

Persuasive Authority in the Law

By Grant Lamond

A LONGSTANDING THEORETICAL PUZZLE OF THE COMMON LAW LIES IN understanding the role played in legal reasoning by those case-based considerations such as *obiter dicta* and persuasive precedents that are not binding on a court. It is universally accepted that many such considerations *do* play a role, and an important one, in understanding the content of common law doctrines, but there are few corresponding accounts of the way in which they play that role.² Nor is this an entirely parochial question about the operation of the common law. All contemporary legal systems acknowledge some role for case law (jurisprudence) in legal doctrine, whether or not they have a practice of binding precedent akin to that of the common law.

In the common law itself, the most obvious example of non-binding but relevant considerations are *obiter dicta*. At the very least, *obiter dicta* include those statements of law made by a court that were not relied upon in reaching the decision in a case. Although such *dicta* are not binding on courts in subsequent cases, they are regularly cited in argument before those courts and relied upon by judges in reaching their conclusions. In addition, courts cite earlier judgments for observations on the rationale for legal doctrines, and for the existence of legal principles, as well as citing judgments of courts outside their own hierarchy as being “persuasive” precedents. For want of a better term, I will follow a common legal convention by referring to all of these non-binding but legally relevant considerations as “persuasive sources.”³

There are two clear ways in which such legal material could be legally relevant for courts.⁴ Firstly, they could be regarded, like any other consideration, as rationally persuasive. They could be urged by counsel in the belief that the court will find the analysis of the law convincing, and their citation by courts could simply be for the purpose of acknowledging the origin of the views adopted in the present case. Secondly, they could be regarded as having a normative force independent of how convincing the court found the assessment. The fact that another court (particularly a higher court in the same judicial hierarchy) has expressed a view on the matter could be regarded as lending weight to the adoption of that view by the present court. The second approach in particular

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would explain the fact that such views seem to have a significance that goes beyond the merits of the views expressed. Such views matter for later courts whether or not they agree with them, and their existence is something the court must take into account in reaching their own conclusions.

Obviously the second approach does not rule out considering the persuasiveness of the view. The view could carry even more weight where it is found to be convincing. But a pervasive feature of the treatment of case law in legal systems, regardless of the precise status of earlier decisions, is that such views can weigh with courts even when those courts are not convinced of the merits of the views. This still leaves the question of how best to understand the role of those views. One suggestion is that they constitute a reason in favor of reaching the same conclusion in the case at hand, irrespective of the court's assessment of their persuasiveness. The weight of such a reason will vary, depending upon a range of factors such as the seniority of the court that expressed it. If this is true, then the earlier view could be said to have a type of *practical authority* for the court deciding the case: they carry weight with the court in virtue of having been expressed, irrespective of their merits.⁵

The practical authority approach is undoubtedly one way to accommodate persuasive sources, but in this article I will argue for an important alternative, namely, that persuasive sources can be regarded as having *theoretical authority*. The force of such sources lies not in their carrying weight regardless of their merits, but as carrying weight due to the probability of their having merit. They provide a reason to *believe* that the view is a sound analysis (and so should be followed); they do not, in themselves, provide a reason to follow the view irrespective of its merits. Although this may seem an overly fine distinction, it has important consequences for how persuasive sources are treated in those cases where a later court is not convinced of the view's merit. I will argue that this provides a superior understanding of the role that considerations like *obiter dicta* and (some) persuasive precedents characteristically play in the common law. None of this precludes the possibility that a source may enjoy *both* practical and theoretical authority, that is, for there to be reasons to believe that the view is sound, but also for it to provide a reason in favor of a decision even if it is not sound. Whether that turns out to be the case or not will depend, ultimately, on the practices of a particular legal system, that is, on how the source in question functions in the legal reasoning of that system. So ultimately it is a contingent question whether a source has practical or theoretical authority (or neither, or both).

The existence of persuasive sources also raises some intriguing questions about existing theories of the nature of law. Take two of the most influential accounts: interpretivism and exclusive legal positivism. If persuasive sources are best understood as possessing theoretical and not practical authority, it is unclear what role should be assigned to them in an interpretivist account of law. If an interpretation is *pro tanto* superior the better it fits with persuasive sources, does this not simply conflate them with other material that plays a distinctive role in legal reasoning? But equally, exclusive legal positivism is normally regarded as attributing practical authority to legal sources. If persuasive sources do not possess practical authority, does that mean that they are not sources of law after all?

Due to the centrality of the distinction between theoretical and practical

authority for the argument over persuasive sources, I will begin by looking in detail at the distinction. In the two sections that follow, I aim to establish a negative and a positive thesis: that the best understanding of (most) persuasive sources in the common law is not in terms of practical authority, but in terms of theoretical authority. Lastly, I will argue that existing theories of law have difficulties coming to grips with persuasive sources because of a basic methodological assumption that needs to be modified if we are to achieve a better understanding of the nature of law.

Two final observations are in order. This paper advances a philosophical analysis of the role of persuasive sources in common law reasoning. Such an analysis necessarily involves a degree of idealization and abstraction from the messiness of the day-to-day work of courts and lawyers. It seeks to understand the common law from the perspective of a competent judge attempting to resolve a case according to the law of his or her jurisdiction. Judicial practice often falls short of this ideal, but as it is the ideal that sets the standard to which conscientious judges aspire, it is the appropriate object for a study of persuasive sources. Secondly, a philosophical account of legal reasoning will at times explain the common law using concepts that the participants in the system would not use, but which make sense of what the participants characteristically think, say and do while acting in the system. The aim of a philosophical analysis is to understand the common law from a common lawyer's point of view, but not necessarily in terms that common lawyers themselves use to understand their practice.⁶ So the argument is not that common lawyers would conceptualize the role of legal sources in terms of "practical authority" or "theoretical authority," but that these concepts best capture the roles that such sources play in common law reasoning.

1. Authority: Theoretical and Practical

AS MY AIM IS TO ESTABLISH THAT PERSUASIVE SOURCES ARE BETTER UNDERSTOOD IN terms of theoretical rather than practical authority, it is essential to clarify the differences between them.⁷ The central distinction lies in the *effect* of authoritative pronouncements. Theoretical authority is characterized by its giving us reasons to *believe* something, whereas practical authority is characterized by its giving us reasons to *do* something (that is, by its giving us reasons for action). This is the fundamental characteristic of what is it to *be* a theoretical or practical authority, or to *have* theoretical or practical authority. But there is far more to the distinction than this, and to explain what more is involved I shall initially look at each separately. For reasons that will become clearer as we proceed, it is easier to begin with theoretical authority, despite the familiarity of practical authority.

