means to argument that, even though the dean is *clearly* mistaken, his instructions are still reasons-giving, then he is actually making a substantive point, albeit one that we need not endorse.

### *(3) Legitimate Authority and Authoritative Roles*

In Sections III.1 and III.2 I offered focused critiques of Darwall's and Marmor's arguments against the service conception of authority. But there is a generic point that tells against both of their conceptions of authority: in defining practical authority in terms of a particular kind of standing, Darwall and Marmor render essential to authority that which is derivative. Carving up our concept of authority in terms of its purpose or justification (as I suggest) rather than in terms of a particular kind of power yields a conceptual framework that

directs our attention toward that which is most important to a thorough understanding of authority for two reasons.

(a) *Variation in the structure of authoritative roles.* First, it can help us to make sense of the dramatic variation in the structures of authorities' relationships with their subjects across various institutional roles; and in turn, it can provide us with a standard to which this variation is answerable. We have seen that some agents that would perform the Razian service for another lack the standing to hold that other accountable for her failure to act on the instructions issued—*viz.*, the financial advisor, the doctor. But there are agents who would perform the service, but who *could not* do so without the standing to hold accountable those subject to them—*viz.*, the parent, the dean, the sergeant—coupled with instructions about how they should do so. Military contexts are particularly urgent and demand an extraordinary degree of coordination and commitment from the agents involved; children's practical rational processes are (typically) severely underdeveloped. Without the standing to hold subjects accountable for their failure to act on authoritative instructions, sergeants and parents would be incapable of performing the Razian service. The dean is an intermediate case: without the cooperation of the university's professors, the dean cannot successfully coordinate university affairs; but because professors have biased perspectives, will often think that the dean's decisions are substantively wrong, and would often be tempted to free ride were the opportunity to present itself, they would frequently face incentives *not* to substitute the dean's decisions for their own practical conclusions were they not accountable to someone for a failure to do so—incentives that could undermine the possibility of cooperation and thereby undermine the dean's capacity to perform the Razian service. So deans' institutional standing to hold professors accountable—or the institutional standing of *someone* within the university to do so—makes possible the provision of the Razian service. But because professors are (in general) mature adults, and because the

contexts in which deans make their decisions are less violent, and because the problems facing deans are typically less urgent, their right to hold professors accountable is far less robust than are the rights associated with military and family roles.

Variation across these roles—sergeant, parent, dean—includes variation in the shape of the power to hold subjects accountable. At the limit of such variation, we find the rights associated with mentor roles like academic advisors. If Professor Sorenson tells her advisee Lawrence that he must read David Lewis' *On the Plurality of Worlds*, and Lawrence fails to do so, Sorenson could have remarkably little standing to hold Lawrence accountable for his failure to do so. She can walk away from the relationship, or she can refuse to write him a letter of recommendation. And in doing so, she might well express to Lawrence her disappointment. But this is a far cry from the right that parents and sergeants have to punish insubordination, and I doubt that departments accord professors the right to do either of these things primarily in order to provide them with a means by which to impose sanctions on insubordinate advisees. Sorenson has a right to walk away from the relationship because, among other things, she has good reason not to waste her time with unserious students; and she is free to refuse to write Lawrence a letter of recommendation because, among other things, she simply cannot commend him to potential employers. Though she will be justified in being disappointed in Lawrence and has the means to express this disappointment, these means are both quite circumscribed and are not justified primarily on the basis of their serving this purpose.

Yet I expect we are still inclined to think of Sorenson as a legitimate practical authority for her Lawrence, even though she might have extraordinarily little institutional standing to hold him accountable. What academic advisors have in common with sergeants, parents, and deans, is that for an agent to occupy one of these roles *well* is for her to help her subjects act in conformity with the reasons holding for them. To occupy an authoritative role is to occupy a

role meant to serve a purpose (in these cases, the provision of the Razian service), and I suggest that the (quite diverse) rights that authorities have over their subjects accrue to the agents in virtue of their occupation of such roles. Sergeants, parents, and deans *cannot* provide the Razian service without the right to make demands of their subjects and to hold them accountable when they disobey, and on these grounds we can justify structuring sergeants, parents, and deans normative relationships with their subjects such that they have the normative standing to make these demands. (We need not think that these rights accrue to agents in authoritative roles by any mysterious process; I expect that the dean has a power to change professors' normative relationships in virtue of a background normative framework. My point is simply that these rights are not *fundamental* to the characterization of the role as authoritative. Institutions might purport to create roles with similar rights, but if those roles are not be justified in a way that practically authoritative roles are justified, then the roles themselves cannot be understood as practically authoritative.)

I've argued that academic advisors, deans, parents, and sergeants serve a common generic purpose (the provision of the Razian service with respect to a particular subject matter), and that though their normative relationships with their subjects diverge considerably, the roles they occupy provide them with the tools necessary to the achievement of that proper perfection. Is this sufficient to ground a duty in others? Not always. Other roles have the same generic purpose as do sergeants, academic advisors, and parents: good financial advisors help their clients invest wisely, and good doctors help their patients make reasonable decisions with respect to their health. Neither financial advisors nor doctors have any claim on clients' or patients' obedience, nor even a normative power to change clients' or patients' obligations. But to afford them one would not help clients or patients act in conformity with the reasons holding for them, and might well positively impede their ability to do so. Doctors' and financial advisors' interest

in being a good authority is *not* sufficient reason to hold their patients or clients to be under a duty to obey, because they can be good authorities *without* the correlative right to rule, and may even be *better* equipped to perform the Razian service if subjects enjoy greater freedom in their relationships. (In some cases, to accord to an agent the right to another's obedience might actually *impede* her capacity to perform the Razian service.)

(b) *Equal emphasis on powers and responsibilities.* But there is an additional benefit to focusing on the proper perfections of institutional authoritative roles, one that is more directly relevant to my project in this paper. We must focus at least as much of our attention on aspects of authoritative roles distinct from the right to rule—in particular, on the peculiar responsibilities and obligations associated with various authoritative roles. These features are just as important to their characters as species of practically authoritative roles as are the rights and powers associated with them. We can make perfect sense of this if we emphasize that institutional roles are authoritative if and only if they have as their proper perfection the performance of the Razian service; but if we make a particular kind of standing central—whether the standing to make demands or to change subjects' normative powers—then the responsibilities associated with these authoritative roles become almost accidental. The importance of the responsibilities and obligations associated with a practically authoritative role to its characterization *as* practically authoritative gives us a strong reason to insist that legitimate authority remain fundamental, that institutional authority should be defined in terms of it, and that those roles whose proper perfection involve the provision of the Razian service be understood as practically authoritative.

By refocusing on the *justifications* for practically authoritative roles, we can both justify the rights accruing to them, make sense of the diversity of the structures of these rights, and give equal priority to these rights and to the responsibilities associated with authoritative roles. I suggest that we should take such claims to mean that A and S occupy an institutional role with

an authoritative character, and that institutional roles have an authoritative character if (i) they are structured in a way that renders them apt to act as authorities, and (ii) the role is justified on these grounds. For example, if the structure of A's institutional relationship with S renders A apt for the provision of the Razian service for S, and if it is in virtue of this that A's institutional relationship with S is justified, then A has authority over S.

(Of course, because I have conceded to Hershovitz that the Razian normal justification is not really so normal, we might well be able to justify authoritative roles in terms of diverse standards. And some authoritative roles might be justified in terms of *multiple* standards. In Section V.4, I'll argue that this is a welcome development insofar as there do seem to be some authoritative roles that are justified both on Razian and Hershovitzian grounds—namely, *representatives* in democratic societies—and that this dual justification is reflected in a tension associated with the role.)

In the rest of this paper, I'll suggest the kinds of responsibilities associated with (Razian) practical authority (and with the provision of the Razian service generally) (Sections IV and V), and then draw on these lessons to argue that the Rule of Law involves requirements that legal officials be subject to precisely such responsibilities (Section VI).

#### **IV. Refining the Normal Justification Thesis**

I suggested above that, when one agent A's instructions are legitimately authoritative for another agent S, S's instructed acts are *more likely* to conform with the reasons holding for S than are S's independent acts in the sense that S should have a higher credence that his instructed acts will conform with the reasons holding for him than that his independent acts will. In this section, I'll argue that this higher credence is justified in part on the grounds that A's practical rational processes *aim at* bringing S's instructed acts into conformity with the reasons holding for him. I'll argue this in four steps. First, I'll (1) invoke Raz's *dependence thesis* in order to set the

foundation for the argument; then, I'll (2) suggest a non-metaphorical interpretation of the "aiming" relationship, (3) argue that an authority's instructions depend on the reasons holding for the subject when the authority's practical reasoning (with respect to the subject) aims at bringing the subject's instructed acts into conformity with the reasons holding for her, and (4) defend it on the grounds that it makes plausible the idea that practical authority is projectable into the future.

(1) *The Dependence Thesis*

Consider a machine designed to spew instructions culled randomly from a pre-defined set of imperatives. During some interval of time stretching from  $t_0$  to  $t_1$ , it's entirely possible that the device would offer some agent Simon instructions that would "get it right" more often than would Simon himself, so (during that interval) it might well be that S would "likely" act in better conformity with the reasons holding for him. But the randomizer doesn't provide the Razian service for Simon. Roughly, the problem is that it isn't a practical reasoner, and one cannot outsource one's practical reasoning to something that doesn't reason about practical matters. Raz expresses this point in his *dependence thesis*: "...all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive."<sup>41</sup> Because the randomizer's instructions do not depend on the reasons holding for Simon, it doesn't count as a provider of the Razian service for him, and so isn't a practical authority with respect to Simon.

