



*The Jean Monnet Center for  
International and Regional  
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## THE JEAN MONNET PROGRAM

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Jean Monnet Working Paper 15/14

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### **Two Logics of Authority: Reason and Fiat in Modern Law**

NYU School of Law • New York, NY 10011  
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ISSN 2161-0320 (online)  
Copy Editor: Danielle Leeds Kim  
© Arie Rosen 2014  
New York University School of Law  
New York, NY 10011  
USA

Publications in the Series should be cited as:  
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**TWO LOGICS OF AUTHORITY:  
REASON AND FIAT IN MODERN LAW**

By Arie Rosen\*

**Abstract**

Authority is not of one kind, and authoritative directives may have different effects on the practical reasoning of their addressees. In this regard, we can distinguish between two types of authority—epistemic and decisionist. Although both are used to influence people’s actions, they diverge in the way in which they are respected and treated by those who follow them. This plurality of forms of authority is closely related to some of the questions that have been bothering legal philosophers for centuries, and particularly to questions concerning the relation between reason and fiat in law. Based on the distinction between epistemic and decisionist modes of reasoning with authoritative directives, we can distinguish two discrete logics governing the dynamics of positive law: an epistemic logic which makes law aspire to correctness and reasonableness, and a decisionist logic which leads to the identification of law with its positive particularity. In the final part of this article, I consider the practical and conceptual implications of this duality.

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I am grateful to the participants of the Legal Theory Workshop at the University of Toronto and to the 2012-2013 participants of the Emile Noël Forum at NYU School of Law for their comments on previous drafts. I am also indebted to Tom Adams, Megan Donaldson, Guy Sinclair, Bosko Tripkovic, Emily White, Moran Yahav, and two anonymous reviewers for their careful reading and engagement.

## INTRODUCTION

As positive law is the product of the exercise of authority, the philosophical study of the phenomenon of authority has taken center stage in modern legal philosophy. Theorist endeavor to trace the proper foundations on which authority is exercised and accepted, and to explore the implications of these findings to legal theory and legal practice. Philosophically, it has been argued that seeing law as an element in relations of authority can settle old debates between legal positivists and their rivals. Practically, arguments based in theories of political authority are employed in debates on statutory interpretation and legal reasoning.

For the most part, however, the philosophical exploration of the phenomenon of authority has overlooked important differences between types of authority. This article focuses on the distinction between epistemic and decisionist exercises of authority, and the different ways in which their directives influence our practical reasoning. In brief, it tries to show that epistemic directives require that considerations of reasonableness and correctness continuously regulate our practical reasoning; while decisionist directives militate against the weighing of such considerations of correctness in determining the best way to follow them.

This difference is of considerable significance to some of the fundamental questions of modern legal philosophy. First, noting this distinction clarifies the relationship between our theory of political authority and our theory of legal interpretation and reasoning, showing that the grounds on which political authority is accepted affect the mode of interpretation and reasoning its addressees adopt. Moreover, it sheds new light on a longstanding philosophical debate regarding the role that reason and fiat play in law.

This philosophical debate oscillates between two core positions. Some claim that law is best understood in terms of fiat, as the product of human will and contingent creation. Others claim that something in the very nature of law—either in its content or in its aspiration—relates it to reason and moral correctness. The positions are usually defended on psychologistic-descriptive grounds, asking what part reason plays in legal

decision-making, and what part is played by arbitrary discretion (“mere fiat”).<sup>1</sup> This old debate is recast in this article as a conflict between two ways in which we are invited to understand the authority of positive law, each leading to a different dynamic of legal evolution, interpretation, and application.

Looking at positive law in this way, as an element in relations of authority, shows that law is governed by two distinct logics. Considered as having epistemic authority, law demands that we weigh considerations of justice and correctness in its interpretation and development; considered as the product of decisionist authority, however, law demands that we refrain from weighing such considerations in its application. This is why at one moment positive law emerges as aspiring to reason and correctness while at another it emerges as mere fiat, completely bound by its contingent particularity.

So there is a lot going on here. The article starts with an analytical discussion of authority and practical reasoning in general terms, making the case for a distinction between epistemic and decisionist types of authority (Part II). It continues with the application of this general analytical framework to modern positive law, advancing a hermeneutical thesis relating different modes of legal hermeneutics to different understandings of political authority (Part III). What comes to light in this part of the inquiry is that our modern preference for understanding political authority in decisionist terms explains why positive law is often treated as fiat—as a sometimes arbitrary and potentially even wicked set of decisions. However, this is inconsistent with our entrenched practices of legal reasoning, which divulge a lingering attachment to epistemic authority in politics and cast positive law as the product of reasoning and

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<sup>1</sup> See generally Lon L Fuller, “Reason and Fiat in Case Law” (1946) 59:3 Harv L Rev 376; John Finnis, *Natural Law and Natural Rights* (Oxford and New York: Oxford University Press, 1980) at 289–90. For position arguing for the primacy of fiat in law see e.g. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Chicago and London: University of Chicago Press, 2005) at 5–7, 30–32; Carl Schmitt, *The Concept of the Political*, translated by George Schwab (Chicago: University of Chicago Press, 1996) at 72–73; Walter Benjamin, “Critique of Violence” in Peter Demetz, ed, *Reflections* (New York: Schocken Books, 2007) 277; Jacques Derrida, “Force of Law: The ‘Mystical Foundations of Authority’” (1989) 11 Cardozo L Rev 920. For arguments in favor of the primacy of reason over fiat see e.g. Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986) at 65–68; Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1998); Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, translated by Ruth Adler & Neil MacCormick (Oxford University Press, USA, 2010).

discovery, aimed at justice and moral correctness. Part IV concludes by tracing some of the normative and conceptual implications of this inconsistency.

## TWO TYPES OF AUTHORITY

### ***A unitary account of authority?***

The phenomenon at the center of my attention in this article is that of *de facto* practical authority.<sup>2</sup> Relations of *de facto* practical authority are those in which one party is in a position to direct the practical reasoning of another, and the latter accepts this direction as legitimate.<sup>3</sup> As such, relations of authority come in many different shapes and forms, often defying attempts of generalization.<sup>4</sup> Although it is possible that there is a common thread that can be found in the authority of priests, police officers, legislators, parents, tribal elders, lay judges, professional judges, professors, military commanders, doctors, and employers, it is also clear that whatever commonalities such figures share are accompanied by very significant differences as well.

In jurisprudence, questions regarding law's authority and the nature of the many relations of authority that constitute modern legal systems have long been at the focus of philosophical interest. What is striking about most of the accounts that arose from this interest is that they assume a unitary analytical account of the grounds on which authority is exercised and the way in which *all* authoritative directives affect the practical reasoning of their addressees. In what is perhaps the most important account of *de facto* authority in modern legal philosophy, Joseph Raz famously suggested that the common ground for authority is its probable ability to make us better comply with

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<sup>2</sup> On the distinction between *de facto* authority and legitimate, rightful authority, see Joseph Raz, *The Authority of Law: Essays in Law and Morality* (Oxford: Clarendon Press, 1979) at 3. On the distinction between practical authority (regarding actions) and theoretical authority (regarding beliefs) see Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2006) 90 *Minn L Rev* 1003 at 1032–33.

<sup>3</sup> See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, translated by Ephraim Fischhoff et al., Guenther Roth & Claus Wittich, eds. (Berkeley: University of California Press, 1968) at 212.

<sup>4</sup> This might also be true of the *moral* phenomenon of rightful authority. See e.g. Scott Hershovitz, "The Role of Authority" (2011) 11 *Philosophers' Imprint*. As noted, however, this phenomenon is not the subject matter of this paper, which is focused solely on *de facto* authority.

reasons that already apply to us,<sup>5</sup> and that every exercise of authority is supposed to be based on the calculation of these prior reasons.<sup>6</sup>

Raz's general understanding of the common ground for authority leads to an equally general understanding of the way in which authoritative directives figure in practical reasoning. Raz explains that since authority is respected based on its superior ability to identify and calculate prior reasons that already apply to us, we do not (and should not) refer back to these prior reasons when we follow directives.<sup>7</sup> To refer back to the prior reasons and weigh them in addition to the reason supplied to us by the authoritative directive that was supposed to replace them is always a mistake. It either leads us to act contrary to the directive (thus subverting the initial rationale behind the exercise of authority) or leads us to "double-count" reasons in favor of acting as the directive instructs.<sup>8</sup> Authoritative directives, Raz concludes, affect our practical reasoning in a single, particular way. They give us a reason to act in the manner stipulated and also give us a reason to exclude from consideration the prior reasons we had for action, on which the authoritative directives are supposed to be based.

Mainly due to this "exclusionary" understanding of the effect of authoritative directives, Raz's theory of authority is often used for defending a particular vision of law: a vision that—in the terms with which we started, those of "fiat" and "correctness"—lies on the "fiatist", positivist side of the divide.<sup>9</sup> In what follows, I argue that Raz's theory of authority is too quick in its characterization of the grounds on which *de facto* authority is normally exercised, and that the same goes for his characterization of the manner in which authoritative directives figure in practical reasoning. Although all exercises of authority share the basic characteristics of this social phenomenon—involving the direction of the practical reasoning of another in a way that is perceived as legitimate—

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<sup>5</sup> Raz, *supra* note 2 at 27.

<sup>6</sup> Joseph Raz, *The Morality of Freedom* (Oxford and New York: Oxford University Press, 1986) at 47 ("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 directives.").

<sup>7</sup> *Ibid* at 46 ("the fact that an authority requires performance of an action is reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.").