To be a theoretical authority is, in essence, to have a level of knowledge and/or skill in some domain that gives one's considered views about a matter within the domain far more credibility than the views of those possessing an average level of knowledge or skill. An authority on Rembrandt's paintings, or medieval iconography, or linguistics, is someone who knows far more about that area, and has far superior judgment about the truth of some question within that area, than the average curator or medieval historian or linguist. So a theoretical authority has a degree of expertise in a domain that gives one a very good reason to think that the authority's considered views about an issue in that domain are

correct.

Another way of thinking about this aspect of theoretical authority is this. An assertion made by someone with theoretical authority (expert "E") that *p* is the case gives us a reason to believe *p* because it gives us a reason to believe that there are (other) good reasons to believe the correctness of *p*.⁸ The expert is, in effect, the intermediary between those other substantive reasons to believe *p* and us. It need not be (though it can be) that we are unaware of those other reasons. When an art expert vouches for the authenticity of a Rembrandt, I may not know what considerations that judgment is based upon. But when an appraiser tells me that my house is worth one million dollars, that may be based on information regarding sales in my neighborhood and on the general economic climate with which I am equally familiar. The difference is that I may be unsure how to use this information properly to make an estimate, whereas the appraiser is not.

So the assertion of *p* by a theoretical authority gives me a reason to believe *p* because it gives me a reason to believe that there are (other) good reasons supporting the truth of *p*.⁹ But there is more to the view expressed by a theoretical authority than this: the assertion of *p* is not simply *a* reason to believe that there are good reasons for believing *p*. Instead it is a good reason to believe that the *balance of reasons* supports the truth of *p*. Another way of putting this point is that the expert is asserting that *all things considered* it is more likely than not that *p* is correct.

That *p* represents an all-things-considered judgment helps to explain a number of features of theoretical authority. The first is that it explains how the assertion of *p* can be a reason to believe *p* even though E's assertion is not itself direct evidence for the truth of *p*. Consider the authenticity of a painting. The evidence for this is constituted by features of the painting itself (its style, its dating, the canvas and paint, and so forth) and documents and testimony attesting to its provenance. E's views are not like a living painter vouching for the authenticity of one of their own artworks: that would be direct evidence for its status. Instead, the reason for believing *p* is that there are good grounds to trust the reliability of E's judgment on this question. This leads to a second point. The expertise and careful consideration of an issue by a theoretical authority provides a reason to believe *whatever* conclusion they come to, whether that is in favor of or against authenticity. If the expert concluded that the painting was in fact a work by the "school of Rembrandt," then that judgment would be a reason to believe that this was what the evidence supported. So the assertion by an expert who has closely considered a question is a reason to believe the truth of whatever conclusion the expert comes to, whether it is *p* or not-*p*. This aspect of authoritative pronouncements can be described as the reasons' being "content-independent" reasons. They are "content-independent" because there is reason to believe whatever is asserted, irrespective of its content.¹⁰ Finally, the fact that E's view represents an all-things-considered judgment explains the sense we have that *p* is not simply one more factor for us to consider in reaching our own judgment of the merits. Instead *p* *competes* with any judgment of the merits that I might make myself. Of course, my own judgment may simply be that I do not know, or that I have no idea. Perhaps the purported Rembrandt looks like it has the right style for the period, and appears to be old; and perhaps it is a striking

portrait with considerable aesthetic interest. So it is not improbable that it is a Rembrandt. But whether it is or not is something I am simply in no position to judge. If the expert is an internationally acknowledged specialist then it is rational to prefer the expert's judgment to my own.

None of this is to suggest that theoretical authorities are limited to empirical inquiries such as the authenticity of an artwork. A mathematician may assert that an extremely difficult theorem (say, Fermat's) has been proved. This judgment turns not on empirical evidence, but on the soundness of the proof. A concert pianist may assert that a particular piece, such as a Chopin prelude, is extremely technically demanding. This involves a judgment about the skill required to successfully perform the piece. A translator may assert that an essayist writing in another language is an outstanding stylist in that language. Again, this does not turn on empirical evidence, but on the appropriate standards of good writing and how they apply in a different linguistic tradition. So theoretical authorities can exist in many domains of understanding and skill, not just in empirical domains.

Theoretical authorities, then, typically provide one with a reason to believe that the balance of reasons supports the correctness of *p*. The strength of the reason to believe this all-things-considered judgment will vary depending upon a range of factors, such as the domain within which the authority works (mathematics versus aesthetics), the expert's own level of skill and knowledge, and the effort devoted to forming the judgment. The role of theoretical authorities might be described as ultimately epistemic. The function is to assist others to form sound judgments over matters where they lack either the knowledge or the understanding to form a credible view of their own.

Practical authorities, by contrast, provide reasons for *action*, rather than reasons for belief. Paradigmatic examples of practical authorities are military superiors (vis-à-vis subordinates), parents (vis-à-vis children) and employers (vis-à-vis employees). To enjoy practical authority over another involves a relationship in which one party is entitled to tell the other what to do, and is entitled to have the instructions obeyed. When a military superior orders a subordinate to requisition a vehicle, the order is regarded by both the superior and subordinate as the reason for the latter to do the requisitioning. Moreover, the order is not regarded as simply *one* consideration among many for the subordinate to take into account in deciding what to do: absent special circumstances the order is to be obeyed. In particular, the subordinate's view of whether the order is sensible, useful or desirable does not count against following the order. The subordinate is not justified in failing to follow the order simply because the order was ill-judged. The subordinate may be justified if the order is to do something outside the scope of the superior's responsibility (for example, an order to marry someone) or if the order is unlawful (for example, to shoot an unarmed non-combatant), but not simply because what they were ordered to do was a bad idea. One might say that a subordinate is bound to obey *valid* instructions, that is, those that the superior is authorized to issue. None of this, of course, actually establishes whether a particular authority *is* justified, or indeed if *any* authority is *ever* justified.¹¹ But for those who believe that an authority over them is justified, the fact that they have been given an instruction is regarded as a good reason for doing as instructed.

There are some obvious parallels (as well as obvious differences) between practical authority and theoretical authority. The first parallel is that an authoritative instruction to do ϕ is regarded by both parties as a *reason* for the subordinate to do ϕ , that is, the instruction itself provides a reason for action. Secondly, the instruction is not simply one additional reason for a subordinate to take into account, but represents instead the authority's judgment of what, all things considered, the subordinate should do. Thirdly, the reason for doing ϕ is that it is what the subordinate was instructed to do. The reason is not that ϕ -ing was supported by the antecedent balance of reasons, but simply that it is what was instructed. Paralleling theoretical authority, the pronouncement provides a "content-independent" reason for acting, that is, a reason for doing something that does not depend upon any other feature of ϕ -ing other than the fact that it was what the subordinate was instructed to do. Fourthly and finally, there is some ground on which the authoritative instruction is to be preferred to the subordinate's own judgment of what they should do.