But were Simon to take the device's outputs as protected reasons, it is true that, during the interval from  $t_0$  to  $t_1$ , if the machine were to output the command: "φ!" Simon would (in some sense) likely act in better conformity with the reasons holding for him were he simply to do as the machine tells him, rather than try to reason the matter out for himself. The randomizer

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<sup>41</sup> Raz, *The Morality of Freedom*, 47.

would satisfy something in the neighborhood of condition C1 with respect to Simon; it *looks* as though Simon would be justified in something like the Razian normal way in taking its instructions as protected reasons. So why not think that, during this interval, the device counts as a practical authority for Simon? What is the connection between the NJT and the dependence thesis?

In order to make sense of the connection, we'll first need to make precise what it might mean for an authority's instructions to depend on the reasons holding for subjects. I'll argue that an authority's instructions depend on the reasons holding for subjects when their practical rational processes (with respect to the subject) *aim at* bringing the subject's instructed acts into conformity with the reasons holding for him. Talk of an "aiming" relation is, of course, frustratingly metaphorical, so I will first offer a non-metaphorical interpretation before applying it to cases of normally justified authority.

## (2) *Aiming Relations*

I suggest that we can unpack aiming relations in terms of a disposition to update systematically in response to evidence. Here's a rough example of what I mean: say that an amateur baker is interested in producing a delicious cake. His father describes a recipe for such a thing to him on the phone, but neglects to tell him how long he ought to leave the cake in the oven. But the baker is willing to do a little experimenting. So after he mixes the ingredients, he puts the cake in the oven at 350°F for an hour and a half, and when he takes it out it is hard as a rock. So he tries again, leaving the cake in the oven for a mere hour. It is still overdone, but less so than the first cake. Ever persistent, he bakes the next cake for forty-five minutes, and now it is almost right, but he suspects that it could be better still. So he bakes a fourth cake for thirty-five minutes, and this time the cake is just right. The baker *aims at* making the predicate *is likely to produce a delicious cake* true of the recipe he uses by updating his recipe in response to evidence

that the predicate is *not* true of the particular recipes he uses at particular times; and, after updating the recipe, the evidence each time suggests that the new recipe *will* be likely to produce a delicious cake.

This is the sort of aiming to which functionalists about the mind might appeal in offering functional definitions of mental states like belief. On such definitions, we might think that mental processes update an agent's beliefs in response to evidence that current set of beliefs contains members that are not true.<sup>42</sup> Or consider film producers, who test their products on audiences in order to gauge reactions to the film; in response to evidence that the movie was not, say, frightening, the producers of a horror movie may take their film back into the editing room, or may even film some more scenes, with the expectation that after some alterations audiences will respond better to the film. They perform such alterations in response to evidence that the predicate *is frightening* is not true of the film; and (if they are good at their jobs) after their alterations the audiences will respond better to the film.

I suggest that in general “aiming” is a three-place relationship holding for a process  $f$ , some  $x$  to be updated, and some predicate  $P$ :  $f$  aims at making  $P$  true of  $x$  if and only if, in response to evidence that  $P$  is not true of  $x$ ,  $f$  (generally) updates  $x$  such that (at the very least) the evidence no longer shows that  $P$  is not true of  $x$ , and (when possible) the evidence positively shows that  $P$  *is* true of  $x$ . So, for example, a good football coach aims at calling winning plays if (i) she updates the plays she in fact calls when they are not effectively moving the ball down the field, and (ii) after updating, the evidence suggests that the plays she calls *will* effectively move the ball down the field. A good scientist aims at rendering a theory predictively useful if (i) he updates the theory in response to evidence that it is not predictively useful, and (ii) after updating, the evidence suggests that the theory will be predictively useful. The creators of a film

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<sup>42</sup> See, for example, Michael Smith “Humean Theory of Motivation,” *Mind* 96 (1987): 54.

aim at making their film frightening if (i) they update the film in response to evidence that it isn't frightening, and (ii) after updating, the evidence available suggests that the film is frightening.

It is worth emphasizing that in giving the examples above I do not intend to say, for example, that all scientists aim at making their theories predictively useful, nor do coaches necessarily aim at calling winning plays. I am not offering descriptive functionalist definitions of scientists or coaches any more than I am signing on to descriptive functionalist definitions of belief. A coach might well see evidence that the plays she calls are actually costing her team, and fail to update those plays. Or she might update her plays such that, after updating, they are no more effective than they were before (or are even less effective). In these cases, she would still be a coach—the role, after all, is defined institutionally—but she would be a *bad* coach. To be sure, the coach role is in part constituted by a normative orientation toward aiming at calling winning plays, such that a coach is a good coach only if she calls winning plays. (This was the point of Section III.)

### *(3) The Claim*

To say that an agent S's practical reasoning (with respect to herself) aims at bringing her acts into conformity with the reasons holding for her, then, is to say that, when she faces evidence that the conclusions of her practical rational processes do not conform with the reasons holding for her, she updates those conclusions appropriately. Say that Elena desires to buy the most fuel-efficient car available in her region, and she believes that in buying a Cadillac Wagon, she will be doing so. Abstracting from all other reasons holding for her, she concludes that she ought to buy a Cadillac Wagon. But she then reads in *Consumer Report* that the Cadillac Wagon has terrible gas mileage. Since testimony from *Consumer Report* about the virtues and vices of particular cars counts as good evidence, Elena's practical rational processes update, and she now takes herself to have a reason to *not* buy a Cadillac Wagon. This is an instance of Elena's

practical rational processes aiming at bringing her independent acts into conformity with the reasons holding for her; if a pattern like this holds in general, then we can say of Elena that she aims at bringing her independent acts into conformity with the reasons holding for her.

I will argue that this three-place “aiming” relation must hold between (*f*) an agent A’s practical rational processes, (*x*) an agent S’s instructed acts, and (P) the predicate “conform with the reasons holding for S” if A is to qualify as a normally justified authority for S. A’s practical reasoning with respect to S must update in response to evidence that the conclusions of this practical reasoning (A’s instructions to S) do not conform with the reasons S has for acting such that, after having updated, the evidence no longer shows that the conclusions of A’s practical reasoning with respect to S do not conform with the reasons S has for acting (and, when possible, positively shows that S’s instructed acts *do* conform with these reasons). In other words, for any two agents A and S, A is a normally justified authority for S only if

C2 A’s practical rational processes aim at bringing S’s instructed acts into conformity with the reasons holding for S.

If a purported authority’s practical rational processes aim at bringing another agent’s acts into conformity with reason in the way that I have suggested, then it seems plausible that her instructions are *based on* the reasons holding for her subject—at least, insofar as the evidence available is not consistently misleading. She offers the instructions that she does *because of* the evidence she has seen and the implications such evidence has about the reasons holding for her subject, and when the evidence changes, she updates her instructions appropriately. So we can understand the instructions issued by authorities whose practical rational processes aim in the right way as *depending* on the reasons holding for subjects, as is required by the dependence thesis.

(4) *Connecting the NJT and the Dependence Thesis*

But why think that authorities' instructions must depend on the reasons holding for subjects? Why not settle for the probabilistic version of the service interpretation of the normal justification C1 (described at the beginning of this section) and jettison the dependence thesis entirely? Authority is useful as a practical concept only if its beneficial features project into the future. We are less interested in the successes purported authorities have enjoyed in the past than in the successes they will enjoy in the future; we want to know that they will enjoy *continued* success. We need a process that *reliably* produces good instructions, not one that accidentally has done so in the past. Processes that aim in the way I have suggested (a) are the sorts of things that are apt to be reliable (and so justify claims that authorities' successes are projectable into the future), and (b) are the sorts of processes by which legitimate authorities produce practical conclusions for their subjects in paradigmatic cases.

(a) *Authority must be projectable.* First, persistent practical rational processes that aim at bringing a subject's acts into conformity with the reasons holding for that subject justify the projection of authority into the future. That an authority "got it right" at time  $t_1$  may be no reason to think that she will get it right at  $t_2$ ; but that she got it right at  $t_1$  because her instructions were the output of process  $f$ , and that process  $f$  produces the instructions the authority issues at  $t_2$  will justify S's taking A's instructions at  $t_2$ . In fact, I take it that authorities' successes in the past are typically taken as evidence that such a persisting state exists. When Lyndon LaRouche claims that he predicted the collapse of the Soviet Union before anyone else, he is not bragging that he got lucky; he implies that his expectation that the USSR would collapse was the result of a persisting rational process in virtue of which we can expect future successes.

Moreover, if an authority's instructions at any point *fail* to guide her subject toward action in conformity with the reasons holding for her, then insofar as she can tell that such failures occur, *this failure itself* (if evident) will count as evidence that her instructions do not guide

the subject toward action in conformity with the reasons, and the authority's practical rational processes will update her instructions appropriately, insofar as they aim appropriately. This means that her instructions will be self-correcting: should she get it wrong in any particular case, she will eventually correct her instructions, which as a result will actually *improve* over time. And as novel problems arise, or as changing circumstances require new solutions to old problems, the authority's instructions will change to fit different contexts as evidence surfaces regarding these novel problems. So the fact that A's practical rational processes aim at bringing S's instructed acts into conformity with the reasons holding for S grounds a projection of authority into the future, even if other states of affairs change.