<sup>8</sup> Raz, *supra* note 2 at 1022.

<sup>9</sup> Joseph Raz, "Authority, Law, and Morality" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford and New York: Oxford University Press, 1994) 194.

they are not all based on the same grounds, and do not all lead to the same mode of practical reasoning.

### ***Epistemic authority and decisionist authority***

The analytical account I offer here suggests an amendment to the normal, unitary philosophical account of authority. It argues for a distinction between two types of authority that are prevalent in our social and political circumstances: epistemic authority and decisionist authority. The defining criterion for the distinction between these two types of authority is the grounds on which they are legitimized and accepted. This difference leads to further dissimilarities in the motivation the two types of authority give for obedience, in their effect on their addressees' system of beliefs, and in their influence on their addressees' practical reasoning. As we shall see in Parts III and IV below, these differences are important for understanding the different logics that govern the dynamics of modern law.

Relations of epistemic authority are constituted by a particular belief on the part of those subject to authority: the belief that the person or organization exercising authority is in a better position to get things right.<sup>10</sup> The authority of experts is usually accepted on such grounds, due to their superior knowledge or reasoning abilities. The successful exercise of epistemic authority depends on the addressees' belief that by following this person's directives they will be more likely to comply with right reason. This gives the subjects of authority content-dependent reasons to follow the authoritative directive: although the authoritative directive might demand a different course of action than the one we had in mind ourselves, we have reason to follow the directive since it is more likely to be right than our own judgment of the situation.

It is clear, however, that sometimes we have reasons to follow the directives of others which have nothing to do with them being more knowledgeable, or wiser, or superior to us in any ability or skill. This is so because besides relationships of epistemic

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<sup>10</sup> Since our focus is on the social phenomenon of de facto authority, and not on the moral phenomenon of rightful authority, what matters is whether people believe that their deference is legitimate and warranted, and not whether they are objectively justified in holding such beliefs. See supra, text accompanying notes 3-6. On the need to study the socio-political phenomenon of de facto authority in distinction from the moral phenomenon of rightful or legitimate authority, see Arie Rosen, "The Normative Fallacy Regarding Law's Authority" in Wil Waluchow & Stefan Sciaraffa, eds, *Philosophical Foundations of the Nature of Law* (Oxford University Press, 2013) 75.



authority there are also instances of decisionist authority, which are quite frequent in modern social and political circumstances. An example of the exercise of such authority is when we contract to abide by the future decisions of someone, or commit ourselves to respect the results of a majority vote. The reason we have for following these decisions once they are made is not dependent on their correctness (or probable correctness). The decisions, once made, have no necessary claim to correctness, but they still have a claim to our respect—a claim most of us would recognize as valid.

Modern political thought offers several decisionist justifications for the respect we owe to political institutions. These include justifications from coordination, consent, procedural fairness, and self-government. When people demand respect on one of these decisionist grounds, they invoke a *content-independent* reason<sup>11</sup> for respecting their authority, and imply that their decisions deserve respect, not (or not only) because they are probably right, and even if they happen to be wrong. Of course, epistemic directives can also be wrong, but in their case their incorrectness, if recognized, would undermine the respect people owe to them. Decisionist directives can be recognized as incorrect, and still have a plausible claim to respect and obedience.

What makes both epistemic relations and decisionist relations types of the general phenomenon of authority is the general *effect* they produce in their addressees: in both types of relations people direct the practical reasoning of others in a manner that is perceived as legitimate. What sets the two types of authority apart are the *grounds* on which their guidance function is legitimized: epistemic authority is respected because it is believed to do a better job in getting things right; decisionist authority is respected for content-independent reasons.<sup>12</sup>

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<sup>11</sup> See Raz, *supra* note 6 at 35 (“A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently ‘extraneous’ fact that someone in authority has said so, and within certain limits his saying so could be reason for any number of actions, including (in typical cases) for contradictory ones”).

<sup>12</sup> For some it might be hard to see why epistemic authority should be considered as a type of authority at all. This reaction is related to the decline of epistemic authority in modern politics, which will be discussed later on in Part III. We have grown so accustomed to thinking of authority—and particularly of political authority—in decisionist terms that it might be hard to see how authority can be anything but decisionist. What is defining of authority as a social phenomenon, however, are not the grounds on which it is accepted, but its function and effect. In this, there can be no doubt that some relations in which people guide the practical reasoning of others are legitimized on epistemic grounds. To exclude such relations from the phenomenon of practical authority would be unjustified and dogmatic. Take for

Now, very few instances of authority are purely epistemic or purely decisionist, and many exercises of authority invoke *both* epistemic and decisionist grounds in their legitimation. This point will be addressed at length later on, and, as we shall see, is important for understanding modern political authority. Still, in most cases, we can identify either a primary epistemic or primary decisionist justification for accepting authority. Some authorities are followed mainly because they are likely to be right, while others are followed for mainly content-independent reasons. Moreover, even in hybrid cases, there is analytical virtue in differentiating between decisionist and epistemic types of authority, as a framework for understanding multilayered, real-life instances of authority. The differentiation is significant because divergence in the grounds on which authority is accepted leads to further important differences.

One such difference is the way authorities of different types influence their addressees' system of beliefs. Although both types of authority are *practical*, in the sense that they ultimately guide our actions and behavior, they have a different impact on what we believe to be the right course of action. In order to affect our practical reasoning, epistemic authority has to influence our personal beliefs regarding what is right and wrong, proper and improper. In this sense, the exercise of epistemic authority binds practical authority together with what is sometimes referred to as *speculative* or *theoretical* authority: it tells us not only what to do, but also what to believe. Things are quite different when it comes to the exercise of decisionist authority. Since the force of decisionist directives does not depend on their veracity or correctness, it is possible to accept them as reasons for action, without accepting that they hold any truth about what we should believe. Decisionist authority thus allows for the separation of practical

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example an epidemiologist at a time of an outbreak of a contagious disease, or a priest in a devout community. Such people clearly direct the practical reasoning of others, and when they do so their authority is accepted on epistemic grounds. Moreover, epistemic grounds can and do serve as the basis of political authority. This is the case, for example, in priestly theocracies, in which political authority is tied to religious knowledge. This has also been the case in pre-modern European politics, where political authority was not understood in terms of arbitrary discretion but depended on its perceived ability to guide to rights reason, justice, and the common good. See e.g. Walter Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna* (London: Methuen and Co. Ltd., 1946) at 112; J P Canning, "Law, Sovereignty, and Corporation Theory, 1300-1450" in JH Burns, ed, *The Cambridge History of Medieval Political Thought c 350-c 1450* (Cambridge: Cambridge University Press, 1988) 454 at 459. For a discussion of contemporary epistemic understandings of political authority see infra notes 47-49 and accompanying text.

authority from theoretical authority. As we shall see, this is important for understanding the authority of modern political institutions.

Another difference between the two types of authority lies in the way their directives figure in our practical reasoning. Whether we understand authoritative directives as the product of decisionist authority or as the product of epistemic authority significantly changes our attitudes towards them, the manner in which we feel obligated to respect and apply them, and the permissibility of weighing moral considerations in deciding how they are to be followed.

This last difference—which is of great importance for questions of legal and political philosophy—is ignored by one-size-fits-all accounts of relations of authority and by unitary theories of practical reasoning based on authoritative directives. This first part of the article thus serves both a negative and a positive purpose: it criticizes the common, unitary account of why and how authoritative directives are followed, and also argues for a particular way in which different types of authoritative directives figure in practical reasoning.

### ***Reasoning with epistemic authority***

The exercise of epistemic authority leads to a particular mode of reasoning in its addressees. It prompts the subjects of authority to do their best to understand the reason behind the directive and consider this reason when applying the directive to their circumstances. As we shall see, this means that epistemic directives<sup>13</sup> invite their addressees to weigh considerations of reasonableness and correctness when following them, thus allowing for situations in which the required course of action deviates from the directive's literal meaning, and even from the intentions of the person who issued it.<sup>14</sup>

This might sound counterintuitive to Razian theorists. After all, the exercise of epistemic authority, as in the case of an expert, seems to be the paradigmatic case for substantiating Raz's claim regarding the exclusionary nature of authority and against

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<sup>13</sup> For purposes of brevity I will call the directives whose authority is accepted on epistemic grounds 'epistemic directives' and directives whose authority is accepted on decisionist grounds 'decisionist directives'.

<sup>14</sup> Later on we will see that this is not the case when it comes to decisionist directives.

the weighing of considerations of correctness by the subjects of authority. An often used example is that of a doctor: Let us say that I cannot decide whether I should take a certain medicine to treat a medical condition I have. I go to the doctor for instruction, and she tells me that I should use a particular drug. I now have a good reason to do as I am told, and also to exclude from consideration the prior reasons on which her directive is supposed to be based. So far, it might seem, Raz's analysis provides a useful framework for understanding what is going on.

What is neglected in Raz's account, however, is the fact that we do not follow epistemic authority blindly or literally. Even when we accept the authority of the doctor, the general purpose of the exercise of epistemic authority gives us license to differentiate between the binding content of the directive and its literal meaning. Andrei Marmor, in contemplating a similar example, came to the conclusion that what actually commands respect is the doctor's *intentions*, and not the literal meaning of the directive.<sup>15</sup> At least in a sense, this is clearly right. When we go to the doctor we are interested in her opinion, and as far as the literal directive differs from her opinion we should aim to retrieve the latter. What is even more interesting in Marmor's analysis is that it shows that the epistemic significance of the directive—that is, the way in which it actually affects our beliefs and convictions—can differ from its literal form. However, Marmor's analysis does not go far enough, and does not exhaust the philosophical and practical repercussions of this insight.