One key aspect of practical authority is the fact that the instruction is binding on the subordinate whether or not the instruction was, all things considered, what the subordinate should have been directed to do. This manifests itself in the fact that subordinates are not justified in failing to follow an instruction simply because they disagree with it. The explanation for this lies in the fourth feature noted above—that there is some ground on which the authoritative instruction is to be preferred to the subordinate's own judgment of what they should do. Relationships of practical authority involve an allocation of decision-making power between the parties: to have authority over another is to have the (normative) power to decide how the other is to behave (within some range of actions). Sometimes the justification for this allocation may lie in the fact that the authority will on the whole be a better judge of the merits of what the other should do—this seems to be a key part of the justification of parental authority, for instance—but in other cases there is a need for coordinated action by a number of people, and the person assigned that role enjoys authority even if their judgment is no better (and maybe even if it is considerably worse) than everyone else's. The benefit of our behavior actually being coordinated outweighs the fact that there were (far) better options that could have been chosen by the authority, since the sub-optimal option is better than no co-ordination at all. In other cases the division of decision-making power will be justified by its contribution to the success of some collective endeavor. A clear system of command, whether in an army or a workplace, may bring benefits to the enterprise even when the individual decisions being taken by those in authority are, more often than not, suboptimal. So long as a certain level of competence is achieved by the operation of the system as a whole, it may justify adhering to the instructions issued throughout the system.¹²

As noted above, to say that a subordinate is "bound" to follow an instruction that falls within the scope of the authority is not to say that there are no justifications accepted by the authority for not doing so. This is sometimes described in terms of the duty being "defeasible," that is, that there are special circumstances where it is justifiable not to follow the instruction. Sometimes there are conflicting instructions that cannot be obeyed together. At other times there are situations that fall within the terms of the instruction, but do not seem to have

been anticipated by the authority since following the instruction would have such untoward results. There are even cases where the subordinate is confident that the authority has simply made an error in the content of the instruction, for example, telling the subordinate to go to one location when it is clear that they meant to indicate another.¹³ So obedience is not blind, but it is guided by a concern to give effect to the authority's instructions, rather than being guided by the underlying merits of the instructions.

Practical authority, then, differs from theoretical authority not simply in the type of reasons it gives, but in the type of relationship between the parties. Barring special considerations, people are not bound to prefer a theoretical authority's view to their own. Indeed, they are often left with the difficult task of considering how much credence to place on the authority's views. A relationship of practical authority, on the other hand, involves the subordinate being duty-bound to follow the instruction of the authority, regardless of its merits. Hence a fundamental difference between theoretical and practical authority lies in the treatment of cases where the authority's judgment is flawed. Theoretical authority gives one a reason to believe in the accuracy of the view expressed. But if the authority's view is in fact mistaken then, obviously, it should not be followed. If an art-expert vouches for the authenticity of a Rembrandt, but I discover compelling evidence that it is a fake, then despite the expert view I should conclude it is a fake. By contrast, if a practical authority instructs me to ϕ , and the balance of antecedent reasons was clearly contrary to ϕ -ing, there is still a reason to ϕ , indeed I am still bound to ϕ . Whether I will, all-things-considered, do ϕ in the practical authority case, depends a good deal on how I see the practical authority's instructions. It is common for practical authorities to demand a degree of obedience that many subordinates do not accept. But if I genuinely regard the authority as a practical authority, then the fact that a valid instruction has been issued will still carry some weight, even when the instruction is ill-judged. In many cases I will ϕ because the grounds I accept for having the practical authority will provide me with reasons for conforming to even a badly ill-judged instruction.

Of course, in the case of both theoretical and practical authority, I must decide for myself whether to accept the other's general authority, and whether to follow any particular expression of that authority. But when I am persuaded that the pronouncement of a theoretical authority is mistaken on some matter, I will simply reject that view, whereas when I am persuaded that a practical authority (whose general authority I accept) has made an ill-judged decision, I will still regard it as having normative force, and I may still end up obeying the decision despite its flaws. One of the many differences between theoretical and practical authorities lies in the fact that the pronouncements of a theoretical authority should not be accepted if there is sufficient reason to doubt their correctness. The instructions of a practical authority, by contrast, still have force even in the face of error. From the point of view of the subordinate, however, the erroneousness of an instruction is often regarded as a consideration against obedience. Generally, the more unmeritorious the instruction, the stronger the reason for disobeying. So a military order to destroy an area of great natural beauty for little strategic advantage might lead a subordinate to disobey, despite the view of the military that this provides no justification for failing to follow the order. The crucial

point, then, is that someone who accepts a practical authority regards its valid instructions as providing a reason to do as instructed, regardless of the merits of what is instructed. There may be cases where the instruction is so ill-judged that the subordinate will decide, all-things-considered, to disobey, but this will be due to the reason(s) to obey the authority being outweighed by some more compelling consideration. Unlike theoretical authority, then, even mistaken pronouncements carry weight with the subordinate.¹⁴

As a coda, it should be emphasized that theoretical authority can extend to matters of practical reasoning, that is, reasoning over what should be done, such as medicine, or architecture, or investment analysis. A medical specialist is, in one sense, a “practical authority” in that area of specialization. A cardiologist knows a great deal about the causes and prognosis for heart disease and coronary problems, but also a great deal about the best treatment for such conditions, that is, about what to *do* to help patients with the conditions. In the terms of this section, however, the cardiologist is ultimately a theoretical rather than a practical authority. The cardiologist does not have (practical) authority *over* their patients, and their patients are not (ordinarily at least) bound to follow their instructions. Instead, when the specialist recommends or advises a certain course of treatment, they are vouching for its being the best available for the specific patient. They are giving the patient a reason to *believe* that the best thing to do, all things considered, is to take this treatment, because of the specialist’s expertise in dealing with these ailments. So a theoretical authority over areas of practical reasoning, in recommending or advising a course of action, is giving the advisee a reason to believe that this is what they ought to do. Indirectly, of course, the authority is advising what should be done, but only because this is (the best estimate of) what ought to be done in any case, not because this is what the authority advises.¹⁵

It is now time to return to the law. From the point of view of the law, the key distinction between practical and theoretical authority lies in the distinction between the authority providing a content-independent reason to act on the one hand, or a content-independent reason to believe on the other. Law is obviously a matter of practical *reasoning*, that is, it is a question of what ought to be *done* according to law. But that does not mean that there is no room for theoretical authorities in the law.