(b) *Paradigm cases.* Second, authorities' practical rational processes *do* aim appropriately in paradigm cases. A doctor, for example, counts as a normally justified authority for her patients if her prescriptions help her patients act in conformity with the reasons holding for them; and her prescriptions do so precisely because she updates them in response to the latest advances in medical science and changes in her patients' conditions when they follow her prescriptions. Similarly, a coach counts as a normally authority for his team if the plays that he calls serve as points on which the teammates can converge, and are in general winning plays (that is, they are equilibria in the teammates' incentive structures). But most good coaches (I'd venture to guess, *all* good coaches) do not call winning plays simply because they consistently get lucky, but because they respond to evidence about the strengths and weaknesses of the players on their team and on the opposing team, about the plays that have been successful in the past, about the plays that have been successful for other teams, and so on—and change the plays that they call in response to that evidence until the evidence suggests that they are calling good plays. It is because doctors and coaches aim in the right direction that we can expect their instructions to conform with the reasons holding for us.

We can also get at this by looking at some deviant cases. For example, those instructors who do *not* satisfy C2 are often taken to be practically authoritative precisely because they are *thought* (mistakenly) to satisfy C2. The instructions issued by readers of zodiacal signs and tarot cards, for example, are thought to be authoritative only insofar as the stars or the cards “hook up” with the reasons in a way in which, in fact, they do not.

What about conventions, which are clearly *not* the result of any single individual’s practical rational processes? Can they, nonetheless, have authority? And if so, can they be said to *aim* in the appropriate way? It will be worthwhile to contrast conventions with similar patterns of general activity that are not authoritatively reasons-giving—things like prejudices, or uninstitutionalized power structures. These non-authoritative general patterns of activity are often non-authoritative because they do not help agents’ act in conformity with the reasons holding for them. But in addition, they are often *unlikely* to be appropriately responsive to evidence that they do not provide to agents the Razian service. When evidence surfaces that these general patterns of activity do not help them act in conformity with the reasons holding for them, they will not vanish.

Authoritative conventions may *turn into* the sorts of things that are not apt to vanish in response to such evidence, but when they do, I suggest we should cease to think of them *as* conventions that give agents authoritative reasons. Even before evidence surfaces that the convention fails to provide the Razian service, some may acquire a special interest in the maintenance of the convention—say, because they have invested their resources on the assumption that the convention would persist, or because their livelihoods depend on the role they play within the convention. Or agents may develop prejudices that tell against abandoning the convention. Under these circumstances, the convention ceases to depend on the reasons holding for agents; it depends, instead, on those social factors maintaining it. Agents may still

have reason to conform to the convention, but because the convention no longer depends on the reasons holding for them, the convention is not authoritative; it does not give agents a *protected* reason to conform to it because they will not be justified in taking it for granted that the convention provides the Razian service. (This gives us a convenient framework within which to make sense of bureaucratic standard operating procedures, which come into being in order to solve problems, but which then become entrenched and take on a life of their own, often impeding the bureaucracy's capacity to perform its functions efficiently.) But if the convention *is* of a type to vanish in response to evidence that it does not provide the Razian service, then we *can* think of the convention as aiming appropriately, and so can think of the convention as practically authoritative.

It is worth emphasizing that C2 only expresses a necessary condition on legitimate authority. For A to be a legitimate authority for S, it is certainly not enough that an agent's practical reasoning with respect to another aim at bringing that agent's actions into conformity with the reasons holding for her. A doctor, for example, is not a practical authority simply because her practical reasoning with respect to her patient aims at bringing her patient's actions into conformity with the reasons (concerning her health) that hold for the patient, but additionally because she has encountered copious evidence that the patient has never encountered. And on a football team, every player might well be quite qualified to learn from past failures and mistakes, and to use this experience to call winning plays; but not all of them can plausibly be authorities for their teammates, or the coordination problem they face would go unresolved.

Condition C2 *does* tell us something about the justification for subjects' higher credence that their instructed acts will conform with the reasons holding for them than that their independent acts will. We should take C1 to require that subjects would be justified in having a

higher credence that their instructed acts would conform with the reasons holding for them than they would that their independent acts would conform with the reasons holding for them; and this credence will be justified on the grounds that (i) the instructor's practical rational processes *aim* in the right condition (satisfaction of C2) and (ii) the authority has superior access to evidence, or superior rational processes, or a capacity to coordinate the interactions of multiple agents, or freedom from bias and passion, *etc.* It is because of these features that we can *expect* authoritative instructions to help us act in conformity with the reasons holding for us, and this is how we should take the qualifier "likely" in condition C1. So the complete condition on legitimate practical authority is:

C\* S will be justified in taking A's instructions as authoritative in the normal way if and only if:

A. The matter is not on one which it would be better that S choose for S-self, and

C1. S's instructed acts would likely conform better with the reasons holding for S than would S's independent acts; and this, only if

C2. A's practical rational processes aim at bringing S's instructed acts into conformity with the reasons holding for S.

In sum: in paradigmatic cases of authority, subjects take the authority's instructions as protected reasons because (C1) they take themselves to be more likely to act in conformity with the reasons holding for them, in part because (C2) they regard the authority's practical reasoning as aimed appropriately at bringing her instructions into conformity with the reasons the subjects have for acting. This refinement of Raz's service conception of authority has important implications for the way that we think about authoritative roles and concepts, including law. I begin to consider these in the next two sections.

## V. Deriving Procedural Constraints

In the discussion so far, I've argued that a commitment to the service conception of authority ought to carry with it an interest in the processes by which authorities arrive at their decisions. On the refined service conception of authority, a decision-making process is authoritative for a group of people if and only if the process is responsive to evidence about the reasons holding for subjects and reliably produces instructions that track the reasons holding for subjects as best it can, given the evidence. In this section, I will discuss some of the implications of this refinement of the service conception: namely, that it requires (1) that authorities acknowledge their epistemic limitations on certain matters and encourage the participation of those without such limitations in authoritative decision-making; (2) that authorities encourage, take notice of, and even participate in normative discourse; and (3) that authoritative decision-making open itself up to critique by subjects by making its processes generally public. Processes that do not satisfy these requirements are not open to important parts of the evidence about the reasons holding for legal subjects, so cannot be responsive to that evidence, and so (in light of what we learned in Section IV) cannot be fully legitimate providers of the Razian service.

Finally (4), I will return to the concerns we raised in Section II.3, that involving subjects in decision-making processes stands in tension with the spirit of the service conception of authority; that evidence that an agent's or institution's authority involves a processual element counts as evidence that the authority is justified on the communitarian grounds that Hershovitz emphasizes; and that, if it doesn't, then there is no principled way in which we can judge whether (or to what extent) an agent's or institution's authority depends on communitarian rather than Razian grounds (or vice versa) in virtue of facts about its processual elements.

*(1) Consultations with Experts and Subjects*

If practical authorities must be responsive to evidence about the reasons holding for legal subjects, then where they are subject to epistemic limitations, they must consult with those free of limitations, particularly experts and subjects themselves.

(a) *Appeal to experts.* Typically, legislators and judges are not experts in those spheres of activity for which they enact regulations. Nevertheless, they can and often do (and, according to condition C2, should) appeal to experts for testimony about the ways in which such regulations should be crafted. The earnest reception of testimony from climatologists prior to the enactment of legislation establishing regulations on the types of automobiles to be sold within the jurisdiction lends to such regulations the capacity to help those with a reason not to contribute to the destruction of our climate to act in conformity with that reason. By making an appeal to experts, legislators acquire evidence about the reasons holding for legal subjects and so attempt to satisfy condition C2.

(b) *Appeal to subjects.* If individuals have privileged access to some of the evidence about the reasons holding for them, then in order to be open to this evidence an authority must be willing to *consult* the individual. (This is an epistemic point, not a point about the nature of reasons. *Whatever* we take reasons to be, it seems quite clear that individuals have privileged access to at least some of the evidence about the reasons holding for them.)

Many accreditation and certification processes illustrate this point nicely. To acquire a license to practice medicine, for example, one must satisfy a set of requirements largely settled on by medical doctors themselves, precisely because these doctors have privileged access to evidence about the kinds of conditions one must satisfy if one is to practice medicine successfully. Nonetheless, it is the *government* that requires that aspiring doctors acquire a medical license before practicing medicine. The medical community identifies a set of experts taken to have access to some important reasons holding for aspiring medical doctors, who then report on

those reasons to the government, which then (on the basis of these reports) issues a set of instructions to the medical community compliance with which helps medical practitioners comply with the reasons holding for them. Obviously, legislators are not normally in a position to issue useful instructions to medical doctors about how best to practice medicine, but they put themselves into a position to do so by appealing to reports offered by medical doctors about the reasons holding for medical doctors.

Moreover, it should be uncontroversial that legitimate authorities must discover the details of the particular scenarios confronting subjects before they will be able to derive practical conclusions about what subjects should do in those situations. Once they understand the subtleties of the scenarios, they may be in a better position than the subject to identify the acts that will best conform with the reasons holding for the subjects—but they cannot possibly make this identification *until* they understand these subtleties. But learning about these subtleties might well require that they appeal to the subjects themselves for information. Presumably, this is why doctors *ask* patients about their symptoms and take their personal and family histories. Perhaps they could discover evidence about patients' illnesses simply by administering every conceivable test as soon as the patient enters the clinic, but to do so would be wildly inefficient.