To continue the example just given, it might be that when I get to the pharmacy, the pharmacist informs me that he has only a generic version of the medicine that my doctor prescribed. After taking a look at the alternative drug, I see that it has exactly the same active ingredient, and I decide to buy it. Now, it is not at all clear that I am deferring here to my doctor's intentions. Although I recognize her epistemic authority, for all I know she wanted me to buy the original drug and this was her particular intention.<sup>16</sup> Despite the fact that in my very choice to buy the drug I am deferring to my doctor's

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<sup>15</sup> Andrei Marmor, *Interpretation and Legal Theory*, 2d ed (Oxford and Portland: Oxford University Press, 2005) at 135.

<sup>16</sup> The motivations here need not necessarily be corrupt. It is possible that the doctor didn't know of the generic alternative or simply did not think of it. Either way, the doctor, whose authority was accepted, did not intend to prescribe the generic drug and did not in fact prescribe it.

authority, I manage to follow it in a way that is different from both its particular wording *and* the specific intention behind it.

What explains my practical reasoning in the example—which is typical of the way we follow epistemic directives—is my ability to distinguish between the epistemic significance the directive has for me and the letter of the instruction or any particular intention behind it. Since the epistemic directive compelled me due to its perceived ability to guide me to proper action, I treated it accordingly. I tried to understand the reason behind the directive, eliminate whatever arbitrary elements the directive includes (e.g. the particular words that were used and even the particular intention of the doctor), and employ it as a piece of knowledge regarding the proper course of action.

The way in which we identify the epistemic significance any specific directive holds for us depends greatly on our own personal expertise and knowledge. If I had been less confident in my own understanding of what informs the choice of prescribing a certain medicine over another, I might have acted differently. My ability to distill the epistemic significance of the doctor's directive (i.e. to buy a drug with a particular active ingredient) is dependent on other things I know about medicine, chemistry, my own medical history, the world of pharmaceutical production and so on.

This impact of prior knowledge on our practical reasoning is apparent, for example, in the different ways that a chef and a lay-person would use a cookbook. Since I know very little about cooking, I would rather follow the plain meaning of the text closely, and accept it as a good approximation of the epistemic significance that it holds. A chef would know better. She would be in a better position to distinguish the epistemic significance of the book from its plain meaning and even from the particular intentions of its author. She would be more likely to identify scribal errors, arbitrary statements, and plain nonsense that I might take very seriously. It is not that I am any less interested than the chef in the epistemic content of the cookbook, and although it might seem that I am treating the cookbook as an arbitrary set of instructions, this is not the case. Just like the chef, I am doing my best to cook properly, and I am using the cookbook in the best way I can in order to do so. I might be following it literally, but I only do so because (and to the extent that) I believe that this is my best chance of getting things right.

So here is the subtle point that is neglected in Raz's account. In establishing the authoritative content of an epistemic directive, the addressee's additional knowledge and prior convictions regarding the proper course of action have a great deal of importance. As Hans-Georg Gadamer explains, particularly if we accord epistemic authority to someone and assume that this person's instructions are correct and *true*,<sup>17</sup> the epistemic significance the directive holds for us is controlled in part by our prejudices and prior knowledge about what is right and proper.<sup>18</sup>

The epistemic significance of an authoritative directive, Gadamer shows, cannot be identified solely on the basis of the "objective" meaning of the directive, nor can it be revealed only by reference to the author's intentions. Rather, the effect the directive has on the practical reasoning of its addressees is partly determined by their additional knowledge and background beliefs (i.e. their "prejudices").<sup>19</sup> This level of significance opens up the possibility of an application of authoritative directives that would be "wholly bound by the meaning of the text",<sup>20</sup> while not carrying the textual directives out literally or according to the author's original intentions.<sup>21</sup>

Raz (and fellow Razians) might argue that once epistemic authority is exercised, this bars any consideration of correctness in the interpretation of its directives. We should be interested, so the objection goes, in the superior knowledge embodied in the directive, and not mar its content with our notions of correctness.<sup>22</sup> But the objection is misconceived. It is true that respect for the intended meaning of the directive or the knowledge "actually in the text" is indispensable in the interpretation of epistemic authority. The objection neglects, however, that in ascribing meaning to the directive—

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<sup>17</sup> Hans-Georg Gadamer, *Truth and Method*, Revised ed, translated by Weinsheimer and D. G. Marshall (London and New York: Continuum, 2004) at 281.

<sup>18</sup> Prejudices play an important role in any instance of interpretation and communication—not just in cases of epistemic authority. However, not in all circumstances do addressees employ their prejudices regarding rightness and propriety. In circumstances in which there is no reason to assume that what is being said is proper or right, the addressee will have no reason to refer to her prejudices regarding correctness when interpreting the utterance.

<sup>19</sup> Gadamer, *supra* note 17 at 291–99.

<sup>20</sup> *Ibid* at 328.

<sup>21</sup> *Ibid* at 325, 329–30.

<sup>22</sup> Marmor, *supra* note 20, chapter 6; Joseph Raz, 'Intention in Interpretation' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) 265 at 265, 289–90 (although Raz does not argue for a pure intentionalist interpretive method, he does argue that the identification of the meaning of established rules (which he calls 'conserving interpretation') should trace the author's intent).

that is, in ascertaining what it demands that we do in our particular circumstances—we as its interpreters draw on our own preexisting knowledge and convictions. In this respect, epistemic directives present us with a conundrum. On the one hand, they suggest that *we* might be wrong, and that to the extent that the directives conflict with our judgment, they should prevail (this is what respecting epistemic authority means). On the other hand, they suggest that in order to properly follow the epistemic directive, we should use the knowledge at our disposal—including our own understanding of the reasons behind the exercise of authority—to eliminate a certain arbitrariness that is unavoidable in communication and to adapt the authoritative knowledge embodied in the directive to our particular circumstances. We strike this sensitive balance every time we follow an epistemic directive. We defer to the directive as authoritative, but in ascertaining what it is that the directive demands in our situation we make use of our prior notions of correctness and propriety. This is how we reason with epistemic directives.

### ***Reasoning with decisionist authority***

Decisionist directives show a greater resistance to the weighing of considerations of correctness in their interpretation and application, but it would be wrong to think that we *exclude* these considerations when we follow such directives.

When it comes to the product of decisionist authority, the value of the directive lies not in its probable correctness, but in the content-independent reasons we might have to abide by that directive. This sets us on a different path when it comes to practical reasoning. What we are urged to respect in decisionist directives is not the epistemic significance of the directive—that is, the impact it should have on our beliefs and convictions—but the directive's *particular content*, that is, an arbitrary element that is left to the discretion of the person in authority. I would like to offer two examples that might help guide our thinking about this matter: one from coordination and another from authority that is based on respecting the will of another person.

In a large construction site, where there can be no hope of spontaneous coordination, if the foreman instructs a multitude of workers to put all the steel bars on the south-east corner, they are likely to do as they are told. This would continue to be

the case even if some workers believe that the best place to put the bars is actually the north-west corner of the site and that the foreman's decision got things wrong in this respect. Even if a worker believes that this is the case, and even if she *knows* so, she will not feel licensed to construe the foreman's directive in congruence with her own notions of what should be done. This is so because the decisionist directive performs a useful function of coordination, which is different from guiding the workers to the best course of action. Deviating from the particular content of the directive—which is potentially arbitrary and wrong—by trying to put the bars in the best place would subvert the purpose and rationale of respecting the decisionist authority in the first place.<sup>23</sup> I think that one can see how the practical reasoning here is very different from the practical reasoning involved in respecting the epistemically authoritative decision of an expert doctor.<sup>24</sup>

Another example of decisionist authority arises when we have content-independent reasons to respect someone's potentially arbitrary—and even potentially wrong—wishes. Let us imagine that my grandfather has grown quite ill, and I come by his house in order to help him out. He wants me to fold the laundry in a particular way, order in food that is bad for him, and—what is worse—not tip the delivery guy that brings over the food to his house. I have—or at least I believe that I have—strong content-independent reasons to do as my grandfather instructs me. This is his house and he is my elder and my grandfather; he is entitled to his independence, and is entitled to doing things his own way; I am just there to help, not to take over. It is clear, I think, that if I recognize his authority in these matters, I will refrain from weighing considerations of correctness in

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<sup>23</sup> There might be a limit, though. If acting in the way they are told would lead to absurdity and would be utterly futile, workers would not follow the directive at all. This, however, does not mean that every coordinating instruction they get should be construed as guiding them towards the most efficient course of action. Such an interpretive attitude would undermine the purpose of the exercise of authority. See generally *infra* note 77.

<sup>24</sup> This is easy to see if we assume that the particular rule of coordination that was announced becomes, for whatever reason, impossible to follow in a conventional manner. If the south-east corner becomes inaccessible, workers would not know what to do. There are two ways in which the new circumstances can be met, and neither of them involves looking for the epistemic significance of the directive. Either workers would try to follow the coordination rule to the best of their ability under the circumstances (e.g. by putting the bars as close as they can to that corner), or there would have to be a new exercise of decisionist, coordinating authority—either by example of a leader among the workers or explicitly by someone who will be taking charge of the situation.



my practical reasoning. I can ignore his wishes and deny his authority, but if I accept his authority, I will follow his instructions in their particular arbitrariness.