2. Persuasive Sources and Practical Authority

THE LAW IS REGARDED AS HAVING PRACTICAL AUTHORITY OVER THE COURTS BECAUSE it conforms to the two principal conditions discussed in the previous section. Statutes and precedents are authoritative for courts because courts must give effect to these sources of law whether or not they agree with their content. A statute declaring that marriage is restricted to a union between a man and a woman has to be applied by judges even if they think this is simply unfair to gay couples.¹⁶ Equally, if a binding precedent allows couples to marry irrespective of gender, this has to be applied by judges who believe that marriage can only properly exist between a man and a woman.¹⁷ Generally speaking, the court is not allowed to refuse to give effect to a statute or precedent simply because it thinks the law unjust, or unwise, or misguided, or lacking in compassion. The court is not allowed

to question the legal status of the source on the basis of its content or merit: its status can only be challenged on the basis of not having been validly enacted, or conflicting with the constitution, or some other special legal ground. So statutes and precedents are regarded as creating content-independent reasons for courts to follow. They are also regarded as binding on the courts: courts are duty-bound to give them effect. This does not mean that these sources must be applied come what may: like other duties, the duty to apply a statute or precedent is defeasible, for example, where there are two conflicting statutes or two conflicting precedents from the same court. But apart from some special circumstances, the court is not justified in failing to give effect to the source.¹⁸

So statutes and precedents have practical authority over the courts because they are regarded as giving binding, content-independent reasons for action. But not all legal practices are regarded as duty-binding or “mandatory.” The view of many lawyers in civil law countries is that their case law operates by giving courts a strong reason to follow earlier decisions independently of the merits of those decisions, but without putting them under a duty to do so. The earlier case-law *ought* to be followed, but courts are not bound to do so.¹⁹ This is also one way to interpret the position of courts in the common law with the power to overrule their own decisions: the default position is that they ought to follow their own precedents, but they are not bound to do so. More weakly still, there are situations in which courts treat certain pronouncements as providing support for a course of action, that is, as lending weight to that outcome. This is the way that lower courts seem to treat *dicta* of courts higher in their hierarchy. Similarly with the use of persuasive precedents: the judgments of courts whose decisions are not binding may still lend support or weight to the outcome supported by those decisions. This suggests that the differences in the treatment of different sources may lie in their normative force rather than their content-independent status.²⁰ The different degrees of force could be described as “mandatory” (duty-imposing), “directory” (should) and “advisory” (a reason). On this approach, it might be said that both mandatory and directory considerations provide sufficient reason for being followed, whereas advisory considerations are not individually sufficient to be followed. The difference between mandatory and directory considerations, on the other hand, lies in the fact that whilst the former are defeasible, the latter can also be outweighed.²¹

From this perspective a court may only depart from a mandatory source in certain well-defined circumstances, such as cases of conflict with another mandatory source, or where it cannot have been meant to apply, or where the case raises some important but unforeseen reason against its application. But the court cannot depart from the instruction simply because it disagrees with the instruction’s content. By contrast, directory and advisory sources do not bar departures based on the unsoundness of the instruction. The earlier view still has a weight or force that must be balanced against the correct estimation of the merits of the case, but it may be outweighed in a particular case. On this approach *obiter dicta* and persuasive precedents operate by providing content-independent reasons to follow the views they support. They lend weight to the adoption of the view, even in cases where a judge does not agree with the view put forward. This seems to chime with the practice in some cases. For instance where a trial judge is

faced with a considered and unanimously supported *dictum* from a recent decision of the final appellate court in their system, they will normally regard the fact that it is “merely” a *dictum* as of little importance. Although not technically binding (so that a ruling at odds with the decision would not be contrary to the doctrine of precedent) the decision carries almost as much weight as a *ratio decidendi*. This is a *dictum* at the upper end of normative force, but the suggestion is that all *dicta* have some force on courts, even if not decisive force. Where a court disagrees with the view taken in the *dictum*, it will seek to show that the *dictum*'s force is weak (for example, because the point was not properly argued, or the statement was an aside, or it was not endorsed by all of the court) and establish that there are even stronger reasons in favor of the contrary view.

The use of persuasive precedents is similar. Where a court is reasoning to its conclusion, it will often cite the existence of persuasive precedents that support the outcome, often without any analysis of the basis on which the views were endorsed. The fact that other courts in closely related jurisdictions have come to the same conclusion strengthens the case for that outcome, particularly where it is the “balance” of opinion, or what most courts endorse. Where a persuasive precedent has come to another view, the court will again attempt to show that it has less force than it might be thought to have.

Now clearly this analysis of persuasive sources regards them as falling short of having practical authority *stricto sensu* over the court. They are not, after all, binding on it. But they do have normative force, that is, they do provide a *content-independent* reason for the decision they support. And so the terminology of “persuasive authority” is not far from the mark. But a better way of conceptualizing these cases is in terms of the court having a *reason* to defer to another's (all-things-considered) view, just because it is that other court's view.²² This preserves up to a point the parallel with practical authority proper, which involves the *duty* to defer to another's all-things-considered view. It is not that these sources provide *additional* content-independent reasons in support of the view so that once they are taken into account the view is, all things considered, to be preferred. Instead, the court must decide whether or not to defer to the view put forward by another. The normal reason for doing so would be the belief that the view was, all-things-considered, correct as a matter of law. But we are concerned with cases where the court does not think the view is correct as a matter of law. What would be the reason then for preferring the persuasive source's view to the court's own?²³

So the major challenge for this proposed understanding of persuasive sources lies in explaining the rationale for deferring to a view even when it is erroneous. There is at least one situation where a good case can be made for such a rationale, but in other situations it is more difficult to see why a persuasive source should be given this type of deference. Take the favorable case first. In the US federal Court of Appeals circuits, it is standard for one circuit to treat the decisions of another circuit as “persuasive precedents” although they are not binding. Each circuit has a defined geographical jurisdiction with its own judicial hierarchy. The hierarchies only join at the point of the US Supreme Court, whose decisions are binding on all federal courts. Nonetheless, each circuit regards the decisions of the other circuits as providing persuasive precedents that they are inclined to follow,

though they are ultimately free to reject the other circuit's interpretation of the law. Why should the circuits maintain this practice? One key reason, obviously, is a concern about divergences in the interpretation of federal law between different regions of the United States. Federal law, after all, is meant to apply consistently throughout the country, unlike the patchwork of differences between the law of individual states. Although divergences in federal law can ultimately be resolved by the Supreme Court, its heavy workload means that this may take a long time. So there are good reasons for trying to avert the situation in the first place. This provides a basis for adopting another circuit's interpretation of the law, even when the court thinks the interpretation is mistaken, and leaving the Supreme Court to decide whether to correct the error. The reason is not decisive, however, and where the court thinks the other court's interpretation is clearly erroneous that decision will not prevail. But in some cases the virtues of consistency in the understanding of federal law will prevail over the better interpretation. So in this type of case there is a content-independent reason (maintaining geographical consistency in the application of federal law) for deferring to a view of the law that is mistaken.

But in many other situations of persuasive precedents such considerations do not apply. When an English, or Irish, or Australian or New Zealand court treats one another's precedents as "persuasive," its aim cannot be to maintain the consistent application of a supranational law binding on all. Of course, for significant periods of the twentieth century some Commonwealth judges did regard the "common law" — at least in its "heartland" areas of private law and crime — as just that: a body of principles and doctrines evolved by common law judges that should ideally be the same wherever it was applied. But very few judges think like this anymore. The common law is now viewed as a body of doctrines and practices taking local root. So why should a judge of the Canadian Supreme Court regard a decision of the Australian High Court, even on one of these "heartland" topics, as "persuasive"? Why follow the decision just because it is a decision of a court with a common legal history? This is the puzzle of regarding such persuasive sources as having even a limited degree of practical authority.