I have at least shown that direct consultation with an agent is sometimes the most efficient method by which one can acquire evidence about the reasons holding for that agent. In some cases, I suspect that it may be the *only* effective method. Say that a patient has an infection in his leg, and that the infection can be dealt with in at least two ways: the doctor can amputate the leg, or she can prescribe a medication that will eliminate the infection but that will have one lasting side effect: every day just after noon, the patient will suffer a crippling headache for about fifteen minutes. Under some circumstances, the doctor may be in a position to acquire *some* evidence (however weak) about the reasons holding for the patient in this case, even without

consulting him. If the patient is a professional sprinter, for example, the doctor may have reason to think that the patient would be willing to put up with the headaches. But even in this case, the best evidence to be had will be acquired by asking the patient which treatment he'd prefer. This will be even more abundantly the case if the patient is *not* unusually dependent on the maintenance of his leg—say, if he works behind a desk and is generally uninterested in sports. In these situations, for the doctor to fail to ask the patient which treatment he'd prefer is for the patient to fail to seek out and respond to important evidence about the reasons holding for the patient; it would be for the doctor to fail to satisfy condition C2 identified above, and thereby to surrender a degree of her legitimacy as an authority for the patient.

Philosophical treatments of consent (as it is exercised here) focus on patients' exercise of their (legal) normative powers, but it is important to notice that, in the process of securing informed consent, doctors will uncover important evidence about the reasons holding for their patients—evidence to which she might previously have been blind. To be sure, I do not mean to argue for a complete revision of our understanding of consent and its role in medical contexts. Certainly we have a practice by which patients exercise (at the very least legally) normative powers to permit their doctors to interfere in their bodily functions, and we typically refer to this practice as consenting. I don't want to suggest that we should stop understanding the practice in this way, nor need we think of consent *merely* as a mechanism by which we offer reports about our reasons. I *do* want to suggest that we might justify the practice at least in part on the grounds that a doctor can be fully legitimately authoritative for a patient only if that doctor is responsive to evidence about the reasons holding for the patient, and that in spite of doctors' technical expertise, patients have privileged access to at least some of the reasons holding for them. So we institutionalize practices requiring that doctors consult patients about

the reasons holding for the latter, notably by requiring that doctors acquire their patients' consent before administering medications or performing surgery.

To some extent, then, because legitimate authorities must seek out evidence about the reasons holding for their subjects, they must in many cases actually *consult* with experts and subjects in order to arrive at useful instructions. This is an important upshot of the refined service conception of authority previously underemphasized in the standard Razian account.

(2) *Employment of Discursive Processes*

Experts' testimony and agents' self-reports about the reasons holding for them do not constitute all of the evidence that a legitimate authority can acquire about the reasons holding for her subjects. This is because agents can be mistaken about the reasons holding for them; their reports may be subject to error. By this, I do not mean only that we can be mistaken about the mere "matters of fact" that bear on the reasons that hold for us, though this should be fairly uncontroversial. There are also ways we can be mistaken about the reasons holding for us even when we are in relatively good epistemic positions with respect to these sorts of "matters of fact." For example, we can misinterpret our own desires, fail to understand what counts as satisfying a desire, or pay inadequate attention to the relations that hold among our desires. Say I arrive at Morton's deli looking forward to a delicious sandwich only to discover that Morton's has closed shop, and I start to consider other ways of acquiring a sandwich and ultimately decide that I had better get to the Burger King across the street. Too late do I realize that I did not desire *any* food product consisting in meat and vegetables packaged between two slices of bread; I desired a *good* sandwich. This, I think, is a familiar enough phenomenon. Similarly, we can be confused about the sorts of principles to which we commit (what does it mean to demand equality?), or about the applicability of a normatively-laden concept (say, "person") to an individual.

But there exists a method by which we attempt to overcome the fallibility of our own judgments about the reasons holding for us, and this method is fundamentally argumentative or discursive. By engaging in earnest discussion, we can help one another clarify our normative concepts and revise our understandings of the reasons holding for us. In general, I suggest that normative discourse—at least when it is earnest, and not mere “intellectual coercion or deceit”<sup>43</sup>—consists in interlocutors’ attempts to provide evidence to one another about the reasons they take to hold for themselves and for each other. There are a number of ways in which such discussions can go. Our interlocutors can encourage us to clarify the nature of a single reason that we take to hold for us by forcing us to consider whether or not we understand the reason in the right way. My interlocutors can grant that I have a reason to  $\phi$ , but can point out that  $\psi$ -ing does not count as  $\phi$ -ing—even though I have taken  $\psi$ -ing to be a way (perhaps even the primary way) by which one  $\phi$ ’s. So, for example, I may take myself to have a reason to do well professionally, but if my interlocutor presents to me cases like that of Ebenezer Scrooge or Ivan Ilyich, I may find myself forced to examine precisely what I mean by “to do well professionally,” and even to wonder if this reason isn’t derivative of another reason—say, a reason to provide for my family—the discovery of which may help me to better discern the ways in which I can act in conformity with the reasons holding for me. And our interlocutors can also bring to our attention previously unidentified dissonances between two reasons that we take to hold for us—as between, say, a reason to ensure our financial security in the future and a reason to enjoy ourselves today. Merely by pointing out to us that, in living profligately, we risk leaving ourselves unprepared for future challenges; or that, in being overly cautious, we are letting our

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<sup>43</sup> Neil MacCormick, *Rhetoric and the Rule of Law: A theory of Legal Reasoning* (Oxford: Oxford University Press, 2006), 17.

lives pass us by, an interlocutor can force us to clarify the relationship between our reasons to prepare for the future and to enjoy today.

In making these sorts of clarifications, we often appeal to a principle of universalizability, according to which “for the present instance of circumstances C to count as a reason now for reaching decision D, and acting on D, it would have to be acceptable to hold a decision of type D appropriate whenever an instance of C occurs.”<sup>44</sup> The presentation of instances of C in which we seem to have no reason to reach decision D is generally taken to provide evidence that instances of C do not count as unqualified reasons to reach decision D; if we are to respond to the new evidence, it must be either by reevaluating our understanding of why we ought to reach decision D or (if satisfactory reevaluation proves impossible) by taking ourselves to have no reason to reach D after all. And there may be other discursive tools by which we explore the reasons holding for us.

Now, where substantive differences exist in the norms holding for two agents, normative discourse will not be up to the challenge of overcoming it: one agent cannot through argumentation *change* the reasons holding for another, so that if Kantian (and only Kantian) reasons *do* hold for Ted, then the utilitarian Norma will not be able to rationally persuade Ted to abandon Kantianism.<sup>45</sup> But each can help the other to recognize the implications of her commitments, to see how standards apply in different contexts, to recognize tensions between

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<sup>44</sup> MacCormick, *Rhetoric and the Rule of Law*, 21.

<sup>45</sup> Though I suspect that discursive processes are not merely processes by which we come to discover the reasons holding for us, but also an important way in which reasons are created. Through our joint engagement in the process of argumentation, you and I create a narrative that lends structure and meaning to features of our interactions outside of or tangential to the argumentation that generate new reasons for each of us. We forge and then give shape to a relationship that will impose constraints on the ways that we should treat each other and understand one another. This, I suspect, is roughly how the establishment of a friendship can generate new reasons for the parties to the friendship. But the content of normative discourse does not reveal these new reasons; it is the structure of (respectful and earnest) discourse that can (though won't necessarily) *generate* these new reasons.

two standards that a single agent might endorse, and to revise her standards when she sees that they fail to give her the reasons she had expected of them. Even two agents for whom substantively different reasons hold can benefit from normative discussion along these lines.

The upshot of all of this is that, for an agent A to count as a full-fledged legitimate authority over another agent S, given that A must be open to evidence about the reasons holding for S, in addition to consulting S and experts on the matters of fact pertaining to S, A must pay attention to (and even encourage) earnest discussion about the reasons holding for S.

### *(3) Publicity of Decisions and of Decision-Making Processes*

Finally, fully legitimate authorities must in general submit their decision-making processes to public scrutiny. The primary reason for this is that, by allowing subjects to identify the evidence that authorities have collected and the processes by which they derive instructions from that evidence, legitimate authorities create space for subjects (including experts) to offer corrections by pointing out evidence that is missing and critiquing the authority's interpretation of the evidence. This is the generalized form of academic peer-review, and the evidence produced about the reasons holding for subjects will surely prove invaluable to legitimate authorities.

Equally importantly, allowing public scrutiny of authoritative processes will give subjects evidence that the instructions delivered are, in fact, based on the reasons holding for them. Without a view into the inner workings of authoritative processes, subjects may well be able to identify a correlation between the instructions offered by a purported authority and the instructions by which they would do well. But if they cannot ascertain and assess the underlying procedures yielding these instructions as output, important questions will remain. Subjects may worry that they are being manipulated, rather than helped; or that the purported authority's success so far has been a mere accident, and could vanish relatively soon; or that the purported

authority will be successful only in very limited conditions that are likely not to last. If subjects are to be justified in taking the purported authority's instructions as protected reasons, they must have access to this sort of evidence. An important way by which authorities can help subjects to overcome these worries is to make evident the relationship between the existing evidence about the reasons holding for subjects, and the instructions the authority offers.