The reason for this is that when it comes to decisionist directives, we are prompted to follow their particular, potentially arbitrary content: the clear instruction (in the first case) and the particular will of my grandfather (in the second example). Can I assume that the particular content of the instruction is different from its plain meaning? In theory, of course. In practice, however, this depends on the circumstances: on my familiarity with my grandfather and his wishes, or on my acquaintance with my fellow workers and my ability to be sure that we all understood the instruction in the same way. We can weigh all sorts of considerations when following authoritative directives, considerations about the probable will of the person in authority or the conventional meaning the directive has in our community, but these should not be confused with considerations of correctness. If we are ready to admit that decisionist directives can deserve respect even when they are arbitrary and even when they are wrong, we cannot assume, as we did with epistemic directives, that their proper execution would also get things right.

Does this vindicate Raz's theory of exclusionary reasons? I think not. To say that considerations of correctness are *excluded* from our practical reasoning still seems wrong, or at least inaccurate. It is not, as is suggested in Raz's account, that the preexisting reasons I had to act in a certain way—for example, to tip the delivery guy—were replaced by the authoritative directive. The reasons to tip the delivery guy are still there, and if I decide not to tip him I would do so despite the lingering reasons I have to the contrary. If I choose not to tip, it seems that the reasons I had to act properly were not excluded, but simply *outweighed* by the content-independent reason I had to act in accordance with my grandfather's wishes.<sup>25</sup> Indeed, the entire Razian logic of exclusion, in which the authoritative directive is supposed to replace the prior reasons that independently apply to the addressee, seems out of place here. Since my grandfather's directive is not taken to be the balance of prior reasons that independently apply to me, the directive gives me no reason to exclude them from consideration.

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<sup>25</sup> This means that the weightier the contradicting reason, the less likely we are to obey the authoritative directive. This should not have been the case had this reason been excluded from consideration.

### ***The simultaneous exercise of different forms of authority***

Unitary theories of authority cannot distinguish properly between epistemic and decisionist grounds for respecting the instructions of others, and are therefore unable to provide us with a useful account of practical reasoning with authoritative directives. For Raz, practical authority is located in a peculiar middle ground, combining different aspects of the two forms. On the one hand, his theory claims that purely epistemic “recognitional authority” does not amount to practical authority at all,<sup>26</sup> while, on the other hand, it insists that the exercise of authority is wholly justified on epistemic grounds, based on its “relative success in getting people to conform to right reason”;<sup>27</sup> on the one hand it ties authority to content-independent reasons for action,<sup>28</sup> while on the other hand it takes the grounds for authority to be content-dependent.<sup>29</sup> Describing both authority from coordination and authority from expertise in the same terms, Raz claims that they both perform a service by affecting our practical reasoning in a unitary way.<sup>30</sup> However, as we have seen, the value attributed to different exercises of authority can vary considerably, and their directives end up affecting our practical reasoning in different ways.

Analytically, we should prefer a more subtle theory that distinguishes between different types of authority and different types of norm-based practical reasoning. But Raz’s theory is still understandable, at least in one respect: in many cases the exercise of authority rests on both epistemic and decisionist grounds. An example for such simultaneous exercise of both types of authority was given by Plato, when discussing the gymnastics instructor, who is not only an expert in physical training but also specially

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<sup>26</sup> Raz, *supra* note 6 at 28–31.

<sup>27</sup> Joseph Raz, “Introduction” in Joseph Raz, ed, *Authority* (New York: New York University Press, 1990) 1 at 13. For a critique of Raz along these lines, see Heidi M Hurd, *Moral Combat* (Cambridge and New York: Cambridge University Press, 1999) at 73–94. For a general critique of Raz’s theory of de facto authority, see Rosen, *supra* note 10 at 76–86.

<sup>28</sup> See *supra* note 11.

<sup>29</sup> See *supra* note 6.

<sup>30</sup> See Joseph Raz, *Practical Reason and Norms*, 2d ed (Oxford: Oxford University Press, 1999) at 63. Scott J Shapiro, “Authority” in Jules Coleman & Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 382 at 405–06; Marmor, *supra* note 15 at 134–35.

appointed for the training of a specific athlete.<sup>31</sup> Another example is that of the military commander, who enjoys superior expertise as well as a higher place in a hierarchical structure which legitimates obedience as such.<sup>32</sup>

Indeed, as these examples show, there is no reason in principle why both epistemic authority and decisionist authority should not be exercised simultaneously. Clearly, the simultaneous exercise of the two types of authority is sociologically effective since it aggregates over the different motivations people have to respect the decisions of others, supplying people with both content-dependent and content-independent reasons for following authority. This aggregation, however, is problematic when it comes to establishing the proper attitude people should exhibit towards the authoritative directives. This is so because the exercise of epistemic authority and the exercise of decisionist authority, as we have seen, differ in the effect they have on our practical reasoning.

Here is an example of the sort of dilemma that might arise. My coach has told me that I should not take shortcuts in my run, but suddenly it starts raining. I must decide *now* how to proceed. Should I take his instruction as the exercise of epistemic authority, and look for its epistemic significance, or should I treat it as the exercise of decisionist authority, which deserves respect even when it does not guide me towards proper action? As containing epistemic authoritative content, it would be unreasonable to follow the order in a way which might harm my physical fitness. As the product of decisionist authority, on the other hand, the purpose of the instruction is understood differently, and it might be right for me to act in a way that is detrimental to my fitness and health.

The example can be modified to accentuate the decisionist dimension of the authoritative directive. Let us assume that all of this takes place in the context of military training, where there is a distinct (perceived) value of discipline and obedience; that is, there are strong (perceived) decisionist reasons to respect the commander's decision, regardless of its correctness. Now, I do not know about athletes, but I do not

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<sup>31</sup> E.g. Plato, "Crito" in *The Dialogues of Plato*, 3d ed (London: Oxford University Press, 1892) 137 at 147–58. Cf. Plato, "Statesman" in *The Dialogues of Plato*, 3d ed (London: Oxford University Press, 1892) 409 at 497–98.

<sup>32</sup> Cf. Raz, *supra* note 30 at 38–42.

envy the soldier who would shorten the run because of the rain. Shortening the run might actually be the right thing to do (after all, my health as a soldier is no less important than my health as an athlete), but there is certainly (perceived) value in sticking it out, doing as I am told even if I get sick because of it. Of course, even in the army (and maybe especially in armies?)<sup>33</sup> there is no certainty. If I do end up getting sick, I might very well be reprimanded for being too simple-minded: I should have known that the commander's instructions were only given in order to improve my physical fitness, and running in the rain subverts this purpose; I should have known better and used my head! As any soldier will tell you, armies tend to be invincible in this way. The reason they can pull this off, at least in part, is due to the fact that they invoke both epistemic and decisionist justifications for their authority.

### ***Respecting decisions as mere fiat and as dependent on correctness***

Before moving from the analytical comfort of the discussion of practical reasoning to the nitty-gritty of our legal and political reality, I would like to say something about the way in which all of this is related to the question of fiat and reason, or rather, the relations between fiat and correctness.

The exercise of different types of authority does not necessarily correspond to different modes of decision-making, to the superiority of the will over reason, or *vice versa*. The doctor, the foreman, the grandfather, the coach, and the military commander all should have acted reasonably, and we have no reason to assume that their decisions were not, at least to a certain extent, the product of reasoning. The foreman's decision might have been—much like the decision of the doctor—the result of expert reasoning based on superior knowledge, and it might be that the decision of the doctor was not devoid of arbitrary dimensions. In other words: it is not that in one case the decision is the product of arbitrary discretion, of fiat, and in another it is wholly the product of reasoning and knowledge.

Even if we assume that *every* decision is partly determined by reasoning and partly determined by an arbitrary dimension which is part of the circumstances of its communication, it is clear that different authoritative decisions are respected on

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<sup>33</sup> Cf. Joseph Heller, *Catch-22* (New York: Simon & Schuster, 1994).

different grounds. My claim in this article is that it is this difference in the type of authority that is exercised—and not the psychologistic question of the very nature of decision-making—which leads us to understand, interpret, and apply authoritative directives in different ways. While the exercise of one type of authority invites us to focus on the epistemic significance which transcends the particularity of the instructor's intentions or specific way of saying things, the exercise of the other type invites us to focus on the particular content of a directive, that is, on its particular formulation or the particular intention behind it.

Epistemic authority urges us to treat its directives as inherently aspiring to correctness, and guides our behavior as such. This gives us license to differentiate the binding epistemic significance of a directive from its plain meaning and the arbitrary intentions of the person in authority. It urges us to strike a balance between our own understanding of what is right and proper, and the contribution the authoritative directive is supposed to make to our system of beliefs on the matter. Decisionist authority, on the other hand, warns us against weighing considerations of correctness and propriety in interpreting and following its directives, as doing so might undermine the value and rationale behind the exercise of authority. It calls upon us to treat directives as if they were mere fiat, and insists that the proper object of our respect is the particular content of the decision—either encapsulated in the actual intentions of the person in authority or in the conventional meaning of the directive.