A similar puzzle concerns the use of *obiter dicta* from decisions within a court's own judicial hierarchy. As is well-known, advocates rely on *dicta* to advance their arguments, and courts cite them to support their conclusions. And as noted above, there are situations where lower courts treat *dicta* as having a normative force all but equivalent to *rationes* or holdings. It might be said that the reason for being influenced by such *dicta* is that they are made by courts having practical authority over lower courts, and the same reasons that ground such practical authority ground a more attenuated authority for such *dicta*. But there are a number of problems with this line of argument. The first is that it overlooks the fact that any *dictum*, whether of a majority or individual judge, and whether from a court lower or higher in the judicial hierarchy, is available to be used in argument. It is not just *dicta* from courts higher in a judicial hierarchy that are cited. The second is that the purported rationale for giving weight to *dicta* cuts across one of the main grounds for drawing the *rationes/dicta* distinction in the first place, namely a desire to restrict the power of courts to make law on issues that they do not need to decide.²⁴ The Common Law has always regarded the law-

making role of the courts to be limited to those issues that *had* to be settled to reach a conclusion in a case. To allow *dicta* to have practical authority over lower courts, even a limited practical authority, would permit appellate courts to influence the law on any issue they chose to discuss. There would no longer be any constraint on the range of legal issues for which a particular case could be authority. This would enable appellate courts to make unnecessary pronouncements on the law in order to influence the law's future development. It would also increase the risk that observations suited only to the facts of the immediate case or made without sufficient reflection could enjoy far more significance than they deserved.

But what of the example discussed above of the unanimous *dictum* of a final court of appeal? It is the exception rather than the rule. It is unrepresentative of *dicta* in general because in the situation in which a unanimous *dictum* has recently been made by a final court of appeal (whose membership has not changed in the interim), the lower court may sensibly think that this is how the issue *would* be decided on appeal, and so it is futile to put the parties to the trouble of an appeal. It is, in a sense, an anticipatory *ratio*, rather than just a *dictum*.²⁵ And yet even in such cases it is still open to the trial court to go its own way if it thinks the *dictum* misstates the law.

A final reason for doubting that *dicta* have practical authority is that judges do not write as if they expected their *dicta* to have any practical authority for other courts. It is common for a court to observe that although some issue does not need to be decided, having now had full argument on the matter it will express a view for the "benefit" of later courts. The thought is that this is the considered view of the merits of the issue, and it is offered to provide assistance to later courts. It is offered not because it is thought that later courts will follow it just because it has been made, but because it is believed to be correct. Nor do advocates, in citing a *dictum* in support of their case, argue that a court should follow the *dictum* even if it is wrong. Instead they argue on the basis that the *dictum* correctly states the law and so should be followed.

So there is a challenge in seeing persuasive sources as having even limited practical authority. The case of co-ordinate courts in a federal system shows that this challenge can at times be met. There will be situations in which there are content-independent reasons for a court to defer to the (non-binding) decisions of another court.²⁶ But in other cases it is unclear why a court should give this type of force to the admittedly non-binding views of another court. This of course does not establish that such views have theoretical authority. After all, the default position is that such views have no authority whatsoever — their only significance lies in the intrinsic persuasiveness of the views as a matter of law. And perhaps it is simply an artifact of judicial rhetoric that anyone might think otherwise.

3. Persuasive Sources and Theoretical Authority

WHY THEN SHOULD AN ACCOUNT OF (SOME) PERSUASIVE SOURCES AS THEORETICAL authorities be preferred to the simpler view that they have no authority at all? There are a number of reasons, some to do with the way in which the courts make use of persuasive sources, and others to do with the reasons why there would be a role for such theoretical authority in the law.

Starting with judicial practice, there does seem to be more than mere

rhetoric to the idea that persuasive sources have a force for courts that goes beyond the merits of their view of the law. Advocates clearly believe that it is an advantage to have a persuasive source in favor of their arguments, and a disadvantage to have no such support, or to be faced with persuasive sources against their arguments. Courts discuss them in oral argument, and rely on them in their judgments, rather than simply cite them. Furthermore, the interest in persuasive precedents seems to go beyond an interest in the underlying reasoning that led another court to reach its decision. In the case of *dicta*, a court may only give a brief explanation for its conclusion, but the fact that it has offered a view, rather than reserving the matter for another occasion, will be given consideration. So the treatment of persuasive sources does not seem to be a matter of courts simply considering how convincing the *arguments* for the view are as a matter of law, but giving weight to the fact that another court expressed its support for that view.

Seeing persuasive sources as (being regarded as) having theoretical authority makes sense of these features. Courts pay attention to persuasive sources because (and to the extent that) they believe the sources are likely to be meritorious. And such sources are thought likely to be meritorious because of the knowledge, experience and skill of those giving them, and the circumstances under which the views have been put forward. This is particularly true of the *dicta* of appellate courts (whether in a judge's own hierarchy or outside it) because such courts have had the advantages (a) of being presented with well-defined questions of law arising from a trial court's judgment, (b) of sitting in panels that can pool their thoughts on the question, especially where there is oral argument or post-submission conferences, and (c) of generally being more experienced and drawn from the more capable ranks of the lower courts and the profession. So even where a judge whose *dictum* is being considered was not *ex ante* an expert on some area of law, the advantageous circumstances in which they come to express a view confers a degree of theoretical authority upon it.

It is noticeable that the weight given to persuasive sources depends to a significant extent on the reputation of the judge or court relied upon. In England, for example, the *dicta* of Lord Goff are treated with great respect, especially in the area of restitution, as are those of Lord Brandon on admiralty questions. The degree of respect turns on the perceived caliber of the judge and their relative expertise in an area. The views of the US Supreme Court on questions of constitutional rights are given careful attention by courts in the rest of the world due to the experience of the court in dealing with such questions and the reputation of many of its leading justices.²⁷

Courts seek guidance from persuasive sources on how they should resolve an issue. And there is a clear rationale for seeking the considered conclusions of other courts. As judges labor under constraints of time, knowledge and skill, they seek reassurance that their conclusions accord with another expert's view of the law. A judgment must be written in a limited amount of time, and given the volume of existing law it is impossible for a judge to be familiar with most of the legal issues that may arise in a case. Similarly, as skillful as some judges might be, there will be complicated issues that tax even the most talented lawyer. So even when judges are confident in their analysis of the state of the law, they will often be less than certain that their assessment of its implications

for the cases before them is correct. This helps to explain why persuasive sources are most often cited where the legal issue is particularly complex and difficult. Where it is easy to extrapolate from existing decisions to a new situation there is little perceived need to search for guidance on the point. If there is a well-known persuasive source to hand, it will be cited, but there is little point in looking far and wide for further guidance. It is mainly where the court thinks that the merits are quite evenly poised that persuasive sources may help to resolve the issue.