#### *(4) Authority and its Procedural Elements*

Recall that Hershovitz has argued that the fact that we regard some authority as illegitimate on *procedural* grounds is evidence that the authority in question is not (solely) justified on Razian grounds. But this isn't necessarily so. The procedurally flawed government to which Hershovitz appeals in the passage quoted in Section II.3 might well issue instructions by which subjects are likely (in *some* sense) to act in conformity with the reasons holding for them, but it does *not* satisfy the refined Razian condition for which I have argued. Its instructions do *not* depend on the reasons holding for its subjects because it does not seek out evidence about the reasons holding for them; it only seeks out evidence about the reasons holding for a privileged, enfranchised few. The fact that its instructions during a given period of time *do* help even the marginalized many act in better conformity with the reasons holding for them than they would have done had they acted on their own practical conclusions is a matter of mere happenstance, a quite contingent fact that may well be quite fragile: more than slight changes in circumstances could undermine it entirely. So (on the modified Razian picture) we should not conclude on the basis of this fact alone that the government in question has legitimate authority with respect to all of its subjects; for this to be the case, it must arrive at useful instructions in the right way. And in order to do this, it must (at least occasionally) *ask* the purported subjects about the reasons holding for them. It might do so by holding elections, or by staging plebiscites, or by running public forums in which subjects are given the opportunity to voice their opinion directly

to the ruling parties. But the government under consideration does not consult all of its subjects about the reasons holding for them, so its instructions cannot be said to be based on the reasons holding for all of its subjects. So it is *not* legitimate, on the modified service conception of legitimate authority.

Of course, this doesn't mean that Hershovitz' communitarian justification *just is* the refined Razian justification. It surely isn't enough to get us the claim that authoritative decisions *belong* to the subject in the way that a community's decisions (expressed through procedurally correct law) are supposed to belong to the members of the community. And, on the communitarian account Hershovitz sketches, involving subjects in decision-making processes is important *because* it counts as respecting their dignity and autonomy, independent of the fact that it will also provide an important source of evidence about the reasons holding for legal subjects. But it *does* show that the mere fact that we sometimes regard authorities as illegitimate on *procedural* grounds does not necessarily count as evidence that their authority is based in considerations of the sort that Hershovitz emphasizes.

We're now in a position to return to the two concerns raised at the end of Section II.3.

First, I've argued that subjects must be involved in decision-making processes, that legitimate authorities will consult with them, will foster and participate in normative discussion (partly, perhaps, with subjects), and will be responsive to critiques of authoritative decisions and decision-making processes (some of which subjects may voice). But one might worry that this much participation by subjects in decision-making processes stands in tension with the service conception of authority. We might put the point this way. A fundamental assumption underlying the service conception of authority is that (i) subjects are in some significant way unable to assess the reasons holding for them. But I argue that authorities must consult with subjects because subjects have privileged access to some evidence about the reasons holding for them,

which roughly amounts to the claim that (ii) subjects are in some significant way uniquely able to assess the reasons holding for them. But claims i and ii contradict one another. Conclusion: the project is misguided from the get-go.

There are two points to be made here. The first is relatively superficial: claims i and ii *don't* contradict one another, of course. That an agent S has unique access to *some* of the *evidence* about the reasons holding for him is not the same as any of the following claims. (iii) S has *exclusive* access to the evidence about the reasons holding for him. (iv) S has access to *all* of the available evidence about the reasons holding for him. (v) S knows how to *interpret* all of the evidence about the reasons holding for him to which he is privy. If any of these claims are false, then although a subject S might have privileged access to *some* of the *evidence* about the reasons holding for him, there might be other agents who also have access to evidence about the reasons holding for S, there might be evidence to which S is *not* privy, and S might be unable to interpret some of the evidence to which he *is* privy. Let's consider a few cases before getting to the more fundamental point.

*Against claim (v).* That S has privileged access to evidence about the reasons holding for her does not entail that S knows how to interpret that evidence. When Elena visits Doctor Penrose because she has a persistent pain in her knee, at the beginning of their visit she will begin by describing the pain, locating it, identifying the times at which it is strongest. This testimony identifies for Penrose evidence about the reasons holding for her, but it is not evidence that Elena is equipped to interpret. That it is a pain of type such-and-such rather than of type so-and-so might be evidence about the cause of the pain, and so might be evidence about the steps Elena ought to take to alleviate it, but Elena will be in no position to recognize that. Penrose likely will be, and will be equipped to arrive at a practical conclusion about what

Elena must do: “Take two Zanotabs twice daily,” he’ll instruct, and she will be justified in taking the prescription as a protected reason to take two Zanotabs twice daily.

*Against (iii) and (iv).* Even if the subject S is in a position to interpret the evidence to which she has privileged access, the *scope* of that access might be fairly narrow. It might be that, although S has privileged access to some of the evidence about the reasons holding for her, agent A has access to *other* evidence, and perhaps quite a bit; under circumstances like these, S might well do better by the reasons holding for her if she provides the evidence to which she has privileged access to A, lets A figure it in with the evidence to which she has access, and then treats A’s instruction as a protected reason. Say that a group of people are engaged in a complex and dynamic activity and have a common goal—say, they are playing football. The activity is complex enough that some of the reasons holding for any one member of the group will depend on the reasons holding for other members, but circumstances change rapidly enough that no settled pattern of activity will help them to act in conformity with the reasons holding for them. One agent must organize the activities of each member of the offense, but each member has privileged access to *some* of the evidence about the reasons holding for them—that is, no single player has access to *all* of the evidence about the reasons holding for everyone else. So the quarterback acts as a sort of aggregator of evidence, taking in testimony from the various other players and factoring that evidence into his decision-making processes in choosing which play to call. The wide receiver may know that the opposing defense’s cornerback is doing a good job of preventing her from executing a move essential to play  $\alpha$ , and likely will even recognize this as a reason for each member of the team not to attempt to execute play  $\alpha$ . But it is a reason that may be outweighed by other considerations to which the wide receiver is not privy, but with which other members of the team are acquainted; they will point these considerations out to the quarterback, who will weigh the various considerations and come to a decision. The members of

the team participate in the decision-making process, but in the end it is the *quarterback's* decision which play to call—not the team's.

This last observation brings us to the more fundamental point. That authorities involve subjects in authoritative decision-making processes does not require that subjects be involved at all stages in those processes. And we can distinguish at least two stages: there is the *evidence-gathering* stage, at which authorities collect evidence about the reasons holding for their subjects; and there is the *decision-making* stage, at which authorities exclude the excluded reasons holding for subjects, balance the remaining reasons, and arrive at a practical conclusion, the authoritative directive. Agents can be involved in the decision-making process at the evidence-gathering stage, and remain excluded from the decision-making stage. By way of illustration, consider the role played by advisors in the decision-making of a head of government. An advisor on foreign affairs will provide testimony about the international scene, an advisor on the domestic economy will provide testimony about local markets, an advisor on environmental issues will provide testimony about pollution within the country and its effects on subjects' health, and so on. These advisors are all involved at the evidence-gathering stage, but ultimately the decision will be made solely by the head of government; she has the responsibility of balancing the evidence to which her advisors have made her privy, and her decision is hers alone. The arguments that I have deployed in this section show only that subjects must be involved in decision-making processes at the evidence-gathering stage; actual decision-making will remain the prerogative of the agent in authority.

This point yields a principled distinction between the procedural elements associated with *Razian* authority, and the procedural elements associated with the communitarian authority that Hershovitz emphasizes. Agents can be involved by participating actual decision-making, or merely by contributing evidence at the evidence-gathering stage. Agents belonging to an

assembly or executive board all participate in the assembly's decision-making process at the stage of actual decision-making, but other agents can be involved merely at the evidence-gathering stage. By taking stock of the *way* that subjects are involved in authoritative-decision-making processes, we can be clear about the kind of authority that is at stake.

Of course, Hershovitz notes quite rightly that democratic institutions are best justified *both* in terms of their involvement of subjects in decision-making processes *and* in terms of their aptitude for the provision of the Razian service. But (one might worry) this brings the initial problem into harsh relief. Does this mean that democratic processes involve subjects at the information-gathering stage *and* at the decision-making stage? How are we to make sense of this? In fact, I think (as I hinted at the end of Section III.3) that this problem rightly reflects a genuine tension in the roles of representatives' within representative democracies. Their roles are authoritative, but they are justified in terms of multiple standards, and this pulls them in different directions. On the one hand, they are meant to delegates of their districts, sent to parliament to *speak for* their constituents, and by their participation to involve the members of their districts in public decision-making processes. On the other, they act as trustees with sufficient autonomy decide for themselves how they should vote. Edmund Burke, in defending the trustee model of representative democracy, argued that "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."<sup>46</sup> Representatives must balance competing demands—that they speak for their constituents, and that they provide for their constituents the Razian service—precisely because democracy is best justified both on communitarian and Razian grounds.

## **VI. Law's Procedural Aspects and its Claim to Authority**

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<sup>46</sup> Edmund Burke, "Speech to the Electors of Bristol," in *The Works of the Right Honorable Edmund Burke*, vol. 1 (Boston: Little, Brown, and Company, 1869), 95.

We're now in a position to apply the lessons of Sections IV and V to law. In this section, I'll advance three points: first, that (1) law claims legitimate (Razian) authority, and that (2) it expresses this claim through requirements that courtroom officials be open to and appropriately responsive to evidence about the reasons holding for legal subjects; second, that (3) an emphasis on these requirements against legal positivism; and third, that (4) by emphasizing law's procedural aspects, we can derive an important connection between the concept of law and the Rule of Law.