### **POLITICAL AUTHORITY AND LEGAL HERMENEUTICS**

#### ***The hermeneutical thesis***

As long as authority is understood as a unitary phenomenon, with a single structure and a single effect on our practical reasoning, the discussion of the characteristics of particular relations of authority seems redundant in legal philosophy. If we think that all instances of authority are basically the same, we might be inclined to make statements like: “Since law has authority, it must be *x*”, or “Since positive law is the product of the exercise of political authority, it must be treated as *y*”. Propositions of this sort are located at the heart of Raz's argument in favor of legal positivism,<sup>34</sup> and also,

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<sup>34</sup> Raz, *supra* note 9.

remarkably, at the basis of arguments in favor of non-positivism as well.<sup>35</sup> They inform textualist<sup>36</sup> and intentionalist<sup>37</sup> theories of legal interpretation, but also justifications for purposive hermeneutical techniques.<sup>38</sup>

Recognizing the existence of multiple types of authority means that we move from such determinative statements about authority and its necessary consequences to a series of contingent implications of the sort of “if  $p$  then  $q$ ”. This gives rise to a more nuanced hermeneutical thesis, which relates particular understandings of political authority to particular modes of legal interpretation and reasoning. If positive law is accepted as the product of decisionist authority then we should expect it to be followed and interpreted in the way decisionist directives are normally followed in our day-to-day lives (*i.e.* like the instructions of the coordinating foreman or those of the autonomous grandfather). If positive law, on the other hand, is taken to be the product of epistemic authority, then we can expect it to be followed and interpreted in a way similar to the way epistemic directives would normally figure in practical reasoning (*i.e.* the way we follow the instructions of a doctor).

This section advances in two stages. First, it looks at the modern understanding of political authority and follows its hermeneutical repercussions. Second, it looks at the traditional modes of interpretation and reasoning involved in the application of positive law and traces their assumptions regarding political authority. The findings of this inquiry are somewhat surprising. As it turns out, in the case of positive law there is an apparent inconsistency between the type of authority we usually associate with its production and the mode of reasoning that is traditionally employed in following it. When it comes to considering the grounds on which law-making political authority is respected, we are inclined to understand law as the product of decisionist authority. However, when it comes to deciding on the proper mode for reasoning with positive law, we have strong inclinations to reason with it as one reasons with epistemic directives.

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<sup>35</sup> E.g. Robert Alexy, “A Defence of Radbruch’s Formula” in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 15; David Dyzenhaus, “Hobbes and the Legitimacy of Law” (2001) 20 *Law & Phil* 461.

<sup>36</sup> E.g. John F Manning, “Textualism and the Equity of the Statute” (2001) 101 *Colum L Rev* 1; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 69–87.

<sup>37</sup> E.g. Marmor, *supra* note 15 at 119–39.

<sup>38</sup> E.g. Lon L Fuller, *The Morality of Law*, Revised ed (New Haven and London: Yale University Press, 1964) at 82–91. Dworkin, *supra* note 1 at 313–54.

For many philosophers, this incongruence fuels (either explicitly or implicitly) a call for a straightforward reform—either of our traditional practices of legal reasoning or of the grounds on which political authority is normally exercised. Later on I will say something about this normative impetus, and why I do not see it to be straightforward at all. My main argument, however, is not normative *per se*, but conceptual and descriptive. I suggest that the fact that positive law is, on the one hand, taken to be the product of decisionist authority and is, on the other hand, traditionally treated as a set of epistemic directives explains why law simultaneously exists for us both as fiat and as the embodiment of reason and correctness. These philosophical conclusions are developed in the final Part of the article.

### ***Decisionist political authority***

Modern political authority is understood in primarily decisionist terms. I emphasize the “modern” part, because this attitude towards political authority is quite different from pre-modern notions, which modeled political authority on such epistemic imaginaries as those of the good shepherd and the doctor. The decline of the attractiveness of these imaginaries is related to the particular circumstances of modern politics, which are those of pluralism and conscious, legitimate disagreement.<sup>39</sup> In these circumstances, political authority cannot be widely accepted on epistemic grounds. If aside from European medicine there is also “alternative” medicine, and if aside from a universal religious belief there are also others, any single doctor or priest would have a hard time exercising effective *epistemic* authority over the entire population. Something similar can explain, in part, the decline of epistemic authority regarding “right reason” and the community’s “common good” in early modern Europe. The more plurality we see in conceptions of reason and the good and the more conscious we become of this plurality,

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<sup>39</sup> Waldron, *supra* note 36 at 102. In this respect, the pre-modern circumstances of politics were very different from our own modern predicaments. Although before modernity as well there was much disagreement about what the common good was and what right reason demanded, no one saw this disagreement as inherent in political life. Indeed, agreement and consensus on questions of the common good and common purpose were understood as constitutive of political community. See Mathew S Kempshall, *The Common Good in Late Medieval Political Thought* (Oxford: Clarendon Press, 1999) at 60. For some of the origins for these lines of medieval thought, see Marcus Tullius Cicero, “The Republic” in *The Republic and The Laws* (Oxford: Oxford University Press, 1998) 1, sec 1.39; Augustine, *The City of God*, translated by Marcus Dods (New York: The Modern Library, 2000), bk 19 section 24; Aristotle, *Politics*, translated by B. Jowell, Jonathan Barnes, ed., *The Complete Works of Aristotle* (Princeton: Princeton University Press, 1984) at 2030 (book 3, chapter 6).

the harder it becomes to exercise political authority that rests on primarily epistemic grounds.

In a short while I will say something about the lingering role epistemic theories have in modern politics, but I think it is clear that for us today, the more prevalent and plausible justifications of political authority are *decisionist* in nature. These justifications supply content-independent reasons for respecting political authority, and are not based—at least not primarily—on the authority’s ability to help us get things *right*. These decisionist justifications come in many forms, and no comprehensive survey can be attempted here. However, I would like to mention three prevalent types of decisionist justifications for political authority, to illustrate the primacy of decisionism in modern political understanding.

According to the first type of justification—the “lesser of two evils” justification<sup>40</sup>—there is wrongness associated with disobedience to the edicts of political authority, and this wrongness is (potentially) greater than the one associated with following a wrong directive. The locus classicus here is Hobbes’ argument in *Leviathan*, which posits law-abidingness as indispensable to political existence, thus justifying obedience to political authority even when its addressees believe—and even when they know—that it gets things wrong.<sup>41</sup> Spinoza, expounding on Hobbes’ argument, explains that civil war and lawlessness, which are the evils associated with the rejection of political authority, far exceed any evil that the ruler’s folly can lead to.<sup>42</sup> Kant’s political philosophy, perhaps surprisingly, is also premised on the Hobbesian “the lesser of two evils” justification,<sup>43</sup> seeing the rejection of political authority as the greater evil that should categorically be avoided. According to Kant’s logic, disobeying the directives of public authority prevents the community from having a univocal, binding decision on the content of rights, which is needed if rights are to be protected at all.<sup>44</sup>

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<sup>40</sup> I borrow this term from Benedictus de Spinoza, *Theological-Political Treatise*, 2d ed, translated by Samuel Shirley (Indianapolis and Cambridge: Hackett, 2001) at 177.

<sup>41</sup> Thomas Hobbes, *Leviathan*, Revised student ed, Richard Tuck, ed. (Cambridge: Cambridge University Press, 1996) at 39 (chapter 6).

<sup>42</sup> Spinoza, *supra* note 40 at 177 (chapter 16).

<sup>43</sup> See Hannah Arendt, *Lectures on Kant’s Political Philosophy*, Ronald Beiner, ed. (Chicago: University of Chicago Press, 1989) at 10–16; Jeremy Waldron, “Kant’s Legal Positivism” (1996) 109 Harv L Rev 1535 at 1562–1566.

<sup>44</sup> Arthur Ripstein, “Authority and Coercion” (2004) 32:1 Phil & Pub Aff 2.



Another prevalent justification for political authority is the one from collective freedom and self-government. In the republican tradition, which condemns submission to another as a form of slavery, modern political practices are understood as mechanisms which facilitate government while maintaining freedom. According to republican views, as long as the authoritative directives can be identified with the general will of the people, they cease to be exogenous to any individual in the community and thus command respect as one's own law to oneself.<sup>45</sup> As long as the exercise of political authority can be seen as a form of self-government and collective freedom, there is justification for following its directives even if they are wrong.

In the liberal tradition, which is suspicious of such notions of collective freedom and political unity, a similar notion of self-government is garbed in procedural terms, interpreting political practices as procedures designed for the collective endorsement of decisions.<sup>46</sup> Such liberal-procedural understandings of law-making authority mean that people can disagree with the content of a law, remain convinced that it is wrong, and still treat it as deserving of their respect and obedience as a legitimate decision.

The three types of justifications just mentioned, which are perhaps the three axes of modern political thought, are all decisionist. They are all supposed to give people content-independent reasons to follow the directives of law-making political authorities. We feel their intuitive pull even if we reject them in their extreme forms (which are at times startlingly authoritarian). Not every act of disobedience would bring a political community down, and not all political communities are worth preserving. Similarly, not every decision can be legitimized by a fair procedure of collective decision-making, and not every "general will" (whatever that term might denote) deserves our obedience. Still, in some cases—and I dare say, in many cases—we think that there is value in obeying the law even when our own notions of correctness tell us to act differently, and even though we do not believe that the law gets things right. When we acknowledge political authority in such cases, we must be doing so on decisionist grounds.

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<sup>45</sup> E.g. Jean-Jacques Rousseau, "On the Social Contract" in *The Basic Political Writings* (Indianapolis: Hackett Publishing Company, 1987) 139.

<sup>46</sup> E.g. Waldron, *supra* note 36.

It is not that the exercise of modern political authority is completely devoid of epistemic claims. Aside from the rise of decisionism, modern political culture also witnessed the rise of the role of expertise and knowledge in government. Democratic legislation is thus presented at times as a process of reasoning,<sup>47</sup> articulation of the shared values of the political community,<sup>48</sup> or discovery of the common good.<sup>49</sup> When seen this way, the exercise of political authority can seem to rest on epistemic grounds. But these claims are highly contentious once we consider them in earnest as *the* basis for modern political authority.