This points to a further ground for thinking that persuasive sources are better explained in terms of theoretical rather than practical authority. As Schauer notes, persuasive sources might be more accurately described as *optional* sources.²⁸ There is no requirement that they be cited: their use is permissive rather than mandatory.²⁹ But if a source has practical authority, if it really provides a (content-independent) reason in favor of an outcome, then it would seem to be a flaw (even if not a fatal flaw) for a court to overlook it and not take it into account.³⁰ If the source provides a reason to do something, and can affect the balance of reasons in favor of that outcome, then (at least in cases that are not clear-cut) it needs to be considered. And more effort would be devoted to ensuring that as exhaustive a survey as possible had been made of existing persuasive sources. But this point exposes the oddity of thinking that persuasive sources have practical authority. The mere luck that an issue had attracted judicial comment (or had been litigated in another jurisdiction) could tilt the balance of reasons in favor of deferring to an erroneous view, just because there were more persuasive sources in its favor.³¹

There are two further aspects of persuasive sources that should be noted. Firstly, judges will often be faced with more than one persuasive source on an issue—*dicta* from a number of cases, or the views of a range of courts outside their hierarchy. Where there is no overall pattern it will show that the issue is a difficult one, but the judges will have the consolation that whichever view they ultimately endorse enjoys a degree of expert support. Where there is a greater consensus in the sources, on the other hand, it demonstrates that one view is favored by others who have considered the question closely.³² Here the judges may of course go against the consensus, but they will generally only do so if they are convinced that the consensus is mistaken. Depending upon the degree of uncertainty about the merits, the views of others will weigh more heavily.

Secondly, some judges will possess an expertise in particular areas of the law that make them theoretical authorities themselves. Judge Posner hardly needs any guidance on issues of US antitrust law. But even an expert has reasons to consult the views of others with theoretical authority. No one is infallible, and consulting the views of other experts provides an opportunity to double-check one's own analysis. But there is another equally important reason for even an expert to cite persuasive sources. A court's judgment is a decision on the merits of the claim, but it is also a justification of the result reached by the court. The judgment is meant to be legally convincing, both to the parties to the case and to other lawyers. So it makes sense to cite persuasive sources to pray in aid the support of other experts' view of the law. The court is pointing out that the conclusion is not just its own view, but one shared by other experts, and thus all the more convincing for that. The disavowal of novelty is not (or not simply) part of the inherent conservatism of legal thought, but a way of bolstering the

persuasiveness of its reasoning.

This of course points to a limitation on persuasive sources. A source is only regarded as “persuasive” if there is a sufficient degree of use and support for it by the judiciary as a whole. An individual judge may cite the French *Cour de Cassation* in support of some view, but unless (and until) the judiciary generally regard that source as persuasive, it will not be regarded as providing support. So a source may possess great expertise (such as a new treatise on some area of law) without being regarded as a persuasive source. And other sources (such as judicial *dicta*) might be accorded the status despite the fact that only a subset of the views from that source merit such treatment.³³

So there is a good case for thinking that many persuasive sources in the Common Law are characteristically treated as having theoretical authority alone. I say “characteristically” because of the element of variation in how judges treat persuasive sources. There probably are trial judges who treat the *dicta* of higher courts as having practical authority, and believe that they should follow them irrespective of their merits. Equally, there probably are judges who (at least in some contexts) treat persuasive sources as providing support for a position regardless of the merits of that position. But overall, the pattern of treatment of persuasive sources, especially in situations where a court disagrees with their content, plus the uses to which persuasive sources are put, is more consistent with their being treated as theoretical rather than practical authorities.

Finally, I want to deal with what might seem the most troubling obstacle to adopting this view of persuasive sources – the problem of legal indeterminacy. The previous discussion has proceeded on the basis that there can be expert views about the law, and that these should be attended to because of the prospect that these views are correct. But this seems to presuppose that every legal issue has a determinate solution. To be an expert on some issue, it seems, there must be a right answer to that issue that one is more likely to have identified. Although the possibility of legal indeterminacy cannot be dismissed out of hand, nor can it simply be assumed, particularly as the overwhelming view of lawyers is that the law is indeterminate.

Let me assume the law is indeterminate. Is that fatal to there being theoretical authority? There are a number of reasons for thinking that it is not. One response to the worry about indeterminacy is to point to the fact that lawyers simply do regard certain views as expressions of expertise, despite their belief in indeterminacy. Why is this? Because the type of indeterminacy that lawyers endorse is in fact a form of underdetermination.³⁴ It is not that they think that *every* legal question has more than one answer, but that many legal questions permit a number of plausible answers. But this is true of expertise generally. To be an expert in an area does not require that there be a single correct answer to every question that can be raised in the domain. It is enough that there are some answers that are correct and incorrect and others that are better or worse. Many domains of practical knowledge require trading off different values and goals to reach an outcome that is, overall, superior. To be an expert in architecture, or engineering, or design, involves juggling a range of conflicting concerns to come up with a solution that is preferable to others. In many areas of expertise like these there is no demonstrably superior solution, that is, no answer that can be shown

without discernment and judgment to strike a better balance than others. It is the same in the law. A theoretical authority in law is someone whose views are likely to be superior to the non-expert and are worthy of close attention because they are more likely to identify a solution that strikes a better balance among competing values. To say that in every legal dispute where there is an arguable case for each side there is no better view of the matter is simply dogmatic. The problem here is that we are not confident which cases have a better solution and which do not, and in the absence of such assurance we seem well-advised to seek expert guidance on the issues.³⁵

4. Theoretical Authority and the Nature of Law

IF THE PRECEDING ARGUMENTS ARE SOUND, THEY SHOW THAT MANY PERSUASIVE SOURCES, at least in the Common Law, are treated as having theoretical authority, not practical authority. But they do more than this: they force us to reconsider a certain methodological presupposition common to many philosophical accounts of the law, and they shed light on a central feature of the Common Law. To illustrate these points I will very briefly consider two influential theories of law: Dworkin's interpretivism and Raz's legal positivism.