*(1) Law's Claim to Authority*

Raz has argued that law necessarily claims legitimate authority over legal subjects: "The law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority."<sup>47</sup> This is the *claimed legitimacy thesis* (CLT). In support of this thesis, Raz points out that law addresses legal subjects in the terms with which agents address those over whom they have authority.<sup>48</sup> Law orders certain actions and proscribes others, imposes obligations and makes demands. If we are to make sense of this phenomenon (Raz argues), we would do well to understand law's language as expressive of something internal to law, namely, that it claims authority.

These are weak grounds on which to rest the CLT, but there is an even deeper problem here. Because Raz takes his "normal" justification of authority really to be the *normal* justification of authority, he understands law's claim to legitimate authority over legal subjects necessarily to be a claim that law provides for legal subjects the Razian service. But if we are persuaded by Herskovitz's critique (discussed in Section II.3) that the "normal" justification is not exclusively *normal*, and that there are other important justifications of authority, then even if CLT is

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<sup>47</sup> Raz, "Authority of Law," 33.

<sup>48</sup> Cf. Raz, "Authority, Law, and Morality," *The Monist* 68 (1985): 300.

correct—even if law does claim legitimate authority over legal subjects—it isn't clear that law claims to provide for legal subjects the Razian service.

From now on, I'll take CLT to be the thesis that law claims, not merely legitimate authority over legal subjects, but *Razian* authority—that is, law claims to provide the Razian service for legal subjects. What sort of evidence might we collect in support of CLT, understood in this way? I suggest that the sorts of institutions with which legal systems are typically associated, the ways in which these systems are structured and the types of evidence to which they are responsive are important aspects of law's self-presentation.<sup>49</sup> If law is peculiarly associated with institutions apt for the provision of the Razian service—institutions that are open to and appropriately responsive to evidence about the reasons holding for legal subjects—then I suggest that we should count this as evidence in favor of CLT.

In the next sub-section, I'll turn my attention to an institution peculiarly associated with legal systems—namely, the *court*—to argue that on ordinary conceptions of such institutions they are apt for the provision of the Razian service, and that this provides us with evidence that law *claims* to provide the Razian service.

## *(2) Courts as Providers of the Razian Service*

In their writings on courts, positivists like Hart and Raz emphasize their role as *appliers* of the law. To be sure, such positivists make considerable room for judicial discretion. Hart argues that though legal rules provide determinate answers to a “core” of easy cases, legal subjects are bound to run into hard cases on which legal rules provide no determinate answers; these cases fall into the rule's “penumbra,” and on these cases judges are licensed to exercise a secondary

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<sup>49</sup> Waldron has helpfully advanced and developed this sort of strategy. See especially his “The Concept and the Rule of Law,” *Georgia Law Review* 43 (2008-2009): 13-19.

legislative function, determining a correct answer through an exercise of judicial discretion.<sup>50</sup> And Raz certainly thinks that courts should be places in which courtroom reasoning *does* appeal to considerations external to the law.<sup>51</sup> But the methodological positivist conception of the court is a conception of something that is primarily and essentially *norm-applying*. Raz might well agree that a court that fails to take extra-legal considerations into account is not the sort of institution we want in our legal system, but the institution would be, without qualification, a *court*.<sup>52</sup> The essence of courts, on these accounts, consists in their *application* of legal norms, not in their revision of them.

But in ordinary discourse (as Waldron observes), it is appropriate to reserve the term “court” to those institutions that accept subjects’ testimonies and encourage argumentation:

...the operation of a court involves a way of proceeding that offers to those who are immediately concerned an opportunity to make submissions and present evidence, such evidence being presented in an orderly fashion according to strict rules of relevance and oriented to the norms whose application is in question... Once presented, the evidence is then made available to be examined and confronted by the other party in open court. Each party has the opportunity to present arguments and submissions at the end of this process and reply to those of the other party. Throughout the process, both sides are treated respectfully and above all listened to by a tribunal that is bound to attend to the evidence presented and respond to the submissions that are made in the reasons that are given for its eventual decision.<sup>53</sup>

I argue that a conception of courts as institutions apt for the performance of the Razian service aligns more closely with the layperson’s conception that Waldron identifies. Courts involve

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<sup>50</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 606-607; *The Concept of Law* (New York: Oxford University Press, 1961), esp. Chapter 7 (“Formalism and Rule-Scepticism”).

<sup>51</sup> See Raz, “Law and Value in Adjudication,” in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009), pp. 180-209.

<sup>52</sup> Raz, *Practical Reason*, 134-136. See also Waldron, “The Concept of Law and the Rule of Law,” 21-22.

<sup>53</sup> Waldron, “The Concept and the Rule of Law,” 23.

structures by which they (a) consult with subjects, (b) foster normative discourse, and (c) make public the reasoning by which decisions were reached; and (d) judges have both the standing to tailor the law's requirements in response to the evidence they acquire through these processes, and a responsibility (*as judges*) to base their decisions on that evidence.

(a) *Consultation with legal subjects.* In a discussion of adjudication, Fuller argued that its essence “lies in the mode of participation it accords the affected party.”<sup>54</sup> Adjudication, on Fuller's view, occurs not simply when one party—the judge—surveys a state of affairs and applies a rule to it, but when the parties being judged retain an opportunity to make their case with reasoned arguments and proofs.<sup>55</sup> The important point is that courts guarantee to plaintiff and defendant alike the opportunity to present their view of the facts. In this respect, courts differ from, say, umpires in baseball, who apply norms *without* guaranteeing to baseball players (those to whom the norms are applied) the right to make their case; and from decision-making processes (like elections) in which agents are given the chance to make their case, but it is *not* guaranteed that anyone will listen.<sup>56</sup> Because courts guarantee to those who come before them both that they will have an opportunity to speak, and that they will be heard, they institutionalize the sorts of consultations identified in Section V.1 as necessary to fully legitimate authority.

(b) *Normative discourse.* Moreover, these sorts of consultations do not occur in isolation, but within a context of argumentation peculiar to legal fora. Courtroom discourse, as Waldron observed, is subject to institutionalized standards of rationality. Evidence is presented according to rules requiring that it be relevant to and instructive about the case at hand, and it is made

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<sup>54</sup> Lon Fuller, “Forms and Limits of Adjudication,” in *The Principles of Social Order* (Oxford: Hart, 2001), 107.

<sup>55</sup> Fuller, “Forms and Limits of Adjudication,” 108.

<sup>56</sup> Fuller, “Forms and Limits of Adjudication,” 108-109.

available to the all parties to the discussion. Claims made about the evidence are subject to challenge, and such challenges must be met. As Neil MacCormick puts the point,

...legal argumentation must be acknowledged to be one special case of general practical reasoning, and must thus conform to conditions of rationality and reasonableness that apply to all sorts of practical reasoning. This implies at least that there may not be assertions without reasons—whatever is asserted may be challenged, and, upon challenge, a reason must be offered for whatever is asserted, whether the assertion is of some normative claim or a claim about some state of affairs, some ‘matter of fact’.<sup>57</sup>

In this respect, courts differ from decision-making processes held to *no* institutionalized standards of rationality. Consider another contrast between adjudication and elections. If a participant in pre-election discourse makes a misleading speech, or offers up for public consumption a manipulative advertisement that appeals to the baser instincts of the electorate, the participant has done something objectionable, but has not necessarily flouted any institutionalized rules about the types of discourse allowed prior to elections. But in court, if a participant in legal proceedings offers in the place of legal reasoning a manipulative *ad hominem* attack, or attempts to distort facts by asking leading questions, or attempts to intimidate witnesses, then other participants in the discussion have the opportunity to call him out for his abuse and to ask that the episode play no role in the court’s decision, and the court has a responsibility to be responsive to such requests. The agent in the wrong can even be reprimanded for violating the norms of courtroom discourse, say, by being held in contempt of court. In this way, courts institutionalize norms of rational discourse that both focus their consultations with legal subjects in a way that is apt to isolate evidence about the reasons holding for legal subjects, and make possible the sorts of normative discourse that is apt to provide evidence about the reasons holding for them, thus institutionalizing a second evidence-gathering procedure identified as central to fully legitimate authority in Section V.2.

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<sup>57</sup> MacCormick, *Rhetoric and the Rule of Law*, 17.

(c) *Publicity of the evidence on which the decision was based.* Third, judges typically give *reasons* justifying the decision they reached. Fuller notes that this is not always the case, but where it isn't I suspect it is only because there are unusual considerations that defeat presumptive reasons in favor of the publication of reasoned opinions.<sup>58</sup> And there are several such presumptive reasons. As Fuller points out, the publication of judges' reasoned opinions makes evident to participants in legal processes the role that their participation in courtroom discourse played in the judge's reasoning, persuading them that the judge's practical rational processes *were* responsive to their claims. (I made this same point in Section V.3.) In addition, however, judges' defenses of their decisions provide the fodder for discussions within the legal community and the community at large of the decision and its justification, much of which will turn up further evidence about the reasons holding for legal subjects. Legal scholars, public intellectuals, scientists, politicians, and ordinary citizens will debate the decision, critique it, and offer reinterpretations of the evidence to which the court was privy at the time or identify new evidence that the court missed. None of this activity will change the court's decision, but when similar cases come up or when the same case is appealed, judges attuned to these discussions will mine them for evidence about the way in which the court should decide now and in the future. Thus, a higher court might reverse the decision of a lower court or precedent might be overturned, and the justification for such changes to the law might well depend on the sorts of evidence uncovered through public discussions of past judges' decisions.