When evaluating scholarly claims that modern law-making authority still rests on primarily epistemic grounds, we should note how reluctant we are to ascribe correctness to binding political decisions. Ascribing epistemic authority to the legislature, for example, would mean that we have good reason to change our mind about what morality, ethics, or utility demands, based on the legislative decision. This is so because the exercise of epistemic authority always binds together practical and theoretical authority—it tells us not only what to do, but also what to believe the right thing to do is.<sup>50</sup> Understanding political authority in epistemic terms seems over-demanding in this sense, not to say pernicious, and I believe that this is the main reason why we simply do not think of political authority in these terms any more.<sup>51</sup>

Scholars arguing today for the epistemic grounds of political authority might want to deny this unattractive over-demandingness of their position. David Estlund, for

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<sup>47</sup> E.g. Joshua Cohen, “Deliberation and Democratic Legitimacy” in James Bohman and William Rehg, ed, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 1997) 67 at 72; David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008) at 8.

<sup>48</sup> E.g. Dworkin, *supra* note 1 at 345–47 (seeing statutes as “flowing from the community’s present commitment to a background scheme of political morality”); Habermas, *supra* note 1 at 157 (distinguishing between individual autonomy, based on a criterion of universalizability, and political autonomy based in the contingent circumstances of the political community).

<sup>49</sup> E.g. James Mill, “Essay on Government” in Terence Ball, ed, *Political Writings* (Cambridge and New York: Cambridge University Press, 1992) 1 at 26–35.

<sup>50</sup> See *supra*, Part II.

<sup>51</sup> Imagine that Congress passes a statute criminalizing all forms of abortion. Pro-choice liberals, upon hearing of this legislation, would not say to themselves: “Thank heavens for Congress! We used to think that it is fine for women have a right to end their pregnancies, but now we see that we were in the wrong”. I doubt that most citizens in liberal democracies think that the legislature knows best what is morally right or rational. Although we might value the legislature as a forum for the articulation of competing views, we tend to show little confidence in the reason behind parliamentary decisions (and sometimes also in the wisdom of our representatives, both collectively and as individuals).

example, argues that if we believe that the political procedure is not virtually infallible, but only supplies us with a moderate rational-epistemic advantage, the individual citizen would not be required to change her moral judgment based on positive law.<sup>52</sup> This, however, is a hard argument to make. If the source of political authority is in its probable correctness, then it should have no force when it is believed to be wrong. As long as the basis for the authority of the legislature is its superior epistemic qualities, in all cases in which we recognize this sort of *practical* authority (deference in matters of practical action) we should also recognize *theoretical* authority (deference in belief). The two simply do not come apart: if the decision is supposed to be correct enough for us to follow, how can it not be correct enough for us to believe it to be right?

It might be, however, that what Estlund calls “moderate epistemic theories” are not epistemic theories at all, but decisionist theories (which find the source of law’s authority in the foundational need for a decision in circumstances of disagreement) with an ancillary epistemic dimension. Such theories, I believe, actually capture quite accurately our modern notions of political authority. It is uncontroversial that we all want our laws to get things right, as Estlund does. Moreover, in refining our political decision-making procedures we might want to make them more rational (e.g. by mandating deliberations or consultations with experts) or more likely to trace the common good (e.g. by establishing universal suffrage). After all, none of us—regardless of our preferred political morality—wants irrational laws, laws unsuitable to our values, or inefficient laws. But this does not mean that the desired correctness of our laws is the ground for their authority. “Law’s claim to correctness”, as Alexy called it,<sup>53</sup> might only constitute an ancillary desire we have from our political system, not a foundational one.<sup>54</sup>

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<sup>52</sup> David M Estlund, “Making Truth Safe for Democracy” in David Copp, Jean Hampton & John Roemer, eds, *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993) 71.

<sup>53</sup> Alexy, *supra* note 35 at 27 (“The correctness argument maintains as valid that individual legal norms, individual legal decisions, and also whole legal systems necessarily raise a claim to correctness.”).

<sup>54</sup> It might seem that such a “moderate epistemic authority” or “decisionist authority with an ancillary epistemic element” is exactly the sort of authority that Raz is out to describe. See *supra* text accompanying notes 26-30. This, however, is inconsistent with Raz’s assertion that the normal justification of authority is based on its ability to make people better comply with reasons that already apply to them. See *supra* text accompanying notes 5-8.

Despite whatever secondary strands of epistemic justification we employ in explaining why we have the particular decision-making procedures that we do, modern political authority demands respect even in the face of its potential wrongness and even from people who are certain that it gets things wrong. This can only be the case if the primary justification of political authority rests on decisionist grounds.

***How to reason with the product of decisionist political authority?***

If positive law is the product of decisionist law-making authority, then we should expect it to figure in our practical reasoning as decisionist directives do. This straightforward platitude is the root for several normative positions in contemporary legal discourse. According to these positions, if we are to reason with law in the way one reasons with decisionist directives, we should do our best to trace the *particular content* that demands our respect and obedience, *i.e.* the plain meaning or particular intention behind positive law. The exact nature of this particular content, of course, depends on the specific decisionist justifications one subscribes to when accepting political authority. Recall the three prevalent grounds for justifying political authority mentioned above. In each of them, the particular content that commands authority is different, but in each of them we are required to seek this particular content (and not an underlying rationale or principle of justice) if we are to properly follow the authoritative directive.

Some decisionist justifications of political authority, and especially those from self-government, take as their focal point the intent or the will which the law-making decision embodies. According to these views, it is imperative that the content of the decision be controlled by the people who are entrusted to make it. Raz captures this widely shared intuition when he explains that—

legislation requires not merely intending to legislate, it requires knowing what one legislates. One is hardly in control over the development of an aspect of the law, if, while one can change the law by acts intending to do so, one cannot know what change in the law one's action imports. The natural suggestion is that legislators make the law that they intend to make, and they make that law by expressing the intention to do so.<sup>55</sup>

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<sup>55</sup> Raz, *supra* note 22 at 282.

This logic tends to give rise to an interpretive interest in the particular *legislative intent*, which is supposed to hold the contingent rationale, the subjective purpose behind the legislative decision.

Emphasis on alternative grounds for respecting political authority can lead to other interpretive interests. The “lesser of two evils” justification, for example, seems to urge us to show deference to the particular *utterance* and to the shared meaning it has for its diverse audience. This is so because this justification grounds political authority in its ability to produce clear, *ex ante* rules that will help coordination and planning. Particularly in pluralist, diverse societies, in which people come from different backgrounds and have various understandings (and various levels of understanding) of what is good, fair, and reasonable, this might mean that the plain meaning of the legal text should be followed quite literally.

As Jeremy Waldron shows, the liberal-procedural justification leads to a similar interpretive mode.<sup>56</sup> Waldron argues that in the circumstances of modern politics, formal procedures of deliberation are the only substantive form of communication that can take place among representatives in the legislature, and we are not entitled to assume any greater agreement among lawmakers than the one explicitly embodied in the text of the statute, i.e. the text that was proposed, amended, and eventually voted on. If this is the case, then the conventional meaning of the legislated text exhausts the content of the authoritative decision. Whatever balance between competing values the legislature has struck, whatever arrangement it decided to put into place, or whatever democratic choice its statute reflects—the authoritative decision is wholly embodied in the conventional meaning of the text.

There might be a host of problems associated with ascertaining the concrete “legislative intent” or even the “plain meaning” of positive law. It might be that in this exercise we will encounter serious disagreements or will have to settle for approximations and inaccuracies. Still, if the authority of positive law is accepted on decisionist grounds, we should expect to see a focus of our interpretive attention on this law’s *particular content*. This attention should be distinguished from the focus on the

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<sup>56</sup> Waldron, *supra* note 36 at 69–87, 118–46.

potential epistemic significance of law, characteristic of reasoning with epistemic directives.

### ***The logic of traditional legal reasoning***

Following the particular content of positive law—the particular intent behind it or its particular plain meaning—makes sense given everything that was said about modern political authority. This is the second side of the implication that was belabored in the first half of the article: this is what is entailed by the fact that political authority is understood in decisionist terms. Remarkably, however, it is not the normal way positive law figures in legal reasoning in courtrooms and in legal practice.

It is worthwhile to separate the normative question—how should legal professionals reason with positive law?—from the descriptive question of how they in fact reason with it. Normatively, it is true that there are some philosophers, theorists, judges, etc. who believe that legal reasoning and the interpretation of positive law should be limited to retrieving its particular content. Still, outside the narrow camp of strict originalists and neo-textualists, there is a virtual consensus that this is not the proper course legal reasoning should take. Theorists across the board—including realists,<sup>57</sup> pragmatists,<sup>58</sup> positivists,<sup>59</sup> non-positivists,<sup>60</sup> and natural lawyers<sup>61</sup>—agree that legal reasoning should not be mechanical and should aim at avoiding unjust results. The idea that a rule against vehicles in the park would automatically entail the punishment of bicycle riders,<sup>62</sup> or that exhausted passengers would be punished under vagrancy laws for nodding off in train stations<sup>63</sup> seems to many of us undesirable, unjust, and absurd.

In any case, my interest here is not normative but descriptive. In this sense, it is clear that the normal reasoning of judges and legal professionals divulges an entrenched practical commitment against mechanical or textual jurisprudence. This is a descriptive

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<sup>57</sup> E.g. Roscoe Pound, “Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case” (1960) 35 NYU L Rev 925 at 927.

<sup>58</sup> Richard A Posner, “Reply: The Institutional Dimension of Statutory and Constitutional Interpretation” (2002) 101 Mich L Rev 952 at 963.