In Dworkin's interpretivism, the law of a Common Law jurisdiction is ascertained by determining which coherent set of principles would best fit and best justify the totality of legal materials in that system.³⁶ The law, in short, is the morally best interpretation of existing legal practice, and the principles determine how a case should be decided. What role then should persuasive sources play in interpretivism as part of the legal materials? A number of views could be taken. (a) *No role*. According to this view, the best interpretation of legal practice assigns no significance to persuasive sources. Like much of the content of judgments, persuasive sources could be treated as irrelevant to the task of justification. This disposes of any difficulties they might present, but at the price of treating a major part of common law practice as legally irrelevant. Given the use to which persuasive sources are put by judges, this view is unlikely to fit sufficiently well with the legal material to be a plausible interpretation of legal practice. (b) *The same role as other legal source material*. On this approach, an interpretation of legal practice would be *pro tanto* superior to the extent that it was consistent with the views expressed in persuasive sources. The weakness of this approach is that it draws no distinction between legal material that common lawyers regard as importantly different. The outcome of a case represents the actual decisions of a political institution, whereas a *dictum* is an observation about some question of law that the case did not need to settle, and a persuasive precedent may be a decision of a court in another community. Why should this material enjoy the same significance in influencing the content of the law as actual decisions of institutions in this community? (c) *A different role to other legal source material*? The question here is what that role would be. The function of legal material is to feed into the determination of the law. Some can be more important than others, that is, fitting with them can be more important than fitting with others, but in the end the only question is fit. In reality there is no room for theoretical authority, because it involves giving a certain role to *others'* views of the effect of legal material. But Hercules does not need anyone else to assist him in determining what the law

is, since he is not subject to the limitations under which ordinary judges labor.

What of exclusive legal positivism, on the other hand? On Raz's account,³⁷ a legal consideration is one that is authoritative, which entails (a) that its existence and content can be identified without recourse to moral argument and (b) that it is binding on courts to apply it. To be binding, for Raz, a consideration must be a "protected reason," that is, it must be both a first-order reason to ϕ plus a second-order ("exclusionary") reason not to act on some of the reasons against ϕ -ing. Applying the law always involves the exercise of moral judgment, as the court must determine whether any of the non-excluded reasons are present in the case, and, if so, whether they outweigh the first-order reasons to ϕ . So statutes and *rationes* are protected reasons, and their application involves considering whether some non-excluded reason applies and prevails in the circumstances.³⁸ Simplifying somewhat, legal reasoning is a modified form of moral reasoning, where sources modify what is appropriate to do in cases where they apply, and also modify what is appropriate in cases where they do not apply ("gaps") because the gap should be filled in the morally best way in light of the existing law. If persuasive sources lack practical authority then on this view they cannot be sources of law. Of course there could be laws directing courts to use persuasive sources in certain circumstances (or permitting their use), but this would not reflect their status as theoretical authorities. Instead it would turn them into legal norms validated by the system's laws. There is no role for persuasive sources except as practical authorities, because the only question to be solved once legal sources have been taken into account is what is the morally best decision in the circumstances.

This brief account of Dworkin's and Raz's theories highlights the way in which neither leaves room for persuasive sources to have theoretical authority. The reason for this is instructive. It is one knock-on effect of their methodological abstraction from the actual capabilities of judges and lawyers. As noted in the introduction to this paper, any theory of law or legal reasoning is inevitably an idealization, and there is much to be learned from idealizations which disregard human limitations. But there are also risks that such idealizations may overlook important aspects of the practice and provide a distorted picture of its operation. And this is the case with persuasive sources. From the perspective of this type of idealization persuasive sources must either be assimilated to more familiar legal material like statutes and court decisions or regarded as extralegal material that play whatever role extralegal material plays in legal reasoning. But to understand the importance of persuasive sources it is necessary to approach law as a social practice suited to human capabilities, rather than one that is oblivious to them.

How then are persuasive sources to be understood? Common lawyers do not regard them as "extralegal material." They regard them simply as sources that are ancillary to statutes and precedents. What reasons are there for accepting this view? Firstly, the status of a source as a "persuasive legal source" depends (like mandatory sources) upon the practices of the courts. An individual judge can (in effect) propose some source as persuasive, but this must be endorsed by the bulk of the judiciary to acquire this status. Secondly, a persuasive source is, in a sense, a second-order source, as it is a source *about* other sources. It is not itself a primary source, for it does not purport to bind courts as to what they should do. But nevertheless this helps to explain why they are regarded as sources of law:

they are material that expresses a view on the *legal* effect of primary sources, that is, on what should be done according to the law. Thirdly, the source is regarded as having theoretical authority about the law, that is, it is regarded as likely to provide a sound view of legal effect of primary sources.

The fact that persuasive sources do not have practical authority relates to the role that they play in case-law. Appellate courts have the power through their decisions to authoritatively alter the law, that is, to make alterations that are binding on lower courts irrespective of the merits of the decision. But that power is in fact very narrow, and there are a variety of devices (for example, the doctrines of *obiter dicta*, distinguishing and overruling) that restrict it. What a court can authoritatively determine in a single case is very limited. A decision's legal effect, then, turns to a large extent on how convincing other courts find its reasoning. Persuasive sources provide a means by which other legal material can be significant without giving them the power to alter the law. Theoretical authority is, in effect, a *tertium quid* between practical authority and simple persuasiveness. It confers on certain views an evidentiary presumption of soundness, but no more.

Ultimately this is important because it reveals a central aspect of the Common Law that more idealized accounts side-line. All of the preceding devices have the effect of giving primacy to the *collective* view of the judiciary over any individual judge's view. There would be no need for such devices if judges had Herculean powers, or could straightforwardly reach the correct decision "according to law." But the legal system must work with judges who have human capabilities. These devices create a feedback system in which judges must persuade other judges that their reasoning is convincing as a matter of law. It inclines them to draw on the common stock of arguments and values shared by the judiciary. And it thereby serves the aspiration of the legal system to speak through many actors with one voice. ◻

Notes

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² A notable exception is Frederick Schauer's "Authority and Authorities," 94 *Virginia Law Review* (2008): pp. 1931-61 which greatly stimulated my thinking on this topic.

³ Hence the term "sources" is used in the relaxed sense of those materials that the courts regard as the legal basis for their decisions, rather than the narrower conception of, for example, Raz's "sources thesis."

⁴ This way of framing the issue is based upon Schauer's "Authority and Authorities."

⁵ This is the gist of the views of both Schauer, "Authority and Authorities" and Aleksander Peczenik, "The Binding Force of Precedent" in D. Neil MacCormick and Robert S. Summers, eds., *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997): pp. 467-72.

⁶ Following the lead of H.L.A. Hart in *The Concept of Law*, (Oxford: Clarendon Press, 1961).

⁷ For some helpful discussions see Joseph Raz, "Legitimate Authority" in *The Authority of Law*, 2nd ed (Oxford: Oxford University Press, 2009); Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), chs. 2-4; Raz, "The Problem of Authority: Revisiting the Service

Conception" in *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009); Les Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), ch. 2; Heidi Hurd, *Moral Combat* (Cambridge: Cambridge University Press 1999), chs. 3–6; and Scott Shapiro, "Authority" in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002).

⁸See C. Gans, "The Normativity of Law and its Co-Ordinative Function" *Israel Law Review* 16 (1981): pp. 333–49, at 339–40.