(d) *Legal change.* Finally, courts do not merely apply the law; courts *interpret* the law and even *change* it in a way that should be responsive to the sorts of evidence that turns up over the

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<sup>58</sup> In particular, Fuller points out that "In some fields of labor arbitration, [...] it is the practice to render 'blind' awards. The reasons for this practice probably include a belief that reasoned awards are often misinterpreted and 'stir up trouble,' as well as the circumstance that the arbitrator is so busy he has no time to write opinions." Fuller, "Forms and Limits of Adjudication," 121.

course of courtroom proceedings. In spite of courts' sometime self-presentation as discoverers of the law, rather than as legislators, the law with which judges interact is in fact quite dynamic. ("[A]s we all know," Waldron observes, "the law is changed every day in our appellate courts..."<sup>59</sup>) I noted that positivists like Hart and Raz might well embrace the idea that courts do and even should refrain from applying the law as they find it; on the positivist conception, this tendency to change the law just isn't essential to their status as *courts*. But given the widespread tendency of courts to change the law, and (more importantly) Fuller's point that courts differ from other norm-appliers (like umpires) in that they take as input other considerations than the rules and the facts of the matter, I see no reason to embrace the positivist conception of courts. We should take courts to be places that are *paradigmatically* apt to revise the law by interpreting it or exercising judicial discretion.

To be sure, a number of considerations tell *against* allowing too much judicial discretion. It could make it difficult for legal subjects to predict the ways in which courts will decide even the simplest cases, which will undermine their capacity to know the law and to guide their actions by it. As Frederick Schauer observes, "it might be the case that the best legal system is one in which individual judges do not seek—or at least, do not always seek—to obtain the best all-things-considered outcome."<sup>60</sup> But I do not argue that judges have or should be given complete discretion to act on the evidence available to them each time a case comes before them, because too much judicial discretion would ultimately destroys the law's capacity to learn. In order for change to count as learning, it must be systematic in a way that legal change *could not be* were judicial discretion utterly unconstrained. The nature of the judicial legal role will accord judges powers, but will also impose constraints; will accord privileges, but also duties and

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<sup>59</sup> Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 12.

<sup>60</sup> Frederick Schauer, "A Critical Guide to Vehicles in the Park," in *New York University Law Review* 83 (2008): 1131.

responsibilities. Judges can be required to modify rules only in response, say, to a preponderance of evidence that the rule as it stands is bad. And (more importantly) judges can be required to modify rules only in response to certain *kinds* of evidence. The imposition of limits on the kinds of discourse acceptable within the courtroom can focus judicial discretion in a way that will afford the law a capacity to change, but that will also shape legal change in such a way as to render it interpretable not merely as chaotic change, but as *learning*.

I have highlighted the features associated with the ordinary conception of courts that Waldron invokes, and suggested that they can be made sense of as features that render the institution apt for the provision of the Razian service. The roles taken on involve a host of powers and responsibilities. Some of these responsibilities ensure that courts will have access to evidence about the reasons holding for legal subjects. Call these *access requirements*: courtroom standards guarantee to legal subjects that they will have the opportunity to speak; judges have a responsibility to organize courtroom discourse according to a set of institutionalized norms, to prevent legal discourse from devolving into mere rhetoric. Others ensure that courts will be responsive to this evidence. Call these *responsiveness requirements*: courtroom standards guarantee, not only that legal subjects will have the opportunity to speak, but also that they will be heard; and judges are typically required to base their decisions on the evidence available to them, to publish defenses of their opinions (at least, where there are no countervailing considerations), and to take previous judges' opinions into account in reaching their decisions. Both access and responsiveness requirements follow neatly from the ordinary (non-positivist) conception of courts that Waldron identifies in the passage quoted above, and structure courts and the roles associated with them in such a way as to render courts apt for the provision of the Razian service.

This is an important part of law's self-presentation to legal subjects, and so should be understood as evidence that law claims to provide the Razian service for legal subjects, vindicating the CLT.

(3) *The Sources Thesis*

In this sub-section, I'll be concerned to critique Raz's argument for legal positivism. First, I'll discuss the argument for the Sources Thesis, according to which all legally valid rules can be identified by appeal exclusively to social facts (that is, without appeal to evaluative arguments). Second, I'll argue that the Sources Thesis (as Raz understands it) does not follow from his argument for it. Third, I'll show that the argument actually tells *against* legal positivism.

(a) *The Sources Thesis and the argument for legal positivism.* Raz has argued that the Sources Thesis follows from CLT (understood as the thesis that law claims to provide the Razian service). The argument has two steps.

First, Raz argues that an agent (or institution) cannot even *claim* authority over another unless she (or it) is capable of having it.<sup>61</sup> Something conceptually incapable of having authority—say, a tree—cannot claim authority over an agent, nor can an agent free of any conceptual confusions about trees take a tree to be authoritative.

Second, Raz argues that one cannot possibly provide the service unless it is possible for subjects to identify one's instructions without having to work out for themselves what they have reason to do. Take two agents, A and S. Say that A would provide the Razian service for S, but S can't determine the content of A's instructions without working out independently what he has reason to do. But then S can't outsource to A his practical reasoning; he has to do his own practical reasoning just to understand A's instructions. So one agent A can't provide the Razian service for another agent S unless it is possible for S to know what A instructs without

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<sup>61</sup> Raz, "Authority, Law, and Morality," 301.

independently determining independently what he has reason to do.<sup>62</sup> If *law* claims to provide the Razian service, and if law *cannot* claim to do so unless it is capable of providing the service, then law *must* provide to legal subjects instructions whose content is discoverable by legal subjects without their having to work out for themselves what they have reason to do. So, Raz argues, CLT entails that all legally valid rules “can be identified by reference to social facts alone, without resort to any evaluative argument.”<sup>63</sup> This is the Sources Thesis.

Raz invokes the Sources Thesis primarily in his critique of Dworkin’s conception of law. For the purposes of this paper, we’ll take the target of Raz’s argument to be the claim that, in order to determine what the law requires, judges must (in part) determine what the law *should* require. (A fuller discussion of the details of Dworkin’s account would lie beyond the scope of my project.) But, Raz argues, the content of law must be discoverable by appeal to social facts exclusively, that is, *without* appeal to evaluative arguments about what law *should* be. So the Sources Thesis is incompatible with this roughly Dworkinian conception of law. And since the Sources Thesis seems to follow from CLT, law’s claim to provide the Razian service seems incompatible with it as well.

(Raz, in arguing against this conception of law, does not argue that judges should not be interested in moral considerations—after all, they are moral agents, and so moral considerations should guide their actions, including the actions they perform on the bench. But Raz denies that

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<sup>62</sup> Here’s how Raz puts the point: “Suppose that an arbitrator, asked to decide what is fair in a situation, has given a correct decision. That is, suppose there is only one fair outcome, and it was picked out by the arbitrator. Suppose that the parties to the dispute are told only that about his decision, i.e., that he gave the only correct decision. They will feel that they know little more of what the decision is than they did before. They were given a uniquely identifying description of the decision and yet it is an entirely unhelpful description. If they could agree on what was fair they would not have needed the arbitrator in the first place. A decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.” Raz, “Authority, Law, and Morality,” 304.

<sup>63</sup> Raz, “Authority, Law, and Morality,” 295-6.

they must appeal to moral considerations in order to determine what the *law* requires in the case at hand. When judges make appeal to, say, *moral* considerations in justifying their decisions, they look beyond the law; and when these considerations tell against applying the law as it stands, Raz argues that judges should change the law by exercising their lawmaking capacities.<sup>64</sup> They do not appeal to evaluative arguments in order to determine what law *is*, what the law instructs legal subjects to do in the case under consideration.)

(b) *An argument against legal positivism.* I argued in Section VI.2 that courts are structured in such a way as to make them apt for the provision of the Razian service for legal subjects, and that this counts as evidence in favor of CLT; since Raz argues from CLT to the Sources Thesis, it looks (at first glance) as though I have provided indirect evidence for the Sources Thesis (and so for legal positivism). But the emphasis on law's procedural aspects for which I've argued suggests an argument that tells in the opposite direction. I suggest that, once we focus on law's procedural elements, we will have to understand the Sources Thesis quite differently than Raz understands it when he invokes it in his argument against the Dworkinian conception of law. Understood as a claim about the sorts of things to which judges (simply in their capacity as judges speaking for the law) must make appeal in deciding particular cases, the Sources Thesis does not follow from Raz's argument for it. Understood more weakly as a claim about the sorts of things legal subjects must look in identifying law's *past* decisions, the Sources Thesis follows from Raz's argument for it, but it no longer tells against a roughly Dworkinian conception of law.

If law claims authority, and if law expresses this claim by imposing access and responsiveness requirements of the type I discussed in Section 5.2 on courtroom officials, then *law itself*—not merely judges acting as moral agents—must be responsive to evidence about the

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<sup>64</sup> Raz, "Authority, Law, and Morality," 309-310.

reasons holding for legal subjects, just as doctors and other providers of the Razian service must be so responsive. Judges render law responsive to this evidence in part through exercises of their power to *interpret* law, and law imposes constraints on the range of interpretations available to judges: by subjecting courtroom officials to access and responsiveness requirements of the sort I described above, law directs judges to reach decisions that are appropriately responsive to evidence about the reasons holding for legal subjects. That means that the range of interpretations available to judges in deciding any particular case will be affected by that evidence and the implications it has about the correctness of past decisions; and *that* means that as new evidence surfaces, the range of available interpretations will change. So the law's content (understood as the way in which law directs judges to decide particular cases) will change as evidence about the reasons holding for legal subjects changes.