<sup>59</sup> Joseph Raz, “Why Interpret?” (1996) 9 Ratio Juris 349 at 360.

<sup>60</sup> E.g. Dworkin, *supra* note 1 at 348.

<sup>61</sup> E.g. Finnis, *supra* note 1 at 287.

<sup>62</sup> Cf. H L A Hart, *The Concept of Law*, 2d ed (New York: Oxford University Press, 1994) at 127–28.

<sup>63</sup> Lon L Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1957) 71 Harv L Rev 630 at 664.

claim, not a normative one, and as such would not be denied even by the hardest of textualists. Most judges and lawyers maintain that positive law is in need of interpretation, and that its application must be the product of reasoning and aim at the just resolution of the particular conflicts that are at hand. In this, they remain true to an ancient, well-established understanding of the proper way in which general legal norms should be applied to particular cases.<sup>64</sup> The commonplace modes of legal reasoning are those which look for the *ratio decidendi* and the *ratio legis*: that is, to the principled reason behind particular judicial decisions and behind particular statutes. Legal professionals thus often interpret positive law as transcending the content of the original lawmaking decision. They apply it in circumstances unintended by lawmakers (if one takes intent as a point of reference) and that are not part of the agreement that is embodied in the conventional meaning of the legal text (if one espouses a more textualist approach). They construe positive law purposively, use substantive canons of interpretation, analogize from established legal rules, and are, on the whole, expected to apply law in a principled, just way.

Some thinkers, who believe that law must be understood solely in terms of fiat, see these practices of reasoning as subverting valid positive law.<sup>65</sup> Many legal positivists often feel driven to assume a similar position, claiming that these practices cannot genuinely be described as modes of applying and following valid, existing positive law.<sup>66</sup> Such accounts cast the traditional practices of legal reasoning as fraudulent law-making under the guise of law-application. They suggest a dichotomy between subversive (and clandestine) amelioration of existing law and between its actual application to particular cases.

More congenial to our actual practices of legal reasoning and to the logic which seems to underpin them are theories that show them to be genuine and acceptable ways for following and respecting positive law. William Eskridge, for example, argues that

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<sup>64</sup> E.g. Aristotle, *Nicomachean Ethics*, translated by W. D. Ross, Jonathan Barnes, ed., *The Complete Works of Aristotle* (Princeton: Princeton University Press, 1984) at 2152 (book 1, part 13).

<sup>65</sup> E.g. Schmitt, *supra* note 1 at 38; Benjamin, *supra* note 1 at 300.

<sup>66</sup> E.g. Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley and Los Angeles: University of California Press, 1967) at 233–56; Joseph Raz, “Interpretation without Retrieval” in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) 241.

changes in values and circumstances can change the meaning of positive law.<sup>67</sup> Eskridge argues that the meaning of positive law does not remain constant over time, and is always the result of negotiation between the interpreter's own ideas of correctness and the text. Similarly, Ronald Dworkin explains that legal interpreters strike a balance between the "preinterpretive" meaning of the text and the interpreter's preconceived notions of justice and propriety.<sup>68</sup> He argues that since law is supposed to be principled and just, what positive law *means* in particular cases necessarily reflects this commitment to principled justice.<sup>69</sup> The interpreter, therefore, should choose the interpretation that puts law in the best possible light.

These accounts of legal interpretation are in line with what we can call an "epistemic logic": that is, a mode of reasoning characteristic of reasoning with epistemic directives. In the same way that we interpret the directives of the doctor in a manner that would best lead to good health, we also interpret the directives of positive law in a manner that would best lead to justice (or: to economic efficiency; or: to conformity with right reason; etc.). These theories thus explain why it is legitimate to disregard at times the *particular content* of positive law in favor of right reason, objective purpose, changing values, and plain old justice, in the process of properly following it. It is therefore not surprising to find that both Dworkin and Eskridge make explicit epistemic assumptions regarding the nature of political authority.<sup>70</sup>

Epistemic accounts of legal reasoning are far more successful than their "positivist", "fiatist" rivals in capturing the logic underlying our entrenched practices of legal interpretation and legal reasoning. They explain the logic that allows legal professionals to interpret positive law according to an objective purpose,<sup>71</sup> by referring to regulative concepts of reasonableness and justice, and maintaining that judicial duty extends

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<sup>67</sup> William N Eskridge, "Dynamic Statutory Interpretation" (1987) 135 U Pa L Rev 1479; William N Eskridge, "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609 at 23.

<sup>68</sup> Dworkin, *supra* note 1 at 65–68 (on the dimensions of fit and justification).

<sup>69</sup> *Ibid* at 55–62.

<sup>70</sup> On Dworkin's epistemic assumptions regarding legislative political authority see *supra* note 81. *Cf. Ibid* at 225. On Eskridge's epistemic political assumptions see *Dynamic Statutory Interpretation* *supra* note 67 at 1513–16.

<sup>71</sup> *E.g.* Aharon Barak, *Purposive Interpretation in Law*, translated by Sari Bashi (Princeton and Oxford: Princeton University Press, 2007) at 148–81.



beyond literalism or originalism to doing justice according to law.<sup>72</sup> The logic of these practices seems to transcend the positivist dichotomy between “following the law as it is” and “creatively making up new law as it is ought to be.” This insistence on an ameliorating, judicious, justice-oriented application of positive law was nicely captured by Lon Fuller when contemplating common law jurisprudence:

Everyone who has attempted to write on the law of the cases must have been concerned by the possibility that his readers might pose this question to him: ‘Does this article state the law, or only your idea of what the law ought to be?’ ... Yet the writer may feel great embarrassment in answering it. To say that he is stating the law as it is will seem to involve either a species of fraud or a kind of omniscience which he has no intention of claiming. On the other hand, he does not like to say that he is only offering for consideration a series of personal reactions to the law, for he may well feel that he has, to a degree not precisely ascertainable, only made explicit ideas which were already implicit in the cases.<sup>73</sup>

To the extent that this experience is familiar to judges, lawyers, jurists, and other legal professionals—as I am sure it is—we must admit that a large part of our legal practices is underpinned by an epistemic logic, inconsistent with much of our decisionist political understanding. There is no reason for us to think that we are any less attached to these practices and the epistemic logic which underlies them than we are to our decisionist political theory and the logic of legality which it entails.

## **TWO LOGICS OF LEGALITY**

### ***Tracing inconsistent assumptions***

The account given in Part III brings to the fore a certain inconsistency in the assumptions we employ in our legal and political lives. On the one hand, political authority, which is responsible for the promulgation of positive law, is largely understood in decisionist terms. We accept positive law as the product of authority that is not respected because it is (or is likely to be) right, but because it is legitimate in the circumstances of modern politics. On the other hand, we have entrenched practices of legal reasoning that refuse to treat positive law as the product of decisionist authority,

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<sup>72</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978) at 78.

<sup>73</sup> Lon L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966) at 138–39.

and are committed to treat it as one would treat a series of epistemic directives. Indeed, for most people, and particularly for those who are trained in law, this is what legal reasoning means.

In his forthcoming contribution to the *Toronto Law Journal*, Jacob Weinrib argues for a similar distinction in law, less rooted in legal practice and positive political morality, but more robust in its normative and conceptual elaboration. Taking Kant's decisionist<sup>74</sup> political philosophy as his starting point, Weinrib argues that despite the fact that the basis for political authority is wholly decisionist, law is (and should be) regulated by a principle of justice and correctness. Unlike the claims of inconsistency that accompany my account, Weinrib suggests that these two aspects of positive law in fact complement each other, and are both necessary for the full realization of freedom under constraints of equality.

What is ignored in Weinrib's illuminating account is the connection to which this article has been dedicated: that is, the connection between the grounds on which authority is exercised and the way in which its authoritative directives figure in subsequent practical reasoning. It is hard to argue with Weinrib's basic intuition that despite our need for decisionist authority, we would like positive law to aspire to justice and correctness. The question, however, is how this desire is to be operationalized in the circumstances of modern politics. What is the concrete meaning of the "regulation" of law by the principle of justice, and how can this be settled with the decisionist political morality appropriate to pluralist societies?

The conflict, as I see it, is unavoidable. On the one hand we have a law-making process whose justification disavows any allegiance to a particular conception of justice, the common good, or right reason, and whose decisionist legitimation stems from our inability to agree on these matters. On the other hand, however, we maintain and advocate for practices of interpretation and law-application that refer to such notions of justice, the common good, and right reason, as if this reference is completely unproblematic in our political circumstances.

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<sup>74</sup> Jacob Weinrib, "Authority and Justice in Public Law" (Forthcoming 2014) *U Toronto L J*. In Kant's decisionism, see *supra* text accompanying notes 43-44.

Our entrenched practices of interpretation are, as we have seen, inconsistent with the way decisionist directives are normally respected and applied. As the product of decisionist authority, the binding, *particular content* of positive law cannot give rise to anything resembling these interpretive practices. Particularly in the modern circumstances of politics, decisionist directives cannot guide legal reasoning beyond their limited particular content.<sup>75</sup> The interpreter of decisionist directives in the circumstances of disagreement cannot assume a general purpose to law that would transcend the actual decision that was made. As long as we are committed to respecting law-making authority as a practice facilitating coordination (or reciprocity, *pace* Weinrib), the stipulated rule would exhaust the particular coordinating content of law; as long as we justify legislation as a will-formation process, the stipulated rule would exhaust the collective decision that was reached.