⁹Or the correctness, or soundness, or accuracy of *p*. The use of "truth" here is not meant to prejudge questions about how best to characterize different areas of understanding.

¹⁰These terms are more commonly used to describe reasons for action, but they apply *pari passu* to reasons for belief. For discussion see H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), pp. 254–5; Joseph Raz, *The Morality of Freedom*, pp. 35–7, *Between Authority and Interpretation*, pp. 210–13; Les Green, *The Authority of the State*, pp. 36–59. For critical discussion of the concept, see P. Markwick, "Law and Content-Independent Reasons," *Oxford Journal of Legal Studies* 20 (2000): pp. 579–96; P. Markwick, "Independent of Content," *Legal Theory* 9 (2003): pp. 43; and Stefan Sciaraffa, "On Content-Independent Reasons: It's Not in the Name," *Law and Philosophy* 28 (2009): pp. 233–60.

¹¹Some philosophical anarchists, for example, deny that any person can really be justified in exercising practical authority over another autonomous person. The modern *locus classicus* is Robert Paul Wolff, *In Defence of Anarchism* (Harper & Row: New York, 1970). (For another sceptical account of practical authority, see Hurd, *Moral Combat*, ch. 3.) By contrast, there is little scepticism about the existence of theoretical authorities.

¹²The most sustained general discussion of the justification for practical authority is to be found in Raz's account of the "service conception" of authority: see *The Morality of Freedom*, ch. 3 and "The Problem of Authority: Revisiting the Service Conception." The arguments in this paper are not predicated on the acceptance of Raz's account.

¹³In some straightforward cases of mistake, the view may still be taken that the subordinate should have obeyed if they were unable to query the instruction, rather than rely on their own judgement that there was an error (even where it is admitted there was one).

¹⁴Could it be argued that the only reason for a subordinate to obey an erroneous instruction is the risk of incurring a sanction? It could, but those who accept the legitimacy of an authority normally think they have two reasons for obedience: (a) the validity of the instruction and (b) the risk of a sanction for disobedience. Even where they regard the risk of being found out as low, a conscientious subordinate will still think there is a reason to obey due to the legitimacy of the authority.

¹⁵Schauer adverts to the role of expertise in justifying legal authority, but sees this as a matter of practical, not theoretical authority: "Authority and Authorities," pp. 1941–2 and 1948–9.

¹⁶For example, s.5(1) Marriage Act 1961 as amended by the Marriage Legislation Amendment Act 2004 (Cth of Australia).

¹⁷For example, *Goodridge v Dept of Public Health*, 798 NE 2d 941 (Mass. 2003).

¹⁸The further issue of judicial *disobedience* to the law is not relevant to the debate on the role of persuasive sources and will not be considered here.

¹⁹See Peczenik, "The Binding Force of Precedent" pp. 469–75.

²⁰This is the substance of Schauer's view ("Authority and Authorities," pp. 1952–6), though he puts the matter differently to the way it is presented here.

²¹This type of characterisation can be found in Peczenik, "The Binding Force of Precedent." It is also the common ground for the contributors from different countries to the *Interpreting Precedent: A Comparative Study* collection: see pp. 551–61. (See also Hurd, *Moral Combat* ch. 4 on "influential authority.")

²²For an interesting recent discussion of deference see Philip Soper, *The Ethics of Deference* (Cambridge: Cambridge University Press, 2002), especially pp. 9–27 and 168–83.

²³One key ground for seeing persuasive *authority* in terms of there being reasons to defer to another's all-things-considered view is that the alternative of regarding them as first-order content-independent reasons makes them conceptually equivalent to requests. This analysis also brings practical authority closer to theoretical authority, where the reason to prefer an expert's

all-things-considered view can vary in strength.

²⁴This concern is not undermined by the fact that it is at times difficult to draw the *rationes/dicta* distinction. In very many cases it is clear that a statement is a *dictum*.

²⁵So it is the flipside of cases of “anticipatory overruling.” (See *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 US 477 (1989) for the US Supreme Court’s rejection of this doctrine vis-à-vis its own decisions.)

²⁶Another example is where a court is asked to overrule one of its own decisions: there can be content-independent institutional reasons against correcting doctrinal mistakes. For a discussion of overruling in the English context, see Harris, “Towards Principles of Overruling,” *Oxford Journal of Legal Studies* 10 (1990): pp.135-199.

²⁷The citation of “foreign law” by US courts is, in effect, the reverse phenomenon: see for example, *Roper v Simmons* 543 US 551 (2005), and the articles in the *Harvard Law Review* 119 (2005): Vicki Jackson, “Constitutional Comparisons: Convergence, Resistance, Engagement,” 109-128; Jeremy Waldron, “Foreign Law and the Modern *Ius Gentium*,” pp.129-147; and Ernest Young, “Foreign Law and the Denominator Problem,” pp.148-67.

²⁸Schauer, “Authority and Authorities,” pp. 1940 and 1946–47.

²⁹For a similar thought, see John Gardner “Concerning Permissive Sources and Gaps,” *Oxford Journal of Legal Studies* 8 (1988) :pp.457-61..

³⁰This is, for example, an assumption shared by the contributors to the comparative study *Interpreting Precedents*, see pp. 472–5.

³¹Indeed it seems that there *must* come a point where a sufficient number of *dicta* would outweigh the fact that the merits were to the contrary.

³²Unless this is simply a case of courts uncritically following an initial decision and contributing to a precedential “cascade”: see Eric Talley, “Precedential Cascades: An Appraisal,” *Southern California Law Review* 73 (1999): pp.87-137; Goutam U. Jois. “*Stare Decisis* is Cognitive Error” *Brooklyn Law Review* 75 (2009): pp. 63-141; Adrian Vermeule, “Many-Minds Arguments in Legal Theory,” *Journal of Legal Analysis* 1 (2009): pp.1-45.

³³The argument of this paper is that (most) persuasive sources are *treated* as theoretical authorities, not that they necessarily deserve that status.

³⁴See for example, Lawrence Solum, “On the Indeterminacy Crisis: Critiquing Critical Dogma,” *University of Chicago Law Review* 54 (1987): pp. 462-503 and Kenneth Kress “Legal Indeterminacy,” *California Law Review* 77 (1989): pp. 283-337.

³⁵For a recent discussion of these issues in the law, see Matthew Kramer, *Objectivity and the Rule of Law* (New York: Cambridge University Press, 2007), pp. 14–38.

³⁶See Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986).

³⁷See for example, Raz, *The Authority of Law*, chs. 3 and 10; “Authority, Law and Morality” and “On the Autonomy of Legal Reasoning” in *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994); “Facing Up,” *Southern California Law Review* 62 (1989): pp. 1153-1236, pp. 1201–12; and *Between Authority and Interpretation*, ch. 14.

³⁸In addition, those courts with the power to overrule precedents will have the power to change the law in this way.