To be sure, some kind of Sources Thesis does follow from Raz's argument for it. Just as patients must be able to identify doctors' past prescriptions, so legal subjects must be able to identify law's past decisions if law is to claim to provide for them the Razian service. But law's *current* content is not fully determined by past decisions; it is determined in part by the evidence available about the reasons holding for legal subjects, and its implications about the correctness of past decisions. Law's content will depend, that is, on the evidence that has surfaced about what law *ought* to be. To be sure, legal subjects may not be able to discover for themselves these implications until the law issues a new decision, but this is no different from the fact that patients cannot discover for themselves the implications of a new ache until they present the evidence to their doctor.

So Raz's argument for a robust Sources Thesis that tells in favor of legal positivism fails. Moreover, the thesis that law claims to provide for legal subjects the Razian service entails a new thesis that is in an important respect quite amenable to the Dworkinian conception of law: law's

content is influenced by the available evidence about the reasons holding for legal subjects, and as new evidence becomes available, the content of the law will change. CLT even becomes a consideration telling *against* legal positivism.

(4) *Law's Claim and the Rule of Law*

Finally, we're in a position to discover a connection between the concept of law and the Rule of Law. One of the more important values served by the Rule of Law is the constraint of arbitrary exercises of power; I'll argue that the access and responsiveness requirements I've discussed above serve this value. And because they follow from something internal to law (its claim to provide for legal subjects the Razian service), they provide a clear link between the concept of law and the Rule of Law.

(a) *Formal requirements associated with the Rule of Law.* Traditionally, the Rule of Law has been associated with formal requirements on legal systems: valid legal rules must be general, public, prospective, clear, coherent, satisfiable, relatively stable; and there must be some match between law as it is officially declared, and law as it is executed by legal officials. These are the eight desiderata associated with Fuller's conception of law's internal morality.<sup>65</sup> In arguing that these desiderata constitute an internal morality of law, Fuller demonstrated that without them, legal subjects could not possibly guide their actions by legal rules. Legal subjects must know what the law is, have reasonable expectations about what law will be, and be capable of satisfying its requirements if they are to fit their actions to its demands. Only in this way will they be ruled in a *legal* fashion.

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<sup>65</sup> Fuller first suggested that these formal requirements constitute a morality internal to law itself in his half of the Fuller–Hart debate (“Positivism and Fidelity to Law: A Reply to Hart,” *Harvard University Law Review* 71 (1958), esp. 644-657), and developed the argument more fully in *The Morality of Law* (New Haven: Yale University Press, 1969), esp. Ch. 2, “The Morality that Makes Law Possible,” 33-94.

Raz, in his discussion of the Rule of Law,<sup>66</sup> offers a list of formal desiderata similar to Fuller's, though it includes (in addition to those Fuller identifies) requirements that courts be independent and generally accessible, that they involve open and fair hearings, that they have review power over other aspects of the legal system; that lawmaking institutions be guided by open, stable, clear, and general rules; and that other law-applying institutions, like police forces or public prosecutors, are not free to subvert the law, say, but choosing not to arrest or prosecute certain classes of violations.<sup>67</sup>

Legal systems' satisfaction of these formal requirements serves a number of values. For one thing, it promotes the kind of stability that underwrites legal subjects' capacities to plan their lives by making them familiar with the ways in which legal officials will interfere in it, and with the ways in which their peers' actions are (and are not) constrained. This is thought to promote legal subjects' freedom by giving them control over the ways their lives go. Violations of the Rule of Law provoke uncertainty and frustrate expectations; the latter, in particular, Raz identifies as an affront to human dignity, arguing that when one's expectations are frustrated through a failure of the Rule of Law, "one is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one."<sup>68</sup>

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<sup>66</sup> Raz, "The Rule of Law and its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 2009), 210-229.

<sup>67</sup> Raz, "The Rule of Law and its Virtue," 214-219.

<sup>68</sup> Raz, "The Rule of Law and its Virtue," 222. But, Raz argues, although the violation of the formal requirements associated with the Rule of Law counts as an affront to human dignity, the *satisfaction* of those requirements does not *prevent* affronts to human dignity. The law might well constitute master-slave relationships through processes that conform perfectly well to the requirements associated with the Rule of Law. So, on this score, the Rule of Law is a *negative* virtue: it prevents (one kind of) disrespect, but does not guarantee respect.

Raz also identifies the Rule of Law as essential to law's *efficiency*.<sup>69</sup> If the formal requirements associated with the Rule of Law are not satisfied within a legal system, then in that system legal subjects will be unable to guide their actions by the law. But general conformity to the law is often a necessary condition for the achievement of the law's purposes, and general conformity is not possible if subjects are unable to guide their actions by the law. So in general, satisfaction of the formal requirements associated with the Rule of Law are a necessary condition for the achievement of law's purposes.<sup>70</sup>

(b) *Arbitrary power*. But the Rule of Law is also understood as a bulwark against arbitrary power.<sup>71</sup> In this vein, Postema distinguishes the Rule of Law from rule *with* law, that is, arbitrary power cloaked in law's trappings so as to give it an air of legitimacy.<sup>72</sup> Raz argues that there are certain kinds of arbitrary power that the Rule of Law (as he conceives it) *cannot* curb: "A ruler can promote general rules based on whim or self-interest, etc., without offending against the Rule of Law."<sup>73</sup> He is right that the formal requirements he and Fuller associate with the rule of law cannot restrain such abuses of power, but I'll argue that by taking the lessons we have learned so far to heart and by applying them to legal officials generally (including, for example,

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<sup>69</sup> Raz, "The Rule of Law and its Virtue," 224-226.

<sup>70</sup> But (again—see n. 68) that doesn't mean it is a *sufficient condition*. It's a familiar phenomenon that general conformity may not be enough to secure law's purposes. So on this count, too (Raz argues), the Rule of Law is a *negative* virtue. It makes possible the achievement of law's purposes by making possible general conformity, but it does not guarantee it.

<sup>71</sup> Raz signs on to this idea in "The Rule of Law and its Virtue," 219. See also Postema, "Law's Ethos: Reflections on a Public Practice of Illegality," in *Boston University Law Review* 90 (2010): 1855. "...[L]aw is best thought of as... a mode of ordering and governance that takes its shape from its fundamental aim, which we might characterize, rather too abstractly perhaps, as that of constraining the exercise of arbitrary power."

<sup>72</sup> Postema, "Positivism and the Separation of Realists from their Scepticism," in *The Hart-Fuller Debate in the 21st Century* (2010), 275.

<sup>73</sup> Raz, "The Rule of Law and its Virtue," 219.

lawmaking institutions like legislatures), we can learn something about the way in which these very abuses might be curtailed.

I suggest that power that is exercised in a way that is unresponsive to evidence concerning the way in which it *should* be wielded is arbitrary power; and at least some of the evidence to which legal officials should be responsive is evidence about the reasons holding for legal subjects. Power that is exercised in a way that is unresponsive to evidence about the reasons holding for those over whom it is wielded counts, then, as a species of arbitrary power. Consider some cases. When the members of particular groups manipulate legal structures to their own exclusive advantage, they render law unresponsive to evidence about the reasons holding for legal subjects generally (that is, *qua* legal subjects, rather than *qua* members of the manipulative groups). This looks like a fairly standard kind of arbitrary power. So do cases in which agents render law unresponsive to evidence about the reasons holding for legal subjects through their own inability to interpret that evidence appropriately. When passions, phobias, and prejudices short-circuit lawmakers', law-appliers', and law-interpreters' capacities to identify and respond to evidence about the reasons holding for legal subjects, the decisions they reach are in an important sense arbitrary. And when legal officials wield their power in unprincipled or even malicious ways simply because they can do so with impunity—again, another way in which power is exercised arbitrarily—their decisions again do not depend on evidence about the reasons holding for legal subjects.

If it is one of the virtues of the Rule of Law that it curbs arbitrary power, and if one species of arbitrary power is power whose exercise is unresponsive to evidence about the reasons holding for those over whom it is exercised, then we are in a position to understand the access and responsiveness requirements associated with the roles of courtroom officials as ways in which law restrains arbitrary power; after all, such requirements are supposed to render legal

officials responsive to precisely this evidence. In structuring courts in a way that renders them apt for the provision of the Razian service, law does not merely express its claim to legitimacy; it establishes constraints on the ways in which courtroom officials can exercise their power. So these requirements are well understood, not merely as expressive of law's claim to provide for legal subjects the Razian service, but also as Rule of Law requirements. So we've identified an important connection between the *concept* of law and the Rule of Law.

## VII. Legal Procedures: A Summing Up

By taking seriously the processes associated with the provision of the Razian service, we have learned three important lessons about law. First, we have vindicated Raz's claimed legitimacy thesis by understanding the access and responsiveness requirements associated with courts as important aspects of law's self-presentation. Second, we have seen that—*pace* Raz—the claimed legitimacy thesis does *not* entail legal positivism—in fact, it shows that law's content is importantly influenced by changing evidence about the reasons holding for legal subjects. And third, we have discovered an important aspect of the Rule of Law left out of the formal requirements articulated by Fuller and Raz, namely, the access and responsiveness requirements associated with courts. These are considerable lessons, and we can discover them simply by noticing that Razian authority does not simply involve the issuing of substantively correct directives; it involves processes that are open to and appropriately responsive to evidence about the reasons holding for subjects, processes that *aim* at bringing subjects' acts into conformity with the reasons holding for legal subjects.

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