Moreover, the application of decisionist directives cannot be the basis for the equitable and just interpretation of positive law.<sup>76</sup> The circumstances that call for the exercise of decisionist political authority are those of disagreement about justice among citizens and officials alike. In these circumstances different judges, legislators, and citizens are bound to disagree on questions of substantive justice. If we allow the interpreters and followers of existing law to employ a “regulative” principle of justice in their legal practice this would subvert the rationale behind the initial exercise of legislative decisionist authority. To employ traditional techniques of legal reasoning is to disregard law’s particular content and look for its epistemic significance given pre-conceived notions of correctness and purpose, and this is inconsistent with our view of law as the product of decisionist authority.<sup>77</sup>

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<sup>75</sup> Cf. Ronald Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (London: Duckworth, 1977) at 34–35 (explaining how the “model of rules” conception of law leads to strong judicial discretion).

<sup>76</sup> Cf. *Ibid* at 22–24 (explaining how the “model or rules” conception of law cannot explain the principled nature of judicial decisions).

<sup>77</sup> This is, indeed, the animating force behind intentionalist and neo-textualist positions. Some might raise the following objection, though. As we have seen, even decisionist justifications for legislative authority involve reference to values and desiderata. Should we not assume that these values permeate authoritative decisions? For example, if a decision is required on utilitarian grounds, does it not follow that the legislature should strive to make the most efficient decision? Or if legislation is respected as an exercise of self-government, are we not entitled to expect that statutes would embody the values associated with collective and personal freedom? Such objections are partly right, but it is important to note their limited significance. If collective endorsement requires that we respect our own laws even if we think that they are

### ***A note on our normative theory***

Before moving on to consider the implications of this observation, it is important to note two points without which the analysis might be misunderstood. The first point is that the inconsistency that is identified here is not between normative theory and a descriptive account of our practices. No argument was made here regarding the grounds that would truly, morally legitimize political authority, or what legal reasoning *should* look like if it is to be legitimate. My claims in this sense were all descriptive: we accept political authority in certain terms (i.e. as justified on primarily decisionist grounds) and we engage in legal practices which divulge allegiance to a particular mode of reasoning (i.e. a mode characteristic of reasoning with epistemic directives). Discrepancy in this descriptive level should not strike us as particularly surprising. In a complex social and political structure, which encompasses many different institutions and institutional practices—themselves resting on different (and sometimes conflicting) justifications and conceptual assumptions—it is not surprising to find inconsistency of this sort.

This is not to say that the descriptive inconsistency does not give rise to serious normative concerns. There is an ‘ought’ associated with authoritative directives, and if we are to take it seriously we should be concerned by the fact that our mode of legal reasoning is inconsistent with the grounds on which we accept law-making political authority. It is important, however—and this is my second point—not to be too quick or one-sided in understanding this normative challenge. The account given here might have given the impression that there is something wrong with our practices of legal reasoning, which are inconsistent with our contemporary justifications of political authority. This is certainly a valid normative position, but it is not the only possibility. We have no reason to assume that our attachment to decisionist understandings of politics is more fundamental or authentic than our (potentially legitimate) attachment to the traditional practices of legal reasoning. Holding fast to these practices and to their underlying logic might lead down different avenues of reform.

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wrong, it cannot be its conclusion that its interpreters should disregard the particular content of collective decisions in order to make them more in line with their own understanding of what freedom demands. Similarly, if our attachment to the benefits of coordination makes us realize that we are better off following together an inefficient rule rather than each of us following the rule he takes to be most efficient, then we should not deviate from the particular content of the directive in order to make the rule more efficient. Cf. *supra* note 23.

I have no intention of going into this normative conundrum here. This is far too serious a question to be dealt with at the last paragraphs of a descriptive, analytical contribution, and I am happy to leave it to another time. What I would like to do instead is see what this descriptive observation of inconsistency can tell us about modern law and about the perennial question of the role fiat and reason play in our legal and political lives.

***Fiat and correctness***

I have spent some time going through questions of *de facto* political authority and modes of legal reasoning, but it seems that I have said very little on the question with which I started: that is, the question regarding fiat and correctness in law. This delay was not accidental. Setting aside the question whether law “by its nature” is connected to reason and morality or whether “the very concept of law” entails the exhaustion of the content of law by positive rules, I suggest that modern law is governed by two logics of evolution, interpretation, and application. On the one hand, positive law is treated as the product of decisionist political authority, whose authoritative meaning is exhausted by its particular content and can thus explicitly diverge from what we know to be moral and reasonable. On the other hand, law is often treated as having the force of reason and correctness, and is thus reasoned with as a set of epistemic directives, that is, as one would reason with the directives of an expert.

The root of the difference between the two views—between the view that sees law as fiat and the view that sees law as inherently connected to correctness—is not in their assumptions about metaphysics or the psychology of decision-making processes. Both views acknowledge a certain arbitrariness that is unavoidable in positive law (which is always the product of human decision-making), and neither of them denies that legislative or judicial decisions are the product of reasoning (at least in part). The difference is in the disparate weights they accord to different logics inherent in modern law—logics which call upon its addressees to treat, follow, interpret, apply, and enforce law in incompatible ways. One logic is related to our notions of modern political authority and the other is entrenched in our traditional practices of interpretation and application of positive law.

It might seem that the ontological or definitional question of what law *is* cannot be dependent on the attitudinal or ideological question of how it is treated and what it is understood to be. This claim, of course, is premised on a false dichotomy, at least when it comes to objects that are socially constituted,<sup>78</sup> and certainly when it comes to law. The question whether law is best understood in terms of fiat, as a body of rules previously promulgated in an act of discretion, or whether it should be understood as inherently aspiring to reasonableness and correctness, is closely related to the human activity of which it is part and which determines its dynamics.<sup>79</sup>

The two logics of positive law explain why law is sometimes conceptualized in positivist terms of fiat and at times in non-positivist terms of connection to right reason. As our attitude towards law is governed by two distinct principles it is not surprising to find irregularity—or rather, two regularities—in our many law-related practices: one reflecting a decisionist logic and the other an epistemic one. Once generalized and theorized, these two regularities lead to two rival understandings of the nature of law: a positivist vision of law-as-fiat, and a non-positivist vision of law as inherently aspiring to correctness.

As noted, this might be unsettling and problematic from a normative point of view. Analytically, however, there is no reason for us to disregard either of these incompatible logics that simultaneously govern the life of positive law. Our philosophy must account for both of these entrenched attitudes, which inconsistently regulate the dynamics of our legal practices. For us, as strange as it might seem, positive law is both the product of decisionist political authority *and* a set of directives susceptible to purposive, reasonable, and just application as only epistemic directives can be. An optimist would say that modern law emerges in this picture as simultaneously part of a political endeavor suitable for pluralist, diverse, and free communities *and* as part of an attempt to get things right, according to a preexisting standard of correctness and justice. A pessimist would say that it emerges as neither.

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<sup>78</sup> Ian Hacking, *The Social Construction of What?* (Cambridge and London: Harvard University Press, 1999); Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Anchor Books, 1967).

<sup>79</sup> *E.g.* Fuller, *supra* note 73; Ronald Dworkin, “Law’s Ambitions for Itself” (1985) 71:2 Va L Rev 173.

There are several virtues to adopting this analytical framework for understanding modern law. For legal and political philosophers, it captures accurately the contours of a centuries-old controversy regarding the nature of law. It points to the centrality of epistemic understandings of the grounds of political authority in many non-positivist accounts of law—from Thomas Aquinas<sup>80</sup> to Dworkin's<sup>81</sup>—and explains why the rise of decisionist visions of political authority was so closely linked to the rise of modern legal positivism.<sup>82</sup> It also points to an institutional tension that seems to be built into modern legal systems—a tension between the primarily decisionist logic of modern legislative activity and the largely epistemic logic that governs the traditional practices of the judiciary.

Identifying these two discrete logics within law also leads to a better understanding of our normative debates regarding legal reasoning and legal interpretation, and the role assumptions regarding political authority play in these debates, often implicitly. Although textualists and intentionalists often argue for their positions in terms of fidelity and respect to past political decisions,<sup>83</sup> this analysis makes clear that their arguments depend on a particular understanding of the grounds of political authority. It shows that some authoritative decisions do not demand to be followed literally or in accordance with the intentions of their authors, but call upon their interpreters to look for the reason and objective purpose that underlie them. On the other hand, it shows how theories of reasoning and interpretation that see law as going beyond the particular plain meaning of positive rules (or the particular intentions of their makers) divulge an attachment to an epistemic understanding of the grounds of political authority.

The plurality of forms that authority can take is reflected in the plurality of modes of reasoning which we employ when following authoritative directives. For too long, legal philosophy has been attached to the assumption that authority is of one kind, and that reasoning with authoritative directives must always follow a single logic. Once this over-

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<sup>80</sup> Thomas Aquinas, *Summa Theologiæ* 1a2ae Q. 95.2, 2a2ae Q. 60.5.

<sup>81</sup> Dworkin, *supra* note 1 at 167, 217 (articulating an epistemic theory of legislation, centered on legislative ability to reflect the principles underlying the system).

<sup>82</sup> On the connection between early legal positivism and modern political theory see e.g. Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986); David Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 *Oxford J Legal Stud* 39.

<sup>83</sup> E.g. Marmor, *supra* note 15 at 119–39; Waldron, *supra* note 36 at 69–87; John F Manning, "Textualism and Legislative Intent" (2005) 91 *Va L Rev* 419.

generalization is corrected and the plurality is noted, it is far less surprising to find that a complex social phenomenon such as law can be authoritative in different ways, and is thus followed in accordance with more than one logic of reasoning; it is far less surprising that law emerges at times as fiat, completely determined by its particular content, and at times as inherently related to justice and as aspiring to reasonableness and correctness.